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Q&A Session

The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards

The Hon. Mogoeng Mogoeng

Chief Justice of South Africa

Chair: Suella Fernandes

Chair of Trustees, Africa Justice Foundation

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Question

There has been a transformation of the South African judiciary since 1994, and many competent lawyers have been appointed to the Constitutional Court. However, there is another group of great lawyers who have never been appointed, and they appear to have encountered difficulties during the interview process. Have they been singled out, perhaps due to their political independence?

Mogoeng Mogoeng

Hon. Mogoeng replied that some of the lawyers alluded to applied to the Constitutional Court before his appointment as chief justice, and thus he could not comment on those cases. Some applicants have been singled out for celebration or vicious attack in the media, but the Judicial Service Commission (JSC) does not focus on media reports and will never rubberstamp a candidate into power based on popularity. It is necessary to look at individuals' track records as judges first.

However, Hon. Mogoeng noted that the executive has more influence over this process than the chief justice. There have been complaints that appointments are decided in advance by members of the ruling party who serve in the JSC. Hon. Mogoeng said it cannot be a case of racial prejudice or gender discrimination, because male and female judges of all backgrounds have been appointed, but rather this indicates collusion between the ruling party and the judiciary, and an attempt to intimidate the JSC.

Hon. Mogoeng stated that without a credible judiciary in place, South Africa's constitutional democracy will be destroyed. He added that question needs to be asked over what kind of judiciary South Africa is creating.

Questions

You linked the role of the judiciary in the promotion of sustainable development, but could you comment on aspects of the rule of law that don't link solely to development, such as the protection of children, women's rights and disabled peoples' rights?

Could you comment on the tensions over proposals to amalgamate solicitors and barristers in the judiciary: is this part of attempts by the government to control the judiciary?

It is essential to have an independent judiciary, but judicial decisions will not be enforced if the executive body does not uphold decisions. How can we guarantee that other institutional actors act in accordance with judicial decisions?

Mogoeng Mogoeng

Hon. Mogoeng stated that the minister of justice and constitutional democracy is creating more sexual offences courts and lots of training has gone into empowering judicial officers at the regional level, as most of the cases are held there. This has meant that victims can go through the court processes more quickly; video conference facilities are being rolled out so victims of crime do not have to face perpetrators in courts; and there are more social workers and counselling available. Sexual offences have been identified as a priority as part of the National Efficiency Enhancement Committee.

New legislature protecting children has been passed in the last few years, enhancing public knowledge of the rights of children. There is less detainment of youths in adult facilities; instead, appropriate rehabilitation programmes are being set up. Women's rights and children's rights are some of the priority areas for the South African justice sector.

Hon. Mogoeng stated that members of the judiciary are not able to comment on the possible amalgamation of solicitors and barristers. The judiciary took the position that the distinction between solicitors and barristers might divide the judiciary unnecessarily, with some identifying as attorneys and others as advocates. It is within the power of the law society of the general council of barristers to do its best to resolve their differences.

Hon. Mogoeng noted that certain judiciaries in Africa are facing serious problems when it comes to the execution of judicial orders. In Kenya, the judiciary had to be dissolved and reappointed from scratch, due to massive corruption; the process is still not finalized. When the judges were asked why they were corrupt, they replied that they were underpaid. Hon. Mogoeng stated that this is why regional structures are needed to investigate threats to the independence of judiciaries and to enable exchange of best practices.

One problem with the judiciaries in Africa is that they sit back, because of the conservative nature of these institutions. Hon. Mogoeng stated that he tells his colleagues to fight to make sure the image of the judiciary in Africa changes. Judiciaries have to speak up otherwise they are part and parcel of the problem. There cannot be rule of law without the carrying out of orders, so

it is important for judiciaries to help each other in Africa; allied institutions must speak up when a particular judiciary is not acting independently.

Question

How does customary law, such as the leadership of traditional chiefs, fit into the South African constitutional and legal system?

Mogoeng Mogoeng

Hon. Mogoeng stated that customary law should not necessarily be viewed as backwards or incompatible with South Africa's progressive constitution and the Bill of Rights. Just as statutory law needed improvement to fit in with constitutional practices, customary law can be developed in the same way to remove elements that could take South Africans backwards.

There has been debate about the implementation of the Traditional Courts Bill between the judiciary and traditional leaders. The courts have to make sure that discrimination against women as practiced in the traditional sector is made a thing of the past.

Hon. Mogoeng noted that traditional leaders still need to be trained; royal academies must be re-established so that leaders are properly qualified in how to run traditional courts. Traditional courts must comply with the constitutional system, in order to improve South Africans' access to justice.

Questions

Some multinational corporations operating in South Africa are using the law to avoid paying tax. Is there a mechanism that can be used to hold companies accountable, and to stop depriving South Africans of this source of revenue?

Can you say more about domestic benefits and inward investment as related to the connection between the rule of law and economic development?

Mogoeng Mogoeng

Hon. Mogoeng stated that the problem lies in international agreements that members of the executive legislature enter into, or are forced to enter into. For example, a conference was held to develop a legal framework facilitating massive investment by China in Africa. However, this presents a major concern: the creation of a permanent legal structure in China that is

favourable to Chinese companies paying minimal or no tax in African countries. This is a one-sided 'partnership'; Africa needs development, but not at all costs.

Hon. Mogoeng noted that big economies have a way of getting away with these practices. Countries that are desperate for development are forced to comply with laws that are posed in accordance with international agreement; where tax is minimal or simply deferred. African citizens need to speak up; African countries need to employ highly qualified legal advice before signing to ensure that they get the right tax revenue systems set up. The judiciary can do little if it is already a done deal. The courts will not step in; arbitration will be carried out in the investor's own country, according to their own laws.

Hon. Mogoeng spoke on the influence of the rule of law on the domestic economy, and the implications for those investing from outside the country. If the legal system does not look safe, companies will think twice before investing. Companies want to invest in countries with an independent judiciary; where they can have the confidence to approach a court of law without the possibility of bribery or corruption. Hon. Mogoeng noted that the judiciary is paid well enough in South Africa to render bribery impossible.