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KEYNOTE SPEECH
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(Ropes Gray)

THE ROLE OF LAW IN DEVELOPMENT FOR THE AFRICAN CONTINENT
FROM A DEVELOPMENT AGENCY PERSPECTIVE
“Hope is the pillar of the world” says ancient African proverb.

Global population is projected to surpass 9 billion people by 2050 with majority of the additional 2.3 billion people being from developing countries. Africa in particular, will double its population within the next forty years from 1 billion to 2 billion, to represent more than 22% of the global population.

Given these demographic projections, meeting the Millennium Development Goals (MDGs) remains a challenge although MDGs remain an essential step towards a prosperous and sustainable world.

Faster growth and sustained macroeconomic stability is key to meeting the MDGs as it also means less extreme poverty, less child malnutrition, and greater progress on many other MDGs.

I must note at the outset, then, that a world anchored in peace, stability and shared prosperity is one which fosters sustainable development. More significantly, the role played by law in the development process is very crucial.

Over the last 50 years, the role of law in development has been progressively highlighted and studied by the academics and professionals.

From the academic and theoretical perspective, a clear linkage between law and development has been established; noting that rule of law is central to any
civilization as it provides a modus operandi and infuses predictability into social and individual behaviours.

As early as the 18th Century, Adam Smith discussed the economic effect of mercantilist legislation. In the 19th Century, Max Weber focused on the increasing rationalization and differentiation of various dimensions of society, including law, religion and the economy. Weber’s *Sociology of Law*, for instance, inquired into the causal relationship between the particular features of Western law and the development of capitalism.

In 1961, Guido Calabresi and Nobel Economics Prize winner Ronald Coase independently published two groundbreaking articles: "The Problem of Social Cost" and "Some Thoughts on Risk Distribution and the Law of Torts". These articles marked the beginning of the modern school of law and economics.

In 2000, the Peruvian economist Hernando de Soto explained in “The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else”; that poverty lingers in the Third World because of the failure to create a legal system for recognizing and organizing property rights into an access to credit, creating wealth.

What the poor majority in the developing world do not have, de Soto observed, is easy access to the legal system, which, in the advanced nations of the world is the gateway to economic success.

He wrote: “My research team and I have collected, block by block and farm by farm in Asia, Africa, the Middle
East and Latin America, that most of the poor already possess the assets they need to make capitalism a success. Even in the poorest countries, the poor save.”

“The value of savings among the poor is, in fact, immense: forty times all the foreign aid received throughout the world since 1945. But they hold these resources in defective forms: houses built on land whose ownership rights are not adequately recorded, unincorporated businesses with undefined liability, industries located where financiers and investors cannot see them.”

“Because the rights to these possessions are not adequately documented, these assets cannot readily be turned into capital and cannot be used as collateral for a loan.”

As Hernando de Soto himself has noted, “law, in addition to providing order, allows people to transport value and trust one another in expanded markets with interdependent specialists in fruitful cooperation.” Later on, I would specifically dwell on particular initiatives by the Bank’s Legal Department to improve the property rights regime in Africa.

The African Heads of State have also realized the necessary linkages between law and development.

In 1970, Kwame Nkrumah the first President of Ghana underlined the existence of legal and political systems prior to the transplantation of modern capitalism into the development process of Africa.

In 1991, Nicéphore Soglo, then President of Benin, spoke of the strong link between law and development when he
emphasized that: “Action of the proponents of the rule of law, administrative reform, and rehabilitation of justice are contributing to political development.”

In 2009, Mr. Abdelaziz Bouteflika, the President of Algeria, stated: “Obviously, success in the development process is conditional on improving and enshrining sustained integration of the rules and standards of good governance into all the areas of activity. Our efforts to this end are geared especially towards transparency in the management of public finance and the creation of an institutional environment that constitutes an incentive for national and international investments, and also towards combating the terrible plague of corruption.”

At the African Development Bank, we have boldly set out the thesis that sustainable economic growth and development are achievable in each African country if Africa reaffirms the pre-eminence of the rule of law and acts resolutely to promote justice for all of Africans.

Permit me therefore to share with you the AfDB’s perspective and strategy on these issues and the actions it has taken to support the implementation of law and justice in Africa.

1.1 First, the Bank recognizes that at the heart of good governance is an equitable, effective and efficient legal and judicial system that caters to the needs of the people.

Accordingly, in adopting its Policy on Good Governance, which grew out of a new Vision for economic development in Africa, the Bank highlighted legal and judicial reform as an indispensable component of its initiatives to reduce
poverty and promote regional economic integration among its countries.

The Bank’s core objective in governance is to assist African countries to strengthen transparency and accountability in public resource management, poverty reduction, open governments, engaged societies and improved business environments.

During the 2003 All Africa Conference on Law, Justice and Development, then President Olusegun Obasanjo of Nigeria stated that "Law should be used as one of the effective weapons in the battle against the economic gap". The event preceded the launch of the Bank’s Strategy on Law for Development.

1.2 Under the Bank’s Law for Development Program, law is used as a tool to foster economic development in Africa.

1.3 Experience has shown that legal and judicial reform is a gradual, long-term undertaking that requires patience, governmental commitment, and significant outlays of financial resources. Policy support, particularly, economic policy support by governmental authorities is key to any successful legal or judicial reform program.

Empirical evidence supports the view that the reform strategy succeeds where economic policies move in tandem with legal and judicial reform efforts.

1.4. In many African legal and judicial systems, costs incurred for resolving disputes are high due to delays, mounting caseloads, high legal costs and obsolete managerial techniques that impose high demands on the time judges must spend on administrative matters.
Funding for legal and judicial functions and services in most African countries is inadequate. Furthermore, some judicial funding mechanisms increase the chances of compromising the independence of the judiciary such as the recent case of Niger. The Bank’s objective therefore includes facilitating greater responsiveness and effectiveness of the judiciary as an independent organ that addresses societal demands to resolve disputes and redress grievances.

1.5 Attempts to conduct partial reforms which do not address real institutional or organizational constraints, or which lack the support of the relevant state actors, usually fail and thus frustrate expectations for fair and expedient judicial services.

The Bank’s approach, therefore, is to support judicial systems that are socially sensitive and equipped to efficiently and justly serve local communities; an approach that engenders the confidence required for both domestic and global transactions. Such judicial systems require the involvement of various groups including the judiciary, the law societies, legal aid groups and the academia.

1.6 The Bank realizes that in certain African countries, literacy rates are low and as such certain aspects of judicial reform may be considered less relevant to those with poor understanding of the legal system and whose interaction with the law might be limited to low level bureaucrats and police.

Accordingly, legal reform program is fashioned within the African context and is not geared to mere transplantation of foreign laws, legal concepts, and bureaucracies.
2. Summary of the Bank’s Action Plan on Law for Development

2.1 The Bank develops legal databases on African law and handles various substantive development law issues such as land reform; private sector development issues, development of stock exchanges and capital markets; statutory and judicial reform (including access to justice), deregulation, harmonization of laws, anti-corruption and public accountability. The Bank's legal department also co-ordinates with the legal teams of other multilateral development banks, international agencies, and other parties participating in legal and judicial reform.

2.2 The Bank has convened and co-sponsored conferences in Africa on legal and judicial reform.

The conferences brought together, amongst others, the heads of the judiciaries in Africa, ministers of justice and attorneys general, the heads of the law societies or bar associations, legal aid societies, and academics.

The conferences aim to provide a forum for discourse amongst participants on pragmatic proposals to strengthen the legal and judicial environment in Africa including the development of a comprehensive joint strategy Paper with support from the Bank and in coordination with other development partners. This would help obtain the requisite political will and governmental commitments.

2.3 In furtherance of the Bank’s Good Governance Policy, which recognizes the negative effects of corruption on economic development, the Bank has developed model Anti-corruption legislation that would be made available
for adaptation and adoption by African countries. The Bank also aims to develop model procurement rules and codes of ethics for public servants.

In 2006, the Bank and other international financial institutions adopted the Uniform Framework for Preventing and Combating Fraud and Corruption, acknowledging that mutual recognition of enforcement actions would substantially assist in deterring and preventing corrupt practices.

Last week we signed an agreement, with all our sister institutions, establishing a cross-debarment system which ensures enforcement of debarment decisions made by other Participating institutions.

2.4 The Bank supports more than twenty-five (25) African countries to improve financial control and audit systems and standards. Some of its recent projects include- (i) an Institutional Support Project for Good Governance providing reinforcement of the Offices of the Auditor General and the Inspector General in Uganda; and (ii) a Budget Support Loan to Mozambique to strengthen public financial management through the external auditing function of the Administrative Tribunal and all ministries.

2.5 The Bank’s vision under the Law for Development Program also calls for greater economic integration in Africa.

The Program therefore places particular emphasis on regional harmonization of approaches to legal and judicial matters; and also promotes the Bank’s policy of economic cooperation and regional integration by supporting the development of regional registries.
Recognising the absence of efficient registries both for companies and for collateral used in secured transactions, at national and regional levels, the Bank’s approach to Legal and Judicial Reform includes developing reliable, efficient registry systems to facilitate financings and cross-border secured transactions.

For example, one of the first Uniform Acts adopted by the OHADA Member States pursuant to the OHADA Treaty is the Uniform Act on General Commercial Law which provides for leadership the establishment of a Register of Commerce and charges in each OHADA Member State.

2.6 Under the stewardship of the Legal Department, the Bank led the creation of the African Legal Support Facility ("ALSF") to assist Africa’s Heavily Indebted Poor Countries (HIPC’s) manage Vulture Fund litigation and negotiate complex commercial contracts.

The creation of the ALSF was timely and crucial considering that more than 70% of the judgments (averaging US$1 billion) awarded to vulture fund plaintiffs had been against African countries. This amount increased to US$ 2.2 billion in 2009.

In February 2007, the African Big Table, a forum for African businessmen also called for a technical advisory facility to support African countries negotiate extractive resource contracts and create appropriate, enabling environments with modern legal and regulatory frameworks for the extractive resource sector.

Further, the recently published African Development Report 2007, devoted exclusively to natural resources for sustainable development in Africa, noted the need for
sound principles to guide the design of efficient contracts in Africa’s natural resource sector.

Against this background, the Bank’s Management recommended the establishment of an autonomous, independent international organization to concentrate on combating vulture funds; assist African countries to negotiate complex transactions; and build their capacities.

Here I would like to give credit and thank to Harvard Law School and in particular Amaka, Leslie Lang, Robyn and Matt, all former interns with in the summer of 2008. 

The Bank supports the various debt relief initiatives such as the MDRI and is concerned that savings gained from debt relief are diverted to pay vulture funds which in turn erodes the effectiveness of the debt relief arrangements.

African countries are also not optimizing the benefits from assets such as extractive resources, inter alia, because of inadequate technical advice.

The African Legal Support Facility seeks to address these challenges. The Facility differs from other existing arrangements to provide advisory services and in many respects, is based on an operational paradigm that is similar to legal aid societies that work to remove asymmetric technical capacities and level the field of expertise among parties.

2.7 With increasing efforts to privatise and use the private sector as a fulcrum for economic development, the need for greater transparency in the way corporations are governed becomes even more imperative.
Corporate governance affects the stakeholders; the corporation’s potential to access global capital markets, and its societal relationships. The rules and the standards applied among shareholders, directors, and management determine the direction of the corporation and require frequent modernization to improve corporate contribution to economic development.

2.8 With regard to commercial law, issues relating to the liberalization of economies for greater private sector participation, both domestically and internationally, affect economic growth and the ability of countries to attract investment. Internationally, the laws governing private sector activities are being revised and harmonised to facilitate cross border transactions.

Issues pertaining to securitizations, insolvencies, security interests in movable properties, model investment laws and other laws that affect the economic environment are critical to the development of Africa. The Bank promotes the adoption of modernised laws and assists in building the requisite legal and judicial infrastructure for the implementation of these laws.

2.9 The Bank currently supports the implementation of the Extractive Industries Transparency Initiative (EITI) in selected African countries including Chad, Liberia, Botswana and Central African Republic; in close coordination with other partners, based on the Bank’s added value and comparative advantage.

The sharp growth of Brazil, India and China has led to a rising need for mined commodities. Resource-rich African countries need capacity for negotiating commercial
contracts now more than ever before. The African Legal Support Facility is here for that.

2.10 The Bank also aims at becoming the premier source of electronic information such as bibliographies, articles and books on law development in Africa. In these regards, the Bank has since 2004 published the Law for Development Review. An African law institute has been set up and modelled after the American Law Institute.

2.11 The more difficult achievements to measure are the intangible activities. Some of these intangible activities would be assessed only over time based on the performance of the judiciaries and alternative dispute resolution mechanisms, the enactment and enforcement of new laws and codes of ethics or conduct, the increase in foreign capital in-flows, and the overall attractiveness of the environment for investment.

The test of the success of the Program will lie ultimately in its impact on the poor in terms of their perception of the degree of equity attainable in the system, the added economic benefits the revised system offers which has an impact on their lives, and, most importantly, on the sustainability of the reforms.

Conclusion

The Bank is committed to an effective Strategy on Law for Development that is based on poverty reduction and regional economic cooperation and integration. Particular emphasis in developing the Strategy depends on the active participation of various stakeholders in the member countries of the Bank.
The Bank recognizes that the implementation of a Strategy that uses law as a tool to further African development can only be realized with the commitment of member countries of the Bank, especially those countries within which contemplated legal and judicial reforms is to take place.

Although we face challenging realities, we, at the African Development Bank are hopeful. A Senegalese proverb states: "Whoever wants honey must have the courage to face the bees."