The Vision of the 2010 Constitution of Kenya

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Keynote Remarks on the occasion of celebrating 200 years of Norwegian Constitution

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Fellow Kenyans

Friends of Kenya, particularly from Scandinavian Countries and Holland

I will start with the vision of our Constitution as I read it; the vision of the new Judiciary as decreed by the Constitution; then turn to the discussion of possible partnership with Norway in achieving both visions. Finally, I will conclude by stating what I hope our courts shall be.

In 2010 Kenya created a new modern constitution that replaced both the 1969 Constitution and the past Colonial Constitution in 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country.

The Vision of the Constitution of Kenya

The making of the Kenyan 2010 Constitution is a story of ordinary citizens striving and succeeding to overthrow the existing social order and to define a new social, economic, and political order for themselves. Some have spoken of the new Constitution as representing a second independence.

There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It

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seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence. In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya; mitigating the status quo in land that has been the country’s Achilles heel in its economic and democratic development; among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution.

The Vision of the New Judiciary under the Constitution

The Old Judiciary

Let me reflect briefly on the nature of the judiciary of which all Kenyans are a part. We are the heirs, albeit by what you might think of as a bastard route, to a tradition that gives a very powerful place to the judiciary: under the common law system. It is a flawed inheritance because it came to us via the colonial route. The common law as applied in Kenya, at least to the indigenous inhabitants, as in the colonies generally, was shorn of many of its positive elements. During the Colonial era we were not allowed freedom of speech, assembly or association. Our judiciary was not independent, but was essentially a civil service, beholden to the colonial administration and very rarely minded to stand up to it. Indeed, administrative officers took many judicial decisions. There was no separation of powers. And institutions of the people that they trusted were undermined or even
destroyed. Indeed the common law was a tool of imperialism. Patrick McAuslan, upon whose book with Yash Ghai² most lawyers of Kenya cut their constitutional teeth, wrote satirically (plagiarising the late nineteenth century poet, Hilaire Beloc³) “Whatever happens, we have got the common law, and they have not”. We can recall the trial of Jomo Kenyatta: a masterful display of juristic theatre in which the apparent adherence to the rule of law substantively entrenched the illegitimate political system in power at the time.⁴ Colonial mind-sets persisted, in the executive, the legislature and, unfortunately, even in the judiciary, even after independence. We continued to yearn for the rule of law.

By the rule of law, I do not mean the sort of mechanical jurisprudence we saw in cases like the Kapenguria trials. It was mechanical jurisprudence that led the High Court in independent Kenya to reach an apparently technically sound decision that the election of a sitting President could not be challenged because the losing opponent had not achieved the pragmatically impossible task of serving the relevant legal documents directly upon the sitting President.⁵ Again it was this purely mechanical jurisprudence that fuelled the decision of a High Court that the former section 84 of the independence Constitution (that mandated the enforcement of Bill of Rights) rendered the entire Bill of Rights inoperative because the Chief Justice had not made rules on enforcement as he was obligated by the selfsame Constitution to do.⁶

³“Whatever happens, we have got The Maxim gun, and they have not.” See, Beloc, H., The Modern Traveler: 1898, Cornell University Library, (2009).
⁴My trusted colleague, Professor Obiora Okafor of Osgoode Hall Law School (Canada) was kind enough to provide the following comment:
“What happened to Jomo Kenyatta and the ‘Kapenguria Six’ in the colonial courts was, in reality ‘the rule BY law’ and NOT ‘the rule OF law. I guess that I have always had some sympathies with Lon Fuller’s notion of an internal morality of law that renders certain kinds of legality so beyond the pale as not even to qualify ‘as legality.’ I think my point here ties into your well-argued notion of a mechanical jurisprudence.”
⁵Election Petition No 1of 1998, Kibaki v Moi & 2 others (No 2) (2008) 2 KLR (EP) 308
The New Judiciary, the New Rule of Law, the Decolonizing Jurisprudence

It is time for the judiciary of Kenya to rise to the occasion, and shake off the last traces of the colonial legacy. As I see it, this involves a number of strands or approaches.

There must be no doubt in the minds of Kenyans, or of us, about our impartiality and integrity. No suspicion that we defer to the executive, bend the law to suit our long term associates or their clients, or would dream of accepting any sort of bribe.

Secondly, to be a judge has always been the pinnacle of ambition of any lawyer who actually takes pride in her work. So it should be possible to take for granted that a judge is of high intellectual calibre, with mastery of legal principles and techniques, hard working, and committed to applying these qualities in the task of judging.

Thirdly, we in Kenya have been the inheritors of not only the common law but of English Court procedures. While English Court procedures have over time been made simpler, some archaic terminology has been done away, with case management has been firmer, and ADR has been much more used, in Kenya we still have cases that are heard in dribs and drabs. We need radical changes in judicial policies, judicial culture, end of judicial impunity and laziness.

Fourthly, I see in the Constitution, especially Article 159 (2), a mandate for us to carry out reforms tailored to Kenya’s needs, and aimed at doing away with these colonial and neo-colonial inefficiencies and injustices. It is perhaps remarkable, and indeed, a paradox that, although disappointment with the judiciary was at least as great among the common Kenyan as frustration with politicians, it is also true that they chose to place their faith in the institution of the new judiciary in implementing the new Constitution.

They did this by promulgating a Constitution that provides for the appointing of women and men of integrity by an independent and broadly representative Judicial Service Commission; by providing for institutional
and decisional independence of the Judiciary and the judicial officers respectively; through the vetting of judges and magistrates who served before August 27, 2010 by a Board had a broad criteria upon which to determine the suitability of these judicial officers; and finally by setting up the Judiciary Fund to signal financial independence of the Judiciary. By vetting the old judicial officers and by recruiting new judicial officers on a transparent manner that called for public participation the new Constitution created a new Judiciary.

Fifthly, what I want to emphasise here is the need to develop new, not only highly competent but also indigenous jurisprudence. I link this last adjective to the Constitution’s value of patriotism. I conceive that it requires the judge to develop the law in a way that responds to the needs of the people, and to the national interest. I call this robust (rich), patriotic, indigenous, and patriotic jurisprudence as decreed by the Constitution and also by the Supreme Court Act of Kenya.7 Above all, it requires a commitment to the Constitution and to the achievement of its values and vision.8

Sixthly, few people now maintain the myth that judges in the common law system do not make law. Our Constitution tears away the last shreds of that perhaps comforting illusion, especially in the context of human rights, when it provides under Article 20 (2) (a) that “a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom”. As I read it, it means that if an existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop that rule so that it does comply. And it is matched (in Article 20(3)(b), which follows) by an obligation to interpret statute in a way that also complies with the Bill of Rights. This is an obligation, not to rewrite a statute, but to read it in a way that is Bill of Rights compliant if at all possible. I would urge that it is not just the Bill of Rights that should be

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7Section 3.
8See the Constitution of Kenya 2010: the Preamble, Articles 2(4), 10, 20(3), 20(4), 22, 23, 24, 25, 159, 191(5) and 259. These articles decree how the Constitution is to be interpreted and, indeed, under Article 10(1) (b) any law. And, “any law” would include, in my view, rules of common law, as well as statute.
used as the touchstone of legal appropriateness but also the Constitution more generally. The Constitution says no less.

**Partnership with Norway**

Let me now turn to a brief discussion of possible partnership with Norway in our task of creating a new Rule of Law and developing progressive jurisprudence. I start by stating that both countries share a vision of social justice jurisprudence.

The jurisprudence of social justice does not mean insular and inward looking. The values of the Kenyan Constitution are anything but. We can and should learn from other countries including Norway. My concern, when I emphasize “indigenous” is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of other jurisdictions and courts, however, distinguished. And, indeed, the quality of our progressive jurisprudence should be a product for export to these distinguished jurisdictions. After all our constitution is the most progressive in the world.

Our jurisprudence must seek to reinforce those strengths in foreign jurisprudence that fit our needs while at the same time rescuing the weaknesses of such jurisprudence so that ours is ultimately enriched as decreed by the Supreme Court Act.

The task of growing such jurisprudence involves a partnership: between other judiciaries, the profession and scholars. I hope that our respective bars, too, will respond to the challenge.

The Judiciary Training Institute (JTI) must become our institution of higher learning, the nerve centre of our progressive jurisprudence. JTI will co-ordinate our academic networks, our networks with progressive jurisdictions, our training by scholars and judges, starting with our own great scholars and judges. In our training to breathe life into our
constitution our jurisprudence cannot be legal-centric; it must place a critical emphasis on multi-disciplinary approaches and expertise. Norwegian Judiciary Training Institute can partner with ours to promote our respective visions.

Let us hope that the community of scholars responds to the challenge equally. Already two Norwegian scholars have had great impact on judicial training in Kenya. Baard Andreassen and Malcolm Langford, both of the School of Law, University of Oslo, are great Norwegian ambassadors in this regard.

The Constitution took a bold step and provides that “The general rules of international law shall form part of the law of Kenya” and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”. The implications of this will have to be worked out over time, as cases come before the courts.

Now, however, the courts have greater freedom. Many issues will have to be resolved. Indeed, we now have great opportunity to be not only the users of international law, but also its producers, developers and shapers. Partnership with Norway and other countries is critical in achieving such a goal.

**Conclusion**

In conclusion I hope that the courts of Kenya will truly be viewed as the courts for all Kenyans, and the salvation of the Kenyan oppressed and bewildered. And, to return to where I really began: I believe we shall only do this through the rigorous but creative use of the basic values of our Constitution, indeed through the judiciary’s becoming the embodiment of those values, especially of patriotism, social justice and integrity.

**I thank all of you for giving me a hearing!**

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9 Art. 2 (5) and (6).