

LAW, JUSTICE AND DEVELOPMENT WEEK 2015

Governance and the Law

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Key Note Address

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Justice of the Supreme Court of Kenya

The World Bank Group Corporate Secretary and President's Special Envoy, Mr. Mahmoud Mohieldin, the Senior Vice President and General Counsel, Ms. Anne-Marie Leroy, distinguished Ladies and Gentlemen, Good Morning.

I thank you all for the privilege of standing here today to address you, as we gather to discuss and debate the role of Governance and the law.

The concept of good governance has several characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and follows the rule of law.¹ Each of these concepts is the subject of international scholarship and debate. Today, I will speak about public participation, which is integral to the law and constitutional making process.

My own experience as a member of all three branches of government in Kenya (Executive, Legislature and the Judiciary) has convinced me that public participation in the governance process can improve the quality of governance outcomes.

¹ United Nations Economic and Social Commission for Asia and the Pacific *"What is Good Governance"*

It was and still is my opinion, that achieving an effective well-grounded constitutional order and a popular legal regime in any democracy, requires the participation not only of elected and appointed leaders, or legal experts such as ourselves, but the participation of the people.

By ‘people’, I mean the ordinary citizen - those who are sometimes referred to as the ‘little people’, or the ‘grassroots’, or the ‘masses’, or the ‘working class’. In political legal-speak we sometimes refer to them as ‘the man or woman on the Clapham omnibus’, or the ‘Joe Bloggs’. In Kenya, we refer to this person as “*Wanjiku*”. The name ‘*Wanjiku*’ is a common name for females among the Agikuyu, the largest ethnic group in Kenya, it is as common as Jane or Mary in the United States; but today the name is gender neutral and has come to mean, or refer to, the ordinary Kenyan citizen. The term was coined in the early 1990s in the course of national debate and agitation for a new constitution. At this time, Kenya’s independence Constitution that had been promulgated in 1964 had been subjected to such numerous amendments that it had resulted in the emasculation of the Judiciary and the Legislature and the regression of a multi-party democratic republic into a one party state. The demand for return to a multi-party democracy by the opposition politicians, and civil society activists included a review of the constitution that was people-driven where ordinary Kenyans’ views were to be collected and incorporated into the new constitution.

This demand, was rejected by the then President Daniel Arap Moi, who, clearly irritated, responded by stating that “*Wanjiku*” – that is the ordinary rural woman - could not be involved in the constitutional review process because not only was she uninformed and ignorant of national issues but her understanding of politics and the processes of constitution making was limited to casting her vote whenever necessary. He further suggested that legal scholars, and experts who had the requisite knowledge to draft a new law should review the Constitution. This statement proved hugely unpopular and raised a hue and cry, depicting powerful politicians as making decisions in the name of ‘*Wanjiku*’ but having little or no regard for his/her needs. Since then the term “*Wanjiku*” became the slogan for constitutional activism and other socio-political debates in Kenya. She is the common man or woman who is aware of his/her rights and can eloquently articulate the issues that affect her; a person whose rights need to be safeguarded; a person whose voice must be heard. As such the only acceptable processes for law –making now in Kenya, are those that are participatory in nature and include a consultative process with the public.

The drafting of Kenya’s Constitution 2010 was participatory and required a Committee of Experts to draft the Constitution, after the requisite public consultations had taken place. **The public consultations were conducted through one on one meetings with different interest groups, debates in the media, town hall and village meetings at the district level and meetings with political parties, religious groups and civil society organisations.** I was a

member of this Committee and for over 18 months, our work was committed to receiving views from the public either through memoranda or town hall meetings. It was a daunting but incredibly satisfying task to translate the day to day, bread and butter issues as they affected ordinary citizens, into rights, obligations, and protections and structure them into legal provisions. We received a total of 39,438 oral and written submissions from the public on issues ranging from the system of government (whether to go parliamentary or presidential), the decentralization of Government through devolution; Protection for Human rights and the judicial system; the mode of elections and accountability of the political class etc. The final document, that became the Constitution of Kenya, 2010 was 357 pages long and extremely detailed. Critics have often stated that much of what is contained in the Constitution should be in enabling legislation and the Constitution should be a document only of principles. But the voluminous nature of the document reflects not only input from the public but also the delicate negotiations that took place amongst the political class – Government and Opposition - and between the political class and other actors such as religious groups, landowners and civil society groups. The end product was not one where each interest group got what it wanted but rather what it could live with. Once the draft Constitution was ready, it was translated into Kiswahili, the national Language, and civic education was conducted to ensure that the public was well informed of its contents before it was put to a referendum question of YES, to adopt or NO to remain with the existing Constitution.

Civic education programs, including intensive media debates and rallies, were held country-wide, both by experts, politicians and interest groups, to ensure that the populace would make an informed choice as to the referendum question. The vote took place on 4th August 2010. Kenyans turned out in large numbers (72% voter turnout) and in response to a majority vote - 70% said YES - the new Constitution was promulgated on 27th August 2010 to much jubilation and celebration. The Constitution of Kenya 2010 is frequently referred to as *Wanjiku's* Constitution; the concept of ownership having been entrenched through the participatory and consultative public process.

The Preamble of the Document speaks of ‘We, the People’ and the sovereignty of the people and the supremacy of the Constitution is a recurring theme which is captured by many articles of the document. Importantly, the National values and principles of governance are articulated in Article 10, and include:

- a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
- b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;***
- c) good governance, integrity, transparency and accountability; and***
- d) sustainable development.***

The values are binding on all persons and public officers whenever any of them:

- a) applies or interprets this Constitution;***
- b) enacts, applies or interprets any law; or***
- c) Makes or implements public policy decisions***

The Constitution also provides that all international treaties and Conventions ratified by the Government, and all rules of international law are to form part of the law of the Country. The net effect of this proviso is to provide guidelines to State institutions – the Executive, Legislature and the Judiciary -, the national and devolved Governments, all constitutionally mandated bodies in their policy-making and operational functions. The other import of the national values is that their application extends beyond Government, to the private sector and the private citizen who are also obliged to observe them.

This point was emphasized in a recent Kenyan Supreme court decision which involved digital migration. Without delving into the facts, it is important to note the emphasis the court laid on the national values and the vital principles of governance which are important in this meeting. The relevant sections of the ruling are as follows (and I quote):

“It is very clear to us that in this appeal the values of equity, inclusiveness, integrity, participation of the people, non-discrimination,

patriotism, and sustainable development are intrinsically integrated to the establishment, licensing, and consequent promotion and protection of media independence and freedom.....”.

With regards to public participation, the court had this to say...

“Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits - generally a contract and investment regime enveloped in non-disclosure - do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.”

In effect, the Supreme Court confirmed that public participation is necessary to ensure transparency and accountability regarding the conduct of public-private business within a democratic government.

The importance of Social Change

In countries where good governance is a challenge, justice is threatened and change is inevitable. As Martin Luther King Junior once wrote, *“Injustice anywhere is a threat to justice everywhere”*².

Three hundred and thirty two million is the approximate number of returns you get when you Google the word *change*. It has

² Martin Luther King, “Letters from Birmingham,” 1963

perhaps been one of the most recurring phrases in the last two decades. It is not in doubt that our current mode of governance and development needs to change if we are to achieve the goals recently adopted at the Sustainable Development Summit in New York. In this era of budget deficits, natural calamities, war and conflict, terrorism and economic crimes, cyber insecurity and other post-modern threats, *change* has to remain our constant. The forces of change must steer us towards sustainability, which has become necessary.³

We have also learnt that litigation and enforcing the law is not the only solution to resolving disputes. The Supreme Court of Kenya was recently requested by the Senate to provide an advisory opinion in connection with the enactment of a Division of Revenue Bill for sharing finances between the national and county governments. The Bill had created a territorial dispute between the Houses of Parliament, namely the Senate and the National assembly. In this case, we advised that the Speakers of the Senate and the National Assembly to consult and encourage mediation to resolve the matter and to engage regularly on areas of dispute. In doing so, it was clear that the dispute was not a question justiciable by litigation, but a matter for cooperation and consultation. As a result the institutional comity fostered cooperative governance and reinforced effective governance.

³ Bosselmann, Klaus (2008), *Principle of Sustainability: Transforming Law and Governance*, (Ashgate Publishing Group, United Kingdom).

As I mentioned before, I have had the opportunity and privilege to work in all the three arms of government in Kenya. In the early stage of my career, I served in the Executive branch as State Counsel in the Office of the Attorney General. I later served in the Legislature, as a member of parliament before being appointed as Judge of the Supreme Court of Kenya. I have learnt a number of lessons:

Interpretation of laws

In the Judiciary where I have sat to hear and determine numerous cases touching on matters of public importance and of constitutional interpretation and application, I can confirm that we now find ourselves in an era where finding solutions transcends the mandate of a single State agency and calls for the inclusion of other actors within the State. In a recent ruling relating to the principle of affirmative action and the constitutional provision that one third of appointments to public office should go to women, the Supreme Court found that this provision was not only progressive and not immediate, but also required different legal and policy initiatives not just by the Legislature, but by the Executive, Political parties and other institutions of Government as well, to make the proviso, a reality.

Judges have the responsibility to interpret and apply the law to various circumstances; but more important they must seek to resolve the dispute rather than simply declare the law on any one issue; This means that Judges need to be innovative and apply

meaningful engagement between parties or alternative dispute resolution (ADR) - to holistically address the causes of a legal dispute as well as its final resolution. In certain instances, the solutions needed are necessary to solve disputes between parties while in others; the remedies sought are necessary for the settlement of issues affecting the public. The centrality of justice for *Wanjiku* needs to inform the Judiciary's approach to everyday dispute resolution. In Kenya, we have as a constant reminder, in the statue of *Wanjiku* that sits outside the Chief Justice's Chambers, that judicial reforms should enable justice for the poor.

Implementation of Law and Policy

Within the Executive, it is clear that it has the responsibility of implementing laws and policies; and although traditionally Parliament has an oversight function over the Executive, in Kenya this has largely only worked with regard to parliament's budgetary allocation role and not its authority to promulgate laws. Oversight on subsidiary legislation, and regulatory framework which often are left to the bureaucrats in the civil service to develop and are not subject to the same level of scrutiny. Additional oversight is therefore necessary and best provided for through public participation.

Public participation is therefore important as it acts as an additional watchdog: like in the USA we have a presidential system

where the house vets Presidential appointments to government. Members of the public are invited to raise their concerns on individual appointments, which may be more effective than a bi-partisan political assessment. Such appointments may also be subjected to judicial review, within the confines of constitutional provisions. Indeed, a number of executive appointments in Kenya have been reversed by courts, for failure to meet the requirements of Chapter Six of the Constitution, on Leadership and accountability – an effective anti-corruption instrument.

Making of laws

Legislators have a duty to make laws that reflect the will of their electors. Many legislators do not sustain the agency type relationship with voters once the elections are over. On the flipside there are others who insist on constituency clinics and discussions of pending bills and legislative work with their electorate. Parliamentary practice that encourages the latter working method, are more likely to see legislation passed that meet the constitutional and legal test in the event of judicial interpretation. Members of Parliament or Congress benefit from engagements with non-state actors, in the private sector or in civil society who may see the issue at hand more clearly. Indeed, occasional working meetings on policy between judicial officers and elected representatives, eases tensions between the two arms of Government and enriches law making from a jurisprudential perspective.

I have drawn many lessons, including from my own experience as a Parliamentarian, especially during the lobbying of the Sexual Offences Bill, which I introduced in a conservative and traditional male dominated House. This was a matter that was dear to my heart, given the statistics of sexual violations in the country – the number of Sexual Assaults were at a crisis level, with a rape or assault occurring every half hour. It required engaging both formally and informally with my colleagues, to provide statistical information, as well as to address misplaced fears expressed about a plethora of issues and misconceptions about the Bill, including the introduction of westernization of African values. The media was also fully engaged in the process, consistently challenging legislators with opposing views - including naming and shaming some holding bigoted and extreme views. One such example was an Member of Parliament (MP), who stated during debate that '*an African woman means yes when she says no*'. A popular radio talk show host challenged this position, inviting national debate on it and the MP eventually publicly withdrew his remarks stating he had been misquoted. Public participation also factored in through educational forums for MPs where they met with medical professionals and survivors of sexual violence, I was able to assuage their misgivings and successfully navigated the enactment of the Bill into law. Information is power; and even our elected representatives need to be in the know. Public participation can be extremely useful, in this way as it facilitates learning of public decision-makers.

Conclusion

It is clear therefore from the narrative in this paper that the principle of public participation embedded in good governance is central to the making of Constitutions and laws in which the citizens - particularly - *Wanjiku*, the ordinary person have a stake. Constitutions and resultant enabling laws are the contract between those who rule and those who are ruled. Like any contracts, best practice dictates the involvement of all parties in the agreement concerned to avoid possible breach or voidance. Good governance is really about the concept of ownership. Citizens *are* shareholders of their governments and therefore the best practice of governance in any country, globally, will depend on the level and extent of citizen participation in government.

I thank you and wish fruitful and hearty deliberations this week.