

REPUBLIC OF KENYA



THE JUDICIARY

**REMARKS BY THE HON. JUSTICE DAVID K. MARAGA, EGH
CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA**

**DURING THE NATIONAL CONFERENCE ON DECRIMINALIZATION AND
RE-CLASSIFICATION OF PETTY OFFENCES IN KENYA
HELD AT THE HILTON HOTEL – NAIROBI, KENYA
ON 30TH MARCH 2017**

The Director of Public Prosecution,
Members of the Law Society of Kenya,
Representatives of Government Agencies,
Civil Society Organizations,
Private Sector Actors,
Regional and National Stakeholders,
Invited Guests from other Countries,
Distinguished guests,
Ladies and Gentlemen,

Good morning

1. I am greatly honored to be with you this morning on this auspicious occasion of *The National Conference On Decriminalization And Re-Classification Of Petty Offences In Kenya*. I also wish to thank the ICJ Kenya for inviting me to give the Keynote Address on these very well deserved and timely discussions on our journey “*towards prevention/response to human rights violations arising from enforcement of laws/by laws that provide for petty offences in Kenya*”.

2. The Judiciary has been a long term strategic partner of ICJ Kenya in our work towards national and institutional reforms. This Conference and its subject matter must be seen in such light.

Ladies and Gentlemen

3. The Kenyan criminal justice system is at a very important historical moment. The question in peoples' minds is whether the criminal justice system is neutral or whether it operates on a two-tier framework – one for the rich and the other for the

poor. We need to eliminate notions of a justice system that is economically discriminatory and decriminalization is part of that process. And it offers important and wonderful possibilities for rolling back custodial sentences or incarceration, which is now coming under so much scrutiny and criticism.

4. Although there is no universal definition of **“decriminalization”** or **“re-classification”**, approaches to decriminalize or re-classify offenses largely focus on modifying how conduct is sanctioned or punished. Seen as a potential

cure for crowded jails, many states are eliminating jail-time for minor offenses such as loitering, marijuana possession, and driving violations, replacing those crimes with so-called “**non jailable**” or “**non-custodial**” or “***fine-only***” offenses. This form of reclassification is widely perceived as a way of saving millions of funds allocated in the national budget for the upkeep of such petty offenders in the prison. It also eliminates the social cost and stigma that arise from imprisonment.

5. Kenya must move decisively in this direction for the use of non-custodial sentences will go a long way in decongesting

prisons. The Community Service Order that came into force in 2003 has been helping in this regard but its budget is still too thin to make it completely effective.

6. Decriminalization is a long and complex process. Modifying sanctions, which is a significant part of it, however represents only the beginning of the decriminalization process. Sanction-focused approaches to decriminalization perpetuate the idea that the chief goal of decriminalization is to reduce or to eliminate punishment. However, there are many other different types of social control mechanisms which are not sanction-

centric but still induce punishment. From this broader perspective, decriminalization's goals should be to restrict opportunities and methods for the State to control civilians in ways that facilitate their entry into, or continued contact with, the criminal justice system.

7. We are all aware that our criminal justice system is flooded with petty infractions of the law that could be dealt with through two front-end reforms: reclassification and diversion. In reclassification, criminal statutes are changed so that minor illegal acts are changed from criminal offenses to civil

infractions that carry a fine. In diversion programs, individuals charged with low-level criminal offenses can have the charges dismissed if they perform community service, enter substance abuse treatment or follow other requirements.

Ladies and Gentlemen.

8. The Constitution of Kenya 2010 has been lauded as one of the most progressive in the world for its inclusive and comprehensive bill of rights, decentralization of power, representation of both gender and marginalized groups in

leadership and sustained independence of key institutions, including the Judiciary.

9. Further, the Constitution details protection of the right to dignity; freedom from cruel, inhuman, or degrading treatment or punishment; freedom and security of the person; right to equality and freedom from discrimination; right to privacy; freedom of association; freedom of movement; right to fair trial and administrative action; rights of accused persons; right to access justice; right to health; right to non-discrimination right to access justice, which are guarantees for all individuals alike

irrespective of whether they are poor or rich. The case for re-classification to provide for other alternative punishment for petty offenders has been further necessitated by coming into force of the **County Government Act in 2013** which repealed the Local Government Act including the repeal of all the by-laws passed thereunder.

10. These guarantees notwithstanding, the current legal framework for petty offences provides for what many actors have rightly argued as outdated, obsolete, vague, unrealistic

and unnecessary. These offences should be struck out from our statutes or lesser civil penalties provided.

11. Indeed this Conference must pose and answer the question of whether laws designed to impose criminal sanctions to punish petty offenses such as idleness, begging, loitering, drunkenness, disorderliness, prostitution, indecent exposure, nuisances, jaywalking, traffic offenses, littering and violation of county laws among other misdemeanors which are not violations of major social norms should have a place in this progressive legal climate.

12. The leading school of thought in this discourse is that laws and norms are established to serve the interests of the social elite, and therefore some behaviors are penalized more heavily than others. Those acts that are penalized more heavily or more frequently are generally those associated with the non-elite and the poor (*i.e stealing a chicken*) while the laws that affect the elite are less enforced (*i.e environmental protection laws such as land or forest grabbers*)

Ladies and Gentlemen

13. The Judiciary is alive to the challenges that are experienced during pre and post detention and trial, and also those faced by potential and actual petty offenders, most of whom are poor. A recent report by the National Council on Administration of Justice (**NCAJ**), which I am privileged to chair, the Legal Resources Foundation Trust (**LRF**), and Resource Oriented Development Initiatives (**RODI**) reveal that out of the **33,194** inmates in prison, **12,704** of them are first-time petty offenders who qualify for release under the Community Service Orders programme. Further to that, **75%** of pre-trial detainees are below the age of 35 years and

basically at the peak of their earning potential. This, in my view, may suggest that Kenya's Criminal Justice System is a major driver of poverty and must be reformed. It is for this reason that in the next couple of weeks I will gazette members of the NCAJ Taskforce on Criminal Justice Reform to implement the recommendations of this report and also examine the whole question of decriminalisation and reclassification of petty offences.

Ladies and Gentlemen;

14. Since the promulgation of the Constitution however, the judiciary has made remarkable strides towards achieving reforms in the criminal justice system. These includes the establishment of functional Court Users Committees (**CUCs**) across the country to bridge access to justice gaps, the introduction of Community Service Orders (**CSOs**) and provision of legal aid services.

15. The **Sentencing Policy Guidelines** spearheaded by the Judiciary is to ensure that there is a positive distinction on punishment for petty offenders and those for serious crimes.

The guidelines are also meant to reduce unwarranted disparity and promote proportionality in passing judgment.

16. The **Bail and Bond Policy Guidelines** are also guided by the consideration of the suspect's economic circumstances with a central role played by the Probation Officers and After Care Service officers mostly in cases of petty offenders.

17. In Kenya, **The Traffic Offences Guidelines** being enforced in our courts ensures that traffic offenders are arrested and immediately taken to court and not detained or booked in the

police cells for long periods of time while processing their bail payment.

18. The recent enactment of the **Legal Aid Act, 2016** also presents a platform for facilitated and coordinated provision of legal aid service and access to justice for the poor who cannot afford legal services. Once fully operationalized by the Office of the Attorney General, the Fund established under the Act will assist those petty offenders who cannot afford the cost of legal representation. There has also been a proposition that the legal fund, if properly utilized in deserving cases, would result

in less crisis in the defence of indigent litigants and minor infractions would be moved out of the criminal justice system.

Ladies and Gentlemen

19. Many factors will determine whether a decriminalization statute ends up working the way it's supposed to, and not just worsening the vice. Parliament can write statutes in ways that promote leniency. Or they can write statutes in ways that permit old habits to persist. Courts can interpret those statutes in ways that promote the values of decriminalization,

or they can issue interpretations that permit business to proceed as usual. Perhaps most importantly, police are at the front lines of ensuring that decriminalization really works the way it's supposed to.

20. There is no doubt that our criminal justice system is flooded with petty infractions. In my opinion, this unfortunate state of affairs can be dealt with through two front-end reforms: *reclassification and diversion*. In reclassification, criminal statutes are repealed or amended so that minor illegal acts are changed from criminal offenses to civil infractions that carry a

fine. In diversion programs, individuals charged with low-level criminal offenses such as drunk and disorderly can have the charges dismissed if they perform community service, enter alcohol or substance abuse rehabilitation treatment or follow other mentorship programmes.

21. To achieve substantive reforms in the policies, laws and by-laws that provide for petty offence, we must therefore ask of all bodies and institutions that are either part of the criminal justice system or interact with it, the questions that concern all: What really are petty offences properly-so-called? Are these

offenses serious enough for criminal sanctions? In the alternative, what would a legal framework for petty offences?

22. We are heavily dependent on police practices and policies in order to make decriminalization real. We need police buy-in. But it really requires a joint effort among all the players who make the criminal system work—from police to prosecutors, to courts and legislatures, and to defense counsel—to make sure that decriminalization is the kind of reform that everybody hopes for.

23. It is my belief that this Conference therefore serves as a platform to further the ongoing conversations and the reform process to find lasting solutions to the systemic marginalization of the poor in the society, foster synergies between actors in the justice chain and other stakeholders towards building an effective and efficient criminal justice system, predicated on equality before the law and equal protection of the law.

Ladies and Gentlemen;

24. The Judiciary reiterates its commitment to play its key role in fundamental national transformation through policy, legal and institutional reforms, as well as creating the necessary awareness, and setting judicial precedence for protection of individuals and marginalized groups. However, to achieve the desired full protections of human rights, the public must be convinced that the law is being applied equally and not in an economically discriminatory manner.

Ladies and Gentlemen (*Striking the balance, Russian experience*)

25. In conclusion, as we pursue this noble agenda, I want to caution that care must be taken and a balance must be struck between the two competing interests. These are punishment as ***a deterrent*** mechanism on the one hand and ***recidivism*** on the other. Any move towards these goals must take into consideration our customs, traditional and family values and the societal (either positive or negative) impact on such legislations. Otherwise we may find ourselves in a broken society. For example, in **Russia**, the Government statistics of January this year (2017) indicates that **40%** of all violent crimes are committed within the family. This includes **36,000**

women being beaten by their partners every day, and **26,000** children being assaulted by their parents every year. Not happy with the statistics, conservative members of the Russian Parliament voted by **380-to-3** to pass a bill decriminalizing domestic violence within certain parameters, such as whether or not the abuse causes “*substantial bodily harm*” or occurs more than once a year. Offenders face a fine and either 15 days of jail time or 120 hours of community service, with harsher criminal charges to follow if the abuse occurs more than once a year. The MPS who pushed the legislation through Parliament said it eliminates an anomaly in the law that

criminalized parents smacking their own children but allowed strangers to do so with impunity. Women's groups on the other hand bitterly opposed the amendment, saying it would lift one of very few legal protections against domestic violence. However, just one month (February 2017) after its passage, reports indicated that domestic violence had more than doubled in Russia since the Government reduced the punishment for spousal or child abuse from a criminal to a civil one. Police in some cities have responded to **350** incidents of domestic violence daily since the law was relaxed compared

to **150** such incidents previously. A clear example of swinging the pendulum. We should avoid such situations.

26. I wish you all fruitful deliberations for the rest of the day and wish to declare the Conference officially opened.

THANK YOU

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