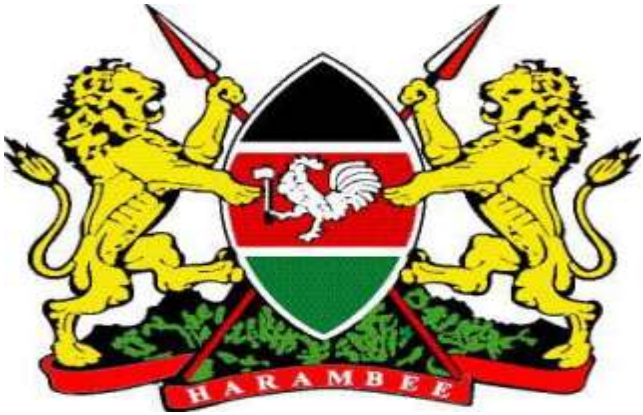
REPUBLIC OF KENYA



THE JUDICIARY

ADDRESS BY

THE HONOURABLE CHIEF JUSTICE

ON THE OCCASION OF THE REGIONAL FORUM ON ALTERNATIVE DISPUTE RESOLUTION & CUSTOMARY AND INFORMAL JUSTICE: ADVANCING SDG 16 AND PATHWAYS TO JUSTICE AT

SAFARI PARK HOTEL, ON MARCH 2, 2020

[PROTOCOLS]

I warmly welcome you to this *Regional Forum on Alternative Dispute Resolution and Customary and Informal Justice*. We are delighted as a Judiciary to be co-hosts of this important conversation. We are even more delighted to be co-hosting this forum with our two erstwhile and dependable partners in the administration of Justice: International Development Law Organization (IDLO) and International Commission of Jurists (ICJ). The Judiciary has undertaken many initiatives and innovations in advancing access to justice in the past decade with the solid cooperation and collaboration of these two

organizations. We are happy to diversify and deepen our conversations about Alternative Dispute Resolution and **Alternative Justice Systems** through this forum co-hosted by these two organizations. There can be no more fitting partners for this forum. I thank them for this collaboration.

In Sustainable Development Goal No. 16, the World, through the United Nations, finally acknowledged that access to justice is a pre-requisite to sustainable and inclusive development. SDG 16's goal is to "*promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*."

A casual observer might miss three important shifts from past development discourses in this innovative SDG:

First, the nearly universal past language of Rule of Law has given way to Access to Justice in the new formulation. This is not idle. It is the realization that an abstract Rule of Law – without contextualization – does not necessarily cascade its benefits to the majority of citizens if those citizens have no truly accessible way to obtain justice in their everyday lives. A Judiciary can remain theoretically and pragmatically independent but that will not necessarily translate to increased justice for the informal trader in the streets of Nairobi or the pastoralist in Mandera who has no

means to practical and realistic means to access it.

Second, SDG 16 unapologetically speaks in the language of an inclusive society. It recognizes that there can be no sustainable development if prosperity and the benefits of that development is not shared among all in the society. The linkage of this recognition to access to justice is clear: there can be no credible mechanism for sharing prosperity if most citizens cannot access justice; a forum where they can present their grievances; resolve their disputes and negotiate their ideas of justice.

Third, SDG 16 makes it clear that there can be no sustainable development unless the society has strong institutions. This,

naturally, includes institutions for promoting access to justice and the sharing of prosperity.

Hence, what SDG 16 does is to put Access to Justice at the centre of the conversation about sustainable development. This raises at least three important questions:

1. How do the majority of the people in the society access justice?

2. Are those means optimal for everyday justice and for encouraging durable social and economic ties that, in turn, lead to stable societies?

3. Finally, what are State institutions doing to promote or impede Access to Justice?

These are the three questions which will form the core of the discussion in this Forum. I look forward to reading your deliberations on these questions and others you will come up with in the next two days.

I am pleased to inform you that the Judiciary of Kenya has been wrestling with these questions. Indeed, it is fair to say that Kenyans wrestled with these questions even before SDG 16 was promulgated. In 2010, Kenyans inserted in their then New Constitution the much heralded Article 159. That Article not only makes it clear that all judicial authority is derived from the people and must be exercised only for the benefit of the people who have delegated their sovereignty to the Judiciary to exercise it on their behalf.

Article 159, then, outlines the specific principles which must guide the Judiciary in the exercise of the Judicial Authority bequeathed to it. It gives four principles thus:

- *One*, that justice shall be done to all irrespective of status;
- *Two*, that justice shall not be delayed;
- *Three,* that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted as long as they do not undermine the values and purposes of the Constitution;

- *Four*, that the purpose and principles of the Constitution shall always be protected and promoted.

These constitutional commands have a number of practical implications for the Judiciary and the State. Among them is that the Judiciary, and the State, must put in place systems for accessing justice for the majority of citizens that are readily available; practical; affordable; and which dispense justice in a timely fashion. There is the further implication that some of the systems which answer to these constitutional imperatives are not necessarily the State-backed systems of dispute resolution. There is an explicit recognition that other systems and methods of dispute resolution may be more appropriate for some disputes for

some people. Like SDG 16, the Constitution of Kenya now requires the Judiciary, and the State, to promote these other forms of dispute resolution.

It is important to note that the Constitution's choice to use the word "promote" to describe the Judiciary's obligations towards these other forms and methods of dispute resolution is not accidental. It is the deployment of a familiar human rights language in the arena of dispute resolution to require the Judiciary and the State to ensure that systems are in place for dispute resolution and access to justice which are simultaneously culturally appropriate, proportionate in terms of time and resources used to conclude matters, and acceptable to the users of those systems.

Gone is the imperial instinct that the State-backed system is the only optimum way to resolve disputes and access to justice; and that all controversies must be channeled there.

It is with this realization that the Judiciary of Kenya formed two Taskforces which are co-hosting this Forum. The Taskforce on Alternative Dispute Resolutions and the Taskforce on Alternative Justice Systems. These two Taskforces have been tasked with formulating appropriate policies and judicial interventions needed to implement Article 159 of the Constitution and, by extension, SDG 16. In the next two days, you will no doubt interact with representatives of these two Taskforces who will, I hope enrich your discussions with what they have found on the ground

in terms of challenges, opportunities and innovations. They will, hopefully also, learn from the other countries represented here other ways of cross-fertilizing our innovations here.

It is, therefore, my distinct pleasure to say *Karibu* once again and to thank you for your attendance at this important and timely Forum. I wish you fruitful and inspired deliberations.

I now declare this Forum officially open.

Thank you and God bless you all.

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