



REPUBLIC OF KENYA

THE JUDICIARY

**REMARKS BY THE CHIEF JUSTICE ON THE OCCASION OF THE
INAUGURAL EALSA CONFERENCE ON BRIDGING THE GAP BETWEEN
LEGAL THEORY & PRACTICE: INTERROGATING THE EFFICACY OF
TEACHING AND LEARNING TECHNIQUES APPLIED IN THE STUDY
OF LAW**

Invited Guests

Ladies and Gentlemen

This conference is timely for at least three reasons:

First, it is extremely gratifying for me to see law students from the region organizing themselves into an organization that is committed to intellectual discourse – and not just the literal politics of the stomach that seems to have infested our student politics in recent years. It is a beautiful thing to see University students rekindle the spirit of inspired conversation and dialogue that has long been the source of social justice discourses the world over. It is a beautiful thing that this conference, for all the profound nature of its themes and

methodology, and the amazing constellation of amazing speakers put together, was organized not by the Law Faculties of the Kenyan Universities – but by an organization of Law Students. This is testament to the fact that these brilliant students have realized that the issue at hand – both the crisis of legal education in the region as well as the challenge of translating cross-border practice into action – will require an integrated conversation of all players; a collective and candid dialogue. These students have managed, perhaps for the first time, to bring all of us, the key players, in the same room. I applaud them for this. I think they deserve our gratitude for doing so.

Second, this conference comes at a time when we are debating a larger question in Kenya: the crisis facing our education system generally. The symptoms of this crisis are scattered all over for us to see: from the red-herring of the debate whether to continue ranking schools in national exams – to the crisis and dilemma of what priority to give students from public schools in Form 1 admissions – to the growing irrelevance of our education to the job market and the often-dramatized complaints from employers about the weakness of new graduates entering the job market.

Third, and bring the theme back home, there is an even more immediate crisis facing us: the crisis of legal education and the legal profession. Since I became Chief Justice, I have often complained about the ethical crisis; the incompetence crisis; and the decorum crisis facing the profession. There were days when you could count on lawyers to be decent and polite human beings. Today, you need to attend an LSK Cocktail reception to disabuse yourself of that notion. I have been invited to give speeches at LSK dinners and ended up trying to shout above the din of seemingly intoxicated advocates young enough to be my own children to deliver my speech. The ability of lawyers to simply act civilly like Learned people appears to have vanished. This crisis of decorum is seen in our courts every day in the way lawyers interact with each other and with the courts. It is heart-breaking, to say the least.

But if this decorum crisis is heartbreaking, the ethical crisis in the legal profession is downright devastating. If you can think of a single corrupt dealing or corruption scandal in Kenya today, you would be hard pressed and irrationally charitable for a lawyer's name not to come to your mind. Every day, in this

country, we have lawyers facilitating, enabling, cooking up, and implementing corrupt deals. The mild rules of professional conduct have been far outpaced by the ability of lawyers to engage in crass corruption. And, beyond these spectacular corruption scandals, there is the everyday lawyer who cheats her client; applies for needless adjournment; keeps her client's money longer than she needs; files a frivolous law suit instead of advising the client that she has no case and so forth – all in a lawyer's day's work. Indeed, these incidents happen so many times, we have come to equate them with normal lawyering.

And then, there is the crisis of incompetence – the seeming implication of the title of this conference. Now, I do not want to be misunderstood: this country is teeming with lawyers of impeccable skills, astounding moral courage and unquestioned integrity. One of them will be giving a Keynote address later today: Senior Counsel Pheroze Nowrojee can only be described in superlative terms despite his self-effacing ways. He exemplifies all that can be grand and noble about lawyers and our profession. Yet, while we have many able and ethical lawyers in this country, there is no escaping the verdict given by many: the spectacular incivility and indecency we often see from the bar is only matched by the breathtaking incompetence and lack of essential skills we see on display in our courts and law offices (or, in some cases, law brief cases!) every day. I do not need to belabor the point except to bring it to the open the main question you will be discussing today: **our law schools are generating too many lawyers who do not appear ready for practice.** I have noted that the conference organizers have charitably and cleverly called this crisis a “gap” between theory and practice of law. Since this conference is organized by law students, perhaps this clever phraseology proves that our law students are still pretty good and thoughtful. So what explains the striking displays of incompetence we see in practice?

As I stated at the outset, one answer could be that this is simply a reflection of the general crisis we are seeing in the education sector in this country. We have a system that is yet to ask the hard questions about how we educate our children, how we identify talent and nurture it, and even how we teach. Even more fundamentally, we have a system that has been impervious to the great social justice question facing us: the question of equity in educational opportunities and whether the system in place serves all our children well. We now have an education system – both public and private – that seems to place profits before

students; one that equates success with shiny new towers in universities and successful financial mobilization rather than pedagogical innovation and ability to generate answers to the great social and scientific questions facing our society.

In addition to this dehumanizing turn of education, where profits and money matter more than students, our system seems problematic for another reason: It seems too obvious to say that a system that forces all learners no matter their learning styles must be subjected to the same pedagogical methods and then tested in them, will produce disenfranchised and disadvantaged groups in the same way that a system that pretends to test everyone in the same way no matter their relative disadvantage or advantage is inherently unfair. This question haunts our education system. For us it becomes this: how do we know that these law students are the ones who should be here? They are, for sure, bright – but perhaps they should be artists painting graffiti or actors out-doing Lupita Nyong'o or musicians rap-dueling with Kanye West. Did the education system channel them here despite and in spite of themselves? Did the education system give their parents a bigger role to determine who they will become than they should?

The second answer is, of course, that there is a problem with how we teach law. This invites the question: has anything changed about how law is taught in the region? The answer is yes and no. Since the days I was at the University of Dar es Salaam, we had lousy teachers and professors. I had a professor who hated students, the university, and his job so much I always wondered why he became a professor. We had our share of academic terrorists – teachers who are threatened by their own students and the only way they can feel secure about their own intellect is to dehumanize their students. These professors and teachers are still in our universities today. So one can say that there has been no qualitative difference in the way law is taught seen this way.

Yet, something seems to have changed in the way we teach law. At the University of Dar, we had a foundational course called Development Studies. This was a serious multi- and inter-disciplinary course which gave us a firm foundation to the social context of law and grounded our jurisprudence. This was not a “common course” in the sense in which these are offered today. This was a serious foundational course that was almost an undergraduate degree in an area

other than law that helped us ground our law. Are our students today getting this kind of grounding?

There is something else that seems to have shifted. In our days, and even when I taught law at the University of Nairobi, we were, first and foremost, academics. We came to work at the University. We spent our days there. Today, probably too many of our teachers are spending too little time in the University. Many of our teachers have become merchants of consultancies and teaching is only their moon-lighting gig. Eventually, this has consequences for our legal education. Absent teachers ultimately translate to absent intellectual engagement. Students who simply go to class, take notes (or, worse, photocopy notes from their colleagues), cram them and pass exams will never equal those who have had an opportunity to subject the rules they are learning to philosophical and policy scrutiny. But students cannot have this kind of scrutiny alone and before they have been introduced to that kind of pedagogy and methodology; and without the presence of intellectual discourse on campus. In a speech at the University of Nairobi two years ago, I lamented that little social critique and social thought seems to be coming out of our universities these days and theorized that this was a direct outcome of the merchantilization of intellectual work at the universities. Too many people are taking up professorial jobs as a latch to other things they want to do outside the university.

There is also the question of whether our methods of teaching law need to change to keep with the changing times. In today's world, information is so readily available, there is a question whether the methods used to teach us in the 1970s would still work with this generation who can simply Google the case of *Rylands V Fletcher*, its ratio and implications rather than think through it. Could it be that Millennial Generation Y needs revised pedagogical methods to really and fully engage them but we are too etched in our analogue ways to do this? If so, then, perhaps the joke is on us: this generation will eventually take over and at the tail end of our lives, they will be making the most important decisions in our society. It behooves us to not only mentor them but to also reach them first so that we can spread the benefits of critical and robust thinking to them. If we fail to do so in the name of anachronistic pedagogical methods, we will all be the poorer for it.

Finally, does regional integration offer solutions or does it complicate the problem? I am happy to note that the Council for Legal Education is represented here – both formally by a member of the Secretariat – and by my representative to the Council, Justice Joel Ngugi. One of the most important questions the CLE will face in the coming days is the question of harmonization of legal education in the region. Like Jesus I ask: will it help for you to save the legal education in your country but lose your eternal soul through admissions from other regional countries by virtue of regional integration?

So, I leave you like I found you: with questions. I am supremely confident that you will not find answers to these questions in this gathering. But it is important enough that we ask the questions so that we begin the conversation. I sincerely thank these students for bringing all of us together to start the debate together. I thank the Judiciary Training Institute, our Institute of Higher Learning at the Judiciary, for sponsoring this conference and for working closely with the students to make this conference become a reality. This is testament to our commitment in the Judiciary to engage meaningfully with all stakeholders, and particularly the academy. We pledge to remain committed to this engagement and we hope that you in the academy will continue calling upon us to continue the discourse. So allow me to salute my colleagues from the Judiciary who agreed to present at this conference: Justice Patrick Kiage of the Court of Appeal; and Justices Isack Lenaola, the Presiding Judge of the Constitutional Division is here, as is the Director of the JTI, Justice Joel Ngugi.

I thank you all for your kind attention.

DR. WILLY MUTUNGA, D.Jur, SC, E.G.H.,
CHIEF JUSTICE/PRESIDENT, SUPREME COURT OF KENYA