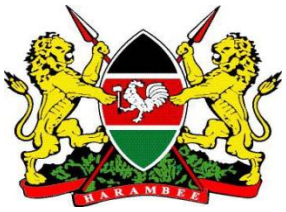

SPEECH BY CHIEF JUSTICE WILLY MUTUNGA[1] AT THE CENTRE FOR STRATEGIC AND INTERNATIONAL STUDIES, SEPTEMBER 7, 2012, WASHINGTON D.C

To the Open Society Foundations, I want to thank you for organising my visit here in the United States. To the Centre for Strategic and International Studies, I want to thank you for hosting me here today to give this speech. It gives me an opportunity to offer you my perspectives on what we are doing at home in the Judiciary.

I know I have been asked to speak on judicial reform and elections in Kenya. As you know, I am not a politician. And neither am I a political advisor, strategist, or analyst, as some of you who are gathered here today. I am the Chief Justice. And it is not in the province of the Chief Justice to speak politics, even though, as Americans are all too aware, he can determine political outcomes, a la Gore vs. Bush in 2000. But this determination is not singularly made -- it is collegiate, made within the confines of the Supreme Court. So I will disappoint you if you expected me to wade and walk into the thicket of political discourse.

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However, I will speak to the issues of Judiciary reforms generally, the Constitution, and the relationship, whether direct or ancillary, these reforms in the Judiciary have on elections in Kenya.

The reforms in the Judiciary were preceded by the passing of a new Constitution in 2010. Both in its structure and content, the Constitution commanded a re-creation and re-imagination of the Kenyan state and society. It created a new Judiciary -- established its independence through the expansion of the Judicial Service Commission, decentralised power and authority by eliminating the monarchical power and character of the office of the Chief Justice, established new ethos and principles in the exercise of judicial authority, and established an independent Judiciary Fund among other progressive provisions, particularly on the enforcement and application of the expanded Bill of Rights.

As part of this new constitutional dispensation, I assumed office in a manner and method that I believe is unprecedented in any part of the world! I was interviewed in public -- the three arms of government participated in my appointment (almost four, given that we have a Dual Executive that must consult and concur before such appointments are made) -- a process so rigorous and transparent that even the much vaunted American confirmatory hearings in the US Senate may not come close! But the attraction of this process, also heightened public expectation -- a public already disillusioned and suspicious of an Executive that drove it to near-civil war and whose divisions make it ineffective, and a legislature the public views as insensitive and self-serving. Desperate to protect the gains made by having the new Constitution, and desirous of some flicker of hope

for the future, the public has turned to the Judiciary. Not too infrequently, I receive public memoranda through mail or street protests on one thing or another, some of which clearly fall outside my constitutional remit. And I understand why.

I must admit that my long years in the field of law and human rights did not prepare me for the shock of office. I had practised law for many years, served as chair of the Law Society of Kenya, taught law at the university, founded many social justice and human rights organizations, studied and written on legal issues but none of these prepared me for the surprises and horror I found in the Judiciary. As I said in reporting to Kenyans to mark my 120 days in office, I found an institution that was designed to fail. It was an institution so frail in its structures, so socially uprooted in its mannerisms and culture, so thin on resources, so low on its self-confidence, so segmented in its human resource formation, so unprofessionalised in its administrative cadre, so overwhelmed by the Executive that it still puzzles me to date how we maintained a modicum of operations.

This is the kind of institution in which the public had invested all its hope. I was the head of that institution. I understood the fierce urgency of now, and the public appetite for leadership in this newly minted republic.
It became clear to me that for the transformation to be successful we had to do at least four things: first, have a philosophy; second, have a plan; third, have an execution strategy; and fourth, cultivate public support. In other words, internal programmatic clarity and external public accountability were critical determinants of success. And that is what we have done.
Philosophically, we understood that the transformation of the Judiciary was not a matter of choice but one that had already been predetermined

and commanded by the Constitution. In fact, in our mind, it was an existential question -- we either transformed or perished. The Judiciary was the agency for the transformation of the Kenyan society that had been imagined by the new Constitution. We, however, needed to re-orient the Judiciary to reposition it from an institution of self entitlement to one of public service. This is why we have sought to close the distance between the institution and the public by removing artificial barriers and challenging outdated practices and rules. That is part of the reason we discarded the wigs, and have just concluded a very successful programme of Judicial Marches countrywide.

We also had to reset the relationship between the Judiciary and other arms of government, particularly with the Executive, by affirming our independence. Judges are increasingly making independent decisions, some of which go against the Executive. I continue and will continue to provide strong political leadership for the institution to defend the territorial space of the Judiciary within the context of appropriate inter-branch relations. It is for this reason that we have anchored our relationship with the Executive on the principle of robust independence and constructive interdependence.

We have developed a comprehensive Judiciary Transformation Framework, 2012- 2016, which is based on previous internal reports and an elaborate consultative process that has involved every segment of the institution and other stakeholders. The framework is based on four pillars and 10 Key Result Areas. The pillars are:

1. People focused Delivery of Justice

2. Transformative Leadership, Organizational Culture, and Professional Staff
3. Adequate Financial Resources and Physical Infrastructure
4. Technology as an Enabler

The overriding theme of the JTF is access to justice, and we are expanding judicial services to various parts of the country, including those that have long been marginalised. We are expanding mobile courts, including provision of boats in Lake Victoria to access deep islands. We have engaged in a massive recruitment of both judicial and administrative staff as part of this important strategy. For example, we have 109 new magistrates; we have expanded the High Court establishment from 70 to 120 judges and the Court of Appeal from 15 to 30 judges. We have created two new specialised courts for Land and Environment, which will have 30 judges, and for Labour and Industrial Relations, which currently has 12 judges.

In terms of the execution strategy, we have set up a Judiciary Transformation Secretariat located in the Office of the Chief Justice, but headed by one of our judges, Prof. Joel Ngugi, a PhD graduate from Harvard, and who has been teaching here in the US. This office leads the execution and implementation of the Framework.

Of course, there is resistance. The old order is too terrified not just of the radical nature of the Constitution but also the assertive independence of the Judiciary. Many people, particularly the political and economic elite, having been socialized in and benefited from a retrogressive culture have neither the skill nor appetite for this new environment. They were used to a CJ and a Judiciary they would call and do deals and bargains with. Not anymore.

They were used to a Judiciary that would be deliberately starved of resources as a blackmail strategy. Not anymore. They were used to a Judiciary that was very unpopular with the public. Not anymore. This has caused considerable frustration not just to these elite but also the lawyers who had established corrupt networks with judges and magistrates.

The transformation of the Judiciary is complex and will take a long time. It is not easy to change an institution that has internalised certain ways of doing things over decades overnight, but there is no choice. The transformation becomes even more difficult if the political environment is hostile to it but such is the business of change and we shall not relent.
The Judiciary is midway through a painful but necessary process of renewal that requires the vetting of serving officers and the public recruitment of new ones. The purpose of this is to renew the Judiciary to give effect to the ambitions of the Constitution. I wish to add that the transformation is not just about brick and mortar issues -- it is also about a change in jurisprudence. I have triggered this debate among judges and challenged them to develop progressive, patriotic, but universal jurisprudence that advances the purposes and objects of the new Constitution. The Supreme Court has embarked on this process and I hope that think tanks such as the ones represented here can benefit and also enrich the jurisprudence that is emerging from that Court. I also hope that the think tanks would be able to establish a working relationship with the Judiciary Training Institute , which we have established as part of the transformation to act as the home and hearth of this new jurisprudence. The institute will seek to promote the training of magistrates as our strategy of improving access to justice since the bulk of Judiciary work is at the magistrate's level.

We do not view the development of jurisprudence as a Kenya-centric undertaking. It is not even Afro-centric. Whereas some jurisdictions have elected not to be part of the international legal system in one way or another, the Constitution commits Kenya to international law and emerging principles of practice. International law and legal norms form part of the Kenya's stock of statute. That is why the Judiciary is keen to create jurisprudence that can be used at home, just as easily as it can be exported abroad because Kenya is but a staging post for the rule of law. There will be need to engage in discourses on the place of international law, considering the emerging contests it has tended to provoke. There is need to view the International Criminal Court in this broad context and acknowledge it as a complex question.

Here in the United States, membership of and participation in the International Criminal Court is acknowledged as a complex question. Debate has tended to get emotive, especially when issues of extra-territorial jurisdiction are surfaced. These are important arguments about the ICC and its place in international law. The questions of self-determination that have been voiced by leading scholars and experts around the world, not least here in the US, require thought and debate. These concerns are similarly alive in Kenya, and it is doubtful that these debates will be resolved easily or quickly.

I now want to turn to the challenge of implementing the Constitution and the elections. First, some background.

Four years ago, Kenya was thrust into the international limelight by a bungled election that quickly degenerated into a crisis of gargantuan

proportions. The cost, in terms of life and limb, added onto a rising invoice in a decades-long struggle for a popular social contract by which Kenyan society could be governed.

The appropriation of the independence constitution in Kenya as well as its repeated mutilation at the hands of narrow interests had systematically alienated the populace from their government, inhibited individual potential and amplified public frustration.

Emerging out of the chrysalis of the resultant institutional failure covering the entire canvass of governance institutions such as the police, the electoral commission and the Judiciary as well as the nation's politics, Kenya produced and adopted a new Constitution two years ago. Its delivery has been long in coming, a fact indicative of the lengthy negotiation it took to produce it.

It was a remarkable achievement for a people, worn out by an unsatisfactory constitutional order, to wilfully choose an orderly means to change it – electing voluntarily to live by the rule of law.
Without a doubt, Kenya has a very ambitious and progressive Constitution. The Constitution promulgated on August 27, 2010, is ambitious not only because it seeks to restore public faith and confidence in the country's institutions, but also because it demands a new leadership and a new citizenship.

It is, perhaps, the greatest achievement of the Kenyan nation to date. The Constitution is the right signal of where Kenya ought to be heading.

Yet, there should be no illusions about the challenges of implementing it. Implementation is a complex undertaking, more so when you have an ambitious Constitution as Kenya does.

The ambition of Kenya's new socio-democratic pact is perhaps only comparable in scale to another equally ambitious constitution passed over 200 years ago.

The Kenyan Constitution is doing similarly audacious things to what the American Constitution did in 1787 -- such as breaking ground for public participation beyond spectator democratic practice. It is taking the country's politics through a public laundry of unprecedented proportions. It has embraced the traditional political and civil rights secured by older constitutions elsewhere, but has stretched its seams to cover socio-economic rights. It has not just altered the philosophy and culture of governance by introducing a devolved system of government with shared power and authority, but also demands a societal transformation undergirded by the principles of social justice.
Doubtless, Kenya's attempt to implement the requirements of devolution will echo America's own internal strains over whether to locate power and the right to self-determination at the centre or on the periphery of the society.

The entrenchment of public participation as one of the fundamental principles in the new Constitution gives citizens a critical role to take part in the governance of their country not just as spectators, but also as promoters and protectors of the social contract to which they have acceded.

There are new requirements to dismantle, reform, and reconstitute a slew of institutions and offices. The Judiciary has been placed at the beachhead of these reforms by requiring its transformation to make it fit for the purpose of pronouncing itself authoritatively on political as well as socio-economic rights.

I have discussed at length the on-going transformation in the Judiciary. Still, the reforms in the Judiciary must be replicated in coordinate institutions to give full effect to the intent of the Constitution. Several institutions created by the new Constitution will have capacity and resource gaps that hinder their ability to deliver on their mandate.

Understandably, there is public frustration at the slow pace of implementing the Constitution. There are many people in Kenya who say this new republic is taking far too long to take shape.

It is important to note that the Kenyan constitution was passed and adopted in spite of powerful political forces, which can expected to continue to make attempts to undermine its implementation. There might be weak laws that negotiate the high standards for democracy and human rights outlined in the Constitution, as well as open resistance to change.

Within the universe of these competing contestations, Kenya must use its new Constitution to manage a delicate transitional election. The next General Election is the most complex ever, requiring the casting of ballots in six elections in one day. It presents significant challenges at the logistical, credibility, and technical level.

Kenya is in a fragile transition, one that would require elite consensus and a closing of ranks rather than mobilizing electoral competition along the lines of ethnicity. Regrettably, the Judiciary does not directly participate in elections. It only adjudicates over aspects of it. This is why I formed the Judiciary Working Committee on Elections Preparations, composed of five judges and two magistrates.

The Judiciary, keenly aware that many of electoral disputes will be brought to it for resolution, has begun preparations to deal with disputes and offences arising out of the electoral contest by training its officers and creating rules. It is also making administrative arrangements for the expeditious disposal of cases, including the use of pre-trial conferencing. Daunting as the implementation of the Constitution seems, we take courage in knowing that we are not alone. Kenya's struggle to implement the Constitution is not dissimilar to that of the United States. The challenges Kenya is facing, and will continue to face, find parallels in America's disputes over the emancipation declaration, the recent questioning of the voting and civil rights laws, as well as contestations over universal medical care. These challenges are not straightforward, and will obviously require patience and sagacity.

For instance, it was not until 1965 that a US court could utter the phrase, 'One person, one vote'. And even then, that court was roundly criticised and its decision variously described as extra-constitutional and a case of judicial activism.

We welcome engagement, and we welcome discourse, but it would not be helpful for anyone to come to these conversations with illusions of

occupying a higher moral posture. The critical role of an independent Judiciary in Kenya in the pursuit of the wider objective of securing a stable and peaceful democracy cannot be over-emphasised. Kenya requires the support of her friends to manage the constitutional transition successfully, but Kenyans are self confident and imbued with a new sense of self-belief about their commitment to uphold the rule of law and constitutionalism. Whereas no one welcomes interference, this should not be interpreted to mean we expect indifference. Nor should the neutrality of Kenya's friends be so wooden as to blind them to manifest injustices. If the United States were to show partisanship, it should to be on the side of the people, and in defence of the Constitution they have chosen as the compass to direct their destiny.

We invite you to be our interlocutors as we embark on putting our Constitution to work.

Thank you.