

Striking a Balance Between Judicial Immunity, Independence and Accountability: The Kenyan Situation

Kenya's Supreme Court is in the eye of a storm. Four members of the apex court face allegations of bribery and impropriety. The Chief Justice himself faces a petition. The Deputy Chief Justice faces the prospect of criminal charges if an ongoing constitutional case is determined against her. One of the Supreme Court judges has declined to appear before the Judicial Service Commission (JSC), citing constitutional immunity.

Lower down the rung, a judge of the High Court who was found unfit has challenged the decision. His appeal has, however, been dismissed by the Supreme Court. Several other High Court judges could face tribunals depending on the findings of the committees set up to investigate the complaints against them. Some of the complaints may turn out to be not worthy of the formation of a tribunal. However, the fact that there are so many complaints against members of the Supreme Court erodes the confidence that should be attached to the apex court, and by extension, to the whole Judiciary.

It is said that when Julius Caesar's wife, Pompeia, allowed a man dressed as a woman into a Roman religious festival strictly reserved for women, Caesar divorced her. The whole thing had been a prank and Pompeia had no intentions of impropriety. Aware of this, the citizens of Rome enquired why Caesar had divorced his wife. "The wife of Caesar must be above suspicion," was the Great Emperor's response. Hence the comparison with the level of integrity expected of a judge.

Perception plays an important role in the discharge of justice. Some 118 years ago, Lord Charles Bowen, while setting aside the ruling of the Lord Chief Justice who had determined an appeal in a case involving his own brother's architectural firm, said, "Like Caesar's wife, a judge must be beyond suspicion."

Now one may ask where Caesar's wife fits in all this? What does Caesar's wife have to do with the integrity of a judge?

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A transparent, reliable and accountable Judiciary is vital in the furtherance of the rule of law, which is fundamental to constitutionalism and democracy. It cannot be gainsaid that right from the recruitment, functioning, supervision, to the removal of judicial officers, the process must be rigorous, transparent, accountable and free from influence. To properly carry out their mandate, judicial officers must be insulated from victimisation arising from the discharge of their judicial functions. Conversely, they must conduct themselves with the propriety expected from those entrusted with great power.

Justice before 2010

Prior to the enactment of the 2010 constitution, the appointment of the Chief Justice was the sole prerogative of the president. He was also the appointing authority in the appointment of judges, the only rider being that with such appointments, he was to act in accordance with the advice of the Judicial Service Commission (JSC).

An examination of the composition the JSC, however, clearly showed that the president held sway in such appointments. Composed of the Chief Justice, the Attorney General, two judges appointed by the president and the chair of the Public Service Commission, all members of the JSC were direct or indirect appointees of the president and, therefore, beholden to him.

Another contract judge, Patrick O'Connor, was sacked by the Chief Justice when he resisted a transfer to Meru. When O'Connor questioned whether the Chief Justice had the powers to sack him, he was criticised by the political class. Not long after, in 1988, Parliament amended the constitution to remove the security of tenure of judges.

Then there were the “contract judges”, who were mostly British citizens. Their contracts were renewable at the government’s discretion. Some of these judges were so beholden to the Executive that, in one instance, the by then Chief Justice, Alan Robin Hancox, in 1991 went as far as advising members of the bar and bench that their loyalty was to the head of state.

Another contract judge, Norbury Dugdale, found himself in conflict with lawyers and members of the Law Society of Kenya (LSK) due to the consistency of his decisions in favour of the Executive. Supporting an earlier call by nine members of the LSK in 1991 to have a tribunal established for the removal of Chief Justice Hancox and Justice Dugdale in September of that year, 107 lawyers signed a memorandum calling for the resignation of the two. (*The Weekly Review Sep 6, 1991, page 4.*)

Not all of the contract judges acted as gatekeepers for the Executive. Not all of them were malleable to the whims of the head of state. The fierce independence of Justice Derek Schofield, a contract judge, comes to mind. In 1978, a family filed a writ of habeas corpus seeking the production of their family member, Mbaraka Karanja. When Justice Schofield ordered the production of Karanja, the police said that he had been shot while escaping and had been buried. The judge then insisted the body be exhumed. Even after the opening of 19 graves, there was still no body of Karanja. Justice Schofield then threatened the Director of Criminal Investigation with contempt, prompting Chief Justice Cecil Miller to remove the case from the judge and to transfer him to Meru. Justice Schofield chose to resign than put up with this blatant interference. He would later say that the Chief Justice had informed him that his actions had been at the behest of President Moi. (*Nairobi Law Monthly 49. Feb/Mar, 1992, and also Nation newspaper, 11 October 2008, interview with Okwemba.*)

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At the lower tier of the judiciary were the magistrates. Greater in number than the judges, and considered the true face of the Judiciary, they worked in far-flung stations. The JSC exercised complete control over their appointment. The law

afforded them nothing in terms of security of tenure and they could be sacked at any time through mechanisms that were not transparent.

They worked alongside police prosecutors. Often considered enforcers for the Executive, their courts acted arbitrarily with little regard for the law or procedure. The extent of their emasculation by the Executive was at its most obvious during the Mwakenya trials. Scores of intellectuals, students, politicians and ordinary wananchi were arrested, tortured and charged with belonging to proscribed groups. The accused persons were “tried” and convicted in the magistrate’s courts, outside court hours, usually in the evenings without the benefit of counsel. (See KNHRC 2009 publication “Surviving after Torture”, pages 41-42.) One of the accusations against the twelfth Chief Justice, Benard Chunga, in 2003 when a tribunal for his removal was constituted, was that during his tenure as the Deputy Public Prosecutor, he had condoned and executed programmes of torture and illegal trials in the magistrate’s courts.

Executive interference was not the only factor that influenced the decisions of judicial officers. Far from it. In many cases, it was corruption that subverted the course of justice. So rooted was this vice that the popular saying, “Why hire a lawyer when you can buy a judge?” was an accurate depiction of the state of corruption in the Judiciary. The corridors of “justice” had become a marketplace where the highest bidder carried the day.

Magistrates who displayed independence were punished. A case in point was in 1994 when Senior Principal Magistrate, Onesmus Githinji; while acquitting six accused persons (famously known as the Ndeiya Six) charged with breaking into a chief’s camp, censured the police and ordered an investigation over allegations of torture. Soon after, he was transferred to a remote court in Kitui, which prompted him to resign.

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The impunity with which some judicial officers conducted their affairs was in

some instances almost hilarious. In Kisumu, an advocate obtained a photograph of a judge being transported in a vehicle that the same judge had irregularly allowed an auctioneer to attach and sell. When the advocate confronted the judge with this evidence and asked that he disqualify himself from the still ongoing proceedings, he declined. (The same judge would resign rather than face a tribunal during the 2003 “radical surgery” of the Judiciary initiated during the Mwai Kibaki administration.) In Nairobi, a magistrate was found with two sets of written judgments for the same case, one acquitting the accused, the other convicting him. His reason for this embarrassing situation was anyone’s guess.

In remote stations, magistrates were a law unto themselves. Feared by a populace that had long accepted corruption as a way of the courts, they went about their sordid business without a care in the world.

The Radical Surgery

By the time the country was going to the 2002 polls, it was plain to see that it was just a matter of time before some serious intervention was made to try and salvage a Judiciary gone rogue. And come it did in the form of what came to be known as the Radical Surgery.

With the defeat of KANU in the 2002 presidential elections and the ascendance of Mwai Kibaki to power, the stage was set for a radical intervention. An Anti-Corruption Committee chaired by Justice Aron Ringera was promptly constituted to investigate corruption in the Judiciary. Upon completing its work, it tabled a report that chronicled instances ranging from judicial officers receiving money to influence decisions to the seeking of sexual favours to make favourable decisions. It implicated 5 of the 9 Court of Appeal judges, 18 of the 36 High Court judges and 82 of the 254 magistrates country-wide.

This radical crackdown had unmasked powerful men and women, who hitherto, like Caesar’s wife, had been considered above suspicion. Pictures of Court of Appeal judges outside what is now the Supreme Court being helped by family members to load personal belongings into the boots of cars was a reflection of the magnitude of what had transpired.

In a brazen, and most would say unfair, move, the names of the implicated judicial officers were published in the national press even before they were informed of

the accusations against them. This was followed by a withdrawal of their benefits and privileges. (These were to be reinstated many months later.) A two-week ultimatum to resign or be dismissed was issued to them. Many opted for the former. Some of the judges decided to face the tribunals. Justices Waki, Anganyanya, Nambuye, and Mbogoli were some of the judges who were later cleared and resumed their duties as judges.

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Years of corruption and impunity within the Judiciary had eroded public confidence. This now ensured that there was little sympathy for these victims of the purge. It was the reason why there was little protest, despite the process of their removal being unfair and unjust. Even when the President, in an unorthodox move, used his authority to appoint 28 acting judges of the High Court to replace the fired ones, there was hardly any opposition.

The President's move was irregular. The new acting judges had not been subjected to scrutiny. Many believed their appointment was influenced by political, tribal and other considerations, rather than merit. The process was flawed. Consequently, an opportunity to effectively clean up the Aegean stables that our Judiciary had become was lost.

In 2003, Evan Gicheru replaced Benard Chunga as the thirteenth Chief Justice of independent Kenya. An embattled Chunga had opted to resign rather than face a tribunal made up of men he had on many occasions crossed swords with, and whose opinion of him could only be negative.

Business as usual

The Radical Surgery having gobbled up a sizeable chunk of the old faces in the judiciary. Many naively expected a reduction in instances of executive interference and corruption and consequently a marked improvement in the delivery of justice. This was not to be and for obvious reasons.

Firstly, the manner in which the Radical Surgery had been carried out, with little regard for the internationally accepted standards for the removal of judges, greatly eroded morale in the Judiciary. The appointment of 28 acting judges to replace those removed was also far from transparent. The appointees were beholden to the appointing authority, which was still the President. The constitution still allowed him the sole prerogative in the appointment of the Chief Justice. Little wonder then that in 2007, Chief Justice Evan Gicheru, who owed his appointment solely to President Kibaki, was agreeable to irregularly swearing him in as president at dusk in a private function at State House after a highly contested election. The culmination of this was an eruption of violence that left over a thousand dead and hundreds of thousands displaced.

The other reason why the Judiciary would still be hobbled with the problems of old was that the institutional deficiencies remained in place. While the faces of the judicial officers had to a great extent changed, the structures and working conditions for a long time remained the same. Soon enough it was business as usual.

The greatest opportunity to truly revamp the Kenyan Judiciary came with the promulgation of the new constitution in 2010. For the first time, the appointment of the Chief Justice would not be the sole prerogative of the president. The new constitution provided for an independent Judicial Service Commission (JSC). Save for the Attorney General and a couple of other members, the JSC was to be composed of a representative elected by magistrates, judges of the High Court and the Court of Appeal, and two members elected by the Law Society of Kenya, amongst others; all independent of the Executive. The members of the JSC were to forward their choice for Chief Justice to the President. Their single nominee - subject to the vetting of Parliament - would be appointed to head the Judiciary.

The new constitution also mandated Parliament to provide legislation for the vetting of all judges and magistrates who were in office on the 27th of August 2010. This culminated in the enactment of the Vetting of Judges and Magistrates Act No. 2 of 2011 and consequently the appointment of a vetting board by the President in consultation with the Prime Minister. A seasoned advocate, Sharad Rao, was appointed to chair the board. The decision of the board was not to be the subject of question or review in any court.

The Mutunga Era

In June 2011, Willy Mutunga, a well-known human rights activist, one-time chair of the LSK and a former detainee, was appointed the fourteenth Chief Justice. Everyone agreed that with his appointment, the third arm of government was on the way to great heights. The state of the Judiciary at the time of his appointment was summed up in [his speech delivered in October 2011](#).

The new Chief Justice was considered an outsider – he had not been a member of the Judiciary nor had he practised much as an advocate. So he was bound to meet opposition to his leadership and any proposed reforms. The advantage was that he would not be bound by the cartels that had for a long time taken root in the Judiciary.

“We found an institution so frail in its structures; so thin on resources; so low in confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a judiciary that was designed to fail.”

The new Chief Justice was alive to the dire state of the Judiciary he had been tasked to head. With only 16 High Court stations and 111 magistrate’s courts around the country, a total of 53 judges and 330 magistrates were expected to cater for a population of over 41 million. Morale amongst the magistrates was low. Considered the backbone of the Judiciary, they handled most of the cases in far-flung courts under appalling conditions, yet their salaries, in comparison with what the judges were paid, was measly. There was a huge case backlog, which was not helped by the constant disappearance of files instigated by litigants and even advocates. Financing was low, with a paltry 0.05 per cent of the national budget set aside for the Judiciary in 2010-2011, compared with the international benchmark of 2.5 per cent. This was the Judiciary that Mutunga inherited from Evan Gicheru.

Upon assuming office, Willy Mutunga realised that there were many reports by civil society and task forces formed by past Chief Justices, the latest being the 2009-2010 report by Justice Ouko that recommended improvements in the functioning of the Judiciary. Using most of this material, his team developed what he called The Judiciary Transformation Framework.

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Mutunga also sought to give the Judiciary a more human face by doing away with some anachronistic traditions. He allowed for less formal attire and did away with symbols such as wigs. Encouraging interaction between judicial officers and court users, he sought to bridge the distance that had been created under the guise of independence and impartiality. He introduced new innovations, like the Daily Court Returns Template tracking the progress of cases.

Then Petition Number 5 of 2013 happened. It challenged the election of Uhuru Kenyatta as the fourth President of the Republic. On 30th March 2013, in a brief statement delivered in an almost cavalier manner, Chief Justice Mutunga dismissed the presidential election petition. A full judgment followed on 16th April of the same year. Criticised for its lack of depth and failure to confront the evidence, it left a blot in the image of a Judiciary that was still struggling to erase an inglorious past.

The presidential petition aside, more than any other Chief Justice, it was Mutunga who squarely faced the institutional bottlenecks that had long dogged the Judiciary. He undertook structured efforts to solve them. His earlier standing in civil society also helped marshal the finances required to transform the Judiciary. The current robust engagement between court users and the Judiciary, hitherto lacking, can be attributed to Mutunga's efforts at giving the Judiciary a human face.

Current state of the Judiciary

On the 1st September 2017, the Supreme Court, chaired by Chief Justice David Maraga, nullified the disputed 2017 presidential elections and called for fresh elections within sixty days. While the world wowed, an enraged President called

the judges of the Supreme Court “*wakora*” (crooks). The political class swore to “revisit” the issue. Confidence in the Judiciary soared.

The nullification of a presidential election by the apex court was a clear indicator of how far the Judiciary had moved in terms of independence from the Executive. Such a move would never have been thought of in the times of Hancox or Miller.

Upon realising that the intimidation of judges no longer worked, the Executive now sought to control the appointment process. One clear instance was the Amendments to the Judicial Service Act that sought to have the JSC forward three nominees to the President, instead of one, for position of Chief Justice. The LSK successfully petitioned a constitutional court to declare the amendments to be in breach of the doctrine of separation of powers.

Further pointers of independence from the other arms of government were evident in the fearless abandon with which the High Court continued to strike down legislation sponsored by the Executive as unconstitutional. In 2015, a five-judge bench agreed with the views of Justice Odunga and struck out eight offensive clauses in the controversial Security Law (Amendment) Act No 19 of 2014 as being in violation of fundamental human rights. This prompted much criticism from politicians, with threats against sitting judges.

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The Executive Director of the Kenya Human Rights Commission (KHRC), George Kegoro, in an opinion piece in the *Standard* newspaper, pointed out other instances of such interference: In one such move the President revoked the membership of two commissioners of the JSC, namely, Rev Samuel Kobia and Kipngetich Bett, while their term had not expired and in disregard of their security of tenure. Another attempt was the insistence on Parliament vetting Justice Warsame, who had been re-elected by the Court of Appeal to the JSC. It took a judgment of the Court of Appeal to scuttle the intended mischief.

The 2016-2017 State of The Judiciary & Administration of Justice Report shows that the number of judges in 2017 had almost tripled to 158 from just 53 in 2011. The number of magistrates had also risen from 330 in 2011 to 421 in 2017. Judiciary funding had almost doubled to 0.99 per cent in 2017. The maximum salary of a judge of the High Court was now slightly over Sh1 million, while that of a Chief Magistrate was over Sh700,000.

With these marked improvements in the numbers and remuneration of judicial officers, why was it that the Transparency International Bribery Index 2017 still considered the Kenyan Judiciary as the second most corrupt institution in the country after the police? Why was there still a perception amongst Kenyans that corruption was still rife in the Judiciary?

The immunity of members of the judiciary from any action or suit for anything done or omitted in good faith, in the lawful performance of a judicial function, is guaranteed in Article 160(5) of the 2010 constitution. Case law also suggests that no action can lie against a judicial officer for anything done within his or her jurisdiction even if done maliciously and in bad faith. (*See Anderson -vs-Gorrie [1895] 1QB, 668*. A similar position was held by our courts in *Bellevue Dev Co Ltd -vs- Justice Francis Gikonyo & 7 others, [2018] eKLR*.) What is suggested is that you can never sue a judicial officer for personal liability over anything he does within his jurisdiction even though it is done with malice. It matters not that his decision is so tainted with malice and militates against the evidence to the extent that it can only be attributable to extraneous factors.

Remedy lies in lodging a complaint with the JSC against such a judicial officer, and that's just about where it ends. Immunity of judicial officers from personal liability for acts while in office, as provided in Article 160(5), suggests that it survives the officer's tenure. Not even the President of the Republic is offered such immunity. The immunity accorded to a President under Article 143 of the constitution over acts carried out while in office does not extend past his tenure. It also allows for the period of limitation of time for any anticipated action against the President to stop running during his term in office.

It is common knowledge that the complaint process against judicial officers is slow and can remain undetermined for years. One of the reasons is that commissioners of the JSC hold other demanding jobs and enterprises. These men and women only meet occasionally. Judicial officers facing complaints have been

known to brag that such complaints will not see the light of day due to the slow process. Others who have been suspended from office as their cases await determination also complain of the slow pace with which their cases are handled. Perhaps the time is right for the implementation of the Sharad Rao-led Judges and Magistrates Vetting Board recommendations of having a permanent Complaints Tribunal to handle such complaints.

The safeguard of immunity, together with the principles of independence and impartiality, are tailored to assist judicial officers to carry out their onerous task of dispensing justice. This has at times been abused. It is not uncommon for an errant judicial officer to shelter behind the iron veil of independence to escape accountability. There is a need to re-engineer these parameters and strike a functional balance between immunity, independence, impartiality and accountability of members of the bench.