Manufacturing a Crisis: How the Executive Is Failing the Judiciary

By Chege Waitara

On 8 June 2020, the head of the Judiciary in Kenya, Chief Justice David Maraga, publicly accused the Executive and President Uhuru Kenyatta of grave constitutional violations, including disregarding court orders, failing to approve the appointment of new judges, and generally acting in a manner likely to suggest that the president’s agenda was to diminish the stature of the Judiciary.

In mid-2019 the Judicial Service Commission (JSC) recommended 41 individuals to be appointed judges to the president. The JSC is an independent constitutional commission that was created to ensure the independence and accountability of the Judiciary, to oversee judicial appointments, as well as to receive and investigate complaints against judges. The JSC was set up in response to a long history of the Executive’s dominance over the Judiciary.

To date, none of the 41 recommended individuals has been appointed. The Executive cites integrity questions as regards some of them, as well as sitting judges, saying that he is not a mere rubber stamp for the JSC. The Judiciary, on its part, maintains that under the 2010 Constitution of Kenya, the president has no power to refuse names recommended to him by the JSC, that the Executive is attempting to claw back powers taken away from it by the constitution, and that the delay in effecting the appointments is one of several measures the Executive has undertaken to undermine the Judiciary’s efficacy.
Legal commentators have pointed to the centrality of the Supreme Court in resolving election disputes and discerned intent by the Executive to fill the Judiciary with appointments that are more in line with its point of view. The Executive has defended its position by pointing the finger back saying that the Judiciary is the author of its own misfortunes, often citing a historical legacy of case backlogs, on the one hand, and delays in prosecution of corruption cases brought by the Executive, on the other.

Why is this happening now?

In a potent and unprecedented display of judicial independence and might, the Supreme Court of Kenya famously annulled the 2017 presidential election and ordered a re-run. The incumbent’s laudable acceptance of the judgement was nonetheless beset with ominous overtones directed at the Judiciary to the effect that there would come a time of reckoning. Subsequent behaviour and public statements by the Executive indicate a perception on its part that the Judiciary is a hotbed of activists rather than neutral arbiters. Furthermore the Executive has accused the Judiciary of being a hindrance to its efforts in fighting corruption, a matter this author has previously discussed.

Efforts by Kenya’s Executive to undermine the Judiciary point to a regime that is intent on concentrating decision-making power within itself. Part of the reason why the Judiciary is under pressure is because Parliament is not playing its constitutionally-mandated role in checking the Executive’s power.

Public spats between the two branches of government are surprising given the existence of formal mechanisms of communication. The National Commission on the Administration of Justice (NCAJ) is a high level co-ordination mechanism established by statute whose members include the Chief Justice, the Attorney General and the Director of Public Prosecution. That these parties have often chosen to ventilate their differences through the mass media is indicative of a communications breakdown.

Furthermore, as a result of the political détente between Uhuru Kenyatta and his main rival-turned-collaborator, Raila Odinga (popularly known as “the handshake”), there does not currently exist an effective opposition in Kenyan democracy. As a result, it would appear that the Judiciary is the last remaining institution capable of standing up to the Executive, keeping it honest and maintaining checks and balances. However, the Judiciary is not adept at playing political games. It communicates mainly through judgments which are long, complex and take a long time to emerge. As such, it is likely to suffer in any public conflict with the Executive, which has a well-oiled public relations machine adept at swaying public opinion.

Surprisingly enough, a factor behind the current impasse could be that elections in Kenya, and indeed in Africa, have not consistently been free and fair. It has been argued that in order for a sitting regime to encourage judicial independence, two things need to happen. First, the regime needs to believe that elections will be held regularly. This happens in Kenya. Secondly, the incumbent regime needs to believe that it could be defeated in a subsequent election. Such a mentality is likely to exist if elections are ordinarily free and fair and widely regarded as such. Since the primary responsibility of ensuring this falls upon the Independent Electoral and Boundaries
Commission (IEBC), which has been found wanting in the past, not only is the Judiciary bearing the burden of a weak Parliament, it is also bearing the brunt of a weak electoral body.

**Why is this concerning?**

The current situation has a variety of potential consequences, none of which are particularly appealing. It negatively impacts the performance of the Judiciary. If judges are not appointed and sufficient finances are not availed, this exacerbates the existing case backlog and undermines the existing process of institutional reform within the Judiciary. If court orders are not obeyed, this undermines public confidence not only in the Judiciary but in the institutional framework established by the constitution. If the political class is encouraged to ventilate grievances outside of the constitution, this is likely to lead to civil strife, particularly come election time.

The Executive will find its war on corruption more difficult since judicial independence is an essential tool to keep bureaucrats and politicians in line, particularly when to do so overtly would be politically costly or even just expensive in terms of expenditure of manpower and finances required for oversight.

The Law Society of Kenya (LSK) was and remains a key actor in establishing the rule of law in Kenya. Political wars could split the LSK, resulting in a division of the bar along political lines. In the latest campaign, Nelson Havi cast himself as the anti-establishment candidate and defeated his main rivals, Maria Mbeneka and Charles Kanjama. The period preceding the election resembled a political campaign, with large sums spent on slick PR campaigns by candidates who represented opposing sides of the political divide. A live debate among the candidates was held on national media prior to the vote. A divided bar would undermine a key player in the struggle for democracy and accountability in Kenya.

**The way forward**

There is nothing particularly surprising about the current tension between the Judiciary and the Executive. Indeed, it might be argued that such tensions from time to time are healthy and that without them the Judiciary would not be doing its job.

When politicians criticise the Judiciary, they often demonstrate a lack of knowledge of the law. Indeed, rarely will a politician even bother to state the section of the law that they allege the Judiciary to have violated. Furthermore, there is always the tacit implication that the rule of law should be subordinate to the objectives of the Executive branch. This perspective returns Kenya to colonial times when the Judiciary existed to serve the purposes of the Executive. It was treated as an arm of the civil service. This view was further cemented during the Jomo Kenyatta and Daniel arap Moi regimes prior to the promulgation of the Constitution in 2010. The Executive would do well to realise that the Judiciary does not exist to offer services to it. It exists to pass judgements in accordance with the law.

Generally speaking, the Judiciary enforces individual rights, while Parliament exists to provide negotiated solutions to social issues. In enforcing individual rights, the question arises “against whom?” As Kenya is finding out, individual rights need to be enforced not only against other individuals but frequently against the government itself. In early May 2020, for instance, the government evicted more than 7,000 people from the Kariobangi informal settlement in Nairobi after giving a two-day notice and notwithstanding the existence of a court order barring the eviction pending the hearing of a case brought by a local civic group. The interim court order was not an unintended consequence of the system; it is a feature that was very deliberately designed to be part of it.
The Judiciary can help the Executive achieve its aims, particularly where these are difficult to obtain politically. A good example is the war on corruption. The alliance, however, needs to be one borne of separation of powers. Increased authoritarianism by the Executive will not help and neither will judicial activism.

It must be said, however, that the Executive, in making claims of judicial activism, has not satisfactorily demonstrated whether and how the Judiciary has failed to enforce or has gone against the letter and spirit of the constitution or whether the constitution perhaps needs to be amended.

**Parliament, the IEBC and the BBI**

Part of the reason why the Judiciary is under pressure is because Parliament is not playing its role in checking Executive power. Whereas courts may be better at enforcing individual rights, legislatures are better at negotiating conflicting values. If the court renders something unconstitutional, there is then a burden on Parliament to see whether that thing is in the public interest and requires legislative change or not.

Upon the successful conduct of free and fair elections (a duty given to the IEBC), it is Parliament that bears the primary responsibility of representing the people of Kenya. However, parliamentarians of both houses are disinclined to be overly concerned with their constituents simply because they owe their positions to state largesse dispensed during lavish campaigns. The problem begins before the election though, at the stage of political party primaries, which resemble a process of nomination rather than election and are characterised by widespread irregularities, candidate intimidation and outright bribery.

Thus, from the very beginning, parliamentarians are ill-equipped to play a representative role. A large proportion of Kenya thus feels marginalised at the national level. This is exacerbated by the incumbent’s legitimacy issues arising from the conduct of the last election. This gap in representation is real and is what the Building Bridges Initiative (BBI) seeks to fill.

Why does the BBI exist? Primarily as a response to the crisis of legitimacy that President Uhuru Kenyatta suffered subsequent to the last general election, its nullification and the opposition boycott of the re-run. In its Introduction, the BBI report states that Kenyans are weary (and presumably also scared) of divisive politics, and of tense and violent elections that produce a winner who is unacceptable to a large portion of voters.

Returning to Parliament: the constitution may have been reformed. However, the current statutory (as opposed to constitutional) regime that we inherited not only from the past regime but going back all the way to the colonial regime remains largely intact. The colonial legal regime was meant to exercise a high degree of control over the governed. It granted a large degree of discretion to administrators, such as chiefs, that the Judiciary could not touch. Upon independence, successive regimes found such a legal order convenient to their purposes and have sought to retain it. Therefore, there remains a large legislative agenda incumbent upon Parliament to bring Kenyan laws in line with a constitution that returns power back to the people. As may be observed, the more authoritarian a regime is, the more it will seek to establish a compliant Parliament that ignores this responsibility.
Parliament has been ceding key functions to the Executive. Importantly, the critical role of budget-making has increasingly been abdicated to the Executive. It may be expected that without oversight, the Executive would tend towards greater and greater spending. Indeed, what has been witnessed is a huge and growing public debt, inflated and unrealistic revenue collection targets, and consequent pressure on the Kenya Revenue Authority to be as aggressive as possible in raising revenue.

If Parliament abdicates its role in checking the Executive, and leaves this role entirely to the Judiciary, it sets the stage for excessive judicial intervention and renders the Judiciary more prone to attacks of overreaching. This has happened elsewhere. Following the Brexit vote in the United Kingdom, the High Court ruled that the power to begin the process of exiting the European Union lay with Parliament and not the Prime Minister. Tabloid newspapers, inevitably pro-Brexit, saw this as a delaying tactic and labelled three judges as enemies of the public. This undermines constitutionalism as a whole.

Parliament needs to play a bigger role in evaluating the constitutionality of legislation, particularly where this legislation is of great political impact or when there is a conflict between the Judiciary and the Executive. Parliament has a large budget (some say too large) and it seems fair that some of this money be directed towards the kind of research and technical expertise it would take to explore these questions more fully.

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The implications of a weak Parliament go well beyond putting pressure on the Judiciary; they undermine democracy as a whole.

The politics of patronage as a whole, of which both the ruling party and the opposition are guilty, means that areas vote as a bloc and remain resolutely divided between the opposition and the government, almost always on tribal lines. The politics of patronage entrenches ethnic divisions, discourages independent thinking and prevents powerful leaders from being challenged in their own backyards by their own supporters.

Conclusion

The 27th of August 2020 marks ten years since the promulgation of the 2010 constitution. Now is an appropriate time to reflect on whether the Executive has honoured its constitutional mandate in its relationship with the Judiciary.

The foregoing discussion shows that the current tension is to be expected, given Kenya’s past and the powers and duties imposed upon the Judiciary by the constitution. Moreover, there are constitutional means of addressing the conflict that have not been used so far. Again, this is to be expected, given that the constitutional regime is relatively young and its strictures and institutions are yet to come naturally to a political class that often equates faithfulness to the constitution with an attack on its freedom to act.

It is clear that there is a consistent attack by the Executive upon the Judiciary through a variety of means, including the targeting of individual judges for recrimination, the withholding of funds, the failure to abide by the decisions of the Judicial Service Commission, and the disregarding of court orders. This is extremely concerning when seen in light of the fact that in two years, the country will hold a general election. The attacks are likely to result in a chilling effect upon the resolve of the
Judiciary to hold the Executive accountable to free and fair elections.

The undermining of public confidence in the Judiciary is likely to result in a public less likely to side with it in a public relations battle rigged in favour of the Executive. Time and again, this country has witnessed that the alternative to judicial arbitration of electoral disputes is violence. If President Uhuru Kenyatta considers peace in Kenya a priority, his administration must obey the constitution and foster judicial independence.

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