



A Scorecard on Uhuru's Presidency

By Yash Pal Ghai



Article 129 of the Constitution of Kenya 2010 states: “Executive authority is derived from the people of Kenya and shall be exercised in accordance with this Constitution...in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.”

The Executive (the President) must protect the constitution, safeguard our national sovereignty, promote the unity of the nation (including recognising the diversity of the people and communities), and protect human rights. The Executive is bound by national values and principles of governance. Its duties include maintaining good governance, state finance, integrity, transparency, accountability and foreign affairs.

As the CEO of the government, she also has special responsibility for matters assigned to other ministers: a strong economy, peace between communities, foreign affairs and international relations, national security, and international relations. She must also demonstrate respect for the people, and bring honour to the nation, dignity to the office, and promote public confidence in the integrity of the office. Most importantly, she has the responsibility to serve the people, rather than the power to rule them.

The status of the Prime Minister is different. Normally she is the head of the party with the most members in the main legislature. She appoints government ministers from members of the House. At Kenya's independence, the CEO was designated the Prime Minister (PM). Jomo Kenyatta was PM for

a year and then he changed the system to a presidential one, with himself as president – a system that has remained, despite strong support for a parliamentary system at Bomas.

The PM's support stems partly from the sense that a PM, coming from and accountable to Parliament, is usually far less of a dominant figure, and her power is less centralised in one person, which was one of the objectives of the search for a new constitutional order. Another reversal from a parliamentary to a presidential system – again motivated by individual self-interest – occurred in the closing stages of the Committee of Experts process.

A reason why at Bomas there was strong support for the parliamentary system was precisely to ensure that the government was under greater control and scrutiny of the public. The Prime Minister emerges from the collective will of the people in the elections, and can be removed by the legislature by a vote of no confidence. It is far harder to remove a President.

But a President is not – in theory – some unguided missile. Checks and balances are supposedly more developed in such a system.

So how has our President performed?

The President and the Judiciary

The Judiciary is the third major arm of the State. Our President has little power to make or remove judges. A number of key decisions are made by the Justice Service Commission, an independent body to which the President appoints two lay members. However, the President's choice has been from those who can take orders from him, not those who can represent the people as the Constitution requires. In defiance of court orders, he has blocked the appointment of many candidates. He has also criticised judges in office, especially in recent years, and often when his own position is challenged (as in elections).

The President and the economy

African governments play a significant role in the nation's economy. Over the decades, the state has helped to establish a modern economy, increasingly based on the private sector. Governments have established institutions of various kinds to regulate economies at regional and international levels. The Kenyan government has probably retained more of a direct engagement with the economy than many. The state has also affected the economy in financial, monetary and other areas.

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Uhuru Kenyatta is not known for his business skills, nor did he distinguish himself when he was Minister of Finance. Yet he took it upon himself to negotiate deals (largely in secret, as the Chinese prefer) with the Chinese government for skills, equipment, and money. The very costly standard gauge railway (SGR) deal with China is shrouded in secrecy. A court has decided that by-passing the law on public procurement on the excuse of a "government-to-government contract" was illegal. There has been corruption in the purchase of land for the line and stations, little control over the construction of the line, and very little attention given to the position of Mombasa as a county and the country's major harbour.

The environment and industry

There have been concerns about the environmental impact of many big Chinese infrastructure projects, including high-speed trains and big dams. China is financing a coal-fired power project that is strongly resisted by the local community. Evidence suggests it is not needed in view of Kenya's renewable energy sources. The SGR has also had a negative impact on Kenya's wildlife as it passes through the Nairobi National Park despite vigorous opposition from civil society, including litigation. The decisions on the railway's route were made by the Kenyan government. Local firms have suffered as a result of the government's preference for Chinese firms for construction and other projects.

The State as entrepreneur

There are around 260 state-owned enterprises (commercial, like the Kenya Ports Authority; infrastructural, like the Rural Electrification Authority; regulatory, like the National Environment Management Authority; social, like the Kenyatta National Hospital, and teaching- and research-based, like universities). The general view of parastatals in Kenya is negative, including because of politicisation of the parastatals and poor corporate governance. Their boards and chief executives are appointed by the politically powerful, including the President himself. Thus, many operational decisions are made by the partisan and the non-expert. The role of the state corporations' advisory committees is just advisory, with little impact on policy or practice. The structure of financing and financial management is weak - many state corporations are allocated funds through line ministries. They are chronically underfunded.

When the President chooses appointees, the whole basis for parastatals is undermined. Indeed, those appointments are usually illegal. By making appointments on an ethno-political basis, the President breaks another obligation of his office: promotion of respect for the diversity of people and communities. The Constitution requires executive authority to be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. It is heartening to now see that many citizens and organisations have raised their objections to presidential appointments on grounds of violation of the letter and spirit of the Constitution. Self-interest lies at the heart of what ought to be public service for the nation.

A genuinely open and competitive process would far more likely produce competent appointees who are respected by the public. But even if the appointees are the best available, the whole process is wrong - it depends far too much on patronage.

Promoting or fighting corruption?

One of the most critical challenges facing the Executive is, unfortunately, corruption. It started with Jomo, followed by Moi and Kibaki, and now has increased beyond imagination. The economy is largely based on partnerships between businesspeople and politicians or public servants.

Various attempts are made through the Constitution to eliminate corruption. Article 73 sets the high standard demanded of public officers, including bringing honour to the nation and dignity to the office. State officers are expected to promote "public confidence in the integrity of the office" and to make decisions that are "not influenced by nepotism, favouritism, other improper motives or corrupt practices". Their task is to serve the people, rather than to rule them. But the grip of the Executive on appointments is a major obstacle to dealing with corruption - indeed it is corrupt.

Rarely are business-related acts conducted without significant bribes (to the extent that more foreign businesses, including multinationals, have left Kenya than come in recently). Corruption

within state institutions (taxes, customs, contracts, procurements, land appropriations, schools and universities, etc.) has never been so intensive.

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The police (which is often praised by Uhuru even when it commits brutal acts against innocent citizens), whose mandate is to serve the people, is perhaps the most corrupt institution we have. Of late the President has shown an apparent concern to fight corruption. But dealing more firmly with people within his administration who are suspected of corruption should have been a policy from the beginning. The Executive cannot maintain that “others” are corrupt.

Corruption may no doubt make some Kenyans rich. But it also makes an infinitely larger number of other Kenyans poor. On a broader basis, the President has shown little sympathy for the poor, whose numbers have increased, not decreased, not least because of the current coronavirus pandemic, which led to massive job losses and produced “corona millionaires” through dodgy procurement practices and corruption.

The President and the Constitution

Uhuru has little regard for the Constitution, though he pays lip service to it. If the law does not suit him, he ignores it. Indeed, it seems that the Executive takes the view that if it wants to do something, it will do it regardless of its constitutionality. And it will only decide, if a court objects, whether it will observe the court’s rulings. Think of the takeover of Nairobi County, the creation of the post of Cabinet Administrative Secretary, the importation of the military into the cabinet, the effort to muscle in on the appointment of the Chief Justice, and the tendency to order supposedly independent officers (like the Director of Public Prosecutions) to do things that it wants done.

With such a scorecard, it is hard to make a convincing case for Uhuru Kenyatta’s government.

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