



Cherry-Picking of Judges Is a Great Affront to Judicial Independence

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The 2010 constitution placed an onerous responsibility on the judiciary. That responsibility is to check that the exercise of public power is done in a manner that is compliant with the constitution. The constitution brought everyone, including the president - in both his capacities as the head of state and head of national executive - under the law. Hence, the judiciary has the final word when called upon to determine whether anything done or said to be done by anyone in the exercise of public power is constitutional.

To ensure that judges and magistrates can perform this task, the 2010 constitution created a strong architecture to secure judicial independence. In a nutshell, judicial independence simply means creating the necessary guardrails to ensure that judges and magistrates are and feel fully protected to make the right decision without fear of reprisal and that the judiciary has the facilities it needs to create an enabling environment to facilitate judges and magistrates' abilities to undertake that core mandate. Ordinarily, the critical aspects of judicial independence include decisional, operational/administrative as well as financial independence.

Operational independence safeguards the ability of the judiciary to run its affairs without interference from other arms of government or from anyone else. Financial independence on the other hand ensures that the judiciary is well funded and fully in control of its funds so that its core

duty (decision-making) is not frustrated by either lack of funds or the possibility of a carrot-and-stick approach where the executive dangles funding to extract the decisions it wants. In this regard, the constitution creates a judiciary fund and places it under the administration of the judiciary. Unfortunately, the national government and the treasury have continued to frustrate the full operationalisation of the judiciary fund.

Centrality of an individual judge's independence

Importantly, the foundational rationale for judicial independence and its different facets is securing the decision maker's (judge and magistrate) individual independence. This is commonly referred to as decisional independence. In the end, the judiciary exists for only one reason: to adjudicate disputes. In this regard, the person who is charged with decision making is the one who is the primary beneficiary of judicial independence. Of course, ultimately, everyone benefits from an independent judiciary.

Still, the constitution has specific and high expectation of the decision-maker, including that he or she makes decisions based only on an objective analysis of the law and the facts. The decision maker must not be mesmerised or cowed by power. He or she should never be beholden to power - in the present or the future. Simply put, under the constitution, a decision maker should never have to think about personal consequences that he or she may suffer for making a decision one way or another as long as that decision is based on an honest analysis of the law and the facts. Put a bit differently, the decision maker should never have to make (or even think of calibrating) his or her decision to please those in or with power - either within the judiciary or outside it - with the expectation that it will help him or her to obtain professional favours, promotion or to avoid reprisals.

And this is why Uhuru Kenyatta's cherry-picking of who should or should not be appointed judge is the greatest threat to judicial independence in Kenya.

But first a quick word on what the constitution says about the process of selecting, appointing and disciplining judges.

Selection and disciplining of judges

Before 2010, the president played a controlling role in the selection of judges. This meant that the surest way to become and remain a judge was by being in the good books of the president and his handlers. The result was that the judiciary was largely an appendage of the executive - and could hardly restrain the abuse of public power by the president or other ruling elites. The 2010 constitutional provisions on the judiciary were deliberately designed to eliminate or highly diminish this vice.

The power to select judges was given to the Judicial Service Commission (JSC), a body representative of many interest groups, the president key among them. Constitutionally, the president directly appoints three of the 11 JSC members: the attorney general and two members representing the public. But with his usual ingenuity at subverting the constitution, Uhuru Kenyatta has added to this list a fourth - by telling the Public Service Commission (PSC) who should be its appointee. Regardless, while there are always endless wars to control the JSC especially by the executive, the many interests represented complicate a full takeover of the JSC by the executive or any other interests. And that is partly what the constitution intended to achieve. The law - which the court has clarified numerous times - is that once the JSC has nominated persons to be judges, the president's role is purely ceremonial, and one that he performs in his capacity as head of state. He must formally appoint and gazette the appointment of the judges. No ifs, no buts.

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In fact, the law further clarifies that not even the JSC can reconsider its recommendation once it has selected its nominees. There is a good reason for this unbendable procedure - it helps to insulate the process from manipulation especially once the JSC has publicly disclosed its judge-nominees. Still, the constitution preserves for the president, the JSC and citizens the option of pursuing a rogue nominee by providing the realistic possibility for the initiation of a disciplinary and removal process of a judge even after appointment if there are legitimate grounds for such action.

In this regard, the JSC also has the responsibility to discipline judges by considering every complaint made against a judge to determine whether there are grounds to start proceedings for removal. It is to be noted that the president has more substantive powers in relation to the removal of judges. This is because if the JSC determines that there are grounds for the removal of a judge, the president's hand is mostly unrestrained with regards to whom he appoints to sit on the tribunal to consider whether a judge should be removed. Unfortunately, there is an emerging trend that indicates that Uhuru undertakes this task in a biased manner by subjectively selecting tribunal members who will "save" the judges he likes.

The injustice of cherry-picking

Now, back to the injustices of Uhuru's cherry-picking of judges for appointment.

The injustice is horrific for both the appointed judges and those who are not appointed, especially those of the Court of Appeal. Under the 2010 constitution, you do not become a superior court judge by chance.. For High Court judges nominated to the Court of Appeal, this is earned through hard work, countless sleepless nights spent writing ground-breaking judgments and backbreaking days sitting in court (likely on poor quality furniture) graciously listening to litigants complain about their disputes all day, and then doing administrative work to help the judiciary keep going. All this while maintaining personal conduct that keeps one away from trouble - mostly of the moral kind. Magistrates or other judicial staff who move up the ranks to be nominated judges endure the same.

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If ever there was a list of thankless jobs, those of judges and magistrate would rank high on the list. It is therefore completely unacceptable that a faceless presidential advisor - probably sitting in a poorly lit room with depressing décor and a constantly failing wifi connection, and who likely has never met a judge - can just tell the president, "Let's add so and so to the list of judges without 'integrity'. And by the way, from the last list, let's remove judge A and add judge Z". Utterly unfeeling and reckless. Worse, the judge is left to explain to the world what his/her integrity issues are when he or she knows nothing about them.

Psychological tyranny

Cherry-picking also creates a fundamental perception problem. Kenya's Supreme Court has confirmed that perception independence is a critical element of independence. For litigants appearing before the judges who were appointed in cases involving the president or the executive, it will be hard to shake-off the stubborn but obviously unfair thought that the judge earned the appointment in order to be the executive's gatekeeper. That is what minds do; they conjure up

possibilities of endless, and at times, conspiracy-inspired thoughts. Similarly, those who appear before a judge who was left out will likely believe that the judge – who decides a case impartially but against the executive – is driven by the animus of non-appointment. And you can trust the president’s people to publicly say as much and even create a hashtag for it. Yet such perceptions (of a judge who is thought to favour or be anti-executive) are relevant because justice is both about substance and perception.

And that is the psychological tyranny of Uhuru’s unconstitutional action – for both the judges that have been appointed and to those who have not. It is, indeed, a tyranny against the judiciary and, in a smaller way, against all of us. Perhaps just as Uhuru intended it to be.

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