The Constitution as the Executive-Judicial Battlefield

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In theory, the written Constitution is a document agreed upon which lays the parameters of governance in a geopolitical unit. Being largely a document of faith, it has some sacrosanct characteristics that should bind the people in that unit to accept its guidelines and obey its dictates, without exception. It prescribes the type of government, how that government is to be arrived at, and the powers and limitations of that government. It also presumes that the people to be entrusted in implementing that Constitution are men and women of honour who, in their differences, work hard to uphold the basic principles of that Constitution. That presumption is not always correct. Instead, the Constitution often becomes a battleground for Executive and Judicial institutional combatants to exercise power by controlling or monopolizing the interpretation of the Constitution.

Three countries that have had influence on Kenya's constitutional interpretation are the United States of America, the United Kingdom, and India. With the Judiciary is often the focal point, they all have had two or three way institutional confrontations that have become global references because of the novelty of the court ruling which calls for judges to be ingenious. As a result, Kenyan legal practitioners and scholars keep referring to and arguing about the jurisprudential value of memorable cases in the United States, in Britain, and in India. Subsequently, students in Kenyan law schools learn about such landmark cases as *Marbury v. Madison* in the United States and probably *Kasavananda Bharati v. State of Kerala* in India, and *R(Miller) v. the Prime Minister*. The three cases, Marbury, Kasanavanda, and Miller symbolized intense institutional power struggle in which the constitution is simply the battleground. In that institutional power struggle, the legislature is often on the sideline of the constitutional battleground.

The United States of America, the country that led others in crafting and implementing a Constitution is a good example of the conflict between good faith expectations and the

realities of implementation obstacles. While some of the implementation obstacles were due to genuine interpretational differences, there were others that were the result of mischief on the part of the implementers. The challenge is in differentiating genuine differences from contrived mischief that is at times meant to undermine the Constitution.

The two perspectives, the genuine and mischievous, manifested themselves in the first three US founding presidents. Within the executive, there were serious ideological differences over whether national interests and state survival should prevail over supposed constitutional scruples and limitations. Secretary of State Thomas Jefferson's interpretation was for limiting and argued that government could do only what the Constitution said it could do. Treasury Secretary Alexander Hamilton countered that government had powers to enable it to do what the government had to do. Although the ideological debate was settled in favour Hamilton, and still continues in 2022, focus shifted to interpretation rivalry between the Executive and the Judiciary especially when Jefferson became the Third president.

The Jefferson presidency, in exposing institutional interpretation differences as well as 'mischief', laid bare the Executive-Judiciary rivalry in battles of intellectual wits in which the president seemed to lose. Among the earliest 'mischiefs' was the Federalist attempt to steal the 1800 election from Jefferson by manipulating the Electoral College to give the presidency to the vice-presidential candidate, Aaron Burr but Hamilton saved his ideological rival because Jefferson was an honest man. As vice-president, Burr killed Hamilton in s dual, got involved in a treasonous scheme to detach sections of the United States into a new country with himself as president, and was tried for treason. Burr was the accused but the stars of the case were President Jefferson as the Executive and Chief Justice John Marshall as the Judiciary. Both men misbehaved but Marshall outwitted Jefferson by finding a way of acquitting a fellow federalist and thereafter making it difficult to convict anyone of treason.

The Judiciary's ability to outwit the Executive showed itself in the events around the 1800 election. Since the losing Federalists controlled the outgoing Congress and the presidency, they engaged in the mischief of passing new laws to circumvent Constitutional provisions, and mounted 'midnight appointments,' in trying to fill as many vacancies as possible; not everyone received the letter of appointment. While John Marshall received his appointment as chief justice, William Marbury did not. A Federalist, Marbury sought to force the

government to give him the letter of appointment by going straight to the Supreme Court where fellow Federalist was Chief Justice. A battle of wits, in *Marbury v. Madison*, between Marshall, the Judiciary, and Jefferson, the Executive, ensued. The law that had allowed Marbury to rush to the Supreme Court, Marshall asserted, was unconstitutional since the Supreme Court was not a court of original jurisdiction. Marshall thus outwitted Jefferson by declaring that, although Marbury deserved the letter, he had no power to force Jefferson to give the letter. By denying himself power to help a friend, Marshall enhanced judicial power to declare laws passed by Congress unconstitutional. It established *judicial review* of laws passed by the legislature as the preserve of the Judiciary. Other countries copied.

In a way, the American courts showed rebellion against Executive desires and other countries did the same when the Executive appeared to be overbearing. In the process, the Judiciary appeared like the institution to turn to when the Executive goes rogue and starts violating constitutional principles. And the Executive seemingly did that primarily to cover up misdeeds or to avoid scrutiny. It tried to do that by attempting to change the constitution and/or restrict the Bill of Rights. This happened in India and in Britain.

In India, the Judiciary had generally accepted the Executive position until Prime Minister Indira Gandhi tried to amass power even within the Judiciary. To protect her questionable behaviour, she tried to change the Constitution and improperly to appoint judges. The Judiciary went into rebellion in *Kasanavanda* by decreeing that some aspects of the Indian Constitution were so basic that neither Parliament nor anyone should be allowed to tamper with them. Gandhi's changes in the Constitution, the Supreme Court declared, were unconstitutional and illegal because they offended the 'basic structure' of the Indian Constitution. Inherent in the *Kasanavanda* decision is a belief that the essence of a country is its constituting structures with the pillars on which that country stands being sacrosanct.

Similarly in Britain, such elements of its constitution like the 1688 Bill of Rights and freedom of speech in Parliament had acquired sacred characteristics. Prime Minister Boris Johnson aroused public wrath when he sought to prorogue Parliament in 2019 in order to frustrate and prevent Parliament from doing its work. This was to enable Johnson to avoid Parliamentary scrutiny over BREXIT. The British Supreme Court, in *R(Miller)* reprimanded Johnson for violating the Bill of Rights that could be traced to 1688. Just as in India where Gandhi abused

office to cover up misdeeds by trying to change the constitution and was stopped in *Kasavananda,* so did Johnson abuse office in Britain to cover up misdeeds by attempting to 'prorogue' Parliament illegally only to be stopped by *Miller*. The Judiciary stopped them.

Kenya is one country that borrowed many constitutional things, including mischiefs, from Britain, United States and India. All of Kenya's constitution makings, from the 1960 First Lancaster House proposals up to the 2010 Constitutional, had British, American, or Indian input. Britain, as the colonial power, actually determined the pre-independence constitutions at Lancaster House in London. The projected winning African political players in KANU went along with British desires as political expediency to avoid Britain handing power to the losing side. They vowed to overthrow the British imposed constitutional documents once they attained power after the election they were sure to win. They considered the independence election of May 1963 to be a referendum on the imposed 1962 Majimbo Constitution. With that political mind frame, the Executive of independent Kenya was to be the main interpreter of the constitution with the Legislature and the Judiciary playing appropriate supporting roles.

In the process, although the tussle over constitutional interpretation was among the borrowed things from the three countries, the theory of institutional equality and checks and balances remained a theory. This reality was vivid in the 1980s when the Executive had visibly overwhelming control of the Parliament and the Judiciary; they simply were appendages of the Executive. With one judge reportedly remarking that the judiciary did not live in political vacuums, there never was any dispute over constitutional interpretation because the interpretation was the Executive one. The lack of in built legislative and judicial constitutional interpretation capacity gave opportunity to 'civil society' to offer competition to the Executive when it came to interpreting the constitution. This culminated in the 2010 Constitution which called for an overhaul of Kenya's existing judiciary with expectations that it would be 'independent' of the Executive.

Inherent in Kenya's 2010 Constitution, however, were two problems that became clear in the presidency of Uhuru Kenyatta, the first president under the new constitution. First, it contradicted and therefore subjected itself to unending arguments. The ambitious section on morality and 'integrity' expectations is offensive to the section on the Bill of Rights.

Knowing that people can be 'framed', the Bill of Rights insists that no one can be barred from contesting elections unless one has been convicted and all the appeals, including the one in the Supreme Court, rejected. Second, it sought to cure past presidential 'sins' by 'handicapping' the president's ability to act. In presidential elections, for instance, it required a presidential candidate to have a running mate as deputy who cannot be fired, the way that President Daniel arap Moi used to do.

That Bill of Rights provision in the 2010 Constitution served Uhuru Kenyatta and William Ruto well in 2012/13 when attempts were made to bar them on account of 'integrity', having been charged with 'crimes against humanity' at The Hague. In interpreting the 2010 Constitution, the Judiciary upheld the Bill of Rights and thus enabled Uhuru and Ruto to be candidates. In 2012, the two had formed the dynamic UHURUTO political team that seemed inseparable and despite big power hostility, they won three elections in 2013 and 2017. The Judiciary asserted itself in 2017 when it nullified the presidential election, and ordered a repeat, on account of procedure. Although they won, however, the two could not govern because Raila, the official election loser, had a different way of interpreting the constitution, which incapacitated them. There therefore appeared to be a three way interpretation of the Constitution: the Executive, the Judiciary, and Raila.

Within the Executive, a split occurred between the president, Uhuru, and the deputy president, Ruto, over interpretation of constitutional expectations on governance. Raila's presence in 'government' made Ruto to complain about being in the governance cold-room. Raila, argued Ruto, had abandoned his constitutional role in the Opposition. Uhuru, however, found no constitutional problem in Raila's presence since he restrained from advancing un-governability. That executive split in interpreting the constitution had negative impact on Ruto who seemingly failed to appreciate Uhuru's dilemma of having to do everything to maintain the 'peace' or watch the country sink. Both men believed they were interpreting the constitution correctly and in the process they collided. With constitutional protection giving him immunity from firing, Ruto expressed reservations to such UHURAILA initiatives as the BBI and also portrayed himself as a victim of dynastic anti-people mischief.

The UHURUTO split and the UHURAILA embrace evolved into a three way expression of frustration and constitutional innovativeness. As UHURAILA called on Ruto to 'resign' from

the DP position, there was vivid display of Uhuru's anguish over constitutional obstacles to his desires to deliver services. This reality showed that Uhuru had serious problems with the Executive shackling 2010 Constitution and the Judiciary which preceded the UHURAILA embrace. When it came to fighting corruption, for instance, he in October 2016 had publicly expressed his frustration by asking "What do you want me to do?" He had sounded helpless as he blamed the judicial system for failure to act on corrupt cases. Ruto's reputed failure to support new ventures, however, was also an opening for Uhuru to be constitutionally innovative.

Uhuru might have taken a leaf from his 'friend', former Murang'a Senator Kembi Gitura, who at one time had argued in a Hamiltonian way that the president could do anything to make the government effective as long as it was not forbidden by the constitution. Kembi had also served as the first Senate Deputy Speaker under the 2010 Constitution. Probably using that logic, Uhuru made two 'constitutional' innovations that stand out and set precedent. He appointed assistant ministers and called them Chief Administrative Secretary, CAS. He also reorganized the government in 2019 by transferring Deputy President's functions to Minister for Interior Fred Matiangi who became a virtual chief minister. Thereafter, presidents can do things, including creating positions not in the constitution as long as they are in perceived national interests and are not offensive to the spirit of the constitution.

Since the courts differed with Uhuru's desires, they seemed to frustrate him and appeared to be in tune with Chief Justice Willy Mutunga's judicial transformation agenda. The Judiciary declared CAS appointments to be unconstitutional but did not order the firing of the appointees. In addition, when Uhuru thought he had found remedies to the 'defects' in the 2010 Constitution in the BBI proposals, what he called 'constitutional moment', the Judiciary had other thoughts. Mutunga had entrusted the Judicial Transformation Framework and Secretariat to Judge Joel Ngugi, a law professor who liked jurisprudential adventurism, to reduce judicial "intellectual laziness". Other university intellectuals joined the adventures and made contributions. Duncan Ojwang of Nazarene University, for instance, claims that Kenya's legal training and practice has been "reduced to positivism without philosophy and history" and thus lacks capacity to "answer deeper and divisive questions of the society." As a thinker of the society's divisive questions, Ojwang's *amici* thinking aided Ngugi and fellow judges to shoot the BBI down. In doing so, the judges borrowed heavily from *Kasanavanda,*

using such unfamiliar Constitutional concepts as basic structure, un-amendable, or entrenched and eternal clauses.

The BBI case, however, was not the first in Kenya to use the *Kasanavanda* logic to limit Parliament's ability to amend the constitution. In the 2004 *Njoya v Attorney-General*, for instance, Justice Ringera had ruled that Parliament had no power to abrogate or repeal the Constitution. Being at the height of the BOMAS constitutional circus, Njoya's challenge to the Parliamentary ability to abrogate and Ringera's ruling did not capture imagination or receive as much attention as the BBI years later.

The BBI case, from the High Court to the Supreme Court, attracted a lot of interest because of its novelty, its politics, and its jurisprudential value. Since there was a lot of reference to the applicability of *Kasavananda* in the Kenyan situation, the main attraction was in propounding the doctrine of 'basic structure' to the constitution that supposedly made it 'eternal' and some of the clauses unamendable. In shooting down the BBI as illegal and unconstitutional, the High Court stressed the importance of 'basic structure' to Kenya as a country. Although not all judges of the higher courts, including the Supreme Court, accepted the *Kasavananda* 'basic structure' arguments in Kenya, they all shot down the BBI.

In claiming that everything was amenable as long as the right procedures were followed, however, the Kenyan Supreme Court left open the theoretical possibility that Kenya can amend itself out of existence or commit country suicide. If it becomes inclined to commit country suicide, should it not consult the neighbours first since its identity is mostly connected to the neighbouring countries? The United Nations and the African Union, as the organs that legitimize states in the world in general and in Africa in particular, may need to be consulted prior to Kenya's intended act of amending itself out of existence.

Judicial rulings such as the BBI one increased Uhuru's sense of frustration with the 2010 Constitution. BBI, he said, was a dream deferred although it is not clear whose dream was deferred. Uhuru wanted to do good but the constitution, as interpreted by the judiciary, seemed to tie his hands. Uhuru sought to change the Constitution and the Judiciary resisted the intended constitutional adjustments. Although the Executive-Judicial contest over the control of the 2010 Constitution was the actual source of Uhuru's frustrations as he tried to

create ‘constitutional moments’, the contest over constitutional interpretation is not unique to Kenya. It was there in the United States, right at the beginning, and involved battles of intellectual wits which sometimes short changed the Executive. In the process, the US judiciary tried to avoid making decisions that would be in vain, like the Marbury case or the Burr treason trial, and still end up looking intellectually good.

The US Judiciary did not always look good in interpreting the constitution and it at times had a lot of mud on its face. Andrew Jackson showed how dependent on the Executive the Judiciary was when he told Marshall to enforce his own decision stopping the federal government from dispossessing Native Americans. In the Dredd Scott case, it reinforced William Lloyd Garrison’s view that the US Constitution was a ‘pact with the devil’ because it protected and entrenched slavery. And the Plessy case sanctified racial segregation with such novelties as ‘separate but equal’ facilities knowing very well that separate could never be equal. In themselves, the above examples gave rise to counter interpretations whose debates still resonate.

As in the United States, from where Kenya borrows a lot, the constitution is an interpretation battlefield mainly between the Executive and the Judiciary. While there are times when the battle is ideological, there also are times when simple ‘mischief’ is the driving force in the battle. When the Judiciary seemingly failed to give ‘credible’ constitutional interpretation and surrendered its independence of thought to the Executive in the 1980s, civil society rose up as alternative interpreters of the constitution. The civil society partly forced the overhaul of the Judiciary through the 2010 Constitution with its inherent defects due to crafting overzealousness and probable mischief. It has in turn produced a different level of constitutional interpretation featuring the Constitution as the battleground while the Executive and the Judiciary are rival institutional combatants.