

AN ADVISORY OPINION ON THE DISPUTES INVOLVING VARIOUS STATE ORGANS (EXECUTIVE, PARLIAMENT, JUDICIARY AND THE GOVERNORS)

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249 of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59 (h) and (i) of the Constitution, which is replicated in Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act empowers the Commission to provide advisory opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission's attention has been drawn to the raging disputes pitting the various State Organs concerning the performance of functions and exercise of powers under the law. In particular, the disputes have have involved the Legislature (Senate and National Assembly), the Judiciary, the Executive and the Governors. The disputes, that have been raging on for some time now, has led to a standoff which is likely to affect the rule of law and good public administration and bears comment. In accordance with our mandate under Article 59(2) (h,i &j) of the Constitution as read with Section 8(h) of the Act, we hereby render our Advisory Opinion which we hope will help address the outstanding matters, and smoothen public administration in this respect.

I. SUPREMACY OF THE CONSTITUTION

The principle of supremacy of the constitution means that the constitution is supreme. It requires government officials to obey and work within the framework of the law. Put differently, the constitution must govern the actions of everybody and no branch of government or person is supreme.

The principle of supremacy of the constitution is expressly provided for under the Constitution of Kenya, 2010. This is aptly captured under Article 2 which states that the Constitution is supreme and binds all persons and State Organs at both levels of government, including Parliament, legislative assemblies, the executive at both levels of government and the judiciary.

Further, it provides that no person may claim or exercise state authority except as authorised under the Constitution. This is a reinforcement of the sovereignty of the people, which is captured under Article 1 of the Constitution, and which requires the conformity with the Constitution in the exercise of delegated power.

Based on the above, the Legislature, the Executive or the Judiciary only exercise delegated powers, and are subordinate to the Constitution. Their actions must always be in conformity with and within the constitutionally allowed parameters. In this regard, any action or decision made by any of the State Organs that is outside the parameters would be null and void. In this regard, the Commission wishes to state that no particular State Organ or branch of government is supreme.

II. SEPARATION OF POWERS

The principle of separation of powers is one of the pillars of constitutional democracy which seeks to ensure equilibrium of power among the three branches of government by distributing the legal and political authority of government. Its primary purpose is to prevent the combination, in the hands of an individual or group, of the legislative, executive and judicial functions and powers of government. This, it realises by confining the Legislature to legislative powers, the Executive to executive powers and the judicial powers to the Judiciary. Through this, it ensures checks and balances in the execution of governmental power thereby limiting the authority of one of the branches to arrogate to itself the core functions and powers of another branch. Further, the principle is based on the assumption that the exercise of the powers granted would be for public good alone, and that none of the arms is subordinate to the other, but all are co-ordinate, independent and co-equal.

The principle of separation of powers is embedded in the Constitution of Kenya, 2010. This is reflected under Chapter 8 of the Constitution that gives the legislative authority to the Parliament consisting of the National Assembly and the Senate at the National level [Art. 94(1)]; Chapter 9 that gives executive power to the Executive consisting of the President, Deputy President and the Cabinet [Art. 130(1)]; and Chapter 10 that gives judicial authority to the Judiciary consisting of the courts and tribunals established by or under the Constitution [Art. 159(1)]. This constitutional framework envisages distinct functions of the three branches of government, but which are inter-dependent. This framework did not create ranks or superiority of one branch over the others.

a) Respect and Self-Restraint

This system provides for checks and balances that is self-executing and although the powers of the three branches may inevitably collide with one another, the Constitution does not envisage a system that is adversarial in nature. In this regard, the Constitution envisages some measure of self-restraint that is determined on the necessity of compromise and accommodation of the legitimate interests and demands of the three branches as they interact. This means that they must act with care and comity having regard to the national values and principles in the Constitution.

In relation to the above, the Commission has noted the failure by various branches of government to respect and exercise restraint in their interactions. In particular, we have noted instances of overreaching Judiciary in dealing with matters that exclusively fall within the jurisdiction of the other branches of government or matters of public interest. Some of the orders given by the court have had the implication of stopping or injuncting other State Organs from performing their constitutional duties or anticipating the decision of the State Organs. The Commission believes that such action may amount to controlling the other State Organs, which ultimately violates the doctrine of separation of powers. In this regard, we wish to point out that whereas the Judiciary has the powers to interpret the Constitution, this should be done within the parameters of the Constitution, bearing the values and principles of governance (Art. 10) and the sovereignty of the people (Art. 1). Further, the Judiciary should not provide a platform for people to derail the implementation of the Constitution through the court process.

Likewise, the Commission has noted that Parliament (the National Assembly and Senate) have formed the habit of treating the Judiciary with disdain, as subordinate to them. They have, for instance, disobeyed court orders on a number of occasions and even failed to appear before the courts where they have been sued. The Commission is of the considered view that this action by Parliament is unacceptable in a democratic and open society, and which amounts to violation of the Constitution.

In this regard, we wish to state that Parliament must accept the role of the Judiciary in promoting and protecting the rule of law and constitutionalism. They must, for instance, accept that the Judiciary has the ultimate power in equal in

the distribution and exercise of state power. In this regard, they should respect the Judiciary and act with restraint in their engagement with the Judiciary. This undoubtedly means that they must comply with the orders of the court or challenge such orders in higher courts where they disagree with them. In addition, they should appear before the courts in case there is a matter before the courts that affect their operations. Failure to do so, would erode the dignity of the courts and public confidence in the Judiciary.

III. THE RULE OF LAW

The principle of the rule of law is closely associated with the principle of separation of powers within a democratic system of government. It posits that no person is above the law and that everybody is subject to the law irrespective of his position or status in society. Further, it requires governance to be based on established laws and principles rather than the personal whims of the rulers.

One of the principles that run through the Constitution from the preamble to the Sixth Schedule is the principle of the rule of law. This is evidenced by the provisions on the Preamble, sovereignty of the people (Art. 1), supremacy of the Constitution (Art. 2), protection and respect for the Constitution (Art. 3) and national values and principles of governance (Art. 10) among others. In particular, Article 3(1) of the Constitution obligates **'every person to respect, uphold and defend the Constitution.'** Further, the national values and principles of governance, of which the rule of law is part, require compliance by **'all State Organs, State Officers, Public Officers and all persons whenever undertake any function or exercise any power' [Art.10(1)].**

In relation to the legislative authority, the Constitution obligates Parliament under Article 94(4) 'to protect the Constitution and promote the democratic governance of the Republic. Regarding the executive authority, Article 129 obligates the National Executive to exercise the authority in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.' For the Judiciary, the Constitution obligates them to exercise judicial authority in a manner that protects and promotes **'the purpose and principles of the Constitution.'**

a) The Judiciary and the Rule of Law

In the design of the Constitution, the Judiciary occupies a special position in relation to the promotion and protection of the rule of law. This uniqueness flows from the judicial authority which makes the Judiciary as the custodian of the rule of law and bastion of constitutionalism. In Kenya, this position is reflected by the power of the Judiciary to interpret the Constitution. In particular, the High Court has been mandated under Article 165(3)(d) to hear any question respecting the interpretation of the Constitution, including the determination of the following:

- (i) The question whether any law is inconsistent with or in contravention of the Constitution;
- (ii) The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;
- (iii) Any matter relating to constitutional powers of State Organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) A question relating to conflict of laws under Article 191.

Further, Article 258(1) of the Constitution empowers the Judiciary to determine any allegation or threat of contravention of the Constitution.

It is clear from the foregoing that the Judiciary has the final determination on the constitutionality or otherwise of any action or decision taken by anybody under the authority of the Constitution or any law applicable in Kenya. This includes any action or decision by the Executive at both spheres of government, Parliament or County Assemblies. It is worth of note that the power of the Judiciary as the final arbiter in matters of the Constitution would also obtain where any State Organ or Public Office exercises quasi-judicial powers, or where it is alleged that the Constitution has been breached by a State Organ or Public Office in the discharge of its core mandate. The Commission is of the view that the intervention by the Judiciary in such instances would not amount to a violation of the doctrine of separation of powers since the Court would merely be performing its solemn duty under the Constitution. Indeed, this would be part of the checks and balances under the doctrine of separation of powers. If the converse were to happen, the result would be anarchy and totalitarianism since State Organs or Public Offices would act in violation of the law in the execution of matters that fall exclusively exclusively within their jurisdictions based on the illusion of separation of powers.

b) Disobedience of Court Orders

Based on the above, it is disheartening when Parliament or any other State Organ or Public Officer disobeys an order of the Court or threatens the Court for performing its responsibility under the Constitution. Disobedience of court orders undermines the Constitution, the rule of law, the authority of the Judiciary and democratic governance. In addition, it is a recipe for chaos, sets a bad precedent and sends a wrong signal to the people about the democratic culture in the country. It is worth of note that **'if citizens have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it.'** Put differently, disobedience of court orders is a hallmark of impunity to disobey court orders which is actionable under the Constitution.

The Commission is particularly concerned with the increasing incidences of disobedience of court orders by State Organs which should be at the forefront in defending and upholding the Constitution. Disobedience of court orders would be an affront to the oath of office taken by the State Officers under Chapter 6 of the Constitution to obey, defend and uphold the Constitution (Art. 74). Indeed, this would be a ground for removal of a State Officer from office since it would be a breach of Chapter Six of the Constitution [Arts. 99(2)(h), 103(1)(g), 106(2)(b), 145(1)(a), 150(1)(b)(i), 152(6)(a), 158(1)(e), 181(1)(a), 194(1)(g), 245(7)(a) & 251(1)(a)].

In this regard, the Commission wishes to state that respect for court orders is not a matter of choice or discretion by anybody. All persons irrespective of their status or position must obey court orders however much they may disagree with the orders. Where they feel that the orders are irregular or disagree with them, they have to either comply or move the court to set aside the order. The Commission wishes to notify State Officers and Public Officers who have the proclivity of disobeying court orders that we shall take action against them for such disobedience in accordance with our mandate under Article 249(1) of the Constitution. Such action may include proceedings for removal from office in accordance with the Constitution.

c) Dereliction of Duty by the Executive

The Commission has noted a worrying trend by the Executive concerning appointments to various State Offices (Constitutional Commissions) whereby

they have consistently and deliberately failed to comply with the law. In particular, the Commission has noted inordinate delay by the President to appoint members of the National Land Commission, National Gender and Equality Commission, Kenya National Commission on Human Rights and the Teachers Service Commission, long after the names of the nominees have been forwarded to him for appointment or conclusion of the matters in court relating to the appointments. The dereliction of duty by the President has taken the following forms:

- (i) Delay in making appointments as required by the law;
- (ii) Making appointments in violation of the Constitution and enabling legislation; and
- (iii) Failure to follow court orders in relation to the appointments.

The dereliction of duty by the President has crippled the operations of some of these institutions and affected the realisation of good governance and constitutionalism. In addition, it has set a wrong precedent and amounts to breach of the Constitution and the relevant laws.

The Commission wishes to remind the President of his duty to respect, uphold and safeguard the Constitution [Arts. 3, 131(2)(a)]. It is his constitutional and statutory obligation to make appointments to a number of State Organs and Public Offices [Arts. 132 (4)(a) & 250(4)]. In addition, he is also obligated under Article 129 to perform his duties and exercise his powers in accordance with the Constitution [Arts. 1, 10 & 129]. Indeed, this is his solemn duty to the people of Kenya captured in the oath of office **'to obey, preserve, protect and defend the Constitution'** that he took before assuming office. In this regard, we wish to urge the President to make appointments in accordance with the Constitution and enabling legislation to give meaning and dignity to the Constitution.

IV. TRANSPARENCY AND ACCOUNTABILITY UNDER THE CONSTITUTION

Transparency and accountability require persons placed in public offices to account, justify and explain their actions and decisions. They encourage open, responsive and participatory government based on the normative values and principles.

The Constitution has placed a premium on transparency and accountability in public office. Accordingly, Article 10(c) of the Constitution expressly provide for transparency and accountability as some of the national values and principles

of governance that bind all State Organs, State Officers, Public Officers and all persons in undertaking their roles. Further transparency and accountability mechanisms are found under the principles and framework of public finance [Art. 201(a)], procurement of public goods and services [Art. 227(1)], financial accountability (Arts. 228 & 229), values and principles of public service [Art. 232(1) specifically the accountability for administrative acts under Art. 232(1)(e)] and the annual reporting under the various provisions of the Constitution.

It is worth of note that Parliament plays an important role in ensuring transparency and accountability under the Constitution. This oversight role enables Parliament to monitor and review the actions of government agencies for efficiency, probity and accountability thereby promoting good governance. In this regard, the Constitution empowers the National Assembly to provide **'oversight over national revenue and expenditure, and State Organs and Public Officers** [Art. 95(4(c) & 5(b))]; while the Senate has been empowered to **'exercise oversight over national revenue allocated to the county governments and some State Officers'** [Art. 96(3) & (4)]. The oversight role of Parliament is borne out of the fact that it comprises of elected representatives of the people who exercise sovereignty on their behalf.

In recent times, there has been debate on whether the Senate can summon Governors to appear before them or any of its Committees in connection with the financial operations of the county governments. Despite the express provisions of the Constitution, Governors have refused to appear before the Senate stating that the Senate lacks the power to summon them in relation to financial matters. We wish to state that the Senate has an oversight role over the county governments in their operations, including financial matters and can, therefore, legally and legitimately summon anybody in the county government, including governors, to appear before them to give evidence or provide information (Arts. 96(3) & 125).

Accordingly, any person summoned by the Senate has no luxury or choice of deciding to comply. It is our considered opinion that failure to comply with the summons would be a breach of the above stated provisions, but would also negate the national values and principles of governance under Article 10 of the Constitution, and the objects and principles of devolved government under Articles 174 and 174 of the Constitution. Further, it would be an abdication of duty by the governors in violation of Section 30(2) of the County Governments

Act, 2012. In this regard, we call upon the governors and other State Officers summoned by the Senate or any other authorised State Organ to comply with the summons to ensure the rule of law and good governance.

On the other hand, the Commission has noted with concern, the propensity of the National Assembly to summon State Organs and Public Offices to appear before them in connection with their operations. In particular, we have noted that a number of Constitutional Commissions and Independent Offices were summoned to appear before the relevant Committees of the National Assembly on several occasions within a short span of time. It was further noted that the summons were issued after the oversight bodies raised concerns over the manner in which the National Assembly was conducting its activities, especially in relation to their remuneration. Whereas the oversight role of the National Assembly over State Organs and Public Offices is admitted, the Commission wishes to urge the National Assembly and other State Organs with powers to issue summons to exercise reasonableness, objectivity and necessity in the issuance of summons or exercise of any of their powers. Such powers should not be used to intimidate or victimise anybody performing their functions under the Constitution or any other law.

V. RESOLUTION OF DISPUTES

The Commission has noted a worrying trend in Kenya relating to management of disputes that have arisen between various State Organs on one hand and Parliament (the National Assembly and Senate) on the other hand. In the first place, Parliament on various occasions threatened other State Organs with certain consequences for holding a different view or acting in a certain manner. In particular, the country has witnessed threats from Parliament against the Judiciary, County Governments and Constitutional Commissions and Independent Offices (National Assembly). The threats by Parliament have included reduction of budgetary allocation, disbandment, removal from office, censure, vetting of judges appointed after the adoption of the Constitution in August 2010, failure to pass the Division of Revenue Bill and enactment of a law to allow the Senators to oversee development in the county governments. The threats have been intended to intimidate and influence the actions of various State Officers.

While the Commission recognises the legislative and oversight roles of Parliament, we wish to state that such authority should be exercised in

accordance with the Constitution, respecting the sovereignty of the people of Kenya and the principles of separation of powers and the rule of law. In this regard, we wish to advise various State Organs to appreciate the mandates and powers of each other as seek to resolve any misunderstanding or disputes through continuous consultation with judicial intervention as the last resort. Indeed, the Constitution envisages consultation and co-operation in the resolution of disputes between the various State Organs. The Commission believes that such approach would be in consonance with the national values and principles of governance and promote national unity and the rule of law.

Further, we wish to state that proceeding on the threats would not only undermine the dignity and independence of the relevant State Organs, but would be actionable under the Constitution, and may form a ground for judicial action or removal from office (Art. 104). In this regard, we wish to reiterate the need for consultation in managing disputes between the various State Organs. Further, we wish to call for the need for respect and comity among the State Organs since none is superior to the other in the constitutional framework.

We call upon the President, as the first among equals in the tripartite configuration of government, to convene a meeting of the three branches of government and such other bodies as he may deem necessary to discuss ways of working together and managing disputes that may arise from time to time.

DATED this 3rd **DAY** of **MARCH** 2014

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