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WEEKLY REVIEW

May 18, 2021

What lessons could be drawn from the Kenyan High Court judgement on BBI for constitutional consolidation in South Sudan?

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Summary

The High Court of Kenya recently handed down a decision that reinforces the role of courts to protect the constitution against executive overreaches. To constitutional lawyers and academics, the decision is a triumph for constitutionalism and the rule of law. In this piece, we discuss lessons that may be drawn from the decision for constitutional consolidation (or amendment) and the role of courts in South Sudan. One lesson is that courts, as custodians of the constitution, must be on guard at all times to ensure the Executive implements the constitution in accordance with its terms, including constitutional amendments. This requires courts' courage (in addition to maintaining their independence) to avoid pandering to the Executive. This is one practical, if not the only, way to protect constitutionalism and enforce the rule of law in this emerging state.

I. Introduction

On 13 May 2021, the High Court of Kenya handed down a landmark judgment on the Building Bridges Initiative (BBI) case.¹ The BBI, proposed by President Uhuru Kenyatta and former prime minister and opposition leader, Raila Odinga, involves a number of contentious amendments to the Kenya's 2010 constitution.² This initiative, opposed by several Kenyan politicians, chief of whom is the Deputy President William Ruto, is seen as authoritarian.

The challenge to the proposed amendment was brought by *David Ndii & Others v Attorney-General & Others*, who presented a wide array of constitutional issues before the court, including the question of whether the 2010 Kenyan Constitution³ has an un-amendable 'basic structure', the extent and limits of public participation in law-making, and political representation and the alteration of constituencies. The petitioners argued that if the

¹ To access full judgement <<https://www.afronomicslaw.org/sites/default/files/pdf/BBI%20Consolidated%20Judgment%20-%20Final%20Version%20-%20As%20Delivered.pdf>> (accessed 19 May 2021).

² A full report can be access here <https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf> (accessed 19 May 2021).

³ <http://extwprlegs1.fao.org/docs/pdf/ken127322.pdf>

amendments were to pass, such would displace the basic structure of the Constitution⁴ and that the amendment would serve only the interests of the political elites, not the national interest. This is largely so because it disregards the sovereign will of the Kenyans, which is the foundation of the Constitution. In its widely received decision, the Court upheld the challenge and states, in part:⁵

basic structure doctrine applies in Kenya and it protects certain fundamental aspects of the Constitution from amendment through the use of either secondary constituent power. [That this basic structure] can only be altered or modified by the people using their sovereign primary constituent power and not merely through a referendum (rephrased)

This courageous decision demonstrates not only competence and impartiality of the Court, but also its courage to stand against what is considered an authoritarian, powerful Executive. From the perspectives of constitutional lawyers and legal academics (and perhaps the Kenyan citizenry), the decision is a triumph for constitutionalism and the rule of law. This raises an important question of what lessons may be drawn from the decision for countries that are grappling with similar issues, such as South Sudan. That is, issues pertaining to ensuring the executive actions accord with the constitution. The remaining part of this Weekly Review focuses on addressing this question.

We first comment briefly on the independence of the judiciary in section II. We then discuss in section III how the basic structure doctrine can be entrenched and protected in a ‘permanent’ constitution of South Sudan. In section IV, we draw particular lessons from the BBI case for constitutional consolidation in South Sudan. The lessons present implications for the pending constitutional reform or permanent constitution building in the country. We conclude in section V with ideas for policy.

II. Context in South Sudan

South Sudan is yet to adopt its ‘final’ constitution. In the interim, it is being governed under its Transitional Constitution, 2011, though barely respected. The Transitional Constitution is based largely, if not wholly, on the 2005 Interim Constitution of Southern Sudan. The Transitional Constitution establishes the Judiciary as an independent institution that administers justice and adjudicates constitutional validity of the executive actions. The Judiciary is independent only in the nominal sense, however. This is attributable to many factors, not least political interference by the Executive. As a result, the Judiciary has not been able to enforce the Constitution accordingly and effectively.⁶ This ineffectiveness of the Judiciary—has arguably created an environment inhospitable to the development of

⁴ It is to be noted that the basic structure doctrine is not explicitly entrenched in Kenya’s Constitution as there is no clause that provides for it. However, in para 388 of the judgement, the court frames the main issues actually asking whether the basic structure is applicable in Kenya. It is their interpretation of the clauses that led them to conclude that it does.

⁵ *David Ndii & Others v Kenyan Attorney-General & Others HC para 747 at 176.*

⁶ M Deng ‘South Sudan’s chief justice is overstepping his bounds: Why it matters for the rule of law’ (The Conversation, 2021), available at: < https://theconversation.com/south-sudans-chief-justice-is-overstepping-his-bounds-why-it-matters-for-the-rule-of-law-160406?fbclid=IwAR28xQmBaLdTeds0ngfD4XwL2KvozvqBRM8dDGUarSPUVXUfOKU_90p1qJc > Accessed May 15, 2021.

constitutionalism and the rule of law in the country. However, the BBI judgement is encouraging in terms of looking at how the basic structure doctrine operates as an in-built protection mechanism for a constitution, particularly in relation to executive tendencies.

III. Entrenching and protecting basic structure doctrine in a constitution

The basic structure doctrine is a constitutional device which restricts amendment of certain parts of a constitution by requiring strict and robust procedures for amendment (Ullah & Uzair, 2020 p 229). The basic structure doctrine, however, does not prohibit Parliament from proposing necessary constitutional amendments, as long as they are carried out in accordance with the constitutional provisions. The features protected by the basic structure of a constitution vary from jurisdiction to jurisdiction. In the BBI case, the Kenyan High Court identified the following features as constituting 'basic structure' of the Kenyan Constitution.

the Preamble, the eighteen chapters, the six schedules of the Constitution...the system of government [people] chose—including the design of the judiciary; parliament; the executive; the independent commissions and offices and the devolved system of government. It also includes specific substantive areas [people] thought were important enough to pronounce themselves through constitutional entrenchment including land and environment, leadership and integrity, public finance, and national security (modified) (BBI case, para 474 (f)).

In summary, the Court declared that 'these chapters, schedules and the Preamble form the core structure, values and principles of the Constitution'. The judgement is to the effect that amendment powers under Articles 256 and 257 of the Kenyan Constitution are mere 'procedural tools' which have limited effects in terms of the substance of the Constitution.⁷

Comparatively, the Indian Supreme Court, in the case of (*Kesavananda Bharati v State of Kerala & Another*, 1973 para 225) declared the supremacy of the constitution, people's sovereign power, democratic form of government, fundamental human rights, and separation of powers as features of the basic structure of the constitution. This, practically speaking, means these features of the Indian Constitution are unalterable legislatively.

Basic structure doctrine is therefore an important feature of any constitution that must be entrenched during constitutional reform or constitution building processes. This, in part, empowers courts to protect the constitution against 'unconstitutional constitutional amendments', to borrow a more forthright phrase by Yaniv Ronzai.⁸

⁷ Bhatia, G (2012) Notes from a foreign field: An instant classic—The Kenyan High Court's BBI judgment (2021), available at: <https://indconlawphil.wordpress.com/2021/05/14/notes-from-a-foreign-field-an-instant-classic-the-kenyan-high-courts-bbi-judgment/?fbclid=IwAR07w9SZXZTDiRoMKW9t0-02g6BwtPspilOsus3ZEKwWcKwo7arNWjbs-9w> Accessed 15 May, 2021

⁸ See generally Y Ronzai 'Unconstitutional constitutional amendments—The migration and success of a constitutional idea' (2013) 61 *The American Journal of Comparative Law* 657-719.

In the contemporary understanding or theory of constitutional design, the power to enact a new constitution (constitution building) or reform an existing constitution (constitution-making), lies with people. This is known as constituent power, and it is perhaps the clearest manifestation of the will of the people (Stacey, 2011 p 614). An understanding of constituent power and its relationship with constituted power (constitutionally delegated power to Parliament) is key to ensuring the basic structure doctrine is entrenched in South Sudan's permanent constitution. So, having discussed the background to the BBI judgement and the basic structure doctrine, what lessons can be drawn for South Sudan's constitutional reform?

IV. Lessons for constitutional consolidation in South Sudan

Lesson 1: You reap what you sow

We have discussed above the meaning, importance and role played by the basic structure doctrine in protecting constitutionalism, fundamental human rights, and the rule of law. The Kenyans secured the protection-of their Constitution by entrenching the basic structure doctrine. They also established a strong and an independent Judiciary which they now look to in seeking the blessing of their Constitution, as well ensuring the Executive operates within its constitutional bounds.

As to how the South Sudanese could possibly replicate the same arrangement in their permanent constitution, that is, entrenching the basic structure and securing the independence of the Judiciary, there are preliminary steps to take to create an environment that is conducive to the development of constitutionalism, the rule of law, and democracy.

The first might be to transform the existing political groups from armed military actors into pluralistic and accountable democratic institutions, capable of championing and demanding constitutional democracy. This is, of course, a giant task requiring considerable resources, but it is necessary. The generally assumed foundational constitutional principles—constitutionalism, the rule of law, democracy and judicial independence—can never develop and be maintained effectively in South Sudan unless political landscape is transformed into a vibrant political space. It is the democratic political forces that may birth independent and accountable institutions such as Parliament and Judiciary that are not subservient to the Executive. Unlike the Kenyan Court, a South Sudanese court may not have the courage to constitutionally invalidate an executive decision, simply for fear of reprisal.

Second, the South Sudanese public has to play a leading role in the upcoming constitution building process. This will be an opportunity for the people to be educated about their sovereign right to partake in the constitution building process and their responsibility to protect the constitution against violations by unprincipled power-seekers. As to how the people can participate in the process, the BBI case is instructive. There are four steps to popular constitution building outlined in the BBI case, and, more generally, in the theory of modern constitution building. These are civic education, public participation, constituent assembly and referendum.

If implemented, these steps would ensure adequate and meaningful popular participation in the constitution building process. The responsibility to ensure popular participation in the constitution building process lies with the South Sudanese political actors (including international actors) and civil society organisations. Ultimately, it would lie with a constitutional assembly, in the sense of having the responsibility to carry out a nationwide civic education and drafting the text. In the meantime, there is a need to seize prevailing reform agenda including judicial reforms under the R-ARCSS

Lesson 2: Seize the ongoing judicial reform agenda

Apart from the upcoming constitution building process, there is a need to seize the judicial reforms contemplated in the R-ARCSS. This is because entrenching and protecting the basic structure of the constitution in South Sudan requires a strong, independent and robust Judiciary. Under the Transitional Constitution, judicial independence is entrenched, but judges' tenure of office is left to Parliament to decide. This leaves judges to serve at the pleasure of the Executive. Seen from that perspective, the biggest hurdle to judicial independence in South Sudan is the Judiciary's marriage with the Executive.

Similarly, judges' tenure is critical to the proper administration of justice and protecting the rule of law. Like Kenya, appointment of judges should receive strong public vetting procedures and the Judiciary should have its own independent budget. This would go a long way in promoting the independence of the Judiciary. These aspects will need to be entrenched in a permanent constitution.

Over the years, the Judiciary of South Sudan has neither been strong, nor independent (i.e., administratively, financially).⁹ To safeguard and protect both the expression of constituent power during the constitutional building process and the basic structure doctrine thereafter, the Judiciary will need to be restructured as per the R-ARCSS. There are two steps in this direction. The first involves reforms of the Judiciary, including review of the Judiciary Act, 2008, and building its capacity per the RARCSS.¹⁰ Second, there should be an establishment of an independent, credible and impartial Constitutional Court as also stipulated in the same Agreement.¹¹ These reforms could protect the basic structure of the constitution from an overbearing Executive.

V. Concluding remarks

The BBI case brings hope for constitutional lawyers and academics, for it signifies a developing constitutionalism in Kenya, and possibly in the region. If the familiar oath lawyers take is of any significance, the phrase 'without fear or favour' really finds its meaning in the constitutional jurisprudence of Kenya.

⁹ (n 5 above).

¹⁰ See Article 1.17.2 of the R-ARCSS.

¹¹ See Article 1.17.7 of the RARCSS.

In this Weekly Review, we have examined the BBI case and attempted to draw lessons for constitutional consolidation/building in South Sudan. Two such lessons are (1) the need to involve the people of South Sudan in the authorship of a permanent constitution. This would not only give the constitution its legitimacy to be an authoritative law, but it would also create a sense of ownership among the people. A sense of popular constitutional ownership would likely give the people the resolve to protect the constitution against violations, as happened in Kenya in the BBI case; and (2) the need to simultaneously entrench judges' tenure of office with judicial independence in a permanent constitution. This is critical to the proper administration of justice and protection of the rule of law. Judges who fear for their careers or lives cannot be expected to administer justice fairly/constitutionally.

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Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan

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