

OPINION & EDITORIAL

Power Separation



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The Constitution is supreme and Parliament is not above the law

The events this week have focused on the parliamentary debate over the legality or otherwise of the draft gazette notice by the Ligale Commission. Beneath all political noises, however, are critical constitutional concerns about procedures followed during this debate.

It needs to be understood that the Constitution not only provides for clear separation of powers between the Executive, Parliament and the Judiciary, but it also ensures that each arm has sufficient checks and balances. For example while Parliament has an oversight role over the Executive and vets its appointments, it is the Judiciary that checks on Parliament by interpreting the laws and making rulings where a member of public files a legal complaint.

MPs' attempt to censure judge over new constituencies illegal

Article 160 of our Constitution states clearly, that the Judiciary is independent and not subject to the control or direction of any person or authority. Further a member of the Judiciary is not liable in an action or suit in respect of anything done in the lawful performance of a judicial function. This point seems to be lost to some Members of Parliament.

During the debate on Thursday the Member of Parliament for Nyakach Ochieng Daima asked the Justice and Constitutional Affairs Assistant Minister William Cheptumo what measures he would take to discipline the judge sitting over the Ligale matter. This amounts to seeking Executive interference of the Judiciary. It matters not that the judge is properly and legitimately performing her role as an independent arbitrator.

Another member now wishes to file a censure motion against the same judicial officer for reasons that are unclear; not only is the matter subjudice, this move is clearly unconstitutional. It is illegal for Parliament to interfere with the Judiciary or to take action against a judicial officer.

A full fronted attack of this sort

amounts to intimidation of judicial officers and gives the impression that Parliament is becoming an autocratic rogue institution which our Constitution was specifically designed to prevent. If this allegation against a judicial officer had been made outside of Parliament then the person involved would be lawfully facing contempt of court charges. In the precincts of Parliament, MP's are protected and have immunity in respect of any speech made. However, parliamentary privilege may not be abused and globally it is recognized there are procedures by which members who behave unlawfully including behavior that would amount to contempt of court should be dealt with.

Regrettably the current standing orders of the House do not specifically provide for this and unfortunately the Code of Conduct for MPs under The National Assembly Powers and Privileges Act has never been

“Like the Executive and the Judiciary, the Legislature must also change.”

established. Any offences established under this Act, however, are cognizable by the Police and MPs may therefore, still be subject to charges of contempt of court. The United Kingdom and other jurisdictions have established precedent on this.

In addition to this, some of Parliaments procedures are now unconstitutional, making an urgent case for review of its standing orders. For example one can no longer file a motion of censure as was done under the former constitution.

Article 47 on Fair administrative action, Article 50 on right to a fair hearing and Article 236 on the protection of public officers all underline the rules of natural justice. A debate of motion of censure where the person concerned has not received written reasons for such action, cannot defend themselves in person or with a lawyer or where public officers are disciplined without due process of the law is unconstitutional.

The writer is an advocate of the High Court