The judiciary in Kenya needs to take note that when exercising judicial review, it does not overreach to judicial activism, tipping the ideal balance envisaged by the doctrine of separation of powers between the Executive, Legislative and Judicial branches of government. Instead, the judiciary should be guided by precedent, heritage of law, taught tradition and judicial restraint.
Even before the anti-BBI ruling by the High Court of Kenya on May 13, 2013, that placed the contest between the three branches of government at the fore of Kenyan politics, the issue had been raised a few days earlier in the interviews for the position of Chief Justice and Judge of the Supreme Court of Kenya.

One of the standard questions that was put to all the interviewees was their opinions on judicial activism or judicial overreach. Justice Nduma Nderi, who was a candidate for both positions, was hard-pressed to explain the reasoning and justifications behind his now infamous 2015 judgement in the case of the Teachers Service Commission (TSC) against the Kenya Union of Teachers (KNUT) & two others (2015) eKLR. The case may clearly be termed as the classical example of judicial overreach. It is an interesting case to say the least. The case was actually instituted by the TSC against the two teachers' unions but its outcome ended up as a judgment against TSC.

The proceedings were initiated by TSC against the unions as petition number 3 of 2015 eKLR seeking various orders and a declaration nullifying the then ongoing industrial strike called by the unions earlier in the year. During the hearing of an interlocutory application, the case was strangely converted to an ‘economic dispute’ in which the unions became the claimants and TSC the respondent yet the unions had not filed any counter-claim; meaning, they had no valid legal claim before the court.

Justice Nderi, who was the presiding judge, awarded teachers (represented by the unions) a hefty basic salary increment of between 50% - 100%. He further went ahead to backdate the award to take effect from 1\textsuperscript{st} July 2013. As expected, three appeals were filed against the judgement challenging the action of the judge and the jurisdiction of the court to determine the matter of salary increment payable to teachers, a mandate reserved for the TSC on the advice of the Salaries and Remuneration Commission (SRC).

The Court of Appeal allowed the appeal and set aside the judgement against TSC expressly stating that the judge had acted outside his jurisdiction. The decision was therefore a nullity. Justice Azangalala, one of the judges of appeal, declared that the judge had assumed a jurisdiction which, under the circumstances, he didn't possess. The judges in the Court of Appeal cited with approval their earlier decision in Shaban Mohamud Hassan and two others against Shaban Mohammud
Hassan and three others to buttress the argument on the supremacy of the Constitution and the functions of the High Court. The role of the High Court is to see that lawful authority vested in state organs and independent organs is not abused by unfair exercise and to ensure that such bodies do not operate outside the bounds of authority prescribed by the Constitution or Statute. The judge (Nduma Nderi) had surely usurped the roles of TSC and SRC; his actions clearly contravened the doctrine of separation of powers.

Separation of powers is an essential principle of the rule of law and is enshrined in all liberal constitutions, including Kenya’s. The system of separation of powers shares State responsibilities amongst the three arms of government in such a way that each of them can check the others. The intent is to prevent the concentration of power on any single arm of government to provide for checks and balances. This separation of powers was theorized by the French judge and thinker, Baron de La Brède et de Montesquieu, who wrote that “If the legislative and executive authority are one institution, there will be no freedom. There won’t be freedom anyway if the judiciary body is not separated from the legislative and executive authorities.” (Modern History Sourcebook: Montesquieu: The Spirit of the Laws, 1748).

The system functions almost ideally when each organ operates independently and within its constitutional confines. It is noteworthy to point out that no democratic system however exists with an absolute separation of powers – governmental powers and responsibilities overlap and are interrelated such that they may not be neatly compartmentalized. It is a delicate balance that preserves the State. Conflict is bound to arise when any arm of government unduly trespasses into the ‘territory’ of the other.

So what exactly is judicial activism? According to Encyclopaedia Brittanica, it is an “… an approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions.” On the other hand, judicial review is one of the tools given to the judiciary to use as a check and balance to the actions of the legislative or executive. A court that has the powers to exercise judicial review can invalidate laws, acts and governmental actions that are disharmonious with a higher authority for instance the constitution. It is therefore an important tool for separation of powers and to balance power between the three arms of government. The challenge comes when this exercise turns to judicial activism and in the process tips the scales as the judiciary overreaches its mandate.
In the appeal case cited above, Prof. Githu Muigai, the then Attorney General, put forward arguments to demonstrate the implications of the judgement by Judge Nduma Nderi. He submitted that about Kshs. 72.5 billion would have been needed to satisfy the judgement thereby devastating the economy and interfering with other sectors which are equally important. This would have amounted to a direct affront on the socio-economic and financial policies put in place by the executive arm of the government. A re-adjustment of the country's budget would have been necessary yet it had already been approved by the legislative arm of government. So, while the initial judgement may have been seen as a victory for the striking teachers, it ignored the authority and powers vested in the other arms of government. Judicial overreach is as dangerous as executive or parliament overreach. It is a recipe for chaos and confusion.

The issue of judicial overreach is however not unique to Kenya. The debate in the US has been going on for sometimes now since the famous case of Marbury – vs – Madison, as illustrated in the book, ‘Judicial Tyranny: The New Kings of America’. This landmark U.S. Supreme Court case and the subsequent judgement in 1803 is the foundation of the principle of judicial review in the United States which empowered American courts to declare illegitimate, laws, statutes, and some government actions that they found to violate the Constitution of the United States.

The author Mark Sutherland considers the threat of judicial overreach so serious that it is capable of eroding the foundations of the United States. He calls upon the American people to ‘do something’ to stop the federal courts that are daily setting themselves above the law and dictating how Americans should live and what they should think. An example given is the decision of Judge Robert Shelby in the state of Utah that struck down amendment 3 to the Utah’s Constitution that defines marriage as between one man and one woman. The decision is considered to have overstepped judicial bounds, ignored the weight of settled precedents and insulted Utah’s electorate. Mark Sutherland refers to the federal judges as the ‘new Kings of America’ – “a single, unelected federal judge who declares the laws and the constitution of an entire state null and void with an opinion clothed in the barest of legal precedent.” There is no better term to describe the actions of such judges like judicial tyranny.

In India, the Supreme Court, while overturning a decision by the Punjab and Haryana High Court, stated that the judiciary must refrain from encroaching on the legislative and executive domain otherwise it would boomerang in form of the political class stepping to clip their wings. “The judiciary should, therefore, confine itself to its proper sphere, realizing that in a democracy many
matters and controversies are best resolved in a non-judicial setting." Not every issue is justiciable. Courts must sift through the issues brought before them by litigants and determine whether they pass ‘the justiciability test’. What is justiciable and subject to the jurisdiction of the Court is what may properly be decided by the Court. The Supreme Court further observed that it had come across many cases where judges were unjustifiably trying to perform executive or legislative functions in the name of judicial activism. That, in the pronouncement of the Court, was not only dangerous but unconstitutional.

The Constitution guarantees judicial officers independence in the exercise of judicial authority. It protects them from any legal action or suit in respect of anything done or omitted from being done in good faith in the lawful performance of judicial functions. They are not subject to the control or direction of any person or authority. The clear intention is to enable them to make decisions freely without any fear of reprisal or witch hunt as a consequence of any decision they make in the course of duty. In undertaking their judicial functions however, judges must be conscious of the fact that they do not enjoy unfettered jurisdiction; they are subject to the Constitution and the Law. They derive their authority and powers from the Constitution and therefore must at all times observe strict fidelity to the dictates of the Constitution and the Law; otherwise, they risk violating the same Constitution and Law that they purport to uphold and defend.

Henry J. Abraham in his book, ‘Justices, Presidents and Senators’ almost in the same words as the Supreme Court of India, urges judges to exercise caution and restraint in the exercise of their heavy responsibilities of interpreting the Constitution. “Moreover, the Justices are well aware of two important facts of life; ultimately they do not have the power to enforce their decisions, for the purse is in the hands of the Legislature and the sword is in the hands of the Executive; and the Court may be reversed by the legislative action or constitutional amendment.”

Judges ought to operate within walls, lines, and limits built from the heritage of the law, the impact of the cases as they have come down through the years, the regard for precedent, the crucial practice of judicial restraint, the deference to the legislative process, in brief, the taught tradition. There is still room for the progressive interpretation of the Constitution but with the discernible boundaries - of the spirit and letter of the Constitution.

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