



By Marilyn Muthoni Kamuru



Kenya is facing two post-election crises. Both are related to the Jubilee administration's failure to adhere to the Constitution's provisions on the inclusion of women in leadership. The first is regarding the validity of the Supreme Court as a legal body. The Supreme Court was created in Article 163, which along with Article 27(8), define its membership both numerically and in terms of gender; it is compliant numerically but violates the provisions of Article 27(8) on gender. The second crisis relates to the constitutionality of the 12th Parliament, which violates Articles 27(8) and 81(b) on gender as well as Article 3, which explicitly provides that any attempt to establish a government "otherwise than in compliance with the Constitution is unlawful".

There have been numerous appeals by various actors to the National Super Alliance coalition (NASA) to submit their dispute regarding the presidential election to the Supreme Court. None of these actors, including those from local human rights organisations or even NASA itself, have cited the illegal composition of the Supreme Court and the challenge that poses to a legal resolution of the presidential election dispute.

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By overlooking the basic issue of the legality of the Supreme Court, these actors obfuscate the actions of the Jubilee administration prior to the election that have resulted in an illegally constituted Supreme Court and the current crisis. By their silence, these actors are asking the public to ignore the violation in terms of the Supreme Court's membership, and to trust that the very law and constitution the Supreme Court itself is violating will be applied fairly to a presidential dispute with far reaching socio-political ramifications. This glossing over of violations of the law when it is convenient, and especially when it is engineered by the administration in power, is dangerous because it subverts the foundational principle of the Constitution as provided in Article 1: "All sovereign power belongs to the people of Kenya and shall be exercised *only in accordance with this Constitution.*"

The Supreme Court of Kenya as a body, and its members as individuals, are subject to the Constitution. Article 2(2) of the Constitution provides for the supremacy of the Constitution and pronounces its application on all persons and both levels of government and clarifies that: "**No person may claim or exercise State authority except as authorised under this Constitution**". Article 3(2) buttresses Article 2 and on it rests our entire system of governance. It states: "**Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.**" Article 27(8), commonly referred to as the Gender Principle, establishes a further requirement on the Supreme Court as an appointive body; it provides that "not more than two-thirds" or 67% of its members, may be of the same gender.

The first major post-election crisis, therefore, is that the Supreme Court is operating outside the Constitution. Technically and constitutionally, this means that either party can legally disregard whatever decision the illegally constituted Supreme Court reaches.

The Supreme Court was reconstituted in 2016, and despite the likelihood of a disputed presidential election, three vacancies were filled by one woman and two men. The Supreme Court is numerically compliant with seven judges (five men and two women); however, the majority gender comprises 71%, an obvious violation of the Gender Principle. As such, the Supreme Court, as currently constituted, is an unlawful attempt to exercise state authority outside of our supreme law. This is a big deal for the apex court. It is also not an illegality that the Supreme Court can cure itself of without violating Articles 2 and 3 of the Constitution.

At the time of the Supreme Court's reconstitution, the Jubilee administration was already on notice as they were facing a court challenge for violation of the Gender Principle in the constitution of the cabinet. During the recruitment and selection process, women's rights advocates and institutions like the National Gender and Equality Commission (NGEC) urged the Jubilee administration and male applicants to the Supreme Court to comply with the Constitution, but as is usual on matters of law that relate to women's inclusion, their calls were ignored. The first major post-election crisis, therefore, is that the Supreme Court is operating outside the Constitution. Technically and constitutionally, this means that either party can legally disregard whatever decision the illegally constituted Supreme Court reaches. It also means that as a nation we are increasingly operating outside of the law.

The lack of sincere reflection on this fundamental violation also has the effect of questioning women's citizenship by silencing women and by affirming that women's illegal exclusion from positions of leadership is acceptable and that their rights are a secondary priority. This is the precise attitude that got us into this mess in the first place.

Acceptance of an illegally constituted court requires that we ignore the violation of the Constitution by the government, because as some will argue, this “minor” illegality merely relates to gender. The lack of sincere reflection on this fundamental violation also has the effect of questioning women’s citizenship by silencing women and by affirming that women’s illegal exclusion from positions of leadership is acceptable and that their rights are a secondary priority. This is the precise attitude that got us into this mess in the first place. Article 27(3) provides for the equality of men and women, and Article 27(8) was designed to provide no escape from the inclusion of women at a minimum level. Almost a decade after the promulgation of the Constitution, what excuse is there for the blatant violation of Article 27(8)? Who benefits from these systematic violations?

The second post-election crisis is upon us this week with the swearing in of the 12th Parliament scheduled for August 22nd 2017. Based on data from the Independent Electoral and Boundaries Commission (IEBC), Parliament’s membership falls short of the legal requirements of the Constitution in Articles 27(8) and 81(b), as more than two-thirds of the Members of Parliament (MP) are male. This situation was not unexpected. In Advisory Opinion 2 of 2012, the Supreme Court ordered that Parliament must enact a law to implement article 81(b) on the Gender Principle by August 27, 2015. Despite the Supreme Court decision and at least two other High Court decisions in 2015 and 2017, the 11th Parliament, on three separate occasions, failed to pass a law implementing Article 81(b), which states that “not more than two-thirds of the members of elective public bodies shall be of the same gender”. Again, business and religious leaders were silent, as were most politicians. The international community expressed their dissatisfaction with these repeated violations of the Kenyan Constitution to exclude women by having António Guterres, the then newly elected Secretary-General of the United Nations, celebrate the International Women’s Day in Kenya.

In Advisory Opinion 2 of 2012, the Supreme Court ordered that Parliament must enact a law to implement article 81(b) on the Gender Principle by August 27, 2015. Despite the Supreme Court decision and at least two other High Court decisions in 2015 and 2017, the 11th Parliament, on three separate occasions, failed to pass a law implementing Article 81(b), which states that “not more than two-thirds of the members of elective public bodies shall be of the same gender”.

On March 29th 2017, in a case brought by the Centre for Education Rights and Awareness (CREAW) and CRAWN Trust, the High Court issued a judgement that gave Parliament 60 days to enact a law on Article 81(b), failing which any person could petition the Chief Justice, and pursuant to Article 261(7), “the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.” Parliament did not comply. This means that Parliament and the Jubilee administration went into the 2017 general election fully cognisant of the risk of dissolution of a newly elected 12th Parliament. By August 18th at least two separate cases have been filed challenging the validity and constitutionality of the 12th Parliament; the first by CREAW and CRAWN Trust and the second by the International Federation of Women Lawyers (FIDA).

The cavalier disregard for constitutional principles and judicial decisions by Parliament must concern all Kenyans, because it attempts to restructure our system of governance by destroying the principle of equality of the three branches of government, negating the principle of separation of powers and exempting the executive and legislature from compliance with the Constitution and judicial decisions.

Kenyans must demand higher standards regarding fidelity to the law from the elected leadership, as well as from the business, religious, human rights and international community who claim to speak for law and peace. We went into one of the most expensive elections in history with the seeds of at

least two post-election crises that could have been averted with appropriate action by the government. Additionally, in both cases, the same leadership class was silent about the violations of the law and the risks these violations posed to Kenya.

Whether from ignorance, ineptitude or misogyny, the silence and complicity of these groups means that they lack the moral credibility to offer non-partisan leadership to Kenyans. The current administration's de facto policy of violating the Gender Principle, and the acquiescent brand of leadership practised by the business and religious community, are largely to blame for our current situation.

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What can we learn from these crises? First, that a crisis starts small but its grows from minimising, silencing and dismissing dissent much like we are doing now; second, that the Constitution will be undermined from unequal application of the law especially on unpopular provisions, such as the Gender Principle; and finally, we aren't out of the woods yet and will not be if, as citizens and leaders, we do not demand greater fidelity to the Constitution and to the law.

We are at a crossroads as a nation. This is about significantly more than the presidential election; it is about whether we, especially the government, will accept to be governed and guided by the Constitution of Kenya 2010 or whether we want to precipitate further political instability by breaking the legal and moral compact we agreed to as a nation on August 27, 2010.

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