



By Marilyn Muthoni Kamuru



*“Conflict in a constitutional system is not a bug; it is a feature.”* – **Sanford Levinson and Jack M. Balkin**

Kenya is facing both a political and a constitutional crisis. The constitutional crisis preceded the political one; if it is ignored and remains unresolved, it has the potential to exacerbate the political crisis in dangerous and unpredictable ways.

Prior to the general election of August 8, 2017 there were already numerous cases of executive and legislative defiance of constitutional dictates and judicial orders. Some observers, like this writer, have already flagged these violations as rising to the level of a constitutional crisis.

It isn't the conflict between branches of government that defines the situation as a crisis but the actions of the Executive and Parliament that have evolved from isolated actions into a pattern reflecting a ***de facto policy*** of selective compliance with the Constitution and disregard of the constitutional authority of the Judiciary. An analysis of the actions/reactions of the three branches of government after the presidential election petition leaves no doubt that Kenya is in a constitutional crisis.

After the Supreme Court nullified the 8 August presidential election on September 1, 2017, the Executive made various statements regarding the Supreme Court and the role of the Judiciary. The declarations by the President and the Deputy President were criticised as regrettable and unfortunate but the criticisms, with the exception of that by the Judicial Service Commission (JSC), failed to identify these statements as ***unconstitutional assertions of executive authority***.

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In the statement issued on September 17, 2017, the JSC asserted the independence of the Judiciary and defended the governance framework prescribed in the 2010 Constitution:

"The Judiciary is an arm of Government equal to the Executive and the Legislature. If leaders are tired of having **a strong and independent judiciary, they should call a referendum and abolish it altogether**. Before that happens, the Judiciary will continue to discharge its mandate in accordance with the Constitution and individual oaths of office".

Further, the JSC put out in the public domain that "**individual judges, particularly of the Supreme Court**, as well as other judicial officers and staff, have been **attacked, threatened**" and took the unusual step of accusing the Executive and Legislature of attempting to influence and direct the actions of the Judiciary. "We therefore **will never agree to work in accordance with the whims and desires of the Executive and Parliament**. The Judiciary as currently constituted cannot and shall not guarantee a particular outcome to any individual."

This was no ordinary statement on the struggle between the branches of government. It is an exposition of the constitutional crisis, from the perspective of a branch of government. By making specific reference to a "referendum", the JSC was admitting that an independent Judiciary was a constitutional choice, one that it acknowledged could be undone legally, but only in the manner set out in the Constitution.

The JSC statement also highlights the risks of ignoring the constitutional crisis and conflating it with a mere political crisis, which entails the threat of, and resort to, violence as a means of conflict resolution. The JSC statement, which was issued more than a month ago, is significant in light of the shooting of Constable Titus Musyoka, the bodyguard of the Deputy Chief Justice, Philomena Mwilu. The shooting occurred on October 24, 2017, a day before the hearing of a case seeking to postpone the October 26 presidential election. The next day, on October 25, Chief Justice David Maraga adjourned the case due to a lack of quorum.

In addition to cases related to the presidential election, the Judiciary has over 330 election petitions related to and coming out of the elections of August 8, 2017. It is also possible there will be a presidential petition on the October 26 election. The Judiciary will, therefore, continue to be the site of resolution of political disputes - but only if we protect its constitutional authority and reject the politicisation of illegality and the normalisation of intimidation and violence to influence institutional actors.

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After the nullification of the presidential election and the Executive's vow to "fix" the Supreme Court, the 12<sup>th</sup> Parliament purported to enact amendments to the election law (Election Laws [Amendments] 2017). Most of the debate focused on the ill-advised attempt by a Parliament politically-aligned to the incumbent President to enact laws with less than a month to the repeat election ordered by the Supreme Court. Foreign envoys released statements requesting Parliament

to refrain from passing legislation, noting that its application to the October 26 election was contrary to “global best practice”.

None of the players highlighted the more serious issue of the legal capacity or authority of the 12<sup>th</sup> Parliament. This Parliament lacks the legal capacity to enact laws as its composition violates at least two specific provisions of the Constitution: Articles 27(8) and 81(b), which both require that “not more than two-thirds” of its members shall be of the same gender.

In a constitutional system, State institutions and actors derive their authority and legitimacy from the Constitution. When the composition of Parliament violates the Bill of Rights and the Principles of the Electoral System, its exercise of authority is **illegitimate and unconstitutional**. How can an unconstitutional body purport to make law? This is a fundamental question that definers of the current crisis as political and not constitutional ignore; yet it goes to the basis on which we as citizens submit ourselves to the exercise of State authority. Beyond merely violating the document, it directly challenges the validity and legitimacy of the Constitution itself.

What we have now is a volatile mix of an illegal and unconstitutional Parliament, an Executive and Parliament that are seeking to direct and influence the actions of the Judiciary (contrary to the Constitution), and the re-emergence of violence as a tool for the resolution of political and legal disputes.

State organs have failed to restrain themselves and each other to act within their constitutional spheres of authority. These actions reflect a pattern, and with the attempts to grab constitutional authority from another branch of government, represent an attempt to change the system of governance in a manner that is unlawful. It isn't that we cannot alter our system of governance to make the Judiciary subject to the direction or control of other State organs, or to change the composition of Parliament; it is that to do so without causing a constitutional crisis would require amending the Constitution.

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The prevailing position seems to be that the constitutional crisis is of minor consequence. It would be grave error if this position continues to dominate the discourse unchallenged. If we continue to misdiagnose our national malaise, we will continue to find resolution elusive. The constitutional crisis preceded and precipitated the political crisis by emboldening State and non-State actors to act beyond their legal authority.

In addition, the actions of politically powerful actors unbound by legitimate authority have had the net effect of restraining State and non-State actors from **legitimate exercise of their agency and authority**. It is because these constitutional crises are illegal attempts to seize and use power that we are seeing a rise in the deployment of violence to resolve political disputes. Like a pregnancy, a crisis doesn't stop growing or disappear because it is inconvenient or unacknowledged.

We should prioritise the resolution of these constitutional crises because by so doing we would be effectively re-asserting the accepted boundaries for the resolution of the political crisis, as well as de-escalating an increasingly polarised political context. If left unchecked, attempts by the Executive, Parliament and the political elite to violate or ignore the Constitution will intensify the

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The most important thing Kenyans can and must do is use these crises to reassert the supremacy of the Constitution by demanding full and unconditional compliance to it by all State actors and the political elite.

A lot remains to be done to address ordinary Kenyans' concerns, but as citizens let us insist on the ground rules we agreed on in 2010 and make these the minimum conditions for engagement for all Kenyans, starting with the politicians. Otherwise we, the people, will lose the most progressive legal, social and economic compact we have ever had as a nation.

**By Marilyn Muthoni Kamuru**

*Marilyn Muthoni Kamuru is a lawyer and a consultant in gender and governance.*

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