



All the President's Men: Uhuru Kenyatta's Proposed Cabinet Raises Serious Constitutional and Legal Questions

By Marilyn Muthoni Kamuru



On January 5, 2018 President Uhuru Kenyatta started the process of constituting his second-term Cabinet by naming some of his nominees. The President's announcement is unusual in two significant respects. First, it was a partial list; he only announced nine nominees even though the Constitution demands a minimum of 14 and allows him to name up to 22 Cabinet Secretaries (his last Cabinet had 18).

Second, the President said he was "retaining" some Cabinet Secretaries and as such he would not be sending the names of all his Cabinet nominees to the National Assembly for vetting. His statement implied an existing Cabinet whose term continued uninterrupted through the 2017 general elections even though a December 2015 High Court decision held that the tenure of all appointed members of Cabinet ended on August 8, 2017. In attempting to retain some members of the previous Cabinet and exempting them from National Assembly approval, President Kenyatta is acting in contravention of the High Court judgment and the law. (It is also interesting to note that all the Cabinet Secretaries that the President "retained" are men, which also raises the issue of gender parity, which the Constitution explicitly encourages.)

Nominating Cabinet Secretaries and constituting a Cabinet is a constitutional obligation of the President contained in Articles 129, 130, 131 and 132. Article 152(1) defines the Cabinet as the President, the Deputy President, the Attorney General and not fewer than fourteen and not more than twenty-two Cabinet Secretaries. Note also that Article 152(1) provides that there shall be a “minimum” number of Cabinet Secretaries, indicating that the President has no discretion to have zero or no Cabinet Secretaries. The constituting of a Cabinet is, therefore, a mandatory function of the President, which must be performed as required by the Constitution.

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Article 129 of the Constitution provides that all “executive authority is derived from the people of Kenya and shall be exercised only in accordance with this Constitution.” This provision reminds the executive that executive power is delegated and has limited authority: it is delegated by the people and may not be legally exercised outside of the limits set by Constitution.

Article 130 defines the national executive as including the President, the Deputy President and “the rest of the Cabinet”, thereby emphasising that the Cabinet is integral to the national executive. Article 131 provides that the president exercises executive authority “with the assistance of the Deputy President and Cabinet Secretaries”, emphasising the necessity of the Cabinet as an instrument for the exercise of executive authority. Additionally, Articles 131(2a) and 131(2e) obligate the President to respect and uphold the Constitution and ensure the “rule of law”.

Furthermore, Article 132(2) explicitly vests powers to appoint the Cabinet in the President, providing that s/he “shall nominate, **and with the approval of the National Assembly, appoint**” Cabinet Secretaries in accordance with Article 152.

So, while the President has the power to nominate he cannot, without the approval of the National Assembly, appoint anyone to the Cabinet. In establishing the Cabinet, the President must follow the process in the Constitution and in law, which includes relevant judicial decisions.

Judicial decisions regarding the process of constituting a Cabinet would, therefore, apply to the President as he undertakes this function. On December 20, 2016, the Constitutional and Human Rights Division of the High Court in Petition 566 of 2015^[1] held that the Cabinet was unconstitutional, as its composition violated Article 27(8) of the Constitution that says that “the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”.

The High Court was asked to address two issues: the constitutionality of *the process of constituting Cabinet and of the composition of Cabinet*. In addition to finding the Cabinet unconstitutional, the High Court found that “the actions of the President and the National Assembly...**in nominating, approving and appointing the Cabinet**” were unconstitutional. As such, the process of establishing the Cabinet and the resulting Cabinet were both declared unconstitutional.

Nothing precludes the President from naming all, some or none of the members of the previous Cabinet; however, all proposed members of the Cabinet, other than the Deputy President, must be nominated again and their names must be submitted to the National Assembly for approval prior to their appointment.

However, the High Court, citing public interest, suspended the judgement for “a period of eight months or until such a time a new Cabinet will be constituted **either by the present government or by the new government to be elected into office in August 2017.**” The effect of this judgement was that it provided temporary legal permission for the Cabinet’s continued existence, with such permission set to automatically expire if the President named a new Cabinet or if a general election was held.

Therefore, the term for all appointive members of the Cabinet ended on August 8, 2017 by judicial order. As such, the President must, by law, name all appointive members of his proposed Cabinet afresh (a minimum of 15 and a maximum of 26, including the Attorney General). Nothing precludes the President from naming all, some or none of the members of the previous Cabinet; however, all proposed members of the Cabinet, other than the Deputy President, must be nominated again and their names must be submitted to the National Assembly for approval prior to their appointment.

The decision of the High Court in Petition 566 of 2015 found that **both** the President and National Assembly had violated their obligations in the process of constituting a Cabinet (nominating, approving and appointing the last Cabinet). The High Court, in holding that the National Assembly had failed to perform its role in approving Cabinet nominees, found that the National Assembly must “...apply a **strict scrutiny in approving of any action of the executive** and where the action involves appointment to public posts a most searching examination in all aspects must be invoked by the National Assembly.” Therefore, the National Assembly cannot be a rubber stamp of Presidential nominees but must exercise the highest legal standard in the vetting and approval, or rejection, of executive nominees.

The President hasn’t violated the law by providing only a partial list of nominees. However, by failing to submit the names of all proposed Cabinet nominees to the National Assembly for approval, and asserting the existence of a valid Cabinet after August 8, 2017, the President is acting in deliberate contravention of the Constitution and the law.

The High Court was explicit that in some cases it is the role of the National Assembly to correct the President: “The National Assembly must exercise that perfect overseer role and tap the President on the shoulder where he is about to slip.” The National Assembly, therefore, has a constitutional obligation to remind the President that all proposed nominees must undergo the entire process of nomination, vetting and approval by the National Assembly prior to their appointment. In addition, the High Court clarified that the National Assembly must reject a proposed Cabinet whose composition would violate the law.

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With his announcement, the President has sent important political and legal messages about his second term. It is surprising he is trying to evade the National Assembly given the Jubilee Party enjoys a majority in both houses of Parliament. It would appear that, despite a parliamentary majority, the President is not confident that his nominees will be confirmed by the National Assembly. This anxiety may stem from Jubilee party politics, including the jostling for the 2022

succession, and betrays fears that these intra-party conflicts would play out in the National Assembly approval process. It is also possible that the President may be concerned about the opposition's ability to utilise parliamentary processes to delay, block or undermine the eventual approval of his Cabinet nominees.

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For an administration whose legitimacy ultimately rests on a judicial decision, the President's wilful disregard of a court order is also evidence that the battle with the Judiciary continues. It is an assertion of executive exceptionalism saying that the decisions and actions of the President and executive are effectively beyond judicial review. It is troubling that the President isn't averse to confrontation with the judicial branch, and courting constitutional crises, given the just concluded experiences of the electoral period and the ongoing political uncertainty.^[2]

The message is clear: This is not business as usual. If successful, the attempt by the President to bypass Parliament and nominate and appoint a Cabinet in contravention of the Constitution would result in the imposition of an unconstitutional and illegitimate national executive.

An unconstitutional national executive would create unprecedented uncertainty as to the legality of its national and international actions. It would also exacerbate existing political conflicts while signalling to other parties that it is acceptable to resort to extra-constitutional means to resolve political and other conflicts.

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Unchecked, the failure by the President and the National Assembly to accept the constitutional limitations of their authority will lay the foundation for a systematic breakdown in the rule of law. By wilfully weakening so many institutions – the Judiciary, the Cabinet, the National Assembly and the Constitution – in a single swoop, the executive is potentially triggering a cycle of political conflict and social instability. The President and the National Assembly would be best advised to reverse the current course and ensure strict compliance with the Constitution in the process of establishing a new Cabinet.

^[1] Marilyn Muthoni Kamuru & 2 others v Attorney General & another [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/129670/>

^[2] The August 8, 2017 presidential election was nullified by the Supreme Court on September 1, 2017. Uhuru Kenyatta won the subsequent election on October 26, 2017. This election was also challenged but this time the Supreme Court, on November 14, 2017, upheld his election paving the way for his assumption of office on November 28, 2017.

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