Addressing Kenya’s electoral, political, governance and constitutional crisis

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Three key issues undergird Kenya’s ongoing political and constitutional process and crisis: First, what is the nature of the occupancy or vacancy in the office of the President between 8/8/17 and when a new President is constitutionally sworn in? Second, is Kenya in a looming or an ongoing constitutional dilemma, stress or crisis? Third, has the Constitution ceased to be the “grund norm” (or basic norm) following the Supreme Court’s decision to annul the 8/8/2017 Presidential election as argued by some?

In the 2013 Presidential elections whose key candidates were Raila Odinga of the Orange Democratic Movement Party (ODM) of the Coalition for the Restoration of Democracy (CORD) and Uhuru Kenyatta of the The National Alliance’s (TNA’S) Jubilee Coalition, the Supreme Court dismissed Odinga’s petition. The Supreme Court in its counter constitutional, counterfactual, counterintuitive and highly criticised decision stated that although there were irregularities, they were not so substantial as to affect the credibility of the electoral process. Remarkably, the Court ignored, neglected or grossly violated article 159 of the Constitution in refusing to admit Raila Odinga’s 900 page affidavit hence defeating justice. Article 159 requires that courts administer substantial justice without undue regard to technicalities of procedure. Uhuru Kenyatta’s controversial election and declaration was thus upheld.

In the 2017 presidential elections, the two candidates, Raila Odinga and Uhuru Kenyatta were still the main contenders. IEBC repeated the same mistakes of outright violation of the Constitution and the law by inter alia, not following the rules on voting, collating and tallying results, transmission, verification, announcement and declaration procedures prescribed for the presidential election under the Constitution, the Elections Act, the IEBC Act, among others. The Supreme Court under the leadership of CJ David Maraga invalidated, nullified and voided the election and ordered IEBC to conduct fresh elections in accordance with the Constitution and the law within 60 days.

Political temperatures have since risen following IEBC’s flagrant attitude towards the Supreme Court directive. Notably, IEBC has demonstrated reluctance in dismissing and taking action against officials who messed up the August 8 presidential election process. Kenyatta and Jubilee have supported IEBC’s lawlessness and intransigence. In the meantime former IEBC commissioner Dr Roselyne Akombe has resigned, and she and IEBC Chair Mr Wafula Chebukati confirmed that IEBC cannot conduct free, fair, and accountable or credible elections. A constitutional crisis is therefore underway in Kenya, as NASA and all progressive forces demand for the clean-up of IEBC and the strict adherence to the law in the fresh elections whose date was unilaterally slated for October 17, 2017 then October 26, 2017 or any future election. Most of NASA’s eight-point “irreducible minimum” are similar to the European Union’s (EU’s) recommendations following the invalidated elections.
A key question that has arisen following the standoff between Jubilee on the one hand and NASA and most Kenyans on the other is on the mode of conducting the fresh election is: what if elections are not held within 60 days? Who will be the President in that event? What is the nature of the occupancy or vacancy in the office of the President? In addressing this, I adopt a three pronged typology.

First, under article 136(2) of the Constitution, presidential elections are to be held every second Tuesday in August in every the fifth year. Thus the President’s term of office constitutionally starts on the date he or she is sworn and constitutionally ends when another President is constitutionally sworn in following his or her valid and legitimate declaration of as President elect.

In the event there is a run off or fresh elections, the incumbent President remains a “temporary incumbent” until another President is validly and legitimately elected, declared and sworn in. A President whose declaration is nullified by the Supreme Court is a temporary incumbent, and at no point in time does he transition to a “full” President, even if fresh elections are not conducted in 60 days.

Second, there can be a vacancy in the Office of the President under article 146 in the following circumstances: if the President dies; resigns, in writing, addressed to the Speaker of the National Assembly; or otherwise ceases to hold office under Article 144 or 145 or under any other provision of the Constitution (my emphasis). A vacancy can be created under article 144 and 145 if the President is impeached due to physical or mental incapacity to perform duties. Presidential impeachment may also be grounded on gross violation of a provision of the Constitution, gross misconduct or if the President has committed a crime under national or international law.

In the event of such a vacancy, the Deputy President is to assume office as President for the remainder of the term of the President. If the office of Deputy President is vacant, or the Deputy President is unable to assume the office of President, the Speaker of the National Assembly shall act as President and an election to the office of President shall be held within sixty (60) days after the vacancy arose in the office of President. What is the status of the Deputy President (William Ruto) from 8/8/2017, or from 1/9/2017 until 26/10/2017? Or until a ne President is constitutionally elected and sworn in? What of where the fresh election that meets constitutional standards is not conducted within 60 days from invalidation as stipulated under Art 140(3)?

Third, Attorney-General Githu Muigai argued that Kenyatta who was sworn on April 9, 2013 would serve until the next President is sworn in, whether presidential elections are conducted within 60 days from invalidation or not. Moreover, some Kenyatta and Jubilee Party supporters say he will serve up to 2022. This is unconstitutional, erroneous and a contrived constitutional interpretation. To argue that the situation in Kenya has been in from 1/9/2017 or is likely to find itself in if the 60 days lapse without constitutionally valid fresh elections is constitutionally
unforeseen is incorrect. The Constitution foresees such scenarios under article 146 and 138, among other provisions.

The A-G’s and other Kenyatta and Jubilee supporters’ have contrived an interpretation of the Constitution by, among others, invoking Prof Hans Kelsen’s theory of the *grund norm* (basic norm). Kelsen’s grund norm has been used to facilitate military and civilian coups by incumbents and opponents. The *grund norm* theory is sometimes conflated with a sudden change of the constitution, or a sudden change of government, or of the presidency.

What is Hans Kelsen’s theory of *grund norm*? Hans Kelsen in *The Pure Theory of Law* emphasized the significance of the *grund norm* in a constitutional and political process. According to Kelsenian social and legal theory, the validity of a law is based on another law until one arrives at the foundation (or base or infrastructure) of the legal system - the basic norm or the the *grund norm*. The *grund norm* is not (necessarily) a legal norm. It is instead a norm that is assumed to be valid by the those examining the legal system. A legally valid norm is then any norm derived from this *grund norm*. To Kelsen, the grund norm need not arise from a legal or a constitutional process. This is because the *grund norm* is not entirely the product of legal action or enactment. It may be the product of conquest, a rebellion or a (peaceful or non-violent) revolution, or the act of a usurper or an adventurer. Its existence may be presumed. Briefly, the *grund norm*, according to Kelsen, is established and changed through a process anticipated in the *grund norm*, or by revolutions.

The grund norm is arguably the Constitution because it establishes the foundation of the state’s legal system. The question that arises in the Kenyan context is whether the Constitution 2010 is the grund norm and the answer is yes.

According to Kelsen, a revolution takes place when there is a sudden change in the constitutional order that was not anticipated or contemplated by the existing constitutional order. I have demonstrated above that the Supreme Court decision 2017 and Kenya’s current situation is contemplated under the Constitution. This is the narrow, petty and contrived interpretation that the supporters of the Kenyatta regime are attempting to apply to force Kenyatta’s continued stay in power after November 1, 2017 (if valid and legitimate elections did not take place), as a legitimate President with full powers. And that informs Kenyatta forcing through a coronation in the form of unconstitutional elections boycotted by about 70% or more Kenyans on 26/10/17.

It is similar to Ugandan President Milton Obote’s and Rhodesian Prime Minister Ian Smith’s advisors insisting that the 1962 Constitution and power arrangements had been constitutionally changed through a *grund norm* in 1966/7 in Uganda and in 1965 in Souther Rhodhesia through Smith’s Unilateral Declaration of Independence (UDI), respectively. The constitutionality of the relevant constitution, or of the conduct of the relevant president, Prime Minister of Government officials were contested in important cases like *Uganda v. Commissioner of Prisons, Ex Parte*

The Kenyan Supreme Court’s verdict was founded on the Constitution, the evidence, and cogent legal analysis. It was based on rational, valid, legitimate, holistic and progressive interpretation and application of the Constitution, which Kenyans overwhelmingly voted for in the 2010 referendum. It was based on the evidence adduced by the petitioners, and by the failure of the respondents to answer simple questions, or their failure to avail the servers as ordered by the Supreme Court.

The 26/10/17 “fresh election” is invalid, illegitimate, irregular, illegal and unconstitutional. IEBC, Kenyatta and Jubilee have remained adamant and are provoking Kenyans to strengthen their resolve on the three options that have been discussed since. These options have a legal foundation and they include.

First, Kenyans demand fresh elections anticipated by the Constitution, the electoral law, and the Supreme Court decision. It must be free, fair, transparent, accurate, verifiable and accountable as captured by the NASA and EU demands or recommendations, respectively.

Second, Kenyans may invoke popular sovereignty under Article 1 and 37 of the Constitution. This includes the right to demonstrate, picket, and economic boycotts. Protests have increasingly been seen as a basic form of democratic political action including in the separate decisions by Justice Isaac Lenaola, Justice Joseph Onguto and Justice John Mativo. People have taken to the streets and somehow succeeded in the Arab Spring, BurkinaFaso, Ivory Coast (Cote d’Ivore), the Gambia, (against incumbent president Yahya Jameh) and others. Kenya is ripe to have an effective protest movement that can challenge the overall power of Jubilee’s autocratic leadership.

The third option Kenyans are discussing is the invocation of popular sovereignty under Articles 1, 10, 37 that entails installation of a people’s President and a people’s government. There can be a peaceful revolution or (bloodless) coup that successfully overthrows a lawless government. There can also be a violent revolution where the lawless regime is murderous and violent. In ordinary or simplistic situations, to some, a coup or a government overthrow may sound remotely extreme mainly because the incumbent regime is part of the pseud-constitutional order in Kenya hence its disruption amounts to an unconstitutional government or “illegality.”

African constitutional scholars like Nigerian Prof Ben Nwabueze and Kenyan Prof Yash Ghai have remarked on the relevance of coups as a means of changing lawless governments that perpetually disregard the Constitution, abuse human rights or rig elections. Prof Nwabueze even called for a “bloody revolution” during the Goodluck Jonathan’s lawless, incompetent, insecure and corrupt kleptocracy. More appropriately, Prof Nwabueze has justified coups in two scenarios: First, when the intervention is for the purpose of chasing out an incumbent government trying to hang on to power by election rigging as it happened in Sierra Leone in
1968, after which the rightful election winner is installed. And secondly, where the intention of the military coup makers “was not to rule themselves but simply to install a government composed of handpicked civilians of proven honesty and efficiency”

Three issues:

First, every person has an obligation to respect, uphold and defend the Constitution. The President has a higher duty complete with an oath to defend and uphold the Constitution. Through the unconstitutional 26/10/2017 “elections,” unjust killing of unarmed civilians demonstrating since 8/8/2017, attacks and interference with independent government organs and institutions, Uhuru Kenyatta, Jubilee and IEBC have violated the Constitution. They lack the constitutional, legal, political or moral authority to purport to govern or rule or defend the Constitution or accuse another of violating it.

Second, disobeying illegal orders or civil disobedience is a duty. To quote Raila Odinga’s speech, “when injustice becomes law, resistance becomes a duty and if there is no justice for the people, let there be no peace for the government.” A President and government that has meted untold suffering and injustices to the people, violating the Constitution in the process, leaves the vulnerable citizens with only one option: to resist and overthrow it constitutionally under Articles 1, 10 and 37.

Third, as evidenced in the Africa practice and scholarship from 1960 through the 2010s, a pro-people coup can be validated or legitimized in law. Hans Kelsen’s pure theory of law, and especially on the change in the grund norm has been relied on by courts on numerous occasions to validate coups. Kelsen has argued that a successful coup or revolution can create a new basic norm and, therefore, can form a basis for a “new legal order.” The courts have buttressed Kelsen in State v. Dosso (1958) 1 PLD 533 (Pakistan); Uganda v. Commissioner of Prisons, Ex Parte Michael Matovu, [1966] 1 EA 514 (Uganda), Madzimbamuto v. Lardner-Burke [1969] 1 AC 645 93 (UK), among others. According to Kelsen, and this view has been backed by courts in the above cases, once a revolution is shown to be efficacious (or effective) in nullifying an old basic norm, it can be regarded as a law-creating fact. This consequently gives validity to a new legal order.

The fourth option is the exercise of popular sovereignty to invoke the internationally accepted right to self-determination or secession. This is the right of people to be free from tribal hegemony, domination, oppression and exploitation and determine their own political status, including formation of their own independent state. Article 1 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), international declarations to which Kenya is party to and are constitutionally binding states:
“All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.”

Similarly, Article 20 of the African Charter on Human and Peoples Rights (ACHPR) states that:

“All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

Under consistently rigged or forceful leadership of Kenyatta, Moi, Kibaki, and Kenyatta II in Kenya since independence, Kenyans have been denied opportunities for the realisation of self-determination. My understanding of Karl Marx’s change means transformative, fundamental, revolutionary or structural change. It is not just cosmetic “reform” that has characterized most of the changes in Kenya from 1963 to 2017, and which has equally suffered reversals under Uhuru Kenyatta. If Kenyatta and his tribal cabal, there can be the Kenya people and the Kikuyu or uthamaki kingdom. In the early days, people should choose where to belong. By staying away from Kenyatta’s coronation on 26/10/2017, most Kenyans want a republic, with free, fair and accountable elections.

Africa has experienced successful and unsuccessful secessions and learnt lessons. Key examples are those in Eritrea, South Sudan, Katanga and Biafra.

I have argued elsewhere that to truly reconstruct Kenya, transformative or revolutionary change is required. This will help to break the bond between ethnic or dynastic gridlock and class stratification, on the one hand, and power relations that are utilized to exploit the ordinary body politic and largely to block reconstruction, electoral justice, socio-economic justice, human rights, the rule of law and constitutional democracy.

Lastly, to paraphrase Karl Marx (1818-1883) “Philosophers have merely interpreted the world. The point is to change [Kenyan rulers and governance].’

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