

FROM A HYBRID SYSTEM TO A PURE PRESIDENTIAL SYSTEM: BETWEEN THEORY AND PRACTICE

BY

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1.0 INTRODUCTION.

Kenya has since independence experimented with all the three generic proto-types of political systems. These are the pure-parliamentary system; the hybrid/semi- presidential system and the pure presidential system. The pure parliamentary system was experimented with between June 1963 and December 1964 when the first amendment to the Kenyan constitution was enacted that transformed Kenya into a Republic. It was a culmination of the British interest to leave behind their legacy given the fact that the pure parliamentary system is mostly identified with the “West-minister” model. In fact for the one year that Kenya experimented with the Parliamentary system, it was basically a “dominion government” since while Kenyatta served as the Prime-Minister being the leader of the Majority Party, the Kenya African National Union (KANU), Queen represented by the Governor General remained the Head of State. This is the colonial relic that the first amendment to the constitution sought to curtail.

The first amendment ushered Kenya into a semi-presidential system. Through this amendment the post of Prime-Minister was abolished and that of the President was created who now doubled up as both the Head of State and Head of Government. The Semi- Presidential system lasted from 1964 until 2007 when the Presidential election results were disputed leading to unprecedented violence in the country that only petered out with the creation of the coalition government. The semi-presidential in essence had aspects of both the pure-presidential system and the pure-parliamentary system

The Hybrid system was adopted in 2008 as a peace solution to post election violence and was anchored on an amendment to the constitution that created a National Accord of Power Sharing between the Party of National Unity (PNU) and the Orange Democratic Movement (ODM). Under the arrangement Mwai Kibaki of PNU retained the Presidency while Raila Odinga of ODM became the Prime-Minister. The two parties also shared Cabinet Positions. The Hybrid government lasted until the March 2013 elections.

In the meantime Kenya adopted a “Pure-Presidential” constitution in 2010. This part of the constitution was however suspended until after the 2013 elections. President Kenyatta was sworn into office on 9th April 2013 thus ushering in the Pure Presidential and a new epoch in the governance architecture of Kenya.

While the constitution is clear that Kenya is a pure presidential system, attitudinally and behaviorally the Kenya executive and legislature are still stuck in the Hybrid/Semi-Presidential system. This paper teases out the disjunctures between theory and practice in the implementation of the pure presidential system in Kenya since April 9th 2013.

2.0 CHARACTERISTICS OF HYBRID/SEMI-PRESIDENTIAL SYSTEM

Although semi-presidentialism and hybrid system are not one and the same, they share several characteristics and hence our lumping together to capture the transition that Kenya has made constitutionally to a pure presidential system.

In a semi-presidential system /hybrid system the president is both the head of state and government however in the hybrid system the executive is shared as apart from the president there is also a prime minister who he/she shares executive power. Second, cabinet ministers are drawn from the legislature and they have a collective responsibility. In a hybrid system the president is elected directly while the Prime Minister must command a majority in the legislature. Third, the hybrid system increases the accountability of the executive while also building in a system of mutual checks and balances and the need for consensus between the two executive wings of government. Fourth, both in the Semi-Presidential system, there is continuous check on the government through the oversight tool of “vote of no confidence.” Fifth in both the Semi-Presidential and Hybrid system, there is official conciliatory politics as evidenced by coalition of parties in parliament. Sixth, in both the semi-presidential and hybrid system party members in parliament have a ‘bound mandate’ and are always expected to vote along party lines. Seventh in both systems the price of disagreeing with the party is very high as it can lead to the collapse of the government and resultant general elections. Eighth in both systems the Cabinet and the bureaucracy control the legislative agenda and the budget making process. Ninth, in both systems party caucuses rather than parliamentary committees tend to make the most important policy decisions. Tenth in both systems a vote of no confidence in the government results in both the executive and parliament going home. Eleventh in both systems, parliament does not exercise aggressive oversight. Twelfth, the government’s survival depends on a cohesive disciplined majority party that votes as a bloc and thirteenth in both systems the executive determines the calendar of parliament.

3.0 CHARACTERISTICS OF THE PURE PRESIDENTIAL SYSTEM

In a pure presidential system, the President has a fixed term of office. Second, the President is both the head of state and head of government. Third, the president can only be removed from office through impeachment and not through a vote of no confidence that can trigger a fresh election. Fourth, the president has power to veto acts of parliament but super-majority of Members of Parliament can override the veto. Fifth, key presidential appointees have to be vetted and approved by parliament. Sixth, party discipline is less strict since here MPs have a “free mandate” and can vote freely with few repercussions against the party or government and therefore the fate of the president is not intertwined with that of the legislature. Seventh, separation of powers is more enhanced in a pure presidential system and thus parliament has more incentives to develop strong effective committees and to play a competitive law making role. Eighth, the government does not need to “win” on every issue since losing a major vote doesn’t endanger the executive’s term in office as it would in a parliamentary, semi-presidential or hybrid systems. Ninth, it is not uncommon in a pure presidential system for different houses of the legislature to be controlled by different political parties and likewise for the President’s party to be a minority in the legislature and as a result bi-partisanship is a hallmark of the pure

presidential system. Tenth, in a pure presidential system, the most important laws and bills come from the executive but it is only the MPs that have the authority to introduce them in the floor of the house. Eleventh, the legislature is free to set its own agenda and pass its own bills. Twelfth both the Executive and the Legislature are independent policy making sites

4.0 IMPLICATIONS OF THE PURE PRESIDENTIAL SYSTEM UNDER THE 2010 CONSTITUTION.

Kenya officially started implementing the pure presidential system on 9th April 2013. This was a momentous transition given that this was the first time that the country would be experimenting with such a system. It is also momentous in that the adoption of the pure presidential system was a last minute “consensus” to the ODM preferred pure presidential system and the Semi-Presidential favored by PNU. In essence this political system was not well thought out and this partly explains why the transition is somehow truncated.

There are certain key characteristics that were expected to change with the adoption of the pure presidential system.

First, is that in a hybrid / semi-presidential system, parliament is passive in initiating laws, policies and budgets. This is in contrast to a pure presidential system in which both the executive and legislature are popularly elected and have the constitutional power of initiation of all policy measures except money bills but the executive may propose an alternative budget to that proposed by the executive.

Second, is that Kenya moved from a unicameral parliament to a bi-cameral parliament with a national assembly representing citizens and a senate representing territorial units in this case counties.

Third unlike in the earlier hybrid/semi-presidential system the president does not control the calendar of parliament

Fourth, unlike in the earlier hybrid/semi-presidential all key presidential appointees have to be approved by parliament

Fifth, unlike the hybrid/semi-presidential the president now cannot be removed from office through a “vote of no confidence” and the only way to remove a president from office now is through “impeachment” for a violation of the constitution

Sixth, the President can now govern irrespective of whether his party/coalition has the majority in parliament or not

Seventh unlike in the hybrid/semi-presidential system the executive now has to use MPs to introduce government motions and bills in the house

5.0 IMPLEMENTING THE PURE PRESIDENTIAL SYSTEM. THEORY WITHOUT PRACTICE.

As of December 2013, it is apparent that Kenya constitutionally has a pure presidential system but behaviorally and attitudinally the executive and legislature are still stuck in the hybrid/semi-presidential system mode. A few illustrations serve as a testimony to this.

First, Members of Parliament still think of themselves as Government MPs and Opposition MPs and thus the lexicon government side and opposition side. This is despite the fact that the “seating arrangement” in both houses has lived up to the pure presidential billing by not having a seating arrangement that reserves a government side and opposition side. In fact it can be argued that this is out of the realization that at any given electoral cycle the executive and the legislature have separate mandates and the power of the executive is not pegged on the competing party’s composition in the legislature. The legislature should therefore defrock itself of the “tags” of government and opposition side

Second, under the pure presidential system, MPs of the president’s party are expected to perform mutually contradictory roles i.e they are expected to support their parties policies while at the same time they are expected to oversight the executive. But the Jubilee MPs have so far not appreciated this new role. They see themselves as having a “bound mandate” to support every Jubilee appointment, Motion or Bill to a large extent. This is despite the fact that in a pure presidential system, the Government is not in parliament. It is therefore a contradiction when the majority leader in the National Assembly proclaims in the house that he is the Government Spokesman. In fact the Constitution in its architecture does not consider a legislator as part of succession. The constitution stipulates that in the event that the President and his deputy are for one reason or another not in office then the speaker of the National Assembly would act as the Chief Executive for a stipulated period of time.

Third, parliament has mistaken the coincidence that accrued from the last elections in which the president is from the same party/coalition in both houses to justify their operation along a hybrid/semi-presidential mode. It will not be always that the President’s party will always have a majority in both houses. Suffice to say that when and if the President’s party is a minority then such parliamentary behavior would ensure that the President’s party would always lose on every vote including the budget and this would certainly lead to a “shutdown” of the government. In the same spirit committee chairs are not “Government Spokesmen” in their respective dockets. But it would appear that Jubilee using their numbers are chairing all the committees with the exception of the “watchdog” committees i.e the Public Accounts Committee and the Public Investment Committee. In a pure presidential system the legislature is first and foremost a law making and oversight body and if it was to live to that billing the n party affiliation should recede to the background and doing the appropriate legislation for the good of the country. To this end in pure presidential systems committee chairs are usually those members of parliament with vast experience or expertise in any given docket. If this were to be adopted then jubilee would not have to chair all the committees and cord would not necessarily have to chair the “watchdog” committees. Similarly since Government is not in the Parliament “shadow ministers” being proposed by the Minority side do not make sense in a pure presidential system.

Fourth, in a pure presidential system, the executive should not have automatic expectation that parliament will support it despite in this case having the majority in both houses. This is because the ideally the minority side should support when it has executed the right policy or law of the country and likewise the majority should oppose it when it has proposed a faulty law or policy. In the same vein the Minority is not expected to oppose for the sake of opposition and the support or opposition should be pegged on a case by case basis depending on the appropriateness of the law or policy. This has largely not been the case in the current parliament so far. A good example was in the vetting of key appointees by the President. Jubilee using their numbers muscled through some of the appointees even though it was glaringly clear that they were not suitable for office. Jubilee it appeared was wrongly in a hybrid/semi-presidential mindset whereby a vote against a presidential nominee would be viewed as disrespect to the president or even party/coalition indiscipline. The reality is that constitutionally any rejection of the president's nominee gives him a second chance to nominate an appropriate person in the national interest.

6.0 CONCLUSION

It appears that so far, constitutionally we have a pure presidential system but attitudinally and behaviorally we are still stuck in the hybrid/semi-presidential behavior. This however should have been expected because for close to five decades the country has experimented with the semi-presidential/hybrid system and the pure presidential system as already noted was a last minute compromise between the then dominant parties in this case PNU and ODM.

Going forward, it appears that there are several measures that have to be put in place if the country is to tune the theory of the pure presidential system into practice.

First, the members of parliament most of whom are new and are learning the parliamentary process should be enlightened on the characteristics of a pure presidential system to help in disabusing them of the semi-presidential/hybrid mindset and to inculcate into them the ethos of the pure presidential system

Second parliamentarians must come to grips with the fact that in a pure presidential system the separation of powers is more enhanced as the executive and the legislature are not diffused as in a pure parliamentary system or in a hybrid/semi-presidential system. To this end they should view parliament in an organic manner and as an organ that is supposed not only to legislate for the whole country but also oversee the executive on behalf of the citizenry. To this end bi-partisanship should define their legislative functions as opposed to partisanship

Third, in a pure presidential system both the executive and the legislature are ceteris paribus of law making. Although the executive has the capacity given the semi-presidential/hybrid history that the country has undergone, the legislature still lacks the capacity in terms of human and financial resource to be an initiator of succinct laws for the country. Some MPs lack offices, most or all do not have adequate staff including researchers and legislative drafters and to that extent one can say that they are currently ill-

equipped to perform the role that a pure presidential system expects of them. This must be redressed going forward.