

WHY DEMOCRACIES FAIL AND THE EFFECT OF CHECKED
GOVERNMENT ON PRESIDENTIAL POWERS AS GRANTED BY THE 2010
CONSTITUTION OF KENYA.

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1. Toussaint Kafarhire Murhula;
2. Ben Sihanya; and
3. Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan.

DECLARATION

I, ESTHER WAIRIMU WAWERU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

ABSTRACT

The three objectives of this study are to question whether democracy is the best form of governance; to show the effects of checked government in a democratic context, on presidential powers and to highlight the consequences of limited presidential powers have on a state.

The scope of this project is a proper understanding of checked government in a democratic context, and its effect on presidential powers. A checked government is a constitutional government with limited powers and with checks and balances in place. The project also analyses the 2010 Constitution of Kenya (COK 2010) in regard to the powers that it has delegated to the President and how these powers have been affected by a checked government.

For the research methodology, the paper first defines and explains democracy and presidentialism as separate legal concepts, and then draws the link between them in a presidential democracy. This is followed by an analysis of the various provisions on the presidency and democracy in the Constitution of Kenya 2010. The paper uses politics, management and juridical relations as an overall framework. First, politics influences democracy through manipulation by politicians during elections. Second, management influences the presidency because limited presidential powers affect the management of a state. Finally, juridical analysis explores the role of law through the analysis of the COK 2010 in regard to provisions relating to presidential powers and democracy. The research methodology involved analysis and review of relevant statutes such as the Constitution of Kenya 2010 and secondary sources (books, local and international journals and articles, research papers, newspaper articles and internet sources accessed from relevant internet search engines and Strathmore University Library).

The major finding and conclusion drawn in this research project is that, democracy is not the best form of governance. However, democracy has proven to be the best form of governance to date, despite the need for improvement. An ideal system of governance would be a hybrid of democracy and dictatorship. It would allow the president to have greater control over the state. It would also better regulate politicians against negative behaviour including: - hate speech; incitement; corruption; misuse of resources; abuse of power, lack of integrity; and self-interest.

A hybrid approach will allow citizens to participate in law making and election of leaders as a check and balance mechanism that holds leaders accountable. Additionally, the hybrid approach will empower the president to: ensure effective management of the state; curb corruption; keep politicians in check; and drive the country towards its development goals with the aim of improving the standard of living of the citizens.

CHAPTER ONE: INTRODUCTION

1.1 BACK GROUND

This study focuses on democracy and the presidency. The term democracy is characterized by two factors: - democracy as power of the people and democracy as rule of the people. No country in the world is a direct democracy other than Switzerland. Most countries have representative democracies whereby the people elect the members of the arms of government who then govern the state on behalf of its citizens.

Elections alone do not make democracy¹. Military coups in Mali and Guinea Bissau, the fraudulent presidential elections in the Democratic Republic of Congo, the unconstitutional third term candidacy of Senegalese President Abdoulaye Wade, and the 2007 post-electoral violence in Kenya, are instances of when democracy has failed². Life terms of heads of states such as Paul Biya in Cameroon, Robert Mugabe in Zimbabwe, Eduardo dos Santos in Angola and Yoweri Museveni in Uganda also question the efficiency of democracy.³ The decline in democracy makes us wonder why democracy is failing in Africa and if so, why it is failing? It may be failing because it is a Western project with no roots and basis in Africa.

To best understand the presidency, we need to have analysis the executive branch of government and the administrative power of the Kenyan government. Presidential powers permeate through all branches of government. Its powers and functions can be studied from three distinct approaches. First, bureaucracy as a management endeavour, which focuses on the efficient management of public resources, power and affairs. Second, bureaucracy as a political process, which focuses on representation and participation through parliamentary and related policy making processes. Lastly, the juridical or legal approach, which focuses on the government's adjudicatory function and fidelity to the Constitution and the rule of law⁴.

¹ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

² Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

³ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

⁴ Ben Sihanya, *The Presidency and Public Authority in Kenya's new Constitutional Order*, SID Constitution Working Paper series No 2

1.2 STATEMENT OF PROBLEM AND OBJECTIVES

This study is based on the premise that democracies fail for reasons that we tend to ignore. For example, presidential democracies are more prone to fail because of lack of accountability, an issue we shall look into this chapter four. The definition of democracy is a fundamental problem. David Held offers the following perspective; “What is democracy? The rule of the people. What rule? Which people? What is deemed to be participation by these people?⁵ Are these people equal?” Saying that democracy is the best form of governance is therefore unwarranted and unjustifiable. ‘The people’ as envisaged in the definition of democracy, are corrupt and unstable beings. Human beings can never be equal. Strata always has to be maintained in society. Therefore, it is wrong to try to dispense equality to naturally unequally beings⁶.

The objectives of this study are to interrogate whether democracy is the best form of governance; to show the effects of checked government on presidential powers in a democratic context; and to show the consequences that limited presidential powers have on a state. A checked government is a constitutional government with limited powers and check and balances in place.

1.3 JUSTIFICATION OF THE STUDY

Until the early 1990s, most African nations were still dominated by dictatorships, one-party and patrimonial states, lack of transparency and accountability of the leaders, social inequalities and injustices, all of which led to internal instability and civil wars along ethnic lines⁷. People blame Africa’s cultural backwardness for its declining democratic experience. However, I contend that Africa as a whole is not made of failed democracies. Ghana, Botswana, Benin, Senegal and Zambia are examples of flourishing democracies.

Although presidential systems are more than parliamentary systems, out of 25 countries globally that have had continuous democracy since 1959, only four—Colombia, Costa Rica, the U.S., and Venezuela—have presidential systems that have worked, and the

⁵ Held, David, *Models of Democracy*. Stanford: Stanford University Press, 1987

⁶ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Africa*

⁷ Huntington, Samuel P., *The Clash of Civilizations: Remaking of World Order*. New York: Touchstone, 1996

Colombian case is debatable⁸. The greatest disadvantage of presidential systems is their difficulty in handling major crises. Even when they allow for impeachment of the president, such impeachments are rare.

It is therefore useful to explore the link between democracy and the presidency from an African and global context.

1.4 RESEARCH QUESTIONS

The study is guided by five research questions:-

1. If democracy is not the best form of governance in a state, then what is?
2. What is a presidential democracy?
3. What is unchecked government?
4. What constitutes limited presidential powers?
5. What effect does limited presidential powers have in the running of a state?

These research questions are explored in chapter three.

1.5 LITERATURE REVIEW

Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, '*Why Democracies Collapse: The Reasons for Democratic Failure and Success*⁹'. He posits that there are five variables that influence democracies (institutional, societal, mediating and foreign involvement variables). I shall look into each variable and analysis them separately in chapter four.

Ben Sihanya, '*The Presidency and Public Authority in Kenya's new Constitutional Order*¹⁰', his study pursues a structured juridical-academic and policy discourse on the presidency in Kenya through the evolution of the office of the presidency in Kenya since 1963, the various types of bureaucracy centred on the presidency and the impact of the Constitution of Kenya 2010 on the presidency, public authority and public administration.'

⁸ Scott Mainwaring, *Presidentialism, Multiparty Systems and Democracy: The Difficult Equation*, working paper 144 September 1990

⁹ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, '*Why Democracies Collapse; The Reason for Democratic Failures and Success*' (International Political Science Review 2005), Vol 26, No. 3, 291–309

¹⁰ Ben Sihanya, *The Presidency and Public Authority in Kenya's new Constitutional Order*, SID Constitution working paper series No 2

Toussaint Kafarhire Murhula SJ, '*Democracy in Africa: An Experiment in Progress*¹¹' says that, '*It is time to revisit the meaning, the principles and the exceptionalism of African democracy.*' It can therefore be argued that democracy is essentially failing in Africa because it is a Western project with no roots in Africa.

The study has been enriched by a number of articles and publications on failures of democracy and the effects that checked government has on presidential powers and the consequences thereto. This research paper is primarily premised on the works of authors who have written extensively on democracy and the presidency.

The arguments from the articles and publications are explored in detail in chapter 2, 3 and 4 of the paper. They form the theoretical framework of the study

1.6 THEORETICAL FRAMEWORK AND HYOTHESIS

Based on Ben Sihanya, there are four theoretical approaches that I have used in discussing the exercise of public authority through democracy and presidentialism. The first is *federalism*¹², which distinguishes between unitary governments and federal or semi-federal governments. The second approach is *presidentialism*¹³, which distinguishes between parliamentary systems and presidential or semi-presidential systems. The third is *proportionality*¹⁴, which distinguishes between cases in which electoral proportionality is low and cases in which the electoral results preserve proportionality. The last approach is *constitutional weakness*¹⁵ (instability), which distinguishes between countries with stable constitutions and minor constitutional changes over time; and countries with unstable constitutions, frequent or major constitutional changes or that in totality they lack a constitution.

The research study is premised on the following seven hypotheses based on the work of Ben Sihanya and Abraham Diskin:-

¹¹ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Africa*

¹² Ben Sihanya, *The Presidency and Public Authority in Kenya's new Constitutional Order*, SID Constitution working paper series No 2

¹³ Ben Sihanya, *The Presidency and Public Authority in Kenya's new Constitutional Order*, SID Constitution working paper series No 2

¹⁴ Ben Sihanya, *The Presidency and Public Authority in Kenya's new Constitutional Order*, SID Constitution working paper series No 2

¹⁵ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, '*Why Democracies Collapse; The Reason for Democratic Failures and Success*' (International Political Science Review 2005), Vol 26, No. 3, 291–309

1. Until now, democracy has proven to be the best form of governance but democratic collapse can happen when exercise of public authority is diminished.
2. Federal states are more prone to democratic collapse than unitary states.
3. Presidential or semi-presidential regimes are more prone to democratic collapse than parliamentary ones.
4. Proportional electoral systems are more prone to democratic collapse than those with less proportionality.
5. Political systems with low constitutional stability are more prone to democratic collapse than those with high constitutional stability.
6. Countries with weak or unstable economies are more prone to democratic collapse than those with stable economies.
7. Therefore, the strongest forms of democracy exhibit:- unitary states; parliamentary regimes; less proportional electoral systems; political systems with high constitutional stability; and stable economies.

1.7 RESEARCH METHODOLOGY AND DESIGN

The three part research design involved definitions, linkages to the constitution, and analysis from a political, management and juridical perspective. I first define and explain democracy and presidency as separate legal concepts then draw the link between them in a presidential democracy. Next I analyse the various provisions on both the presidency and democracy as captured in the Constitution of Kenya 2010. Finally, I use political, management and juridical perspectives to analyse the presidency and democracy.

The research methodology involved an analysis and review of relevant statutes, the Constitution of Kenya 2010 and secondary sources.

1.8 LIMITATIONS

The limitation of this research study is the limited studies on governance that are better than democracy to date. Additionally, the research uses a qualitative approach due to resource and time constraints. A quantitative approach is therefore not assumed in spite of its inherent additional value.

1.9 CHAPTER BREAK DOWN

This study is divided into five chapters. The first chapter has introduced the problem and the purpose of the study. The second chapter has outlined the paper's theoretical

framework based on a literature review of democracy and presidentialism. The third chapter has explored the five research questions in order to analyse democracy and presidentialism. The fourth chapter has outlined the findings of the research based on the theoretical framework set out in chapter two. Lastly, the fifth chapter has discussed in a concise form the main findings of the research and their implications. Additionally, the chapter has provided suggestions for future research work based on the findings and conclusions generated from the study.

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 CONCEPTUAL FRAMEWORK FOR DEMOCRACY

Democracy has been defined as ‘rule of the people’ by David Held. It is unfortunate that the world has promoted a political system that has remained poorly defined over the years. Despite all the transformations that democracy has undergone, it is still an unclear concept. It is therefore unwarranted for the world to crown democracy as the best political system.

One misguided concept of democracy, according to Toussaint Kafarhire, is equality. As earlier discussed in chapter one, you cannot dispense equality to human beings who are naturally unequal. There is a difference in the liberal perspective of democratic equality¹⁶ during ancient times and modern times. In ancient times ‘the people’ were mostly property owners and so the poor acted as regulators in order to limit the rights of these property owners. In modern times, democracy is as a matter of checking and balancing the powers, the might, the influence and the rights of the sovereign in so far as it involves its citizens.

Democracy today focuses on political arrangements and participation. It maintains institutions and processes that guarantee the rights and freedoms to choose and replace leaders through regular and free elections, equality of opportunity and access, and a just distribution of social benefits and burdens.¹⁷

Democracy can be viewed from three perspectives: liberalism; governance and elections.

2.1.1 THE PARADOX OF LIBERAL DEMOCRACY

Liberal democracy is defined as a form of government characterized by fair, free and competitive elections between multiple distinct parties, separation of powers, rule of law and equal protection of human rights, civil rights and political freedoms¹⁸. In the African context it has three paradoxes. First, the democratization process in Africa was only a part of a worldwide movement; African countries were just following a trend in

¹⁶ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

¹⁷ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

¹⁸ https://en.wikipedia.org/wiki/Liberal_democracy accessed on 14th April 2017

East Europe and Western institutions (World Bank, IMF) were pushing to liberalize the political economic system¹⁹ across the continent.

Democracy was introduced in Africa as a control mechanism against African dictators who squander a large proportion of public resources. Economic globalization has historically been able to undermine political control in developing countries. This is because undemocratic market forces and democratic participation²⁰ seek to reduce social inequalities and promote public interest both of which are key concepts of liberal democracy.

A second paradox concerns the distribution of power and the very nature of African states²¹. It falls under a state's function to promote and protect external and internal distribution of power. We can say that this paradox is as a result of the intention behind colonization. Colonization was not meant to benefit Africans but it was meant for the colonizers to benefit from Africa; they were out for their own production interests. Coming from such a past, it is clear why Africa struggles with democracy. Democracy is on the decline in Africa because Africans struggle with the necessity of development as a key function of a state. Development carried out under colonization was not meant for Africans, it was meant for the colonizers. As a result, today there is a conflict between state development and private interests. African leaders are out for their private interests while in power because history has dictated that private interest shall overpower development when a balance is struck because this is the precedent that colonizers set.

This suggests a third paradox, the distribution of worth or dignity²². Africa's rush to embrace democracy was founded on abuse of power by dictators and protection of human rights and dignity. Democracy seeks to maintain the people as 'equals' while liberalism on the hand seeks to bring about separation and strata in society. This is to say, liberalism wants to invest in a small group of property owners with immense powers that affect social justice. This is to say that liberalism and democracy are two concepts which cannot see eye to eye. They can never be two peas in a pod because one

¹⁹ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

²⁰ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

²¹ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

²² Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

calls for 'equality' and the other calls for inequality. Hence, I argue that the very source of democratic crisis is liberalism.²³

2.1.2 THE CONCEPT OF GOVERNANCE

Governance is different from government. Governance is a neutral concept comprising the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations and mediate their differences²⁴. Good governance addresses the allocation and management of resources to respond to collective problems; it is characterized by the principles of participation, transparency, accountability, rule of law, effectiveness, equity and strategic vision²⁵.

When we judge a country's governance, we are looking at the degree to which its institutions and processes are transparent, accountable to the people and their promotion of public participation. We also look at the freedom that both the private and civil society have with due regard to participation. In summary, good/ democratic governance entails the will of the people, the government's response to matters affecting its citizens, participation of the public in both political and public affairs, protection of human rights and promotion of human development.

Is it warranted to speak of democratic regimes being on the rise yet good governance has hit rock bottom? It is important to pay more attention to the quality of governance rather than the promotion of democracies. Countries which are well governed are less likely to be violent, poor or to have bad national policies. Good governance promotes equitable sharing, growth and development.

2.1.3 ELECTORAL PROCESSES AND THE ROLE OF ELECTORAL MANAGEMENT BODIES

Elections are a regular and direct means of citizen participation in governance. Electoral systems set a two-way relationship based on participation and accountability between the elected and those they represent²⁶. Yet, elections are not sufficient to make a country

²⁴ G. Shabbir Cheema and Linda Maguire, *Democracy, Governance and Development: A Conceptual Framework*, United Nations

²⁵ G. Shabbir Cheema and Linda Maguire, *Democracy, Governance and Development: A Conceptual Framework*, United Nations

²⁶ G. Shabbir Cheema and Linda Maguire, *Democracy, Governance and Development: A Conceptual Framework*, United Nations

democratic. It is the quality of the electoral process, which promotes democratic governance²⁷. States should have the efficiency and transparency to conduct elections based on universally recognized standards.

2.2 CONCEPTUAL FRAMEWORK FOR PRESIDENTIALISM

In this study presidentialism is viewed from two perspectives: - executive power and the Constitution of Kenya 2010.

2.2.1 THE EXECUTIVE AND ADMINISTRATIVE POWER

The concept of the executive has its origins in the doctrine of separation of powers, and checks and balances. The executive has the power to execute the laws, veto and the right to convene and dissolve the legislature.

Globally, presidential systems have not fared well, even though they outnumber parliamentary systems. This can be explained by the lack of mechanisms to ensure that the executive has a majority in the legislature, and the fact that a government cannot be replaced until the next elections.

2.2.2 THE PRESIDENCY AND PUBLIC AUTHORITY IN THE 2010 CONSTITUTION

Over the last 48 years the office of President in Kenya has undergone fundamental change in its nature and the extent of its powers. This has had an effect on public authority, administration, the socio-economic factors and politics in Kenya.

The 2010 Constitution of Kenya under Articles 131 and 132, provides that the President exercises, among other powers: executive authority of the Republic as the head of state and government; is the Commander-in-Chief of the Kenya Defence Forces; chairs the National Security Council; appoints high ranking state officers; and directs and coordinates the functions of government ministries²⁸. However, the presidency has been subjected to horizontal and vertical checks and balances. Horizontal checks are effected by the legislature, judiciary, constitutional commissions and constitutionally independent offices. Vertical checks are effected by the county governments and public service. Unlike the 1963 Constitution of Kenya, parliament has been delinked from executive control in the 2010 Constitution of Kenya and given powers to vet all

²⁷ G. Shabbir Cheema and Linda Maguire, *Democracy, Governance and Development: A Conceptual Framework*, United Nations

²⁸ Article 131 and 132, *Constitution of Kenya (2010)*

presidential appointees, impeach the President, oversee and investigate cabinet secretaries and other state officers.

The 2010 Constitution gives the judiciary the power to interpret the Constitution and in exercise of this power, the judiciary can rule on the constitutionality and legality of presidential authority. However, this power should not be confused with judicial activism which refers to judicial rulings suspected of being based on personal or political considerations rather than on existing laws.²⁹

2.3 CONCLUSION

While this paper is based on African democratic paradoxes, I contend that Africa as a whole is not made of failed democracies. Further, I assert that presidential systems have not fared well in Africa and it might be time to look into other forms of government such as parliamentary systems.

This chapter introduced democracy and presidentialism as separate concepts. This approach makes it easier to draw the link between presidentialism and democracy in order to understand the effects of limited presidential powers by going through the constitutional provisions that touch on the presidency.

²⁹ < https://en.wikipedia.org/wiki/Judicial_activism > accessed on 14th April 2017

CHAPTER THREE: CASE STUDIES OF PRESIDENTIAL DEMOCRACY

This chapter explores the link between democracy and presidentialism in a presidential democracy by addressing the five research questions of the project in relation to the problem statement which include:-

1. If democracy is not the best form of governance in a state, then what is?
2. What is a presidential democracy?
3. What is unchecked government?
4. What constitutes limited presidential powers?
5. What effect does limited presidential powers have in the running of a state?

3.1 IF DEMOCRACY IS NOT THE BEST FORM OF GOVERNANCE, THEN WHAT IS THE BEST FORM OF GOVERNANCE IN A STATE?

Democracy has failed in many instances. Military coups in Mali and Guinea Bissau, fraudulent presidential elections in the Democratic Republic of Congo, the unconstitutional third term candidacy of Senegalese President Abdoulaye Wade, and the 2007 post-electoral violence in Kenya, are examples of democratic failure. Additionally, life terms of heads of states such as Paul Biya in Cameroon, Robert Mugabe in Zimbabwe, Eduardo dos Santos in Angola and Yoweri Museveni in Uganda and landslide re-election victories of Kagame in Rwanda in 2010³⁰. Other examples include:- the Nigerian government cutting social funds from oil revenues; Mali going through a democratic crisis because of the presence of the terrorist group Al-Qaeda in Maghreb; Senegal and Ivory Coast are going through anti-constitutional fraud; and Gabon, Togo and DRC are going through a change of government with violent outcomes.

This begs the question, what is the best form of governance if not democracy?

Historically, democracy has proven to be the best form of governance when compared to different forms of government structures such as; absolute monarchy, anarchy, commonwealth, communist, confederacy, constitutionalism, republicanism and dictatorship. However, given its deficiencies, it is not the best form of governance. An

³⁰ Toussaint Kafarhire Murhula SJ, *Democracy in Africa: An Experiment in Progress*

ideal solution would be a form of governance that combines the strengths of democracy and mitigates its weaknesses in relation to presidentialism.

Therefore, I recommend a hybrid of democracy and dictatorship as the best form of governance. Democracy is key in ruling a state due to equal rights and protection of human rights and dignity while dictatorship allows a strong president to assert authority against vices like: - hate speech and insecurity.

3.2 WHAT IS PRESIDENTIAL DEMOCRACY?

A presidential democracy is a system of government in which the executive branch is separate from the legislature. It is based on the doctrine of separation of powers. The head of government in this system is also head of state and he/she leads an executive branch. The president is not responsible to the legislature and the legislature cannot dismiss the president unless through impeachment.

There are many instances when presidential systems have failed.

Globally, presidential systems have not fared well even though they outnumber parliamentary systems. Only four countries (Colombia, Costa Rica, the U.S and Venezuela) have presidential systems that are flourishing. However, the Colombian case is debatable³¹ given the country's track record of human rights abuse,

3.3 WHAT IS UNCHECKED GOVERNMENT?

To first understand what unchecked government is, we first need to understand what checked government is. A checked government is a government system whereby the people's power is captured within a constitution. Democracy is the foundation of a checked government. This is because, powers are delegated or distributed so that one leader or group of leaders does not have too much influence or power. Essentially, this government is in place so as to provide its citizens their individual freedoms and protect private property. To be duly noted is the fact that, power is not the ultimate goal in a checked government. The ultimate goal is to keep peace among all parties involved in the government hence separation of powers. In a checked government, those who create laws also have a duty to follow those laws and the citizens have a choice in who becomes a lawmaker through elections.

³¹ Scott Mainwaring, *Presidentialism, Multiparty Systems and Democracy: The Difficult Equation*, working paper 144 September 1990

A good case study on checked government is the United States. The checked government of the United States is split into a system of checks and balances so that the branches within the government have shared responsibilities and one division does not become more important than the other.

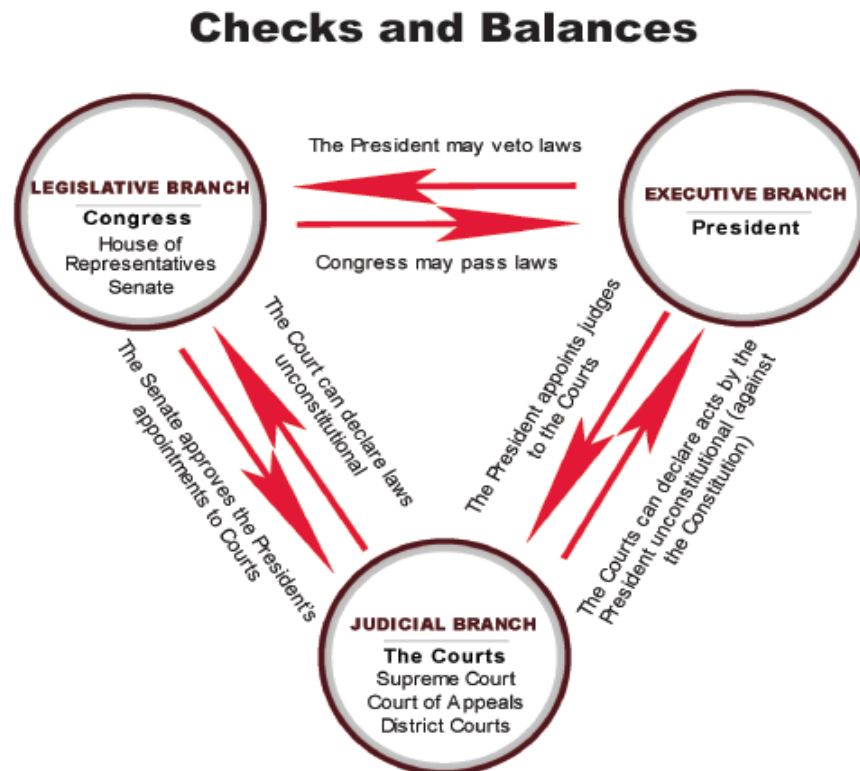


Figure 1 checks and balances system in the United States distribution of powers.

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I define an unchecked government as a government in which no limits are imposed on the ruler's authority. The leaders do not have to follow the same laws as everyone else. Essentially, there is no limit to the government's powers. There exists a dictator who has all powers and makes all laws. The people's rights, freedoms and private property are not guaranteed. There is total abuse of power and the people have no control over the government unlike in a checked government.

³² Appendix 1

A good case study of an unchecked government is North Korea. This is because they have a dictatorship system whereby the leader does whatever he pleases. In present day North Korea, the dictatorship is supported by government sponsored propaganda.



Figure 2 monument of North Korea's President.

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In the past, other examples of this form of government were Germany under Adolf Hitler and the Soviet Union under Joseph Stalin's rule.

What is the difference between unchecked and checked government?

A checked government is a constitutional government with limited power and with checks and balances in place whereas an unchecked government is an authoritarian government.

A checked government ensures that the leaders do not to abuse or misuse powers. It creates control of the leaders so as to protect the rights of the citizens. An unchecked government gives sole power to one person or to a small group of people. The citizens under this unchecked government cannot restrain the power of the rulers.

3.4 WHAT CONSTITUTES LIMITED PRESIDENTIAL POWERS?

Presidential power is the executive authority given to the president of a country by the country's constitution to carry out his/her official duties.

³³ Appendix two

There are three categories of presidential powers: **constitutional powers** which are powers granted by the Constitution; **delegated powers** which are powers granted by Legislature; and **inherent powers** which are powers inherent in the president's power as chief of the executive branch. Constitutional and delegated powers make up the **expressed powers** because these powers are clearly outlined in the Constitution. Example of inherent powers are emergency powers and executive orders.

In Kenya, presidential powers are derived from **Article 131**³⁴ to **Article 135**³⁵ of the Constitution of Kenya 2010. To be duly noted is **Article 129 (1)**³⁶ which states that executive authority is derived from the people of Kenya and is exercised in accordance with the Constitution. This is an example of a checked government.

Article 131 (1)³⁷ lists the authority/presidential powers while **Article 132**³⁸ lists the functions of the President of Kenya.

So far, **Article 129**³⁹, **131**⁴⁰ and **132**⁴¹ are Constitutional powers. **Article 132 (4)** touches on delegated powers by providing that the *President can perform other executive functions provided for in national legislation*. It also touches on inherent powers by providing that the President *may establish an office in the public service in accordance with recommendation of the Public Service Commission*.

Other examples of presidential powers include: - veto power, power of mercy; powers of appointment; executive orders; foreign policy powers and power to declare war with the assent of parliament.

A president's powers are limited by checks and balances written into a Country's Constitution. Through this, the legislative and judicial branches have specific power to deny or impede the executive's actions.

³⁴ Article 131, *Constitution of Kenya (2010)*

³⁵ Article 135, *Constitution of Kenya (2010)*

³⁶ Article 129 (1), *Constitution of Kenya (2010)*

³⁷ Article 131 (1), *Constitution of Kenya (2010)*

³⁸ Article 132, *Constitution of Kenya (2010)*

³⁹ Article 129, *Constitution of Kenya (2010)*

⁴⁰ Article 131, *Constitution of Kenya (2010)*

⁴¹ Article 132, *Constitution of Kenya (2010)*

One of aims of the Kenya's 2010 constitution was to reduce the power of Kenya's 'imperial presidency' through formal constraints on the executive, including a provision for impeachment which is an example of vertical checks. Similarly, all the major presidential appointments in state offices, must be approved by Parliament. The president's cabinet was reduced from 48 to 24 members. The president can only appoint non-parliament members to cabinet positions. The president can no longer suspend or dissolve the National Assembly as its members are elected to fixed 5-year terms. The president no longer exercises any control over the Election Commission, which is now completely independent. The new constitution places more power directly into the hands of Kenyan citizens unlike the previous constitution which laid all powers directly with the president.⁴²The Bill of rights also gave the Kenyan Citizens more power and protection for their political, economic and social rights, freedom of expression, and protection of property and consumer rights. Although the bill grants the government limited authority to curb certain rights under special circumstances, it is extremely explicit in outlining the requirements and/or justification for any legislation restricting such rights⁴³. The new constitution also prohibits the government from limiting or removing some rights at any time or under any circumstance.

In the repealed constitution, separation of powers was not promoted. It had consolidated power in the president. To fix this atrocity, the 2010 Constitution of Kenya promotes independence of the arms of the government. **Article 129⁴⁴** goes ahead to state that the executive's authority is derived from the people. ⁴⁵This means that the executive authority must defer to the sovereignty of the people.

One of the functions of the devolved government is decentralization of the state organs, which is a limitation on executive/presidential powers. This is an example of horizontal checks and balances.

⁴² Scott Mainwaring, *Presidentialism, Multiparty Systems and Democracy: The Difficult Equation*, working paper 144 September 1990

⁴³ <http://www.monitor.co.ke/2014/12/15/the-presidential-powers-in-the-new-constitution/> accessed on 10th January 2017

⁴⁴ Article 129, *Constitution of Kenya (2010)*

⁴⁵ <http://www.monitor.co.ke/2014/12/15/the-presidential-powers-in-the-new-constitution/> accessed on 10th January 2017

The president can no longer be sworn in at odd hours of the day as provided for by **Article 141**⁴⁶ of the Constitution which outlines the manner in which the elected president should assume office. The 2010 Constitution has also provided timelines for elections and how challenges to the presidential elections can be dealt with.

3.5 WHAT EFFECT DOES LIMITED PRESIDENTIAL POWERS HAVE IN THE RUNNING OF A STATE?

As earlier discussed, a president's powers are limited through checks and balances which allow each branch of government to keep the other two from abusing their influence. Just as U.S President James Madison once noted, "you must first enable the government to control the governed; and in the next place, oblige it to control itself."⁴⁷ Checks and balances also promote consistency in the rule of law because government policies are applied more consistently across different cases. This increases the number of independent people that have to agree to an action against a citizen, law or place.

However, checks and balances complicate the law making process and make it more time consuming. It can result to a stalemate among the three branches and can force the majority to give in to minority interests⁴⁸. The centres of power can collude if there interests happen to align as there are no statutory that prevent it. To the contrary, checks and balances are also not always effective especially when there is no political interest from all of the three branches of government.

⁴⁶ Article 141, *Constitution of Kenya (2010)*

⁴⁷ Federalist No. 51 (1788)

⁴⁸ <http://peopleof.oureverydaylife.com/pros-cons-checks-balances-11272.html> accessed on 10th January 2017

CHAPTER FOUR: FINDINGS ON WHY DEMOCRACIES FAIL AND THE LINK BETWEEN DEMOCRACY AND PRESIDENTIAL POWERS

4.1 WHY DO DEMOCRACIES FAIL?

This chapter explores seven hypotheses of why democracies fail by looking at institutional, societal and mediating variables as argued by Diskin. It also explores the link between democracy and presidential powers from a management, political and juridical perspective as argued by Sihanya.

4.1.1 Institutional Variables

Institutional variables address type of regimes and concentration of power⁴⁹. There are four institutional variables that help explain how and why democracies fail: - federalism, presidentialism, proportionality and constitutional weakness.

Federalism

Federalism is a system of government in which states or provinces share power with national government. e.g. United States of America. The opposite of federal governments is unitary governments. A unitary government has a central supreme government which is superior to subordinate local governments e.g. United Kingdom. There is no power sharing. Power is only held by the central supreme government.

Based on Diskin, I hypothesize that federal states are more prone to democratic collapse than unitary ones⁵⁰. A federal system denies that the national majority is the expression of the sovereignty of the people and instead replaces this majority with a more diffuse definition of sovereignty⁵¹. The universal power of ruling is called that which recognizes no ally, nor any equal or superior to itself⁵². And this supreme right to universal jurisdiction is the form and substantial essence of sovereignty⁵³. When this

⁴⁹ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, 'Why Democracies Collapse; The Reason for Democratic Failures and Success' (International Political Science Review 2005), Vol 26, No. 3, 291–309

⁵⁰ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, 'Why Democracies Collapse; The Reason for Democratic Failures and Success' (International Political Science Review 2005), Vol 26, No. 3, 291–309

⁵¹ Reginald Whitaker, *Federalism and Democratic Theory*, Institute of Intergovernmental Relations Queen's University, Discussion Paper No. 17 1983

⁵² Thomas Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?*, Publius 9:4 (1979) 9-42

⁵³ Thomas Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?*, Publius 9:4 (1979) 9-42

right is taken away, sovereignty perishes. This right of sovereignty does not belong to individual members, but to all joined together.

Presidentialism

Presidentialism is a system whereby the head of state is also head of government and leads an executive branch that is separate from the legislative branch. The opposite of a presidential system is a parliamentary system. A parliamentary system is a system of democratic governance where the executive branch derives its democratic legitimacy from the legislature and is also held accountable by that legislature. Essentially, the head of state is a different person from the head of government.

Based on Diskin, I hypothesize that presidential or semi-presidential regimes are more prone to democratic collapse than parliamentary regimes⁵⁴. Presidentialism lacks the confidence vote. Presidential governments are not likely to be supported by a majority of the legislature⁵⁵. Thus conflicts between the executive and the legislature would be common. Moreover, coalitions in presidential regimes are thought to be rare, due to the fact that nothing in the system would provide incentives for the politicians and their political parties to cooperate with one another and the government⁵⁶. Decision making under presidentialism is thought to be decentralized because the president just assents to bills forwarded to him by parliament. This may create room for politicians to push for their own self-interests rather than public interests.

Proportionality

Proportionality distinguishes cases in which electoral proportionality is low (Canada) from cases which electoral results preserve proportionality (Netherlands). Based on Diskin, I hypothesize that proportional electoral systems are more prone to democratic collapse than those with less proportionality⁵⁷. A more proportional system enhances voter confidence and smaller parties, minority and women are given their fair share of seats in Parliament. Moreover, a more proportional electoral system mitigates the

⁵⁴ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, 'Why Democracies Collapse; The Reason for Democratic Failures and Success' (International Political Science Review 2005), Vol 26, No. 3, 291–309

⁵⁵ Jose Cheibub, *Systems of Governments: Parliamentarism and Presidentialism*

⁵⁶ Jose Cheibub, *Systems of Governments: Parliamentarism and Presidentialism*

⁵⁷ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, 'Why Democracies Collapse; The Reason for Democratic Failures and Success' (International Political Science Review 2005), Vol 26, No. 3, 291–309

problem of wasted votes and is a more effective way to reduce the incentives for strategic voting and increase voter turnout.⁵⁸

4.1.2 Societal Variables

Malfunctioning economy

The economy is deemed to have malfunctioned when it fails to function properly. In this case I distinguish between cases with minor economic problems (Norway) and those with significant economic problems (Germany). Based on Diskin, I hypothesize that countries with weak or unstable economies are more prone to democratic collapse than those with stable economies⁵⁹. First, less economic activity means less competition in the marketplace which keeps prices higher and in turn, impacts the access of material goods⁶⁰. Secondly, less activity equals less people working. Therefore, living standards will be lower and there shall be high unemployment. Thirdly, less economic activity means less tax collection. This in turn impacts negatively upon the government's capacity to deliver services to improve the population's wellbeing which ultimately leads to democratic collapse.

Unfavourable history

Unfavourable history deals with historical experience, political culture, and the degree of development. Based on Diskin, hypothesize that countries with undemocratic or mixed historical backgrounds (Peru and Turkey, respectively) are more prone to democratic collapse than those with democratic historical, cultural, and civil societal backgrounds (Switzerland).

⁵⁸ Dr. Heather MacIvor, *Proportional and Semi-Proportional Electoral Systems: Their Potential Effects on Canadian Politics*, University of Windsor, April 23rd 1999

⁵⁹ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, ' *Why Democracies Collapse; The Reason for Democratic Failures and Success*' (International Political Science Review 2005), Vol 26, No. 3, 291–309

⁶⁰ <http://muds.org.au/stability-in-developing-nations/> accessed on 10th January 2017

4.1.3 Mediating variables

Government instability

Based on Diskin, I hypothesize that unstable governments, or governing coalitions (Fourth French Republic), are more prone to democratic collapse than stable governments (Germany post-Second World War)⁶¹. Governmental instability is an indication of an overall decline in stability resulting from other factors, which should be looked into by a state.

4.2 DEMOCRACY AND PRESIDENTIAL POWERS

According to Sihanya, democracy and presidential powers can be viewed in three approaches: - management, politics and a juridical/legal approach.

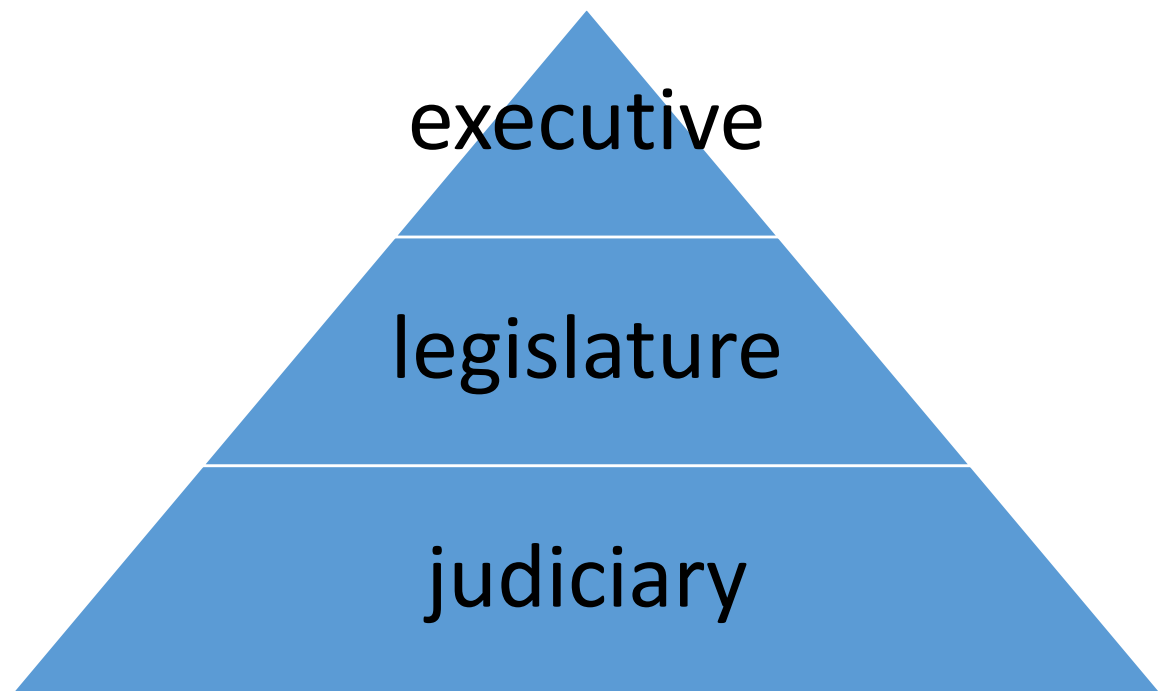
4.2.1 Bureaucracy as a management endeavour

Presidential powers can be viewed from the perspective of efficient management of public resources, power and affairs. Bureaucracy is a system of government in which most of the important decisions are made by state officials rather than elected representatives. Max Weber (1864-1920), is the 'father of the bureaucratic management theory.

From this perspective, the president sits at the top (executive), holds most power and oversees the efficient management of resources. All the other branches answer to the president (executive).

I therefore posit that, for democracy to work, the president should have checked power so that there is efficient management of both resources and the state.

⁶¹ Abraham Diskin, Hanna Diskin, and Reuven Y. Hazan, 'Why Democracies Collapse; The Reason for Democratic Failures and Success' (International Political Science Review 2005), Vol 26, No. 3, 291–309



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Figure 3 structure of government.

4.2.2 Bureaucracy as a political process

Presidential powers can also be viewed from the perspective of representation and participation through parliamentary and related policy making processes. All bills passed by parliament are forwarded to the president for assent. The president may assent to them without reservations or assent to them with reservations. In the latter case, she/he may forward the bill back to parliament which can accept the reservations before forwarding the bill to him/her. Alternatively, the president may refuse to assent to a Bill because he believes it does not lie align with public policy and public interest. The president can also issue executive orders which have the force of the rule of law.

I therefore note that democracy is majorly influenced by politics and so, the only way a democracy would succeed, is if the president has the power to influence politics in itself. Assenting and refusing to assent to bills passed by parliament is a way in which the president checks politics.

⁶² Appendix 3

4.2.3 The juridical approach

Presidential powers can also be viewed from the perspective of the government's adjudicatory function and fidelity to the constitution and the rule of law.

The Constitution of Kenya 2010 defers to parliament the role of making detailed legislation to bring constitutional provisions into effect. First, the constitution being a politically negotiated instrument, has latent ambiguities and ambivalence. These inadequacies are dealt with through legislative enactments and amendments by parliament in order to bring clarity and provide a proper and detailed substantive and procedural framework. Second, constitutional and public interest litigation sheds light on the interpretation of contradictory, ambiguous and ambivalent constitutional provisions. Third, administrative processes, e.g., decisions and policy making, are used to establish Kenyan constitutionalism (or constitutional values) as sources and benchmarks of constitutional law on Kenya's presidency and administrative bureaucracy.⁶³

The judiciary plays an increasingly significant role in setting out definitions that guide the operation of the Constitution. With its new and significant role in constitutional interpretation, construction, translation, implementation and development, the judiciary can develop jurisprudence that does not go beyond its mandate⁶⁴

I therefore observe that for democracy to flourish, the judiciary needs to come in and fill in the blanks set up by ambiguities and ambivalence in legislation. The judiciary also plays a key role in interpretation of the law. This helps us in understanding democracy as a concept and as a form of rule of law which is linked to presidency as earlier discussed in chapter three.

⁶³ Ben Sihanya, *The Presidency and Public Authority in Kenya's new Constitutional Order*, SID Constitution working paper series No 2

⁶⁴ Ben Sihanya, *The Presidency and Public Authority in Kenya's new Constitutional Order*, SID Constitution working paper series No 2

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This chapter summarizes the previous chapters and then makes the case for a hybrid approach to address the failures of democracies and the negative impact of limited presidential powers.

5.1 CONCLUSION

From the discussion in previous chapters, there is clearly an ambiguity in defining democracy as the power of the people. This ambiguity makes it difficult for scholars like David Held, to clearly state what democracy is and what it entails.

In Chapter three, I acknowledged that elections alone do not make democracy. With the current global trend of democratic collapse there is a need to analyze Africa's political landscape afresh. In chapter four, I explained the reasons why democracies fail. Using three variables suggested by Abraham Diskin, I noted the reasons as: - strong federalism, weak presidentialism, strong proportionality, malfunctioning economy, unfavourable history, government instability and constitutional weakness.

In Chapter three I drew a link between democracy and presidency through a system of government called presidential democracy. However, this required an understanding of the difference between checked and unchecked government and the effect that checked government has on presidential powers. As an illustration, I focused the lens on Kenya by carrying out a constitutional analysis on the presidency. This analysis focused on how the president's powers have been limited by the 2010 Constitution of Kenya and the subsequent impact on democracy and management of the state.

Based on my analysis, I concluded that democracy is not the best form of governance due to the observed trend of democratic collapse globally. However, when compared to other forms of governance, it has proven to work best. Checked government has the effect of limiting presidential powers and it can either be detrimental or beneficial to the state. I concluded that there is a higher likelihood of it being detrimental to the state because the president is compelled to allow certain negative actions to go unchallenged in the name of democracy. Awful acts like corruption, hate speech and incitement are perpetrated by the public based on their democratic right. This is not in line with the public good. A president needs to have sufficient executive control over his government and his state to promote order, development and integration in the best interests of the public.

5.2 RECOMMENDATIONS

Based on my research, I recommend a hybrid of democracy and dictatorship as the ideal form of governance. Through democracy, the people need to participate in the day to day running of their state through the process of making laws and elections. They also need to establish systems of check and balances which will allow them to hold their leaders accountable in management of public resources, development and issues of public interest. Additionally, a watered down version of dictatorship would ensure the president has the necessary control and power while running a state. We cannot have a country where politicians spread hatred amongst citizens, incite citizens to take up arms and kill each other while they seek refuge in other countries. Without such a hybrid approach: citizens find it appropriate to destroy other people's property arguing "it's my right to demonstrate"; judges refuse to leave office when their terms of service are over; politicians outwardly defame the president; teachers strike whenever they desire a pay rise; doctors on strike leave patients to die putting their self-interest above public interest; members of the executive steal land from public schools to expand their private businesses. This is unjust. A country should focus its energy on development instead of the negative outcomes of failed democracies and limited presidential powers.

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