



Fusion of Powers in Relation to Kenyan Presidential System

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Abstract

Fusion of powers is a political system where the executive and legislative branches of government are interconnected and share powers, often resulting in a more collaborative governance structure. The Constitution of Kenya envisages separation of powers with the head of government typically not being part of the legislature. Still there is greater integration between legislative decisions and executive actions. The fusion of executive and legislative powers in Kenyan Presidential system of government lacks strict party discipline for a political party not in government, as result of the government poaching members of parliament from other political parties in parliament. The study uses desktop research method to study. The research study indicates that fusion of power in Kenya can lead to more efficient decision-making and prompt action, but at the cost of granting much significant power to the executive branch of government.

Subject Areas

Law, Politics

Keywords

Fusion, Power, Executive, Legislature, Presidential, Government

1. Introduction

Fusion of powers exists when the executive arm and the legislative branches of government are amalgamated or blended. It tends to be a feature of parliamentary democracies like in the United Kingdom (UK) [1]. The Magna Carta (1215) began a process of reducing the English monarch's political powers, and Edward I adopted the "Model Parliament" in 1295, which included members of the clergy and aristocracy, and representatives from the different boroughs, cities and counties [2].

The term fusion of powers is believed to have been first coined in the mid-1860s by Walter Bagehot, a British journalist and constitutional expert [3]. He proclaimed that a ‘nearly complete fusion of executive and legislative powers’ was the ‘efficient secret’ of the English constitution [4]. The British political system is a constitutional monarchy in that sovereigns must exercise their powers within the limits prescribed by an established legal framework (a written or unwritten constitution) [5]. The system resembles a balance of powers more than a formal separation of the three branches of government. According to Waldron, separation of powers is often elided with the rationale of checks and balances and with the rationale of the dispersal of power [6]. It entails separation of the different functions of government—legislation, judicial, and executive.

The parliamentary system of government, involves a certain fusion of the legislative and executive arms of government [7]. The head of government in a parliamentary system (often called the Prime Minister or Premier in UK and Australia, or Chancellor in Germany and Austria) or President in South Africa is selected by the legislature, through a process of selection that can involve actual election by Members of Parliament (MPs) or selection by the majority party, or a coalition of parties, followed by appointment by a head of state often a monarch like in the UK, or a President as is the case of Germany.

In fusion of powers, the branches of the state are closely linked. The executive and legislature; the executive and judiciary; and the judiciary and legislature overlap and interact. For example, the Prime Minister is both head of the executive and generally the leader of the majority party in the legislature. This is because to form the government, a political party has to win more local elections than other parties to have the most Members of Parliament (MPs). This means the leader of that party will be the head of the Government, the Prime Minister, and will usually have the most MPs who can vote to pass laws in parliament.

Though Constitution 2010 established separation of powers between the legislative and the executive arms of government, the two arms are not distinct in their operations. This has been so due to the executive’s overwhelming influence over the legislatures through control of the MPs and the speakers of Parliament. In addition, Cabinet members appear before plenary of Parliament for oversight instead of just the parliamentary committees as envisioned in the Constitution.

In light of the above, the question that begs for an answer is: does Kenya’s post-2010 presidential system of government exhibit fusion of powers, and with what consequences? In answering this question, further secondary questions are posed throughout the work.

2. Literature Review

2.1. Kenyan Context

Kenya Constitution 2010 which replaced both the 1969 Constitution and the former colonial Constitution of 1963, established three arms of government: the legislature, executive and the judiciary in chapter 8, 9 and 10 respectively [8]. Though

the constitution envisioned a presidential system of government with complete separation of powers, this has not been the case.

The presidential system of government has its origins in the United States of America (USA) presidential system of government and its 1787 constitution [9]. The key characteristic of the American system is that the executive and legislature (Congress) are separate agents of the electorate, with President as both the head of state and the head of government and the Cabinet derives its authority exclusively from the President [10]. Cabinet selections in the country depend on previous experience in public service and are based primarily on political considerations (e.g. who are major Presidential campaign donors, education and/or work experience) while in Kenya Cabinet appointments for strategic ministries favor the President's ethnic group [11].

The Kenyan system is not characterized by a recognizable distribution of powers between the key arms of state along, say the American system. Rather it's an injudicious mix of elements of American presidential and British parliamentary democracy [12]. The coalition of parties supporting the President is assigned the majority party with no justifiable reasons in the National Assembly even with less elected members, and the majority coalition party is referred to as the minority. The terms majority-ruling party and minority-opposition are interchangeably used to refer to the same thing in the Kenyan context.

At independence, 1963, Kenya had a brief period of the Westminster system of government with a Prime Minister as head of government, and the Monarch of Britain, represented by the governor, as the head of state. Though this was quickly fused into the Presidency by 1964, the President and his cabinet were still members of Parliament either as elected or nominated members [13]. The President became the head of state and the head of the national executive. The Attorney General was also a member of the cabinet, ex-officio member of the legislature, and was also the public prosecutor. The first Senate at independence out of the negotiations of the Lancaster House independence constitution talks, hardly lasted for more than 3 years as it was abolished by the political elite who sought to concentrate power in the executive [14].

During the pre-1963 era, there existed a Legislative Council (Legco) with both elected and nominated members with the Monarch of Britain, represented by the governor, as the head of state. What informed the drafters of the 2010 constitution to choose the current fusion of power system?

The question of the fusion of powers has been given new relevance in Kenya by the question of constitutional reform and by the new constitutional questions under the Building Bridges Initiative (BBI) and the National Dialogue Committee (NADC). The tradition of fusion of powers is still with us with every subsequent administration. The executive has significant sway and influence over the legislature. Government bills are passed in parliament without much debate even as members of parliament are appointed into cabinet positions leading to unnecessary costly by-elections funded by the state. Is it time for Kenya to review its

promulgated 2010 constitution?

The President under article 132 of the constitution of Kenya, is required to address the opening of each newly elected Parliament, address a special sitting of Parliament once every year and may address Parliament at any other time [15]. This address is a form of fusion of powers, as the President's address is done and discussed in Parliament. There is the position of Prime Cabinet Secretary who is not an elected member of the National Assembly, but an appointee in the executive. The Prime Cabinet Secretary appears before the National Assembly to answer questions in accordance with standing Order 42(A) and (6) [16]. Cabinet Secretaries too, do appear before the National Assembly to answer questions from members of the National Assembly under the standing order 25A(b) and 40 [17]. Most of these changes were ushered in by the 2010 Constitution, which introduced a new system of government and new institutions in the country. The executive is present at the heart of the national parliament, as the overall functioning of a country's systems and institutional qualities depend on cooperation and consensus between the executive and the legislature. In light of the above, the question is: does the current arrangement safeguard political accountability?

In addition, the Speaker of the National Assembly and the Senate, are elected by a political party or coalition of members of political parties following a pre-election agreement [18]. The leader of majority in both Senate and the National Assembly, introduces government bills in the house as per article 108 [19]. The government has a majority of members of Parliament (obtained through poaching) who are led by a chief whip who is the political leader who ensures that party members attend the legislature and votes on legislation as the executive prescribes. This is attributed to majoritarian party politics and other informal mechanisms where the party or alliance of parties in power has little incentive to grant the opposition parties opportunities to participate in legislative affairs that the executive is proposing [20]. Kenyan state is that of 'equal opportunity' kleptocracy where anybody can 'eat', as long as they are prepared to be a sycophant and to spread the loot [21]. Kenya has had a regime under the control of an ethnic oligarchy that directly shape the structure of access to resources [22]. Those with political power concentrate on the promotion of the economic interests of their kinsmen and allies and playing factions against each other [23].

The Presidency ends up being powerful [24]. This leads to abuse of power [25]. MPs are bribed to vote for executive bills or opposition MPs are paid to stay away from Parliament during voting of executive sponsored bills [26]. Opposition MPs are appointed to the executive necessitating by-elections [27] [28]. Cabinet appointments are used as instruments of patronage [29] This has been brought about by weak party institutionalization, parties not grounded in ideology and ethnically and regionally-based political parties [30] [31].

2.2. Pros and Cons of Fusion of Powers

Fusion of powers exists when the executive and legislative branches of government

are intermingled. While it offers critical advantages such as preventing abuse of power and enhancing accountability, it also comes with challenges like gridlocks and an executive that is overreaching [32].

The constitution does not absolutely aim for a strict separation of powers, but opt for a compromise, where some functions are shared between the institutions of state. In Kenya, the powers of Parliament, Government and Judiciary are closely intertwined. In fact, the executive and legislature are seen as a 'close union, nearly complete fusion of the executive and legislative.

Under article 141 of the constitution, the president and his deputy, are sworn into office in public by the Chief Justice or Deputy Chief Justice who are judicial officials. The Prime Cabinet Secretary and the cabinet secretaries appear before the National Assembly and are able to respond to questions from the house. The Speaker, majority leader and party chief whip, are from the party in the executive and most executive bills are passed easily.

With fusion of powers the executive head of government and the cabinet secretaries depend for their continuation in office on the confidence of the legislature. Under article 145, a member of the national assembly with support of at least a third of the all the members, may move a motion for the impeachment of the President, while the Deputy President can be impeached under article 150 [33]. The executive officials can be removed from office as a result of a no-confidence vote by the Senate, and such a vote can be premised on mere political disagreement within the government as is the case of Kenya's Deputy President in 2024.

Change of governments is a common feature in Italy which has had 69 governments since the end of World War II in 1945 [34]. Israel has held five general elections between 2019-2022 due to divisions in government [35]. In the UK PM Margaret Thatcher resigned in 1990 over differences of joining the European Union (EU), while David Cameron resigned as Conservative Party Prime Minister after the Brexit referendum of 2016. Since then, three Consecutive Party PMs (Theresa May, Boris Johnson and Liz Truss) have been pushed out of office [36]. Australia has been able to change its PM six times from 2007-2022 [37].

In Kenya, responsible government initially emerged with the 2010 Constitution. Prior to this, appointment of cabinet members was a preserve of the executive. The constitution requires such an appointment to involve the legislature. Executive governing authority is limited by the constitution. Elected legislators have a say in executive and judicial appointments. This fusion of power leads to more efficient and responsible government but can also result in gridlocks as it happens in the USA from time to time when the House of Representatives and the Senate are controlled by different parties, or by a different party than the party of the president.

The executive passed the controversial 2024 finance bill despite strong opposition from the public led by Generation Z (Gen Z) protests. Despite the bill being unpopular just as the 2023 one, the executive was able to have its stalwarts pass the law in the National Assembly even as Parliament was torched.

Moreover, the executive depends either on the support of its party, if it has a

majority in the legislature, or on the support of a coalition of parties, if it has been necessary to develop a coalition to form a government [38] [39]. Since 2002, Kenya has had pre and post-election coalitions made up of multiple political parties. The executive has to take care of the interests represented by the various parties. Fusion of powers ensures that the executive takes care of diverse interests.

The supremacy of parliament is often viewed as characteristic of the fused powers system. After all, if parliament can elect to remove the head of government, it would seem to follow as a logical matter that parliament which is an elected body is supreme.

Central to Bagehot's argument was the idea that the cabinet had the dominant role in setting governmental policy [40]. Currently, members of cabinet appear in the national assembly or house committees. Some of the Cabinet Secretaries were appointed from the elected members of parliament. Though the members of parliament who joined the executive resigned from parliament, their inclusion in the cabinet promotes unity between the legislative and executive branches enhancing fusion of powers.

The executive, through its cabinet secretaries is fully accountable to the legislative branch. Given this reality, public servants can benefit greatly from a deeper understanding of the legislative branch to which their cabinet secretary is accountable. When cabinet secretaries appear before house committees, they are normally accompanied by public servants who work under them are involved in day to day implementation of government policies. Public service provides non-partisan policy advice and implements government decisions. Public servants move between these two branches much more freely than. This leads to an empowered bureaucracy, with useful insight into the legislative branch, legislative process and political acuity. House committees offer an air of democratic legitimacy to the policy review process by subjecting proposals to scrutiny by opposition, witnesses and members of the public.

Typically, fusion of powers enhances harmony between the institutions of the state. Fusion of powers between the executive and legislature provides stability and efficiency in the operation of government. In Kenya, the executive is made up of the President, Deputy President and the Cabinet Secretaries. The executive formulates and implements policy. The legislature is made up of the elected and nominated members of the senate and the national assembly. Some of the members of parliament are also members of political party or coalition of parties of the President and the Deputy President. The President being a leader of the party or coalition of parties, he is able to have leverage over members of his party or coalition giving him more freedom and action.

Under fusion of powers, the legislature may delegate law-making powers to the executive, through powers to draft secondary or delegated legislation. This can liberate Parliament from the need to scrutinize small technical details, while maintaining the safeguard of Parliamentary approval. The executive is able to introduce legislation to Parliament with the support of its MPs or it can be given powers for

subsidiary legislation. In this way, fusion of powers enhances reciprocity.

Under fusion of powers, there are sufficient procedures in place to ensure that the executive does not dominate Parliament. Bills from the government are sufficiently scrutinized and either endorsed or rejected by the legislature. The executive members do not participate in parliamentary debates. The Prime Cabinet Secretary and Cabinet Secretaries only appear before the house committees when they are required to, and answers questions in parliament once a week. The constitution of Kenya has also set a limit on the number of Cabinet Secretaries the President can appoint.

Fusion of powers between the legislature and executive may actually facilitate scrutiny provided that the necessary procedures are in place are far from separate powers in Parliament. The question time for Prime Cabinet Secretary and the Cabinet Secretaries is a powerful procedure for holding the executive to account. It eliminates gridlocks between the executive and the legislature. The executive is able to persuade parliament to pass its legislation faster.

The judiciary comprises the judges in the courts of law, those who hold judicial office in tribunals, the magistrates, court martials, and the *Kadhis*. Senior judicial appointments are made by the President who is from the executive, on the recommendation of the Judicial Service Commission (JSC). This kind of fusion of powers is intended to have an independent judiciary.

Judges do not legislate but they interpret legislation. The judiciary does not usurp the powers of the legislature to make laws. The judiciary formulates principles while the legislature is concerned with policy. Under fusion of powers, legislature may give tacit approval to judge-made law by not interfering with it. No court order could restrict or prohibit Parliamentary debates with *sub judice* rule guarding against Parliamentary interference in court proceedings.

Under fusion of powers, the judiciary scrutinizes any delegated legislation to ensure the executive actions are consistent with the scope of power granted by the legislature. The judiciary ensures the legality of government action and the actions of other public entities.

3. Methodology

The study is a narrative that uses desktop research study method. The relevant keywords were used for literature review and search from various databases to generate qualitative data for overview. Articles reviewed include the independence Constitution, 2010 Constitution, peer reviewed political science and historical articles. The suitability of desk top research is based on its ability to facilitate in-depth study as well as its flexible nature. Qualitative data collected from the desk top research was analyzed using content analysis.

4. Discussion

The 2010 Constitution which replaced both the 1969 Constitution and the former colonial Constitution of 1963, came with an array of reforms including Chapter

Seven on Representation of the people to address the issue of representation in the country. The type of representation Kenya opted for defines clear areas of responsibilities for both government and Parliament. This makes it essential for the executive to seek the cooperation of the legislature if it is to work well.

Fusion of powers is intended to have checks and balances in place to ensure that no branch of government has too much power over the other. For example, in Kenya, unlike the 1963 and 1969 Constitutions, the 2010 Constitution requires major presidential appointments to be done in conjunction with the legislature. the legislature keeps check on the executive through the Prime Cabinet Secretary question and answer sessions, Cabinet Secretaries questions time, MPs debates and investigations by house committees.

Despite the key role the fusion of legislative and executive branches plays in our system of government, there is a growing risk for the executive to muzzle the legislature which in turn provides partisan policy oversight and implements government decisions and the legislative agenda without strong scrutiny and debates. The legislature, the institution that directly wields the people's power, would demand that the executive abide by the law, but no. They are there and willing to rubberstamp the executive orders more so than not, without making the process an inclusive legislative affair. This has led to the usurping of Parliament's power by the Executive and showing it contempt, despite Kenya's progressive 2010 constitution.

The judiciary has been able to successfully limit executive or legislative overreach. The Judiciary has ruled multiple bills and amendments unconstitutional, for example the Finance Bill 2023, [41], the Privatization Act, 2023, [42] the Constitution of Kenya Amendment Bill, 2020, Building Bridges Initiative (BBI) [43].

5. Conclusion

The fusion of the executive and legislative branches of government is perhaps the defining component of the Kenyan ruling coalitions. Thus, the executive is constantly subjected to scrutiny at the hands of legislators who are representatives of the people, though the executive has a direct influence on governance and policy-making over the legislature. The Judiciary through its ruling, has been able to ensure the executive and legislature, adheres to the constitution.

Conflicts of Interest

The author declares no conflicts of interest.

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