The Broken Promise: Kenyatta's Love for Abusive Constitutionalism and Imperial Presidency

By Joshua Malidzo Nyawa*

***All this can happen again, soon*[1]**

Introduction

Robert Ludlum's *Parsifal Mosaic* novel is set during the cold war. Michael Havelock's girlfriend (Jenna Karas) is killed by his colleagues at CIA because she is believed to be an agent of KGB. As a result, Michael resigns and goes sightseeing. Strategists for consular operations of the US government decide that he is a paranoid schizophrenic and must be terminated, lest he compromise entire networks across Europe. During the meeting, the idea of terminating his life is opposed by the attorney because the constitution grants everyone protection and the following discussion ensues

> Ogilvie: A few screaming freaks with political hatchets and outsized egos. They are not worth it''
>
> Attorney: The law says they are. The constitution says they are
>
> Ogilvie: *'Then fuck the law, and let's put a couple of holes in the constitution. I'm sick to death of its being used by loud-mouthed, bushy-haired smartasses who mount any cause they can think of just to tie our hands and draw attention to themselves. I've seen those rehabilitation camps, Mr. Lawyer, I've been there*.'

Ogilvie's words can be understood in Scheppele's conception of 'autocratic legalism"[2]. Autocratic legalists to him are charismatic leaders who come to power through the law but however use the law to dismantle the constitutional systems that they inherited. They can take different routes but commonly is the fact that they will try 'to consolidate power and to remain in office indefinitely, eventually eliminating the ability of democratic publics to exercise their basic democratic rights, to hold leaders accountable, and to change their leaders peacefully'. He notes further that because

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[1] Pheroze Nowrojee, 'The Legal Profession 1963-2013: All This Can Happen Again – Soon' in Yash Pal Ghai And Jill Cottrell Ghai (eds), *The Legal Professions and the New Constitutional Order in Kenya* (Strathmore University Press, 2014)

[2] Kim Lane Scheppele, Autocratic Legalism (2018) 85 *The University of Chicago Law Review* 544

these legalistic autocrats use the law to achieve their aims, an impending autocracy will not be easy to notice. Put it differently, Unlike in the past when dictators would come to power through military coups, today's dictators come to power through elections (and in most of the times, they are elected by the majority), unlike in the yester-years where the dictators would promise to dismantle the constitution, the would-be dictators of today promise the realisation of human rights. The would-be dictators actualize their goal (s) through the legal ways. They choose this way because in most of the circumstances the citizens would not easily point out these dictatorial acts. Make no mistake, the intention is similar. Just like the then dictators whose regimes were marked by the 'retention of clientelism, the centralization of power in an executive, the displacement of the party by a bureaucracy answerable to the head of state, and the downgrading of representative institutions[3], the todays would-be dictators are seeking to achieve the same purpose.

Unlike the pre-2010 constitutions which created an architecture of power that not only made multi-partyism difficult but also prevented a transition from the imperial presidency which was prevalent then to a constitutional democracy[4], When Kenyans promulgated the 2010 constitution, they gave to themselves the promise of a 'New kenya'[5] by unchaining themselves from the past memories. The 2010 constitution which can be described in D. Elazar's term an "eminently political act,"[6] draws on past experiences and future aspirations. I would add that as political act, the constitutions tells the leaders and Kenyans the *Dos and Don'ts*. The past experiences and future aspirations therefore constitute 'the promise', the promise of 'never again' and the promise of walking to a better society. In the conceived New Kenya, Kenyans were unchaining themselves from imperial presidency, from Nyayoism and Kenyattaism. This is the promise that the 2010 constitution gave them. The High Court in *Dennis Mogambi Monga're* summarizes the promise as '' [w]hen the people of Kenya voted in favour of the Constitution, they made a decision to make a break with the past and bring in a new constitutional dispensation on the basis of the values and principles set

[3] Allen, C, 'Under-standing African Politics' (1992) Review *of African Political Economy*, 65.
[4] See Godwin R. Murunga, Duncan Okello and Anders Sjögren, 'Towards a new constitutional order in Kenya: an introduction' in Godwin R. Murunga, Duncan Okello and Anders Sjögren (Eds), *Kenya: the struggle for a new constitutional order* (Zed Books, London, 2014)
[5] New Kenya is a term borrowed from the conceptualization of the country after the promulgation of the new constitution by President Mwai Kibaki , see The Promulgation Speech by HE Hon Mwai Kibaki during the promulgation of the Kenyan Constitution on 27 August 2010 http://english.alshahid.net/archives/11884
[6] D. Elazar, "Constitutional-Making; The Pre-eminently Political Act," in K. G. Banting and R. Simeon, *Redesigning the State: The Politics of Constitutional Change* (Toronto: University of Toronto, 1985).

out in the Constitution".[7]. A promise that they expected to be honoured by every president who would be elected under the constitution. At the center of the 2010 constitution is the idea that human beings will always act selfishly and abuse power. Therefore, Kenyans constitutionalized restraints and checks and balances in order to 'prevent lapses into an authoritarian or even totalitarian system cloaked with populist trappings'[8]. The 2010 constitution as Prof Yash says, puts serious restrictions on the authority of the government and prescribes how it must exercise the powers of the state[9]. The dream of the New Kenya was eloquently summarized by the high court in Federation of Kenya Women Lawyers (FIDA-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] eKLR where a three-judge bench expressed itself *inter alia* as follows:

> Only last year and in our early maritime history we constructed a great ship and called it our new Constitution. In its structure we put in the finest timbers that could be found. We constructed it according to the best plans, needs, comfort and architectural brains available. We tried to address various and vast needs of our society as much as possible. We sent it to the people who ratified it. It was crowned with tremendous success in a referendum conducted on 4th August 2010. We achieved a wonderful and defining victory against the "REDS". We vanquished them. The aspirations and hope of all Kenyans was borne on 27th August 2010. We achieved a rebirth of our Nation. We have come to revere it and even have an affection for it. We accomplished a long tedious, torturous and painful chapter in our history. We all had extraordinary dreams. It is a document meant to fight all kinds of injustices. It is the most sophisticated weapon in our maritime history. As Kenyans we got and achieved a clean bill of constitutional health.

Willy Mutunga[10] describes the vision of the 2010 constitution in this way

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[7] *Dennis Mogambi Monga're* para 53.

[8] See Walter F murphy, 'constitutions, constitutionalism and Democracy' in Douglas Greenberg *Et Al, Constitutionalism and Democracy Transitions in The Contemporary World* (Oxford University Press, 1993) 3-25.

[9] See Yash Pal Ghai, 'Constitutions and constitutionalism: the fate of the 2010 constitution' in Godwin R. Murunga, Duncan Okello and Anders Sjögren (Eds), *Kenya: the struggle for a new constitutional order* (Zed Books, London, 2014)

[10] Willy Mutunga,' Developing Progressive African Jurisprudence: Reflections from Kenya's 2010 Transformative Constitution', a paper presented at the 2017 LAMECK GOMA ANNUAL LECTURE held at Lusaka, Zambia on July 27, 2017 ; See also Willy Mutunga, The Vision of the 2010 Constitution of Kenya Keynote Remarks on the occasion of celebrating 200 years of Norwegian Constitution University of Nairobi May 19, 2014 where he noted that

> That oppressive constitutional outlook was dismantled in 2010, with the emergence of a democratic constitutional order following a referendum many years after the first political opening in 1992. At the heart of it, the making of the Kenyan 2010 Constitution is a story of ordinary citizens striving *and succeeding* to reject or as some may say, overthrow the existing social order and to define a new social, economic, cultural, and political order. Some have spoken of the new Constitution as representing a second independence. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 54 years of independence[11]

The desire for a new Kenya (the rebirth) explains why the Kenyans rejected the 2005 constitution draft [12] which had the effect of reintroducing the imperial presidency (the draft had retained the powers in the presidency)[13]. The then lead opponent of the draft constitution described the problem with the draft in the following words 'The power of the President has not been devolved. Instead, power has been concentrated on the President'[14]. The dream to do away with an overreaching

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> There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence. In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development; among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution.

[11] See also Linus Mwangi, 'The 'Dying' Oracles of the Law and the Looming Resurrection of Dugdalian Jurisprudence' Available at https://thealchemyofatransformativeconstitution.wordpress.com who argues that

> *"If the Constitution of Kenya 2010 is transformative; if it is inherently activist; if it eschews authoritarianism and embraces the culture of justification in decision making; if it discards the traditional strict disjunction between law and politics; if it approbates interdependence while reprobating absolutism in the functioning of the three branches of government; if it contemplates a substantive conception of the principle of separation of powers; if it bridges our dark past and promises to delivers us to a holistically democratic and egalitarian society; if our Constitution is supreme and reigns above all, where can the above sentiments by aspiring candidates to the position of CJ find refuge?"*

[12] See Kenyans Reject New Constitution, BBC NEWS, Nov. 22, 2005, http://news.bbc.co.uk/2/hi/africa/4455538.stm.

[13]For further discussion, see Daniel Branch & Nicholas Cheeseman, 'The politics of control in Kenya: Understanding the bureaucratic-executive state, 1952–78', (2006*) Review of African Political Economy*.

[14] 'Too Much Control Vested in the President', *Daily Nation*, 12 October 2005).

president can be seen in the Kenyan Commission of Inquiry (the Waki Commission) which noted as follows:

> The attempt to reduce the personal power [of the presidency] that had been accumulated by former President Moi initially was the reason opposition forces sought to introduce the post of prime minister)[15]

Although the 2010 constitution is different from the 2005 draft, little has been achieved and as prof Yash had earlier predicted that some presidents would see the constitutions as mere rhetoric, this is what the 2010 constitution is to president Kenyatta.[16] Relatedly is the old soviet joke that Tom Ginsburg and Alberto Simpser remind us in their *Constitutions in Authoritarian regimes* that when a man goes to a restaurant, surveys the menu and orders for chicken. He is told that there is no chicken and same happens for all the dishes in the menu until he gets upset and says "I thought this was a menu, not a constitution." The joke according to them captures the usual perception of dictatorial constitutions as meaningless pieces of paper, without any function other than to give the illusion of legitimacy to the regime[17] but don't be shocked when those who look at the law as if it does not count when they embrace the same when it *suits their fancies*[18].

No matter how you look at it, the current president is wearing what the Nigerian scholar, Ochereome Nnanna, called a dictatorial toga[19] or let's say that Kenyatta has unfortunately fallen to the autocratic temptation[20]. He is quickly destroying all the gains that Kenyans had made before he came to power. Don't look further, since he came into power in 2013, his *modus operandi* has been to destroy and do away with all checks and balances. Not muzzling the registrar of civil societies who attempted to deregister civil societies, Militarization of Nairobi county, attempt to control and direct the constitutional commissions, branding the Judiciary as Wakora and now cooptation of the opposition through the famous handshake and the problematic use of Executive

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[15] Republic of Kenya. 2008. Report of the Commission of Inquiry into Post-Election Violence. Nairobi: Government Printer at Pg. 30.
[16] Y. P. Ghai, "The Rule of Law: Legitimacy and Governance," (1986) *International Journal of the Sociology of Law* 179-208.
[17] Tom Ginsburg and Alberto Simpser, 'Introduction: Constitutions in Authoritarian Regimes' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) at Pg. 1
[18] Patricia Kameri Mbote and Migai Akech, 'Kenya; Justice Sector and the Rule of Law', (2011) *Open Society Foundations* at Pg. 55-56
[19] Ochereome Nnanna, *Is presidentialism a given?*, VANGUARD, Feb. 28,2005, *available* at http://www.vanguardngr.com/articles/2002/columns/peopleandpolitics/pp28022005.html.
[20] Carnes Lord, *The modern prince; what leaders need to know now* (2003)

orders. Unlike his predecessors who would fight the opposition though criminal prosecutions, today it's a different game altogether, As Aili Mari reminded us "The old-style personal dictatorships that ruled Africa with impunity are virtually nonexistent today. [African] authoritarianism has 'softened'[21].

Although the present generation of leaders were expected to "take the lead in dismantling the imperial Presidency"[22], Kenyatta has shown to anyone who cares to listen that he is not ready to do that. He is ready to do away with the vision of a new kenya if the same will stop him from being an imperial president or from creating what has been termed as a 'bureaucratic executive' state and entrenchment of bureaucratic authoritarianism'[23]. Put it differently, Kenyatta has a vision for Kenya, the vision is however not in tandem with the 2010 constitution, his vision is to rule Kenya like the princes and potentates of the past times did[24]. Kenyatta's vision is however in tandem with what happened during the Peloponnesian war where it is said that during the age of Pericles, democracy was in name only but in actuality it was a rule by a single man [25], Kenyatta has made it clear that he wants to rule like the traditional monarchs or rather like the "late-flowering medieval monarchs."[26]

In this paper, I will show how President Kenyatta has made several attempts in establishing a bureaucratic authoritarian regime (also referred to as imperial presidency in this paper). Such a regime is defined by Cardozo to contain the following elements, Firstly, in such a regime, the relations of power are organised in favour of the presidency. Secondly, there is elimination or sharp reduction in the role of the legislature. The 'links between civil society and the bureaucratic-authoritarian regime are achieved through the cooptation of individuals and private interests into the system'[27]. In addition, I will show you that the current president does not have a legal and/ or moral leg to stand on in his blatantly dictatorial or would be authoritarian practices.

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[21] Aili Mari Tripp, *The Changing Face of Authoritarianism in Africa: The Case of Uganda,* 50/3 AFRICA TODAY 2
[22] See Ellen Johnson Sirleaf, *The Challenges of Leadership in Post-Conflict Africa: The Case of Liberia,* The 2006 Oppeinheimer Lecture at the International Inst. For Strategic Studies, London (May 31, 2006), *available at* http://www.iiss.org/conferences/recent-key-addresses/oppenheimer-lecture---ellen-johnson-sirleaf
[23] Berman, B. & J. Lonsdale, 'Coping with the Contradictions: The Development of the Colonial State, 1895-1914', in B. Berman & J. Lonsdale, *Unhappy Valley: Conflict in Kenya and Africa,* (Oxford: James Currey, 1982) at 144
[24] See Carnes Lord, *The modern prince; what leaders need to know now* (2003)
[25] Donald Kagan, *Pericles of Athens and the Birth of Democracy* (New York: Free Press, 1991).
[26] C. Achebe, *Anthills of the Savannah* (London: Heineman, 1988).
[27] Cardoso, F.H., 'On the Characterization of Authoritarian Regimes in Latin America', in D. Collier (ed.), *The New Authoritarianism in Latin America, (*Princeton: Princeton University Press 1979) at 37-41

Imperial presidency in post-colonial Kenya, 1964-2002: Jomo Kenyatta and Daniel Moi

The term imperial presidency is borrowed from Arthur M. Schlesinger, Jr who uses the term to describe "the shift in the constitutional balance" in the United States in favor of "presidential supremacy," which has come about through "the appropriation by the Presidency, and especially by the contemporary Presidency, of powers reserved by the Constitution and by long historical practice to Congress." [28]

When kenya gained its independence, like other African countries, they chased away the whites but forgot to do away with their practices or rather put it differently Kenyans did not do away with their 'authoritarian colonial heritage'. In kenya, the powers of the colonial governor were transferred to the president. While discussing the transfer of these powers, Gertzel wrote that

> by the middle of 1968 the executive in independent Kenya enjoyed the position very similar to that of the executive during the days of colonial rule. The President occupied a position very much akin to that of the Governor, both in the scope of his powers and in the manner in which he could call upon the provincial administration to ensure Central Government control [29]

Everything would revolve around the presidency. When Kenyatta took over, he entrenched the culture of executive supremacy (bloated executive), muzzled the judiciary and the legislature and empowered the provincial administration. Moi came with 'Fuata Nyayo' which not only sustained the Kenyatta's executive supremacy but also embodied the imperial presidency (The Moi regime left a mongrel executive). In kenya, we had a one all-powerful presidency[30], which used constitutional amendments to entrench authoritarianism. For instance, in 1964, after coming to power, Kenyatta was dissatisfied with the restricted powers (the governor was required to share the powers with the prime minister), he lobbied the parliament to abolish the two posts and merge

[28] Arthur M. Schlesinger, Jr., The Imperial Presidency viii (1972); see also Bruce Ackerman, 'The Rise of World Constitutionalism', (1997) 83 *VA. L. REV*. 771.
[29] Gertzel, C., M. Goldschmidt & D. Rotchild (eds.), *Government and Politics in Kenya: A Nation Building Text,* (Nairobi: East African Publishing House 1969) at Pg. 171
[30] Peter Kagwanja, 'Kenya: The Prime Minister Is Back, Its Time to Build an Inclusive Democracy', https://allafrica.com/stories/201912010026.html

them into a single presidency [31], later on he lobbied for the abolishment of the senate and finally abolished regionalism.[32]

The Moi-Kanu era was not any different, Infact Prof Ojwang (former supreme court judge) argued that the president had extra-judicial powers. This is to mean that the president in Africa unlike in the west derive their legitimacy and 'lawful authority to rule and rein extra-juridically'[33]. Simply put, the central thesis was that the president could act outside the remit and realm of Kenya's law and the same would be justified and therefore legitimate. Like his predecessor, Moi picked from where Kenyatta had left and embarked on a process of strengthening the imperial presidency. To start with, in 1982, Moi spearheaded a constitutional amendment making Kenya a De jure state, later on strengthened the security apparatuses before enhancing the personality cult around the him. He would also use draconian laws to ban civil societies that were opposed to his governance[34]. In summary, the two reigns were characterized by the centralization of power in the presidency, the personalization of the institution of the presidency [35], a controlled provincial administration [36], deployment of criminal law to silence opposition[37]

The imperial presidency was aided by both the parliament, and the courts. The two presidents (Kenyatta and Moi) made the MPs dependent on executive patronage[38] in many ways *interalia* by ensuring that development was only done in the constituencies where the MPs supported the Kanu party while leaving the other areas undeveloped. The other way was by giving handouts to cooperative MPs or giving them the ministerial positions. The judiciary on the other hand aided the imperial presidency by implementing what Prempeh[39] refers to as the "jurisprudence of

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[31] Zareen Iqbal, 'Kenya's New Constitution: Erasing the Imperial Presidency', Available at http://iijd.org/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency

[32] Paul Tiyambe Zeleza, 'The protracted transition to the Second Republic in Kenya' in Godwin R. Murunga, Duncan Okello and Anders Sjögren (Eds), *Kenya: the struggle for a new constitutional order* (Zed Books, London, 2014)

[33] See Ahmednasir Abdullahi, SC, JB Ojwang: the man, the myth and the reality

[34] See Paul Tiyambe Zeleza 'The protracted transition to the Second Republic in Kenya' in Godwin R. Murunga, Duncan Okello and Anders Sjögren (Eds), *Kenya: the struggle for a new constitutional order* (Zed Books, London, 2014)

[35] Tamarkin, M, 'The roots of political stability in Kenya' (1978) 77 *African Affairs* 297–320.

[36] Branch, D. and N. Cheeseman 'The politics of control in Kenya: understanding the bureaucratic–executive state, 1952–78'. (2006) *Review of African Political Economy* 11–31.

[37] Mueller, S. D. 'Government and opposition in Kenya, 1966–1969'. (1984) 22(3) *Journal of Modern African Studies* 399–427.

[38] Daniel Branch & Nicholas Cheeseman 'The politics of control in Kenya: Understanding the bureaucratic-executive state, 1952–7', (2006) *Review of African Political Economy* 11-31.

[39] H. Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa', (2008)35 *Hastings Const. L.Q.* 761.

executive supremacy'' to mean a jurisprudence that regards the 'state' (personified in an omnipotent chief executive), not a supervening constitution as the source, juridically speaking, of all 'rights' and 'freedoms"[40]. Therefore, the constitution did not matter but the president mattered. In this era, the bill of rights could be violated by the executive at will. This resulted in what Kathurima (now Court of Appeal judge) referred to as the "bills of exceptions."[41]

The rejection of any constraint on the powers of the president has always been two-fold. Firstly, the presidents have compared themselves to the traditional chiefs to make the argument that the traditional chief was in charge of everything and his powers were unconstrained. He would make decisions without consulting and the same would be enforced without questions. This is because the system of checks and balances is seen as foreign to Africa. Simply it is not ours, it is for the whites. Arthur Lewis puts this point across very eloquently, that "As for our political scientists, they fall all over themselves to demonstrate that democracy is suitable only for Europeans and North Americans, and in the sacred names of 'charisma,' 'modernization' and 'national unity,' call upon us to admire any demagogue who, aided by a loud voice and a bunch of hooligans, captures the state and suppresses his rivals."[42] For instance, the presidents who came after colonialism were given specific names to demonstrate that they are responsible for national unity or for bringing independence to their countries. An example is worthy here. In Kenya, the president was referred to as 'Mzee Kenyatta', no one was expected to oppose him because he was thought to know better and deserved respect. Anyone opposing him was therefore disrespecting 'Mzee'. Murunga [43] argues that then, reference was no longer to the state but the Kenyatta or Moi state and further it was even a treasonable act to imagine the death of the president[44].

Secondly, that the president is in charge of the economic growth of the country and as such, he should be left (unchecked) to develop the country. Mwalimu Nyerere (Tanzanian's first president) formulates this argument so well in the following words

[40] H. Kwasi Prempeh, 'A New Jurisprudence for Africa' in Larry Diamond & Marc F. Plattner (eds)., *The Global Divergence of Democracies* (2001) at Pg. 260, 266
[41] Kathurima M'inoti, *Why the Kenyan Bill of Rights Has Failed,* EXPRESSIONS TODAY (Nov. 1998)
[42] W. Arthur Lewis, Politics in West Africa (1965) 89
[43] Murunga, G. R. 'The state, its reform and the question of legitimacy in Kenya' (2004) 5(1&2) *Identity, Culture and Politics*, 179–206.
[44] Tamarkin, M. 'The roots of political stability in Kenya'. (1978) 77(308) *African Affairs* 297–320.

> We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a straitjacket of constitutional devices—even of our own making. The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution.[45]

I don't find this speech surprising. Earlier on in 1962, in his paper *How much Power for a Leader?* President Nyerere rejected the system of checks and balances in favour of economic development of the country by arguing that

> Our Constitution differs from the American system in that it avoids any blurring of the lines of responsibility, and enables the executive to function without being checked at every turn. For we recognize that the system of 'checks and balances' is an admirable way of applying the brakes to social change. Our need is not for brakes-our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistances which are inherent in all societies.[46]

However, it has been shown that imperial presidency/dictatorship/bureaucratic executive does not in any way guarantee efficiency or enhance the government's performance. Unfortunately, the opposite occurs. By the mere fact that powers are consolidated around one person, this does not guarantee development, instead, such an administration is characterised of maladministration, run away corruption and human rights violations. Kenyans can testify to this fact. The reign of Kenyatta, Moi and now uhuru has been marked by corruption scandals (Goldenberg, Maize, Nys 1 and 2), land grabbing cases, poaching, environmental degradation, Nepotism, patrimoniasm, Ethnic clashes and ghost projects. This argument is well summarized by Carnes in the following words

> This is the explanation of the paradox of a strong and stable executive who, however, is unable to govern well. By his excessive weight, the president prevents his ministers from doing it, and however great his own intelligence may be, it's not sufficient to allow him to

[45] J. K. Nyerere (in a speech to Parliament), reproduced in R. Martin, *Personal Freedom and the Law in Tanzania* (Nairobi: Oxford, 1974).
[46] Julius Nyerere, *How much Power for a Leader?* 7 AFR. REP. 5 (1962).

> do it by himself. But he doesn't see that the whole problem stems from him, and so attributing setbacks to the ineptitude of the ministers, he reduces them more and more to inaction, concentrating all the time in his own hands powers he is less and less capable of exercising[47].

In some countries however, the presidents do not reject constitutions that impose the checks and balances, they accept the constitutions but they don't adhere to them hence Prof H.W.O Okoth Ogendo makes the conclusion that what was happening in Africa was 'constitutions without constitutionalism'[48]. Although the leaders allow the adoption of constitutions which promises rights and checks and balances, there is no commitment towards realising this.

Kenyatta's invention of Autocratic (Abusive) Constitutionalism (Legalism) and Re-invention of Imperial presidency

Despite the promulgation of the new constitutions in Africa (especially the Kenya's 2010 constitution) which promised the doing away of the past ills and the yester-years imperial presidency, the unfortunate position however is that imperial presidency persists. As Carnes Lord observes that '[T]he general trend in democracies today seems to be in the direction, if anything, of a further strengthening of the executive element, especially at the expense of legislatures" and Gary Rosen adds that *''*Around the world, the imperial presidency appears to be alive and well." It is this unfortunate position that Kenyatta 2 is struggling to return us to. Kenyatta 2 is however a good student of L.P Mair. Unlike his two predecessors (His father and Moi) who would strangle their political enemies though arrests and trials (The famous Nyayo cells and 'Kangaroo trials')[49], the current president has learnt a lesson from Mair who advised that 'The crucial problem for the new governments seems likely to be how to be authoritarian enough to maintain stability and carry

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[47] Carnes Lord, *The modern prince; what leaders need to know now* (2003)

[48] H.W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Douglas Greenberg *Et Al, Constitutionalism and Democracy Transitions in The Contemporary World* (Oxford University Press, 1993)

[49] See Pheroze Nowrojee, 'The Legal Profession 1963-2013: All This Can Happen Again – Soon' in Yash Pal Ghai And Jill Cottrell Ghai (eds), *The Legal Professions and the New Constitutional Order in Kenya* (Strathmore University Press, 2014) at Pg. 35 who describes this tool in the following words

> The use of criminal charges to get rid of political opponents was a constant feature of the Kenyatta and Moi years. This too was to be camouflaged by following the forms of a fair trial, such as open courts, defence counsel, and statutory court procedure. But, the 'fair' process was always subverted by the State having first ensured a pre-determined conclusion and conviction by managing that such cases were only placed before compliant magistrates and judges

through their modernizing policies, and yet not so obviously oppressive as to provoke active or passive resistance."[50]

Kenyatta cannot be said to be a pure authoritarian. An authoritarian is one who rejects human rights entirely and is governed by unconstrained powers [51], his is not that of military coup but rather a constitutional coup (abusive constitutionalism)[52]. In an abusive constitutionalism, the president uses means to control the branches of government and the horizontal accountability mechanisms that would keep him in checks. Levitsky and Ziblatt [53] in their recent launched book, *How democracies die* note that democracies today do not die at the hands of generals but of elected leaders (presidents or prime ministers) who subvert the very process that brought them to power, this might be quickly in some countries but may take a slowly approach and in barely visible steps in others[54]. Today, military rule, blatant dictatorship has disappeared but the same has taken a different route[55]. They argue thus

> Many government efforts to subvert democracy are "legal," in the sense that they are approved by the legislature or accepted by the courts. They may even be portrayed as efforts to *improve* democracy—making the judiciary more efficient, combating corruption, or cleaning up the electoral process. Newspapers still publish but are bought off or bullied into self-censorship. Citizens continue to criticize the government but often find themselves facing tax or other legal troubles. This sows public confusion. People do not immediately realize what is happening. Many continue to believe they are living under a democracy ……Because there is no single moment—no coup, declaration of martial law, or suspension of the constitution—in which the regime obviously "crosses the line" into dictatorship, nothing may set off society's alarm bells. Those who denounce government abuse may be dismissed as exaggerating or crying wolf. Democracy's erosion is, for many, almost imperceptible (at page 10)

[50] L.P. Mair, 'Social Change in Africa', (1960)36 *INT'L AFFAIRS* 447, 456
[51] See Mark Tushnet, 'Authoritarian Constitutionalism: Some Conceptual Issues' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) at Pg. 36.
[52] B Basheka and Christelle J Auriacombe, 'Abusive Constitutionalism in Africa: A Threat to Efficient and *Effective* Public Administration Systems?' (2019) 11(2) *African Journal of Public Affairs*.
[53] Levitsky Steven and Ziblatt Daniel, *How democracies die* (New York: Crown Publishing, 2018)
[54] Ibis at Pg. 8
[55] Ibid at Pg. 9

In the following part, I will show how the president has mastered this art of killing democracy in a peaceful and unnoticed process.

Kenyatta's co-optation of the opposition: The bridge to Imperial presidency

Elections serve different purposes, Magaloni argues that elections can be used to disseminate public information about the regime's strength, provide information about supporters and opponents of the regime and to trap the opposition, so that it invests in the existing autocratic institutions rather than challenging them by violent means"[56]. Put it differently, elections are used by the authoritarians or would-be authoritarians to identify a potential regime-threatening opposition and then lures it with gifts so that the opposition remains with less threatening paths.[57] For the purposes of this paper, I will restrain myself to the last purpose.

Edmund Malesky et *al* have explained this trick by authoritarians. They argue that "[e]lections allow leaders to identify the most popular local notables or potential opposition forces" and then "placate [them] by giving them some say over policymaking."[58]. They proceed to argue that Co-optation is the most effective tool because it "takes place in a more stable, institutionalized environment than would be the case in an informal . . . arrangement," and "disagreements . . . can be presented in a controlled and unthreatening manner that will not generate larger protests''.[59] Mark Tushnet[60] however answers the question as to why the opposition gladly agree to be co-opted, he argues that 'Perhaps the regime throws them some scraps on minor policy issues, and the opposition leaders believe that something is better than the nothing the regime might do were they not to participate in elections with effectively predetermined outcomes'.

The second reason is what he terms '*"Pork barrel" spending*. He illustrates this point by borrowing from William Case who argues that a leader in an authoritarian regime provide supporters with valuable benefits such as "on-the-spot 'development grants' for new clinics, paved

[56] Magaloni Beatriz, *Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico* (New York: Cambridge University Press, 2006) at Pg. 9-10.
[57] For an overview of the functions that elections serve for authoritarian rulers, see Jennifer Gandhi & Ellen Lust-Okar, 'Elections Under Authoritarianism', (2009)12 *ANN. REV. POL. SCI*. 403, 404–06.
[58] Edmund Malesky, Paul Schuler & Anh Tran, 'The Adverse Effects of Sunshine: A Field Experiment on Legislative Transparency in an Authoritarian Assembly', (2012) 106 *AM. POL. SCI. REV* at 765.
[59] Edmund Malesky, Paul Schuler & Anh Tran, *ibid* at 766.
[60] Mark Tushnet, 'Authoritarian Constitutionalism', (2015) 100 Cornell L. Rev. 391.

roads, or mosques."[61] An argument that is also held by Magaloni who argued that "[T]he ruling party monopolizes the state's resources and employs them to reward voter loyalty and to punish voter defection." [62]

Kenyatta confirms the above arguments of the various authors. Firstly, Kenyatta's 2013-2017 reign was marked by marginalization of the opposition strongholds. The opposition strongholds were characterized with dilapidated roads, failed sugar industries at the former western region and non-issuance of title deeds in the said strongholds. However, things were different in his strongholds. Members of his strong holds were granted state appointments, the coffee, milk and tea farmers were bailed out by the government. After the famous BBI, Kenyans have seen the president tour the Nyanza region and officially launched an upgrade of the lake port, various cabinet secretaries have made several stepovers in the region each launching a different project. Today, the governors and MPs supporting the regime are gifted by different projects.

Secondly, immediately after the handshake, the former prime minister, (now the official opposition leader) Raila Odinga was appointed to serve as the AU's High Representative for Infrastructure Development in Africa[63]. Raila's running mate, Kalonzo Musyoka, would later be appointed as South Sudan's special envoy[64]. As if the appointments are not enough, Raila Odinga now enjoys some executive powers. His Capital based office is always a bee-hive of activities. Several cabinet secretaries and other state appointees fall on each other as they seek for his attention. He has on several sessions issued directives to government officials and departments.

Raila today wields powers that are not founded upon any legal instrument courtesy of the handshake. He can issue policy directives to the government and they are implemented while the president remains silent. Don't be deceived however to think that the president is a 'fool', he is not. The trick of Co-optation has worked for him. Unlike in the first term where the opposition would demonstrate, issue press statements or question his actions in parliaments, today they are

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[61] See William Case, 'Manipulative Skills: How Do Rulers Control the Electoral Arena?' In Andreas Schedler (Ed), Electoral *Authoritarianism: The Dynamics of Unfree Competition* (2006) at 103; See also Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (2013) 99 At 143–44

[62] Beatriz Magaloni, 'Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico' (2006) at 19.

[63] See Hillary Orinde, 'Raila Odinga lands new job as AU special envoy ' https://www.standardmedia.co.ke/article/2001299776/raila-odinga-lands-new-job-as-au-special-envoy

[64]See Simon Ndonga, 'Uhuru appoints Kalonzo his Special Envoy to S.Sudan' https://www.capitalfm.co.ke/news/2019/07/uhuru-appoints-kalonzo-his-special-envoy-to-s-sudan/

dead silent enjoying the packages. At the end of it all, it is the president who is benefiting. He is succeeding in creating an abusive constitutionalism or re-inventing the imperial presidency.

Kenyatta's struggle to take over the Judiciary*, The Wakora*

Aware that the judiciary is a bulwark against the excesses of the government, Kenyans established an independent judiciary and while still at it removed the president from the tunnel of appointment of judges. Instead Kenyans created an independent commission, the judicial service commission, and tasked it with the mandate of interviewing candidates for appointment. The commission is further required only to forward to the president one name and not a pool of names where the president can choose. The Kenyans only gave the president the power to gazette them. This is to mean that once the names are forwarded to the president, he has no option but only to gazette and swear them.

In their creative nature, Kenyans established a clear procedure of the people to occupy the JSC. These include representatives from the judiciary and also appointees of the president. Unlike the appointees of the president, the representatives of the judges and magistrates are not subject to parliament approvals. Once elected in the set procedures, the president is only required to gazette them. I will use the two scenarios to show how the president has made several attempts to take over the judiciary.

Sometime in 2017, the judges of the court of appeal elected Justice Warsame to sit at the commission. When the same was forwarded to the president for gazettement. The president created a new criterion that required the Justice to appear before and be approved by the parliament. Thus, was contrary to the set procedure under section 15 of the Judicial commission Act. The same was challenged before the high court and the court of appeal. The court of appeal upheld the high court decision and held that 'We have already endorsed the construction placed on ***section 15(2)*** by the High Court that the President's duty is simply to appoint an elected commissioner within three days of submission of the nominee's name'[65].

The main intent here was to ensure that the president has a say on who sits in the commission. By requiring that the elected judge be approved by the legislature, the president was seeking to

[65] *Attorney General v Law Society of Kenya & 4 others* [2019] eKLR, Civil Appeal 426 of 2018.

establish a legal avenue where the elected judge will either be approved or rejected by the parliament according to the president's wishes. Since he controls the parliament, this would have been an easy task

Another upfront by the president was in the Amendments to the Judicial Service Act, 2011 by the Statute Law (Miscellaneous Amendment) Act, 2015. The amendment sought to put the president at the center of appointment of chief justice and deputy chief justice. In his quest to create an imperial presidency, the president required the JSC to forward three names instead of one for each post. In this formula, the president would be having a choice to choose on who to forward to parliament for approval. The high court struck down this amendment in *Law Society of Kenya v Attorney General & another* [2016] eKLR. The high court underscored the importance of Judicial independence and the independence of the JSC. By divesting the president of any role in the appointment of the judges, the constitution was reacting to the ills of the past where Kenyans had lost confidence in the Judiciary. This was demonstrated in 2007/2008 post-election violence where Kenyans chose to go to the streets and not the courts to challenge the presidential elections. Kenya's experience in removing the president from any appointment role is similar to that of South Africa. While South Africans were reacting to the unwanted Apartheid regime, Kenyans were reacting to the Moi, Kenyatta, Kibaki ills which were evident in 2007. Writing on the South Africa's experience, **A**ndrews Penelope[66]notes that:

> *"The drafters of the first Constitution, in keeping with the newly adopted principles of transparency and accountability in South Africa's political and legal culture, appreciated that the old system of appointing judges was no longer appropriate in this new dispensation. A shift from past practices was therefore essential. The process of appointing judges under the system had been at the discretion of the President on the recommendation of the Minister of Justice. The appointment process did not require input from the judiciary, notably the Judge Presidents, nor from members of the legal profession or the civil society. Public scrutiny was excluded entirely. The new system reflects a complete rejection of that which persisted under apartheid."*

[66] Andrews Penelope E in 'The South African Judicial Appointment Process' [2006] *Osgoode Hall Law Journal* at 572.

When he was defeated in taking control of the appointment of the CJ and DCJ, he has also made an attempt at controlling the judicial appointments. On two occasions now, the president has refused to gazette judges recommended for appointment by the JSC. In doing so, he has disobeyed court orders. In the recent scenario, the president has refused to appoint the judges to the court of appeal. He has argued that he has a dossier against them. This argument is sick for the reason that the president is represented at the JSC by three representatives. He would have channeled the said dossier to the JSC during the interviews. In summary, the import of the constitutional provisions removing the president from the appointment process was to ensure that the judiciary is not a subject of the executive.[67] This again was an attempt by the president to establish an imperial presidency.

Following the supreme court decision overturning his election the president promised to *revisit* the judiciary. This has happened in several ways; I will highlight a few instances. A few weeks after the decision, the Deputy chief justice, Philomena Mwilu was arrested and later charged in court.

Kenyatta and the chapter 15 Commissions

The 2010 constitution establishes a fourth arm of the government under chapter 15. The commissions are expected to be independent. The understanding of these commissions as a fourth arm has been advanced by Prof. Bruce Ackerman[68] and Prof. B. M. Sihanya[69]have advanced the argument that contemporary Constitutions have constituted a fourth arm of Government, in the form of independent bodies which they refer to as the *'integrity branch', 'constitutional*

[67] See the decision of the Constitutional Court of Uganda in *Karahunga vs. Attorney General* [2014] UGCC where it was held that:

> The fact that the Judicial Service Commission is placed within Chapter 8 of the Constitution – a chapter which deals with the judiciary – is not a mere coincidence. As a body created for purposes of supporting the Judiciary, the Judicial Service Commission must, like it is with the Judiciary, be supported by all institutions/branches of the state, to independently carry out its mandate without interference. The duty/authority to initiate the appointment of a Judicial Officer lies exclusively with the Commission and should not be interfered with by either the Executive or the Legislature.

[68] Prof. Ackerman 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 633], he discusses an additional branch of Government by recognizing the functions of the Federal Election Commission, noting (page 718) that "Granted, the function of representational reinforcement does not find an easy home within the standard Legislative/Executive/Judicial trichotomy. But so much the worse for the trichotomy! A better understanding of the separation of powers would recognize that agencies like the FEC deserve special recognition as a distinct part of the system of checks and balances. Call it the "democracy branch." The powers delegated to this branch will depend, of course, on the particular conception of democracy embraced at the Constitutional convention."

[69] 'Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects', *FES Occasional Paper No.5*(2011), at Pg. 38.

watchdogs' or *'democracy branch'.* Prof. Sihanya has argued that the Constitution of 2010 creates a fourth arm of Government in the form of commissions and independent offices, with express provisions outlining their independence from other arms of Government.

The perception of commissions as a fourth arm of Government is also held by Professors P.L.O. Lumumba and L.G. Fransceschi[70]they observe that the newly-formed commissions and independent offices carry out functions which were previously performed by the traditional arms of Government; and hence the framers of the Constitution must have deliberately intended that certain Government functions be separated from the familiar arms of Government, in order to promote transparency, fairness and objectivity.[71]. These offices and commissions are not part of the three arms; they are to be distinguished from the three arms of Government through the functions they discharge.[72]In recognizing the values and aspirations of all Kenyans[73], the drafters of the constitution created the fourth arm of government; it is a state organ but is not an extension of the executive. Accordingly, they should be, and must manifestly be seen to be, outside government[74]. These institutions/commissions are expected to be only subject to the law[75].

The supreme court of kenya has expressed itself with regards to the independent clause, it noted in *Re IIEC*[76], that

> [59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated

[70] *The Constitution of Kenya, an Introductory Commentary*, 2014 at page 19.
[71] Advisory Opinion Reference No. 2 Of 2014 at Para 163.
[72] Ibid at 172.
[73] The preamble to the 2010 constitution.
[74] See also *Independent Electoral Commission v Langeberg Municipality* Para 31.
[75] See also *Kenneth Otieno v Attorney General & another [2017] eKLR* at Para 80 where the court held that 'The independence of IEBC is secured by Article 248(1) (c) which lists the commission as one of several constitutional commissions. Under Article 249 (2) (a), constitutional commissions are only subject to the Constitution and the law. Sub-Article (b) provides that the constitutional commissions are independent and not subject to direction or control by any person or authority'.
[76] In *Re the Matter of the Interim Independent Electoral Commission* Sup. Ct. Application No. 2 of 2011; [2011] eKLR.

other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".[77].

The independence of these commissions is primarily to ensure that they check the powers of the executive. Their main function is summarized by Prof. Sihanya thus:

> "Article 248 of the 2010 Constitution establishes nine commissions and independent offices…These commissions differ from commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of government and they are administratively and financially delinked from the executive. The commissions and independent offices check presidential and public authority at two levels. The first is that the general constitutional mandates of all commissions under Article 249 are to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles, and promote constitutionalism. Second, the constitutional commissions have been mandated with specific constitutional powers that under the 1969 Constitution were presidential powers, or were statutory powers commandeered, usurped or abrogated by the President."[78]

The current president is however ignorant of this fact. To him these commissions are seen as part and parcel of the executive. This was confirmed in his Executive order No 1 of 2020. The president put the commissions under respective ministries. According to this Executive order, the

[77] ibid at paras 59-60; see also *Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others*, Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR *[CCK]* at para 169-170; see also *Independent Policing Oversight Authority & Another v. Attorney General & 660 Others*, Petition No. 390 of 2014; [2014] eKLR; For comparative analysis see *New National Party v Government of Republic of South Africa & others* (CCT9/99)[1999]ZACC 5.

[78] Prof. Ben Sihanya, 'The Presidency and Public Authority in Kenya's New Constitutional Order' (Society for International Development, Constitution Working Paper No. 2, 2011) pp. 12-3

commissions are expected to operate under the Cabinet Secretaries. The intent of these commissions is to check the powers of the executive. When they are put under the executive, this demonstrates his urge to ensure that everything is revolving against him. Another instance was in *Independent Policing Oversight Authority & Another*[79], the High Court had to determine several issues including, whether the National Police Service Commission acted independently in its functions related to the recruitment of police. Considering the independence of that Commission, the Court observed

It is important that the NPSC should not be seen to have been directed and/or controlled by any person or authority because that would be a direct affront to the independence granted to it by Article 249 (2) (b) of the Constitution.[80]

What we are witnessing therefore is 'democratic backsliding' which is "*the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy*"[81], It's a presidency that hates any form of checks and balances. It is a presidency that is interested in doing away with all forms of checks and balances. A presidency that has is struggling with doing away with both the vertical and horizontal checks and balances.

Kenyatta and the civil (*evil*) societies

Like his predecessors who would deregister every society that provided any opposition, Kenyatta has similarly led a campaign them. His government has branded them as 'evil societies' and that they are being used by foreign agents to control Kenya. His purpose is however to ensure that there is a systematic repression of civil society[82]. This is however not new, in the Kanu Era, the then president threatened to deregister LSK. In the Kenyatta regime, the NGOs coordination Board has been intimidating the civil societies ever since he came to power. In 2017, board made unlawful attempts to deregister KHRC and Africog. The board had also forwarded a list of about 150 leading civil societies to the banks seeking to freeze their bank account for allegedly engaging in money-laundering. The actions were later challenged in court by KHRC where the court declared the same

[79] *Independent Policing Oversight Authority & Another v. Attorney General & 660 Others,* Petition No. 390 of 2014; [2014] eKLR.
[80] ibid at para 98.
[81] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) *Journal of Democracy* 5–19.
[82] See Bojan Bugaric, 'Could Populism Be Good for Constitutional Democracy? (*2019*) 15 *Annu. Rev. Law Soc. Sci.* 41–58; see also Muller J-W, *What Is Populism? (*Philadelphia: Univ. Pa. Press, 2016) at Pg. 44-48

as unconstitutional, null and void[83]The intent is the same, clamp down any opposing voice, remove any checks and delegitimize civil society.

Kenyatta and the county governments

The 2010 constitution established a devolved system of governance which was mainly meant to diffuse powers from the center but take governance closer to the people. The two levels of government are thus independent but interdependent. The Kenyatta's of reign has however sought to act as the prefect of the county governments. His main tool has been reducing the funds that would go to the counties or delaying the disbursement of those funds. In his two terms in office, the revenue division bill has been challenged in the supreme court twice. Although the constitution requires that the revenue division bill be tabled before the senate, the president has always used his muzzled National Assembly to pass the bill which has the effect of reducing the funds to be disbursed.

As if this is not enough, the president after his election in 2013 sought to reintroduce the provincial administration in Kenya. The provincial administration as has been shown above was used by pre-2010 administration to consolidate power around the presidency. While the 2010 constitution dealt away with the District and provision commissioners, the current president has only baptized them to *Regional and county commissioners.* The appointment of the county commissioners was done by president Kibaki, although the same was declared unconstitutional by the High court, the court of appeal overturned the decision. This is a system of governance that was rejected by the Kenyan people because it was *unresponsive and dysfunctional*[84] and hence the championing of devolution. Professors, Yash Ghai and Jill Cottrell Ghai while commenting on the provisions of Article 174 reiterate the need for devolution in the following terms

> "These objectives are elaborations of the national values and principles and show the importance of devolution to the new system of government. An essential purpose of devolution is to spread the power of the state throughout the country; and reduce the centralization of power which is the root of our problems of authoritarianism, marginalization of various communities, disregard of minority cultures, lack of

[83] *KHRC vs NGOs Coordination Board* (2016) Eklr, petition 495 of 2015.
[84] See the Concurring Opinion of Mutunga, CJ & President *in the Matter of the Speaker of the Senate & another* [2013] eKLR at para 160.

accountability, failure to provide services to people outside urban areas and even within them."[85]

Kenyatta's militarization of Nairobi county

Nairobi county government is established as a county government under schedule one of the constitution. In as such, the county government is expected to be run by a popular elected governor. But this suddenly changed under the Kenyatta's reign. The Nairobi county governor was summoned to State House by the president where he executed an instrument. Shockingly, the governor later admitted that he was not given a chance to read the instrument, an instrument whose details are scanty. In the said instrument, the governor is said to have transferred some functions to the national government. Although such a move is not illegally, there are certain procedures that need to be followed *inter alia* involvement of the County Assembly in the entire process. Even if we are to assume that the county assembly was involved, what happened after the execution is more problematic. By an Executive order, the president established a Nairobi Metropolitan services to run the county. The president also appointed a military officer, Mr Badi, to run the organ. The said Mr Badi has also made the several appointments of people drawn from the armed Forces.

The question then is, how will the military officers be held accountable? Can the military officer be summoned by the senate or national assembly like the civilian governor? Which law governor the military generals, the martial law? At the end of all these questions, one thing stands out, the president does not want any process of checks and balances.

Kenyatta and court orders

Kenyatta's regime has disobeyed almost all court orders that have been issued by the government against it. From orders barring the government from demolishing houses to orders requiring them to observe the constitution and human rights. From the *Miguna miguna saga orders* to orders requiring the president to swear in the court of appeal judges. The regime has become a law unto itself and left the court to baby sit its own orders. Courts have been left with no option but to document their displeasure with the manner at which the executive treats the court orders. For

[85] Ghai Y.P. &Ghai J. C., *Kenya's Constitution: An Instrument for Change* (Katiba Institute, 2011) Pg. 119.

instance, in *Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others* Petition No. 23 of 2013 the court noted that:

> **"The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion on a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."[86]**

Kenyatta and the parliament

Kenyatta's party has prided itself with the 'tyranny of numbers theory' ever since the 2013 general election. The 2013 and 2017 elections saw the ruling party winning more seats than the other parties. This notwithstanding, the president embarked on a mission to win the parliamentarians who belonged to the opposition parties. This cham offensive campaign involved the promising of development projects and even buying them off using the famous *brown envelope*. It is this tyranny

[86] See *Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors* JR No. 2 0f 2014 where the Court sent a warning in the following terms:

> "Where such dishonorable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law…Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings, they ought to secure proper legal advice from the Government's Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute."

of numbers that saw the passage of controversial bills in parliament including the security amendment act, the election amendment act.

The problematic aspect of the behaviour of the members of the ruling party is that they see themselves as subject to the president and not the law. Their business is to push the business of the executive but not to check the excesses of the president. For instance, the majority leader in national assembly once declared that his task is to do what the president says and not to question it.

The second aspect of Kenyatta's control of the parliament is less evident to many. After the 2017 elections, he has held two jubilee parliament group meetings, whereas, this is a normal party activity, what transpired in these meetings demonstrates the tendencies of a would-be authoritarian. The aforesaid meetings have for example seen the 'axing' of the leaders with dissenting voices. These include the majority leaders in the two houses, the deputy speaker of the senate, and the whips in the two houses. The same have been replaced with Kenyatta's confidants. Make no mistake, the purpose is to hold the parliament hostage, to make it an extension of the executive.

Conclusion

The advent of constitutionalism was to limit arbitrariness which is inherent in governments and to ensure that their powers are used for the greater benefit of society.[87] The constitution prevents arbitrariness or abuse of power by providing for separation of powers and the non-concentration of powers in one person or office. A point that is eloquently expressed by Eric Kibet and Professor Charles Fombad [88]that

> "The quest to strike a balance between anarchy, on the one hand, and tyranny, on the other, is a key preoccupation of constitutional law and the core of constitutionalism. The primary function of constitutions is to strike this balance by establishing power maps for the exercise of public power in a fashion that ensures that the government is neither too weak nor despotic. Thus, constitutions create state institutions, allocate to them powers and,

[87] B.O Nwabueze, *Constitutionalism in the Emergent States* (Fairleigh Dickinson University Press, 1973) 1.
[88]Eric Kibet and Charles Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' 2017 17(2) *African Human Rights Journal*.

importantly, define the limits of their powers. In this sense, constitutionalism is the notion of government limited by law. It posits that it is possible and, indeed, desirable, that government should be limited by law, the constitution sitting at the top in the hierarchy of law."

President Uhuru Kenyatta has however launched legal (mis)reforms and created a culture of impunity that seek to remove the checks on the executive powers. The opposition is no longer there and the parliament is dead. While everything might look so normal, no military tanks, no machine guns, no armed forces in the streets, the president is slowly turning into an authoritarian and the question remains Can Kenyans stop the president from becoming a fully authoritarian? As Bruce Ledewitz[89] said, today I say

The hour is late. I hope not too late

[89] Bruce Ledewitz, 'Taking the Threat to Democracy Seriously', (2019) 49 *U. Memphis L.Rev*. at Pg. 1307.