

**ADEQUACY OF POST 2007 CONSTITUTIONAL MECHANISMS IN  
ADDRESSING ETHNIC CONFLICT IN PRESIDENTIAL ELECTIONS IN  
KENYA**

**BY  
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THE AWARD OF DOCTOR OF PHILOSOPHY (PHD) IN LAW,  
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## DECLARATION

I hereby declare that all work contained in this thesis is my original work and has not been submitted to any university for the conferment of any academic award. All sources have been duly cited and acknowledged. No external editorial services were sought.

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## SUPERVISION

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## DEDICATION

This is dedicated to my late dad Joseph Irungu and late mum Margret Wangeci. Your humility and push for tenacity was such a great inspiration .Special thanks to my wife Mary and my three daughters –Rita ,Una and Etana.You have been my very good cheerleaders .

To all Kenyans (and other non-Kenyans ) that have suffered political ethnic conflict including my uncles in Riftvalley (Uncle Gatweci and late Wamahiu).I hope ideas that I have generated herein can birth a peaceful solution.

To Reggae which has inspired my pursuit of Justice for everyone ,I remember words of Marcus Mosiah Garvey , “Up ye mighty race,you can accomplish what you will”.

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***ABSTRACT***

This study was guided by four objectives : (i) examining the linkage between ethnic conflict and Presidential elections in Kenya; (ii) evaluating adequacy of post-2007 constitutional mechanisms in addressing ethnic conflict in presidential elections in Kenya; (iii) examining what lessons Kenya can draw from constitutional mechanisms of other select countries, and ( iv) making recommendations. Since 1992, cyclic ethnic conflict in presidential elections has caused deaths and loss of property. Prior to 2007, enforcement of criminal law was viewed to be the remedy. However, ethnic conflict in 2007 presidential elections led to the view that constitutional reform was the solution. In 2008 Kenya amended Constitution of Kenya of 1969 and applied consociationalism. New Constitution of 2010 dropped consociationalism and introduced devolution, nation-building measures and centripetalism. Despite these mechanisms, the problem persisted in 2013 and 2017 presidential elections hence this study.

Literature on constitutional design for divided societies prescribe either accommodation (consociationalism and devolution ) or integration (centripetalism and nation-building) of ethnic groups into a state's power structures. The main gap in this literature is failure to consider importance of electoral data in designing constitutional prescriptions. This research took an explanatory and indepth approach unlike past studies that took comparative and descriptive methods. The methodology used was qualitative: interviewing key informants, experts and focus group discussions. By gathering data from the field and studying national vote electoral data from 1992 elections, it uncovered a theory that shows the higher the margin of votes between a winner and best loser in national votes in Kenya, the lower the chances of ethnic conflict. Ensuring a margin of about 18 per cent between the two main contestants constitutionally boosts chances of ethnic peace. Among other proposals, the study recommended that article 138 (4) of the Constitution of Kenya 2010 be reviewed to increase the margin of victory of a winner. The law used and analysed by this study was as at 1st February 2020.

## LIST OF CASES

### Kenyan cases

- 1) *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others [2017] eKLR.*
- 2) *Commissioner for the Implementation of the Constitution v Attorney General & 2 others [2013] eKLR Civil Appeal 351 of 2012.*
- 3) *Community Advocacy and Awareness Trust & 8 Others V Attorney General Interested Party National Gender and Equality Commission & 5 Others [2012] eKLR.*
- 4) *Council of Governors & 3 others v Senate & 53 others [2015] eKLR.*
- 5) *Francis Gitau Parsimei & 2 Others v The National Alliance Party & 4 Others*
- 6) *IEBC v Maina Kiai & 4 Others [2017] eKLR.*
- 7) *Independent Electoral & Boundaries Commission (IEBC) v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy [2017] eKLR.*
- 8) *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR.*
- 9) *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.*
- 10) *Judges & Magistrates Vetting Board & 2 Others v Centre for Human Rights & Democracy & 11 Others (supra) (2014) eKLR.*
- 11) *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission [2017] eKLR.*
- 12) *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & another [2017] eKLR.*
- 13) *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another (Petition no.1 of 2017) eKLR.*

- 14) *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others eKLR [2013]*.
- 15) *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya & 6 Others eKLR [2017]*.
- 16) *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombomuti [2018] eKLR*.
- 17) *Dr. Timothy M. Njoya and 6 others v Honourable Attorney General and Another [2004] eKLR*.
- 18) *Speaker of the Senate & Another vs. The Hon. Attorney-General & Others [2013] eKLR*.
- 19) *Tom Luusa Munyasya & another Governor, Makueni County & another [2014] eKLR*.
- 20) *Virginia Edith Wambui Otieno v Joash Ochieng Ougo & Another eKLR [1987]*.
- 21) *In Re Matter of Zipporah Wambui Mathara KLR (2010)*.

#### Foreign cases

##### **1. Guyana**

- 1) *Attorney General of Guyana v. Cedric Richardson (2018) CCJ*.

##### **2. Nigeria**

- 1) *Attorney General of Abia State & 2 Others v Attorney General of the Federation and 33 Others (Revenue Monitoring case)*
- 2) *Attorney General of Lagos State v Attorney General of the Federation & 35 Others (Urban Planning case)*.
- 3) *Attorney-General of Ondo State v Attorney-General of the Federation and 35 others (2002) 6 S.C. (Pt. I) 1*.

##### **3. United Kingdom**

- 1) *The case of R (Jackson) v Attorney General [2005] UKHL 56*.
- 2) *Madzimbamuto v Lardner-Burke [1969] 1 AC 645*:

##### **4. South Africa**

- 1) *Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC)*.

## **LIST OF LEGAL INSTRUMENTS**

- 1) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- 2) The African Charter on Human and Peoples Rights, 1981.
- 3) The Basic Education Act No.14 of 2013.
- 4) The Charter of the United Nations, 1948.
- 5) The Constitution of Kenya, 2010.
- 6) The Constitution of Guyana of 1980.
- 7) The Constitution of Nigeria of 1963.
- 8) The Constitution of Nigeria of 1979.
- 9) The Constitution of Nigeria of 1999.
- 10) The European Convention on Human Rights, 1950.
- 11) The Good Friday Agreement of 1998(United Kingdom).
- 12) The Government of Ireland Act of 1927(United Kingdom).
- 13) The Kenya Information and Communication Act of 1998.
- 14) The National Accord and Reconciliation Act no 4 of 2008.
- 15) The National Cohesion and Integration Act No 12 of 2008.
- 16) The National Accord and Reconciliation Act No. 4 of 2008.
- 17) The Repealed Constitution of Kenya of 1969.
- 18) The Rome Statute of the International Criminal Court, 1998.



## OPERATIONAL DEFINITION OF KEY TERMS

- 1) **Centripetalism** : - A set of legal rules that aim to achieve stability and peace in ethnically divided societies by enhancing political rewards for moderation. This is by adopting electoral rules that require winning candidates to seek cross-ethnic support. In Kenya, Article 138(4) of the Constitution of Kenya 2010 is an example of a centripetal rule. It indicates that, “A candidate shall be declared elected as President if the candidate receives (a) more than half of all the votes cast in the election; and (b) at least 25 per cent of the votes cast in each of more than half of the counties”.
  
- 2) **Consociationalism**: – A set of legal rules, usually established in states with major internal ethnic conflict, that aim to maintain stability and peace by co-opting into state’s power structures, elites of all major ethnic groups. In Kenya, The National Accord and Reconciliation Act of 2008 (Act no.4 of 2008), which established a Government of National Unity comprised of major elites from various ethnic groups in Kenya after 2007/08 ethnic conflict, is an example of a consociation law.
  
- 3) **Ethnocracy**: – A type of governance structure where the state is appropriated by an ethnic group(s) to cement its power and interests.
  
- 4) **Immobilism** : - A governance stalemate caused by resistance to change and or inertia by leaders and policy makers.
  
- 5) **Welfarism** : - Policies and or laws that characterize a welfare state.

## LIST OF ABBREVIATION

<b>AV:</b>	Alternative Vote
<b>AU:</b>	African Union
<b>DRC:</b>	Democratic Republic of Congo
<b>GoK:</b>	Government of Kenya
<b>ICC:</b>	International Criminal Court
<b>IEBC:</b>	Independent Electoral and Boundaries Commission
<b>KANU:</b>	Kenya African National Union
<b>KAMATUSA:</b>	Kalenjin, Maasai, Turkana and Samburu
<b>NCIC:</b>	National Commission for Integration and Cohesion
<b>NFD:</b>	Northern Frontier District
<b>STV:</b>	Single Transferable Vote
<b>UN:</b>	United Nations

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# CHAPTER ONE

## INTRODUCTION

### 1.1. Background

This chapter introduces the study and outlines the subject matter of the thesis. It includes the background of the study, statement of the problem, theoretical framework, objectives of the study, research questions, hypothesis, assumptions, justification, significance, scope and limitations of the study, research methodology and literature review.

Ethnicity "is a state of belonging to a social group that may share on common language, ancestral, social, cultural, or national experiences".<sup>1</sup> Ethnicity is also an umbrella concept that embraces persons that have differences of colour, religion, and language and thus covers tribes, religions, races, and nationalities.<sup>2</sup>

The term "ethnic conflicts" includes ethnic riots, feuds, attacks, protests, assaults, fights, arson, forced migration and genocides.<sup>3</sup> The conflict may either be directed at the state or another ethnic group. However, the principal motivation for the conflict is significantly ethnic.<sup>4</sup> Ethnic conflicts are categorised into low intensity (feuds, arson, rampage, disagreements, and riots) and high-intensity (war and ethnic cleansing).<sup>5</sup> As per the 2019 census, Kenya had a population of 47,564,296, comprising of 44 ethnic groups.<sup>6</sup> Kikuyu, Luhya, Kalenjin, Luo and Kamba groups consist about 70 per cent of the total Kenyan population.<sup>7</sup>

Ethnicity has several benefits to society. It gives its members a sense of history and identity, with group members treating each other as family.<sup>8</sup> In countries with weak welfare

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<sup>1</sup>Oxford Dictionary of English, 'Ethnicity', (Oxford University Press 2010), <<http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/acref-9780199571123>> accessed 26 August 2019.

<sup>2</sup>Donald L Horowitz, *Ethnic Groups in Conflict: With a New Preface* (first published 1985, 2<sup>nd</sup> Ed. University of California Press 2008)332.

<sup>3</sup>Jonathan Fox, 'Trends in Low -Intensity Ethnic Conflict in Developing States in Post War Era: A Large N Study' (2003) 2 *Review of International Affairs* 54, 70.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

<sup>6</sup> Government of Kenya, *The 2019 Kenya Population and Housing Census*, (Kenya National Bureau of Statistics 2020 ) table 2.31.

<sup>7</sup> *ibid.*

<sup>8</sup>Fox (n 3).

systems, ethnicity can offer substitute welfare support.<sup>9</sup> For example, new rural immigrants into cities that have no housing schemes for the poor often find temporary shelter amongst their co-ethnics who arrived earlier.<sup>10</sup> In such states, burials and medical expenses of the poor are usually defrayed by richer co-ethnic members.<sup>11</sup> Through its ability to bring people together, ethnicity has been used to inspire the liberation of oppressed people.<sup>12</sup>

Ethnic diversity in multi-ethnic societies may trigger conflict for fear of ethnic domination. The second half of the 20<sup>th</sup> century has coincided with a worldwide explosion of identity politics combined with a culture of ethnic entitlement.<sup>13</sup> In states with large ethnic groups that have numbers that can enable them to win elections on their own over smaller groups, ethnic conflict may ensue.<sup>14</sup> Ethnic fragmentation makes it less probable that governments “deliver public goods, make productive investments, and generate economic growth”.<sup>15</sup> In short, *ceteris paribus*, countries with more ethnic groups, are likely to be poorer than those with fewer ethnic groups. Highly diverse states have GDP growth rates which are two per cent lower than “less diverse” nations.<sup>16</sup>

### **1.1.1 Historical Analysis of Ethnic Conflict in Kenya**

Kenya has been riddled with ethnic conflict for most of its pre and post-colonial history. Pre-colonial conflicts in regions now forming part of Kenya were mainly part of nation-building in which smaller communities were driven by dynamics of change to merge with bigger populations.<sup>17</sup> There was intermittent conflict arising over grazing rights between neighbouring communities, such as the Maasai and her neighbours.<sup>18</sup> During colonialism, Kenya experienced several rebellions fuelled by discrimination against black Africans by

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<sup>9</sup>ibid.

<sup>10</sup> Lucinda Platt and Alita Nandi, ‘Ethnic diversity in the UK: new opportunities and changing constraints’, (2018) 1 *Journal of Ethnic and Migration Studies* 219,220.

<sup>11</sup> ibid.

<sup>12</sup> ibid.

<sup>13</sup>Lotte Hughes and Mark Lamont, ‘Cultural rights and constitutional change’, (2018 ) 77 *Issue 2 African Studies* 313,323.

<sup>14</sup>Fox (n 3) 89.

<sup>15</sup>Nic Cheeseman, *Ethnicity and Development* in Carol Lancaster and Nicholas Van De Walle eds, *Oxford handbook of the Politics of Development* , (University Press 2016) 30.

<sup>16</sup>ibid 77-79.

<sup>17</sup> ibid .

<sup>18</sup> Rok Ajulu, ‘Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective’, (2002) 61 *Issue 2 African Studies* 134,135.

the white ethnic minority, with the most significant being the *Mau Mau* rebellion.<sup>19</sup>The Kikuyu stood up to the white settlers to protest land grabbing in central Kenya.<sup>20</sup>The ethnic conflict did not coincide with presidential elections in colonial Kenya because there were no democratic presidential elections.

Immediately after independence, Kenya was faced with a crisis of ethnic conflict influenced by Somali's irredentist tendencies.<sup>21</sup> On independence, the Somali Republic made it abundantly clear that it wished to re-unite the Somali-speaking persons resident in the Northern Frontier District (NFD) and encouraged the Somalis in Kenya to fight for the same.<sup>22</sup> This led to an open armed conflict commonly referred to as the Shifta War.<sup>23</sup>The uprising was quashed by the Kenyan government. The two governments later agreed to settle the dispute with the help of the Organisation of the African Union (OAU), with President Kenneth Kaunda of Zambia acting as the mediator.<sup>24</sup>

In the period between the independence of Kenya in 1963 and the 1990s, presidential elections were monopolised by the Kenya African National Union (KANU)-the sole ruling party. The party did not accommodate intra-party open competition and therefore no conflict coincided with presidential elections. Competitive presidential elections happened after the repeal in 1991 of Section 2A of the old constitution which clause had barred multi-party politics.<sup>25</sup> This led to the formation of ethnic parties to jostle for the presidency with different parties assuming different strategies to suit their ethnic compositions.<sup>26</sup> Presidential elections in Kenya are held every five years, a cycle that commenced in 1992.

In the 1992 presidential elections, the KAMATUSA group, which comprised of the Kalenjin, Maasai, Turkana and Samburu ethnic groups, was founded by leaders drawn from

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<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> Hannah Whittaker, *Insurgency and Counterinsurgency in Kenya: A Social History of the Shifta Conflict, c. 1963-1968*, (Brill 2015), 45.

<sup>22</sup> n 18.

<sup>23</sup> text to n 21.

<sup>24</sup> *ibid.*

<sup>25</sup> Brian Sang YK, 'The Reach of the Bill of Rights into Personal Legal Relations in Kenyan Constitutional Law and Jurisprudence' (2016) 16 Oxford University Commonwealth Law Journal 235,247.

<sup>26</sup> Charles Fernandes Taylor, 'Ethnic Politics and Elections Campaigns in Contemporary Africa :Evidence from Ghana and Kenya ', (2017) 24 Journal of Democratization 440 .

KANU.<sup>27</sup> The group expelled from their regions opposition-leaning ethnic groups. More than 2,000 people were killed, property worth over Kshs. 56 million was destroyed and more than 20,000 families displaced in the Coast and Rift Valley provinces.<sup>28</sup>

In 1997, ethnic clashes in the coastal region preceded the presidential elections. This pitted several indigenous groups against the immigrant ethnic groups, mainly the Luo, Kamba, and Kikuyu.<sup>29</sup> The KANU regime benefitted as the opposition was not able to garner sufficient votes in the affected areas.<sup>30</sup> Despite the ethnic conflicts and loss of life, no one was ever held responsible for these atrocities.<sup>31</sup> There was displacement of about 25,000 families, loss of 120 lives, and destruction of properties worth Kshs 60 million in Rift Valley province.<sup>32</sup> The 2002 presidential elections were largely peaceful.

The ethnic conflict that surrounded the 2007 presidential elections is the most intensive in the history of Kenya.<sup>33</sup> A Commission of Inquiry into the Post-Election Conflict (CIPEV) was instituted by President Mwai Kibaki to look into that ethnic conflict.<sup>34</sup> The commission reported that there had been 1,133 deaths attributed to the conflict.<sup>35</sup> An account of the 1,133 people who died showed that most of the deaths were reported in the Rift Valley (744), Nyanza (134) and Nairobi (125).<sup>36</sup> Grave injuries totalled 3,561 persons, and there were 117,216 private properties destroyed. The government 'lost 491 properties, entailing

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<sup>27</sup> *ibid.*

<sup>28</sup> National Assembly of Kenya, *Report of the Parliamentary Commission on Ethnic Clashes*, (Parliamentary Select Committee Chaired by Kenneth Kiliku, 1993), p.40-60. See also National Elections Monitoring Unit (NEMU), 'Courting Disaster: A Report on the Ethnic Clashes', (Nairobi: NEMU, 1993), 7.

<sup>29</sup> Judicial Commission, *Judicial Commission Into Tribal Clashes*, (commonly known as 'Akiwumi Report', 1998) 57.

<sup>30</sup> Spencer Leighann, 'Kenya's History of Political Violence: Colonialism, Vigilantes and Militias' ( *The Conversation*, 28<sup>th</sup> September 2017), <<https://theconversation.com/kenyas-history-of-political-violence-colonialism-vigilantes-and-militias-83888>> accessed 8 November 2019.

<sup>31</sup> *ibid.*

<sup>32</sup> Sarah Jenkins, 'Ethnicity, violence, and the immigrant-guest metaphor in Kenya' , ( 2012 ) 111 issue 445 *African Affairs* 576,595.

<sup>33</sup> Leighann n 30.

<sup>34</sup> Government of Kenya, *The Kenyan Commission of Inquiry into 2007 Post-Election Violence*, (commonly known as 'Waki Report' , 2008), 2.

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*



offices, vehicles, health centres , schools and trees, and the displacements amounted to approximately 350,000 persons and 1,916 who sought refuge in Uganda.<sup>37</sup>

In 2013 presidential elections, 477 lives were lost and 118,000 people were displaced.<sup>38</sup> In 2017 presidential elections, as at 9th October 2017, 37 persons, including a six-month-old baby, had died in clashes between state agencies and opposition supporters in 33 days of protests.<sup>39</sup>

The 2017 general election exposed the historical power struggles between the Luos and the Kikuyus.<sup>40</sup> The nullification of the presidential election, though a historical legal landmark in Africa, ignited fears of political conflict between supporters of the National Super Alliance (NASA) political coalition and the Jubilee political alliance.<sup>41</sup> There were numerous reported cases of police brutality against demonstrators and supporters of the NASA coalition even before the decision to nullify the election was rendered.<sup>42</sup> Human Rights Watch stated that there were up to 33 deaths directly linked to the police only and possibly up to 50 deaths in total.<sup>43</sup> Aside from extra-judicial killings, the police injured hundreds more in the Nairobi area as they protested against the results of the August 2017 elections.<sup>44</sup>

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<sup>37</sup>International Center for Transitional Justice, ‘Prosecuting international and other serious crimes in Kenya’ (*ICTJ 2013*), <<http://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf>> accessed 16 April 2018; ‘Perceptions and Realities: Kenya and the International Criminal Court’ (*Human Rights Watch* April 17, 2015) <<https://www.hrw.org/news/2013/11/14/perceptions-and-realities-kenya-and-international-criminal-court>> accessed 16 April 2018.

<sup>38</sup>Human Rights Watch, *High Stakes: Political Violence and the 2013 Elections in Kenya*, (*Human Rights Watch* June 24, 2015) <<https://www.hrw.org/report/2013/02/07/high-stakes/political-violence-and-2013-elections-kenya>> accessed 16 April 2018.

<sup>39</sup>Kenya National Commission on Human Rights, ‘Mirage at Dusk: A Human Rights Account of The 2017 General Election’, (*KNHRC* 9 October 2017) <http://knchr.org/Portals/0/PressStatements/KNCHR%20PRESS%20STATEMENT-%20ELECTION%20REPORT%202017.pdf?ver=2017-10-09-114042-250> accessed 1 April 2018.

<sup>40</sup>Albert Gordon Omulo and John James Williams, ‘A Survey of the Influence of “Ethnicity”, in *African Governance, with Special Reference to Its Impact in Kenya Vis-à-Vis Its Luo Community*’ (2018) 16 *African Identities* 87,90.

<sup>41</sup>*ibid* 96.

<sup>42</sup>Human Rights Watch, ‘Kill Those Criminals’: Security Forces Violations in Kenya’s August 2017 Elections’ (*Human Rights Watch* October 16, 2017) <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-violations-kenyas-august-2017-elections> accessed 16<sup>th</sup> April 2018.

<sup>43</sup>*ibid* .

<sup>44</sup>*ibid* .

The Gross Domestic Product (GDP) always dips with every presidential electoral cycle with investors shunning Kenya.<sup>45</sup> It is clear Kenyans have a conflicting "dual citizenship dilemma", loyalty to ethnicity and the liberal state with its individualised duties and entitlements.<sup>46</sup>

### **1.1.2 Causes of Ethnic Conflict in Presidential Elections**

The causes can be summarised into two viewpoints. One view holds that ethnic conflict in presidential elections are acts of criminality, and the remedy lies in punitive criminal law sanctions.<sup>47</sup> This view does not attempt to explain the causative factors which may underpin the conflict. Rather, perpetrators are viewed as individuals violating the penal code hence deserve personal punishment. The perpetrators may be charged with committing offenses like arson<sup>48</sup>, murder<sup>49</sup> and stealing.<sup>50</sup> The policymakers are expected to enforce criminal law without fear or favour. The positive aspect of this view is that it places culpability on individual perpetrators, instead of ethnic groups, hence ensuring victims get justice. The problem with this view is that it fails to appreciate causative factors that underpin ethnic conflict in presidential elections. If these factors remain unaddressed, ethnic conflict may recur, notwithstanding arrests and prosecutions under criminal law.

The second view attributes the conflict to systemic issues of ethnic fear of domination and resource misallocation, necessitating constitutional remedial measures. These measures include decentralising government by devolving resources to counties in a new system of devolved governance to address complaints of ethnic discrimination.<sup>51</sup> The positive aspect of this view is that it appreciates criminality may be underpinned by factors that need systematic legal interventions of constitutional nature. If well designed, these measures can

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<sup>45</sup>Institute of Economic Affairs (IEA), 'Brief: Effects of Elections on Kenya Economy', (*Institute of Economic Affairs* 3 May 2016 ) <<http://www.ieakenya.or.ke/publications/research-papers/effect-of-elections-on-kenyaa-s-economy>> accessed 1<sup>st</sup> December 2017 .

<sup>46</sup>Stephen N Ndegwa, 'Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics', (1997)91 issue 3 *American Political Science Review* 599,600.

<sup>47</sup> See the recommendations of both the 1993 Select Parliamentary Committee Report -commonly known as Kiliku- and 2008 Judicial Committee Report - commonly known as Akiwumi .

<sup>48</sup> Penal Code, s.332.

<sup>49</sup>ibid, s.203.

<sup>50</sup> ibid, s.268.

<sup>51</sup>The Constitution of Kenya, 2010, Art. 174.

promote national cohesion in the long term. The shortcoming of this is that it can overlook justice for the victims, and perpetrators can be pardoned.

The first view was presented by the Kiliku and the Akiwumi Commissions of Inquiry that investigated the ethnic conflict in 1992 and the 1997 presidential elections, respectively. Both Commissions characterised the ethnic conflict in presidential elections as criminal acts that can be remedied by enforcement of criminal law.<sup>52</sup>

The Kiliku Commission of Inquiry was established by the National Assembly in 1993 in the aftermath of ethnic conflict surrounding the presidential elections of 1992.<sup>53</sup> Its report blamed high profile KANU politicians and recommended prosecution, but the plenary of the National Assembly rejected it.<sup>54</sup>

The Akiwumi Commission of Inquiry was established in 1998 as a presidential inquiry commission to address the ethnic conflict arising out of the 1997 presidential elections.<sup>55</sup> It presented its report to the President on 19<sup>th</sup> August 1999. Its findings blamed high profile KANU politicians and recommended their prosecution. However, this remained a secret until the report was published by the Attorney General on 18<sup>th</sup> October 2002.<sup>56</sup> It stated that the conflict was caused by acts of criminality. Criminal prosecutions were deemed by the two reports as being the remedy only that there was a lack of political goodwill.<sup>57</sup>

To address the challenge of lack of political goodwill to prosecute powerful leaders as recommended by earlier parliamentary committee (1993) and judicial commission (2008), the Waki Commission of Inquiry in 2008 proposed prosecution of high profile persons before the International Criminal Court (ICC) and local prosecutions for other categories. Therefore, several persons were criminally prosecuted both locally (low-level suspects) and in The Hague, Netherlands (high profile suspects).<sup>58</sup> Despite these prosecutions, the

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<sup>52</sup>n 28 ( 1992 elections ethnic conflict ) and n 29 (1997 elections ethnic conflict) .

<sup>53</sup>n 28.

<sup>54</sup>ibid.

<sup>55</sup> Note 29. See also Karuti Kanyinga, 'Pluralism, Ethnicity and Governance in Kenya' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *Ethnicity, nationhood, and pluralism: Kenyan perspectives* (Ottawa: Global Centre for Pluralism, 2013) 66. See n 563 also.

<sup>56</sup> ibid.

<sup>57</sup> ibid.

<sup>58</sup> For high level suspects, see International Criminal Court, 'Cases in the Situation in the Republic of Kenya' (ICC, 8 March 2017) <<https://www.icc-cpi.int/kenya>> accessed 1<sup>st</sup> April 2018. For low level suspects, see n 59 below.

2013 and 2017 presidential elections were engulfed by conflict. Criminal prosecutions in ethnically divided societies tend to be ineffective. This is because prosecution institutions are viewed as being partisan and skewed in favour of the 'other' ethnic group.<sup>59</sup> Prosecutions get politicized and feelings of marginalisation and ethnic victimhood get embedded.<sup>60</sup>

The second view, which attributes ethnic conflicts to fear of ethnic domination and resource misallocation, can be denoted from the processes that underpinned the making of the new Constitution between 2008 and 2010. The Constitution of Kenya Review Act (2008) that was enacted to underpin enactment of a new Constitution provided that the new Constitution ought to encourage Kenyans to "live in peace, national unity and in a republic which enjoys the respect of ethnic and regional diversity and communal rights; [and in which] there is an equitable framework for economic growth and equitable access to national resources."<sup>61</sup>

The Committee of Experts was mandated to draft the 2010 Constitution stated that "smaller ethnic communities experience discrimination from those from larger communities. Hence the mechanisms for inclusion needed to ensure that these intersecting forms of exclusion were addressed."<sup>62</sup> The Committee stated that devolution was meant to respect ethnic diversity, and it drew lessons from multi-ethnic states like India and the USA.<sup>63</sup> These constitutional attempts aimed at remedying this problem of cyclic ethnic conflict during presidential elections are the focus of this study.

### **1.1.3 Constitutional Attempts to Address the Problem**

The first constitutional attempt to address the aforementioned problem was the power-sharing arrangements that obtained in Kenya between 2007 and 2013 - described by experts

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<sup>59</sup> Stephen Brown and Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves :Criminal Accountability for Post –Election Violence in Kenya', ( 2012) 111 African affairs 122 ,130.

<sup>60</sup> *ibid.*

<sup>61</sup> The Constitution of Kenya Review Act 2008, s.4.

<sup>62</sup> The Committee of Experts on Constitutional Review, 'The Preliminary Report of the Committee of Experts on Constitutional Review Issued upon the Publication of the Harmonized Draft Constitution' (*Government of Kenya 2009*) 130.

<sup>63</sup> Objects of Devolution (n 51).

as consociation.<sup>64</sup> That arrangement was established by insertion of a new section 15 A into the Constitution of 1969 (now repealed) and the enactment of the National Accord and Reconciliation Act No. 4 of 2008 which expanded the executive by creating offices of the Prime Minister with two deputies and an equally over-sized cabinet.<sup>65</sup>

A second attempt has been the enactment of a raft of legal provisions collectively termed as “nation-building measures”.<sup>66</sup> These included the promotion of common official languages<sup>67</sup> and institutionalisation of compulsory and free basic education using constitutional tools.<sup>68</sup> It is intended that the education will impart nationalistic values in young people through a common educational curriculum.<sup>69</sup> The third is the promotion of ethnic-minded quota systems. Opportunities in the public sector entailing employment and education access in national and county schools ought to consider ethnic diversity.<sup>70</sup> Parliament has established a body under the National Cohesion and Integrity Commission Act.<sup>71</sup> Its key objective is to “facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof.”<sup>72</sup>

A third attempt has been the enactment of Article 138 (4) of the Constitution of Kenya 2010, which changed the threshold for winning the presidency obtaining between the elections from 1992 to 2007. The Article provides that the winner must garner 50 per cent plus one of all votes cast plus at least 25 per cent in 24 counties. It was thought this would

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<sup>64</sup>Peter Kagwanja and Roger Southall, ‘Introduction: Kenya – A Democracy in Retreat?’ (2009) 27 *Journal of Contemporary African Studies* 259,262.

<sup>65</sup> *ibid.*

<sup>66</sup> See Gregory Shaffer and others (eds), *Constitution-Making and Transnational Legal Order - Comparative Constitutional Law and Policy*, (Cambridge University Press,2019) 365.

<sup>67</sup> Constitution of Kenya, 2010, Art. 7 (2).

<sup>68</sup> Constitution of Kenya, 2010, Art. 53 (1) (b) .

<sup>69</sup> Basic Education Act, 2013, s.4 (j) provides that one of the guiding principles of basic education is the elimination of hate speech and tribalism through instructions that promote the proper appreciation of ethnic diversity and culture in society.

<sup>70</sup> Constitution of Kenya, 2010. Art. 130 (2) provides that “the composition of national executive shall reflect the regional and ethnic diversity of the people of Kenya. Article 232 of the Constitution of Kenya 2010 provides that the national values and principles of public service include “ representation of Kenya’s diverse communities.”

<sup>71</sup> No. 12 of 2008.

<sup>72</sup> *ibid.*, s.25.

incentivise serious presidential contenders to seek support beyond their ethnic groups, hence promote ethnic solidarity and harmony.<sup>73</sup>This is what is called “centripetalism.”

A fourth attempt has been devolution. “Article 174 (b) of the Constitution of Kenya 2010” provides that “one of the objectives of devolution is to encourage national unity by appreciating diversity.” Devolution was meant to reduce the concentration on the presidency hence address ethnic conflict in every electoral cycle.<sup>74</sup> The Electorate can now elect governors in their own county. In addition, each governor and county government has a devolved budget they can work with for better redistribution of resources.

Apart from the above four mechanisms which are designed specifically to tackle this problem, the 2010 Constitution does contain other standard provisions that may, in some manner, ameliorate ethnic conflict in presidential elections. These includes a robust human rights framework that inhibits hate speech or ethnic discrimination- Article 27 (4) and 33 (2); independent criminal justice system and separation of powers. However, these mechanisms tend to be ineffective in an ethnically divided society and hence this study did not focus on them. This is because they often get politicized ,and judiciary (the organ often bestowed with legal powers to uphold these principles ), often acts post-the-fact.<sup>75</sup>

Notwithstanding the attempts mentioned above, the problem of ethnic conflict in every presidential election cycle has persisted. In the 2013 and 2017 presidential elections, lives were lost and property destroyed in ethnic conflict.

#### **1.1.4 The Global Extent of Ethnic Conflict in Electoral Contests**

With the impending collapse of Communism in the late 1980s, the triumph of liberal democracy as the best and last form of government was predicted.<sup>76</sup> The ascendancy of

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<sup>73</sup>Mai Hassan, ‘The Strategic Shuffle: Ethnic Geography, the Internal Security Apparatus, and Elections in Kenya: The Strategic Shuffle’ (2017) 61 American Journal of Political Science 382,399.

<sup>74</sup> Gabrielle Lynch, ‘Devolution Has Changed Kenyan Politics’, *Daily Nation* (Nairobi February 23, 2018)<<https://www.nation.co.ke/oped/opinion/Devolution-has-changed-Kenyan-politics/440808-4317606-wn7r7cz/index.html>> accessed 6 September 2017.

<sup>75</sup>Sujit Choudhry, ‘After the Rights Revolution :Bill of Rights in Post Conflict State’, (2010)6 Annual Review of Law and Social Science 322.

<sup>76</sup>See Francis Fukuyama, *The End of History and The Last Man* (1st Ed. 1992 ,Freepress Reissue edition 2006)463 ,though the same author in Francis Fukuyama ,*Identity: The Demand for Dignity and the Politics of Resentment*, (Farrar, Straus and Giroux; 1st Edition ,2018) 239 appreciated the saliency of ethnicity .He explains that ethnicity is rooted on demands for recognition ,not economics.

liberal democracy fashioned along the lines of Western democracies was deemed to usher the last stage of humanity's social and cultural revolution.<sup>77</sup> The “Wind of Change” that blew around the world in the 1990s, including in Africa and in Kenya, ushering in democratic pluralism, vindicated this hypothesis.

The triumph, it appears, was too early, as it was followed by major conflicts between ethnic groups.<sup>78</sup> Between 1990 and 2000, intense ethnic conflicts in Rwanda and the former Yugoslavia gave credence to the potency of culture as a source of conflicts. Ethnic conflicts arising from struggles for power have occurred in diverse places including former Yugoslavia, Northern Ireland, Spain, Ukraine, Rwanda, Scotland, Democratic Republic of Congo, Liberia, Ivory Coast, South Sudan, Yemen, and Iraq.<sup>79</sup> Low-intensity conflicts, which at times turn very violent have occurred in countries like Kenya, Uganda, and Malawi.<sup>80</sup>

The legal interventions to address ethnic conflicts by the international community have taken the form of the establishment of human rights treaties enshrining rights of minority ethnic groups.

Article 1 of the United Nations Charter stipulates for the importance of culture and it has been stated that it gives people of different ethnic persuasions the right to associate as they wish to.<sup>81</sup> Article 27 of the “International Covenant on Civil and Political Rights”<sup>82</sup> (ICCPR) and The United Nations General Assembly Declaration on Rights of Persons belonging to Ethnic, Religious or Linguistic Minorities reaffirm respect for human rights, as well as

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<sup>77</sup> Claude Klein and András Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, (OUP Oxford; 1 edition, 2013) 1423.

<sup>78</sup> Samuel P Huntington, ‘The Clash of Civilizations?’ (1993) 72 *Foreign Affairs* 22.

<sup>79</sup> Spanish example being very topical, for more constitutional debates on the matter see Hèctor López Bofill, ‘Hubris, constitutionalism, and “the indissoluble unity of the Spanish nation”: A rejoinder to Antonio Bar’, (2019) 17 Issue 3 *International Journal of Constitutional Law* 984, 990.

<sup>80</sup> United Nations Office for the Coordination of Humanitarian Affairs, ‘Lessons Learned: Review of the Kenya National Election Humanitarian Preparedness Process’, (UNOCHR, 2013), <https://www.humanitarianresponse.info/ru/operations/kenya/document/ocha-lessons-learned-review-kenya-national-election-humanitarian-0> accessed 16<sup>th</sup> April 2018.

<sup>81</sup> Etain Tannam, *International Intervention in Ethnic Conflict: A Comparison of the European Union and the United Nations* (Palgrave Macmillan; 1st ed., 2014) 199.

<sup>82</sup> UN General Assembly, ‘International Covenant on Civil and Political Rights’, (*United Nations, Treaty Series, vol. 999, 16 December 1966*) 171 <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed 28th August 2019).

fundamental freedoms devoid of the discrimination, premised upon language, religion, race or sex, and this enables non-discrimination and protection of minorities thus cushioning them from the risk of ethnic subjugation. This is further buttressed by the "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992" emphasizing the desire to uphold ethnic minorities' rights.<sup>83</sup>

Article 21 of the European Union Charter of Fundamental Rights guarantees minorities non-discrimination based on ethnicity or any other aspect.<sup>84</sup> African states have adopted this approach and indeed Article 19 of the African Charter on Human and Peoples' Rights provides that "no ethnic group should exercise *de jure* or *de facto* hegemony over others".<sup>85</sup> In Europe, a concept of multiculturalism is now in vogue. It embodies the search for respect for all communities devoid of their ethnic and cultural inclinations.<sup>86</sup> The multiculturalism concept deters ethnicity and exclusion of persons based on their cultural background.<sup>87</sup> Ethnic diversity, including places like in Africa, has the potential of encouraging rapid growth of tourism, international trade, and cultural exchanges when patterns of global variations are exploited.<sup>88</sup> In contrast, inter-ethnic contact has some negative aspects of conflict attributed to the growth of ethnic entities as avenues for political and social mobilisation.<sup>89</sup> Where educational inequalities exist among ethnic groups, as opposed to economic and demographic inequalities, the risk of discord rises because it does induce grievances.<sup>90</sup>

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<sup>83</sup> UN General Assembly, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', (*United Nations*, 3<sup>rd</sup> February 1992) <<https://www.refworld.org/docid/3ae6b38d0.html>> accessed 3<sup>rd</sup> September 2019.

<sup>84</sup> European Union, 'Charter of Fundamental Rights of the European Union', (*EU 26 October 2012*), <<https://www.refworld.org/docid/3ae6b3b70.html>> accessed 3<sup>rd</sup> September 2019.

<sup>85</sup> Paul Tamuno, 'New Human Rights Concept for Old African Problems: An Analysis of the Challenges of Introducing and Implementing Indigenous Rights in Africa', (2017) 61-Issue 3 *Journal of African Law* 305,331.

<sup>86</sup> Fukuyama (n 76) 375.

<sup>87</sup> Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and Constitutional Culture', (2015) 13-Issue 3 *International Journal of Constitutional Law* 769,770.

<sup>88</sup> Daniel Chigudu, 'Strength in diversity: An opportunity for Africa's development', (2018) 4 *Cogent Social Sciences* 230.

<sup>89</sup> Law and Society Association, 'Our Commitments', (*Law and Society Association, 2016*) <<http://www.lawandsociety.org/commitments.html>> accessed 19 October 2017.

<sup>90</sup> Ludovico Alcorta, Jeroen Smits, Haley J Swedlund, 'Inequality and Ethnic Conflict in Sub-Saharan Africa', (2018) 97 Issue 2 *Social Forces* 769,791.



The challenge most ethnic minorities have is the enforcement of the above charters in terms of assuring them of their freedoms. These treaties are inspirational legal instruments, which are in any event silent on issues relating to electoral contests.

The international community is yet to find a common legal response to the issue of ethnic-based fractious electoral contests. Where ethnic-based conflicts escalate to a level where international crimes occur, the UN has in some instances formed judicial entities to punish perpetrators.<sup>91</sup> At present, the ICC, which is a standing court devoted to international crimes, has the mandate to deal with such matters. Kenya is bound by the Rome Statute, which governs the ICC's functions, jurisdiction, and structure.<sup>92</sup> Kenya has had an ICC intervention in 2009, but this did not deter subsequent ethnic-based conflicts in the 2013 and 2017 presidential elections.<sup>93</sup>

### **1.1.5 Regional Concerns for Ethnic Conflict in National Elections**

The diminished trust amongst the diverse ethnic groups (in Africa) is a recipe for conflicts attributed to handicaps in decision making on how to share the state largesse.<sup>94</sup> Instances of ethnic homogeneity, on the converse, lead to enhanced mutualism and cooperation and subsequently minimal conflicts.<sup>95</sup>

Some scholars attribute the highly volatile nature of political competition to its immense ethnic diversity. Evidence shows that failure by African constitutions to facilitate communication between government and its citizenry is a critical causative factor.<sup>96</sup> Whereas economic hardships may impact on the saliency of ethnicity, local context do matter. Modern forces have caused immigration in Africa. This movement may cause an

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<sup>91</sup> Julian Arato, 'Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations', (2012 ) 10 Issue 3 International Journal of Constitutional Law 627,657.

<sup>92</sup> International Criminal Court , 'Kenya Ratifies Rome Statute', (ICC 2010) [https://asp.icc-cpi.int/en\\_menus/asp/press\\_releases/press\\_releases\\_2005/Pages/kenya\\_ratifies\\_Rome\\_statute.aspx](https://asp.icc-cpi.int/en_menus/asp/press_releases/press_releases_2005/Pages/kenya_ratifies_Rome_statute.aspx) accessed 4th September 2015.

<sup>93</sup> *ibid.*

<sup>94</sup> Hanne Fjelde and Kristine Hoglund , 'Electoral Institutions and Electoral Violence in Sub-Saharan Africa', (2016) 46 Issue 2 British Journal of Political Science 297,320.

<sup>95</sup> John Mc Cauley , 'The Logic of Ethnic and Religious Conflict in Africa', ( 2018 ) 117 Issue 468 African Affairs 540,541.

<sup>96</sup> Tony Prosser, 'Constitutions as Communication', (2017 ) 15 Issue 4 International Journal of Constitutional Law 1039,1050.

upsurge of ethnic conflict as new ethnic groups increase in localities resided ordinarily by other groups.<sup>97</sup>

In Africa, ethnic conflict has been attributed to the skewed allocation of educational resources among ethnic groups.<sup>98</sup> The fight for minimal resources causes feelings of disenfranchisement from the ethnic communities that miss out.<sup>99</sup> This argument suggests ethnic diversity, on its own, is not a cause of conflicts. However, the real and perceived disenfranchisement is emanating from the disproportional allocation of resources based on ethnicity.<sup>100</sup> The accrued imbalance gives credence for the need to have ethnic communities champion their leaders as a measure of accessing the state resources.<sup>101</sup>

Ethno-linguistic fractionalization has been greatly evident in Africa.<sup>102</sup> The ethnic conflict occasion impaired economic performance and increased cases of conflicts creating the potential for political imbalance and civil strife.<sup>103</sup>

The African Union's "African Charter on Human and Peoples' Rights" (ACHPR), 1981 serves as the primary legal instrument governing relations amongst most African member states. The instrument is, however, silent on the issue of ethnic conflicts and electoral contests. Being the region's Human Rights Instrument, it lacks guidelines to address ethnic conflict.

## **1.2 Statement of the Problem**

Save 2002, ethnic conflict has surrounded presidential elections in Kenya since the repeal of section 2A of the 1969 Constitution in 1991 to reintroduce multiparty democracy. Between 1993 and 2008, enforcement of criminal law was thought of as being the best remedy. Despite various criminal prosecutions both locally and internationally, ethnic conflict during presidential elections persisted. In post-2007, Kenya resorted to

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<sup>97</sup> This is true even in electoral politics for advanced democracies .See Peter John Loewen and others 'Nationalism And Ethnic Heterogeneity: The Importance Of Local Context For Nationalist Party Vote Choice', (2015) 39 Electoral Studies 129,130 .

<sup>98</sup> n 88.

<sup>99</sup> Matthew Kange Ithaca , 'Killing Others: A Natural History of Ethnic Violence',( Cornell University Press, 2017) 256.

<sup>100</sup>ibid 451-456.

<sup>101</sup>ibid 453, 458.

<sup>102</sup>Ithaca (n 99).

<sup>103</sup>ibid 720.

constitutional mechanisms; consociationalism, nation-building measures, centripetalism and devolution. Despite these mechanisms, 2013 and 2017 presidential elections were engulfed by ethnic conflict. This study therefore sought to determine why despite post-2007 constitutional mechanisms, ethnic conflict in presidential elections in Kenya persists.<sup>104</sup>

### **1.3 Research Objectives**

The general objective of the study was:

- 1) To examine the linkage between constitutional design and ethnic conflict in presidential elections in Kenya.

Specific objectives of the study were :

1. To examine the linkage between ethnic conflict and Presidential elections in Kenya.
2. To evaluate the adequacy of the post-2007 constitutional mechanisms in addressing ethnic conflict in presidential elections in Kenya.
3. To establish what lessons Kenya can draw from constitutional designs of specific commonwealth countries, namely, UK (Northern Ireland), Nigeria and Guyana.
4. To recommend legal interventions to address the problem of ethnic conflict in presidential elections in Kenya.

### **1.4 Research Questions**

- 1) What is the linkage between ethnic conflict and Presidential elections in Kenya?
- 2) How adequate are the post-2007 constitutional mechanisms in addressing ethnic conflict in presidential elections in Kenya?
- 3) What lessons can Kenya draw from the constitutional mechanisms of other commonwealth jurisdictions namely Northern Ireland, Nigeria, and Guyana?

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<sup>104</sup> Statement problem should be brief-see Moni Wekesa, *Research Methods for Lawyers & Other Professionals*, (Sportslink Ltd ,2016)44.

- 4) What legal interventions can be recommended to address the problem of ethnic conflict in presidential elections in Kenya?

### **1.5 Assumptions**

The study was premised on the assumption that the nature of Kenyan Presidential contests is based on ethnic divides, which in turn occasions ethnic conflict.

### **1.6 Hypothesis**

Post-2007 constitutional mechanisms meant to address ethnic conflict in presidential elections are inadequate.

### **1.7 Significance**

The findings generated by this study has generated knowledge in the area of ethnic conflict in presidential elections in Kenya.

Secondly, the findings of this study may help the government to develop policies in the area of ethnic conflict in presidential elections in Kenya. The study objectives may align with the country's growth and development plan, Vision 2030.<sup>105</sup> Specifically, one of Kenya's goals of Vision 2030 is to enhance cohesion, unity, and justice.<sup>106</sup>

Thirdly, findings of the study may assist in the development of programs by both government and non-governmental organizations that can assist in the promotion of ethnic peace during presidential elections in Kenya.

Finally, the study findings may assist in the enactment of new laws and legislation in the field of electoral processes and ethnic conflict management in presidential elections.

### **1.8 Justification of the Study**

This study's significant original contribution to knowledge is both in terms of methods and content. In terms of content, it shows the link between ethnic conflict in presidential elections in Kenya and the margin of votes between the winner and best loser in presidential elections. By studying voting patterns since the reintroduction of multi-party elections in 1992, it has uncovered a new theory that shows the higher the margin of votes between a

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<sup>105</sup> Government of Kenya, *Kenya Vision 2030: The Popular Version* (GOK 2006) paras3.12-3.17.

<sup>106</sup>ibid 23.

winner and the best loser in presidential elections in Kenya, the lower the chances of ethnic conflict and vice versa. Ensuring a margin of about 18 per cent between the two main contestants (supermajority) constitutionally has been proposed by the study.

This then justifies the proposal to amend article 138 (4) of the Constitution of Kenya 2010 to increase the margin of victory of the eventual winner. A supermajority system, justified by an analysis of historical electoral data, is an advancement of existing centripetalism theory of constitutional electoral systems which presently advocate either Ranked Choice Voting or 50 per cent plus one vote and distributive mechanisms.<sup>107</sup> Other ethnically divided societies worldwide can consider it.

In terms of methods, legal scholars have been using data mainly litigation, arbitration, and commercial law practice.<sup>108</sup> This study, however, extends the approach into constitutional and ethnic studies by using historical electoral data, as opposed to a comparative approach. Emre Bayamhoglu & Ronald Leenes have explained why lawyers have been slow to adopt the data-driven approach.<sup>109</sup> They contend whereas data driven decision-making is the new norm in other disciplines, this approach may conflict with the concept that underpins public-sector decision-making, which is, adherence to the rule of law.<sup>110</sup> However, this study is an inter-disciplinary fusion of law and political science in the tradition of social engineering theory of law. It adopts the approach with a view of examining the adequacy of constitutional mechanism set to remedy ethnic conflict in presidential elections in Kenya. Article 138 (4) of the Constitution of Kenya 2010 has a mathematical expression. It states a requirement that a winner for the presidency needs to get 50 per cent plus one vote. No evidence exists that illustrate data was used to justify this mathematical

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<sup>107</sup> For an overview of electoral systems in more than 200 countries and a discussion of merits and demerits of each design, see Andrew Reynolds and others, *Electoral System Design*, (The New International IDEA handbook, 2005) 245.

<sup>108</sup> Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, 'The Data-Driven Future of International Economic Law', (2017) 20 Issue 2 *Journal of International Economic Law* 2. Constitutional law in divided societies has taken a comparative approach, ignoring using electoral data. See seminal works for centripetalist like Donald (Ethnic Groups in Conflict) or consociationalist Arend (Patterns of Democracy) or more recent works Cochrane and others, *Mediating Power-Sharing: Devolution and Consociationalism in Deeply Divided Societies*, (Routledge; 1 edition 2018) 134, which looks at UK's Northern Ireland, the Brussels in Belgium and Cyprus.

<sup>109</sup> Emre Bayamlioglu and Ronald Leenes, 'The 'rule of law' implications of data-driven decision-making: a techno-regulatory perspective', (2018) 10 Issue 2 *Law, Innovation and Technology* 223, 235.

<sup>110</sup> *ibid*.

expression. Based on electoral data obtained since 1992, this study is the first one to do such an investigation and propose an amendment to the said article.

This study advances institutionalism, a theory of ethnic conflict which is explained in the literature review section of this study. Whereas institutionalism adopts a comparative approach –making comparisons across states -,this study took a different route of using electoral data to study patterns and make deductions.

### **1.9. Methodology**

This study involved a desk review and field studies. The desk review was qualitative, and it entailed the interrogation of government reports, in-depth understanding of constitutions, journals, periodicals, review of statutes, books, and internet searches as secondary sources of data. The field study was primarily qualitative, and it entailed focus group discussions and interviews on key informants.

The research method was justified by the social engineering theory of law which underpins this thesis. This theory advocates for sociological approaches to constitutions law and theory .<sup>111</sup> Such an approach required interviewing key informants to get a deeper understanding of the linkage between ethnic conflict and Kenyan presidential elections. Further, interviews assisted the study to get a deeper understanding of the adequacy of various constitutional mechanisms.

The study's objectives justified qualitative research method.<sup>112</sup> It allowed respondents to give the depth of understanding which would have been difficult to obtain from quantitative research. Respondents freely expressed their experiences and thoughts in line with the study's objectives.

The study employed a maximum variation purposive sampling method to determine respondents identified as voters and the focus group discussion participants. The method was preferred because it enabled the identification of specific persons with the capacity to provide credible information for the study.

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<sup>111</sup> Chris Thornbill, 'The Sociology of Constitutions',(2017) 13 Annual Review of Law and Social Science 493,500.

<sup>112</sup> Wekesa (n 104).

The adoption of this method enabled the researcher to collect information from individuals who had a shared set of characteristics. For example, this study being on ethnic groups and conflict, linguistic and cultural similarities was important for each county sampled.

Random sampling would have given a different outcome. By taking a heterogeneous purposive sampling approach, it was possible to select individuals with diverse backgrounds in an ethnic group per county (income, age, and gender variations ) hence ensuring relevancy to the issue being studied. This enabled one to get an opportunity to develop as much insight as possible. The study obtained a strong perspective that represents the general public. This ensured every perspective in the community was captured.

Purposive sampling assisted the study to reduce the margin of error since the information came directly from the source. Each informant had identifiable characteristics that placed them into the same demographic. Random sampling, for example, in the cosmopolitan Eldoret Town of Rift valley, would have possibly comprised some non-Kalenjin and Kikuyu respondents. This is despite the study targeting those two groups with a view of understanding why they conflict during presidential elections in that town.

One major demerit of purposive sampling is the researcher's bias. This is because a sample relies on the judgment of the researcher. However, the study developed sampling criteria that is underpinned by the theoretical framework-instrumentality of ethnic conflict.

It has been contended that there is usually no way one can evaluate the reliability of experts involved in purposive sampling.<sup>113</sup> The study remedied this weakness by choosing reputable experts.

The study used the maximum variation typology of purposive sampling. This enabled the study to get a diverse range of perspectives relating to ethnic conflict in presidential elections in Kenya and on the adequacy of various constitutional mechanisms designed to address the problem. These included views that can be said to be typical and those are extreme. Variations included the level of education; occupations; regional locations within a county; varying age sets and gender. These persons did exhibit differing range of experiences. The basic rationale underpinning the choice of maximum variation sampling

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<sup>113</sup> Mugenda ( n 137).

was to gain greater insights into this problem by examining it from various angles. This assisted in identifying common themes evident across the sample.

Desk review and field study methods were adopted so that they could complement each other. Data from the field was augmented by previously published works on the subject.

### **1.9.1 Research Site**

Article 6 (1) as read with the first schedule of the Constitution of Kenya 2010 divides Kenya into 47 counties. However, the study was carried out in specific counties only for several reasons.

First, the number ( 12 counties ) was statistically significant. Second, these counties experienced ethnic conflict in 1992, 1997, 2007, 2013, and 2017 which was related directly to presidential elections.

These counties are Kiambu, Nairobi, Mombasa, Kwale, Nakuru, Uasin Gishu, Kisumu, Nandi, Bomet, Kericho, Homa Bay and Siaya counties (hereinafter effected to as “affected counties”). Though the cyclic ethnic conflict in presidential elections is usually deemed as a problem for Kenya as a whole state, it does not occur in all counties. It is usually confined in the above mentioned affected counties where the big ethnic groups reside together.<sup>114</sup>

Out of a total Kenyan population of 47,564,296 in 2019, Kikuyu had 8,148,668 people, Luhya 6,823,842 , Kalenjin 6,358,113, Luo 5,066,966 and Kamba 4,663,910.<sup>115</sup> These big ethnic communities, who make about 70 per cent of the total Kenyan population, are the main contestants for the presidency.<sup>116</sup> The coveted positions are president and his deputy noting article 148 (1) of the Constitution of Kenya 2010 provides that each candidate in a presidential election must nominate a person who is qualified for nomination for election as President, as a candidate for Deputy President. Sub article (2) states it is a joint ticket noting there will be no separate nomination process for the Deputy President.

For example, for 2013 and 2017 elections, respondents in this study did affirm that President Uhuru was largely viewed as vision bearer for the Kikuyu community (largest

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<sup>114</sup> Various official reports on electoral ethnic conflict in Kenya ,cited previously in this chapter (for example, Kiliku report of 2003 ;Akiwumi Report of 2008;Waki Report of 2008) attest to this .

<sup>115</sup> Government of Kenya (n 6).

<sup>116</sup> *ibid* .



community in Kenya) and linguistically related communities of Embu and Meru; his deputy William Ruto for Kalenjin (third largest community); best loser Raila Odinga for the Luo and Luhya (second and fourth largest communities) and his running mate Kalonzo Musyoka for Kamba (fifth largest community).<sup>117</sup>

In 2006, The National Cohesion and Integration Commission, a governmental body established by National Integration and Cohesion Act, published a report entitled “Ethnic and Diversity Audit of County Public Service” .<sup>118</sup>The report does assist this study in ascertaining ethnic numbers in the affected counties which often correlates with ethnic numbers in respective counties’ public service. From the said report, one discerns Kiambu is a semi-urban county with Kikuyu domination with significant Luo workers in Limuru and Thika regions. Nairobi, Mombasa and to a certain extent Kwale are urban counties with significant Luo and Kikuyu numbers. Nakuru is a semi-urban county with a Kikuyu majority and significant Luo and Kalenjin minorities. Uasin Gishu, Nandi, Bomet and Kericho are rural counties with overwhelmingly Kalenjin numbers but Luo and Kikuyu significant numbers as well. Kisumu, Homa Bay and Siaya counties Luo dominated counties with significant minority Kikuyu settlements in urban centres as traders.<sup>119</sup>

No data that is relevant to the objectives of this study would have been collected from counties where these big communities’ numbers are either low or counties where the big communities are an overwhelming majority. Ethnically homogeneous counties recorded no instances of presidential related ethnic conflict since 1992. For example, Nyeri where Kikuyu is the overwhelming majority or Garissa where a small ethnic group of Somali is the overwhelming majority.

Nairobi, Kisumu, and Mombasa counties are fairly cosmopolitan urban counties. Respondents from the voters’ category from these counties were drawn mainly from low-income informal settlements where ethnic conflict during elections is cyclic, for example,

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<sup>117</sup> See the data collected in chapters three and four of this study .

<sup>118</sup> The National Cohesion and Integration Commission , *Ethnic and Diversity Audit of County Public Service*,(Government of Kenya Counties 2016) 1 ,40,80.

<sup>119</sup> *ibid* .

Kibera slums in Nairobi.<sup>120</sup>In these conflict-prone urban estates, ethnic groups often settle in isolated patterns whilst adopting ethnically inspired names for those sections, like Kisumu Ndogo (in English, it means *small Kisumu*) in Kibera which signifies a largely Luo settlement.<sup>121</sup>

For respondents under the categories of voters, one's ethnicity was taken into account. This is because the study was restricting itself to the ethnic groups that, as per official reports, often conflict during presidential elections. For the other respondents (IEBC officials and experts), ethnicity did not matter since it was expert opinion that was being sought. For presidential candidates (2007, 2013 and 2017 presidential elections), the study made an effort to interview all but only 15 responded.

The nature of conflict in the affected counties includes arson, murder, riots, and rampage against persons of other ethnic groups, their property, and state property. Different local ethnic communities were evaluated in all the areas and the same related to their voting patterns in the national presidential elections.

### **1.9.2 Population, Sample and Sampling Procedure**

The study population consisted of the registered voters in the records of the IEBC in the counties affected, the IEBC staff, presidential candidates and experts. The voters from the affected counties were expected to give information on whether ethnicity influenced their choices for presidential candidates, and if so, why.<sup>122</sup> They were expected to explain whether the constitutional mechanisms employed post-2007 have addressed the ethnic conflict in presidential elections. The voters were expected to give views on the consociational government, used to govern Kenya from 2008 through 2013. They gave their views on the centripetal feature provided in article 138 (4) of the Constitution of Kenya regarding 50 per cent plus one winning threshold requisite for presidential

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<sup>120</sup> For more information on the connection between urban informal settlements and ethnic conflict in elections in Kenya, see John De Smedt, 'No Raila, No Peace!' Big Man Politics and Election Violence at the Kibera Grassroots (2009) 108 No.433 African Affairs 581,598.

<sup>121</sup> *ibid.*

<sup>122</sup> Appendix VI.

elections. The study was keen to subject the voters to focus group discussions targeting opinion leaders and persons considered knowledgeable in the communities.<sup>123</sup>

The respondents gave insights on factors predisposing the occurrence of ethnic conflict in their counties in presidential elections. In line with the instrumentalist theory of ethnic mobilisation of the masses by elite which underpins this work, the voters were drawn from the known pool of political influencers in the selected counties. For example, former and sitting elected leaders; officials of influential women and youth groups.<sup>124</sup> Each of the focus group discussion group had eight people spread from the confines of the counties.<sup>125</sup>

In each focus group, half of the respondents were from areas in the county that experienced ethnic conflict and the other half from areas that did not- despite having considerable ethnic heterogeneity. That allowed one to examine the factors contributing to its absence in those places. The study thus had a total of 96 respondents from the voter population.

The study interviewed the IEBC chairman, one commissioner, and returning officers of all the affected counties.<sup>126</sup>The IEBC staff gave their opinions on the relationship between ethnicity and presidential elections owing to their experience in elections administration.<sup>127</sup> Constitutional mechanisms under study are those enacted after the 2007 ethnic conflict. As explained in the background, prior to 2007, measures to combat ethnic conflict in presidential elections were hinged on criminal law (outside the scope of this study), not constitutional law. The candidates gave their views on the extent to which ethnicity had affected their candidacies.

They gave their views on the effectiveness of the post-2007 constitutional mechanisms in addressing ethnic conflicts.

The study purposefully selected four constitutional experts who have published academic works on this subject.<sup>128</sup>Two experts from each field underpinning this study were picked

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<sup>123</sup>Appendix II.

<sup>124</sup> Appendix V-VIII .

<sup>125</sup>Mark Mason, 'Sample Size and Saturation in PhD Studies Using Qualitative Interviews' (2010) 11 Forum Qualitative Forum: Qualitative Social Research ,112.This paper states that whereas mean sample size for qualitative PhD studies is 31, guiding principle in determining size should be the concept of saturation.

<sup>126</sup>Appendix V.

<sup>127</sup>Appendix III.

<sup>128</sup> Appendix IV.

(law and political science). To achieve maximum variation principle, two were international and two local.

This enabled the researcher to pick on expertise with publicly known academic excellence in the relevant field of constitutional engineering for ethnically divided societies.

The experts gave their views on the linkage between ethnicity and presidential elections in Kenya; the adequacy of post-2007 constitutional mechanisms in addressing ethnic conflict in Kenya and possible remedies.

At the tail end of the research, it was realised that Ranked Choice Voting, a centripetal innovation, was unknown in the country, including amongst the local experts. However, the international scholars did give their views on this electoral system.

For practical testing on how Ranked Choice Voting compares with plurality voting in terms of reducing ethnic competition, enhancing moderation amongst candidates, and enhancing voter participation, the study interviewed university students from Catholic University of Eastern Africa's faculty of law.<sup>129</sup>

Students were chosen because of their enhanced level of education as compared to the normal population. Ranked Choice Voting is a novel electoral mechanism in Kenya; hence, it may require data to be collected from a pool of informed respondents who could share comparative lessons.

Law students were picked because they were undertaking a course related to this thesis (law). They are fairly familiar with the subject. Catholic University of Eastern Africa's faculty of law was chosen on account of having students drawn from diverse places (including from other African states). This is as compared to other local universities.<sup>130</sup>

The testing of Ranked Choice Voting was done by interviewing 10 students (5 females and five males) from the Catholic University of Eastern Africa's Faculty of Law picked in a class of 100 students randomly.

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<sup>129</sup>Appendix VII.

<sup>130</sup>See admission criteria -Catholic University of Eastern Africa ,(Students admission,1st May 2018 ) <<http://www.cuea.edu>> accessed 1st Dec 2018.

Before the interviews were done, an experiment intended to introduce the workings of Ranked Choice Voting was conducted amongst the students. The simple voting experiment using Ranked Choice Voting comprised posing a hypothetical dilemma to the 10 students.

The sample size in qualitative research remains a hot scholarly debate. Mason cites a study done on Ph.D. studies using qualitative approaches which analysed their sample sizes. 560 studies were identified and mean sample size was 31.<sup>131</sup>

This then justifies the sample sizes used in this study, including for students. As Mason held, the guiding principle should be saturation which this study adhered to.

The study picked a topic students would relate with and hence participate passionately in a manner that mirrors ethnic conflict in presidential elections in Kenya.

The students voted on the following issue:

"A lecturer has a holiday internship vacancy for a student in this class, and he will pay Ksh 100,000 per month. Assist the lecturer in choosing the intern by first agreeing on the gender of the said intern by way of secret ballot voting".

Two-round voting was carried out on the subject. In round 1, students would vote on a plurality basis (pick just one over many possible choices, say female/ male/ lecturer to choose/abstain. In round 2, students would rank choices in the order of preferences (1, 2 and 3 with 1 being the most preferred choice and 3 the least), enabling them to express preferences for multiple choices in the same contest.

In the first round, the winning threshold was set at 6 votes out of 10 of the vote. In the second round, the students were to rank their choices for a winning threshold of 6. If there was no outright winner in the first round, second choice votes for the least preferred choice in the first round would be transferred.

After that, the students would be requested to compare the two contrasting electoral methods in terms of enhancing voters' participation, enhancing moderation, and reducing negative campaigning.

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<sup>131</sup> Mason (n 125).

**Table 1: IEBC Sample Size**

<b>IEBC</b>	<b>Staff</b>
Chairman	1
Commissioner	1
Returning officers 12 affected counties	12
Total	14

**Source: Author, (2019)**

**Table 2: Experts Sample Size**

<b>Law lecturers</b>	<b>Political science lecturers</b>
2(1 local,1 international )	2(1 local,1 international)
Grand Total	4

**Source: Author, (2019)**

**Table 3: Presidential Candidates Sample Size**

<b>Election year</b>	<b>Number of respondents</b>
2007	9
2013	8
2017	8
Totals	25

Source: IEBC website <sup>132</sup>

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<sup>132</sup> 10 aspirants did not participate in the study citing various reasons ,including hectic schedule and being out of the country.

**Table 4: Sampling Frame**

<b>Category of respondents</b>	<b>Population</b>	<b>Percentage of total respondents</b>
Voters	96	64.3 %
Constitutional experts	4	2.7%
Presidential contenders	25	16.7%
IEBC	14	9.3%
Students	10	4.7%
Total	149	100%

**Source: Author, (2019)**

The total number of respondents was 139. When one deducts 10 non responsive presidential aspirants, the actual number of respondents was 129.

### **1.9.3 Data Collection Instruments and Procedures**

The study employed interview schedules for voters and contenders in previous presidential elections, the constitutional experts and IEBC staff. After the interviews, it conducted focus group discussions in each affected county comprised of select group of voters and IEBC officials. Secondary data interrogation guides have been used as the tools for gathering research information as well as for evaluating the trends regarding the ethnic voting patterns in the previous presidential elections.

### **Interview Schedules**

The Interview schedules facilitated the interaction between key informants who were deemed to be in a position of knowledge by virtue of their stature.<sup>133</sup>The schedules were considered worthwhile because they facilitated structured interaction between the researcher and the respondents. Leading questions were avoided and the researcher did more of listening, with questions structured to elicit in-depth responses.<sup>134</sup> Interviews, as a research method, assisted this study to examine how Kenya's written constitution works

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<sup>133</sup> *ibid.*

<sup>134</sup> Seidman (n 150).

practically. That is, the law in action as opposed to the law in books, as Roscoe Pound wrote.<sup>135</sup>

### **Focus Group Discussion Questions**

The study employed focus group discussion questions. They were used in each county on the voters and IEBC officials after the primary interviews. This was motivated by the ability to realise a good environment for ventilation by the voters who were opinion leaders at the local level in a structured manner.<sup>136</sup> The tool facilitated contribution by all the participants in the wake of information generation. These encouraged probing respondents to realize more feedback than what was actually captured in the tool.

### **Secondary Data Interrogation Guides**

The secondary data interrogation guides facilitated the evaluation of records pertaining to the ethnic conflict and voting patterns in the presidential elections. The focus was on capturing trends from the year 2007 to 2017. This helped to evaluate the efficacy of the constitutional interventions after the 2007 general elections. This had a focus on determining the relationship between ethnic lineage and the voting patterns. The study looked at the records from the judiciary concerning election petitions in presidential elections. The institution is charged with the responsibility of arbitrating the presidential elections petitions. This was with a view of confirming the extent to which ethnic mobilization and conflicts formed the grounds for a presidential election petition.

### **Problems in Data Collection**

The study encountered various problems during data collection. First, there was non-responsiveness by some targeted respondents. For presidential aspirants, 10 were not available for a variety of reasons, including being too busy. The remaining 15 aspirants were a good and representative sample though noting they came from diverse ethnic backgrounds. For other respondents, assurance of confidentiality boosted the response rate.

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<sup>135</sup>Allison C R , 'Law in Books Versus Law in Action : Review of the Socio-Legal Literature' .in Imbeau L and Jacob S (eds),*Behind a Veil of Ignorance ?Power and Uncertainty in Constitutional Design* ,(vol.32,pringer ,2015).

<sup>136</sup> Mason (n 125).



Second, language barriers among some very few selected rural voters were experienced in Kisumu and Siaya counties (three Luo speakers); Bomet and Kericho counties (two Kalenjin Kipsigis speakers). The study hired two competent translators for each language. They translated and back-translated the instruments used in this study and the responses thereof.

#### **1.9.4 Validity and Reliability**

Validity is “the degree to which a test measures what it implies to be measuring”<sup>137</sup>. In the alternative, it may be referred to as ‘the degree to which results obtained from an analysis of data actually represent the phenomenon under investigation.’<sup>138</sup> The researcher evaluated the face and content validity of the questionnaire.

Face validity is in relation to the misunderstanding or misinterpretation of the question.<sup>139</sup> This was verified through the pretesting method noting the piloting was done in Thika (Kiambu County). The researcher pretested the instruments with persons who were not considered in the actual research. This was by way of subjecting ten respondents to a single instrument twice consecutively. This was to confirm if the instruments were capacitated to generate similar responses in the two different periods of administration.

Content validity refers to ‘the capacity of the instrument to provide adequate coverage of a topic.’<sup>140</sup> Sufficient instrument preparation under the auspices of the supervisors, expert opinion, and pretesting of the open-ended questions helped establish the content validity.

Reliability is a measure of the extent to which an instrument consistently yields the same result after several times of administration to the same respondents. To establish the reliability of the research instruments, the test-retest method in the pilot study was applied. The questions were similar for all respondents. For voters, the study ensured respondents had attained secondary school educational level (even among those that preferred local

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<sup>137</sup> Olive Mwhiki Mugenda and Abel Gitau Mugenda, *Research Methods Quantitative & Qualitative Approaches* (Acts Press 2003) 67.

<sup>138</sup> Kothari C R and Gaurag Garg, *Research Methodology Methods & Techniques* (New Age International Ltd 4<sup>th</sup> ed., 2019) 57.

<sup>139</sup> Ibid 10.

<sup>140</sup> Ibid.

languages as explained in 1.9.3 above). Questions with technical words were explained similarly to respondents who requested.

The study took into account various potential biases, either from the respondents or researcher, which may impact on reliability and validity.<sup>141</sup> It took various steps to mitigate on those biases.

Triangulation of data was used. Responses obtained during interviews and focus groups were compared with existing theories and documents on the subject. Peer debriefing mechanism was used. Two colloquiums were held and data was subjected to criticism. The author participated in two international conferences. The first one was on 27th-31st August 2018, University of Nairobi, Kenya. The second one was on 7th -11th October 2019 Addis Ababa Ethiopia at Addis Ababa University. Both were under a Finnish funded program called ‘The African Forum for Doctoral Research in Human Rights’. The author gave related presentations and received criticism. The study then considered these views. Respondents were given transcripts of their responses at the end of each session and affirmed it represented their true original representations (member checking).

### **1.9.5 Data Collection Procedures**

To carry out the fieldwork, permission was sought by the researcher from the National Commission of Science Technology, and Innovation.<sup>142</sup> Clearances from county commissioners in the counties which were involved in the data collection exercise were obtained.<sup>143</sup> Voluntary consents were obtained from the target respondents hence allowing the researcher to hand-deliver the interview schedules and conduct the same with the target respondents.<sup>144</sup>

### **1.9.6 Data Analysis Procedures**

The analysis of the data involved four processes ; data reduction, data display, conclusion and verification.<sup>145</sup> Data reduction entailed selection, focusing, simplification and

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<sup>141</sup> Siedman (n 150).

<sup>142</sup> Appendix XII and XIII.

<sup>143</sup> One clearance has been annexed as a sample. See Appendix XI.

<sup>144</sup> Appendix I.

<sup>145</sup> Mugenda and Mugenda (n 137) .

transformation of the raw data to useful information.<sup>146</sup> Organization of the raw data in a manner allowing the drawing of conclusions justifiably is the data display.<sup>147</sup> Scientific deciphering of the meanings accrued from the data generated, elucidation of the irregularities, identification of patterns in the explanations made with a view of drawing inferences, arriving at possible configurations and propositions, guided the drawing of conclusions in the data analysis process.<sup>148</sup> Verification and authentication of the generated data were done by way of testing the provisional conclusions drawn from the study for their validity.<sup>149</sup>

Qualitative data analysis entailed deciphering the information generated from the provided answers and comparing it with other previous research works on ethnicity in the competitive presidential contests.<sup>150</sup>

### **1.9.7 Ethical Considerations**

The study obtained informed consent from the targeted respondents and they were accorded full information about the research. This entailed reasons for their choice as participants. The participants were assured of their privacy and confidentiality. Consent forms were explained to the participants in a language that they fully understood, in the event of those not conversant with English, with a view of ensuring achievement of informed consent. The researcher obtained letters of introduction from the relevant institutions to ascertain and confirm to the respondents that the requisite permits had been granted for the conduct of the study. The researcher strived to be objective and uphold the requisite standards of integrity for the study.

The study acknowledged and cited all the sources of information and did not engage in any form of plagiarism. Respondents' participation was purely voluntary with no form of financial inducements. The full disclosure as regards the purpose of the research was done

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<sup>146</sup> ibid 56.

<sup>147</sup> ibid 57.

<sup>148</sup>n149 .

<sup>149</sup>Gregory Cisek J and James Wollack (eds), *Handbook of Quantitative Methods for Detecting Cheating on Tests* (Educational Psychology Handbook),( 1st Edition, Kindle Edition Publisher: Routledge; 1 edition,2016)20.

<sup>150</sup>Irving Siedman , *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (1st published 2013 ,5th Ed. Teachers College Press 2019) 45.

as a measure of enhancing informed decision-making as pertains to participation in the research.<sup>151</sup>Legal and technical terms used in the tools were explained to the respondents.

### **1.10 Scope and Limitations**

In terms of territorial limitation, the study focused on Kenya as a country. However, scholarly work on other countries that have experienced ethnic conflicts during election periods was considered. Though the study focused on presidential elections in Kenya, lessons from countries with parliamentary and hybrid systems in other ethnically divided societies were considered. The experiences of the UK, Nigeria, and Guyana were examined. This is because, just like Kenya, they have many ethnic groups living together in their jurisdictions and have had histories of ethnic conflicts.<sup>152</sup>

The presidential contests under study are those undertaken from 2007 onwards. This is because the level of ethnic conflict, which occurred following the general elections held in 2007, was by far the most momentous and this necessitated constitutional reforms to reduce the tendencies of ethnic conflict in presidential elections. The rationale for underscoring the extent to which the latter had realised the envisaged fruits was thus of importance. However, this study did undertake statistical modeling with a view of determining if the victory margin in presidential elections impacts on deaths and ethnic conflict. Data modelling requires a large sample size to boost accuracy and elections results from the 1992 presidential elections onwards were considered in chapter three. Chapter three deals with the objective one of the study.

There are many ethnically inspired conflicts in Kenya, for example, cattle rustling in arid regions. The study was limited to conflicts that were ethnically motivated with respect to presidential contests without focusing on other electoral contests.

This being a study on forms of governments, the focus of the study was on the Constitution of Kenya. Other legal instruments were cited for elaboration purposes. Criminal prosecutions as a means of addressing ethnic conflict were not considered. This is because

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<sup>151</sup> Liam F Gearon and Scott Parsons, 'Research Ethics in the Securitised University',(2019 ) 17 Issue 1 Journal of Academic Ethics 73,93.

<sup>152</sup> The Commonwealth, 'Members' ( *Commonwealth Members*,1<sup>st</sup> May 2018 ) <<https://thecommonwealth.org/member-countries>> accessed 8<sup>th</sup> November 2019.

such prosecutions are mainly underpinned by statute law, an area out of the scope for this study.

Voter registration is a requirement for participation in the electoral contests by the voters. The study had a focus on persons who had previous experience in participation in the voting exercise by virtue of being registered voters. The study was limited to respondents who had registered as voters and had the experience of voting at least once. This helped in getting first-hand information on how the electorate votes and why they do so. In addition, the focus on voters got the electorate's opinions on the causes of ethnic clashes during presidential elections. This assisted in determining whether constitutional reforms after the 2007 ethnic chaos had deterred conflict in subsequent elections.

The number of registered voters for each affected county is big. The need to get a manageable sample that achieves maximum variation principle was important. National ethnic numbers do exist in Kenya's census reports but not for each county. Calculating a suitable sample size in qualitative studies remains a conceptual debate.<sup>153</sup>

A manageable sample comprised of respondents drawn from various ethnic groups was interviewed in each affected county. The sample size was based on ratios that mirrored percentages of ethnic numbers in each affected county public service as reported by National Cohesion and Integration Commission report of 2016.<sup>154</sup>

## **1.11 Theoretical Framework**

The study employed three theories, which were motivated by the objectives guiding the research. The theories were the Social-Engineering legal theory, the Instrumentalist theory, and the Structural (Invisible) Violence theory. These theories, among other things, underpinned this study's research method; the limitation and data analysis.

### **1.11.1 Social Engineering Legal Theory**

The key proponent of the Social Engineering Legal Theory of law is Roscoe Pound. Pound's view is that legal science has to liaise and complement with other social disciplines

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<sup>153</sup> Konstantina Vasileiou and others, 'Characterising and Justifying Sample Size Sufficiency in Interview Based Studies :Systematic Analysis of Qualitative Research over a 15 year Period' ,( 2018 ) 18 :148 BMC Med Res Methodol 11.

<sup>154</sup> For the report ,see n 118.

as a measure of engineering social change.<sup>155</sup> The theory espouses the essence of social control in the wake of viewing aspects of the law.<sup>156</sup> The law is to be viewed as a social institution, which is gradually improved by way of making intelligent efforts.<sup>157</sup> The school of thought assists a jurist to look at other studies beyond the law as a measure of assuring the improvement of jurisprudence.<sup>158</sup> The premise on which the theory is founded thus looks at the effects emanating from the legal institutions and doctrines guiding them.<sup>159</sup>

The theory equally underpins the functional premise on the kind of legal materials used to institute the requisite changes in the law, the change they aim to make and how they work to realise the required changes critical in the Social Engineering Legal Theory.<sup>160</sup> The essence of the theory is to bring out the interface between political science and legal jurisprudence requisite to harness the best out of the piece of law.<sup>161</sup>

Whereas Tamanaha has described it as a 'dead theory' by the end of last century, a contemporary scholarly movement known as "Law and Society" which has some underpinnings from this theory is a clear illustration of its currency.<sup>162</sup> This theory assisted in investigating the linkage between ethnic conflict and Presidential elections in Kenya.

In this study, knowledge of Political Science was applied as part of an interdisciplinary approach. This school holds the view that law can engineer social change, and this resonates with the theme of this study that provides that ethnicity in presidential elections

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<sup>155</sup>Linus J McManaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound' (2013) 33(1) St. John's Law Review ,10.

<sup>156</sup> *ibid.*

<sup>157</sup>VD Mahajan and MC Setalvad, *Jurisprudence and Legal Theory* ,(1<sup>st</sup> Published 2001 Eastern Book Company 5th Ed. 2016 )3.

<sup>158</sup> S N Dhyani, *Fundamentals of Jurisprudence* ,(Central Law Agency ,2015) .

<sup>159</sup>Noga Morag-Levine, 'Introduction' in Markus Dubber D and Christopher Tomlins (eds), *Sociological Jurisprudence and the Spirit of the Common Law* ( Oxford University Press 2018).

<sup>160</sup>Elise G Nalbandian, 'Sociological jurisprudence: Roscoe Pound's discussion on legal interests and jural postulates' (2011) 5(1) Mizan Law Review 141.

<sup>161</sup>The legal philosophy of Roscoe as explained in Christoph Möllers and Hannah Birkenkötter, 'Towards a new conceptualism in comparative constitutional law, or reviving the German tradition of the Lehrbuch',(2014) 12 Issue 3 International Journal of Constitutional Law 603,624.

<sup>162</sup>See Brian Z Tamanaha , 'Sociological Jurisprudence :Past and Present' ,(2019) 19-03-01 Law and Social Inquiry Washington University in St.Louis –School of Law .See also Law and Society Association, 'Our Commitments',(Commitments ,3rd June 2019) <<http://www.lawandsociety.org/commitments.html> > accessed 19 October 2017; Chris Thornhill,*The Sociology of Law and Global Transformation of Democracy*, ( 1st Published 2013 ,Cambridge University Press Reprint edition August 2, 2018).

can be managed through good constitutional design. It assists in researching objective two of this study (examining the adequacy of post-2007 constitutional mechanisms). The theory explains how constitutional interventions, whether local or from other select states, as legal concepts, can impact on ethnic conflict in Presidential elections. It assists in researching objective three (best practices) and some aspects of objective four (recommendations) of the study.

However, despite the theory underpinning some aspects of the study, it could not explain objective one of the study, namely the linkage between ethnicity, presidential elections and ethnic conflict. These concepts were better explained by adopting the following additional theory.

### **1.11.2 The Instrumentalist Theory**

There are two main theories that explain the causes of ethnic conflict, primordialism, and instrumentalism. Primordialists position is that ethnic conflict springs from inherent differences in cultural identities. Instrumentalists regard ethnic conflict as stemming from the manipulation of identities to generate political- socio-economic advantages for co-ethnics at the expense of other ethnic groups.<sup>163</sup>

This theory, as espoused by Posner, explains ethnic conflict by blaming leaders-who may include presidential elections contestants, media owners, and church leaders - for manipulating the masses through charisma, media, and mobilisation.<sup>164</sup> A good example is the 1994 Rwanda ethnic conflict, which was, largely, blamed on leaders.<sup>165</sup>

The Instrumentalist theory, as explained by Horowitz,<sup>166</sup> views ethnicity as an instrumental identity used by a community for achieving a specified material objectives with ethnic elites playing a significant role.<sup>167</sup> Ethnic identity is used as an instrument for mobilising

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<sup>163</sup>Afa'anwi Ma'abo Che, 'Linking Instrumentalist and Primordialist Theories of Ethnic Conflict' ,(2016) 5 (2) International Journal of Humanities & Social Science Studies.

<sup>164</sup> James Habyarimana and others, *Coethnicity: Diversity and the Dilemmas of Collective Action*, (1st published 2004 Russell Sage Foundation; Reprint edition 2011)161.

<sup>165</sup> *ibid.*

<sup>166</sup>Donald L Horowitz, *Structure and Strategy in Ethnic Conflict* (World Bank, 1998) 20.

<sup>167</sup>James Habyarimana and others, 'Better Institutions, Not Partition' (2008) 4 Foreign affairs -Council on Foreign Relations,1 .

communities towards expectations for collective material rewards.<sup>168</sup>The flexibility that comes along with the Instrumentalist approach makes it possible for presidential elections contestants to employ strategic manipulation<sup>169</sup> and mobilisation in order to get material rewards from their political positions.<sup>170</sup>

At the advent of the occurrence of political competition emanating from ethnic balkanization geared towards achieving material ends, conflict is bound to occur.<sup>171</sup> This predisposes states to instability due to instrumentalist practices by elite presidential elections contestants and country's partitions, along ethnic lines, do not remedy the situation.<sup>172</sup>

The Instrumentalist approach relates well with the reality of the Kenyan Presidential elections contests, which revolve around specific elites who champion an ethnic agenda. It explains the voting patterns as being greatly influenced by the elite. The competition of these elites is geared towards attaining the standard envisaged in Article 138 (4) of the Constitution of Kenya 2010 which provides that "A candidate shall be declared elected as President if he receives more than half of all the votes cast in the election" and "at least twenty-five per cent of the votes cast in each of more than half of the counties".<sup>173</sup>This theory assists in researching objective one of the study (linkage between ethnicity, ethnic conflict and presidential elections). It does assist in the evaluation of objective two -the adequacy of the post-2007 constitutional mechanisms – to the extent of examining the role of the ethnic political elite in constitutional design, processes and outcomes.

The weakness of the theory is its inability to explain why the masses agree to be manipulated. On one score, the masses can be deemed to be playing the same game of interests, but evidence points to the contrary. If, for example, the Kikuyus vote for their

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<sup>168</sup>ibid.

<sup>169</sup> Biniam E Bedasso, 'Ethnicity, Intra-elite Differentiation and Political Stability in Kenya', (2015)114 Issue 456.

African Affairs 361. See also Nic Cheeseman and others (eds), *The Oxford Handbook of Kenyan Politics*, (Oxford University Press, 2020).

<sup>170</sup>Habyarimana and others (n 167).

<sup>171</sup> John Ishiyama and others 'Does Conflict Lead to Ethnic Particularism? Electoral Violence and Ethnicity in Kenya 2005–2008', (2016)22 Issue 3 *Nationalism and Ethnic Politics* 300.

<sup>172</sup>Daniel N Posner, 'When and why do some social cleavages become politically salient rather than others?', (2017) 40 Issue 12 *Ethnic and Racial Studies*.

<sup>173</sup> Constitution of Kenya 2010, First schedule.



fellow presidential candidates with a view of getting preferential treatment like getting more paved roads, it would then be logical to assume that the Luos living amongst them would vote for the said Kikuyu candidate. The same logic would apply to Luo regions. If Luos vote against Kikuyu candidates on account of regional economic discrimination, Kikuyus living in their regions would as well vote along that line. Evidence from presidential elections since 1992 elections suggests otherwise. For example, a Kikuyu, irrespective of his place of residence, votes for a fellow Kikuyu presidential candidate.<sup>174</sup> This was a major cause of ethnic conflict in 2007.

This school explains how elites manipulate their co-ethnics, but it does not explain how the masses consent to this manipulation. The gap in this theory then necessitated the study to adopt a third theory, the Structural (invisible) Violence Theory.

### **1.11.3 Structural (Invisible) Violence Theory**

The Structural Violence Theory, as advocated by Johan Galtung, refers to invisible violence where institutions cause harm to the citizenry by blocking or frustrating them from meeting their fundamental basic needs.<sup>175</sup> It has been contended that "just as the divisive politics of negative ethnicity made it easy for the colonialists to achieve the aim of exploiting the colony to serve the capitalistic machinery of their home country, after independence the same system mutated itself.....(new ) elite took over and continued using ethnicity as a means of maintaining the monopoly of power in a way that gives them unlimited access to products from the capitalist systems of the West."<sup>176</sup>

In conclusion, Wen-Chen Chang holds the view that constitutional studies ought to combine legal and political disciplines. Chang holds that constitutions present an intricate set of intersecting law and politics and thus constitutional law scholars ought to pay attention to political foundations of constitutionalism with further democratic revivals and better civic engagements.<sup>177</sup> This then justifies linking the above three theories (legal and

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<sup>174</sup>See n 169 .

<sup>175</sup> Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6(3) *Journal of Peace Research* 167,190.

<sup>176</sup>Phoebe A Nyawalo, and others, *The Invisible Violence in Kenya: A Case Study of Rift Valley and Western Region*, (Konrad AdeunaaurStiffung, 2011) .

<sup>177</sup> Wen-Chen Chang, 'Back into the Political? Rethinking Judicial, Legal, and Transnational Constitutionalism' ( 2019)17 Issue 2 *International Journal of Constitutional Law* 453.

political science theories ) in the following sub-section. Otherwise, as Chang argues, overemphasis of constitutions as legal texts may lead to domination of legal and judicial elites in constitutional and political spheres, which inevitably triggers rise of neo-authoritarianism.<sup>178</sup>

#### **1.11.4 The Linkage between the Theories**

The study employed the three theories postulated above, namely, Social-Engineering legal theory, the Instrumentalist theory, and the Structural (Invisible) Conflict theory. The theories have a relationship with the needs of fulfilling legal obligations bestowed on the voter regardless of their ethnic inclinations. The Social Engineering Legal Theory focuses on the aspect of having the supreme law inclining the society towards nationalistic attitudes without ethnic persuasions polarizing the citizenry along the fractious cleavages. The Social Engineering Legal Theory identifies with the position of using constitutional interventions to configure executive power with a view of impacting on ethnic conflict.

The Instrumentalist Theory builds on that premise and introduces the role of elites in ethnic politics and their manipulation of such identities and galvanizing communities for collective ethnic goals. The two theories identify with Article 38 (1) of the Constitution of Kenya 2010, which allows citizens freedom to independently make political choices devoid of their ethnic affiliations and persuasions. The two theories combined recognises the inherent ties of social aggregation and mobilisation. The Structural (Invisible) Conflict theory explains the negative impact of the ethnic contest in the institution of the presidency in Kenya over the years. The three theories hence assist in establishing the link between presidential elections in Kenya and ethnic conflict and in the evaluation of the adequacy of the constitutional interventions aimed to address the problem of ethnic conflict in presidential elections in Kenya. Viewed together, the theories assist in evaluating lessons Kenya can learn from constitutional mechanisms of other jurisdictions.

Establishing the linkage between ethnic conflict and presidential elections; evaluating the adequacy of various constitutional mechanisms and drawing lessons from some

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<sup>178</sup> *ibid.*

commonwealth countries are the objectives of this study. The three theories help in that endeavour with each assisting in evaluating various aspects of those objectives.

## **1.12. Literature Review**

### **1.12.1. Introduction**

This chapter does an interrogation of literature written on issues surrounding ethnic conflict and electoral contests with a special bias on Presidential contests. It is guided by the objectives of the study. This included scholarly books, peer-reviewed and well-ranked journals with good impact factor. These journals included the *International Journal on Constitutional Law* which is published by Oxford University Press and NYU School of Law, *Electoral Studies*, *African Affairs* by Oxford Academic and *Annual Review of Law and Social Science*, hosted by Stanford University.

This study appreciates criticisms about the evaluation of journals based on impact factor including citation counts tend to be highly skewed in terms of distributions. Bad articles may be cited more for criticism hence boost ranking.<sup>179</sup> Many journals from the global south are not ranked as they are not internet-based. Therefore, select good publications that are not in highly ranked journals were considered. They include works in *The Africa Journal of Comparative Constitutional Law* (AJCCL), a publication of JUTA Law of South Africa and Kenya School of Law that is not open-access.

However, *Journal of Democracy*, a quarterly academic journal that is not peer-reviewed, was considered. This is because it covers matters about democracy which are relevant to this study's objectives and has published reputable authors in this field like Donald L. Horowitz.<sup>180</sup> Secondly, it is published by reputable John Hopkins University Press and has a strong editorial team.

As a guard against citing predatory journals, open-access journals were given preference.

The study relied on contemporary literature published from 2014 to present (five year period). However, older literature deemed classic by way of scholarly impact was

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<sup>179</sup> Ewen Callaway, 'Beat it, impact factor! Publishing elite turns against controversial metric', (2016) 535 *Nature* 6.

<sup>180</sup> An example, Donald L. Horowitz, 'Presidents vs. Parliaments: Comparing Democratic Systems', (1990) 1 No.4 *Journal of Democracy* 73,77.

considered. Literature which does not fall within the study's objectives was excluded. Literature in disciplines that do not underpin this study was excluded. Self-citation was excluded.

## **1.12.2. The Linkage between Ethnic Conflict and Presidential Elections**

### **1.12.2.1. Theories of Ethnic Conflicts**

Understanding theories of ethnic conflicts is important because theories inform proposed legal reliefs. Explanations for ethnic conflicts have inclinations to any of the following four schools of thought: institutionalism, primordialist, instrumentalist, and constructivist.<sup>181</sup>

#### **1.12.2.2. Primordialist Accounts**

Friedman explains Primordialism as the school of thought which holds that ethnic groups exist because there are traditions of belief towards primordial objects such as biological features and territorial location.<sup>182</sup>Horowitz's case is that dispositions towards kinship "makes it possible for ethnic groups to think in terms of family resemblances".<sup>183</sup>The idea that ethnic identity is fixed and almost permanent has received a judicial endorsement in Kenya. In the famous S.M. Otieno Case, the Court of Appeal held that modernization does not erase one's ethnic and cultural identity.<sup>184</sup> Ethnic groups' identity, being so fixed poses a threat to civil and multi-ethnic states. This pre-supposes the argument that conflict in multi-ethnic societies is a natural phenomenon.

The position identifies with sentiments shared by Peter Kagwanja. He was of the view that the conflict experienced after the 2007 elections in Kenya was motivated by ingrained primordial persuasions.<sup>185</sup> He accentuated that the deeply rooted traditions and negative perceptions about the supposed Kikuyu community hegemonic practices triggered an

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<sup>181</sup>Ashutosh Varshney, 'Ethnicity and Ethnic Conflict' in Carles Boix and Susan C Stokes (eds), *The Oxford Handbook of Comparative Politics* (Oxford University Press ,2009) .See also Raymond Taras and Ganguly Rajat, *Understanding Ethnic Conflict*, (1st published 2003 Routledge; 4th edition, 2015).

<sup>182</sup>Steven Friedman, 'The 'science' of superiority: Africa and scholarly colonial assumptions'(2018)36-Issue 4 *Journal of Contemporary African Studies* 449.

<sup>183</sup> *ibid*.

<sup>184</sup> Joseph Serگون and Dr.Scholastica Omondi, 'An Analysis of the Weaknesses of Traditional Dispute Resolution Mechanisms (TDRMS) As an Avenue of Dispute Resolution in Kenya', (2019) 24 Issue 9 *Journal Of Humanities And Social Science* 8 .

<sup>185</sup>Peter Kagwanja 'Courting Genocide: Populism, Ethno-Nationalism and the Informalisation of Violence in Kenya's 2008 Post-Election Crisis' (2009) 27(3) *Journal of Contemporary African Studies* 365.

eruption of conflict.<sup>186</sup> This primordialist approach as explained by above-mentioned studies, however, does not take into account role of elites in temporal variations in ethnic conflict. Dominika Koter has illustrated how various ethnic groups in Africa have undergone several cycles of solidarity and cooperation since independence in presidential elections.<sup>187</sup> This study did explain the role of elites in fanning ethnic conflicts in Kenya. This explains why it was important for the study to interrogate the following other accounts:

### **1.12.2.3. Instrumentalist Accounts**

The instrumentalist account has been explained in the section dealing with the theoretical framework of this study.<sup>188</sup> It holds the view that ethnic conflict is motivated by leaders of the community exploiting their cultural groups for mass political mobilization.<sup>189</sup> They manipulate their ethnic constituencies in the quest to acquire power and access state resources because they deem the approach more effective than reaching out to social classes.<sup>190</sup> Ethnicity is, thus, viewed as a tool to achieve particular ends.<sup>191</sup> Similar sentiments were espoused by Westen Kwatamba Shilaho who studied ethnicity and political pluralism in Kenya. His case is that presidential elections contestants in Kenya use their ethnic communities as tools for political ascendancy purposes.<sup>192</sup>

Phoebe Akinyi Nyawalo-Dar and others have blamed elites for actions related to ethnic conflict in parts of Kenya.<sup>193</sup> They have traced ethnic conflict to colonial institutions (including a strong presidency) which was adopted by elites who took power after colonialism. The study, however, does not investigate the role of various constitutional mechanisms in addressing ethnic conflict.

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<sup>186</sup> Ibid.

<sup>187</sup> See Dominika Koter, *Beyond Ethnic Politics in Africa*, (Cambridge University Press, 2016). In 1963 during the independence struggle, the two communities peacefully cooperated. In 2002, the two communities were largely on the same side of Presidential elections contests - Kenya was peaceful.

<sup>188</sup> See section 1.11.2 of this study.

<sup>189</sup> Ibid.

<sup>190</sup> Fukuyama (n 76) 54.

<sup>191</sup> Ibid.

<sup>192</sup> Westen Kwatamba Shilaho, 'Ethnicity and Political Pluralism in Kenya' (2013) 6 (9) *Journal of African Elections* 77.

<sup>193</sup> Phoebe A Nyawalo, and others (n 176).

The centrality of elites as causative agents of Africa's and Kenya's cyclic ethnic conflict in presidential elections has been discussed by several scholars. Brian Klass opines that elections manipulation in modern Africa has shifted to 'strategic rigging' from brazen rigging. Elites may bend and change election laws, but have a critical focus on wanting to be viewed as being democratic and constitutional.<sup>194</sup> His view is that their behaviour in response to constitutional changes on electoral rules provides insights into the impact of formal political institutions in Africa. Constitutionally established institutions limit elite action but in the same vein incentivize novel "forms of rule-bending or –breaking. This is in pursuit of the same goals – such as new, but no less insidious, forms of manipulation."<sup>195</sup> His article did not specifically study the impact of various constitutional mechanisms in Kenya including devolution, national building measures and centripetalism as expressed in article 138(4) of the Constitution of Kenya on elite behaviour –which is a gap filled by this study.

Nic Cheeseman and Daniel Branch blamed the 2007 ethnic conflict after the presidential elections on three trends: “elite fragmentation, political liberalization, and state informalization.”<sup>196</sup> Their case is that the origins of each could be located to the ruling style incorporated by former President Arap Moi. It was their case that even though his first government of 2002–5 he perpetuated these styles, President Kibaki did not appreciate their impact on national unity.<sup>197</sup> Despite illustrating the role of elites holding leadership positions on ethnic conflict, this work fails to address the impact of the institutions created by the constitutions on elite behaviour hence the focus of this study.

In their study on the 2017 presidential elections entitled "Kenya's 2017 elections: Winner –Takes –All as usual?" Nic Cheeseman and others analysed Kenya's 2017 presidential elections and the capacity of the Constitution of Kenya 2010 in addressing political competition and prospects of ethnic conflict.<sup>198</sup> They identified three constitutional changes

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<sup>194</sup> Brian Klaas, 'Electoral Rules: The Relationship between Political Exclusion and Conflict' in Nic Cheeseman (ed), *Institutions and Democracy in Africa* (1st edition, Cambridge University Press 2018)64.

<sup>195</sup> *ibid* .

<sup>196</sup> D Branch and N Cheeseman, 'Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya' (2008) 108 *African Affairs* 344.

<sup>197</sup> *ibid* .

<sup>198</sup> Nic Cheeseman and others , 'Kenya's 2017 Elections: Winner-Takes-All Politics as Usual?' (2019) 13 *Journal of Eastern African Studies* 215.

as being particularly key: article 138 (4) of the Constitution of Kenya 2010's 50 per cent plus one presidency winning threshold; devolution; and the introduction of a Supreme Court with its right to handle presidential electoral petitions. They found that the impact of the 2010 Constitution was mixed. The 50per centplus 1 threshold incentivized ethnic coalition formation, but this trend has long been evident. Devolution had given "a wider set of Kenyans a stake in the system, but has created new structures that can be used to channel dissent against the state".<sup>199</sup> Though the Supreme Court demonstrated its capacity to act independently it did little to sustain electoral legitimacy.

Unlike this study, the aforementioned paper fails to explain the dangers of ethnic coalitions whose emergence has been speeded up by the 50 per cent plus one constitutional proviso and how this can be remedied.

A pertinent question arises as to why the ethnic members agree to be mobilized on ethnic terms. This study explains the role of the Kenyan populace in agreeing to be fanned by the elite.

#### **1.12.2.4. Constructivist account**

Constructivists urge the importance of political and social processes in constituting ethnic identities which then leads to ethnic conflict. Umut Ozkirimli has highlighted the socially constructed nature of ethnic groups.<sup>200</sup> Fukuyama shows how demands for recognition of ethnicity goes hand in hand with the upsurge of technology and liberal democracy.<sup>201</sup> Both Ozkirimli and Fukuyama do not specifically study Kenya. This study did investigate the role played by historical factors like the return of multi-party democracy in 1991 in cementing ethnic conflicts in Presidential elections.

#### **1.12.2.5. Institutionalism account**

Varshney describes this theory as being the "idea that the design of political institutions explains why some multi-ethnic societies have conflicts, and others enjoy peace."<sup>202</sup> In deeply ethnically divided societies, several constitutional interventions have been

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<sup>199</sup> *ibid* .

<sup>201</sup>Text to n 76 (Identity) in ch 2.

<sup>202</sup>Text to n 159 in ch 3.

proposed by various scholars including nation-building measures, devolution, consociationalism, centripetalism, and electoral rules reforms. Varshney's commentary does not mention Kenya; thus, this study investigated various constitutional mechanisms used in addressing ethnic conflict in Kenya. Whereas institutionalism theory tends to take a comparative approach, this study took a different route of using electoral data to study patterns and make deductions. This illustrated the link between the margin of victory and ethnic conflict in Kenyan presidential elections -this study's significant original contribution to knowledge.

### **1.13 Adequacy of Various Constitutional Mechanisms**

How constitutions are made in ethnically divided societies has been investigated by Hanna Lerner. She proposes an incrementalist approach to constitution-making, which assists states driven by internal ethnic divisions to enact a constitution. She illustrates this with Israel, India and Ireland.<sup>203</sup> She examines incrementalist strategies in the constitutional making process including evading clear decisions, using ambivalent textual language and inserting contrasting provisions in the supreme law. This enables the deferral of controversial matters. The gap in her book is the failure to address the substantive provisions of a constitution that may embed peace. This study will focus on the substantive constitutional law, instead of strategies of the constitutional making process in divided societies.

Sujit makes a good effort by examining how substantive constitutional law in ethnically divided societies can be designed.<sup>204</sup> He identifies two approaches-the first being "accommodation". This refers to institutionalising ethnic differences by various means including devolution and consociationalism. The second is "integration". This refers to mechanisms that blur and cross-cut ethnic differences. These are centripetal and nation-building measures.<sup>205</sup> The author does not undertake a specific detailed study on Kenya.

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<sup>203</sup> Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, (Cambridge University Press, Reprint Edition 2013).

<sup>204</sup> Sujit Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation?* (Cambridge University Press, 2008) 7.

<sup>205</sup> *ibid.*



The gap will be filled by this study. However, his framework forms the mechanisms which are examined in the following sub sections thematically.

### **1.13.1 Consociationalism**

Consociationalism has long been associated with Lijphart. It refers to an agreement premised on power-sharing to co-opt leaders from competing ethnic groups into a centralized government. To augment his position, Lijphart did a study in 36 countries.<sup>206</sup> He categorised democracies into two forms: *majoritarian democracy* where Parliamentarians voted by a simple majority governs, like in the United Kingdom<sup>207</sup> and a *consensus democracy*, which entailed greater compromise and major rights of ethnic minority rights.<sup>208</sup>

In this book, Lijphart advocates for "consensus (form of) democracy" (a type of consociationalism) as the best governance for any state on account that it has better objective outcomes. These outcomes include reduced inflation rate, lower imprisonment rates, a higher rate of the abolition of the death penalty, environmental rights, more foreign support schemes, and more welfare.<sup>209</sup>

An example of a country with this form of democracy is Switzerland. It has a strong tradition of direct democracy as a constitutional feature.<sup>210</sup> The problem of this form of democracy is "immobilism". This refers to constant bickering amongst the ethnic elites which stalls government business.

Mugumo Munene cites the example of Kenya's experiment with the grand Coalition Government in 2008-2013 providing several apt examples of immobilism.<sup>211</sup> Cochrane FG and others analyse the system as privileging ethnic identity while circumventing personal

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<sup>206</sup>Arend Lijphart, *Patterns of Democracy: Government Forms & Performance in Thirty-six Countries*(Yale University Press 1999) 67.

<sup>207</sup>ibid ch 4.

<sup>208</sup>ibid ch 2.

<sup>209</sup>ibid ch 3.

<sup>210</sup> Rosalind Dixon and Felix Uhlmann, 'The Swiss Constitution and a weak-form unconstitutional amendment doctrine?', (2018) 16 Issue 1 International Journal of Constitutional Law .

<sup>211</sup>Mugumo Munene, 'Power Politics behind Kibaki-Raila Standoff', *Daily Nation* (Nairobi ,February 19, 2011) available online <https://www.nation.co.ke/news/politics/Power-politics-behind-Kibaki-Raila-standoff-/1064-1111064-is7u6uz/index.html> accessed 1st April 2018.

political choice.<sup>212</sup>In their view, consociationalism implies ethnocracy as opposed to true pluralistic democracy.<sup>213</sup>

Another problem of this model is that by giving more credence to certain ethnic elites over others, these coalition arrangements may run counter to other provisions of the Kenyan Constitution in particular political rights under Article 38.

John McGarry and Neophytos Loizidies hold that power-sharing in ethnically divided places can take centripetal or consociational forms that ensure coalitions are proportionately representative of the main ethnic forces.<sup>214</sup> They examine Cyprus between 2008 and 2010 and explains why the adopted model failed.

They propose the proportional sequential (PS) coalition which is automatically determined by election results, and allocate portfolios on a proportionate and liberal basis amongst main parties. They hold that PS coalitions provide inclusive settlement in the context of a re-united Cyprus.<sup>215</sup>They opine that achieving political stability and consequent national unity demands nothing but putting into place institutions calculated to offer safeguard to diversity particularly in the ethnic sense.<sup>216</sup> The most prominent approach towards managing conflicts in divided societies is consociationalism.<sup>217</sup>

They view the consociational arrangement as a model of power-sharing connoted by the representation and subsequent participation of all ethnic groups in the processes of making decisions with respect to state institutions.<sup>218</sup> This arrangement thus primarily desires to create a framework of democracy, involving the accommodation of minority communities through inclusion. Basing on Lijphart's understanding, Agarin and others observe that proportionality,<sup>219</sup> veto rights,<sup>220</sup> grand coalition,<sup>221</sup> and segmental autonomy are what

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<sup>212</sup> Cochrane FG and others, *Mediating Power-Sharing: Devolution and Consociationalism in Deeply Divided Societies*, (Routledge; 1 edition 2018).

<sup>213</sup> *ibid.*

<sup>214</sup> John McGarry and Neophytos Loizidies 'Power-sharing in a re-united cyprus: centripetal coalitions vs. proportional sequential coalitions' (2015) 13 Issue 4 International Journal of Constitutional Law 847,872.

<sup>215</sup> *ibid* 850.

<sup>216</sup> *ibid* 865.

<sup>217</sup> *ibid* .

<sup>218</sup> *ibid.*

<sup>219</sup> Timofey Agarin and others, 'Others in Deeply Divided Societies: A Research Agenda', (2018) 24 Issue 3 Nationalism and Ethnic Politics 299.

<sup>220</sup> *ibid* .

<sup>221</sup> *ibid.*

constitute a consociational arrangement.<sup>222</sup> Even though such constituents of consociationalism may all be put into play, it does not guarantee excellence in resolving the conflicts. Sjogren and Angerbrandt observe that furthering inclusivity of major ethnic groups is important.<sup>223</sup> Otherwise, such solutions may remain but a mirage.

Though cognizant that from a conceptual perspective an arrangement of consociationalism may offer a solution to ethnic conflicts, nonetheless there are reservations to this arrangement. The arrangement can only be helpful in the initial phase of post-conflict.<sup>224</sup> It is thus more probable to fail to score the intended objective to obtain a long-term political solution and the desired democracy in societies that are deeply divided into ethnic lines. Such an arrangement may result in a political stalemate and further buttress ethnic divisions since it institutionalizes ethnicity.<sup>225</sup>

Schwartz defines democracies as being consociational if ethnic fragmentations are expressed into state institutions and justified by an assumption that it is necessary to do so where there is a deep ethnic division within society.<sup>226</sup> He provides a brief look into the aims of consociational systems.<sup>227</sup> Schwartz thus holds that consociational arrangements aim to guarantee representation of all main portions of the society and vests in them the ability to control the various governmental institutions.<sup>228</sup>

Like is evident in other several scholarly articles, it is in the opinion of Schwartz that the classic formula for consociationalism was first pronounced by one Arend Lijphart.<sup>229</sup> In this vein, he states that consociational arrangements are constituted by four institutional features. The institutions include sharing of executive powers, group autonomy, proportional representation, and mutual veto power.<sup>230</sup>

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<sup>222</sup> *ibid.*

<sup>223</sup> Anders Sjögren and Henrik Angerbrandt, 'Accommodating, Opposing, or Dismissing? Ethno-Regional Mobilization, (De)Centralization, and State-Wide Party Strategies in Nigeria and Kenya' (2019) Vol 25 *Nationalism and Ethnic Politics* 343,352.

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*

<sup>226</sup> Alex Schwartz, 'Judicial Power and Consociational Federation: The Bosnian Example' (2018) 46 *Federal Law Review* 631.

<sup>227</sup> *ibid* 632.

<sup>228</sup> *ibid* 633.

<sup>229</sup> *ibid.*

<sup>230</sup> *ibid.*

De Villiers interchangeably uses the word grand coalition for consociationalism.<sup>231</sup> He as well attributes the development of consociationalism to Arend Lijphart, who in De Villiers' view actively developed and applied the concept of consociational democracy as a solution to societies divided deeply.<sup>232</sup> However, despite being significantly developed by Lijphart, De Villiers says that this concept was in 1603 first used by Althusius.<sup>233</sup> He adds that for the avoidance of doubt, even Lijphart by himself acknowledged that at the time of his writings, there was in place active advocacy for this concept by other experts.<sup>234</sup> A vital underlying principle enunciated by De Villiers is by citing Lijphart's opinion to the end that the ability of the elites to accommodate divergent interests and appreciate the adversaries of political fragmentation is a prerequisite to the success of consociational arrangements.<sup>235</sup>

Drawing lessons from ethnically divided Northern Province of Italy (South Tyrol), Andrea Carla views consociationalism as an important legal strategy for managing ethnic conflicts. This is because it can assist in democratic accommodation of differences.<sup>236</sup> This makes it a suitable form of government in societies that are divided for a considerable time.<sup>237</sup> Despite these merits, she admits concerns exist with some holding that it is ineffective and may obstruct other peace building goals, for example, gender equality.<sup>238</sup> This is corroborated by the argument that this concept is quite useful in the management of conflicts as opposed to the elimination of ethnic differences.<sup>239</sup>

As far as the origins of the concept of consociationalism are concerned, it was not until after the second of world war that this concept saw its outright advancement.<sup>240</sup> United

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<sup>231</sup> Bertus de Villiers, 'The Utility of Comparative Constitutional Law- The Practical Contribution by South Africa to a World Searching for Consistency in Democratic Practices' (2019) 18 *Journal on Ethnopolitics and Minority Issues in Europe* .

<sup>232</sup> *ibid* .

<sup>233</sup> *ibid*.

<sup>234</sup> *ibid* .

<sup>235</sup> *ibid* .

<sup>236</sup> Andrea Carla , 'Peace in South Tyrol and the Limits of Consociationalism'(2018) 24 *Issue 3 Nationalism and Ethnic Politics* 251,275 .

<sup>237</sup> *ibid*.

<sup>238</sup> *ibid*.

<sup>239</sup> *ibid* .

<sup>240</sup> *ibid*.

Nations over the years has adopted this approach as a standard remedy for post-conflict societies.<sup>241</sup>

Judiciary acts as a safeguard in consociational democracies by ensuring parties honour the settlements by way of judicial review. However, as Musiga explains, Kenyan courts do employ ‘political question doctrine’ hence may view disagreements among parties as being outside their competence.<sup>242</sup>

Christine Landfried and others problematise the power of unelected judges to supervise political representatives with some holding apex court judges may be motivated by many things-not necessarily the law itself.<sup>243</sup> Where this concept has been entrenched in constitutional terms, then the Judiciary is called upon to make principled judicial activism in support thereof.<sup>244</sup>

The other prerequisite is that systems of consociational power-sharing work better where the elite co-operation is intensified.<sup>245</sup> This second requirement may be supplemented by advocating for political will, which is incumbent upon the respective community leaders.<sup>246</sup> Consociationalism is best suited as a transitional and short term solution.<sup>247</sup> It may fail to rectify the problems of divided societies in the long term.

Dube is categorical that the constitutional solution for ethnic tensions and violence in South Sudan lies in the implementation of consociationalism.<sup>248</sup> Other possible constitutional solutions, according to him, can not work.<sup>249</sup> Closely connected to most scholarly views, Dube asserts that the ideas informing consociationalism have been in effect even before the express promulgation of the theory.<sup>250</sup> Countries like Lebanon and Belgium had the occasion to make consociational arrangements before the seminal works

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<sup>241</sup> *ibid.*

<sup>242</sup> T O Musiga ,‘The Political Question Doctrine and Justiciability of Rights in Kenya in the post-2010 Constitution Period’, (2018 ) 1 Africa Journal of Comparative Constitutional Law 115 .

<sup>243</sup> Christine Landfried , (ed.) ‘Judicial Power: How Constitutional Courts Affect Political Transformations’, (2019) 17 Issue 3 International Journal of Constitutional Law 1010,1014.

<sup>244</sup> *ibid*

<sup>245</sup> *ibid* .

<sup>246</sup> *ibid.*

<sup>247</sup> *ibid* .

<sup>248</sup> Robert Dube, ‘Consociationalism: A Constitutional Solution for Ethnic Tension and Violence in South Sudan’ (2019) 28 Minnesota Journal of International Law 413.

<sup>249</sup> *ibid.*

<sup>250</sup> *ibid.*

by Lijphart.<sup>251</sup> Dube defines it as a government form in which ethnic group control of power rests with the elites in the respective ethnic groups.<sup>252</sup>

What remains outstanding about Dube's discussion is that it at depth, attempts to elaborate on the essential elements of successful consociational arrangements, which are four in number.<sup>253</sup> It should be noted, however, that his discussion is based on Lijphart's work.<sup>254</sup> At the very first, Dube asserts that such governments embracing consociational democracies ought to ensure that each ethnic community enjoys some significant degree of autonomy.<sup>255</sup> Second, Dube opines that, amongst the representatives of significant groups, executive power-sharing is required.<sup>256</sup> The absence of political power may provide avenues for unrepresented groups to resort to violence.<sup>257</sup> Third, proportionality ought to be inculcated and should form the political standard of valuing representation.<sup>258</sup> Finally, ethnic groups should be vested with the capability of vetoing policies that they deem contrary to their interests.<sup>259</sup>

Nic Cheeseman comments on Alan J. Kuperman's edited volume titled 'Constitutions and Conflict Management in Africa'. He describes it as an impressive attempt to evaluate in the African context the efficacy of two different forms of constitutional design. That is, accommodation (the protection of various groups through their formal inclusion in the political system), and integration (the promotion of a single unified national identity through more centralized institutions).<sup>260</sup> He cites his own 2015 work "Democracy in Africa: Successes, Failures and the Struggle for Political Reform" and affirms the failure of various constitutional arrangements to prevent ethnic conflict and election-related violence. He notes 'violent upheavals in countries as diverse as Burkina Faso, Burundi, Mali, and South Sudan' and proposes accommodation, as championed by

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<sup>251</sup> *ibid.*

<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*

<sup>254</sup> Matt Qvtrup, 'The Logic of Constitutional Engineering: Institutional Design and Counterterrorism from Aristotle to Arend Lijphart' (2018) 41 Issue 2 *Studies in Conflict and Terrorism*.

<sup>255</sup> *ibid.*

<sup>256</sup> *ibid.*

<sup>257</sup> *ibid.*

<sup>258</sup> *ibid.* 420.

<sup>259</sup> *ibid.* 422.

<sup>260</sup> Nic Cheeseman, 'Accommodation Works Better for Reducing Conflict' (2016) 15 *Ethnopolitics* 538.

consociationalism, is better.<sup>261</sup> His paper fails to analyse the demerits of Kenya's accommodative arrangements in 2008-2013 and which gap is examined by this study in an in-depth manner.

One key gap of all the above-mentioned literature discussed in this section is its failure to explain how this mechanism fits into the framework of the Constitution of Kenya 2010. This study did fill this gap by evaluating the effectiveness of this model in managing ethnic conflicts within the context of the new Constitution of Kenya 2010.

### **1.13.2 Centripetalism**

Centripetalism, as explained by Donald L. Horowitz, refers to a set of electoral rules that give incentives to ethnic entrepreneurs to move their politics to the centre devoid of ethnic conflict.<sup>262</sup> This includes provisions like the one in Article 138 (4) of the Constitution of Kenya .It provides a winner of presidential elections has to get 50 per cent of the total votes cast plus 25per cent of votes cast in more than half of the counties.It may also include electoral rules reforms that entail preferential electoral systems where voters cast their ballots preferentially.<sup>263</sup> This would cause presidential elections contestants to cast their nets wider across the ethnic divides to get votes of second preference or even third.

Similarly, other works carried out by Horowitz, with a focus on the democratization process in Indonesia, found out that the ethnic elites do affect the democratization process.<sup>264</sup> Decisions made at the top level by the ethnic elites percolated powerfully amongst the common populace.<sup>265</sup> The new Constitution adopted in Indonesia in 1998 after the fall of dictatorship had the formula for electing a president: one had to secure a majority of votes in Indonesia at large, together with a minimum of twenty per cent of the vote in not less than half of Indonesia's regions.<sup>266</sup> According to Horowitz, the formula gives ethnic

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<sup>261</sup> *ibid* .

<sup>262</sup> Donald L Horowitz, *Democratic South Africa? Constitutional Engineering in a Divided Society* (1st ed.University of California Press 1992) 167.

<sup>263</sup> *ibid* ch 2.

<sup>264</sup> Donald L Horowitz, *Constitutional Change and Democracy in Indonesia*, (Cambridge University Press 2013)40.

<sup>265</sup> *ibid* 26.

<sup>266</sup> *ibid* 20.

elites an incentive to procure support across societal cleavages, and he calls it ‘multi-polar fluidity’.<sup>267</sup>

McGary in his work on constitutions for ethnically divided societies, believes good constitutional designs take either of the following two designs: centripetal or consociational.<sup>268</sup> He compares the merits and demerits of both.<sup>269</sup> His view is that there are many supporters of a centripetal approach in lieu of his case study in Cyprus. According to him, in the views of Centripetalist, it is more probable to agree on coalitions of moderate parties as contrasted with consociational grand coalitions due to their delivering functionality and the higher ability for cooperation.<sup>270</sup> His ultimate argument was that centripetal coalition is unlikely to be feasible or operational in Cyprus or any other similarly divided polity.<sup>271</sup> On the other hand, proportional sequential coalitions are more feasible to the Cypriot parties and more viable in terms of functionality.

Benjamin Reilly observes that this theory is premised upon the convergence at the centre doctrine, especially for those in deeply divided places.<sup>272</sup> All the same, from a centripetalism perspective, creating a moderate-ethnic inclusive party would be possible, with the capability of winning executive power by itself through a presidential system. Still, then, this is a near impossibility, especially in such a deeply divided place.<sup>273</sup>

Reilly holds that consociational grand coalitions are undemocratic as compared to centripetal coalitions.<sup>274</sup> They possess advantages over the alternative in terms of their functionality and adaptability.<sup>275</sup> He advocates for a multiple balance of power, and this is mainly aimed at making it impossible for one party to govern without the other.

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<sup>267</sup>ibid 28.

<sup>268</sup> John McGarry and Neophytos Loizides, ‘Power-Sharing in a Re-United Cyprus: Centripetal Coalitions vs. Proportional Sequential Coalitions’ (2015) 13 *International Journal of Constitutional Law* 847.

<sup>269</sup> ibid.

<sup>270</sup> ibid 847.

<sup>271</sup> ibid 848.

<sup>272</sup> Benjamin Reilly, ‘Centripetalism and Electoral Moderation in Established Democracies’ (2018) 24 *Nationalism and Ethnic Politics* 201.

<sup>273</sup> ibid.

<sup>274</sup> ibid.

<sup>275</sup> ibid .



This has been seen in Israel, Sri Lanka as well as Northern Ireland.<sup>276</sup>In cases of an intra-bloc balance of power, then a grand coalition would be suitable.<sup>277</sup>

Siobhan Byrne and Allison Mcculloch appreciate that the constitution-enabled power-sharing model can lead to stability in multiethnic states.<sup>278</sup> The most prominent of these model is consociationalism. It advocates for multiethnic coalition cabinets. However, it can stall women's progress in leadership positions.<sup>279</sup>

They appreciate that when a party of one group maintains in the position of power for longer periods, and the other remains in opposition indefinitely, then the feeling of exclusion becomes eminent.<sup>280</sup> However, upon evaluating various countries, they hold consociationalism negates gains for historically marginalized groups like women.<sup>281</sup>

This is because the arrangement focus is on ethnic groups, not gender or other classes of historically oppressed groups and thus centripetalism may be better.<sup>282</sup>

Bell states that peace processes in several countries for ethnic conflict have, since 1990, tended to institutionalized compromises between contenders for power in the form of consociational power-sharing arrangements.<sup>283</sup>She does a world wide reappraisal of these agreements and affirms that indeed women tend not to gain in terms of representation in such settlements.<sup>284</sup>Focus tends to be on ethnic groups during peace negotiations, not gender issues. However, in centripetalism arrangements, women fare better.<sup>285</sup>

Gloria Loo Jing Xi asserts that Indonesia has dual constitutionalism comprised of hybrid systems that are legally autonomous from each other. They combine elements of

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<sup>276</sup> *ibid.*

<sup>277</sup> *ibid.*

<sup>278</sup> Siobhan Byrne and Allison Mcculloch, 'Is Power-Sharing Bad for Women?',(2018)24 Issue 1 Nationalism and Ethnic Politics 1,2.

<sup>279</sup> *ibid.*

<sup>280</sup> *ibid.*

<sup>281</sup> *ibid.*

<sup>282</sup> *ibid.*

<sup>283</sup> Christine Bell, 'Power-Sharing, Conflict Resolution, and Women: A Global Reappraisal',(2018) 24 Issue Nationalism and Ethnic Politics 13,32.

<sup>284</sup> *ibid.*

<sup>285</sup> *ibid.*

centripetalism and consociationalism.<sup>286</sup> Consociationalism induces power-sharing as compared to centripetalism.

It presupposes that when society in a given state is plural in character and, especially, strongly divided ethnically, individual ethnic groups should possess their distinct representation in state government and thus able to participate in political decision making.<sup>287</sup>

This dual constitutional system also consists of a presidential system whose main checks are those of international law. On the other hand, the parliamentary system is checked by electoral politics and the constitutional court.<sup>288</sup>

Some institutions form centripetalism, these include; A territorial structure within the framework of which large ethnic groups are divided, preferably multi-ethnic territorial units; the constitutional requirement for candidates in elections (presidential) to obtain a territorial distribution of votes and supra-regional and inter-ethnic political parties.<sup>289</sup>

Unlike power-sharing arrangements, centripetalists put their trust on the voter to make a rational decision. However, as Schleicher holds, in democracies most voters do not know well enough local candidates they vote for.<sup>290</sup> Lack of adequate knowledge about these local candidates does not trouble them.<sup>291</sup> However, due to leaning either democratic or republican, some can vote knowledgeably.<sup>292</sup> Elections, where voters are less preferential and more reliant on party preferences developed concerning another level of government, are conventional worldwide, and political scientists have termed them as second-order elections, which is the trend in the United States.<sup>293</sup>

Centripetalists do support devolution as part of the reform package for ethnically divided societies. For example, the United Kingdom is a fairly centralised state whose electoral

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<sup>286</sup> Gloria Loo Jing Xi, 'ASEAN and Janus-faced Constitutionalism: The Indonesian case', (2019) 17 Issue 1 International Journal of Constitutional Law 177.

<sup>287</sup> *ibid.*

<sup>288</sup> *ibid.*

<sup>289</sup> *ibid.*

<sup>290</sup> David Schleicher, 'Federalism and State Democracy', (2017) 95 Texas Law Review 763.

<sup>291</sup> *ibid.*

<sup>292</sup> *ibid.*

<sup>293</sup> *ibid.* p.765.

system is first-past-the-post. However, devolution was enacted into law in the late 1990s by the Labour Government. Mackinnon states that it took a highly asymmetrical form where different sub-nations were granted different powers.<sup>294</sup> He states that this allowed devolved governments to develop policies which mirror needs of their areas thus encouraging policy divergence. However, this is countered by centripetal pressures whose goal is to ensure devolved units do not contradict those of the central state, promoting convergence.<sup>295</sup>

Kenya is another example. The Kenyan Constitution of 2010 has embedded an electoral system with centripetal underpinnings together with a robust devolution system.<sup>296</sup> However, the recent vote by the United Kingdom citizens to leave European Union is causing problems for devolved units, fraying the centripetal forces and ethnic nationalism is on the ascendancy.<sup>297</sup> The devolved units in the UK voted differently, with the Scottish and Northern Irish favouring to remain but English voting to exit the union.<sup>298</sup> Contrary to centripetalism theorist, that vote made some scholars wonder if indeed voters can be trusted to make all key decisions.<sup>299</sup>

Devolution can assist a state that does not intend to provide for ethnic power-sharing. This is by channeling demands of multi-ethnic society through the enhanced citizen involvement in the democratic process.<sup>300</sup> Leyland finds that where state democracy fails to produce policies or outcomes that are responsive to preferences of residents, less of the benefits of devolution will be realized.<sup>301</sup>

Benjamin Reilly has examined the record of another related centripetal subtype in five situations of Estonia, Northern Ireland and Fiji. It is called preferential or Ranked Choice

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<sup>294</sup> Danny MacKinnon, 'Devolution, state restructuring and policy divergence in the UK', (2015)181 Issue 1 The Geographical Journal.

<sup>295</sup> *ibid.*

<sup>296</sup> Constitution of Kenya 2010, article 138 (4) and article 6.

<sup>297</sup> Derek Birrell and Ann Marie Gray, 'Devolution: The Social, Political and Policy Implications of Brexit for Scotland, Wales and Northern Ireland' (2017)46 Issue 4 Journal of Social Policy.

<sup>298</sup> *ibid.*

<sup>299</sup> *ibid.*

<sup>300</sup> Peter Leyland, 'The multifaceted constitutional dynamics of U.K. devolution', (2011) 9 Issue 1 International Journal of Constitutional Law, 251,270.

<sup>301</sup> *ibid* 769.

Voting electoral system, which enables voters to rank their choices amongst aspirants on the voting paper.<sup>302</sup>

He describes the system to be divided into two modes: Alternative vote (AV) or single transferable vote (STV). He describes the former as a model used in single-member constituencies that demands the winner to achieve not just a majority of votes but 50 per cent of registered voters.<sup>303</sup>

Where no aspirant reaches that threshold, the aspirant with the least first-preference cast votes is knocked off and the votes are transferred to the other aspirants according to the second preferences marked (in that order).<sup>304</sup> This process of eliminating and transferring preferences continues until a winner who has attained the intended threshold emerges.<sup>305</sup>

Reilly defines STV as an approach employing the proportional ranking mode in multi-member constituencies. This cushions the minority communities from marginalisation. Voters have the privilege of ranking candidates in line with their preferences on the ballot akin to the AV. Determination of the "quota" of votes required for a single candidate is the precursor to the voting according to the candidates with the most first preferences immediate election. Non-achievement of the quota eliminates the candidate with the least number of first preferences and their second and later preferences ultimately distributed to other candidates left in the race. The "surplus" votes of elected candidates are subsequently redistributed with a diminished value inclined to the minimal preferences on the ballots until all the seats are eventually filled.<sup>306</sup>

Reilly's position is that such methods can incentivise ethnic elites in divided societies to seek votes, not just from ethnic strongholds, but "second-choice" support from other ethnic communities. Hence, it provides aspirants with an incentive to pool support across ethnic cleavages.<sup>307</sup> To get this, aspirants have to demonstrate the ability to represent communities

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<sup>302</sup> Benjamin Reilly, 'Electoral Systems for Divided Societies' (2002) 13 *Journal of Democracy* 129.

<sup>303</sup> *ibid* 158.

<sup>304</sup> *ibid* 157, 169.

<sup>305</sup> *ibid* 159.

<sup>306</sup> *ibid* 160.

<sup>307</sup> *ibid* .

other than their own. Alternatively, where swing or neutral electorates exist, aspirants moderate their views and move to the middle to attract them.<sup>308</sup>

Sarah Ann Miller conducted a study on the application of the aforementioned preferential voting system in ethnically divided New Papua Guinea.<sup>309</sup> She concludes that AV worked very well in the country before it got independence and bemoans its scrapping immediately after independence.<sup>310</sup> However, she fails to interrogate its effectiveness post-independence and in her recommendations, she does not mention the system.<sup>311</sup>

None of the aforementioned studies entails Kenya, which has unique social and political circumstances as compared to the said countries. This study; thus, investigated how effective the present centripetal provisions have been used, as per Article 138 of the Constitution of Kenya 2010 in addressing ethnic conflict. Secondly, a vast majority of the countries, United Kingdom, Estonia, South Africa and Indonesia, studied in the aforementioned cases, are Parliamentary democracies. Electoral contests in Kenya are centred on the presidency. How this influences ethnic conflicts was an area under investigation in this study.

None of the above-mentioned literature explains the impact of a margin between a winner and the second-best contestant in Kenyan presidential elections in reducing chances of ethnic conflict. Those two gaps have been studied greatly by this work. Finally, Ranked Choice Voting as Centripetal Mechanism and its application in Kenya has not been studied before. This study did groundbreaking work on the same in Kenya.

Japhet Biegon, in his paper entitled “Overcoming Ethnic Politics: Constitutional and Legislative tools”, holds the view that article 138 (4) of the Constitution of Kenya 2010 had the exact opposite effect( of encouraging ethnicity ). It encourages presidential candidates or their political parties to enter into ethno-regional coalitions. As a result, the 2013 presidential election was reduced to a race between the two major ethno-regional

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<sup>308</sup> *ibid* .

<sup>309</sup> Sarah Ann Miller, ‘Ethnic Conflict, Electoral Systems and Power Sharing in Divided Societies’ (Masters of Art thesis, Georgia State University, July 2006) .

<sup>310</sup> *ibid* 11.

<sup>311</sup> *ibid* 54-55.

coalitions, Jubilee and Cord .<sup>312</sup> He endorses other experts calls for constitutional electoral reforms with a view of Kenya adopting proportional representation (PR) or mixed electoral systems, where parliamentary seats are allocated to parties in accordance to the votes they garner in an election.<sup>313</sup>

His views on article 138 of the Constitution of Kenya 2010 mirror those of Yash Pal Ghai in a Chapter entitled “Ethnicity, Nationhood and Pluralism: 2010 Constitution”.Yash’s position is that presidential system as embedded by article 138 has made the presidency to remain “a big political prize that all communities covet (urged on by manipulation by presidential elections contestants), for which people are willing to kill others (as most past presidential elections have shown)” .<sup>314</sup>He claims politics of acceding presidency have remained a significant occupation of leaders and media and thus the presidency will “remain the foundation of ethnic hegemony and exclusion” .<sup>315</sup> He proposes Mixed Proportional Representation and a parliamentary system as a possible panacea to the problem of politicization of ethnicity in Kenya.

Both Yash and Japhet fails to highlight major demerits of proportional representation systems in an ethnically divided society, including a tendency of parliamentarians in such systems to seek to please the party that nominated them more than the constituency allocated them.<sup>316</sup> This may then entrench, rather than reduce, ethnicity as Members of Parliament will be eager to please their ethnic leaders who own the parties. They fail to draw lessons from other ethnical societies, including Northern Ireland and Guyana, which remain ethnically divided despite having adopted parliamentary systems. This study did draw those lessons to fill this gap. Both Yash and Japhet did not consider ways of strengthening article 138 ( 4) of the Constitution of Kenya 2010 with a view of

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<sup>312</sup> Japhet Biegon, ‘Overcoming Ethnic Politics: Constitutional and Legislative Tools’, in Yash Pal Ghai and others (eds.)*Ethnicity and Politicisation in Kenya* (Kenya Human Rights Commission 2018) 40.

<sup>313</sup> *ibid* .

<sup>314</sup> Yash Pal Ghai, ‘Ethnicity, Nationhood and Pluralism:2010 Constitution’, in Yash Pal Ghai and others (eds.)*Ethnicity, Nationhood and Pluralism: Kenyan perspectives* (Katiba Institute 2013) 75.

<sup>315</sup> *ibid* .

<sup>316</sup>Michael Chege, ‘Book Review : A Look at Prof Anyang’ Nyong’o’s Latest Essays’ - *Daily Nation* (Nairobi,2019)15 available online <<https://www.nation.co.ke/lifestyle/weekend/A-look-at-Prof-Anyang--Nyong-o-s-latest-essays/1220-5264206-pkk6ws/index.html>> accessed 8<sup>th</sup> November 2019.

incentivising ethnic electoral cooperation possibly by enhancing the threshold and this study did fill that gap.

Anyang Nyong'o in his book, *Presidential or Parliamentary Democracy in Kenya*, has criticised presidential system as embedded by article 136 and 138 of the Constitution of Kenya 2010.<sup>317</sup> It is his case that the presidential system has been ineffective in curbing ethnicised politics at the national level and proposes a parliamentary system where the executive's legitimacy is derived from parliament.<sup>318</sup> Nyong'o did not adequately address demerits of parliamentary systems within the context of an ethnically divided Kenya. They include lack of a definite election calendar and possible abuse thereof. Further, propensity to produce unstable political coalitions with exacting minority parties. Thirdly, cyclic threats and actual no-confidence votes, and the impact of all this on an ethnically divided country like Kenya. This study did address these gaps.

The above studies have adopted a comparative approach. This study took a different route of using electoral data to study patterns and make deductions. This illustrated the link between margin of victory and ethnic conflict in Kenyan presidential elections. This forms the study's significant original contribution to knowledge.

### **1.13.3 Devolution**

Lapachelle and Onate contend that devolution (and federalism) is aimed at reducing ethnic conflict, presupposing self-governance minimises demands for sovereignty.<sup>319</sup> They aver that some public goods, like the instruction language and the structure of governance, ought to be provided as local goods as opposed to nationwide, to satisfy ethnic groups.<sup>320</sup> Moreover, it embeds ethnic power players, previously excluded from power, into the matrix of governance.<sup>321</sup> However, the analysis fails to take into account circumstances that are unique to countries like Kenya whose devolution units are not divided along ethnic-

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<sup>317</sup> Anyang Nyong'o, *Presidential or Parliamentary Democracy in Kenya* (1<sup>st</sup> Ed., Booktalk Africa 2019) 30.

<sup>318</sup> *ibid.*

<sup>319</sup> Guy Lapachelle and Pablo Onate, *Borders and Margins :Federalism,Devolution and Multi Level Governance* , (1st Ed.,Verlag Barbara Budrich ,2017) 74.

<sup>320</sup> *ibid* ch 2.

<sup>321</sup> *ibid* ch 3.

lines per se, though under ethnic groups being regionally concentrated, there is some coincidence.

Tamil explains how ethno-nationalism has become a popular force in various countries including Britain (Brexit), United States and others. This is due to presidential elections contestants' exploiting various prejudices. She makes a case for egalitarian virtues and how progressives can reclaim ethnicity from ethnic extremists by redirecting it to progressive outcomes.<sup>322</sup> Devolution embeds ethnic minorities into state organs. Although this study was cognizant of Tamil's arguments, this thesis did not deal with right wing versus left wing politics –which is her main focus. Rather, it sought to ascertain whether devolution has fostered national unity and addressed stiff ethnic conflict for the centre.

Jack Donnelly has examined how states have addressed ethnic minorities rights. His focus is on politics of human rights. He reviews multilateral institutions, for example, United Nation's periodic review mechanism; systems at the regional level; the doctrine of humanitarian intervention. He does case studies examining Special Procedures mechanisms in Myanmar, Syria and Israeli settlements in West-Bank Palestine.<sup>323</sup> Ethnic minorities have been denied rights and devolution has not worked as intended.<sup>324</sup> The United Nations Human Rights mechanisms and devolution have not worked in those countries.<sup>325</sup> This study, unlike Jack's approach, does not focus on Human Rights systems and devolution. Instead it did focus on Kenya's devolution process by taking into account local dynamics.

Empirical evidence shows that devolved system of governance, by conferring semi-autonomy, has enhanced national building in some countries.<sup>326</sup> Ludovico and others confirmed equal educational opportunities among all ethnic groups may assist in pacifying ethnically divided societies in Africa and this is a key lesson in Kenya where devolved units have some educational roles.<sup>327</sup> Devolution is a valuable tool for peace because it

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<sup>322</sup> Yael Tamil, *Why Nationalism*, (Princeton University Press 2019)66 .

<sup>323</sup> Jack Donnelly, *International Human Rights (Dilemmas in World Politics)*, (5th Ed., Routledge, 2017), 90.

<sup>324</sup> *ibid* ch 1.

<sup>325</sup> *ibid* 45.

<sup>326</sup> *ibid* .

<sup>327</sup> Ludovico Alcorta and others, 'Inequality and Ethnic Conflict in Sub-Saharan Africa', (2018)97 Issue 2 *Social Forces* 769.



ensures devolved educational opportunities benefit minorities equally.<sup>328</sup> The decentralisation and semi-autonomy from the majority offer some semblance of recognition to the minority assuaging their fears about future domination, thus forcing them to integrate towards holding together and respecting their neighbours.<sup>329</sup> However, this has not been achieved fully in Kenya. Continued ethnic tensions after the 2013 and 2017 Presidential elections, despite devolution, invites some investigation of this hypothesis in Kenya.

Bagehot has contended that devolution was used to foster peace at the advent of secessionist demands by Northern Ireland from the UK. The devolved unit in Northern Ireland is, however, subservient to the UK as pertains to international relations, defence, taxation and immigration.<sup>330</sup> Employing devolution as a form of governance thus conferred explicit constitutional and legislative acts that transferred authority to a subordinate body according to its semi-autonomy and assuring pacification as pertains to quelling ethnic conflict.<sup>331</sup> Devolution thus effectively dealt with the separatist nationalist and accommodated their ethnic identities, which gave them a stake in regional politics.<sup>332</sup> In this respect, devolution thus assured democratic representation of the minority ethnic groups and strengthened the national aspirations and appeal.<sup>333</sup> However, his work does not mention Kenya. Therefore, how these principles apply in Kenya is a gap that was investigated. Secondly, the cleavages in the UK were few (protestant versus catholic). This is unlike the Kenyan situation where several ethnic groups are involved in presidential elections conflict.

In none of the above-mentioned studies were voters interviewed on why despite devolution, ethnic groups in Kenya continue fighting for the presidency. This study did interview voters and experts to fill that gap.

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<sup>328</sup> *ibid* .

<sup>329</sup> *ibid*.

<sup>330</sup> Bagehot (n 1089) 54.

<sup>331</sup> *ibid* ch 2.

<sup>332</sup> *ibid* .

<sup>333</sup> *ibid* ch 3.

#### 1.13.4 Nation-Building Measures

Edward Miguel explains that nation-building measures refer to a raft of measures instituted by states and underpinned both by law and policy aiming to forge one common national identity out of many.<sup>334</sup> Edward Miguel did a study comparing Kenya and Tanzania in which he investigated the extent to which ethnicity and nationalism were entrenched in each country and why. His findings were that unlike Kenya, Tanzania was a more coherent and united nation.<sup>335</sup> He attributed this to effective common language policies and strong leadership of Julius Nyerere, the founding President of Tanzania. He eschewed ethnicity in Tanzania.<sup>336</sup>

Although this is true, Miguel failed to take into account that Tanzania has tended to have less a democratic space than Kenya. Its press is muted, and the ruling party, Chama Cha Mapinduzi (CCM), has been in power ever since Tanzania attained independence in 1961. For an open democracy like Kenya, with its open and intensive debates, negative campaigns do impact on ethnicity and nationalism. This research did study the link between negative campaigns and local media. Ethnic composition differs in the two countries and these impacts on ethnicity index of any particular country. It would be fair to say that Kenya has some few large ethnic communities that can mount a credible run for the presidency, unlike Tanzania which has several small disparate ethnic groups thus the disputes would be significantly less.

Nic Cheeseman and Dominic Burbidge have contrasted Kenya with Tanzania and the political salience of ethnicity in each state and affirmed indeed it is far higher in Kenya than Tanzania, negatively impacting on interethnic trust.<sup>337</sup> According to them, this difference has previously been blamed on the various leadership forms experienced by the two states that the two after independence as evidenced by aggregate or survey data. Their paper assesses ethnicity at the individual level by deploying monetized two-round trust

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<sup>334</sup>Edward Miguel, 'Tribe or Nation? Nation Building and Public Goods -Kenya versus Tanzania' (2004) 56 World Politics 327.

<sup>335</sup> cf Alcorta (n 327) 340.

<sup>336</sup> *ibid.*

<sup>337</sup>Dominic Burbidge and Nic Cheeseman, 'Trust, Ethnicity and Integrity in East Africa: Experimental Evidence from Kenya and Tanzania' (2017) 2 The Journal of Race, Ethnicity, and Politics 88.

games and experimental games conclude higher levels of trust and trustworthiness exist in Tanzania as compared with Kenya.<sup>338</sup>

How trust can be constitutionalised is problematic. This study did inquire on the impact of local media in Kenya's nationalistic project and what gaps exist in current laws that can be addressed to remedy ethnic conflict in presidential elections.

#### **1.14 Comparing Kenyan Constitutional Mechanisms with Those of Other Jurisdictions**

In the UK, according to Michael Dougan, devolution has been a method of addressing ethnic conflict among the people of England, Scotland, Wales and North Ireland.<sup>339</sup> Devolution in the UK refers to legal granting of powers from the United Kingdom's parliament to the various parliaments of Scotland, Wales, North Ireland and London City. This is now imperilled by UK's decision to leave European Union.<sup>340</sup> In Nigeria, Donald Horowitz has praised the use of both federalism and centripetalism as methods of addressing ethnic conflicts for the presidency.<sup>341</sup> In Northern Ireland, centripetal rules of Ranked Choice Voting systems worked well.<sup>342</sup> Ranked Choice Voting has never been applied in Kenya hence this was studied by this thesis.

In Kenya, the Constitution of Kenya 2010 was viewed as the tool for promoting ethnic peace during presidential elections.<sup>343</sup> It contained nation-building measures, centripetal clauses and devolution as mechanisms for addressing ethnic conflict.

Other Kenyan studies that mention other countries vis a vis the Kenyan constitution on this subject include the PhD thesis of Mutakha Kangu. He did focus on carrying out an interpretation of the constitutional framework for devolution. The work entailed a comparative study that involved drawing lessons from South Africa. However, his work is

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<sup>338</sup> *ibid.*

<sup>339</sup> Michael Dougan, *The UK after Brexit: Legal and Policy Challenges*, (1<sup>st</sup> ed. Intersentia, 2017).

<sup>340</sup> *ibid.*

<sup>341</sup> Donald L Horowitz, 'Ethnic Power Sharing: Three Big Problems' (2014) 25 (2) *Journal of Democracy* 5.

<sup>342</sup> For how it has worked in several countries, see Miller (n 309).

<sup>343</sup> *ibid.*

silent on the interplay of devolution and ethnicity occasioned by the Presidential contests.<sup>344</sup> This study did cover this gap.

His thesis found that the previous position of centralised form of governance in Kenya was unfair and undemocratic.<sup>345</sup> The motivation of the new system was to ensure that ethnic groups that have been marginalized got positions in state and local governance systems.<sup>346</sup> His focus was not on all constitutional mechanisms employed to deter ethnic conflict in presidential elections. This study seeks to go further and place focus on the constitutional mechanisms employed to deter ethnic conflict post-2007.

On his part, while drawing lessons from other countries, Conrad Bosire has stated that devolution can be designed to achieve development, ethnic peace and neuter abuse of power in the centre though this requires some trade-off in the design structure.<sup>347</sup> Bosire's position is that the design of devolution in the Constitution of Kenya laid much emphasis on development to the detriment of ethnic peace and checking abuse of power by the executive.<sup>348</sup>

Unlike Bosire's work, which investigated devolution only (objects of development, conflict resolution, and limiting central power), this study extends to the nexus of ethnic conflict and Presidential elections in Kenya. Bosire's work is desk review based but this study adopts both qualitative and field methodologies. The work was done in 2013, before actual experimentation of devolution in Kenya coupled with the other constitutional interventions in place after 2007.

Another Kenyan study on the related subject was done by Ghai and others. They interrogated whether minority ethnic groups have adequate political rights and public participation in Kenya as compared with other states. This entailed the right to form and

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<sup>344</sup> Mutakha J K, 'An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach', (PHD(law) thesis, University of Western Cape, South Africa, 2014).

<sup>344</sup> *ibid.*

<sup>345</sup> *ibid.*

<sup>346</sup> *ibid.*

<sup>347</sup> See Conrad M Bosire 'Devolution for Development, Conflict Resolution, and Limiting Central Power: An Analysis of the Constitution of Kenya', (unpublished PhD(law) thesis, University of the Western Cape, 2013).

<sup>348</sup> *ibid.*

participate in forming political parties and engaging in public activities therein. This may include the realms of member recruitment and campaigning for their political causes.<sup>349</sup>

They celebrated the new Kenyan Constitution of 2010 and averred it gave citizens new and expanded rights to free, fair and regular elections premised on universal suffrage. While drawing lessons from Fiji, South Africa and Germany, they stated Kenyan 2010 constitutional framework was an improvement.<sup>350</sup> The present study took an in-depth approach as opposed to overallly comparative methods of Ghai and others. This assisted in getting primary data on how the new Constitution has helped to buttress public participation rights of the ethnic groups.

A Study that drew lessons from other states was by Hamdi Ibrahim Tartarini which focused on marginalization and democracy in Kenya. The study deduced that the Constitution affirms that all persons are equal before the law, have the right to equal protection and equal benefit of the law, and includes the full and equal enjoyment of all rights and fundamental freedoms.<sup>351</sup> The findings by Hamdi reinforced the position taken by Walter Oyugi. He posited that the constitutional provisions allow political mobilization based on any motivation including ethnic affiliation and this contributes to ethnic profiling and related discriminatory practices in the quest to seek votes.<sup>352</sup> The present study focused on the gap accrued from the failure of devolution as a governance practice, which should stem ethnic conflicts in the democratization process.

In conclusion, literature on constitutional design for divided societies prescribe either accommodation (consociationalism and devolution) or integration (centripetalism and nation-building) of ethnic groups into a state's power structures. Much of the literature is comparative and descriptive. Most do not specifically focus on Kenya. Those that focus on Kenya take an overallly comparative approach. The main gap in this literature is failure to consider importance of electoral data in designing constitutional prescriptions. This

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<sup>349</sup> Yash Pal Ghai and others, *Taking Diversity Seriously: Minorities and Political Participation*, (Minority Rights Group International, 2013)50.

<sup>350</sup> *ibid.*

<sup>351</sup> Hamdi Ibrahim Tartarini, 'Marginalization and Democracy: Kenya's 2007 Post Election Violence' (Unpublished PHD thesis, University of Nairobi 2015) 23.

<sup>352</sup> Walter O Oyugi, *Ethnicity and democratization in Africa* (1st ed., Dakar: Codesria Books 2004) 45.

research took an explanatory and indepth approach unlike past studies that took comparative and descriptive methods.

As a prelude to subsequent chapters, the following sub-section sets out the chapter breakdown of the study.

### **1.15 Chapter Breakdown**

The study is divided into six chapters:

Chapter One: Introduction. This chapter introduces the study and outlines the subject matter of the thesis. The chapter lays a basis for the discussion in the succeeding chapters. The chapter includes the background of the study, statement of the problem, objectives of the study, research questions, hypothesis, the assumptions, justification for the study, significance, scope and limitations of the study and research methodology. This chapter entails an in-depth analysis of the existing literature on the topic and reveals the gaps which this study intends to fill.

Chapter Two: Conceptual Framework

This chapter sets out the conceptual framework that gives a conceptual relationship between the variables guiding the research. They include ethnic conflicts, constitutionalism, constitutional mechanisms for addressing ethnic conflict and Presidential elections.

Chapter Three: The Linkage between Ethnic Conflict and Presidential Elections in Kenya

This chapter establishes the linkage between ethnic conflict in Kenya and presidential elections in Kenya. It discusses the causative factors of ethnic conflict in presidential elections based on data obtained from the field.

Chapter Four: Evaluation of the Adequacy of the Post 2007 Constitutional Mechanisms

This chapter presents the constitutional mechanisms for intervention after the 2007 post-election conflict and considers their efficacy with regards to stemming the recurrence of the same in any other subsequent elections. This is with a view of determining how effective the constitutional interventions put in place were.

#### Chapter Five: Best Practices from other jurisdictions

This chapter discusses best practise drawing lessons from other states that have had ethnic conflict in their electoral processes. They are UK's Northern Ireland, Nigeria and Guyana . Despite some key differences, the three countries were chosen because just like Kenya, they have acute ethnic differences, they are all Commonwealth countries, and they share some cultural characteristics including their propensity towards the use English as the language of communication and embracement of the Christian religion.

#### Chapter Six: Recommendations of constitutional interventions

This chapter makes recommendations of constitutional and policy mechanisms which can be employed to address ethnic conflict in Kenya. It highlights constitutional measures that can be employed as well as a policy a framework which can be adopted to stem the occurrence of ethnic conflict in presidential elections.

#### **1.16 Conclusion**

The chapter has introduced the study by way of setting out the background, statement of the problem, assumptions, hypothesis, justification, scope, theoretical framework and on reviewing literature based on the objectives guiding the study. It has illustrated the gaps in the literature on the topic. The chapter has placed a foundation for subsequent chapters of the study. The next chapter deals with the conceptual framework that guides the study.

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK

#### 2.1. Introduction

This chapter gives the conceptual linkages between various variables that guided this research. It defines various terms and expressions and places them within the context of this study by explaining the relationship among them. It discusses the linkage between ethnic conflict, presidential elections in Kenya, and the post-2007 constitutional mechanisms. It lays down the evaluation criteria for the post-2007 constitutional mechanisms. It discusses the merits and demerits of various constitutional mechanisms that seek to address the recurring problem of ethnic conflict in presidential elections in Kenya.

#### 2.1.1 Constitution and its importance in addressing ethnic conflict in presidential elections in Kenya

#### 2.1.2 Defining “Constitution”

*Black's Law Dictionary* defines a constitution within the context of public law as "the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organising the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers".<sup>353</sup>

Dennis J Galligan and Mila Versteeg state that, 'a constitution creates a government, defines the role and functions of its institutions, enacts substantive limits on its scope, and regulates relations between constitutional institutions and the people'.<sup>354</sup> As a result, it constrains the government by generating a set of inviolable tenets to which legislative and other government activities, including executive functions, must conform. However, it

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<sup>353</sup>Bryan A Garner, *Black's Law Dictionary*, (11th Edition -STANDARD EDITION Thomson Reuters, 2019), 45.

<sup>354</sup> Denis J Galligan and Mila Versteeg, *Social and Political Foundations of Constitutions*, (1st Ed. Cambridge University Press 2013) 71.



enables the government, through empowering its institutions and by mandating it to promote the welfare of its citizenry.<sup>355</sup>

They contend that constitutions can be viewed on four prisms, namely; “(1) constitutions as expressions of values; (2) constitutions as manifestations of power; (3) constitutions as coordinating devices; and (4) constitutions as contracts.”<sup>356</sup>

The Constitution of Kenya 2010 illustrates a combination of these four prisms.

A cursory look at Constitution of Kenya 2010 shows it is steeped in values. Its preamble, for instance, establishes essential values of human rights, equality, freedom, democracy, social justice, and the rule of law. Article 4 (2) of the same establishes Kenya as a multi-party democracy based on national values. Article 10 sets out those values to include "human rights and devolution."

These are core and constitutive political commitments that reflect transnational norms and standards.

However, irrespective of the values, constitutions are often products of domestic power struggle. Ran Hirschl's perspective is that constitutions are "politics by other means" that illustrate interests and bargains of different elites.<sup>357</sup> Hirschl identifies what he refers to as a "strategic -realist approach" to constitutions. His case is that "strategic behaviour by politicians, elites, and courts plays a key role in explaining the tremendous variance in the scope, nature, and timing of constitutional reform".<sup>358</sup>

This view follows the rational choice theory as expounded by Mark Petracca, which asserts that politicians are self-interested and utility-maximizing actors who, *ceteris paribus*, favour constitutions that serve their interests.<sup>359</sup> As per this prism, constitutions are neither documents written in "constitutional moments" of higher lawmaking calling, nor are they products of a careful and deliberate choice of higher values. However, they are political

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<sup>355</sup> *ibid.*

<sup>356</sup> *ibid.*

<sup>357</sup> Ran Hirschl, 'Judicialisation of Politics' in Gregory A Caldeira and others, *The Oxford Handbook on Law and Politics* (1st Ed. Oxford University Press 2013) 157.

<sup>358</sup> *ibid.* See also John Griffith's 1978 Chorley lecture as expounded in Martin Loughlin, 'The Political Constitution at 40', (2019) 30 Issue 1 *King's Law Journal*.

<sup>359</sup> Mark P. Patracca, 'Rational Choice Approach to Politics: A Challenge to Democratic Theory' (1991) 53 (2) *The Review of Politics* 289.

bargains and products of a power play by self -interested elites. Constitutional historians do affirm the great impact presidential elections contestants have had in the evolution of Kenya's constitutional history.<sup>360</sup>

Those that view constitutions as coordination tools assert that the "whole point of a constitution is to organize politics and society in particular ways."<sup>361</sup> According to Russell Hardin, 'establishing a constitution is a massive act of coordination that creates a convention that depends on its maintenance on its self -generating incentives and expectations.'<sup>362</sup>

As a reply to Hardin's assertion that views constitutions as coordination tools, Tom Ginsburg postulates that constitutions are understood at best as contracts.<sup>363</sup> While arguing coordination theory does not explain constitutional contents, he asserts that contract theory provides a set of valuable tools to understand how constitutions are negotiated institutions. He refutes various objections to the theory of "constitutions as social contracts." One of the objections is , whereas in contract parties must be in agreement, and a third party enforces them, constitutions are not agreed to by all parties and are self-enforcing. They create a government that is not limited by time, while contracts are generally time-bound .<sup>364</sup> He considers the merits of drawing parallels between the two. One merit is in the negotiations over the constitutional design and content, which mirrors negotiating a contract. His view is that "the content of constitutions may, like contracts, have a form - like quality. Provisions migrate from document to document, sometimes with only minor amounts of local tailoring."<sup>365</sup>

This study, which is underpinned by social engineering theory of law, endorses the view that Constitution and the formal institutions created therein shape the political life of

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<sup>360</sup> Morris Kiwinda Mbondenyi, 'Human Rights and Democratic Governance in post 2007 Kenya :An Introductory Appraisal' , in Morris Kiwinda Mbondenyi and others ( eds), *Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal*, (Pretoria University Law Press 2015) ch 1 .

<sup>361</sup> Ran Hardin, 'Why a Constitution?' in D. Galligan and M. Versteeg (Eds.), *Social and Political Foundations of Constitutions* ( Cambridge: Cambridge University Press,2013).

<sup>362</sup> *ibid.*

<sup>363</sup> Tom Ginsburg, "Constitutions as Contract, Constitutions as Charter," in Dennis Galligan and Mila Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013)50.

<sup>364</sup> *ibid.*

<sup>365</sup> *ibid* 197.

Kenyans and Africa in general. This is in contrast with the argument in *Africa Works*, a treatise by Patrick Chabal and Jean-Pascal Daloz. They did not imply that Africa lacks norms and laws that regulate behaviour in predictable ways. Instead, they held that formal rules do little to shape political life. However, whereas Africa is said to have ‘active societies and weak states’, Muna Ndulo states several countries now adhere to basic constitutional tenets, like term limits and holding regular elections.<sup>366</sup> Patrick Chabal and Jean-Pascal’s views appear now untenable, with modern studies affirming an endeavour by African leaders to adhere to constitutions albeit with problems.<sup>367</sup>

Kenya has had three written constitutions since its attainment of independence. These are the 1963 independence Lancaster Constitution, the 1969 replacement of the Lancaster Constitution, and the current Constitution of Kenya 2010. Regarding this study, both constitutions of 1969 and 2010 offer important information hence reference was made to both. It is noteworthy that three of the four post-2007 mechanisms under evaluation are in the current Constitution of Kenya 2010. These are Nation-building, Centripetalism, and Devolution. However, Consociationalism was embedded in the year 2008 in the now repealed Constitution of 1969.

In the promulgation of the 2010 Constitution, the consociational model was saved in its transitional clauses, and it lapsed in 2013 after the general elections. Chapter 18 of the Constitution of Kenya 2010 establishes the transition and consequential provisions of Section 262 of the same. It explains that these transitional provisions are set out in the Sixth Schedule and would take effect on the stated effective date. Article 3 ( 2) of the sixth schedule of the Constitution of Kenya 2010 provides that the provisions of the former Constitution concerning the executive and the National Accord and Reconciliation Act would continue to operate until the first general elections held under this Constitution.

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<sup>366</sup>Muna Ndulo , ‘Constitutions :The Politics of Constitutional Reforms’ in Nic Cheeseman (ed), *Institutions and Democracy in Africa: How the Rules of the Game Shape Political Developments* (1st edn, Cambridge University Press 2018) ch 5.

<sup>367</sup> *ibid.*

### **2.1.3 The Constitution as a Tool for Addressing Ethnic Conflict in Presidential Elections in Kenya**

As explained in the preceding paragraphs, constitutions can be viewed as tools for coordination of government business as well as the manifestation of power. When viewed from the perspective of manifestation of power, then it goes without saying it impacts on politics; otherwise, presidential elections contestants would be disinterested in its contents.

Murunga explains how a pure presidential system was incorporated in the Constitution of Kenya in 2010 upon the intervention of powerful political forces.<sup>368</sup> Influential political players concentrated in debates about forms of government while ignoring discussions on other parts of the Constitution. If it can impact on politics, then it can as well be remodeled in a manner that shapes politics of presidential elections hence address ethnic conflict in Kenya. When viewed as a tool for social and national coordination, then again, it can as well be applied to remedy one major social and political ill in Kenya –the recurring ethnic conflict in presidential elections. If viewed as an expression of values, then it ought to be modeled in a manner that achieves ethnic peace, a universal norm and value. If viewed as a social contract, care needs to be taken by constitutional drafters who have to avoid "copy and paste" techniques – a common practice by many contract makers. One may copy foreign clauses that do not suit local circumstances.

Except for the ‘contract’ prism which leans more to a fully comparative study, this thesis combines the three other approaches. It views a Constitution as a mechanism that sets out how the dominant presidential position should be filled and presidential powers (power manifestation).<sup>369</sup> This has to be done in an orderly and rational manner (as a coordination tool). The aim is to uphold ethnic peace and democracy (national values).

Article 2 (1) of the Constitution of Kenya 2010 provides that the Constitution is the supreme law of the country. The supreme court has restated this position in *The Speaker*

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<sup>368</sup> Godwin R Murunga , 'Elite Compromises and the Content of the 2010 Constitution' in Godwin R Murunga and others (eds.), *Kenya: The Struggle For A New Constitutional Order*, (Zed books, 2014)ch 7.

<sup>369</sup> Constitution of Kenya 2010, Art. 138.

of the Senate and *Another vs. The Hon. Attorney-General and Others* [2013] eKLR where at paras 57, 59, and 64 it held as hereunder:

In the South African case, *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11, it was held that “under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act under, and within the limits of, the Constitution', and the supremacy of the Constitution requires that the obligations imposed by it must be fulfilled. Courts are required by the Constitution to ensure that all branches of government act within the law and fulfill their constitutional obligations. (para 38).

The above-illustrated supremacy means all laws and policies that conflict with the Constitution are null and void. As a result of this legal supremacy, anyone intending to reform laws on presidential elections, he or she must undertake a constitutional study, hence this thesis.

In constitutional engineering, Yash Ghai gives three approaches to Constitution making in societies where loyalties by communities are competing; the liberal state, the nationalist state, and the consociational or multi-national state.<sup>370</sup> The liberal state concerns itself with the individual above everything else. The state is designed by the Constitution as a vehicle to enable individuals to pursue their interests as they see them but not as defined by others.

Yash explains that the autonomy of the individual is the primary object of the state. The individual thus is abstracted from the community in which he or she lives, "atomized and self-centered".<sup>371</sup> The state is neutral as between different ethnic groups, not privileging one over others. Ethnic groups are not recognized as corporate groups but as a mere collection of persons associating privately. The right bearer is the individual, known legally as a citizen, and is valued equally. His view is that in this model, the minorities are specially recognised. The key is on constitutional symmetries.<sup>372</sup>

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<sup>370</sup>cf Ghai( n 314).

<sup>371</sup> *ibid* 76-80.

<sup>372</sup> *ibid*.

His view is that the "nationalist" state is based on the theory of nationalism—that one nation/people is entitled to the state above the rest. This fosters an ethnically-based leadership engaged in establishing a state on the principle of the supremacy of one ethnic group over others.

Finally, he identifies the third major approach of a multi-ethnic state, which combines liberal and nationalistic states' features.<sup>373</sup> It aims at the values of democracy and rights but is based on the view that in multi-ethnic states, the institutions and procedures of liberalism are ineffective.

This study adopts the liberal state approach, noting the Constitution of Kenya 2010 has adopted its main features. For example, Article 27 provides for equality of all persons, and thus the state is neutral as between various ethnic groups, not privileging one over others.

#### **2.1.4 Exploring which branch of Government has Constitutional Competence to Address Ethnic Conflict**

The next subsections evaluate the roles of various organs of government in addressing ethnic conflict in presidential elections in Kenya. This would assist in justifying which organ is the focus of this study. That inquiry is underpinned by the concept of separation of powers, which is key in Kenya's realisation of political liberty and absence of abuse of power.<sup>374</sup> In order to preempt and avert possible abuse of power, De Montesquieu opined that it is necessary to install checks and balances on the organs of government.<sup>375</sup>

In *Spirit of the Laws*, he described constitutional political power distribution among the various arms of government. His approach was to present a form of government that was not excessively centralized in all its powers to a single ruler. He discerned a separation of powers among the executive, parliament, and the courts:

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<sup>373</sup> *ibid.*

<sup>374</sup> Yash Pal Ghai, 'Constitutions and Constitutionalism: The Fate of the 2010 Constitution' (n 370).

<sup>375</sup> Cambridge University, 'Full Text of Montesquieu 'The Spirit of Laws', (*Cambridge University*, 1st Dec 2019), Baron De Montesquieu, *Esprit des lois The Spirit of Laws*, 1748, chapter Xi (11) 3-6 available online

[https://archive.org/stream/MontesquieuTheSpiritOfLawsCambridgeIntegral/Montesquieu%20-%20%27%27The%20Spirit%20of%20Laws%27%27%20%5BCambridge%2C%20integral%5D\\_djvu.txt](https://archive.org/stream/MontesquieuTheSpiritOfLawsCambridgeIntegral/Montesquieu%20-%20%27%27The%20Spirit%20of%20Laws%27%27%20%5BCambridge%2C%20integral%5D_djvu.txt) accessed 1st December 2019.

In every government there are three sorts of power: the Legislative; the Executive in respect to things dependent on the law of nations; and the Judiciary in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state.<sup>376</sup>

Montesquieu's view was that each arm ought to strictly exercise its function:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power is not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.<sup>377</sup>

Connected to this is the concept of checks and balances.

In the case of *Apollo Mboya v Attorney General and two others* [2018] eKLR, the court had this to say:

93. According to the classical doctrine of the separation of powers, the power of enacting laws (legislative power) should be separated from the power of administering the state (executive power) and the power of interpreting and

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<sup>376</sup> *ibid* .

<sup>377</sup> *ibid* .

applying the laws to particular cases (judicial power).[43] However, constitutions adhering to this doctrine, such as ours, do not typically keep the branches of government entirely separate. As James Madison contended, the doctrine allows for each of the three branches of government to have some involvement in, or control over, the acts of the other two. This partial mixture of mutually controlling powers is known as a system of checks and balances.[44]<sup>378</sup>

The constitutional principle of "checks and balances " is the notion of a branch limits the other two. This ensures a balance between the three arms of the state. The ambitions of one arm curtail those of the other and, none is supreme. This eternal confrontation among them assures the liberty of the people.

The difficulty of setting up a state can be solved even by a nation of devils, so long as a suitable constitution exists that pits opposing factions against themselves.<sup>379</sup>

The following sections examine each constitutional organ of government to establish which is competent to address ethnic conflict in presidential elections in Kenya.

### **2.1.5 Constitutional Organs: Judiciary and Ethnic Conflict**

Ethnic conflict in presidential elections does entail matters that entail express violations of the Kenyan Constitution. For example, presidential election candidates under the guise of freedoms of political expression (article 38), may incite ethnic groups. As a result, though the violations may be unconstitutional, what needs to be investigated is whether the judiciary has the competency to intervene.

This subsection examines to what extent the judiciary, as a Constitutional Organ under the Constitution of Kenya 2010, can address the problem of ethnic conflict in Presidential elections in Kenya.

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<sup>378</sup>*Apollo Mboya v Attorney General & 2 others* [2018] eKLR.

<sup>379</sup> Tom Ginsburg, 'Constitutional Advice and Transnational Legal Order' in Gregory Shaffer and others (eds.), *Constitution-Making and Transnational Legal Order (Comparative Constitutional Law and Policy*, (Cambridge University Press, 2019) ch 2.



Article 159 of the Constitution of Kenya 2010 provides that, “Judicial authority is derived from the people and vests in and shall be exercised by, the courts and tribunals established by or under this Constitution”. Article 159(2) provides, “In exercising judicial authority, the courts and tribunals shall be guided by the following principles—(a) justice shall be done to all, irrespective of status .”

Since the elections of 2013 ,the first in Kenya under the new Constitution, losing contestants have always resorted to the judiciary seeking redress. This may suggest renewed confidence in the judiciary by presidential candidates. Thus it can be viewed as being competent in tackling ethnic conflict during elections.

However, the saliency of ethnicity in Kenya has been manifested in Constitutional lawyering of those petitions. This suggests the cases are ethnic conflict by other means. Musumba has noted that there was a link between the ethnicity of the individual parties in the main 2013 presidential petition (Raila Odinga v. IEBC, Issack Hassan, Uhuru Kenyatta, and William Ruto) and their respective lead counsel (in 2017 presidential petition also). This may suggest the judicial process had been ethnicised and politicised ab initio.<sup>380</sup>

The doctrine of 'judicial restraint" has been raised in the two supreme court petitions on presidential elections (2013 and 2017). The doctrine does suggest judiciary may not be the competent organ. Judicial powers are nuanced as courts only deals with specific purported constitutional violations and evidence as raised in a petition, not underlying factors of ethnic conflict.

As a contrast to judicial activism, judicial restraint has two approaches: the procedural or substantive approach to the exercise of judicial powers.<sup>381</sup>Being a doctrine of procedure, judicial restraint requires judges to restrain themselves from deciding constitutional matters

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<sup>380</sup>Linda Musumba, ‘Best Foot Forward: A Critical Assessment of the Lawyering Demonstrated During the 2013 Presidential Election Petition in Kenya’ in Collins Odote and Linda Musumba (eds), *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Election in Kenya and the Emerging Jurisprudence* (International Development Law Organization (IDLO) and Judiciary Training Institute (JTI) 2016).

<sup>381</sup>Jane S Schacter, ‘Putting The Politics of “Judicial Activism” in Historical Perspective’ (*The Supreme Court Review*, 18<sup>th</sup> July 2019 )<https://www-cdn.law.stanford.edu/wp-content/uploads/2019/03/Jane.S.Schacter-Putting-the-Politics-of-Judicial-Activism-in-Historical-Perspective-2018.pdf> accessed 31st Oct 2019.

unless such a decision is so fundamental in resolving disputes between parties.<sup>382</sup>As a substantive concept, with a view of avoiding to legislate on the bench, it urges courts handling constitutional disputes to grant deference to the views of the elected branches and invalidate their actions only when the limits of the constitution are violated in express terms.

In the Raila 2013 case, the counsels for the second respondent, IEBC urged the Court to exercise judicial restraint. The counsel for the Commission stated the special circumstances of the case required restraint. This is because the Presidential elections "took place in a context of perfect peace. As many as 86 per cent of the electorate – a high turnout by any standards – did vote; no case of loss of life in the course of the election was reported. So, the will of the electorate, by which the 3<sup>rd</sup> respondent was entrusted with the Presidential mandate, ought to be upheld". He contended that in such conditions, the Court "should, in principle, desist from intervention, but should instead affirm the principle of restraint."

He relied on the American case, *Bush v. Al Gore* 531 U.S. (2000), in support of the contention that despite the constitution having jurisdiction to invalidate a Presidential election in pursuance of Article 140 of the Constitution, restraint was paramount for the issues involved were inherently *political* in nature.

The counsel also relied on the South African case, *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC), wherein the court held:

"Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may have budgetary implications. In this way, the judicial, legislative, and executive functions achieve appropriate constitutional balance."<sup>383</sup>

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<sup>382</sup> *ibid.*

<sup>383</sup> *Minister of Health v. Treatment Action Campaign* (2002) (5) SA 721 (CC).

It was urged that "what is before the Court is a political contest, for all politicians, their business is to offer themselves for elections; that of IEBC is to conduct elections; that of the people is to decide." Counsel submitted that in an electoral contest such as the instant one, "the Court should have a very limited role."

The court held -

"This is the *first time* the Judges are called upon to declare their perception of their role in a fundamentally political-cum-constitutional process. It is particularly significant that the organ, which is the subject of the dispute is the most central agency of the Executive Branch, namely the presidency. The new Constitution will not be fully operational, without the Presidential office being duly filled, as provided by the Constitution and the ordinary law. The Constitution not only represents a unique and historic compact among *the people*; it expressly declares all powers of governance to emanate from *the people* and to be for service to *the people*. Article 1 of the Constitution thus provides:

*"(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.*

*"(2) The people may exercise their sovereign power directly or through their democratically elected representatives."*

What is now before the court is a case in which the people, as makers and primary beneficiaries of the Constitution, have employed the prescribed machinery, and cast their votes in the exercise of their political will to elect the leading member of the Executive Branch.

What principle ought to guide this court in its attempts to resolve the electoral question?

"Without as yet deciding the main question in the contest, we express the opinion that, in the special circumstances of this case, *an insightful judicial approach* is essential. There may be an unlimited number of ways in which such an approach is to guide the court. The fundamental one, in our opinion, is *fidelity to the terms of*

*the Constitution, and of such other law as objectively reflects the intent and purpose of the Constitution.”*

What the court meant by 'insightful judicial approach ' was not expounded in the judgment expressly and clearly. Since the court did not in express terms reject the doctrine or accept it, one can conclude that it took a middle of the road stance.

However, the court applied the test of fidelity to the terms of the Constitution to reflect the intent and purpose of the Constitution.

It is worth noting that the petitioner lost the case, and this may presuppose a judicial approach that leaned more to restraint rather than activism.

In 2017, the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & two others* [2017] eKLR was filed.<sup>384</sup> The Petition was premised on grounds, inter-alia, that the impugned declaration of the Presidential results was made an absolute breach of the Constitution of Kenya and legislation governing elections. In particular the section 39(1C) of the Elections Act, No. 24 of 2011 and Elections (Technology) Regulations, 2017. These laws mandatorily require that the results at the polling stations are final and must be transmitted electronically by the presiding officer in the prescribed form. The petitioners contended that the electronic transmission system of results from polling stations to the constituency tallying centers and to the national tallying centres was not secured as to deliver a free, fair, secure, credible, transparent, accurate, accountable, and verifiable election in compliance with articles 81 and 86 of the Constitution. The petitioner implored the court to compel the first respondent to give access to and supply to the court and the parties with the information and data that was in the exclusive possession of the first respondent.

Other issues included the existence of irregularities and illegalities in the 2017 presidential elections and whether those alleged irregularities and illegalities impacted on the integrity of the presidential elections. The court was satisfied that the first respondent, the electoral body, committed irregularities and illegalities. The court thus issued a declaration annulling

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<sup>384</sup>*Raila Amolo Odinga* [2017] eKLR available online <<http://kenyalaw.org/caselaw/cases/view/140420/>> accessed 18<sup>th</sup> Dec 2019.

the presidential election held on 8th August 2017 on account of not having been conducted following the Constitution and the applicable law.<sup>385</sup>

The supreme court held for the petitioners and ordered scrutiny of the electoral system and technology.<sup>386</sup>

The decision of the court was split, and neither the majority nor the minority used the term judicial restraint in express terms. However, the minority decision, as expressed by Justice Ojwang', did express itself in a manner that appears to have been influenced by the concept.

The minority held that the Constitution, while protecting the Judiciary's adjudicatory space, entrusts some governance-spaces to other arms of government as the basis of "constitutional principle of separation of powers". This is a concept whose validity in the Kenyan constitutionalism was settled.

It held that Judiciary was the trustee of the sovereign power [Article 1(3)] for the interpretation of the Constitution, and of all other law. It held that "the outer limits of such reserved competence have not been specified in express terms, it follows that the frontier areas of such power, at least potentially, admit of conflicting interpretive approaches. As already noted earlier, the proper trustee of the boundary-delimiting ethics must be the Judiciary. This is an arm of the state tasked with the special facility of juristic values, objective criteria of conflict resolution, a placid mien, such as facilitates professionalism, justice and fairness, and the benefit of access to relevant comparative lessons." It argued that Judiciary "ought to enter upon its task by taking into account the uncontested reserved remits of the other agencies of the state."

It held that "the people, in the exercise of their sovereign power, have expressly delegated some of that power to "Parliament and the legislative assemblies in county governments" [Article 1(3)(a)]. They have exclusively entrusted some of their sovereign powers to "the national executive and the executive structures in the county governments."

It held that there is no basis for abridging Parliament's power and mandate; for the Constitution [Article 94(1)] prescribes that "the legislative authority of the Republic is

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<sup>385</sup> *ibid.*

<sup>386</sup> *ibid.*

derived from the people and, at the national level, is vested in and exercised by Parliament.” Similarly, there is no basis for detracting from the general character of executive power, Article 129(1) prescribing that “Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.” Unlike the Judiciary, the work-orbit of which is lined up with laws, principles, and jurisprudential yardsticks, both the Legislature and the Executive, because of their electoral and policy foundations, may quite properly be described as "political agencies." They relate to the largest number of Kenyan people, in close and direct proximity; they influence and are influenced by, the momentary concerns which justify the conception and espousal of policy and politics conceived and executed within short time-frames.

It held that this is in stark contrast with the relationship between the ordinary citizen and the Courts of law. If the Courts overlook this reality, it will constitute a groundswell for the failure of judicial responses in line with the professional, juristic remit.

It further held that the prolonged history of judicialism, in all democratic countries, demonstrates that the proper role of the Courts has been professional, judicial, and founded upon cardinal principles which draw lines of correctness and propriety in situations of dispute, so as to secure a certain optimum level of safeguards for the rights of the citizen. Beyond that level of safeguard and fulfillment, it falls to the political agencies to pursue continuously, such policy stands as will satisfy, and give fulfillment to the national populace.

It went on to hold that on these principles of institutional disposition, and it follows that it falls not to the court, to make undue haste in assuming the policy mantle. A stampede is destined not only to disrupt the delicate institutional balances but to weaken the reliable jurisprudential bedrock, which assures the citizens of an ultimate governance safety-net.

It held in the context of the foregoing reasoning, it follows that the majority on the instant petition, has made a precarious move, that is destined to prove detrimental to the dependable setting of relations among essential governance entities—to the detriment of the rights and legitimate expectations of the citizen.

The court went on to hold that “ general perception associates the majority Judgment with an overtly political inclination”.

The majority court, despite annulling the election, did not express itself on the issue of adopted judicial approach or merits or demerits of either judicial restraint or activism.

The Supreme Court did hold, however, that its jurisdiction in a presidential election was both original and exclusive. The court found that no court other than the Supreme Court had the jurisdiction to hear and determine disputes relating to an election for the office of the President. The court, however, noted that that jurisdiction was, however, not boundless in scope as it is circumscribed in extent and in time. The jurisdiction only relates to an inquiry into the evidentiary, legal, and factual questions relevant to the determination of the validity or invalidity of a presidential election.<sup>387</sup>

When one views the insightful approach of 2013, combined with the overt restraint approach advocated by Ojwang' in 2017, it can be deduced that Kenyan judicial jurisprudence leans more towards judicial restraint rather activism.

This minimalist judicial approach that defers “politically sensitive “matters to parliament is evident in Nigeria. In *Attorney General of Lagos State v Attorney General of the Federation & 35 Ors ( Urban Planning case)* in a case entailing matters falling within the judicial review ambit of the court, Justice Tobi declared that, even in cases where a section of a statute is inconsistent with the Constitution, the court was duty-bound to only "remove the chaff from the grain ".

This means outright violations of the Constitution may warrant judicial interventions (for example, criminal acts or express constitutional violations like electoral rigging that may arise out of political activities ). However, courts may not curb activities of political nature that are nuanced or subtle. This is despite the net effect being to embed ethnicity in presidential elections and ultimately result in conflict.

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<sup>387</sup> *ibid.*

Possible remedies to ethnic conflict in presidential elections may fall within the policy ambit of other organs of government. This task may entail the organ with the competency to redesign the Constitution.

Having affirmed judiciary may be restrained in handling underlying issues that cause ethnic conflict in presidential elections in Kenya, the following subsection now explores which, between parliament and executive, may competently handle the issues.

### **2.1.6 Executive and Parliament: Addressing Ethnic Conflict in Presidential Elections**

This subsection examines to which constitutional organ, between parliament and executive, as established by the Constitution of Kenya 2010, can address the problem of ethnic conflict in Presidential elections in Kenya.

Article 130 (1) of the Constitution provides that, “the national executive of the Republic comprises the President, the Deputy President, and the rest of the Cabinet.”<sup>388</sup> The functions of the President as per article 132 of the Constitution include: “(1) (a) address the opening of each newly elected Parliament; (b) address a special sitting of Parliament once every year and may address Parliament at any other time; and (c) once every year- (i) report, in an address to the nation, on all the measures are taken and the progress achieved in the realization of the national values, referred to in Article 10; (ii) publish in the Gazette the details of the measures and progress under subparagraph (i); and (iii) submit a report for debate to the National Assembly on the progress made in fulfilling the international obligations of the Republic.”<sup>389</sup>

Sub article (2) provides that the President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss - (a) the Cabinet Secretaries, in accordance with Article 152; (b) the Attorney-General, in accordance with Article 156; (c) the Secretary to the Cabinet in accordance with Article 154;

(d) Principal Secretaries in accordance with Article 155; high commissioners, ambassadors and diplomatic and (e) consular representatives; and

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<sup>388</sup> Constitution of Kenya 2010, Art. 130 (1).

<sup>389</sup> *ibid*, Art.132 (1).



(f) in accordance with this Constitution, any other State or public officer whom this Constitution requires or empowers the President to appoint or dismiss.<sup>390</sup>

Sub article (3) provides that, “the President shall-(a) chair Cabinet meetings; (b) direct and co-ordinate the functions of ministries and government departments; and (c) by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament”.<sup>391</sup>

Sub-article (4) provides that, “the President may-(a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;(b) receive foreign diplomatic and consular representatives;(c) confer honours in the name of the people and the Republic; (d) subject to Article 58, declare a state of emergency; and (e) with the approval of Parliament, declare war.”<sup>392</sup>

Sub article (5) provides that, “the President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries”.<sup>393</sup> The Constitution does not bestow the executive power to remake or redesign the Constitution to address issues of ethnic conflict in presidential elections.

In comparison, Article 94 ( 3) of the Constitution provides that Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution. This suggests in the first instance that Parliament is the actual forum for redesigning the Constitution with a view of addressing ethnic conflict in presidential elections.

Indeed the wide authority of parliament to redesign the Constitution has been upheld by courts from other jurisdictions under discussion in chapter five of this study.

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<sup>390</sup> *ibid*, Art. 132 (2).

<sup>391</sup> *ibid*, Art. 132 (3).

<sup>392</sup> *ibid*, Art. 132 (4).

<sup>393</sup> *ibid*, Art. 132 (5).

In the *Attorney General of Guyana v. Cedric Richardson*,<sup>394</sup> Mr. Cedric Richardson, a Guyanese citizen, alleged that his right as conferred by articles 1 and 9 of Guyana Constitution to choose whomsoever he wanted to be President had been violated. That allegation followed an amendment by Parliament of article 90 of the Constitution with intent to disqualify a person who had already served two terms as President. The petitioner had applied for orders to invalidate the alteration of the Constitution.<sup>395</sup> At the trial court, Chang CJ (Ag), found in favour of the petitioner. The holding of the trial court was subsequently affirmed by the Court of Appeal. The Court of Appeal concluded that the freedom to choose the people's representative was an essential component of a sovereign democratic state. The state appealed to the inter-state regional court.

The regional court found that Constitution of Guyana permits its alteration by Parliament.<sup>396</sup> Being the supreme law, its design restricts the methods of its alteration. This helps in making it more challenging to do so by means like passing ordinary legislation. Article 13 of the Guyanese Constitution recognises “the principal objective of the political system of the State as to establish an inclusionary democracy by providing increasing opportunities for the participation of citizens and their organizations in the management and in the decision-making processes of the State”.<sup>397</sup>

While the petitioner had challenged that amendment, the State relied on the doctrine of judicial restraint in challenging the jurisdiction of the court in concluding that articles 1 and 9 had been amended by implication, and as such, the regional court could not inquire into the propriety of the amendment nor limit the Parliamentary power to amend Article 90 as it had a limited role in that process.<sup>398</sup> The court found it was necessary to observe the principle that courts should be generous in their interpretation of Constitutions. That notwithstanding, the courts ought not to be overly literalistic and restrictive but should give effect to the meaning of the Constitution.<sup>399</sup> The court found that the constitutional

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<sup>394</sup>[2018] CCJ 17(AJ).

<sup>395</sup> *ibid.*

<sup>396</sup> Constitution of the Cooperative Republic of Guyana ,art.164.

<sup>397</sup> *ibid.*,art. 13.

<sup>398</sup> *ibid.*

<sup>399</sup> *ibid.*

architecture in article 9 granted parliament the sovereignty to add new qualifications restricting the persons who may stand for the Presidency of the Republic of Guyana.

In the United Kingdom, with its unwritten constitutional order, parliamentary supremacy has a long tradition. Dicey had this to say:

"Parliament means, in the mouth of a lawyer (though the word often has a different sense in conversation)- the King, the House of Lords, and the House of Commons: these three bodies acting together may be aptly described as the "King in Parliament," and constitute Parliament. The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever: and, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament".<sup>400</sup>

This tradition means Parliament may enact laws concerning anything; no Parliament can bind a future one, and a valid Act of Parliament cannot be overturned by the court.

This view was reinforced by Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645:

“It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political, and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. Nevertheless, that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts would not hold the Act of Parliament invalid.”<sup>401</sup>

However, in recent years, this traditional view about Parliament sovereignty has been questioned. The enactment of the Human Rights Act 1998 which domesticates the European Convention on Human Rights, gives UK courts power to issue a declaration of

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<sup>400</sup>See Emiry Chemerinsky, *Constitutional law -Connected Casebook*, (5th Ed. Wolters Kluwer, December 16, 2016) quotes from A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Mcmillan, 1885).

<sup>401</sup> (1969) 1 AC 669.

incompatibility where the terms of an Act of Parliament contravene rights. The effect of such a decision is not to void the impugned law but to send a signal to Parliament, which may then decide to amend the offending provision. This does not negate parliamentary sovereignty as Parliament may choose not to amend the contentious provisions.

The case of *R (Jackson) v Attorney General* [2005] UKHL 56 is noted for containing obiter dictum comments suggesting that there may be limits to parliamentary sovereignty.

Jackson and others challenged the use of Acts of Parliament to enact the Hunting Act 2004. They contended that the Parliament Act of 1911 could not be used to pass the Parliament Act 1949, which amended the 1911 Act. The Court of Appeal rejected this claim. It held that Parliament Act procedure cannot be used to effect major constitutional changes. The case went to the House of Lords. The court held that it had the authority to examine the validity of the Act as a question of statutory interpretation. The court held there were no limits to the kind of legislation that could be passed using the Parliament Acts except for the express limitations contained in law. In obiter comments, Lord Steyn, Lord Hope, and Baroness Hale suggested that there might be limits to parliamentary sovereignty.<sup>402</sup>

Unlike UK, Kenya is a constitutional democracy. Legislative power, under Kenyan democracy, is not unfettered or a blank cheque that allows parliament to legislate as it will. First, this power excludes overhauling the Constitution.

This was held in the case of *Reverend Dr. Timothy M. Njoya and 6 others v Honourable Attorney General and Another*.<sup>403</sup> In 2004, Kenya was in the midst of a Constitutional review debate through a process commonly known as 'Bomas Process'.

A draft Constitution had been prepared by a constitutional conference and was about to be presented to Parliament for passage. Some unhappy Kenyans challenged the process.

The applicants prayed to the Constitutional Court to issue certain orders.

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<sup>402</sup>*R (Jackson) v Attorney General* [2005] UKHL 56. See also N. W. Barber, 'The Afterlife of Parliamentary Sovereignty', (2011) 9 Issue 1 International Journal of Constitutional Law, 144.

<sup>403</sup> *Dr. Timothy M. Njoya and 6 others v Honourable Attorney General and Another* [2004] eKLR.

They included a declaration that section 26 (7) and 27 (1) (b) of the Constitution of Kenya Review Act vitiated the constituent power of the people of Kenya.

Further they sought a declaration that subsection (5), (6) and (7) of section 27 of the said law were unconstitutional to the extent that they converted the applicants' right to have a referendum as one of the organs of reviewing the Kenyan Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference.

Further they sought a declaration that the constitution gives every person in Kenya an equal right to review the constitution which rights (sic) embodies the right to participate in writing and ratifying the constitution through a constituent assembly or national referendum.

Issues for determination included whether Parliament could use its amendment power under section 47 of the now repealed 1969 Constitution to establish a new Constitution. Further the court sought to define the meaning of the phrase 'constituent power'.

In a landmark judgement, the court held the phrase 'constituent power' represented a primordial power which reposes with the people. Parliament could not therefore enact a new Constitution without a referendum.

Secondly, the process and the outcome of the legislative action ought to be constitutional. In Nigerian case of *Attorney General of Abia State & 2 Ors v Attorney General of the Federation and 33 Others (Revenue Monitoring case)*, the issue before the court was the constitutionality of the Local Government Revenue Monitoring Act passed by the National Assembly. The plaintiff states argued that the Act, which provided for direct disbursement of local government allocations from the federal account and monitoring of the process by federal authorities, amounted to undue interference with their powers over the matter of local government political and fiscal administration as recognized under section 7, among others, of the Constitution. The main purpose of the Revenue Monitoring Act was purported to ensure allocations from the Federation Account were properly distributed to the local governments. This was an important policy objective considering that the deplorable state of infrastructure in the country is largely traceable to the misappropriation

of public funds. There was a need for initiatives to check corruption in the country. Local authorities have had a notoriously poor record of performance in governance over the years, and the proper delivery of federal allocations, which forms the bulk of their resources was an essential factor in the state of affairs.

The court upheld the case of the plaintiffs. It emphasized that legislative action, no matter how laudable, must be kept within constitutionally prescribed limits, because legislative powers and functions are "not at large." Justice Tobi in the lead judgment emphasized the significance of the Supremacy Clause, which mandates all three arms of government to conform to the provisions of the Constitution. Referring to various dicta in *Attorney-General of Odon State v Attorney-General of the Federation and 35 Others (ICPC case)*, the court reiterated its support for the anti-corruption policy of the political branch. It, however, maintained that the initiative must be conducted within constitutionally sanctioned limits.

In conclusion, this study did concern itself with parliamentary power (instead of the executive or judicial interventions) to legislate and remake the Constitution in ways that would address the problem of ethnic conflict in presidential elections in Kenya. The study appreciated the need to ensure the constitutionality and limits of parliamentary power.

## **2.2 Defining "Ethnicity"**

According to Karega Munene, the term "ethnic" is derived from the Greek term "ethnos," which means pagan or heathen.<sup>404</sup> He adopts the *American Heritage College Dictionary* definition of the term "ethnic," which means "groups of people with a common, distinctive racial, national, religious, linguistic or cultural heritage".<sup>405</sup> In common parlance, the phrase has been used interchangeably with the term "tribe", a pejorative term that connotes primitive and pre-civilization ethnic groups of Africa.<sup>406</sup>

In respect to this study, "ethnicity" refers to the fact of belonging to a group of people who identify themselves as being distinct by virtue of having a shared common history including

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<sup>404</sup>Karega Munene, 'Production of Ethnic Identity in Kenya' in Kimani Njogu, Kabiri Ngeta and Mary Wanjau (eds), *Ethnic Diversity in Eastern Africa: Opportunities and Challenges* (Twaweza Communications 2010) 34 .

<sup>405</sup> *ibid.*

<sup>406</sup> *ibid.*

a myth of common ancestry, similar traditional customs, unique economic circumstances, distinct language. Majority of its members tend to occupy a contiguous territory exhibiting an identifiable common political organizing that coincides with aforementioned group characteristics.

However, due to the flux nature of ethnic groups, defining the term "ethnicity" or a person's ethnic group is problematic. This was proved by the case of *Community Advocacy and Awareness Trust & 8 Others V Attorney General Interested Party National Gender and Equality Commission & 5 Others [2012] eKLR*.

In this case, the third interested party's ethnicity was one key issue for determination in the tussle for appointment into a constitutional commission. As per Article 250(4) of the Constitution of Kenya 2010, ethnic and regional diversity was a key consideration for appointment. The third interested party's mother was a Kikuyu, her father a Kamba, and her husband a Luhya, but she disavowed her characterization by the appointing authority as a Kikuyu.

The Court held that no constitutional or legislative or policy guidelines exist on what constitutes (one's) ethnic background. The court held that it could not attempt to set out such guidelines. The Court, however, held that the issue of one's ethnicity was not an issue of personal choice as this would undermine the legal objective of regional and ethnic balancing as persons would be choosing ethnicity in a manner that suits their interests. The Court held that it was rational for one to view the said party as a Kikuyu by her Kikuyu name "Wambui" that appears in several of her educational certificates and her affirmation that her mother was a Kikuyu. The definition of the term "ethnic" as per this study is deliberately adopted to reflect the objectives of this research.

### **2.3 Defining "Ethnic Conflict"**

According to Jonathan Fox, the term "ethnic conflict" means ethnic riots, feuds, attacks, protests, assaults, fights, arson, forced migration, and genocides.<sup>407</sup> Ethnic conflict may be directed towards the state or another ethnic group's motivation being ethnic.<sup>408</sup> Ethnic

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<sup>407</sup>Jonathan Fox, 'Trends in Low -intensity Ethnic Conflict in Developing States in Post War Era: A Large N study' 2003 (2) 3 Review of International Affairs 54, 70.

<sup>408</sup> *ibid.*

conflicts are categorised into low intensity (feuds, disagreements, and riots) and high-intensity conflicts (war and ethnic cleansing).<sup>409</sup>

For the purposes of this study, the expression “ethnic conflict” is in respect to conflict occurring immediately before and /or during and /or after presidential elections in Kenya whose grievances relate to presidential elections and is usually directed either towards the state’s assets and or personnel (deemed as representing the impugned ethnic group) and or persons of other ethnic groups and or their property. As expounded in the background section of this study, ethnic conflict in Kenya’s presidential elections is often documented in official government reports or reputable civil society groups write-ups.

#### **2.4 Defining "Presidential Elections in Kenya"**

Section 2 of the Elections Act 2011 defines the term "elections" to mean a presidential, parliamentary, or county election, including a by-election.

For the purposes of this study, Presidential elections mean elections to choose a president in Kenya democratically.

Under various laws, Kenyan citizens have the fundamental right to choose a president of their choice. For example, Article 21 of the Universal Declaration of Human Rights 1948 provides as follows:

“Everyone has a right to take part in the government of his country, directly or through a freely chosen representative in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by an equivalent voting procedure.”<sup>410</sup>

Article 25 of the International Convention on Civil and Political Rights, 1999 states :

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;

a) To take part in the conduct of public affairs, directly or through freely chosen representatives

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<sup>409</sup>ibid.

<sup>410</sup> Universal Declaration of Human Rights 1948, Art. 21.



b) To vote and to be elected at genuine periodic elections which shall be held by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors

c) To have access on general terms of equality, to public service in his country.

Having been ratified by Kenya, these Conventions have the force of law in Kenya pursuant to Article 2(6) of the Kenya Constitution 2010. These principles have been domesticated in Articles 38, 81, and 86 of the Kenya Constitution 2010; Parts II, IV, V and VI of the Elections Act; and the Election Regulations.

Under the bill of rights chapter, Article 38(2) and (3) of the Constitution of Kenya 2010 states:-

Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) Any elective public body or office established under this constitution or

(b) Any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions:

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office or office within a political party of which the citizen is a member and elected to hold office."

In respect to Presidential elections, Article 136 of the Constitution of Kenya 2010 provides that, "registered voters, in a national election conducted in accordance with the Constitution and any Act of Parliament regulating presidential elections, shall elect the President." It provides that, "an election of the President shall be held on the same day as a general election of Members of Parliament, being second Tuesday in August, in every fifth year or in the circumstances contemplated in Article 146."<sup>411</sup> Article 138 provides that, "if only one candidate for President is nominated, he or she shall be declared elected.

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<sup>411</sup> Constitution of Kenya 2010, Art. 136.

If two or more are nominated, an election shall be held, and the winner will be the one that gets more than half of all cast votes plus at least 25 per cent in each of more than half of all counties.”<sup>412</sup>

The term “election” must not be viewed narrowly to mean just the act of electing a president pursuant to the provisions of the set law. The law that sets out how a president will be elected, on its own, cannot trigger ethnic conflict. This is attested by having provisions enacted peacefully with the consensus of all political players. The term "elections" must be defined broadly to include electoral processes immediately prior to, during, and after the actual day of voting, together with perceptions surrounding those elections as per the views of observers, media, monitors, the candidates, and the ethnic groups supporting them.

This study adopts a broad definition of the term "Presidential Elections in Kenya" to mean the processes as guided by the electoral law occurring prior, during, and after actual elections for electing a President of Kenya.

## **2.5 The Relationship between Ethnic Conflict and Presidential Elections in Kenya**

As explained in the section dealing with scoping of this study in chapter one, ethnic conflict under examination in this study is the one linked to presidential elections. This can be best understood when viewed from the prism of the presidential elections electoral cycle. The term 'electoral cycle ' in relation to Kenya has not been defined before. The scholar who has fallen short of defining the term is Nic Cheeseman in his article entitled “Kenya – Politics of Permanent Electoral Cycle“.<sup>413</sup>He laments that 'we have not yet reached the end of 2018, and the next election campaign has already been underway for several months – even though there are still three years until the polls come around.”<sup>414</sup>His position is that this is the "intensification of a long-term trend that began in the 1990s, in which political decisions and alliances are shaped not simply by what would make for good policy, but to win the next election. Kenya has been embroiled in an almost continuous election campaign that is recalibrated, but not actually brought to an end, by the elections

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<sup>412</sup> *ibid*, Art. 138.

<sup>413</sup> See Nic Cheeseman, ‘Kenya –Politics of Permanent Electoral Cycle’ ,(East African Review, 1 Sep 2018) <https://www.theelephant.info/op-eds/2018/09/01/kenya-the-politics-of-the-permanent-electoral-cycle/?print=pdf> accessed 1<sup>st</sup> December 2019.

<sup>414</sup> *ibid* .

themselves. It means that everyday politics is not about solving current problems but winning future contests."<sup>415</sup>

Section 2 of the Elections Act 2011 defines campaign period as "campaign period" means the period specified as such in the notice issued by the Commission in relation to an election,' but as explained by Nic Cheeseman, campaigns and related ethnic conflict occurs long before official campaigns.<sup>416</sup> Often this is usually a period of forty five days before actual elections.

Timelines for politics of presidential elections must be viewed broadly and indeed, the United Nations, taking a cue from other observation missions, appreciates elections are not "one-day events "and therefore pre- and post-elections day evaluations are important.<sup>417</sup>

Taking into account prolonged unofficial campaigns that characterise Kenya's presidential elections and at the same time considering IEBC's official campaign period, this study defines the period under consideration for the purposes of either counting number of deaths or linking the conflict to presidential elections to four months, prior and after the announcement of elections.

The issue of finding the linkage between Presidential elections and peace or lack of it remains outstanding.

Ethnic conflict in Presidential elections is a form of electoral violence, which must be differentiated from other forms of organized conflict. As explained by Sarah Birch and others , the institutional frameworks surrounding elections impact the ways in which ethnic conflict intervenes in the electoral process.<sup>418</sup> The players, motivations, and institutions provided by the electoral rules established by the constitutional framework affects its scale, how and why conflict arises, and influence both its timing and targets. Therefore, ethnic

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<sup>415</sup> *ibid* .

<sup>416</sup> Often the periods range between 30 to 45 days – in the 2017 repeat elections, IEBC gazetted 40 days .Visit IEBC website for more information.

<sup>417</sup> United Nations Electoral Assistance Division, 'Politically Speaking 2018', (*United Nations* ,1 May 2019), <[https://dppa.un.org/sites/default/files/politically\\_speaking\\_in\\_2018.pdf](https://dppa.un.org/sites/default/files/politically_speaking_in_2018.pdf)> accessed 8th May 2019.

<sup>418</sup> Sarah Birch and others , 'Electoral Violence: An Introduction',(2020) 57 Issue 1 Journal of Peace Research,324.

conflict in presidential elections subject matter of this thesis would not have occurred or would have manifested itself differently in the absence of a presidential contest.<sup>419</sup>

The recurrent ethnic conflict in presidential elections in Kenya can be linked to the tussle for the powerful presidential position. Kenya's constitutional history has been one of a strong presidential system. J. B. Ojwang posits that though the Constitution of Kenya 1969 had established a mixed parliamentary and presidential systems of governance, the nature and scope of the executive power was expansive by virtue of being the bearer of prerogative and other superior discretionary competence. Lastly, possessing extra juridical competence as a result of various circumstances of historical nature.<sup>420</sup>

The Constitution of Kenya 2010 did not improve things noting it adopted a pure constitutional system. The court affirmed this position in the case of *Tom Luusa Munyasya & another v Governor, Makueni County & another [2014] eKLR*. He held that Kenya's Constitution of 2010 established a pure presidential system where the President's powers include the absolute prerogative of hiring and firing cabinet secretaries.

This strong presidency has been a lure for ethnic competition during the electioneering period. Michael Chege's view is that ethnic identities have been mobilized by elites to gain power and control by means fair or foul.<sup>421</sup>

The connection between presidential elections in Kenya and ethnic conflict was endorsed by the court in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR* where it held as follows :

As we now turn to the heart of this appeal, it is apposite for the clear appreciation of the long, windy, and sometimes turbulent journey this nation has traveled to get to where we are today, that we retrace our electoral history. Because elections determine political winners and losers, electoral processes, from voter registration through to declaration of results, have long been targeted for manipulation and are the foremost

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<sup>419</sup> *ibid* .

<sup>420</sup> J B Ojwang', 'The Nature and Scope of Executive Power in English and French Speaking Africa: A Comparative Perspective.' (4. Quartal 1980) 13 (4) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 319.

<sup>421</sup> Michael Chege, 'Ethnic pluralism and national governance in Africa: A survey', in Njogu Kimani and others (eds) *Ethnic Diversity in Eastern Africa: Opportunities and Challenges*, (Twaweza Communications, 2010).

cause of electoral conflicts. Such manipulation or, sometimes, even the mere threat of it weakens public confidence in democratic processes, in the courts, security agencies, in the legislature, and in the end, can erode the legitimacy of governance institutions. Lack of trust among the political parties and players and suspicions of electoral fraud have in the past catalysed polarisation and triggered bloody ethnic conflicts in nearly every election cycle. The reforms to electoral processes that have been initiated in Kenya have been triggered by, among other factors, failure to deliver credible and acceptable elections. Pressure from the public has been instrumental in the introduction of some of the electoral reforms that have been witnessed, as was the case in 1997 when under the auspices of the Inter-Parties Parliamentary Group (IPPG) far-reaching constitutional changes were introduced. Global and regional obligations for transparent and accurate electoral administration have played an equally important role in setting the yardsticks by which the electoral processes and administration are to be assessed in the future. Despite these many strides, the fear of manipulation of the election results and interference with the integrity of the electoral process generally persists.

## **2.6 The Objectives of Evaluating the Adequacy of Post-2007 Constitutional Mechanisms**

The United Nations Office of Drugs and Crime adopts the definition of the term "evaluation" from the definition set by the United Nations Evaluation Group (UNEG), which is:

“An assessment, as systematic and impartial as possible, of an activity, project, programme, strategy, policy, topic, theme, sector, operational area, or institutional performance. It analyses the level of achievement of both expected and unexpected results by examining the results chain, processes, contextual factors, and causality using appropriate criteria such as relevance, effectiveness, efficiency, impact, and sustainability”.<sup>422</sup>

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<sup>422</sup>United Nations Office of Drugs and Crime, ‘Defining Terms’ ,( *United Nations*,4 May 2019 ), <https://www.unodc.org/unodc/data-and-analysis/index.html> accessed 7th October 2018.

The term “evaluation criteria” means “measurable, quantifiable benchmark, standard or yardstick”.<sup>423</sup> It entails analysing information about a phenomenon’s activities and outcomes. Its objective is to improve its efficacy or inform programming outcomes.

The term evaluation connotes set criteria. This study adopts constitutional and legal criteria against which the post-2007 Constitutional mechanisms must be evaluated.

The criterion is based on the overarching values contained in the Constitution of 2010 and various international treaties that Kenya has ratified. These instruments are part of Kenyan law by dint of Article 2.6 of the Constitution of Kenya 2010. Hinging the proposed remedy for ethnic conflict on presidential elections on an existing constitutional criterion ensures the remedy does not unravel the design of the Constitution of 2010. Otherwise, a problematic amendment may be inserted, which causes confusion and entrenches unintelligible provisions into the constitution. Pre-empting this is important because all constitutional provisions are deemed constitutional. This was the position of Chief Justice Mutunga, as he was then, in *Judges & Magistrates Vetting Board & 2 Others v Centre for Human Rights & Democracy & 11 Others*(*supra*), where he held that no provision of the constitution could be unconstitutional; this would be a contradiction.

Secondly, problematic amendments may result in what Rosalind Dixon and David Landau views as being instances of "unconstitutional constitutional "amendments.<sup>424</sup> They argue a constitution must exist as a unified, coherent and functioning document.<sup>425</sup>

The criterion adopted by this study is one that sets a conjunctive yardstick of democracy, human rights, and adherence to sustainable development. This criterion is a summarized adoption of the provisions of Article 10 ( 2) of the Constitution of Kenya 2010, which provides that the national values and principles of governance include democracy, human rights, and sustainable development. These principles form the objective of the entire evaluation exercise in this study.

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<sup>423</sup> *ibid.*

<sup>424</sup> Rosalind Dixon and David Landau, ‘Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment’, (2015)13 Issue 3 International Journal of Constitutional Law,606.

<sup>425</sup> *ibid.*

Isaac Lenaola in *Nairobi Metropolitan Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others* [2013] eKLR, explained the goals and objectives of the Constitution of Kenya 2010 as enunciated by its principles and values of good governance as follows:

“The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers, and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability, and participation of the people. It is thus clear to me that the constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement” .<sup>426</sup>

Therefore, the recommendations in chapter six of this thesis have adhered to these constitutional values and principles.

## **2.7. The Post 2007 Constitutional Mechanisms that Address Ethnic Conflict in Presidential Elections in Kenya**

In this thesis, "post-2007 constitutional mechanisms" refers to a variety of methods employed by the state to address ethnic conflict, which was deepened by the conflict that arose after the 2007 presidential elections. One of these mechanisms was contained in the Constitution of Kenya of 1969, whereas three were embedded into the Constitution of Kenya 2010.

These mechanisms have been studied by Karuti Kanyinga and James D. Long. They examined Agenda item no. 4 reforms carried out by the Kenyan government in the

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<sup>426</sup>*Nairobi Metropolitan Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others* [2013] eKLR.

negotiation process following post-2007 presidential elections ethnic conflict.<sup>427</sup> They illustrated how high stakes, which thwarted progress and caused ethnic conflict during the 2007 elections, caused the previous stalling of reforms. They concluded that public pressure, together with a realignment of interests and constitutional change from power-sharing, helped enable the constitutional review process.

These mechanisms are: Consociational, Devolution, Nation-Building Measures and Centripetalism.

### **2.7.1 Nation-Building Measures**

For the purposes of the conceptual framework of this thesis, nation-building measures mean mechanisms that a multi-ethnic society employs intending to morph its population into one coherent nation. In other words, Harris Mylonas has defined nation-building as the restructuring of national identity using state machinery.<sup>428</sup>

States' ability to create a national identity in a globalisation era of international norm setters appears impossible. However, Chris Thornbill holds the view states are now more effective in hastening nation formation.<sup>429</sup> The goal of nation-building is the unification of the diverse people within a state. It becomes politically stable. Rosemarijn Hoefte and Wouter Veenendaal view is that modern states undertake nation-building and nation-branding together. This is a process through which national majorities are constructed.<sup>430</sup>

According to Keith Darden and Harris Mylonas, nation-builders use various methods. They include constitutional, legal, policy, and administrative initiatives of creating a national community using government programs, nationalistic army, and uniform content for mass schooling.<sup>431</sup> Andreas Wimmer cite factors that determine its success over the long-run.

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<sup>427</sup>Karuti Kanyinga and James D. Long, 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution' (2012) 55(1) *African Studies Review*, Cambridge University Press.

<sup>428</sup> See Harris Mylonas, 'Nation-building' in Patrick James (ed), *Oxford Bibliographies in International Relations* (Oxford University Press 2007).

<sup>429</sup> Chris Thornbill, 'On Misunderstanding States: The Transnational Constitution in the National Constitution', (2018) 16 Issue 4 *International Journal of Constitutional Law* 1186,1188.

<sup>430</sup> Rosemarijn Hoefte and Wouter Veenendaal, 'The Challenges of Nation-Building and Nation Branding in Multi-Ethnic Suriname', (2019) 25 Issue 2 *Nationalism and Ethnic Politics* .

<sup>431</sup> Keith Darden and Harris Mylonas, 'Threats to Territorial Integrity, National Mass Schooling, and Linguistic Commonality' (2016) 49 (11) *Comparative Political Studies* 1446.



They include development of civil society, emergence of a state capable of providing public goods evenly across a territory, and a shared medium of communication.<sup>432</sup>

Within the post-colonial regional context, nation-building referred to efforts of newly independent African countries to redefine the populace of territories which had been carved out by departing colonialists without regard to ethnic boundaries. The reformed states would turn out to be viable and coherent national entities. In other words, mechanisms employed by law to make state and national boundaries coincide as consolidated by governments mainly after second world war.<sup>433</sup>

Nation-building mechanisms include the establishment of national anthems, flag, national holidays, national games, national languages. Lotte and Mark have illustrated how Kenyan Constitution 2010 strives to create a balance between ‘traditional’ cultural rights and nation-building measures-and this illustrates the ascendancy of demands for ethnic recognition in modern era.<sup>434</sup> The colonial divide and rule policies in Africa had resulted in ethnically heterogeneous populations.<sup>435</sup>

Despite independence, most post-colonial African countries were plagued by ethnicity and rivalry between groups within the state. This resulted in their near-disintegration. Examples include the failure of the first constitution and subsequent 1960’s Biafra efforts to secede from Nigeria and the agitation by Somalis in the Ogaden region of Ethiopia for independence. This shows what can happen where there is disillusionment with internationalised constitutional state-building techniques.<sup>436</sup>

Around the world, the division of colonial India into India and Pakistan, Bangladesh break away from Pakistan, Tamil tigers efforts to break away from Sri Lanka, post-communism split of Czechoslovakia into two states, chaos in Northern Ireland between Unionists and

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<sup>432</sup>Andreas Wimmer, ‘Nation Building: Why Some Countries Come Together While Others Fall Apart’ (2018) 60 *Survival* 151.

<sup>433</sup> Chris Thornhill, *The Sociology of Law and Global Transformation of Democracy* (Global Law Series ), (Cambridge University Press; Reprint edition August 2, 2018).

<sup>434</sup>Lotte Hughes and Mark Lamont (n 13 ).

<sup>435</sup>Harris Mylonas, ‘Assimilation and its Alternatives: Caveats in the Study of Nation-Building Policies’ in Erica Chenoweth, Adria Lawrence and Belfer Center for Science and International Affairs (eds), *Rethinking Violence: States and Non-State Actors in Conflict* (MIT Press 2010).

<sup>436</sup> Christine Bell, ‘Introduction: Bargaining on Constitutions – Political Settlements and Constitutional State-Building’, (2017) 6 *Issue 1 Global Constitutionalism* Cambridge University 13,30.

Nationalists were mainly due to ethnic differences.<sup>437</sup>The Rwandan genocide, as well as the split of Sudan into two sovereign states, relate to a lack of ethnic cohesion within a country. It has often proved difficult to unite states with similar ethnic but different colonial backgrounds.

This work is concerned with nation-building measures employed in Kenya, which are expressly constitutional in nature and thus, it excludes policy, statutory, and administrative methods. Constitutions have been used in various places to drive a transformative nation-building agenda. While giving good examples of Germany and South Africa, Michaela Hailbronner has explained that using constitutional means to achieve transformative nation-building agenda has to be done in tandem with non-constitutional means.<sup>438</sup>

As per Chege's position, constitutional nation-building measures are contained in many African founding constitutions including Kenya's.<sup>439</sup>Kenyan founding fathers had adopted them with the intention of "killing ethnicity to build the nation" . They include common language measures and ethnic quota systems. By continued ethnic conflict in presidential elections, the efficacy of nation-building measures though necessary and helpful, particularly in an un-defined longterm, appears ineffective in the short and mid-term. Chege affirms ethnic is an elastic and fluid phenomenon; these measures are work in progress.<sup>440</sup>His view is that nation-builders have ignored the enduring nature of ethnic identities and this has been a major reason for unceasing tragedy and ethnic conflict and proposes that solutions should be sought elsewhere.<sup>441</sup>

The Constitution of Kenya 2010 has retained these measures including Article 7 which establishes English and Kiswahili as official and national languages.

### **2.7.2 Devolution**

Another mechanism that is intended to redress the problem of ethnic conflict in Presidential elections was devolution. Nicholas Aroney explains that 'devolution' is the delegation of

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<sup>437</sup> Luke McDonagh, 'Losing Ireland, losing the Empire: Dominion Status and the Irish Constitutions of 1922 and 1937', (2019 ) 17 Issue 4 International Journal of Constitutional Law 1192.

<sup>438</sup>Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South', (2017)65 Issue 3 The American Journal of Comparative Law 527,560.

<sup>439</sup> Chege (n 421).

<sup>440</sup> *ibid.*

<sup>441</sup>*ibid.*

powers from the national government to the sub-national levels, such as a regional or local level.<sup>442</sup> His view is that it differs from federalism in that the devolved powers of the subnational authority may ultimately reside with the central government being that it is temporary and reversible.<sup>443</sup> Thus, under devolution, the state remains de jure unitary.

As explained by Horowitz, there are several ways by which devolved units can have benign effects on ethnicity. For the purposes of this study, in generic terms, devolution refers to the establishment by a constitution of sub-state territorial units that have clear governmental power independent of the national central government.

Firstly, devolved units that are below the national government do allow an ethnic group that is a minority in a country as a whole but a majority in a sub-state unit to exercise governmental power in ways that would be foreclosed if the whole country were one undifferentiated territory.<sup>444</sup> For example, in Kenya, whereas the Luo are about 12 per cent of the total population and do not exercise great power at the national government, they nevertheless control four counties of Kisumu, Homabay, Siaya and Migori. It is expected those county governments would be responsive to Luo interests in the said counties. This is particularly key in Kenya where ethnic groups are territorially differentiated. Devolution certainly addresses, but not vitiates, the continued sense of minority ethnic groups' exclusion at the national level. The point is that such power, though not completely satisfying, can be deemed as sufficient to avert ethnic conflict over the presidency.<sup>445</sup>

Secondly, the existence of counties can quarantine conflict within their boundaries. Horowitz gave an example of ethnic conflict in Malaysia that tends not to spread from one unit to another due to devolution.<sup>446</sup> He cited the Nigerian First Republic (1960- 1966), which had three major territorial units where every localized ethnic conflict threatened to engulf the whole country and ultimately did in the Biafra War. In the restructured Second

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<sup>442</sup>Nicholas Aroney , 'The formation and amendment of federal constitutions in a Westminster-derived context', (2018)16 Issue 1 International Journal of Constitutional Law 17,50.

<sup>443</sup> *ibid.*

<sup>444</sup>Donald L Horowitz, 'The Many Uses of Federalism', (*Duke Law* ,2007) 55 Drake Law Review 953 [https://scholarship.law.duke.edu/faculty\\_scholarship/1855](https://scholarship.law.duke.edu/faculty_scholarship/1855) accessed 8th October 2018.

<sup>445</sup> *ibid.*

<sup>446</sup> *ibid.*

and Third Republics, with larger numbers of sub-states, “many ethnic issues have become sub-national issues limited to one state at a time.”<sup>447</sup>

He gives an example of the issue of Sharia or Islamic law. This is a delicate issue in Nigeria so evenly divided between Muslims and Christians. It became a sub-state matter rather a national issue, with various remedies employed by respective northern sub-states.

While those solutions have not always been reached peacefully, at least they were confined to those areas without necessarily creating grievances that spill across boundaries into other units.

Thirdly, devolution can address discontent by way of special and asymmetric arrangements in ethnic regions with distinctive identities.<sup>448</sup> For example in Indonesia, devolution has enabled Aceh County, to impose Islamic law without devolving such power to other sub-national units. The same applies to Quebec's special identity in Canada. Kenya's devolution is not asymmetrical, but devolution, where required, can have special dispensations possible, particularly at the periphery, without destabilizing the centre.

Fourthly, in ethnically heterogeneous countries like Kenya, devolution provides an avenue upon which leaders from various ethnic groups encounter each other, familiarize with each other, bargain, and get to know and understand about the needs and aspirations of an ethnic group rather than their own before rising to the national level, where complex and delicate issues of national importance may need to be resolved.<sup>449</sup> Experience in compromise, a key feature in the management of counties where struggles between governors and members of county assemblies are a constant feature, is important in ethnically divided countries.

Fifthly, splitting a country into devolved units can create incentives for political actors to look at some issues in terms of competition between counties rather than among ethnic groups.<sup>450</sup> For example, in Kenya, resource-rich counties like Muranga and Taita Taveta with their water assets are likely to push for apportionment of revenue from water

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<sup>447</sup> *ibid.*

<sup>448</sup> *ibid.*

<sup>449</sup> Governors have higher chances of rising to national slots than any other category of aspirants. See Nate Silver, ‘The Governors advantage in Presidential races is bigger than you thought’, (*New York Times*, 4 June 2011), <https://fivethirtyeight.blogs.nytimes.com/2011/06/15/the-governors-advantage-in-presidential-races-is-bigger-than-you-thought/> accessed 7th Dec 2018.

<sup>450</sup> Horowitz (n 444).

according to the principle of derivation (water revenue be returned to the place in which it originated) and vice versa. Counties that are water resource-poor like Nairobi and Mombasa would push for the apportioning of revenue proportionately by population. If resource-rich counties and resource-poor counties do not coincide with specific ethnic groups, then this fight over revenue will cross-cut ethnic cleavages and create allies out of ethnic groups that may otherwise be antagonistic.

Cross-cutting cleavages can address conflict inspired by ethnicity. One key problem in ethnically divided societies is the difficulty in arranging for deliberate cross-cutting cleavages, but devolution may inadvertently do what experts and policymakers cannot otherwise do.<sup>451</sup>

Sixthly, it activates sub-ethnic cleavages which drop conflict downwards to the sub-national level -from the interethnic to the interethnic level.<sup>452</sup> Prior to India's reorganization of states along ethnic lines in the 1950s, the undivided original state of Madras was always having ethnic conflict Tamil and Telugu communities. The state reorganization partitioned these two groups,with Telugus finding themselves in Andhra Pradesh and TamilsinTamilnadu, cleavages changed dramatically.<sup>453</sup>With Tamils gone, in Andhra, for example, the three intra-Andhra territorial groups fights began. Ethnic groups are malleable and one stimulus for that is territorial context. Ceteris Paribus, the smaller the context, the lower the level of politically salient identity.<sup>454</sup>

Horowitz's view is that "if there are multiple territorial compartments, there are likely to be multiple sub-ethnic conflicts. Inevitably, the more of these there are, the more difficult it is for the country as a whole to be divided along a single overarching cleavage line. One function of (devolution) is create such ethnic and sub-ethnic complexities so as to reduce the level of conflict the whole country experiences.This function is a corollary, in a sense, of the quarantine function. Countries, such as Tanzania, that have a large number of

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<sup>451</sup>ibid.

<sup>452</sup> ibid.

<sup>453</sup>ibid.

<sup>454</sup>ibid.

dispersed groups are generally not as conflict-prone at the national level as those, such as Sri Lanka, with a few large groups that meet at the center of politics.<sup>455</sup>

Finally, ethnicity gives an incentive for inter-ethnic alignments and coalitions.<sup>456</sup> He gives an example of Hausa-Fulani in Nigeria who could no longer govern essentially alone after devolved units were increased, and hence, compelling their political party to seek genuine coalitions with other groups. He holds that “if, then, (devolution) helps to proliferate groups and subgroups, or if it helps to confine the power of groups to a more or less proportional share, it will, all else equal, make it impossible for one group to aspire to control the whole government through the democratic process. If that is so, and if parties remain ethnically based, as they are likely to be, then it follows that incentives to form inter-ethnic coalitions will be enhanced. Inter-ethnic coalitions are much more likely to attend to the interests of multiple groups, thereby reducing conflict, especially if the coalitions are formed before elections.”<sup>457</sup>

However, devolution has demerits. They include costs because of duplication of functions, facilities, personnel, and infrastructure. Other related demerits include jurisdictional disputes and corruption, which has now become rampant in Kenya.<sup>458</sup>

Another demerit is the ethnic cost where in ethnically homogeneous counties, members of migrant groups may be experiencing son-of-the-soil discrimination.<sup>459</sup> There need to be put in place sufficient legal protections, so the costs of devolution do not outweigh benefits. Judiciary can be an independent umpire. To address the above-mentioned demerits, it is suggested the establishment of devolution should be timed well.<sup>460</sup>

Countries likely to benefit from devolution typically come to that realization too late after divisions have been embedded, and conflict has intensified. Devolution with a weak centre may resort to Bosnia and Cyprus scenarios where the countries split up.<sup>461</sup>

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<sup>455</sup> Horowitz ( n 444).

<sup>456</sup> *ibid.*

<sup>457</sup> *ibid.*

<sup>458</sup> Michelle D’Arcy and Agness Conell, ‘Devolution and Corruption in Kenya: Everyones turn to eat?’ (2016) 115 (459) *African Affairs* 246.

<sup>459</sup> *ibid.*

<sup>460</sup> *ibid.*

<sup>461</sup> *ibid.*

Donald champions for “aptly configured” devolution that has the following features: (1) Equality of powers among the component units; (2) equality of size among the component units; (3) a reasonable number of units; and (4) units based on pre-existing boundaries.<sup>462</sup>

He cites examples of the size of sub-state units of Nigerian experience in the First Republic, where a group in an unusually large area could utilise the electorate of nearly the entire sub-state in an attempt to control the entire country. The thesis in support of reducing sizes of counties and sub-state was made clear by Second and Third Republics, in which no single ethnic group has been able to leverage its territory in order to dominate the entire country. Several counties larger than the number of ethnic groups is preferable to the other model.

Article 6 of the Constitution of Kenya 2010 provides that the territory of Kenya is divided into counties. Article 174 provides objects of devolution including; “to foster national unity in diversity, ensure equitable sharing of resources, and recognize rights of communities to manage their own affairs”. Horowitz, a leading centripetalist, as explained in the foregoing sections, has extolled devolution's virtues as a peacebuilding mechanism for ethnically divided societies. Similarly, Lijphart, leading consociationalism, has upheld devolution as a means for assisting ethnically divided societies.

### **2.7.3 Consociational mechanisms**

The term Consociationalism has been explained in literature review of chapter one.<sup>463</sup> This section deals with the relation of the term with other key variables in the study.

Consociationalism is a system of government whose goal is power-sharing in a politically and ethnically divided state (cultural divisions based on ethnicity, religion, or linguistic groups).<sup>464</sup>

It stands in contrast with centripetalism. Centripetal systems are integrationists, in that minority groups are to be integrated into the system and rights are based on individuals solely.<sup>465</sup> By contrast, the consociationalist systems comprise of

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<sup>462</sup>n 444.

<sup>463</sup> 33 of this thesis .

<sup>464</sup>Arend Lijphart, ‘Constitutional Design for Divided Society’ (2004) 15 (2) Journal of Democracy 96.

<sup>465</sup> *ibid.*

accommodating minorities, by granting ethnic groups collective entitlements. Lijphart holds that the features of Consociationalism include Executive power-sharing; Mutual Veto; Proportional Representation and segmental Autonomy.<sup>466</sup>

Rather than having a specific structure, Consociationalism does take different forms in various countries. The Kenya 2008-2013 grand coalition government can be deemed as a consociational. United Kingdom's Northern Ireland settlement of Good Friday is often characterized as a successful consociationalism mechanism but is now being tested by United Kingdom's decision to leave European Union.<sup>467</sup>

This model has several merits. One fundamental merit for such mechanisms is that they guarantee peace.<sup>468</sup> Ethnic minorities are incorporated into the political and economic center stage. It is a practical option in deeply divided societies. After the 2007 post-election ethnic conflict, the mechanism was applied, and Kenya had peace.<sup>469</sup>

Secondly, the system diffuses power from one entity. Power is exercised in a collegiate manner rather than a unipolar angle. Whereas the Montesquieu doctrine of separation of powers is intended to achieve this, this goal is not realizable in a majoritarian system because the executive branch retains powerful prerogatives.

Consociationalism was first researched academically by Lijphart. He stated that he had 'merely discovered what political practitioners had repeatedly-and independently of both academic experts and one another-invented year earlier'.<sup>470</sup>

Consociationalism can be traced back to 1917 in the Netherlands, where it was first practiced and it has been a proposed constitutional remedy for several divided countries in Africa.<sup>471</sup> Lijphart relies on the Netherlands experiment in developing the thesis in its favour as a remedy for managing conflicts in ethnically divided societies. The experiment in the Netherlands was between 1857 and 1967 and was segmented into four non-territorial

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<sup>466</sup> *ibid.*

<sup>467</sup> Aileen McHarg, 'Navigating without maps: Constitutional silence and the management of the Brexit crisis', (2018) 16 Issue 3 *International Journal of Constitutional Law* 952.

<sup>468</sup> *ibid.*

<sup>469</sup> *ibid.*

<sup>470</sup> Lijphart (n 464).

<sup>471</sup> Alan J Kuperman, 'Introduction' in Alan J. Kuperman (ed.) *Constitutions and Conflict Management in Africa: Preventing Civil War Through Institutional Design*, (University of Pennsylvania Press, 2015).



entities: Catholic, Calvinist, Socialist, and General. During that period, each consisted of highly-organised groups, educational institutions, medical facilities, media-divided along with a polarised social structure.<sup>472</sup> The concept focuses on the role of political elites and their co-operation as being important towards a stable plural democracy.

According to Lijphart, consociational states have the following features with various degree of variation: coalition cabinets where power is divided between parties but does not repose on one and they are oversized, balance of power between parliament and the executive branches of government, decentralised form of government where devolved units have appreciable powers, incongruent two-chamber parliament where it is almost impossible for a single political party to have a majority in the two houses.<sup>473</sup> There is proportional representation which allows small ethnic groups to gain parliamentary representation; proportional quotas for employment in the public sector, a ceremonial head of state who often gives up his affiliation upon being elected, referendums are only used to allow ethnic minorities to block legislation and equality between ministers in the cabinet.<sup>474</sup>

Scholars have identified pre-requisite conditions that must exist for consociationalism to succeed. Jeremie Gilbert explains why there is a general reluctance towards accommodation of ethnicities in most African constitutions. He cites lack of segmental isolation of ethnic groups, single sources of political power; lack of some external force which is against all ethnic groups; absence of patriotism to the state; lack of a culture of elite accommodation and socioeconomic ethnic inequality.<sup>475</sup>

Sujit Choudhry has posited which conditions are important towards a functioning consociational state: political elites have to be motivated to engage in conflict regulation; the ethnic leaders ought to lead deferential ethnic segments; and there must be a multiple balance of power with the subcultures being stable.<sup>476</sup> In his study of Lebanon and Northern

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<sup>472</sup> *ibid.*

<sup>473</sup> Arend Lijphart, *Institutional Design in New Democracies: Eastern Europe and Latin America* (1st Edition, Routledge, 2018).

<sup>474</sup> *ibid.*

<sup>475</sup> Jeremie Gilbert, 'Constitutionalism, ethnicity and minority rights in Africa: A legal appraisal from the Great Lakes region', (2013) 11 Issue 2 *International Journal of Constitutional Law* 414–437.

<sup>476</sup> Sujit Choudhry, 'Constitutionalism in divided societies', (2007) 5 Issue 4 *International Journal of Constitutional Law* 573–575.

Ireland, he adds that existence of external pressure, from state to non-state actors, provides local elites with sufficient incentive for their acceptance of consociation.<sup>477</sup>

However, one can question the nature of the cleavages that exist in the countries which Lijphart views as "classic cases" of consociationalism. For example, using the Swiss example seems problematic. This is because it's political parties cross-cut cleavages in the society and it provides a remarkable example of direct democracy.<sup>478</sup> For the Netherlands, it appears the whole cause of the disagreement was the feeling of some Dutchman that it mattered what all the inhabitants of the country believed. Dutch example differs from Catalan (Spain) because the latter's conflict is underpinned by linguistic and economic concerns.<sup>479</sup> On the contrary, in Northern Ireland, the inhabitants have never shown much worry about the prospects of the adherents of the other religion going to hell.<sup>480</sup> This makes religion such a powerful cleavage in that country.<sup>481</sup> The relevance of Dutch consociational model for other divided societies is hence doubtful noting its main current constitutional concern is populism.<sup>482</sup>

Entrenching ethnic identity rules in the constitution formally does happen in some divided societies. For example, in Northern Ireland assembly members must register their ethnic identity (nationalist, unionist or other).<sup>483</sup> Arend approaches, though, fails to appreciate instances of cross-denominational co-operation, and dissolution of formerly coherent political sub-cultures as time goes by.

Coalitions may not be formed due to negotiation between segments but to improve parties' power.<sup>484</sup> It can be contended Netherlands was "stable" even before consociationalism. One can question how the Netherlands, or indeed any state which adopts a consociational system, could be deemed as a democracy, and whether describing a consociational country,

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<sup>477</sup> Choudhry (n 75).

<sup>478</sup> Rosalind Dixon and others (n 424).

<sup>479</sup> Hèctor López Bofill, 'A nation of nations? A reply to Joseph H. H. Weiler', (2019) 17 Issue 4 International Journal of Constitutional Law 1315–1318.

<sup>480</sup> See Christopher McCrudden, 'Northern Ireland, the Belfast Agreement, and the British Constitution' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6th ed., Oxford University Press 2007).

<sup>481</sup> *ibid.*

<sup>482</sup> Nicola Lacey, 'Populism and Rule of Law', (2019) 15 Annual Review of Law and Social Science 79, 91.

<sup>483</sup> N W Barber, 'Why Entrench?' (2016) 14 Issue 2 International Journal of Constitutional Law 325, 350.

<sup>484</sup> *ibid.*

democracy is not nullified by definition of the very term 'democracy'.<sup>485</sup> Lijphart appears to have problems of rigour when identifying if specific divisions were ethnic cleavages, if particular ethnic cleavages were segmental, and if particular cleavages were cross-cutting.<sup>486</sup>

Maurice Adam's position is that whereas Belgium has been cited as a positive example of this model, societal differences (confessional) on which consociationalism was justified have eroded over time but the model remains.<sup>487</sup> He states Belgian Constitution is now developing into a nominal constitution that lacks existential reality and may have lost its legitimacy.<sup>488</sup>

Notwithstanding the abovementioned criticisms, the concept of consociationalism retains currency by virtue of several states having embraced it at various stages of their political evolution. They include Belgium, Lebanon, Cyprus, Northern Ireland, Switzerland.<sup>489</sup> European Union can be said to be a consociational democracy.<sup>490</sup> Other good examples include the former Yugoslavia Dayton agreement between Bosnia and Herzegovina and Ohrid agreement of 2001 which denoted the constitutional power-sharing in the Republic of Macedonia.<sup>491</sup>

Between 2008 and 2013, Kenya applied this model. Nick Chessman explains the background of its application. This was after the declaration of former President Mwai Kibaki as the victor of the elections held on 27<sup>th</sup> of December 2007.<sup>492</sup>

Raila Odinga's supporters alleged electoral manipulation, a point which was widely confirmed by international observers but who also said it was being perpetrated by both parties.<sup>493</sup>

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<sup>485</sup> *ibid.*

<sup>486</sup> *ibid.*

<sup>487</sup> Maurice Adams, 'Disabling constitutionalism. Can the politics of the Belgian Constitution be explained?', (2014) 12 Issue 2 International Journal of Constitutional Law 279,390 .

<sup>488</sup> *ibid.*

<sup>489</sup> Lijphart (n 473) .

<sup>490</sup> *ibid.* .

<sup>491</sup> *ibid.*

<sup>492</sup> Nic Cheeseman, 'The Kenya Elections of 2007: An Introduction' (2008) 2(2) Journal of Eastern African Studies.

<sup>493</sup> *ibid.*

After the announcement of presidential elections, the targeted ethnic conflict escalated and at first was directed against Kibaki's ethnic community who reside outside their ancestry central Kenya, especially in the Rift Valley region.<sup>494</sup>

Former United Nations Secretary-General Kofi Annan arrived in Kenya about a month afterwards and successfully brought the warring sides to the round table. On 28th February 2008, Kenyans celebrated when Kibaki and Odinga signed a power-sharing agreement, which was enacted into a law called the National Accord and Reconciliation Act 2008.<sup>495</sup> Some of its features included creating the office of the Prime Minister and creating a coalition government. The power-sharing cabinet, which was to be supervised and coordinated by Odinga as Prime Minister, was eventually named on 13<sup>th</sup> April 2008, after significant negotiations over its composition and it commenced work on 17<sup>th</sup> April 2008.<sup>496</sup>

Speaking in the National Assembly after it reopened on 6th March 2008, the President urged it to pass laws required to implement the socialist power-sharing agreement quickly.<sup>497</sup>

He named four proposed laws that the Assembly needed to pass: the National Accord and Reconciliation Bill, a bill amending the Constitution by adding a new section 15 A that creates the office of the Prime Minister, a bill establishing the Truth, Justice and Reconciliation Commission and a bill dealing with ethnic matters.<sup>498</sup>

On 11th March 2008, a house committee requested for the bills to be fast-tracked, which would have them considered within five days, rather than three or so weeks. The Assembly passed the bills in a record one week.<sup>499</sup> The Constitution of Kenya (Amendment) Bill was passed unanimously with 200 votes, and it constitutionally established the positions of Prime Minister and his two Deputies.<sup>500</sup>

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<sup>494</sup> *ibid.*

<sup>495</sup> Richard Stacey, 'Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process', (2011) *International Journal of Constitutional Law* 587.

<sup>496</sup> Biniam E Bedasso, 'Ethnicity, intra-elite differentiation and political stability in Kenya', (2015) *114 Issue 456 African Affairs* 361.

<sup>497</sup> *ibid.*

<sup>498</sup> *ibid.*

<sup>499</sup> *ibid.*

<sup>500</sup> Franzisca Zanker and others, 'Power, peace, and space in Africa: Revisiting territorial power sharing', (2015) *African Affairs* 72,80.

It was followed by a law detailing the terms of the power-sharing arrangement. The President signed them into law a few hours later and said that he was "now confident a permanent solution to the crisis will be achieved" and called for the drafting of a new Constitution.<sup>501</sup> Odinga called for a "national, ethnic conference where we will have representatives from all the forty two tribes in the country come together to discuss openly how we want to lead this country".<sup>502</sup>

Then came the issue of cabinet appointments and ODM proposed a cabinet with thirty four members and Kibaki proposed forty four members. On 1st April 2018, a small civil society protest broke out in Nairobi against these proposals with the activists saying Kenya would not afford a bloated cabinet; the protesters demanded a slim cabinet.<sup>503</sup>

The following day, Annan raised red flags about the slow naming of a new cabinet.<sup>504</sup> He urged both leaders to put the national interest first and name a cabinet with an equal division of power. On 3rd April 2018, the two sides reached an agreement on the size and composition of the cabinet.<sup>505</sup> True to consociational theorists, the new cabinet was oversized noting it had forty ministers hence the largest in Kenya's history.

Many contended that a forty -member cabinet was unnecessary, and it was merely intended to provide additional jobs to politicians. The government counter-argument was that the large size of the cabinet was needed for ethnic inclusivity. The then Government Spokesman, Alfred Mutua, said that "there is no price that is too high for our country to ensure peace, harmony and reconciliation, healing and stability that will spur and grow the economy and create even more wealth".<sup>506</sup>

Raila Odinga and the Cabinet were sworn in and Koffi Annan came to Kenya for the event and the latter appealed for Kenyans' support for the new cabinet, saying there was "still a

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<sup>501</sup> *ibid.*

<sup>502</sup> Jenkins (n 32) .

<sup>503</sup> *ibid.*

<sup>504</sup> *ibid.*

<sup>505</sup> *ibid.*

<sup>506</sup> Andreas Mehler, 'Peace and Power Sharing in Africa: A Not So Obvious Relationship', (2009) *African Affairs* 453,470 .

long way to go", and that the next task would be to "mould the cabinet as a cohesive, effective and productive thing that will help steer this nation right".<sup>507</sup>

Like in typical consociational states, there was grumbling about lack of opposition to oversight government. As a result, about 70 backbencher MPs supported the creation of a coalition of opposition MPs for checks and for democratic governance.<sup>508</sup> On 22nd May 2008, the cabinet resolved to oppose the creation of such opposition on the basis that it was unconstitutional and would negate the coalition.<sup>509</sup>

As a result of the consociational constitutional model, there was peace in the period between 2008 and 2013. The economy recovered as a result, and all ethnic parties felt well represented in the government. After the post-2007 ethnic conflict, the economic growth dipped from a high of seven per cent per annum in 2007 to one per cent before averaging five per cent between 2009 and 2013.<sup>510</sup> This rate was maintained in the period between 2013 to 2018.<sup>511</sup>

However, that model was not adopted into the Constitution of 2010 with drafters opting for the majoritarian centripetal systems notwithstanding its success in restoring peace.

Ethnicity remains a salient cleavage in Kenya. Leadership is shaped by ethnicity, and consequently, leaders serve their ethnic groups, resulting into a zero-sum game for the participants. The Kikuyu are approximately 22 per cent of the total population, the Luhya 14 percent, Luo 13 percent, Kalenjin 12 per cent and the Kamba 11 per cent of the total population. There are more than 43 ethnic groups.

Daniel Posner devised a method of counting politically relevant ethnic groups (PREG).<sup>512</sup> By (PREG) standards, the fractionalisation score of Kenya is at 0.57, taking into account the Kikuyu, Luo and Kalenjin ethnic groups.<sup>513</sup>

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<sup>507</sup> *ibid.*

<sup>508</sup> *ibid.*

<sup>509</sup> Clark C Gibson and James D. Long, 'The presidential and parliamentary elections in Kenya, December 2007', (2009) 28 *Electoral Studies* 492.

<sup>510</sup> Kenya National Bureau of Statistics, (*Economic Survey*, 7 June 2018) <<https://www.knbs.or.ke/download/economic-survey-2018/>> accessed 8<sup>th</sup> Dec 2018.

<sup>511</sup> *ibid.*

<sup>512</sup> Daniel N Posner, 'Measuring Ethnic Fractionalization in Africa.' (2004) 48 (4) *American Journal of Political Science* 849.

<sup>513</sup> *ibid.*

The model can also offend provisions of Article 10 (2) of the Constitution of Kenya 2010. They include principles of good governance such as respect for human rights, sustainable development and democracy.

Lenaola in *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others* [2013] eKLR, explained the goals and objectives of the Constitution of Kenya 2010 as enunciated by its principles and values of good governance as follows:

The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement.

United Kingdom's Northern Ireland settlement of Good Friday is often characterised as a successful consociationalist mechanism.<sup>514</sup> One key merit for such mechanisms is that they guarantee peace, a key ingredient for sustainable development.<sup>515</sup> After the 2007 post-election ethnic conflict, the mechanism was applied, and Kenya had peace.<sup>516</sup>

This model does uplift ethnic identity over personal political choice. Hence, it is undemocratic and violates human rights provisions relating to political rights.<sup>517</sup> Consociationalism as a form of ethnocracy which may not lead to full democracy.<sup>518</sup>

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<sup>514</sup> n470.

<sup>515</sup> *ibid*.

<sup>516</sup> n 400 3-10.

<sup>517</sup> See Cochrane F Loizides and N Bodson, *Mediating Power-Sharing: Devolution and Consociationalism in Deeply Divided Societies*, (Routledge; 1 edition 2018).

<sup>518</sup> *ibid* 3.

#### 2.7.4 Centripetalism

Literature review of chapter one has explained this term.<sup>519</sup> Horowitz has defined the term as being electoral rules that give incentives to ethnic entrepreneurs to move their politics to the centre devoid of ethnic conflict.<sup>520</sup>

Centripetalism is a concept that was promoted by Donald Horowitz.<sup>521</sup> His view is that presidential elections candidates in deeply divided states would rationally reject moderation due to pressure from the citizenry. Such leaders must be incentivized to favour inter-ethnic support. Certain institutional designs do a good job than others at providing incentives to presidential elections contestants to push for centrist agendas that assist in inter-ethnic appeal.

Although electoral systems that encourage moderation vary according to contexts, it is assumed that centripetalism can be upheld through majoritarian preferential voting systems like Ranked Choice Voting, also known as Alternative Vote (AV) or it's a variant called Supplementary Vote (SV). Jack Santucci view is that the AV system manufactures an electoral majority in a divided candidate field. It creates an electoral incentive for a broad-based coalition comprised of reform moderates and an outsider majority bloc which then disincentives for extremist outbidding.<sup>522</sup>

AV refers to electoral systems that provide voters have to rank candidates according to their preferences, say 1, 2, 3, 4, and 5. If one candidate during the first count secures a set criterion, say more than 50 per cent of votes cast, s/he wins. If none does, the candidates with the lowest number of votes are eliminated. In the second count, the second preference of votes is tallied until one person receives the set threshold, say over 50 per cent of the votes.<sup>523</sup>

Sri Lanka, Australia, Northern Ireland and some states in America use the system. Nayomi G. Field has contended that the system has not worked in Sri Lanka, with the successful presidential

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<sup>519</sup> cf Posner (n 512).

<sup>520</sup> Horowitz (n 444 ).

<sup>521</sup> *ibid.*

<sup>522</sup> Jack Santucci , 'Maine ranked-choice voting as a case of electoral-system change', (2018) 54 (3) *Journal of Representative Democracy* 297,311 .

<sup>523</sup> Ben Reilly and Andrew Reynolds, *Electoral systems and conflict in divided societies*, (Papers in International Conflict Resolution -National Academy Press, 1999) 56.



elections candidates continuing to appeal to fears of the majority Sinhalese to the detriment of Muslim and Tamils.<sup>524</sup> Fresh war memories and the huge numbers of the majority Sinhalese ethnic group (who form 75 per cent of the country's population) offers no incentive to presidential elections candidates for compromise with the minorities.<sup>525</sup>

John Coakley and Jon Fraenkel have reviewed Fiji, Bosnia, Sri Lanka, Northern Ireland, Estonia and Papua New Guinea. They analysed the effect of preferential voting systems and its effect in obviating ethnic politics. According to them, many years later, with a larger volume of data, they assess these verdicts.<sup>526</sup> They hold that ballot transfer and party vote-seat share patterns in the deeply divided polities and find little support for centripetalist claims that the system encourages 'moderate' parties. They state that where district magnitude is low, departures from the vote-seat proportionality does favour 'moderate' parties, but such heavily engineered systems do advantage the larger parties or yield erratic outcomes. However, 2015 elections where the incumbent nationalistic president lost after the winner (from the same majority ethnic group as the incumbent) obtained support from minorities seems to nullify Nayomi's thesis.<sup>527</sup>

Centripetal mechanisms are embedded in Kenya through Article 138(4) of the Constitution of Kenya. It requires the winning candidate to obtain more than half of the votes cast and 25 per cent of votes cast in more than half of the counties. They include electoral rules reforms that entail preferential electoral systems where voters cast their ballots in order of preference. A voter could cast some of his votes to parties other than his co-ethnic party.<sup>528</sup> This, in turn, would compel presidential elections candidates to broaden their appeal across the ethnic divide to get second and third preference votes.

Sarah Ann Miller has conducted a study on the application of the electoral systems in ethnically divided countries.<sup>529</sup> She concludes that proportional systems did not work well

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<sup>524</sup> Nayomi Gunasekera Field, *Making Extremism Pay? Centripetalism and Nationalism in Post War Sri Lanka* (Unpublished Master's Thesis, Ohio University, 2016).

<sup>525</sup> *ibid*.

<sup>526</sup> John Coakley and Jon Fraenkel, 'Ethnic Implications for preferential voting', (2017) 52 *Government and Opposition Journal*-Cambridge University Press 671.

<sup>527</sup> *n*524.

<sup>528</sup> *ibid*.

<sup>529</sup> Miller (n 309).

and proposes ranked-choice voting as adopted in pre-independence New Papua Guinea and bemoans its scrapping immediately after independence.<sup>530</sup>

Merit of either ranked choice voting or pluralistic centripetalism is that it respects personal choices hence adheres to the tenets of democracy and human rights. Notwithstanding the centripetal provision as provided in article 138 of the Constitution of Kenya 2010, Kenya has experienced ethnic conflict during the last two presidential elections.

The rationale that underpins centripetalism is the idea that electoral systems have the potential to shape particular incentives for political behaviour. They influence political interaction within a given nation-state.<sup>531</sup>

Wrongly designed electoral systems that are established by the constitutions encourage ethnic outbidding if structured in a manner that enables presidential elections candidates to depend on co-ethnic votes solely.<sup>532</sup>

If this is correct, designs of electoral systems can have an impact—positive or negative—on deeply divided places. This is because in such places, institutional exclusion from the government is often accompanied by exclusion from the national community.<sup>533</sup>

## **2.8 Conclusion**

This chapter has defined key terms and concepts used in the study and has established the relationship between them. Having laid the conceptual framework of the study in this chapter, the study now delves into establishing the linkage between ethnic conflict and presidential elections in Kenya.<sup>534</sup> This was the first objective of the study.

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<sup>530</sup>ibid 11.

<sup>531</sup>ibid.

<sup>532</sup> Ferran Martinez Coma and Alessandro Nai, 'Ethnic diversity decreases turnout. Comparative evidence from over 650 elections around the world', (2017) 49 *Electoral Studies* 75,95.

<sup>533</sup>ibid .

<sup>534</sup>Edwin Odhiambo Abuya, 'Consequences of a Flawed Presidential Election' (2009) 29 *Legal Studies* 127.

## **CHAPTER THREE**

### **THE LINKAGE BETWEEN ETHNIC CONFLICT AND PRESIDENTIAL ELECTIONS IN KENYA**

#### **3.1 Introduction**

This chapter sought to find out the linkage between ethnic conflict and presidential elections in Kenya. This was by way of interrogating responses emanating from presidential candidates, experts in the fields of political science and law, election administration officials, voters in the study areas and officials from the electoral management body (IEBC). Negative campaigns by presidential candidates, stiff competition in presidential elections, lack of nationalism by voters, the role of the media and the winner takes it all concept in the competitive elections presented themselves as critical linkages during the data collection exercise. The study adopted them as the thematic areas on which the data analysis and interpretation were premised.

##### **3.1.1 Negative Campaigns by Presidential Candidates**

Negative campaigns in presidential elections in Kenya refers, in this study, to the adoption of campaign strategies within which leaders focus on criticising other leaders during campaign periods. Often, instead of emphasizing their positive qualities, such leaders criticize other leaders who are from different ethnic groups.

Voters interviewed from affected counties affirmed frequent use, by presidential aspirants and their key supporters, of outright and coded ethnic hate speech, harsh words, impolite language and appealed to supporters' base instincts. This is contrasted with positive campaigning, which refers to a strategy that focuses on a candidate's positive policies. Positive campaigns focus solely on the aspirant running for office and on the positive things that he/she intends to do once elected.

In divided electoral polity, the negative campaign seems effective than issue-driven platforms. Dino P Christenson and Herbert F Weisberg argue that negative campaigns work better than the positive ones.<sup>535</sup> The scholars investigated the impact of campaign

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<sup>535</sup> See Dino P Christenson and Herbert F Weisberg, 'Bad characters or just more polarization? The rise of extremely negative feelings for presidential candidates', (2019) 61 Electoral Studies .

advertising and its attendance negative sentiments towards presidential candidates in the United States' 2016 campaigns. The researches found that negative advertising is powerful in influencing preferences and turnout.

Electoral turn out is also impacted by ethnic composition .Andre Foster has illustrated regions that are ethnically heterogeneous are associated with lower electoral turnout.<sup>536</sup> Dalston G Ward and Margit Tavits observe that voters' behavior is attributed to the tone of the political campaigns and the extent to which the same affect the voters' psychology.<sup>537</sup>

As Joris states, negative and hostile attitudes by voters towards communities or parties may be as a result of parental socialization.<sup>538</sup> This is where children learn from parents to dislike certain communities and parties.

Nicholas Haas and others view negative campaigns as having more negative impact in emerging democracies as compared to developed states where voters are more accustomed to such or political divisions are more ideological.<sup>539</sup> In their study, they sought to find out the extent to which negative campaigns affect presidential elections in Egypt and USA.

In this study, there were diverse responses regarding the linkages between ethnic conflict and presidential elections emanating from the respondents as pertains to negative campaigns. According to one of the respondents, the presidential candidates use negative campaign to boost voter turnout by whipping ethnic fear of domination.<sup>540</sup>

The responses confirmed the position taken by Japhet Biegon in his work which looked at political processes in Kenya.<sup>541</sup> The plight of vulnerable members of the society, especially

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<sup>536</sup> André Förster, 'Ethnic Heterogeneity And Electoral Turnout: Evidence From Linking Neighbourhood Data With Individual Voter Data', (2018) 53 *Electoral Studies* 57.

<sup>537</sup> Dalston G Ward and Margit Tavits, 'How partisan affect shapes citizens' perception of the political world' (2019) 60 *Electoral Studies* .

<sup>538</sup> Joris Boonen, 'Learning who not to vote for: The role of parental socialization in the development of negative partisanship', (2019) 59 *Electoral Studies* .

<sup>539</sup> Nicholas Haas and others , 'Negative campaigns, interpersonal trust, and prosocial behavior: The mediating effect of democratic experience', (2020) 63 *Electoral Studies* 87.

<sup>540</sup> Respondent A, Bomet County, 14 January 2019.

<sup>541</sup> Japhet Biegon, *Gender equality and political processes: Challenges and prospects* (Strathmore University Press, 2016) 7.

women and children, was exposed. They were shown as bearing the biggest brunt of the pain occasioned by negative campaign instigated by presidential elections contestants.

In this study, RE1, a political scientist, blamed, especially, colonialism for negative campaign. He cited Mahmood Mandani's argument that the colonial state established a dual system-one for the settler community with modern institutions and another system for Africans that retained ethnic customs as sources of law and authority.<sup>542</sup>This state of affairs did not assist in creating a nation out of the several ethnic groups after independence. He stated that ethnicity is neutral. Thus presidential elections candidates instrumentalised it using negative campaigns in their struggle for power post-independence Kenya. He did acknowledge primordialism has some cogency in explaining ethnicity.He stated , "If you meet a Swahili speaker in South Africa, there is an ingrained tendency to inquire if he is from Kenya ." The responses were corroborated by previous works carried out by Uraia Trust with a reflection on negative campaigns employed in the 2013 general elections. This was despite the enactment of a new constitution which was thought to have adequate constitutional safeguards to deter the practice.<sup>543</sup>

Negative campaign is the currency for the presidential candidate's campaign as it inspires high voter turnout.<sup>544</sup> Driven by fear and hatred, the members of an ethnic group are manipulated by the demands of the presidential candidates.This includes fighting people of other ethnic groups even to their deaths. Incitement from presidential candidates, thus, stands as a principal cause of interethnic conflicts.<sup>545</sup>

A chief within Kiambu County confirmed that presidential candidates do conduct negative campaigns among their co-ethnic members as against other groups.<sup>546</sup> He cited two instances which entailed the 2013 and 2017 general elections. He said that in the two periods, a presidential contender with ethnic affiliation to the region rallied his support base to turn out and vote for his candidacy by whipping up ethnic-based emotions.This was

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<sup>542</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and legacy of late Colonialism*, (Princeton University Press, 2018) 31.

<sup>543</sup> Fred Otieno, 'Introduction' in Fred Otieno (ed), 'New constitution same old challenges: Reflections on Kenya's 2013 General Elections', (*Society for International Development (SID)/ Uraia Trust 2015*) 2.

<sup>544</sup> Respondent B Bomet County, 14 January 2019- Appendix IX.

<sup>545</sup> Respondent B Bomet County, 14 January 2019- Appendix IX.

<sup>546</sup> Respondent A Kiambu County 7 January 2019 -Appendix IX.

because he was wary of the harm the competition would occasion to him in the event that he lost the contest. He said that the accrued fear acted as a catalyst, inspiring huge turnouts on the material voting days. He contended that gullible voters had biases towards groups which they compete against during presidential contests and it is ingrained in their mindsets. This was very weighty taking into account his position in society.<sup>547</sup>

Often, presidential candidates use negative factors that have affected specific regions to foster negative campaign. For example in Mombasa County, a respondent stated that presidential elections candidates use the historical land injustices as a mechanism for a negative campaign and hence, it causes ethnic conflict in presidential elections.<sup>548</sup> Similar positions held in Uasin Gishu County. The focus group discussions participants confirmed that the emotive issue of land was used as a negative campaign issue during the presidential campaigns in 2007. Discussants said this was a factor that ignited ethnic conflict after the declaration of the disputed 2007 general elections results.<sup>549</sup> The position was supported by the “National Election Crimes and Offences Report” which faulted presidential elections candidates for using the land as a negative campaign issue. It fans ethnic conflict in presidential contests in the Rift Valley region of Kenya.<sup>550</sup>

In the opinion of one expert respondent, ethnic conflicts are largely a result of the elite's ambition to get into power. He said that candidates inspire ethnic fear through negative campaigns to get into power, as happened in the 2007 and 2017 elections.<sup>551</sup>

PC1, another presidential candidate respondent, was of the view that ethnic chieftains mobilize their respective communities and bargain with their counterparts.<sup>552</sup> His view was that negative campaigns based on negative ethnicity had been the mainstay of a political campaign since 1963. He said that Articles 91 and 92 of the Constitution are supposed to

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<sup>547</sup>“It shall be the duty of every chief or assistant chief to maintain order in the area in respect of which he is appointed, and for such purpose, he shall have and exercise the jurisdiction and powers by this Act conferred upon him over persons residing or being within such area.” [Act No. 43 of 1952, Sch., L.N. 101/1964, Sch., Act No. 13 of 1978, Sch.]”

<sup>548</sup> Focus Group Discussion, Mombasa County, 25 January 2019- Appendix IX.

<sup>549</sup> Focus Group Discussion, Uasin Gishu County, 2 February 2019 .

<sup>550</sup> National Crime Research Centre ,*National Election Crimes and Offences Report In Kenya 2016* (Nairobi, National Crime Research Centre 2016) .

<sup>551</sup>ER1, Interview, 19 February 2019- Appendix IX.

<sup>552</sup>PC1, Interview, 18 February 2019- Appendix IX.

address this challenge. However, the Articles were dealt a monumental blow by the Court of Appeal decision in *Political Parties Forum Coalition and other v Registrar of Political Parties and others*.<sup>553</sup>

### 3.1.2 Stiff Competition in Presidential Elections

The term “competition “within business setting means “rivalry in which every seller tries to get what other sellers are seeking at the same time: sales, profit, and market share offering the best practical combination of price, quality, and service”.<sup>554</sup> Building on the above definition, within the context of this study, the expression "stiff competition" means intense rivalry in which the main presidential candidates try to win the elections by using every available method. These methods include employment of huge financial and human capital resources, higher media coverage as compared with other campaigns for other seats. The stiffer the campaigns for a seat, the higher the likelihood of disagreements. This is either before or during and after the vote. Fringe candidates (those that do not attract support above 10 per cent) do not offer stiff competition. Stiff competition is often between contestants with realistic chances of winning and who emerged first and second after the announcement of results.

Ultimately the disagreements will either turn violent, or parties end up in courts. It does not necessarily mean that political seats that entail stiff competition will attract more aspirants. There is a tendency for candidates to shy off seats that attract stiff competition. Often, there emerges two main contestants, whom the respondents informed the interviewer are referred to as "farasi wawili" in Kiswahili translated into English as, "two horses". It means "A two-horse race".

Stiff Competition ,as per Kwale ,Nairobi and Kisumu respondents interviewed in this study, can be measured with two elements –costs and margin of victory.

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<sup>553</sup> Civil Appeal No. 80 of 2014. Constitution of Kenya 2010 art.91 sets out basic requirements for political parties including having a national character; upholding and promoting national unity, promoting human rights and democracy. Article 92 provides a framework for political parties' legislation.

<sup>554</sup> Online Business Dictionary , ‘Competition’ , (*Dictionary*, 9 June 2019),<http://www.businessdictionary.com/definition/competition.html> accessed 2nd May 2019.

Concerning costs, as per the IEBC gazetted campaign spending, presidential aspirants were expected to spend only up to Ksh. 5.25 billion. The aspirants for the governors' seats were expected to spend up to Ksh 433 million only.<sup>555</sup>

Concerning margin of victory in a stiff election, losers and/or their supporters will most likely express their dissatisfaction by either going to court or causing conflict or both.

An analysis of data from the 2017 elections affirms respondents from Kisumu ,Kwale and Nairobi's position that presidential and gubernatorial contests are the stiffest.

Electoral data used in the following paragraphs to highlight the significance margin of victory between candidates in predicting conflict in Kenya was not obtained from the field. The data is based on official results published by the official body charged with elections in Kenya in respect to each election since the year 1992 when Kenya held the first democratic elections after reintroduction of multi-party democracy in 1991. Presently it is called IEBC. It is established by Article 88 of the Constitution of Kenya 2010. Its mandate includes conducting and supervising elections.

Despite statistical and data modelling together with examining confidence levels of findings, the study remains qualitative.

There were six seats on offer during the 2017 elections. These were the presidential, the gubernatorial, the senatorial, the member of the National Assembly, the women representative and the member of the county assembly seats.

The study analyzed data regarding which seat had the highest level of post election disagreements or dissatisfaction, as evidenced by recourse to courts or conflict. The Judiciary issued a status report on the number of cases filed for various positions as of 20<sup>th</sup> April 2018.<sup>556</sup>

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<sup>555</sup> *Kenya Gazette Notice* (No. 6307 of 8th August 2016).

<sup>556</sup> Judiciary Committee on Elections, 'Status Report on the Election Petition Appeals filed at The Court of Appeal and at The High Court following finalization of the 388 election petitions as at 20<sup>th</sup> April 2018' ([Judiciary](#), 3 May 2019)///C:/Users/User/Downloads/Status%20Report%20to%20the%20Press%20on%20outcome%20on%20the%20388%20Election%20Petitions%20and%20189%20%20Elecction%20Petition%20Appeals%20as%20at%2020th%20April%202018.pdf > accessed 8th April 2019.



Based on the summary of petitions filed at that time, the following table summarises the level of dissatisfaction.

**Table 5: level of dissatisfaction with results announced in 2017 elections as measured by the institution of a court case.**

S/NO	POSITION	NO OF SLOTS NATIONALLY	NUMBER OF POST POLL PETITIONS	DISSATISFACTION IN %
1	PRESIDENCY	1	1	100%
2	GOVERNOR	47	35	74.46%
3	SENATOR	47	15	31.9 %
4	MPS	290	98	33.7 %
5	WOMEN MP	47	12	25.5 %
6	MEMBER OF COUNTY ASSEMBLY	1450 seats -	139	9.5 %

Source: Judiciary, (2019)

The above data confirm that the seats for governor and president had the stiffest competition. The respondents attributed this to the huge amount of resources controlled by winner .Further, executive powers granted to the holders of these offices by the law attract many. This includes power to hire and fire of officials and their ranking order in state protocol terms.

In projecting the levels of post-election dissatisfaction, the margin of win mattered a lot. The study has analyzed gubernatorial races that escalated up to Supreme Court at a great cost to the litigants. This is in terms of personal emotions and toil, legal fees and time.

**Table 6: An analysis of the gubernatorial cases that went to The Supreme Court and margin of loss as per the declared results in 2017<sup>557</sup>**

S/NO	WINNING PARTY	CASE DETAILS	ELECTORAL AREA	STATUS
1	ODM	Petition no.17 of 2018 Cyprian Awiti vs IEBC & a 2017	Siaya	Winner: 52.5 %  Best Loser: 47.3%
2	MAENDELEO	Petition 11 of 2018 Alfred Mutua vs Wavinya Ndeti	Machakos	Winner:54.4%  Loser :45.5%
3	JUBILEE	Election Pet.Appeal no 2 of 2018 Mohammed Abdi Mohammed Versus Ahmed Abdullahi Mohammed and Ahmed Muhumed Abdi	Wajir	Winner: 57%  Best loser: 43%
4	JUBILEE	Election Pet No.6 of 2018 Lenny Kivuti v Martin Wambora and An.	Embu	Winner:50.9%  Best loser: 49.1%

Source: IEBC<sup>558</sup>

Compare this with few gubernatorial (which seats attract stiff competition) cases randomly picked where no case was filed.

<sup>557</sup>The data used is the one available at Judiciary official website as at 8th April 2019- Judiciary of Kenya , 'Elections Petitions 2017 ',(Judiciary, 6 May 2019 )<https://www.judiciary.go.ke/download/status-on-elections-petition-appeals-as-at-april-20/> accessed 12th December 2019.

<sup>558</sup>Only the votes for the winner and best loser were considered in the calculations of percentages.

**Table 7: Margin of Victory in Counties Where Supreme Court Election Petitions were not Filed for Governor Position in 2017 General Elections**

S/NO	WINNING PARTY	PARTIES	ELECTORAL AREA	STATUS
1	JUBILEE	BABA YAO WAITUTU VS KABOGO	KIAMBU	Winner: 78.8% Best Loser: 21.1
2	JUBILEE	PROF. CHEPKWONY VS JONAH KETER	KERICHO	Winner; 95.1% Best loser; 4.9%
3	ODM	WYCLIFF OPARANYA VS BONI KHALWALE	KAKAMEGA	Winner; 74.1% Best loser; 25.8%
4	WIPER	KIVUTHA KIBWANA VS DAVID MASIKA	MAKUENI	Winner; 89.5% Best loser: 10.5%
5	JUBILEE	STEPHEN SANG VS A. SANG	NANDI	Winner: 91.2% Best Loser; 8.8%
6	JUBILEE	LEE KINYAJUI VS PETER KOROS	NAKURU	Winner; 89.1% Best Loser; 10.55

Source: IEBC, (2019)

The above data indicate that for gubernatorial positions, where the competition was stiff as illustrated by a low margin of victory parties tended to revert to court.

To support this conclusion, the study checks national votes results data from 1992 presidential elections to the latest elections results in 2017. For presidential and other national contests including referendums, where the competition was stiff as illustrated by a low margin of victory, ethnic conflict arose with or without a simultaneous court case being filed. All respondents, including experts and IEBC officials, did affirm that the voting patterns in all post 1992 elections and referendums followed an ethnic voting

pattern.<sup>559</sup>The ethnic voting pattern in respect to the main aspirants who cross a threshold of 500,000 votes (for referendum ,every choice) is indicated at the end of every table as affirmed by the respondents.

**Table 8: 1992 Presidential Election Results-Low Margin of Victory. Ethnic Conflict Occurs**

Candidate	Party	Votes	%
Daniel Arap Moi	Kenya African National Union	1,927,645	36.6
Kenneth Matiba	FORD – Asili	1,354,856	25.7
Mwai Kibaki	Democratic Party	1,035,507	19.6
Jaramogi Oginga Odinga	FORD – Kenya	903,886	17.1
Chibule wa Tsuma	Kenya National Congress	15,393	0.3
George Anyona	Kenya Social Congress	14,253	0.3
John Harun Mwau	Party of Independent Candidates of Kenya	10,449	0.2
David Makaru Ng'ang' a	Kenya National Democratic Alliance	8,527	0.2
Invalid/ blank votes			-
Total		5,270,516	100
Rigestered Voters/ Turnout		7,956,354	

Source: IEBC

Note: Daniel Moi –Largely Kalenjin, Kamba, Luhya small ethnic groups like Coastal groups and Masai; Kenneth Matiba –largely Kikuyu and Luhya; Mwai Kibaki –portions of Kikuyu/Embu/Meru; Oginga Odinga –Luo and partly Luhya.

<sup>559</sup> See respective questions in Appendixes II to IV .

**Table 9: 1997 Presidential Election Results –Low Margin of Victory. Ethnic Conflict Occurs.**

Candidate	Party	Votes	%
Daniel Arap Moi	Kenya African National Union	2,500,865	40.40
Mwai Kibaki	Democratic party	1,911,742	30.89
Raila Odinga	National Development Party	667,886	10.79
Michael Kijana Wamalwa	FORD – Kenya	505,704	8.17
Charity Ngilu	Social Democratic Party	488,600	7.89
Martin Shikuku	FORD – Asili	46,512	0.59
Katama Mkangi	Kenya National Congress	23,554	0.38
George Anyona	Kenya social congress	16,428	0.27
Kimani wa Nyoike	FORD- People	8,306	0.13
Koigi wa Wamwere	Kenya National Democratic Alliance	7,745	0.13
Munya Waiyaki	United Patriotic arty	6,194	0.10
Godfrey M' Mwereria	Green African Party	4,627	0.07
Wangari Maathai	Labour Party	4,246	0.07
Stephen Oludhe	Independent Economic Party	3,691	0.06
David Waweru Ng'ethe	Umma Patriotic Party	3,584	0.06
Invalid/ blank votes			-
Total		6,189,684	100
Registered Voters/ turnout		9,063,390	

Source: IEBC

Notes: Daniel Moi: Largely Kalenjin, significant Luhya; coastal and small ethnic groups; Mwai Kibaki: largely Kikuyu/Embu /Meru; Raila –largely Luo.

**Table 10: 2002 Presidential Election Results–High Margin of Victory. No Ethnic Conflict.**

Candidate	Party	Votes	%
Mwai Kibaki	National Rainbow coalition	3,646,277	61.3
Uhuru Kenyatta	Kenya African National Union	1,835,890	30.2
Simeon Nyachae	FORD – People	345,152	5.9
James Orengo	Social Democratic Party	24,524	0.4
David Ng’ethe	Chama Cha Uma	10,061	0.1
Invalid / blank votes		114,006	-
Total		5,861,904	100
Registered voters / turnout		10,451,150	57.2

Source: IEBC

Note: Mwai Kibaki –larger portion of Kikuyu/Embu /Meru/Luhya /Coastal ethnic groups; Uhuru Kenyatta – significant portion of Kikuyu community and Kalenjin

**Table 11: 2005-Referendum Results–High Margin Of Victory. No Ethnic Conflict**

	Votes	%
Yes	2,532,918	41.65%
No	3,548,477	58.35%
Valid votes	6,081,395	100.00%
Invalid or blank votes	0	0.00%
Total Votes	6,081,395	100.00%
Registered voters/ Turnout	11,594,877	52.45%

Source: IEBC

Note : ”Yes vote” largely Kikuyu/Embu /Meru vote; ”No vote” largely non-Kikuyu vote combined.

**Table 12: 2007 Presidential Elections Results –High-Intensity Ethnic Conflict. The low margin of victory**

Candidate	Party	Votes	%
Mwai Kibaki	Party of National Unity	4,584,721	46.42
Raila Odinga	Orange democratic movement Kenya	4,352,993	44.07
Kalonzo Muskoka	Kenya Patriotic Trust Party	879,903	8.91
Joseph Karani	Kenya Patriotic Trust Party	21,171	0.21
Pius Muiru	Kenya people's party	9,667	0.10
Nazlin Omar	Workers Congress Party of Kenya	8,624	0.09
Kenneth Matiba	Saba Saba Asili	8,046	0.08
David Waeru Ng'ethe	Chama Cha Uma	5,976	0.06
Nixon Kikubo	Republican Party of Kenya	5,927	0.06
Invalid/ blank votes			-
Total		9,877,028	100
Registered voters / turnout		14,296,180	96.1

Source: IEBC

Note: Mwai Kibaki –largely Kikuyu/Embu/Meru; Raila Odinga –largely Luo/Luhya /small Coastal and Muslim communities; Kalonzo Musyoka –largely Kamba .

**Table 13: 2010 Referendum Results –High Margin of Victory. No Ethnic Conflict**

No.	Choice	Votes	%
1	Yes	6,092,593	68.55
2.	No	2,795,059	31.45
3.	Valid Votes	8,887,652	97.54
4.	Invalid	218,633	2.46
5.	Total votes Cast	8,887,652	70.44
6.	Registered votes	12,616,627	100

Source: IEBC

Note: “Yes Vote” –largely Kikuyu/Luo /Luhya /small communities

“No Vote “-largely Kalenjin group and small element of devout Christians

**Table 14: 2013 Presidential Elections Results –Low-intensity ethnic conflict. Low Margin of Victory**

Candidate	Running mate	Party	Votes	%
Uhuru Kenyatta	William Ruto	Jubilee Alliance	6,173,433	50.51
Raila Odinga	Kalonzo Musyoka	Coalition for Reforms and Democracy	5,340,446	43.70
Musalia Mudavadi	Jeremiah Ngayu Kioni	Amani Coalition	483,981	3.96
Peter Kenneth	Ronald osumba	Eagle Alliance	72,786	0.60
Mohammed Abduba Dida	Joshua Odongo	Alliance for Real Change	52,848	0.43
Martha Karua	Augustine Lotodo	NARC – Kenya	43,881	0.36
James Ole Kiriapi	Winnie Kaburu	Restore and build Kenya	40,998	0.34
Paul Muite	Shem Ochuodho	Safina	12,580	0.10
Invalid / blank votes			108,975	-
Total			12,330,028	100
Registered voters/ turnout			14,352,533	85.91

Source: IEBC Note: Uhuru Kenyatta –largely Kikuyu/Embu /Meru and Kalenjin Vote;Raila Odinga –largely Luo, Luhya, Kamba and small ethnic groups vote.



**Table 15: 2017 Presidential Elections Results -Low Margin of Victory. Ethnic Conflict Occurs.**

<b>Candidate</b>	<b>Running mate</b>	<b>Party</b>	<b>Votes</b>	<b>%</b>
Uhuru Kenyatta	William Ruto	Jubilee Party of Kenya	8,223,369	54.17
Raila Odinga	Kalonzo Musyoka	National Super Alliance	6,822,812	44.94
Joseph Nyagah	Moses Marango	Independent	38,029	0.25
Abduba Dida	Titus Ngetuny	Alliance for Real Change	38,004	0.25
Ekuru Aukot	Emmanuel Nzai	Thirdway Alliance Kenya	27,400	0.18
Japheth Kaluyu	Muthiora Kariara	Independent	11,774	0.08
Cyrus Jirongo	Joseph Momanyi	United Democratic Party	11,282	0.07
Michael Wainaina	Miriam Mutua	Independent	8,870	0.06
Invalid / blank votes			411,510	-
Total			15,593,050	100
Registered voters/turnout			19,611,423	79.51

Source: IEBC Note :Uhuru Kenyatta –Largely Kikuyu/Embu /Meru and Kalenjin; Raila Odinga –largely Luo, Luhya, Kamba and coastal groups.

The above results show electoral victory margin matters in terms of satisfaction with the announced results. In non-presidential seats, the dissatisfaction will result in litigation. In presidential, it will result in litigation and conflict simultaneously.

The above data can be expressed graphically and in mathematical terms. Such mathematical model would assist in answering the question: "Does margin of votes as expressed between the first and second contestant impact on the number of presidential election-related deaths or occurrence of ethnic conflict in Kenyan presidential elections?"

The study used the victory margin as expressed in percentage form. This ensures it is in line with article 138(4) of the Constitution of Kenya 2010. The article uses the same percentage form (50per centplus one vote). Data for the referendum (non-presidential contests) outcomes are considered for two reasons. Firstly, the referendum contests in Kenya take ethnic angles just like presidential ones as affirmed by respondents.<sup>560</sup> Secondly, the referendum results will make data-rich hence ripe for analysis.

In statistics, there are two models that can be used. Either a logistic regression model (or logit model) or linear regression.<sup>561</sup> Basic statistic model is expressed in the following terms:

$$Y = a + b x$$

Where "Y" is the dependent variable," a "is a constant variable, "b" is the slope or gradient, and "x" is the independent variable.

Dependent variable means that variable which is impacted by some other phenomenon (the independent variable ). For example, if one wants to investigate if putting more hours in class increases one's chances of passing an exam, the hours put will be the independent variable, whereas passing or failing the exam will be the dependent variable. Both the constant variable (a) and variable (b) (also known as the co-efficient) is usually calculated by computer-based programs and their values given out in an output. What this study did was to put the figures for "Y" and "X", and "a" and "b" were portrayed on the programme.

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<sup>560</sup> n 559.

<sup>561</sup> David A Freedman, *Statistical Models: Theory and Practice* ,(1st Ed. Cambridge University Press, 2009)26. He states "A simple regression equation has on the right-hand side an intercept and an explanatory variable with a slope coefficient. A multiple regression equation has two or more explanatory variables on the right-hand side, each with its own slope coefficient."

Various statistical programmes exist including STATA and SPSS but this study chose SPSS for logistics regression. This was because STATA could not do the configurations because the data available (national votes held since 1992 the year when democracy was reintroduced, and ethnic conflict in presidential elections became cyclic) was for less than ten periods.

Excel was used for linear regression because of the same reason (data available was for less than ten periods).

Logistic Regression Model is used to model a binary dependent variable, whereas the linear model is used for data that is a continuum in nature. For example, if one wants to establish if there is a relationship between the eruption of ethnic conflict and the margin of victory in presidential elections in Kenya, one will use logistic regression because Y data will be expressed in terms of either "no conflict " or "conflict " in respect to any particular year. Other examples of binary data include death /alive, sick /healthy, pass/fail.

If one wants to establish if there is a relationship between a number of reported deaths arising out of the ethnic conflict that occurs in presidential elections in Kenya and the margin of victory in presidential elections, one will use linear regression. This is because deaths can be, say one or twenty in any particular electoral year.

This study used both the logistic and the linear regressions to analyze and determine if there is a relationship specifically between the number of deaths /likelihood of ethnic conflict and margin of victory in national votes.

A. Ethnic conflict and margin of victory

### **Descriptive Analysis**

The following table displays No. of votes between the two leading Presidential candidates from years 1992 to 2017 ( for 2005 and 2010, national referendums).It includes the percentage votes difference and on whether there was a conflict or not.

**Table 16: Descriptive Analysis**

Year	Votes for the 1 <sup>st</sup> Contestant	Votes for the 2 <sup>nd</sup> Contestant	% Difference in votes	Conflict during the electoral cycle
1992	1,927,645.00	1,354,856.00	10.9	Yes
1997	2,500,855.00	1,911,742.00	9.5	Yes
2002	3,646,277.00	1,835,890.00	30.93	No
2005	2,532,918.00	3,548,477.00	16.7	No
2007	4,584,721.00	4,352,993.00	2.35	Yes
2010	6,092,593.00	4,352,993.00	37.1	No
2013	6,173,433.00	5,340,546.00	6.8	Yes
2017	8,223,569.00	6,822,812.00	9.3	Yes

**Source: IEBC for number of votes).**

For conflict, 1992 – Kiliku Committee Report<sup>562</sup>; 1997-Akiwumi Commission of Inquiry into Tribal Clashes<sup>563</sup>; 2002-European Elections Observation Mission’s report<sup>564</sup>; 2005-

<sup>562</sup> Kiliku (Note 53).

<sup>563</sup> Akiwumi ( n 29).

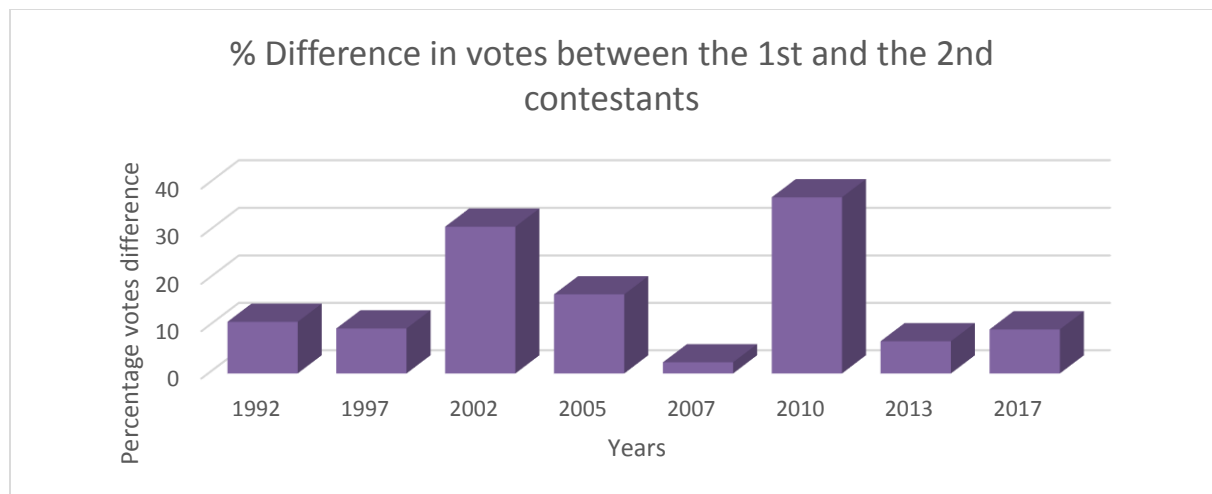
<sup>564</sup> European Mission Observation Mission Final Report, ‘Kenya General Elections 27<sup>th</sup> Dec 2002’, <http://aceproject.org/regions-en/countries-and-territories/KE/reports/Kenya%20-%20EU%20rep02.pdf> (accessed 8<sup>th</sup> May 2019).

Kenya National Human Rights Commission<sup>565</sup>;2007-Waki Commission; 2010-Kenya Human Rights Commission<sup>566</sup> ;2013 –Human Rights Watch<sup>567</sup> ;2017 –Kenya National Human Rights Commission.<sup>568</sup>

From the table above and the graph below it is clear that the 2<sup>nd</sup> contestant filed a case court when the margin was below 11per cent. This was witnessed in the year 1992, 1997, 2007, 2013 and 2017 general elections.

The table displays the percentage of differences between the first and second contestants in respective years. The 2010 referendum has the highest percentage difference, whereas 2007 general election had the lowest percentage difference.

**Figure 1: Difference in votes between the 1st and the 2nd contestants**



**Source: Author, (2019)**

<sup>565</sup> Kenya National Human Rights Report, |" Referendum Report" Sep 2006, <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/BehavingBadly.pdf?ver=2013-02-21-140244-413> (accessed 8<sup>th</sup> May 2019).

<sup>566</sup> Kenya Human Rights Commission, “Wanjiku’s Journey: Tracing Kenya’s Quest for a New Constitution and Reporting on the 2010 Referendum” Nov 2010, <https://www.khrc.or.ke/publications/38-wanjiku-s-journey-tracing-kenya-s-quest-for-a-new-constitution-reporting-on-the-2010-referendum/file.html> accessed 8<sup>th</sup> May 2019.

<sup>567</sup> Human Rights Watch, ‘High Stakes: Political violence and 2013 elections in Kenya ‘, Feb 2013 <https://www.hrw.org/report/2013/02/07/high-stakes/political-violence-and-2013-elections-kenya> accessed 8<sup>th</sup> May 2019. The death toll and whether indeed 2013 ethnic conflict was related to presidential elections remains a contentious issue. See Nic Cheeseman and others. ‘Democracy and its Discontents: Understanding Kenya’s 2013 election’, (2014) 8 Journal of Eastern Africa Studies, 23.

<sup>568</sup> Kenya National Human Rights Commission, ‘Still a Mirage at Dusk: A Human Rights Account of the 2017 Fresh Presidential Elections 2018’, <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Still-a-Mirage-at-Dusk.pdf?ver=2018-05-23-123451-723> ( accessed 8<sup>th</sup> May 2019).

There is a need to validate the above figures through inferential statistical analysis by analyzing the above data using STATA (general-purpose statistical software) as follows.

### **Inferential Analysis**

#### **Binary analysis**

The nature of data in this research is binary in nature since the dependent variable under consideration is whether there was a conflict after a presidential election or not. The study considered the following special problems when the response variable is binary, (Conflict after an election as a binary variable, with a Yes or No response).

The tables below and equations were directly lifted from the STATA program output once the "x" and "y" input were undertaken and it assists in indicating how the final figures were arrived at:

- Non-normal Error Terms

$$\text{When } Y_i=1: \varepsilon_i = 1 - \beta_0 - \beta_1 X_i$$

$$\text{When } Y_i=0: \varepsilon_i = -\beta_0 - \beta_1 X_i$$

- Nonconstant Error Variance

$$\sigma^2\{\varepsilon_i\} = (\beta_0 + \beta_1 X_i)(1 - \beta_0 - \beta_1 X_i)$$

- Ordinary least squares are no longer optimal
- Constraints on Response Function;  $0 \leq E\{Y_i\} \leq 1$

#### **The logistic equation**

The logistic formulas are stated in terms of the probability that  $Y = 1$ , which is referred to as  $P$ . The probability that  $Y$  is 0 is  $1 - P$ .

$$\ln\left(\frac{P}{1-P}\right) = a + bX$$

The  $\ln$  symbol refers to a natural logarithm, and  $a + bX$  is the equation for the regression line.

$P$  will be computed from the regression equation. The study calculates the expected probability that  $Y = 1$  in the regression equation for a given value of  $X$ . The above equation can be rewritten as follows;

$$P = \frac{\exp(a + bX)}{1 + \exp(a + bX)} = \frac{e^{a+bx}}{1 + e^{a+bx}}$$

### Interpretation of $b_1$

$$\log_e \left( \frac{\hat{\pi}}{1 - \hat{\pi}} \right) = b_0 + b_1 X$$

$$\text{when } X = X_j, \quad \text{odds}_1 = \frac{\hat{\pi}_{X_j}}{1 - \hat{\pi}_{X_j}} = e^{b_0 + b_1 X_j}$$

$$\text{when } X = X_{j+1}, \quad \text{odds}_2 = \frac{\hat{\pi}_{X_{j+1}}}{1 - \hat{\pi}_{X_{j+1}}} = e^{b_0 + b_1 (X_{j+1})}$$

$b_1$  = increase in log-odds for a one unit increase in  $X$

## SPSS LOGISTIC REGRESSION ANALYSIS OUTPUT

### Variables

The data used in the analysis dealt with whether a conflict was experienced after a presidential election. This variable was coded as a binary variable with conflict represented a dummy variable 1, and the presence of conflict represented by a dummy variable 0. The study considered eight periods, as shown in the tables below.

The tables, below, have been lifted directly from the STATA program output. They indicate how the final output was arrived at by the said programme.

**Table 17: SPSS Logistic Regression Analysis Output**

Statistics			
		Margin	Conflict
N	Valid	8	8
	Missing	0	0

Source: Author, (2019)

Classification Table					
	Observed	Predicted			
		Conflict		Percentage Correct	
		No	Yes		
Step 0	Conflict	No	0	3	.0
		Yes	0	5	100.0
	Overall Percentage				62.5

Source: Author, (2019)

**Table 18: Logistic regression model**

Variables in the Equation							
		B	S.E.	Wald	Df	Sig.	Exp(B)
Step 1 <sup>a</sup>	Margin	-6.163	1861.055	.000	1	.997	.002
	Constant	84.915	25543.491	.000	1	.997	7.551E+036

Source: Author, (2019)

From the table above, our constant is 84.915, and the margin has a negative coefficient, i.e. -6.163. One can write our model logistic equation as follows;



$$Y = \frac{e^{84.915-6.163}}{1+e^{84.915}}$$

From the above output, the odd value is 0.002. This implies that an increase in the margin between the first and the second presidential contestants reduces chances of a conflict. This is by 1 minus the odds value (i.e. 1-0.002) which is 99.8 per cent. There is need to have a significant margin between the first and the second presidential candidates.

**Table 19: Number of Deaths and Margin of Victory**

<b>Election Year</b>	<b>No. of Deaths</b>	<b>Margin (Percentage difference between the 1<sup>st</sup> and the 2<sup>nd</sup> contestant)</b>
1992	778	10.9
1997	104	9.5
2002	0	30.93
2005	0	16.7
2007	1133	2.35
2010	0	37.1
2013	477	6.8
2017	37	9.3

**Source: IEBC (for margin of victory)**

For deaths, 1992 –Kiliku Committee Report<sup>569</sup>; 1997-Akiwumi Commission of Inquiry into Tribal Clashes<sup>570</sup>; 2002-European Elections Observation Mission’s report<sup>571</sup>; 2005-Kenya National Human Rights Commission<sup>572</sup>; 2007-Waki Commission; 2010-Kenya Human

<sup>569</sup> Kiliku (n 28 ).

<sup>570</sup>Akiwumi (n 29).

<sup>571</sup> European Mission Observation Mission Final Report (n 540).

<sup>572</sup> Kenya National Human Rights Report, ‘Referendum Report’, (KNHRC ,1 Sep 2006, <https://www.knchr.org/portals/0/Civilandpoliticalreports/Behavingbadly.Pdf?Ver=2013-02-21-140244-413> accessed 8<sup>th</sup> May 2019.

Rights Commission<sup>573</sup>; 2013-Human Rights Watch<sup>574</sup>;2017-Kenya National Human Rights Commission.<sup>575</sup>

The country registered the highest number of deaths in 2007 elections . This was because the national vote that had the smallest margin of winning between the first the second candidate. It is followed by the year 1992, which registered 778 deaths with a margin of 10.9 per cent. The country did not experience any ethnic conflict in the year 2002, 2005 and 2010, which had 30.93 per cent, 16.7 per cent and 37.1 per cent margins, respectively.

With a view of determining the extent to which margin of victory affects the number of deaths in national votes, the above data was then subjected to the excel program to do data analysis. It gave the following output:

**Table 20: Model Summary Output Table**

SUMMARY OUTPUT	
<i>Regression Statistics</i>	
Multiple R	0.506533601
R Square	0.256576289
Adjusted R Square	0.132672337
Standard Error	412.5759801
Observations	8

**Source: Author, (2019)**

<sup>573</sup> Waki ( n 34 ) and Kenya Human Rights Commission ( n 542).

<sup>574</sup> Human Rights Watch, ‘High Stakes: Political Violence and 2013 Elections in Kenya’, (*HRW*,4 Feb 2013 <https://www.hrw.org/report/2013/02/07/high-stakes/political-violence-and-2013-elections-kenya> accessed 8th May 2019.

<sup>575</sup> Kenya National Human Rights Commission, ‘Still a Mirage at Dusk: A Human Rights Account of the 2017 Fresh Presidential Elections’, ( *KNHRC* ,8 Dec 2018)<https://www.knchr.org/portals/0/Civilandpoliticalreports/Still-A-Mirage-At-Dusk.Pdf?Ver=2018-05-23-123451-723> accessed 8<sup>th</sup> May 2019.

From the above table, the coefficient of determination is 0.2566 (R Square). This shows that the margin between the first and the second contestants contributes to approximate 26 per cent of the number of deaths. There are other factors that could cause deaths in presidential elections. Such factors are beyond the scope of this study.

**Table 21. Excel summary output**

The table below is directly lifted from the excel program output. It sets out how the final output was arrived at by excel.

SUMMARY  
OUTPUT

<i>Regression Statistics</i>	
Multiple R	0.6248
R Square	0.3904
Adjusted R Square	0.2889
Standard Error	367.45
Observations	98

<i>ANOVA</i>					
	<i>Df</i>	<i>SS</i>	<i>MS</i>	<i>F</i>	<i>Significance F</i>
Regression	1	519046.8	519046.8	3.84	0.09761
Residual	6	810160.1	135026.7	4031	1
Total	7	1329207			

	<i>Coefficients</i>	<i>Standard Error</i>	<i>t Stat</i>	<i>P-value</i>	<i>Lower 95%</i>	<i>Upper 95%</i>	<i>Lower 95.0%</i>	<i>Upper 95.0%</i>
Intercept	659.53	218.075	3.02	0.02	125.922	1193.143	125.92	1193.143
Margin	22.230	11.3385	1.96	0.09	49.9751	5.513	49.975	5.5138

Source: Author, (2019)

From the above table, one can specify the regression equation as follows:

The number of deaths are a function of the margin between the first and the second contestant. This can be rewritten in a mathematical form as follows;

The number of deaths = f (margin), which can be rewritten as:

$$Y = \text{constant} + \beta X$$

$$Y = \alpha + \beta X$$

$\alpha$  – represents the constant term in the equation

$\beta$  - Represents the coefficient of X (margin)

From the above table,

R squared at 0.39 or 39 per cent. This means that, all other things constant, the margin of victory contributes to 39 per cent of reported deaths occurring during the cycle of presidential elections in Kenya.<sup>576</sup> The above justify the conclusion that there is a need for the higher-margin between first and second contestants in national votes.

The question of what margin should be between the winner and the second contestant in order to decrease the likelihood of ethnic conflict or deaths in presidential elections in Kenya remains outstanding. Article 138 (4) of the Constitution of Kenya does not specify what margin should be between the first and second contestants in a presidential election.

To determine the rational margin, the study used 2002 -2017 electoral data. This is because in 2002 KANU lost elections for the first time since independence (39 years). The year marked ‘democracy consolidation in Kenya’. The expression “democratic consolidation” refer to the challenge of making new democracies secure. It entails events that prolong life expectancy of democracy and render democracy “the only game in town”. It refers to divergent events that may occur in a country including popular legitimation, the diffusion of democratic values, the neutralization of antisystem actors, elimination of authoritarian

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<sup>576</sup> Note the p-value for both the intercept and margin should be below 0.05-However, due to limited data, the output gave p values for both ranging between good (intercept) and weak (margin) categories. See Raymond Hubbard and J. Scott Armstrong, ‘Why We Don’t Really Know What “Statistical Significance” Means: A Major Educational Failure’ (2006) 28 *Journal of Marketing Education* p.114.

enclaves, stabilization of electoral rules and the routinization of elections.<sup>577</sup> These events did happen in 2002 in Kenya after that historic KANU loss. Thus useful data for the purposes of calculating the rational margin should be from 2002 to present. The data was divided into two sets –one when conflict occurred and the other when it did not:

a.National vote with deaths /conflict

2017 -9.3 per cent(margin)

2013 -6.8per cent(margin)

2007 –2.35per cent(margin)

Total -18.45 per cent

Average -6.11percent

b.National vote without deaths /conflict

2010- 37.1percent

2005-16.7percent

2002 -30.93

Total -84.73

Average -28.24

An average of the two is obtained:

$28.24 + 6.11 = 34.35$  divide by 2 =17.17percent

To determine the margin of error, the sample size is very small (n=2).<sup>578</sup> The study considers the difference of + (plus) or - minus) 5per cent(at 95 per cent confidence level).This is 16.31per centand 18.03 per cent.<sup>579</sup>

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<sup>577</sup> Roberto Stephen Foa and Yascha Mounk, 'The signs of democracy deconsolidation',2017 ( 8) 1 Journal of Democracy,5,6.

<sup>578</sup> Pav Kalinowski, "Understanding Confidence Intervals (CIs) and Effect Size Estimation" ( 2010)23 (4 ) Observer .

<sup>579</sup> This data is subjected to confidence test because the legitimacy of the results as announced by respective electoral bodies -2007,2013 and 2018 - is contentious .

It is assumed that in a presidential contest with only two major candidates, this margin can only be achieved when the tallies are at 59 per cent (winner): 41 per cent (loser) hence the margin of about 18 per cent. A tally of 58 per cent: 42 per cent would result in a margin of 16 per cent (below the error).

Considering some data used in these calculations were obtained when presidential elections' winning threshold was first past the post, 60 per cent winning threshold would guarantee the winner's margin of victory over the second contestant is always above 17.85 per cent.

The issue of other marginal candidates remains. In 2017, the first and second candidates combined had 99.1 per cent of the total vote. In 2013, the combined votes for the 1st and second contestants was 93.83 percent. In 2007, the combined votes for the 1st and second contestant were 90.49 percent. For 2002, the combined votes for the 1st and second contestants was 91.5 per cent.

The above trend suggests that, with time, the impact of other candidates has been declining. Secondly, their vote share is insignificant. To cater to their interests, a 1 per cent is added on the winner margin hence the proposal for 60 per cent.

In 2007, the first and second contestant combined vote was 90.49 per cent. This means that the rest are statistically insignificant.

One respondent gave a topical example as follows:

The introduction of multiparty democracy has led to the formation of parties that are in ethnic competition. For example, we have the Amani National Congress, a small party which is predominantly *Luhya*. The candidates fronted by these small parties represent the interests of small ethnic groups. Thus presidential elections turn out to be competition between main ethnic groups and small groups are outliers.<sup>580</sup>

Elections in Kenya are ethnic competitions between coalitions of big ethnic groups. Small ethnic groups either wait behind to form pre or post elections pacts with the bigger ethnic

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<sup>580</sup> Respondent A, Kiambu County, 7 January 2019- Appendix IX.

coalition . These elections are not contests of ideology or agenda but competition among personalities and their ethnic pull.<sup>581</sup> The candidates, often, do not possess any agenda that the people may interrogate and choose against others. Instead, the candidates front themselves as “mtu wenu” (one belonging to their ethnic group) to make the voters feel obliged to vote for them.<sup>582</sup>

The above respondents’ positions were confirmed in previous work carried out by Karuti Kanyinga in the study entitled “Kenya, Democracy and Political Participation” which confirmed elections as being competition between big ethnic groups coalitions. Historical reasons explain this pattern as well.<sup>583</sup> The historical practices in-turn identify with ethnic inequalities driven by the regional boundaries dictating settlement patterns. Marginal areas disenfranchised by the historical disposition patterns feel alienated by government and will certainly compete to get one of their own as president. This is done under the illusion of assured development to their regions<sup>584</sup>. This, thus, becomes competitive presidential elections in the quest of galvanizing ethnic support by candidates.

Another respondent stated: “even though it was dictatorial, a one-party state was more unifying for it had all ethnic groups under the ruling party. There were no competitive elections. A one-party state lacks opposition, and there is no room for dissenting voices to prevail and instigate conflict”.<sup>585</sup>

Similar sentiments were articulated by Ngala Chome in his paper about the small Muslim community participation in Kenyan elections . He was of the view that Muslims were a minority group that faced political marginalization .<sup>586</sup> He contended that during the single-party days, the Muslims had better representation in government. Local grievances fueled Muslim activism in Kenya more than global Muslim ‘victimization’ narrative.

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<sup>581</sup> Respondent A, Bomet County, 14 January 2019- Appendix IX.

<sup>582</sup> Respondent B, Bomet County, 15 January 2019- Appendix IX.

<sup>583</sup> Karuti Kanyinga, *Kenya Democracy and Political Participation*, (Institute for Development Studies (IDS) of University of Nairobi, Open Society Initiative for Eastern Africa, 2014).

<sup>584</sup> *ibid.*

<sup>585</sup> Respondent A, Kiambu County, 7 January 2019- Appendix IX.

<sup>586</sup> Ngala Chome, ‘From Islamic reform to Muslim activism : The evolution of an Islamist ideology in Kenya’(2019) 118 (472 ) *African Affairs* 531.

The competitive ethnic desire to rule the rest is primary within the quest for winning the election.<sup>587</sup>

This section is part of this study's significant original contribution to knowledge. In terms of content, it develops centripetalism theory by suggesting super majority wins, as may be mandated by law, are better in remedying ethnic conflict in presidential elections. Second, this approach differs with comparative approaches common in studies of constitution and ethnicity. It used electoral data to study patterns and make deductions. This illustrated the link between margin of victory and ethnic conflict in Kenyan presidential elections -this study's significant original contribution to knowledge.

### **3.1.3 Lack of Nationalism by Voters**

The third issue cited by Nairobi, Uasin Gishu, Kericho, and Bomet Focus Groups and also respondents by PR1 and ER4 is lack nationalism by voters. Within the context of this study, the term "Nationalism" means devotion and loyalty to Kenya by placing emphasis on promotion of its interests as opposed to those of its many ethnic groups. Lack of nationalism means the opposite –disloyalty to Kenya by the promotion of interests of one's ethnic group above those of the country .

Though it is largely the leaders who bear most blame for the sustenance of ethnic conflict, the role of the people –pressure from below –can not be ignored. Evidence indicates that in Kenya and in other ethnically divided societies, leaders who pursue nationalistic agenda fare badly in elections as compared to those that pursue the ethnic line of persuasion.

This is in line with a concept that Donald Horowitz refers to as 'ethnic outbidding' as explained in *Ethnic Groups in Conflict*.<sup>588</sup> This concept refers to a situation where partly 'due to pressure from below' leaders commence, and ultimately try to outdo each other in appealing to the ethnic base, and ultimately spiral to the extreme. This negates the existence of democratic institutions. According to Kanchan Chandra, ethnic outbidding inevitably creates extreme ethnic parties. The emergence of one leader spewing ethnic hate "infects"

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<sup>587</sup> Respondent B, Nakuru County, 18 January 2019- Appendix IX.

<sup>588</sup> n 2.



the political system, creating a spiral of extreme bids which destroys democratic politics ultimately.<sup>589</sup>

To confirm if indeed voters reward ethnic out bidders; hence, demonstrate lack of nationalistic ethos, results from the 2017 general elections for MPs seats have been analyzed. This has been done to ascertain if leaders who have faced ethnic hate speech charges have had an advantage over those leaders who have never faced such charges. Though this is not to pass judgment as to their guilt or otherwise, if a pattern is discerned regarding matters they were recorded as having stated in public irrespective of a conviction, it would buttress the argument that voters lack nationalistic ethos.

The data for those that served in the 11<sup>th</sup> Parliament and made it back to the 12<sup>th</sup> Parliament was analyzed (to determine whether they had criminal cases or not). The next section examined how MPs that had hate speech cases in the period leading to 2017 elections fared during the general elections.

The following is a table that shows the MPs who got re-elected during general elections held in August 2017. The first column indicates what positions the MPs served in the 11<sup>th</sup> Parliament (whether previously they were MPs from single constituencies or serving as women MPs representing entire counties or served as nominated MPs or were serving as senators ). The second column indicates the number of those re-elected from each category. The third column indicates the percentage of each category when compared with the total of all aspiring immediate former MPs.

### **11<sup>th</sup> to 12<sup>th</sup> Parliament Transition rate of MPs in the National Assembly 2017 Elections<sup>590</sup>**

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<sup>589</sup> Kanchan as cited by Shane Mac Giollabhuí in ‘The fall of an African president: How and why did the ANC unseat Thabo Mbeki?’, (2017) 116 (464) *African Affairs* 391–413.

<sup>590</sup>Information regarding which MPs have served in Parliament at any given time is available at Parliament of Kenya website, Parliament of Kenya, ‘Members of 12<sup>th</sup> Parliament’ ,(PSC, 9 July 2019 ) <http://www.parliament.go.ke/> accessed 3<sup>rd</sup> December 2019.

**Table 22: Transition Rates for 2017 National Assembly Elections**

RETURNING MPS ELECTED	NUMBER	PERCENTAGE OF TOTAL NATIONAL ASSEMBLY MPS
IN CONSTITUENCIES	124	35.73
IN COUNTIES	12	3.4
NOMINATED	3	0.08
FORMER SENATORS	4	0.11
TOTAL	143	41.84

**Source: Parliamentary Service Commission**

Seventeen senators were re-elected to the senate, representing 25.4 per cent of the total.<sup>591</sup> The information in the above table was used to ascertain the percentage of MPs who won their re-election bid in 2017. This percentage was then compared with that of MPs who faced hate speech charges prior to 2017 with a view of ascertaining if the prosecuted group had any distinct re-election advantage. Such distinct re-election advantages were then investigated.

The following are the MPs who faced criminal prosecution for any criminal offence during the electioneering period (2016-2017) -Moses Kuria (Gatundu), Ferdinand Waititu (Kabete), Junet Mohamed (Suna East), Kimani Ngunjiri (Nakuru East), Timothy Bosire (Kitutu Masaba), Machakos Senator Johnson Muthama, Busia Woman Representative Florence Mutua, Kilifi Woman Representative Aisha Jumwa and Imenti Central Gideon Mwiti.<sup>592</sup>

Where an MP was facing charges on other private issues, he or she lost in their re-election bid. Eight out of the nine MPs were facing hate speech and ethnic contempt charges

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<sup>591</sup> *ibid.*

<sup>592</sup> This is based on information obtained from mainstream media reports-*The Daily Nation* and *The Standard* Newspaper websites. There is the likelihood of cases filed away from the public eye. Such cases were ignored because they do not matter politically.

instituted by the National Cohesion and Integration Commission relating to a violation of sections 13 and 62 of the National Cohesion and Integration Act, 2008 respectively. Out of these eight, six won, one lost and one did not vie.<sup>593</sup>

All the above were re-elected except Mwiti and Bosire who lost their bids while Muthama did not contest.<sup>594</sup> This represented a 67 per cent re-election success rate as compared to the 42 per cent re-election success rate for the general MPs' population or Senate's 25 per cent success rate.

Having ascertained from the aforementioned data that indeed during the 2017 elections, the MPs with any criminal case had higher re-election chances, the next section examines factors that explain this advantage.

Ascertaining which MPs had anti-corruption credentials in the lead up of 2017 elections may be deemed as difficult and subjective. By virtue of crucial oversight positions they held in the lead up to the elections, this study picked on two MPs: BoniKhalwale (Senator for Kakamega) and Nicholas Gumbo (MP for Rarieda). Khalwale was the chairman for Senate Committee for Public Accounts Committee for the period between 2013 and 2017 whereas Gumbo chaired National Assembly Public Accounts Committee. In 2014, Khalwale won "Shujaaz Award" from a non-governmental organisation for his parliamentary efforts in fighting corruption.<sup>595</sup>

Gumbo's committee tabled damning reports against the government in parliament against National Youth Service and the Euro Bond scandals.<sup>596</sup>

Khalwale vied to be governor for Kakamega County, and Gumbo vied to be governor for Siaya County in 2017 elections. Both lost. Although their losses may be attributed to many other reasons, it does suggest that anti-corruption platforms in Kenyan politics do not mean

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<sup>593</sup> Parliament of Kenya ( n 590 ).

<sup>594</sup> Waititu won the Kiambu governorship seat. For the purposes of this study, this is deemed as re-election, noting the gubernatorial contest is deemed as a more competitive seat by virtue of its prestige and wider geographical reach. Muthama is excluded from the tally.

<sup>595</sup> Robert Amalemba, 'Shujaaz Award Buys up Khalwale to Fight More', *The Standard*, (Nairobi ,4<sup>th</sup> September 2014) <<https://www.standardmedia.co.ke/article/2000145854/shujaaz-award-buoys-up-khalwale-to-fight-more>> accessed 8<sup>th</sup> November 2019.

<sup>596</sup> See *The Hansard Reports* ( n 590 ).

much to the voters. Information from the respondents did explain factors underpinning this state of affairs.

The cited focus groups identified the main reasons which boosted the re-election chances for the MPs subjected to criminal prosecutions. The first one was the nature of charges facing the MPs. Where an MP was facing charges relating to ethnicity, his or her re-election chances were boosted. This was because of the creation of a public perception brought by the prosecution that he or she is a champion of their community in a country whose politics at the national level are ethnic. This supports conclusions made in other studies regarding politics in ethnically divided societies like Northern Ireland, Lebanon, and Malaysia, where it has been ascertained that candidates move to the extreme to increase their victory chances.<sup>597</sup>

One MP-who lost in the general elections-was facing charges of rape, contrary to section 3 of the Sexual Offences Act, 2006.

The lack of national ethos is reinforced by the explanation given by the focus groups. They cited the only electoral loss of the MP who had faced ethnic charges. The said MP hailed from Nyamira County, home of the Kisii-a small ethnic community that plays 'swing' politics. The Kisii have been supportive of the Kikuyus,their fellow Bantus, since the return of multi-party ethnic-based- politics in Kenya in 1992. However, in the 2013 general elections, the Kisii pivoted to the opposition for reasons beyond the scope of this thesis .<sup>598</sup> The said MP was an opposition legislator having a national post in the opposition party, and at the time of his prosecution, he was fashioning himself as the party's champion.<sup>599</sup> Unbeknown to him, the Kisii in Nyamira had moved back to the 'Kikuyu' government after the said government appointed their "sons" (prominent fellow Kisiis from Nyamira) to top government positions.<sup>600</sup> This cost him the seat. On the exclusion of the MP facing rape

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<sup>597</sup> Horowitz (n 2).

<sup>598</sup> One interviewee said that the opposition leader Raila is a Luo, who neighbour the Kisii; hence, he played the "regional card" to lure them.

<sup>599</sup> Henry Nyarora and Caroline Wafula, 'Uhuru has the last laugh as MPs Bosire, Lempurkel loses seats to Jubilee',

*Standard Newspaper* ,(Nairobi ,7 June 2019 )<https://nairobi.news.nation.co.ke/.../uhuru-last-laugh-mps-bosire-lempurkel-lose-seats-j>. accessed 3<sup>rd</sup> Nov 2019.

<sup>600</sup> The then Cabinet Secretary for Education Dr Fred Matiang'i and Chief Justice Maraga were cited. President Uhuru was quoted publicly citing this point on the campaign trail. Chief Justice denied this –See

charges, the re-election success rate for MPs facing criminal prosecution related to ethnic hate rises to 88 per cent.

Hate speech charges are tied to the ethnic nature of Kenya politics. A politician facing such charges can leverage and appear as a hero amongst his ethnic base. Though independent data regarding other successful candidates were not available for comparison purposes, its noteworthy that from the interviews, it was said Moses Kuria won in all except two polling centres; Waititu won against a rich incumbent by over 70 per cent; Junet won despite being a non-native; Kimani Ngunjiri won by over 67 per cent; Mutua was re-elected notwithstanding women MPs' re-election success rate being below 20 per cent, and she is an ethnic Kamba in a constituency where her community is less than 1percent, and Aisha moved from the women MP position to a constituency seat and won .

From the cited focus groups, the MPs viewed charges of hate speech as having little chances of conviction. This view is affirmed by data from NCIC which confirms that it 'has recommended to the Office of the Director of Public Prosecutions (ODPP) the prosecution of over 3000 individuals since inception for the offences of hate speech and ethnic contempt'.<sup>601</sup> It holds the view that while only three convictions have been secured, the investigations in themselves serve as a deterrence to hate speech-related offences.<sup>602</sup>

The second factor identified was the timing of the criminal prosecution. Eight out of the nine MPs facing criminal prosecutions in the 11<sup>th</sup> Parliament were arrested together on or about the second week of June 2016.<sup>603</sup> Informal campaigns had commenced as the country raced towards the elections in August 2017. All the MPs interviewed agreed that if the arrests were made earlier in their term, say 2014, the voters would have forgotten about them hence the MPs would lose the electoral advantage garnered.

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Caroline Wafula , 'Chief Justice Maraga Tells President Uhuru He is not His Project considerations', *The Standard*,(Nairobi 11<sup>th</sup> April 2007), <https://www.standardmedia.co.ke/article/2001235864/chief-justice-maraga-tells-president-uhuru-kenyatta-he-is-not-his-project> accessed 3<sup>rd</sup> November 2019.

<sup>601</sup> National Cohesion and Integration Commission, ' Introduction' ,(NCIC ,1 Feb 2019 ),- <https://www.cohesion.or.ke/> <accessed 20 August 2018.> accessed 3<sup>rd</sup> Dec 2019.

<sup>602</sup>ibid.

<sup>603</sup>Zadock Angira and Stella Cheroni , 'Five Legislators Arrested over Hate Speech' *Daily Nation* (Nairobi ,9 July 2016) <<https://www.nation.co.ke/news/five-mps-arrested-over-hate-speech/1056-3250032-irrp2z/index.html>> accessed 8 November 2019.

This affirms various research studies that have concluded that timing is everything in politics with appeals delivered closest to the elections day most effective.<sup>604</sup>

The final factor identified by the cited focus groups was the role of the media publicity in assisting the criminal suspects to gain electoral advantage. A perusal of several mainstream media reports at the time of the arrests and prosecutions of the MPs do affirm that hate speech prosecution got a lot of media attention.

The impact of negative publicity in assisting politicians and other products and services generally has been researched for many years. Tod Donovan and others suggest negative publicity within the context of a country with plurality electoral system like Kenya has the potential of increasing name recognition. It can assist a presidential elections candidate unlike societies with preferential electoral systems.<sup>605</sup> It can be suggested the MPs indeed benefited from the media hype surrounding their dramatic arrests.

On the other hand, the voters are easily convinced to fight each other in defense of those candidates whose ethnicity they share. There is an actual or perceived access to national resources and opportunities if a person from one's ethnicity becomes president. This advantage over other ethnic groups buttresses an ethnic group's animosity towards another.<sup>606</sup> The ignorance of the voters is one cause of the ethnic conflicts because they fight for their candidates without questioning the issues involved.

Voters follow their ethnic leaders blindly - the leaders take advantage of this to manipulate the voters into fighting for them in instances where they lose elections.<sup>607</sup>

PC 3 affirmed lack of national ethos created in the voter's mindsets in a particular region that members of another ethnic group benefitted from the state largesse and actually queued at cash-dispensing sites for regular disbursements.<sup>608</sup> This ignited negative ethnic passions, and when illusions of the "stolen" victory were created, they did not view the loss as the candidates alone but equally considered themselves as having had lost the

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<sup>604</sup> Jan Eric Blumenstiel and Thomas Plischke, 'Changing motivations, time of the voting decision, and short-term volatility – The dynamics of voter heterogeneity', (2015) 37 *Electoral Studies* 28,40.

<sup>605</sup> Todd Donovan and others, 'Campaign civility under preferential and plurality voting', (2016) 42 *Electoral Studies* 157.

<sup>606</sup> Respondent A, Bomet County, 14 January 2019- Appendix IX.

<sup>607</sup> Respondent C, Kiambu County, 7 January 2019- Appendix IX.

<sup>608</sup> PC 3 Nairobi County 19<sup>th</sup> February 2019- Appendix IX.

opportunity to access the said "disbursements". This was thus an easy trigger to conflict stemming from the perceived alienation and loss of the "opportunity" to benefit from "easy state resources". This was confirmed in the Commission of Inquiry into the Post-Election Violence (CIPEV) report (2008).It detailed the falsehoods peddled by presidential elections candidates in the 2007 general elections. Such falsehoods led to vandalism of the Equity Bank and Cooperative Bank branches in the Luo Nyanza region of Kenya .<sup>609</sup>

One voter who was a respondent in Bomet County stated that the lack of tolerance converts elections into ethnic rivalries. The respondent stated that elections in Kenya are not poll contests but rivalries between ethnic groups to see which one is stronger politically.<sup>610</sup>

Evidence from the discussions conducted with the focus group in Kiambu County showed that there was a spiraling of revenge attacks on persons perceived to be from ethnic communities that had attacked the local co-ethnics upcountry.<sup>611</sup> This was confirmation that despite awareness of non-involvement of the persons subjected to the retaliatory attacks, the non-tolerant ethnic bias was a trigger for conflict.<sup>612</sup> Similar responses accrued from the Focus Group in Nakuru County where the members attested to be more than ready to defend their kinsmen even in future in the event of ethnic conflict emanating from electoral contests.<sup>613</sup> This brought to the fore the polarizing nature of ethnic intolerance within the discussants, thus a reflection of the community at large.

PC4 confirmed that ethnic intolerance was a salient issue in presidential elections in Kenya. Practices of bigotry and raw chauvinism exhibited towards particular ethnic groups in the wake of socialization negatively affected interactions.<sup>614</sup> The practices were overplayed during electoral campaigns as a measure of mobilization. This occasioned negative perceptions and ill-will further perpetuating ethnic intolerance. He cited the example on failure to undergo circumcision as an initiation rite which was overpitched

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<sup>609</sup> Waki ( n 34).

<sup>610</sup> Respondent C, Bomet County, 15 January 2019- Appendix IX.

<sup>611</sup> Kiambu Focus Group Discussion 8 th January 2019 - Appendix IX.

<sup>612</sup>ibid .

<sup>613</sup>Nakuru Focus Group Discussion 17 th January 2019 - Appendix IX.

<sup>614</sup> PC 4 interview held on 21 st February 2019 - Appendix IX.

during the presidential campaigns to depict candidates from the affected communities as not qualified enough position .<sup>615</sup>

The responses about lack of national ethos confirm the position of the report, entitled "Ethnicity and Politicization in Kenya", done by the Kenya Human Rights Commission. The report espoused the reality of ethnicisation of presidential elections in Kenya. The Japhet Biegon exposes practices by presidential elections candidates in creating negative perceptions to stoke intolerance towards rival ethnic groups as a way of marshalling votes .<sup>616</sup> The gullible voters rally behind the negative ethnic persuasions even without the assurance of any direct benefits towards them only to satisfy the urge to travail over the "competing" ethnic group.<sup>617</sup> The sense of triumph occasioned by the ethnic diversity, clientelistic resource distribution, and politicization, serves as a "psychological status symbol" for the ethnic group.<sup>618</sup>

Some communities have a sense of entitlement to the resources at the expense of the rest. The entitlement is owing to the size of the group, the larger the group, the greater the entitlement. This entitlement carries the reasoning that some communities are more suited to lead the country as compared to others.

A respondent from Kiambu held the view conflicts erupt due to people's lack of national ethos. He stated that people believe that members of their community are best suited to lead the country. He stated that the notion perpetuated by political leaders influences the behaviour and expectations of voters during the election period.<sup>619</sup>

RE4 shared similar sentiments of ethnic sense of entitlement to national leadership being the undoing of cohesion of the national fabric. He blamed the situation on the perception that the communities which participated in the struggle for independence from colonialists felt superior to the others.<sup>620</sup>

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<sup>615</sup> PC 4 interview held on 21 st February 2019 - Appendix IX.

<sup>616</sup> Japhet Biegon , ' Politicization of Ethnic Identity in Kenya :Historical Evolution ,Major Manifestations and the Enduring Implications' in K Kanyali (ed) and Kenya Human Rights Commission, *Ethnicity and Politicization In Kenya*, (Kenya Human Rights Commission 2018)3-20.

<sup>617</sup> *ibid.*

<sup>618</sup> *ibid.*

<sup>619</sup> Respondent B, Kiambu County, Thika West Sub County, 7 January 2019- Appendix IX.

<sup>620</sup> RE 4 interview conducted on 22 February 2019 - Appendix IX.



The responses were vindicated by a report by the Kenya Human Rights Commission in its assessment of the 2017 general elections.<sup>621</sup> The report brought forth the risk of lack of national ethos by presidential candidates who felt that they had been on the trenches fighting for democracy for long as a factor which spurred ethnic entitlement by their co-ethnics.<sup>622</sup> The ethnic groups of the candidates felt that the other groups owed them support by virtue of their contribution to the democratic space and civil liberties enjoyed. The same position was held by Elisha Ongoya and Willis Otieno in their publication which delves on electoral systems reforms.<sup>623</sup> They were of the view that there was a need to stop the practice of self-entitlement to leadership positions. This was because it gave a false impression to the voters even before the actual conduct of the elections and potentiated the occurrence of conflict in the contests.<sup>624</sup>

RE1 view was that ethnic groups view the Kenyan state as a vehicle of personal and communal development. He indicated that evidence suggests that regions inhabited by ethnic groups that have had presidential power have benefited disproportionately in terms of objective standards of living. This then makes presidential contests do or die affairs for ethnic groups. This was evidenced from anecdotal reports from the "Institute of Economic Affairs (IEA-Kenya)" which show that Laikipia County, inhabited mainly by the Kikuyu who have occupied the presidency longest in post-independence period, has the highest life expectancy (72 years) in Kenya, way above the national average of 67 years .<sup>625</sup> Homa Bay County, inhabited by Luos who have been in the opposition for a long period, has the lowest at 57 years.<sup>626</sup>

FGD discussants in Homa Bay<sup>627</sup>, Siaya<sup>628</sup> and Kisumu<sup>629</sup> counties buttressed the position of lack of national ethos during presidential contests. The discussants alleged that public

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<sup>621</sup> Kenya Human Rights Commission (n 569).

<sup>622</sup> *ibid.*

<sup>623</sup> Elisha Ongoya and Willis Otieno, *Handbook on Kenya's Electoral Laws and System: Highlights of the Electoral Laws and System Established By and Under the Constitution of Kenya 2010 and Other Statutes*. (Electoral Institute for Sustainable Democracy in Africa -EISA 2013).

<sup>624</sup> *ibid.*

<sup>625</sup> Kwame Owino , 'The best counties to live in based on life expectancy, poverty and access to basic services', *Daily Nation* ( Nairobi 3 March 2018)8.

<sup>626</sup> *ibid.*

<sup>627</sup> Focus Group Discussion, HomaBay County 18 January 2019- Appendix IX.

<sup>628</sup> Focus Group Discussion, HomaBay County 18 January 2019 - Appendix IX.

<sup>629</sup> Focus Group Discussion, Kisumu County, 17<sup>th</sup> January 2019- Appendix IX.

goods in terms of services and infrastructure development were doled out by the government on the basis of ethnic patronage. They alleged that having one of their "own" in a position of power and with the capacity to determine the nature of resources allocated greatly influenced local developments. The prevailing political dynamics thus forced them to fervently support their preferred presidential candidates as the only sure way to access the state largesse.

The FGD discussants in Kiambu<sup>630</sup> and Nakuru<sup>631</sup> counties brought forth a different impression from the one displayed by those from the Luo Nyanza region. They were of the view that despite the notion that their regions derived immense benefits from bequeathing the nation with presidents for several times, it was not the case. They contended that incidences of poor roads, failure to access drugs in public hospitals, inadequate infrastructure in schools and related challenges still bedevilled them just like other citizens of Kenya.

The respondents' sentiments were confirmed by "Anke Weber" in his thesis titled "Ethnic Diversity, Clientelistic Resource Distribution, and Politicization: The Impact of Ethnicity on Education in Africa". The author was of the view that the inequitable distribution of resources stimulates erosion of national ethos.<sup>632</sup> When an ethnic group's candidate does not win an election, the group opposes the results through conflict because they believe that if a person from their group wins the election, he/she will bring development to them in a direct manner.<sup>633</sup>

#### **3.1.4 The Role of the vernacular media**

The fourth issue identified by the respondents in this study is the role of the vernacular FM media stations. They were viewed as a possible trigger for ethnic conflict in presidential elections in Kenya.

The term "vernacular stations" (also referred to herein as 'local media') in this study refers to FM radio stations that broadcast in local Kenyan languages apart from English and

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<sup>630</sup> Focus Group Discussion Kiambu County 7<sup>th</sup> of January 2019- Appendix IX.

<sup>631</sup>Focus Group Discussion Nakuru County 16 January 2019 - Appendix IX.

<sup>632</sup>See Anke Weber, 'Ethnic Diversity, Clientelistic Resource Distribution, and Politicization: The Impact of Ethnicity on Education in Africa', (Unpublished PhD -Arts – Thesis, University of Zurich 2010).

<sup>633</sup>ibid.

Kiswahili. These are two official languages per provisions of Article 7 (2) of the Constitution of Kenya 2010. It excludes TV stations.

Radio remains the most popular form of media in Kenya.<sup>634</sup>As at December 2018, Kenya had 173 licensed FM stations.<sup>635</sup>Though Kiswahili radio stations remain the most listened to, according to Geopoll,<sup>636</sup>respondents blamed vernacular radio stations for the continued influence of ethnicity in presidential elections. The Geopoll showed that the older generation (which is more politically active) has a preference for vernacular radio stations.<sup>637</sup>The vernacular media plays a role in fostering development and acts as a space of giving voice to the voiceless .<sup>638</sup> It gives room for social agitation and question the excesses of those in power.<sup>639</sup> The respondents indicated that guests that were brought onto talk shows during prime time often showed their skewed or unbalanced views.

The post-election conflict stemming from the 2007/2008 electoral period depicts the vernacular radio stations in a very bad light, especially as presented in the Waki report.<sup>640</sup> The reports opine that the vernacular radio stations contributed to a polarized environment in terms of fuelling hate and conflict between different ethnic community groups.<sup>641</sup>

The reports cited the offending radio stations as Inooro, Kameme and Coro ( Kikuyu) and Kass FM (Kalenjin).<sup>642</sup> Evidence of this was in the prosecution of a media personality in the ICC in The Hague, in the Netherlands. Although he was later discharged, it was nevertheless a pointer to the gravity of the situation.<sup>643</sup> The two reports cited the media

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<sup>634</sup> GeoPoll and Portland, 'The Reality of Fake News in Kenya',(*Geo Poll*,2017) <<https://www.geopoll.com/blog/geopoll-and-portland-launch-a-survey-report-on-fake-news-in-kenya/> > accessed 8th April 2019.

<sup>635</sup> Communication Authority of Kenya, 'Second Quarter Sector Statistics Report for the Financial Year 2018 /2019' (CAK,June 2019),<<https://ca.go.ke/wp-content/uploads/2019/03/Sector-Statistics-Report-Q2-2018-19.pdf> > accessed 2 May 2019.

<sup>636</sup>ibid.

<sup>637</sup>ibid .

<sup>638</sup> ibid.

<sup>639</sup> Michael M Kamau, 'Media Contents and Diversity:Undermining Democracy through Vernacular Radio 'Metaphocidal 'Political Campaigns in Kenya ',(2016) 4 ( 8) *International Journal of Education and Research* 6.

<sup>640</sup> Waki (n 34).

<sup>641</sup>ibid .

<sup>642</sup>Gabrielle Lynch and others, 'From peace campaigns to peaceocracy: Elections, order and authority in Africa',(2019) 118 ( 473) *African Affairs* 603–627.

<sup>643</sup>ibid.

houses as having breached some fundamental tenets regarding the code of ethical conduct guiding their operations, like objectivity .<sup>644</sup>

The two reports confirmed the positions taken by various respondents who alluded to the occurrence of ethnic conflict in presidential elections as being driven by the freedom enjoyed by the local media.<sup>645</sup> The same was confirmed by a Kiambu respondent who was of the view that lack of professionalism in the media had the potential of occasioning ethnic strife once negative sentiments and biased information was propagated.<sup>646</sup> He cited issues of ethnic incitement attributed to uncensored news items attributed to political leaders with influence in their ethnic communities.

Siaya and Kisumu Focus Groups stated that there was a need to monitor media activities. This would forestall situations which may give rise to ethnic conflict. Participants were of the view that the local media should harness its potential for peacebuilding.

The findings confirmed Peter EggeLangsæther and others study which suggest media attention is an electoral asset. Voters tend to reward leaders for politically relevant exposure.<sup>647</sup> Ethnicity within Kenyan context is a politically relevant issue.<sup>648</sup> Prior to the return of multi party democracy in Kenya in 1991, there was a lot of fear in the media sector. There were many arrests by repressive state actors once they reported what was considered as not politically correct.<sup>649</sup> The advent of multipartism, coupled with the liberalization of the airwaves, came along with a lot of freedoms to the players in the local media industry.<sup>650</sup> However, this did not accord practitioners with a sense of responsibility in terms of the reporting.<sup>651</sup>

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<sup>644</sup>ibid .

<sup>645</sup> Focus Group Discussion, Kiambu County 7 January 2019- Appendix IX.

<sup>646</sup> Respondents B, Kiambu County, Thika West Sub County, 7 January 2019- Appendix IX.

<sup>647</sup>Peter EggeLangsæther and others, 'Is all PR good PR? How the content of media exposure affects candidate popularity' ,(2019) 57 Electoral Studies 143-152.

<sup>648</sup> ibid.

<sup>649</sup> Denis Galava, 'The Birth of a *Nation*: The story of a newspaper in Kenya',A review article of the book *The Birth of a Nation: The story of a newspaper in Kenya*, by Gerard Loughran. London and New York, NY: I. B. Tauris, 2010,(2011) 110 (439) African Affairs 319–321.

<sup>650</sup>ibid.

<sup>651</sup>ibid .

Responses from FGD discussants in Kiambu,<sup>652</sup> Nakuru,<sup>653</sup> Uasin Gishu,<sup>654</sup> and Nairobi<sup>655</sup> showed that local media had not effectively exploited its role in peacebuilding. This was confirmed by PC1<sup>656</sup>, PC 2<sup>657</sup>, PC 3<sup>658</sup>, PC 5<sup>659</sup> and RE 1<sup>660</sup>, RE2<sup>661</sup> and RE3<sup>662</sup>. Their view was that the issue of the local media presenting information according to the whims of ethnic interests eroded its objectivity. The respondents contended that players in the political sector had interests in the local media. This ensured skewed provision of information geared towards suiting the political interests of the shareholders. This ultimately had a negative effect on the quality of information propagated to the public and had the potential of inflaming ethnic passions. This was confirmed by an official from the elections management and administration body (IEBC). Its view was that the local media in Kenya is bedevilled by a litany of challenges. This included failure to have optimal financial stability, lack of adequate equipment and ill-equipped staff with regards to training.<sup>663</sup> This greatly affected their ability to conform to the expected standards as regards ethics, media ethos and general broadcasting rules.<sup>664</sup> This ultimately compromised their ability to play by the rules.<sup>665</sup>

The role of the local media in stoking these conflicts is relevant because they present a one-sided narrative of the issues instead of offering a fair and accurate account. It was shown that the local media does not show consistent information, which could be a flaw of the electoral agencies as well.

Varying information during the transmission of the results is a cause of ethnic conflicts as the information relayed on various media platforms is different.<sup>666</sup> This was confirmed by

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<sup>652</sup> Focus Group Discussion, Kiambu County 7 January 2019- Appendix IX.

<sup>653</sup> Focus Group Discussion, Nakuru County 7 January 2019- Appendix IX.

<sup>654</sup> Focus Group Discussion, Uasingishu County 7 January 2019- Appendix IX.

<sup>655</sup> Focus Group Discussion, Nairobi County 7 January 2019- Appendix IX.

<sup>656</sup> PC 1 17<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>657</sup> PC 2 21<sup>st</sup> January 2019 Nairobi - Appendix IX.

<sup>658</sup> PC 3 19<sup>th</sup> February 2019 Nairobi- Appendix IX.

<sup>659</sup> PC 4 6<sup>th</sup> March 2019 Kirinyaga - Appendix IX.

<sup>660</sup> RE 1 26<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>661</sup> RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>662</sup> RE 4 18 March 2019 Nairobi - Appendix IX.

<sup>663</sup> EM 9 January 2019 -Kiambu town- Appendix IX.

<sup>664</sup> *ibid.*

<sup>665</sup> *ibid.*

<sup>666</sup> Focus Group Discussion, Kisumu County, 17 January 2019.

one discussant in the FGD in Kiambu County .She stated that "these fights, after presidential elections, are propagated by the local media ". She blamed this on the situation of the local media failing to be patriotic in terms of sifting what to air. She was of the view that some of the recorded audios in verbatim did not deserve airplay. She vividly cited audio aired by a media house during the electioneering period before the post-election conflict. It depicted a political operator with influence urging their co-ethnic community members to uproot members of other communities from amongst them. The derogatory inference made to the "non-local community" likening them to "weeds inhabiting our ancestral land" continues to irk the old lady to date making her decry the failure to observe ethics by the media houses as a contributing factor to ethnic strife.

The findings were confirmed by a study by Nicole Stremlau on media and post-conflict constitutional making processes in Africa. It argued that the confidence that the citizenry had in a post –conflict constitution correlated with local media evaluation of the supreme law.<sup>667</sup> Trust and confidence build up in the local media as sources of information. This is especially true in polarized electoral contests where accurate information must be shared, and the practice of providing skewed particularistic information stemmed .<sup>668</sup> Instances of political polarization coupled with varied shades of political opinion in the media practitioners are catalysts to conflict. Ingrained local media partisanship reduces their institutional capacity to act as judicious and moderating tools to deter conflict in the event of conflict.<sup>669</sup> This is confirmed by RE2. He contended that in the absence of the expected impartiality by local media, the ethnic communities were exposed to great risk.

Evidence of similar practices of abuse of local media for the propagation of ethnic hate has been reported in the Republic of Rwanda, which suffered an immense loss of human life and property during the genocide in 1994. Respondents compared this to Kenya in 2007 whereby local media was cited as having broadcasted inflammatory statements from presidential elections candidates. This had triggered in 2007 strategic violence employed to suppress or mobilize. This is not what Burchard calls accidental electoral violence, that

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<sup>667</sup> Nicole Stremlau, 'Constitution-making, media, and the politics of participation in Somalia'(2016) 115 (459)African Affairs 225–245.

<sup>668</sup>ibid.

<sup>669</sup>ibid.

‘occurs as a result of cross-pressured actors who, because of exigent circumstances, were forced into different sides of the same political space’.<sup>670</sup>

The news item was cited by the respondents had stated “muondoe hii madodoa kati yetu”(let’s remove the dark spots from our midst).<sup>671</sup> The broadcast incited the local community to uproot the alleged unwelcome ethnic community from its midst.<sup>672</sup> Responses from ER1<sup>673</sup> , PC1<sup>674</sup> ER2<sup>675</sup> PC3<sup>676</sup> and virtually all the FGD discussants confirmed that the inflammatory statements attributed to the local media fanned ethnic conflict in the post-election conflict in 2007-2008. The respondents stated coded language, proverbs and idioms casting other ethnic groups negatively fuelled the conflict. Censorship by the then Communications Commission of Kenya, the predecessor of the current Communications Authority of Kenya, confirmed how volatile the situation was.<sup>677</sup>

A United States Institute of Peace study entitled “Elections and Violent Conflict in Kenya Making Prevention Stick” focused on the Kenyan 2013 general elections and local media.<sup>678</sup> It stated that self-censorship by local media and the calls for tolerance partially assisted 2013 general elections .<sup>679</sup> Maturity exhibited by hosting of a common debate by all presidential candidates equally came out strongly. This played a big role in demystifying false perceptions in naïve voters’ mindsets about the candidates.<sup>680</sup> The report called for enhanced peace messaging from the mainstream media in the electoral processes as a measure of subduing incidences of conflict.<sup>681</sup>

Vernacular stations have useful roles. Edwin Okoth explains how these local media have created jobs and increased economic activities at the grassroots level in his paper entitled,

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<sup>670</sup> Stephanie M.Boulder, *Electoral Violence in Sub-Saharan Africa: Causes and Consequences*,(1st ed.Lynne Rienner Publishers,2015) 95.

<sup>671</sup> See Christa Odinga, ‘Use of New Media during the Kenya Elections’, (Unpublished Master’s Thesis Uppsala University 2013).

<sup>672</sup> *ibid*.

<sup>673</sup> RE 1 26<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>674</sup> PC 2 21<sup>st</sup> January 2019 Nairobi - Appendix IX.

<sup>675</sup> RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>676</sup> PC 4 6<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>677</sup> Johan de Smedt (n 120).

<sup>678</sup> Claire Elder, Susan Stigant, and Jonas Claes, *Elections and Violent Conflict in Kenya : Making Prevention Stick*, (United States Institute of Peace, 2014).

<sup>679</sup> *ibid* .

<sup>680</sup> *ibid*.

<sup>681</sup> *ibid* .

"The Emergence and Growth of Vernacular Radio in Kenya: A Case Study of Radio having a Positive Economic Impact".<sup>682</sup>

On the flipside, Michael Mwangi Kamau in his PhD thesis entitled "Vernacular Radio and Democracy in Kenya: A Historical Reconstruction of Audiences Usage of Kass and Inooro Radio Stations in Uasin Gishu District", holds that local media can destroy society. This is by enhancing audiences' narrow world-view, embedding the wide social distance between people co-habiting in the same geographical space, and enhancing irresponsible journalism that undermines democracy in Kenya.<sup>683</sup>

### **3.1.5 The Winner-Takes it All**

Finally, the winner takes all system was identified as a key linkage of ethnic politics to presidential elections in Kenya. The notion of 'the winner takes all' in this study refers to two things. First, unlike the period under the now-repealed constitution; presently losers of the presidential race do not have a soft landing in terms of being elected for another position. They cannot vie for other positions; say MP or governor, whilst they are vying for presidential positions.<sup>684</sup> Second, it refers to extensive benefits that accrue to the winner in a pure presidential system to the exclusion of the other contestants, including, appointive powers. This then makes campaigns for presidential elections stiff. Article 137 (1) of the Constitution of Kenya 2010, sets out the qualifications for presidential candidates. It states that a presidential candidate must be qualified to stand as an MP but should not actually become one. This is unlike in the repealed Constitution. Article 97 and 98 sets out the composition of Parliament in which the President is not a member. Section 3 (f) of the repealed Constitution of 1969 provided that "the candidate for president who is elected as a member of the National Assembly and who receives a greater number of valid votes cast in the presidential election than any other candidate for President and who, in addition,

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<sup>682</sup> See Edwin Okoth, *The Emergence and Growth of Vernacular Radio in Kenya: A Case Study of Radio having a Positive Economic Impact*, (Reuters Institute Fellowship Papers and Oxford University, 2015).

<sup>683</sup> See Michael Mwangi Kamau, 'Vernacular Radio and Democracy in Kenya: A Historical Reconstruction of Audiences Usage of Kass and Inooro Radio Stations in Uasin Gishu District', (unpublished PhD thesis Media studies, Moi University 2011).

<sup>684</sup> The law that is usually cited to support this position is Article 131 (3) of the Constitution of Kenya 2010, which states 'The President shall not hold any other State or public office'. However; it is arguable that this does not affect candidates but rather a successful contestant. Courts may need to interpret this. In 2013 and 2017 elections, presidential candidates in Kenya did not offer themselves for any other position.



receives a minimum of twenty-five per cent of the valid votes cast in at least five of the eight provinces shall be declared to be elected as President.

Kenya has had a centralised governance system since independence. It was largely borrowed from the British colonial masters. All focus groups held the view that this had perpetuated ethnicity and personalization of the presidency.<sup>685</sup> Focus groups held the view that officeholders of the presidency had exploited the office for political benefit - a position shared by scholars of this subject.<sup>686</sup> Experts interviewed by this study held the view that this occasioned exclusion of the ethnic communities which do not enjoy access to power via their leaders. This position is shared by Behuria and others.<sup>687</sup> This has seen the escalation of economic marginalization of the ethnic groups that lose in presidential contests. This gives rise to inequalities in terms of socioeconomic development.<sup>688</sup>

Focus groups in Kisumu, Siaya, Nakuru and Kericho held the view that this trend was employed by the colonial masters and amplified by the first President Jomo Kenyatta. They stated he favoured the Kikuyu in political and administrative positions to the exclusion of other ethnic groups. The Independence Constitution provided a winner take all semi-federal governance structure that centralised power.<sup>689</sup> The justification was "nation-building", effectively embedding a culture of denial of the cogency of ethnicity in Kenya.<sup>690</sup>

Voters interviewed in Nairobi held the view the centralized governance system espoused winner take all exclusion of some ethnic groups. They stated after the ascension to power by President Daniel Arap Moi, a new cabal of the Kalenjin ethnic elite replaced the Kikuyu ethnic group at the centre. According to them, prior to 2010, Kenyans have never owned the process of writing the constitution. All constitutional amendments since 1963 having been done by elites with an aim of enlarging executive powers. This has been affirmed by

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<sup>685</sup>Karuti Kanyinga, 'Pluralism, Ethnicity and Governance in Kenya' in Ghai YP and Cottrell J (eds) *Ethnicity, Nationhood, and Pluralism: Kenyan Perspectives* (Global Centre for Pluralism, 2013) 66- 72.

<sup>686</sup>ibid .

<sup>687</sup>Prithish Behuria and others , 'Studying political settlements in Africa', ( 2017) 116 ( 464) *African Affairs* 508.

<sup>688</sup>ibid .

<sup>689</sup>Elizabeth A. O'Loughlin, 'Kenya's Constitution in a global context', ( 2017) 15 ( 3) *International Journal of Constitutional Law* 839-848.

<sup>690</sup>ibid .

Kindiki Kithure.<sup>691</sup> Voters in Mombasa supported this view and stated that this was made worse by the formalisation of the monolithic party structure in the country that could easily alter the supreme law. As a result, new African constitutions including Kenya's, have made alteration harder as a partial redress for winner-take-all.<sup>692</sup> Respondents in Migori held the view that making it harder for incumbents to change a constitution is positive.<sup>693</sup>

ERI view was that the 2010 Constitution was premised to cure the inherent flaw of winner take all by introducing devolution to assist excluded ethnic groups.<sup>694</sup> He stated that the 2010 Kenyan Constitution has many principles aimed at assuring political inclusion for all ethnic groups in the country. The very recognition of the diversity in terms of the ethnic communities in Kenya, despite the hushed manner that the subject has been previously handled, is a great feat for the country. Other respondents equally concurred with the position.<sup>695</sup> This was a point of concurrence by most of the FGD discussants. They agreed the prevailing constitutional dispensation had sought to take care of the concerns of all ethnic groups in presidential contests. It granted all qualified persons meriting to run for president the opportunity to do so. It provided for valid nominations devoid of their ethnicity as confirmed by IEBC officials interviewed by this study and as espoused in Article 137 (1) (2).<sup>696</sup>The issue of winner takes all thus came out as an individual trait from primordial practices.

Responses from PC1, PC2, PC3, RE1 and RE2 showed that the majoritarian electoral system is applied in Kenya with the legal anchorage of Presidential elections being found in the Constitution of Kenya (chapter 7).<sup>697</sup>IEBC officers alluded to the majoritarian system having been adopted at the advent of independence. They opined that it was borrowed from the colonialists owing to the rush to get independence and execute the political aspirations of the republic as a young nation .<sup>698</sup> They were of the view that the system has been

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<sup>691</sup>Kindiki Kithure, 'The Emerging Jurisprudence on Kenya's Constitutional Review Law' (2007) 153 (1) Kenya Law Review 153.

<sup>692</sup> Charles Manga Fombad, 'Some perspectives on durability and change under modern African constitutions,(2013) 11 (2) International Journal of Constitutional Law 382.

<sup>693</sup>ibid .

<sup>694</sup>RE 1 26<sup>th</sup>January 2019 Nairobi - Appendix IX.

<sup>695</sup>RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>696</sup>Constitution of Kenya 2010, Art.137 (1) (2).

<sup>697</sup>PC 3 19<sup>th</sup>February 2019 Nairobi- Appendix IX.

<sup>698</sup> National IEBC secretariat staff.

retained chiefly because it effectively serves the interests of the powerful elite with the ability to marshal resources for the popular vote.<sup>699</sup> They contended that the majoritarian winner take all system evokes feelings of exclusion hence accelerating polarization of ethnic groups.<sup>700</sup>

FGD discussants in Nairobi, Kiambu, Mombasa, Kisumu and Nakuru identified winner take all system as a cause of intense competition between political parties akin to warfare. The intense competition, with an ethnic schism, for the presidential position, encouraged carrying out of all that is within and without the written electoral rules in the name of political competition to beat the opponents by candidates.<sup>701</sup> The officials held that if there existed a system which would allow a presidential candidate a fair share of the vote and get them elected, then that would reduce the intense competition.<sup>702</sup>

RE4 was of the view that a system where a presidential elections contender wins and forms a government with his or her political friends was the cause for ethnic conflict. This is because of the failure to accommodate losers.<sup>703</sup> His expert views mirrored sentiments shared by discussants in FGD's in Kisumu, Siaya, Homa Bay, Migori, Kwale and Mombasa. The respondents deemed the winner take all constitutional provisions, were a source of ethnic conflict pre and post-elections. They were of the view that in the event of "their" candidate losing out in elections they felt unrepresented and out of "government". They attributed this to the pride that came along with identifying with a co-ethnic in power or someone that they had voted for but not any direct benefits.<sup>704</sup>

One respondent stated that when the voters perceive the election as unfair and discriminatory, they retaliate against the opponent's community.<sup>705</sup> He stated that the winner take all system made some ethnic groups feel they have already lost even before participating in the elections for the presidency.<sup>706</sup>

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<sup>699</sup>ibid .

<sup>700</sup>ibid .

<sup>701</sup>RE 1 26<sup>th</sup> January, 2019 Nairobi - Appendix IX.

<sup>702</sup>RE 4 18<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>703</sup>Respondent C, Homa Bay County, 21 January 2019- Appendix IX.

<sup>704</sup>Focus Group Discussion, Kisumu County 14<sup>th</sup> January 2019 - Appendix IX.

<sup>705</sup> Respondent A, Nakuru County, 16 January 2019- Appendix IX.

<sup>706</sup>Focus Group Discussion, Homa Bay County, 19 January 2019 - Appendix IX.

The losers find it hard to concede.<sup>707</sup> As such, the elections favour certain communities over others.<sup>708</sup>

Kenya's presidential elections where the candidate emerging as the winner "takes it all" equally predisposes the system to cheating as confirmed by RE 3.<sup>709</sup> He suggested that the perception of "deep-state"<sup>710</sup> conjures up feelings of apathy in relation to the judicial processes of redress in the event of malpractices in presidential elections or dissatisfaction with the outcome.<sup>711</sup> He was of the view that candidates have a perception that despite the Judiciary being independent, it is still under the stranglehold and control of the Executive.<sup>712</sup> The same sentiments were perpetuated to the presidential candidate's core ethnic support bases, thus having the potential of igniting negative passions on the declaration of results deemed unfavourable.<sup>713</sup>

The sentiments reflected the views of a respondent from Kisumu County. He was of the view that the failure to accommodate his preferred candidate after he lost the presidential elections brought some collective gloom to his home area.<sup>714</sup> He felt that, in his quest to empathize with the presidential candidate, he and fellow community members barricaded roads and caused riots to "send their message to government".<sup>715</sup> His position was captured as follows in Kiswahili:

“Wakati Kura ya Jakom iliibiwa, huzuni ilitanda humu na tukaonelea tukiandamana na kufunga barabara, ujumbe wetu wakufadhaishwa na hio hali ya wizi wa kura utafikia serikali”

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<sup>707</sup>Focus Group Discussion, Nairobi County, 29 January 2019 - Appendix IX.

<sup>708</sup>Respondent A, Nairobi County, 29 January 2019 - Appendix IX.

<sup>709</sup>RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>710</sup>Deep state in political science means an informal association comprised of government officials, top-level finance and other players (in some states the army ) that effectively govern a country without reference to the consent of the people as expressed through its formal institutions. See Michael Rofgren, *The Deep State: The Fall of the Constitution and Rise of a Shadow Government* (Penguin Books, 2016).

<sup>711</sup>ibid .

<sup>712</sup>ibid .

<sup>713</sup>ibid .

<sup>714</sup> Respondent A Kisumu 14<sup>th</sup> January 2019 - Appendix IX.

<sup>715</sup>ibid .

(When Jakom's votes were stolen, we were very saddened. We felt that by rioting and barricading roads the government would get the message that we were unhappy).<sup>716</sup>

The response was an indication of the great attachment to the presidential candidate from the community that he drew his support from. It was an indication of the risks that the local community members were ready to take all in the name of defending the position of their preferred candidate. It equally manifested the psychological import of the “winner takes it all” situation going by the collective sense of loss by the community members.

Similar sentiments were shared by RE3 who espoused the need to broaden government to cater for the position of the official opposition. This would give the runners-up in the presidential contest a position. The losers presently are thrown into the abyss of despair.<sup>717</sup> He proposed that the assurance of a functioning opposition effectively discharging alternative government roles should be taken care of. This would enhance political stability and reduce intense ethnic competition.<sup>718</sup>

### **3.2 Conclusion**

The factors that have been identified in this chapter as linkages between ethnic conflict and presidential elections do affirm the instrumentalist theory that underpins this study. This chapter has shown that negative campaigning and vernacular media does impact on elections in Kenya.<sup>719</sup> Winner takes it all amplifies the centrality of elites in ethnic conflict in presidential elections.<sup>720</sup> This is in tandem with the instrumentalist approach which holds ethnicity as a tool used by individuals and groups to organize and unify populations. The intention is to achieve certain goals. They include demands access to state resources and power, respect for an ethnic group's identity and culture. Instrumentalists hold that ethnicity

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<sup>716</sup>ibid .

<sup>717</sup>RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>718</sup>ibid .

<sup>719</sup> See Keith Somerville and Keith Somerville, ‘Kenya: Political Violence, the Media and the Role of Vernacular Radio Stations’, *Radio Propaganda and the Broadcasting of Hatred* (Palgrave Macmillan UK 2012)9.

<sup>720</sup> ibid.

has little ranking outside the political process. It is comparable to other political affiliations such as liberal or conservative ideological beliefs.<sup>721</sup>

Instrumentalists hold that ethnic conflict arises if groups compete for the same goal. In the Kenyan context, it is the power associated with state and access to resources which the presidency may actually or by presumption confer. Vernacular stations are good agencies which elite use to mobilize ethnic groups. This is by way of subtle and nuanced negative campaigns, under the guise of constitutionally guaranteed freedom of media, expression and political rights. Law enforcing agencies may not curb these effectively. The pure presidential system which embeds winner take all incentivises stiff ethnic competition.

Lack of nationalism by voters is an aspect that is not explained by instrumentalist theory. Structural violence theory does assist in understanding how ethnicity as a social institution may harm people by preventing them from meeting their basic needs. According to Galtung, structural violence is an "avoidable impairment of fundamental human needs". Ethnic conflict as a consequence of lack of nationalism does result in deaths and unnecessary loss of property every electoral cycle in Kenya.

By way of conclusion, this chapter has laid out the linkage between ethnic conflict and presidential elections in Kenya. It has discussed the impact of stiff competition in presidential races in heightening ethnic tensions; absence of nationalism ethos amongst the voters; the impact of vernacular media particularly radio and the winner take all presidential system in place. Finally, it has illustrated the connection between instrumentalist and structural violence theories and findings of the study.

The next chapter discussed the strength and weaknesses of each of the post-2007 constitutional mechanism that has been applied to address the problem of ethnic conflict in presidential elections.

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<sup>721</sup>Hudson Meadwell, 'Cultural and Instrumental Approaches to Ethnic Nationalism' (1989) 12 *Ethnic and Racial Studies* 309.

## CHAPTER FOUR

### EVALUATION OF THE ADEQUACY OF THE POST-2007 CONSTITUTIONAL MECHANISMS

#### 4.1 Introduction

This chapter evaluates the adequacy of the post-2007 constitutional mechanisms in addressing ethnic conflict in presidential elections in Kenya. This evaluation entailed interrogating responses emanating from presidential candidates, experts in the fields of political science and law, election administration officials, voters in the study areas, and officials from the electoral management body (IEBC).

The mechanisms evaluated are consociationalism, centripetalism, national building measures, and devolution. The study adopted them as the thematic areas on which the data analysis and interpretation for the chapter were premised. In the answers from the respondents, there were positive and negative evaluations regarding the post-2007 constitutional mechanisms.

Evaluations for each mechanism were as follows:

#### 4.2 Consociational Governments

While supporting Consociationalism, one expert interviewed in this study cited the Indian Constitution. Citing Khaitan, he vouched for constitutional directives as useful tools for expressive accommodation of ethnic groups who would otherwise lose out in constitutional negotiations in deeply divided African societies.<sup>722</sup> Such accommodation gives such groups enough hope for future political victories hence incentivizing them to stay within a country's constitutional realm.<sup>723</sup>

He cited various scholars and stated that Kenya has been bedeviled by ethnic animosity, lack of sound structures in the political party systems, and a history of unrest during the elections period.<sup>724</sup> Failure to institute coalition-building mechanisms, lack of an

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<sup>722</sup>Tarunabh Khaitan, 'Directive principles and the expressive accommodation of ideological dissenters', (2018) 16 (2) International Journal of Constitutional Law 389,400.

<sup>723</sup>ibid .

<sup>724</sup>Allisson McCulloch and John Mc Garry (eds), *Power-Sharing: Empirical and Normative Challenges* (Routledge, 1st Edition , 2017) 92.

accommodating culture and lack of motivation to share power all brought a competitive political process.<sup>725</sup> He held the view that political unrest and instability of the period was an antecedent for coalition government building with a view of reversing the conflictual situation.<sup>726</sup>

Citing Chege, a second expert held that the view during the period surrounding 2007-2008 in Kenya, power-sharing in the form of a grand coalition government suited the country in the short term.<sup>727</sup>

However, salient undercurrents as regards ethnic discontent still festered and needed to be addressed for the long term.<sup>728</sup>

Focus groups in Mombasa, Kisumu, and Nairobi held the view socio-economic indicators between 2008 and 2012 had no much significant change. The political class benefitted most.<sup>729</sup> Consequently, new frontiers of elite conflict were opened up as regards role sharing and endless bickering in the new governance dispensation.<sup>730</sup>

According to them, the sealing of the peace agreement by the ruling elite in 2008, provided semblance of peace in the short term between 2008 and 2012.<sup>731</sup> The establishment of institutional framework to handle factors that had motivated the post-election crisis was agreed on. This entailed establishment of an Independent Review Commission on the General Elections held on 27<sup>th</sup> December 2007.<sup>732</sup> Second, establishment of a Commission of Inquiry into Post-Election Conflict.<sup>733</sup> Third, establishment of a Truth, Justice and Reconciliation Commission.<sup>734</sup> Fourth, the review of long-term issues and pursuit of a constitutional review process.<sup>735</sup>

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<sup>725</sup>ibid .

<sup>726</sup>ibid .

<sup>727</sup> Edward Goodman, 'Nationalism, Globalization and Africa', (2015) 114 (456) African Affairs 485–486.

<sup>728</sup>Michael Chege, 'Kenya's Electoral Misfire', (2018)29 Journal of Democracy, John Hopkin's University Press, 152-172.

<sup>729</sup>ibid .

<sup>730</sup>ibid .

<sup>731</sup> National Accord and Reconciliation Act No. 4 of 2008.

<sup>732</sup>ibid .

<sup>733</sup>ibid .

<sup>734</sup>ibid .

<sup>735</sup>ibid .



Despite the power sharing of 2008 which ushered the country into a new constitutional dispensation in 2010, it did not transit into the new constitutional order.<sup>736</sup> The 2010 constitution omitted power sharing mechanisms.<sup>737</sup> This study now summarises adequacy of this constitutional mechanism in deterring ethnic conflict in presidential elections in Kenya.

#### **4.2.1 Positive Evaluations**

##### **4.2.1.1 Reflective of political reality**

Espinosa has defined the term "social reality" in his article titled 'Responsive Constitutionalism' as accepted social tenets of any given society.<sup>738</sup> Building on this definition, the phrase "political reality" in this study refers to accepted political tenets of Kenyan society, involving relatively stable political norms and social representations. The endeavor of this evaluation is to establish if this design best reflects Kenyan accepted political tenets as opposed to an abstract reality. A constitution that is abstract, non-contextual, and too removed from a country's social and political reality is bound to fail - law in books and law in action dichotomy. The reality, in this case, is the ethnic nature of Kenyan politics; hence, a constitutional mechanism that appreciates this reality can last longer (as long as the political reality remains the same).

It was respondents' view that consociationalism, by its express configuration of power in almost express ethnic terms, reflects Kenyan political reality best. It was their view that the current Constitution is based on a false assumption that serious and impactful Kenyan political parties can have a national character and promote national unity, as set out in article 91 of the Constitution of Kenya 2010.

RE3 was of the view that the coalition government that prevailed in Kenya in the year 2008 was initially triggered by the president's party having minority members in Parliament.<sup>739</sup> He thus sought legitimacy by inviting other parties (Wiper Democratic Party) in the

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<sup>736</sup>Judiciary Working Committee on Election Preparations (JWCEP) (2013) *Post-Election Report March - September*, (Judiciary 2013).

<sup>737</sup>*ibid*.

<sup>738</sup> Manuel J Cepeda Espinosa, 'Responsive Constitutionalism', (2019) 15 Annual Review of Law and Social Science 21,40.

<sup>739</sup>RE 3 11 th March 2019 Nairobi - Appendix IX.

formation of a government before the advent of the “National Accord” .<sup>740</sup> He stated that the arrangement was timely given the then deep ethnic fissures in the national fabric .<sup>741</sup> This was affirmed by PC1<sup>742</sup>, PC2<sup>743</sup>, PC3<sup>744</sup>, PC4<sup>745</sup> and RE2<sup>746</sup> who all confirmed that the "National Accord" was timely after the country going through a charged season of ethnic conflict.RE 3 stated that nationally, there was a silent consensus on the need for a political truce.He stated ethnic groups that did not have a co-ethnic with a viable chance of winning the presidency provided the swing needed to bring peace (Kamba).<sup>747</sup> Unfortunately, the political brinkmanship was negating it owing to the hardline positions taken by the main ethnic parties.<sup>748</sup> When the coalition government was eventually formed, it reflected the political reality in Kenya by embedding an outsized cabinet consisting members of many ethnic groups,big and small.<sup>749</sup>

The sentiments expressed by RE3 were confirmed by empirical works carried out during by Jeremy Horowitz.<sup>750</sup> The works enumerates how small ethnic groups provide the swing needed to make peace in Kenya and hence a grand coalition ought to include as many groups as possible.<sup>751</sup> This was attributed to inherent networks within the individual associations by persons across ethnic divide.<sup>752</sup>The associations spurred interpersonal integrations sustaining business and other social-economic activities nationally.<sup>753</sup> This brought to the fore the short-term political truce which did not heal social-economic prejudices motivating ethnic conflict in the presidential elections .<sup>754</sup>

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<sup>740</sup>ibid .

<sup>741</sup>ibid .

<sup>742</sup>PC 1 17<sup>th</sup>January 2019 Nairobi - Appendix IX.

<sup>743</sup>PC 2 21<sup>st</sup>January 2019 Nairobi - Appendix IX.

<sup>744</sup>PC 3 19<sup>th</sup>February 2019 Nairobi- Appendix IX.

<sup>745</sup>PC 4 6<sup>th</sup> March 2019 Kirinyaga - Appendix IX.

<sup>746</sup>RE 1 26<sup>th</sup>January 2019 Nairobi - Appendix IX.

<sup>747</sup>RE 3 11<sup>th</sup> March 2019 Nairobi- Appendix IX.

<sup>748</sup>ibid .

<sup>749</sup>ibid .

<sup>750</sup>Jeremy Horowitz ,'Ethnicity and the Swing Vote in Africa's Emerging Democracies: Evidence from Kenya',(2019) 49 (3) British Journal of Political Science 911.

<sup>751</sup>ibid ,901.

<sup>752</sup>ibid .

<sup>753</sup>ibid .

<sup>754</sup>ibid .

These findings on the nexus between proper functioning of constitutions and underlying social context tally with a paper titled ‘The Sociology of Constitutions’ by Chris Thornbill.<sup>755</sup> The author contends that constitutions are embedded in deep lying legitimational social processes reflecting collective decisions about a country’s governance system.<sup>756</sup> It follows therefore that a constitutional form of government that reflects Kenyan social reality is important.<sup>757</sup>

A respondent from Bomet stated that the coalition government was timely in quelling the ethnic conflicts that arose in the 2007 election. The respondent was convinced that it only had a temporal relevance.<sup>758</sup> He held the position that it reflected political reality and was appropriate for long-term purposes.<sup>759</sup> As such, it can address ethnic conflicts successfully.<sup>760</sup>

#### **4.2.1.2 Inclusivity**

For this study, inclusion refers to the political participation and representation of minority ethnic groups into Kenya's state apparatus on the same equal basis as politically dominant ethnic groups.

According to Paul Blokker, democracy should be about the authentic inclusion and accomodation of different (ethnic) groups, otherwise populist movements may emerge and imperil liberal constitutional order using popular claims.<sup>761</sup>

He states that it is often assumed that ethnic nationalism and populist political groups have no relation with constitutionalism. He holds the view that constitutions can be used to advance an exclusionist agenda.<sup>762</sup>

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<sup>755</sup> Chris Thornbill ,‘The Sociology of Constitutions’ ,(2017)Annual Review of Law and Social Science 493,500.

<sup>756</sup>ibid .

<sup>757</sup>ibid .

<sup>758</sup> Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>759</sup> Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>760</sup>Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>761</sup> Paul Blokker , ‘Populism as a Constitutional Project’,(2019) 17 (2) International Journal of Constitutional Law 536–553.

<sup>762</sup>ibid .

Inclusion in the state is possible only when (a) group's defining concern can be assimilated to an established or emerging state imperative, and (b) civil society is not unduly depleted by the group's entry into the state.<sup>763</sup>

RE1 stated that inclusivity is vital in an ethnically divided society .He cited the 2003 grand coalition of ethnic groups as an example.<sup>764</sup> The multi-ethnic coalition defeated the autocratic KANU regime .Later on it collapsed due to a lack of inclusivity.<sup>765</sup> Similar sentiments were shared by RE 2<sup>766</sup>, RE 3<sup>767</sup>, RE 4<sup>768</sup>, PC 1<sup>769</sup>, PC 2<sup>770</sup>, PC 3<sup>771</sup>, and PC 4<sup>772</sup> . They stated that inclusivity or the perception of " inclusivity " was a critical aspect of determining the levels of cohesion in Kenya. They cited the African situation, where coalition governments were adopted after the occurrence of electoral disputes. Experts told this study that Kenya pioneered the practice in 2008 in the region.It was carried out in Zimbabwe upon the opposition's boycott of the second round of presidential elections alleging conflict, lack of a fair playing ground, and intimidation by state functionaries in 2008.

In a book review article, Victor Gwande states that the situation in Zimbabwe was a little different.Despite the opposition in the country not participating in the second round of elections, it formed a post-electoral pact with the ruling party.<sup>773</sup> By power sharing, Kenya and Zimbabwe added an element of social inclusivity in government. This brought peace, tranquility, and the ability to execute social and related development programmes.

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<sup>763</sup>ibid .

<sup>764</sup>RE 1 26<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>765</sup>ibid .

<sup>766</sup>RE 2 19<sup>th</sup>February 2019 Kiambu County - Appendix IX.

<sup>767</sup>RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>768</sup>RE 4 18<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>769</sup>PC 1 17<sup>th</sup>January 2019 Nairobi - Appendix IX.

<sup>770</sup>PC 2 21<sup>st</sup>January 2019 Nairobi - Appendix IX.

<sup>771</sup>PC 3 19<sup>th</sup>February 2019 Nairobi- Appendix IX.

<sup>772</sup>PC 4 6<sup>th</sup> March 2019 Kirinyaga - Appendix IX.

<sup>773</sup> Victor Gwande , ‘Zimbabwe’s predatory state: Party, military and business’,(2019) 118(472)*African Affairs* 601–602.

This was confirmed by discussants in the FGD's in Bomet<sup>774</sup>, Nandi<sup>775</sup>, Kericho<sup>776</sup>, Uasingishu<sup>777</sup>, Homabay<sup>778</sup>, Kisumu<sup>779</sup>, Siaya<sup>780</sup> and Mombasa.<sup>781</sup> The discussants were of the view that the grand-coalition eased the conflict that erupted after the 2007 elections by striking a balance between those in power and since the voters generally followed influence from their leaders, peace trickled down to the unruly voters gradually pacifying the country.<sup>782</sup> The respondents were of the view that similar governments, applying the same principle, can address ethnic conflicts effectively. It brings inclusivity of the major contestants. The FGD discussants in Bomet County were of the view that the Constitution should be amended to accommodate the first runners-up who, in most cases, had a significant following close to that one of the winners and locking them out was akin to a failure to include half of the country in governance.<sup>783</sup> The respondents felt that the grand-coalition form of governments could adequately solve ethnic conflicts in presidential elections.<sup>784</sup>

RE2 stated that coalition governments have worked in some other non-African jurisdictions.<sup>785</sup> He likened the situation obtaining in Kenya in the period of 2008 – 2013 as a classical coalition government.<sup>786</sup> He enumerated the coalition arrangement as one that seeks to assure the realization of a majority in Parliament when a ruling party does not achieve the same after the conduct of elections.<sup>787</sup> He gave the example of the Wiper Democratic Party leader's invitation to form a government by the Party of National Unity after the 2007 general elections to shore up the numbers in the government's side.<sup>788</sup> He stated that giving the then government formation some national outlook was of essence

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<sup>774</sup>Bomet County, FGD14<sup>th</sup> January 2019 - Appendix IX.

<sup>775</sup>Nandi County, FGD24<sup>th</sup> January 2019 - Appendix IX.

<sup>776</sup>Kericho County, FGD23<sup>rd</sup> January 2019- Appendix IX.

<sup>777</sup>Uasingishu County, FGD27<sup>th</sup> January 2019 - Appendix IX.

<sup>778</sup>Homabay County, FGD 18<sup>th</sup> January 2019- Appendix IX.

<sup>779</sup>Kisumu County, FGD 14<sup>th</sup> January 2019- Appendix IX.

<sup>780</sup>Siaya County, FGD16<sup>th</sup> January 2019- Appendix IX.

<sup>781</sup>Mombasa County, FGD 25<sup>th</sup> of January 2019- Appendix IX.

<sup>782</sup>, Bomet County, FGD 14 January 2019- Appendix IX.

<sup>783</sup>Bomet County, FGD, 14 January 2019- Appendix IX.

<sup>784</sup>Bomet County, FGD 14 January 2019- Appendix IX.

<sup>785</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>786</sup>ibid .

<sup>787</sup>ibid .

<sup>788</sup>ibid .

going by the then feelings of exclusion and concentration of government appointments in Mount Kenya region.<sup>789</sup> He stated that the practice was politically expedient to cushion the country from the risks of instability.<sup>790</sup>

## 4.2.2 Negative Evaluations

### 4.2.2.1 Embedding Ethnicity

The term "embedding ethnicity" means a constitutional mechanism that deepens ethnic group consciousness, in a manner that is characterized by ethnic altruism, diffuse sentiments, and the willingness of individuals to make sacrifices on behalf of the group.<sup>791</sup> Instead of fostering national unity, this mechanism was deemed by some respondents as enhancing the opposite.

RE3 was of the view that coalition governments foster ethnicity as government positions are shared with ethnicity as the organizing principle.<sup>792</sup> He stated that some candidates thrive on ethnic conflicts with the hope of increasing their stake in future grand coalition government.<sup>793</sup> This may cause coalition government's failure.<sup>794</sup> He averred that the formation of the grand-coalition did not resolve the issue of ethnicity. Most leaders tried to ensure their communities benefited more from the alliance through the allocation of national resources.<sup>795</sup>

A respondent, RE2, stated that the coalition government of 2007 was not successful because it was structured to deconstruct ethnicity.<sup>796</sup> This was confirmed by PC1,<sup>797</sup> PC2<sup>798</sup> and PC3<sup>799</sup> who incidentally had insider knowledge by virtue of serving in the grand coalition government. They were of the view that the working arrangement was more or less like a forced marriage negotiated under the auspices of statesmen who had firm

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<sup>789</sup>ibid .

<sup>790</sup>ibid .

<sup>791</sup> Donald L Horowitz, 'The Structure and Strategy in Ethnic Conflict', (Horowitz, 9 June 1998) <<http://web.ceu.hu/cps/bluebird/eve/statebuilding/horowitz.pdf>> accessed 2 May 2019.

<sup>792</sup>RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>793</sup>ibid.

<sup>794</sup> ibid.

<sup>795</sup> ibid.

<sup>796</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>797</sup>PC 1 17<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>798</sup>PC 2 21<sup>st</sup> January 2019 Nairobi - Appendix IX.

<sup>799</sup>PC 3 19<sup>th</sup> February 2019 Nairobi- Appendix IX.

instructions from the international community that the country should not go down the perilous path of self-destruction.

The National Accord and Reconciliation Act, 2008 stipulated that President Kibaki was to retain his head of state and government status. Raila Odinga, who was the head of the opposition party(Orange Democratic Party), was to play the function of coordination and supervision of government.<sup>800</sup> The National Accord buttressed the need for reflection of the national diversity in government. This was by representing ethnic communities based on the strength of the coalition partner's parliamentary strength.<sup>801</sup>This was a sure recipe for conflict. This was because parliamentary strength of the coalition partners was a contentious issue. It has been suggested by Rosalind Dixon and Tom Ginsburg that political elites always use constitutions as insurance against three risks—to their power, person, and policies.<sup>802</sup>

The Grand Coalition of Kibaki and Odinga can therefore be viewed as a form of political insurance that ensured their power did not decay.The question was how to make this system work. Although adoption of the Accord helped end the conflict, it did embed ethnicity hence planting seeds for future instability. Tensions could easily disrupt the ability to plan, coordinate, and follow up on policy decisions.

#### **4.2.2.2 Immobilism**

The term “immobilism” in this study refers to situations of political policy inertia, stagnation, stalemates, and bickering among leaders in government hence stalling policy development or legislative action.

The two principals of “Grand Coalition Government”, President Kibaki and the Prime Minister, Raila Odinga, were both persuasive presidential elections contestants with solid support bases from their ethnic groups and equally cut national appeal. PC1<sup>803</sup>, PC2<sup>804</sup>,

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<sup>800</sup> National Accord and Reconciliation Act, 2008.

<sup>801</sup>ibid .

<sup>802</sup> Rosalind Dixon and Tom Ginsburg, ‘The forms and limits of constitutions as political insurance’,(2019)15 (4)International Journal of Constitutional Law 988–1012.

<sup>803</sup>PC 1 17<sup>th</sup>January 2019 Nairobi- Appendix IX.

<sup>804</sup>PC 2 21<sup>st</sup>January 2019 Nairobi - Appendix IX.

PC3<sup>805</sup> and RE1<sup>806</sup> thought that despite the ability to quell ethnic conflict nationwide, the ability to plan and execute government functions with regards to policy decisions was significantly curtailed by the presence of fear and suspicion. The coalition was not one of the willing but that of nudged participants forced into a political marriage.

PC1<sup>807</sup>, PC2<sup>808</sup>, and RE1<sup>809</sup> felt whereas the National Accord had put in place structures to assure policies get the coalition government prosper, lack of trust in the two political groups was immense. PNU and ODM were political rivals, they said. One side viewed the other as persons who had stolen elections. The other side deemed the others as intruders. RE1<sup>810</sup> was of the view that the prevailing situation created a lot of immobilism in the management of government.

RE1<sup>811</sup> and RE2<sup>812</sup> opined that the distrust permeating through government occasioned the risk of poor coordination of the government ministries. They stated that the presence of a huge cabinet was a great challenge to the management of government<sup>813</sup>. PC2<sup>814</sup> decried the need for continuous consultation and respect for the then prevailing structures in government, which was a critical imperative but was unfortunately in many instances flouted. He argued that realization of compromise as regards policy positions and priorities was a tough call to the Cabinet, creating a deadlock in decision making, especially in the absence of a unifying agenda, thus a challenge to forging a working relationship<sup>815</sup>.

PC1<sup>816</sup>, PC2<sup>817</sup>, PC3<sup>818</sup>, confirmed that it took the intervention of the principals in the wake of reaching out to their teams and implore them to keep off internal politics. They confirmed that a large Cabinet forced the creation of working committees in varied sector-

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<sup>805</sup>PC 3 19<sup>th</sup>February 2019 Nairobi- Appendix IX.

<sup>806</sup>RE 1 26<sup>th</sup>January 2019 Nairobi - Appendix IX.

<sup>807</sup>PC 1 17<sup>th</sup>January 2019 Nairobi- Appendix IX.

<sup>808</sup>PC 2 21<sup>st</sup>January 2019 Nairobi - Appendix IX.

<sup>809</sup>RE 1 26<sup>th</sup>January 2019 Nairobi - Appendix IX.

<sup>810</sup>ibid.

<sup>811</sup>RE 1- Appendix IX.

<sup>812</sup>RE 2- Appendix IX.

<sup>813</sup>ibid.

<sup>814</sup>PC 2- Appendix IX reinforced the position.

<sup>815</sup>ibid .

<sup>816</sup>PC 1- Appendix IX.

<sup>817</sup>PC 2- Appendix IX.

<sup>818</sup>PC 3- Appendix IX.



specific line ministries. This allowed specialisation and ease in decision making owing to the sheer size of government. They stated that this was the only way to allow the government to function after realisation that much valuable time had been lost in bickering. In a previous study titled 'Convention by Consensus :Constitutional Conventions in Germany', Greg Taylor has affirmed the importance of governance by consensus.<sup>819</sup> Lack of consensus driven by antagonistic practices between ODM and PNU occasioned much immobilism in the grand coalition government between 2008 and 2013.

However, in many other states partners in grand coalition governments often differ on matters protocol, policy and legislative proposals hence occasioning immense immobilism.<sup>820</sup>

The focus group discussions in Kiambu, Nakuru, Nairobi, and Kwale counties equally brought to the fore the ability of the local populace to take cognisance of the selfish streak in the elite in the grand coalition government.

A respondent in Kiambu County aptly captured the thrust of the immobilism when he put forth his argument by saying in Kiswahili :

"Tulithani viongozi wetu walikua wanatujali kumbe wali enda kupigania matumbo yao. Kile tuliskia ni vita baina yao mara sijawekewa mkeka mwekundu pamoja na choo nikendakwa baraza la njena mambo menginekamahayo.Ndipo tulijua wao walikua wanashindania nafasi zao wajifaidi ilihali siokuboresha hali zetu za kimaisha"<sup>821</sup>(We thought that our leaders cared for our welfare but they went to fight for their gains. What we heard of were fights amongst themselves with some demanding attention in terms of the VIP treatment entailing red carpets and mobile toilets while holding public meetings. That is when we realized that they used us to fight for their gains as opposed to our socio-economic empowerment).<sup>822</sup>

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<sup>819</sup>Greg Taylor, 'Convention by consensus: Constitutional conventions in Germany', (2014)12(2) International Journal of Constitutional Law 303–329.

<sup>820</sup> ibid.

<sup>821</sup> Respondent A Kiambu County - Appendix IX.

<sup>822</sup>ibid .

### 4.2.2.3 Expensive Bureaucracy

Bureaucracy in this study means the entire set of both non-elected state officials and the administrative policy-making wing of the state.<sup>823</sup> Bureaucracies can often be inefficient and convoluted and at times, inflexible to persons hence hinder progress.<sup>824</sup> Max Weber had stated that it constitutes the most efficient way in which human activity can be planned in systematic processes and organized hierarchies for maintaining order, boost efficiency, and negate favouritism.<sup>825</sup> He warned that unfettered bureaucracy could be a threat to individual freedom.<sup>826</sup>

Focus group discussants in Kwale, Mombasa, Nairobi, Kiambu, Kisumu, and Bomet stated that grand coalition arrangement was expensive because it demanded an expanded Cabinet. Arend affirms that one often characteristic of consociational arrangements is an expanded cabinet, intended to fit various warring ethnic groups.<sup>827</sup>

### 4.2.2.4 Lack of an effective oversight machinery

World Bank has identified one key role of the opposition is to oversee the government.<sup>828</sup> The expression "lack of an effective oversight machinery" means the absence, both inside and outside Parliament, of a strong political body or entity that checks government excesses.

All experts interviewed by this study raised an issue of lack of effective oversight during the grand coalition period. Although independent media, an effective judiciary, and a vibrant civil society might exist, effective oversight of government is guaranteed by a vibrant opposition. Indeed, Tim Kessel has defined post conflict consociational settlements which exposes their inherent flaw. They are 'agreements among powerful social groups

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<sup>823</sup> Max Weber, "Bureaucracy" in Tony Waters and Dagmar Waters (eds.) *Weber's Rationalism and Modern Society* (Palgrave-Macmillan 2015) 114.

<sup>824</sup> *ibid.*

<sup>825</sup> *ibid* 1-20.

<sup>826</sup> *ibid.*

<sup>827</sup> Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 *Journal of Democracy* 96. Also available online <https://www.journalofdemocracy.org/articles/constitutional-design-for-divided-societies/> accessed 2nd May 2019 .

<sup>828</sup> World Bank , 'Unit 7 :The Role of the Opposition',(*World Bank*,5 May 2016)),<http://siteresources.worldbank.org/PSGLP/Resources/commonwealthunit7.pdf> accessed 2nd May 2019.

that ends a conflict and sustains a set of institutions and a distribution of power that delivers an acceptable distribution of benefits' but their main demerits remain negation of opposition.<sup>829</sup>

In Kenya, the opposition chairs the Public Accounts Committee as well as the Investments Committee of the National Assembly as per provisions of the National Assembly's Standing Order 178 (2). In a consociational state, there would be a stalemate as to who would chair these key committees.

#### **4.2.2.5 Negates Human Rights**

Human rights in this study refer to rights as set out by chapter 4 of the Constitution of Kenya 2010.<sup>830</sup> One expert, Prof Karuti Kanyinga, stated that by providing seats for certain persons who represent ethnic communities, it hoists group rights over individual rights and autonomy. This then offends political rights under article 38 of the constitution of Kenya 2010. Related to this, is the idea of negating the essence of political competition whose net outcome should be winners and losers –not all contestants winning. The benefit for political competition may be lost as results. This include a dynamic "political market" consisting of contrasting ideological positions. It may create lethargic presidential elections candidates with a high sense of entitlement. Giving preferential treatment to some ethnic communities negates provisions of Article 27 of the Constitution of Kenya 2010. It provides equality of persons without permitting any form of discrimination and preferential treatment.

#### **4.2.2.6 Consociational Model as proposed by Building Bridges Initiative Report**

Some experts in this study gave further views on this model. This was because it has been proposed in current public debates on constitutional reforms in Kenya. As explained in conceptual framework, the Supreme Court nullified presidential elections that were held in 2017 and ordered repeat.<sup>831</sup> Ethnic chaos followed. After the October 2017 repeat presidential elections that were boycotted by the main opposition, President Uhuru

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<sup>829</sup> Mushtaq Khan, 'Power, pacts and political settlements: A reply to Tim Kelsall', (2018)117(469) African Affairs 670–694.

<sup>830</sup> The Constitution of Kenya 2010 did expand them. However, 1969 Constitution had significant set of rights as well.

<sup>831</sup> Raila n384.

Kenyatta and his main competitor Raila Odinga entered into a pact to calm the chaos. This became popularly known as ‘handshake’. The President formed a task force to examine various national challenges, including divisive presidential elections and cyclic ethnic antagonisms, and recommend reforms.<sup>832</sup>The taskforce conducted public consultations in all 47 counties and made several recommendations in a document commonly known as Building Bridges Initiative (BBI) report.<sup>833</sup>

This study restricts itself to BBI report’s recommendations on matters that concern this study’s objectives: ethnic antagonism, divisive elections and devolution .The BBI report holds that ethnic antagonism is linked to winner take all presidential elections –a statement that is in line with this study’s findings.<sup>834</sup> To cure this, it recommends what it describes as “a more consociational model of governance” like other divided societies.<sup>835</sup>The shape this form of governance would take is captured in a recommendation regarding the issue of divisive elections. It recommends retention of article 138 ( 4) of the Constitution of Kenya 2010 . It retains various presidential powers. Instead, it proposes the creation of a post of Prime Minister whose key mandate is to deliver day to day functions of the government.<sup>836</sup>It proposes that the Prime Minister be appointed by the President upon confirmation by a majority of Members of Parliament. He or she must either be from the majority party or he/she must command majority support in Parliament.<sup>837</sup>

It proposes that the holder of the office should have authority over the supervision and execution of the daily affairs of the Government. He or she will be the head of government business in National Assembly and may chair Cabinet sub committees upon nomination by the President.It proposes cabinet ministers be partially drawn from Parliament .<sup>838</sup>It proposes the return of the post of leader of opposition and county funds be increased.<sup>839</sup>

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<sup>832</sup> Kenya Gazette No.5154 published on 31<sup>st</sup> May 2018.

<sup>833</sup> Presidential Taskforce on Building Bridges to Unity , *Building Bridges to a United Kenya :Form a Nation of Blood ties to a Nation of Ideals* ,(Government of Kenya October 2019)23-25.

<sup>834</sup> *ibid* 10.

<sup>835</sup> *ibid* .

<sup>836</sup> *ibid* .

<sup>837</sup> *ibid* .

<sup>838</sup> *ibid*.

<sup>839</sup> *ibid*.

Some experts stated that positive aspects of these recommendations are that they appear to mirror the 2008-2013 grand coalition constitutional model that was obtaining in Kenya. Respondents in this study did attest that, during this period, there was a sense of 'inclusivity' in government. The BBI report has endeavoured to address the issue of cost by stating that the Prime Minister will only earn a parliamentary salary. Unlike 2008-2013 government that had an expanded cabinet, Article 152 (1) (d) of the Constitution of Kenya 2010 which caps Cabinet positions to a maximum of 22 will remain. Reinstating the post of leader of opposition does mitigate negative effects of winner take all- a position shared by respondents in this study. Devolving more funds is positive as it may reduce competition for the presidency.

The demerits of the recommendations are many though. First, the President has retained vast powers and hence the seat remains a coveted trophy for ethnic competition. Article 131 (1) (a) of the Constitution of Kenya 2010 which makes the President both the head of government and state will be retained. Article 131 (1) (b) which enables the President to exercise executive authority on behalf of the republic has been retained. The current political formations of two multi-ethnic blocs of almost equal political strength may remain, with the Prime Minister seat only establishing extra slot to be given out within a bloc. The report has not addressed the issue of potential conflict between a powerful president and an overbearing prime minister wishing to appropriate excess powers. This happens often where the holders of the two posts are from different parties. This leads to 'immobilism' (constant bickering among powerful office bearers which makes government unstable), an issue which the respondents in this study raised.

The BBI report's proposals if adopted may cause the theoretical independence of Legislature and Executive to diminish because the two branches will be fused. This is because both the Prime minister and Cabinet will be drawn from Parliament. The Constitution of Kenya 2010 had embedded a Montesquieu separation of powers between the two arms by removing the executive from parliament. The practical effect of this fusion will have to be observed over time.

BBI report proposes a change of governance model at the national level but makes no such recommendations at the county level. Interfering with the structure at the top without

mirroring such model at the county level may create confusion and disrupt synergies between the two levels of government. For example in the case of *Tom Luusa Munyasya & another Governor, Makueni County & another [2014] eKLR*, the applicant was a member of the county executive who had been dismissed by a governor.

He challenged his dismissal challenging a governor's power to dismiss him without notice or due process. He relied on sections 40, 44, and 45 of the County Government Act 2012 which compelled the governor to subject him to due process before dismissal.

The respondents (the governor for Makueni and County Government of Makueni) case was that Constitution of Kenya 2010 had established a pure presidential system which under Article 132 grants the President the power to appoint Cabinet Secretaries. They contended the Constitution appreciated these were political appointees of the President. It was their case that Sections 40, 44, and 45 of the County Governments Act 2012 do not conform to the presidential system of government formulation and hence unconstitutional, null and void *ab initio*. This is because Article 2 of the Constitution of Kenya 2010 provides for the supremacy of the Constitution noting that it binds all state organs at both levels of government.

The court held that Kenyan legal framework in employer-employee relationship had the due process doctrine as stated by the claimants, both private and public sectors. It affirmed that labour reforms of 2007- 2008, did away in employment matters the pleasure doctrine. It held that Employment Act 2007 codified the concept of unfair termination and indeed many Industrial Court decisions endorsed the view. It held that due process was finally entrenched in the Constitution of Kenya 2010 citing Articles as 47, 50, and 236.

Cabinet Secretaries and Members of the County Executive Committees are appointed by the President and the Governor respectively, to assist in political mandates.

The court held:

29. The creation of Counties as devolved units of Government under the Constitution of Kenya, has, as seen in this preliminary objection introduced fresh questions, on the relationship between Public Officers and the Governments which employ them. As the Court understands it, the structure of the National Government

is replicated at the County level. The CEO at the National level, in the Corporation that is the State, is the President. At County level, his reincarnation is the Governor. The principles and structures at the two levels, under Chapter 9 and 12 of the Constitution basically espouse a pure Presidential System. 30. The President and his Deputy are popularly elected, as is the Governor and his Deputy under the Constitution. These are political offices, discharging political mandates, and accountable to the electorate. These CEOs and their Deputies may be removed from Office through the mechanism of impeachment, initiated by Members of the respective Legislative Assemblies, culminating in a vote in the Senate on whether they should cease holding office.

The court proceeded to render a verdict in favour of the county. Such synergies, like the one exemplified by the aforementioned case, will be disrupted once the national executive structure change and the county government system remains.

Finally, on the face of it, the BBI report recommendation for increment of funds devolved to the counties to a range of 35 per cent-50 per cent of the national revenue based on last government audited accounts appears positive.<sup>840</sup> As explained by Arend Lijphart (a key proponent of consociational) and Donald (key proponent of centripetalism), devolution is a partial remedy for addressing ethnic conflict in divided societies.<sup>841</sup> This proposal is in line with findings of this study, as discussed in subsequent sub-chapters on devolution. Article 203 (2) of the Constitution of Kenya 2010 provides that for every financial year, the equitable share of the revenue raised nationally which is devolved to counties should be not less than fifteen per cent of all revenue raised nationally. Sub article 3 of the foregoing article provides that the amount should be calculated on the basis of the most recent audited accounts of revenue and approved by the National Assembly. The auditing process has been slow and hence counties do not receive enough funds. If one picks a baseline year, say 2017, in absolute terms it does appear counties did receive more than twice the constitutional requirement (15 per cent) in equitable share for

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<sup>840</sup> *ibid.*

<sup>841</sup> n204 and 259.

that year.<sup>842</sup> On factoring variations between “last audited revenues”, the criterion for sharing, and projected revenues of the year 2017/18, equitable share falls well below 20 per cent.<sup>843</sup>

The problem with this recommendation is that it fails to indicate what functions should be devolved pursuant to this proposal, because funds must follow functions, a key rule of decentralisation. Paragraph 163 of the BBI report proposes establishment of an ostensibly national government entity called health commission in respect to already devolved function of health, which is self defeating, as this is a form of re-centralization.

This study, in the section dealing with devolution, addresses that gap.

### **4.3 Centripetalism**

This study distinguishes two electoral systems under centripetalism – plurality and ranked-choice voting. Plurality is the electoral system in which a voter chooses one aspirant on the ballot. The winner is the one who reaches the set winning threshold. This voting style exists in Kenya and many other countries, including Nigeria and Guyana. In Kenya, Article 138 (4) of the Constitution of Kenya 2010 sets it at 50 per cent plus one vote of all votes cast and at least 25 per cent of votes cast in at least half of the counties.

Ranked-choice voting refers to an electoral system and is used in very few countries. For example, in Northern Ireland, it is used in voting for parliamentary seats. It is used in Australia and America. Voters rank candidates in the order of preference. Often only three candidates are ranked.

#### **4.3.1 Plurality Centripetalism**

##### **4.3.1.1 Compels cross-ethnic campaigning**

Cross ethnic campaigning refers to key political players being compelled by political incentives to seek support from other ethnic groups that normally they would not seek

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<sup>842</sup> National Treasury, ‘Budget Statement 2017-2018’ ,(GOK, 30th March 2017) [http://www.treasury.go.ke/component/jdownloads/send/175-budget-statement/518-budget-statement-2017-18.html?option=com\\_jdownloads](http://www.treasury.go.ke/component/jdownloads/send/175-budget-statement/518-budget-statement-2017-18.html?option=com_jdownloads) accessed 11th Dec 2019.

<sup>843</sup> *ibid.*



support from in an ethnically divided Kenya. This is because it boosts their chances of electoral success.

The two international experts ,RE1<sup>844</sup> and RE2<sup>845</sup> ,opined that electoral systems in flourishing democracies consist of "plurality or majoritarian systems,"; "proportional representation systems," and "mixed systems". They stated that the context in which the systems are employed determines the potential therein of the occurrence of ethnic conflict in presidential elections or lack of.<sup>846</sup> In the wake of plurality systems, more so in the "first-past-the-post" (FPTP) variation, the winner (though not necessarily the absolute majority vote bearer) has the benefit of taking it all after the elections.<sup>847</sup>

The position was amplified by PC1,<sup>848</sup> PC2,<sup>849</sup> RIE1<sup>850</sup> and RIE 2<sup>851</sup> who were of the view that the article 138 of the Constitution of Kenya underpins the current political coalition between Kikuyu and Kalenjins groups. The two often fight in previous elections prior to 2013. The prevailing situation incentivized presidential elections candidates from two communities to mobilize their ethnic groups, through all means possible, to clinch the presidency. They employ ethnicity as it is an easier mobilization tool unlike class or ideology, as confirmed by PC3.<sup>852</sup>This has seen the establishment of political parties and forging of ethnic coalitions all with the sole aim of the political elites capturing political power as documented by the Kenya National Human Rights Commission in its report titled "Ethnicity and Politicization in Kenya".<sup>853</sup>

Article 138 (4) of the Kenyan Constitution of 2010 retains the "first-past-the-post" provisions though it provides for a "two-round-system" with provisions for a face-off between the winner and the first runners up in the event of no candidate meeting the requirements.<sup>854</sup>

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<sup>844</sup>RE 1- Appendix IX.

<sup>845</sup>RE 2- Appendix IX.

<sup>846</sup>ibid .

<sup>847</sup>ibid .

<sup>848</sup>PC 1- Appendix IX.

<sup>849</sup>PC 2- Appendix IX.

<sup>850</sup>RIE 1- Appendix IX.

<sup>851</sup>RIE 2- Appendix IX.

<sup>852</sup>PC 3- Appendix IX.

<sup>853</sup>Kenya National Human Rights Commission ( n 618) ch 3.

<sup>854</sup>ibid.

Various respondents had different views on the efficacy of provision with RE1,<sup>855</sup> RE2,<sup>856</sup> RE3,<sup>857</sup> PC1,<sup>858</sup> PC2,<sup>859</sup> PC3,<sup>860</sup> RIE1<sup>861</sup> and RIE2<sup>862</sup> in addressing ethnic conflict in presidential elections in Kenya. Some stated that it fostered candidates to larger ethno-regional coalition before elections

Similar sentiments were shared by FGD discussants in Kisumu,<sup>863</sup> Siaya,<sup>864</sup> Migori,<sup>865</sup> Nairobi,<sup>866</sup> Homa Bay,<sup>867</sup> Mombasa<sup>868</sup> and Kwale<sup>869</sup>. To them, Article 138 (4) encourages ethnic coalitions of almost equal strength.

The need to get cross ethnic support is captured by a respondent's view in Migori County in Kiswahili <sup>870</sup>-:

“Siku hizi mambo imebadilika katika kupiga kura, hata kama watu wanachagua mtu ambaye wanapenda kwa uchaguzi ya urais hio ni kuenda kuchoka bure. Hii ni kwa sababu makabila yake haina watu wa kutosha kupea yeye kura hawezi kushinda hicho kiti. Inabidi atafute wengine. Uchaguzi wa rais katika nchi ya Kenya umekua kama siku ya kuenda kuhesabu idadi ya watu kulingana na makabila yao.”<sup>871</sup>

(Nowadays issues have really changed as pertains to presidential elections. Even if people vote for the person that they like during elections, it's all in vain. This is because if his ethnic group does not have the numbers to assure the candidate of the position, then he cannot win. He must get other groups. Nowadays, in Kenya,

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<sup>855</sup>RE 1- Appendix IX.

<sup>856</sup>RE 2- Appendix IX.

<sup>857</sup>RE 3- Appendix IX.

<sup>858</sup>PC 1- Appendix IX.

<sup>859</sup>PC 2- Appendix IX.

<sup>860</sup>PC 3- Appendix IX.

<sup>861</sup>RIE1- Appendix IX.

<sup>862</sup>RIE2- Appendix IX.

<sup>863</sup>Kisumu- Appendix IX.

<sup>864</sup>Siaya- Appendix IX.

<sup>865</sup>Migori- Appendix IX.

<sup>866</sup>Nairobi- Appendix IX.

<sup>867</sup>Homabay- Appendix IX.

<sup>868</sup>Mombasa- Appendix IX.

<sup>869</sup>Kwale- Appendix IX.

<sup>870</sup>Migori County- Appendix IX.

<sup>871</sup> ibid .

presidential elections have been reduced to ethnic census exercises to confirm the numerical strengths of each group).<sup>872</sup>

Similar sentiments were shared by Nic Cheeseman and others in their study titled ‘Kenya’s 2017 Elections :Winner –takes –all Politics as Usual?’<sup>873</sup> They stated that ethnic-based competition had been entrenched in presidential elections in Kenya but fostered cross ethnic coalitions ,albeit targeting 50 per cent of the total possible votes.<sup>874</sup> However ,they averred that in the presidential elections, the contestation had been reduced to conducts of ethnic census.<sup>875</sup> The greater the numbers of an ethnic group in terms of domination of the country's total population, the higher the likelihood of the candidate from the group winning the presidency<sup>876</sup>. The numerical superiority of the ethnic groups thus played a core role in propelling their candidates to victory in presidential elections.<sup>877</sup>

#### **4.3.1.2 Promotes Moderation**

For the purposes of this study, moderation means the adoption of a strategy where contestants in presidential elections eschew ethnic extremism platforms in favour of moderate policies and make a preference for compromising and non-confrontational strategies over exclusive, and confrontational methods.

Three factors can cause moderation. First, once ethnic groups form parties, electoral considerations prevail as triggered by the incentives provided by law, and these groups abandon ethnic agendas in favour of vote-maximizing strategies. Secondly, fear of state repression as legitimized by law. The logic of survival necessitates that these groups avoid openly confronting the state and its coercive powers. The finally, elections in some instances may increase the salience of superordinate,national identity. This happens where centripetal systems induces correct social psychology.<sup>878</sup>

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<sup>872</sup>ibid.

<sup>873</sup> Cheeseman and others (n 196) .

<sup>874</sup>ibid.

<sup>875</sup>ibid.

<sup>876</sup>ibid.

<sup>877</sup>ibid.

<sup>878</sup>Anaid Flesken , ‘Ethnic Parties ,Ethnic Tensions?Results of an Original Elections Panel’,2018 (62) 4 American Journal of Political Science 967.

Respondents from Kericho and Nakuru stated article 138 ( 4) compelled the candidates to seek cross-ethnic support, thereby bringing communities closer. Through the union of community leaders, the voters from Kikuyu and Kalenjin communities have forged friendships and harmonious coexistence. In 2007, the respondent stated, such a provision would have prevented the ethnic conflict.<sup>879</sup> A Bomet County respondent's view was that the provision compels the candidates to form binding alliances with leaders of various communities. As such, it fosters amicable ethnic relations and unity.<sup>880</sup> Another was of the view that the provision would ensure that the communities are unified as it is impossible for a single community to secure a win on their own.<sup>881</sup>

#### **4.3.2 Negative Evaluations**

##### **4.3.2.1 Incentivises Ethnic Extremism (ethnic outbidding)**

Ethnic outbidding means the process by which aspirants for a presidential election and their key supporters compete amongst themselves for the support of a particular ethnic group resulting to ever greater demands to protect that group to the exclusion of others. It was deemed by respondents as one key feature of centripetalism as currently configured .

One respondent, PE5 was of the opinion that, on its own, centripetalism as currently configured in the constitution was inadequate. As long as voters look at the ethnic names of the presidential candidates, the provision cannot reduce ethnic conflicts.<sup>882</sup> The mechanism has made the candidates to form calculated ethnic alliances to meet the threshold as set in Article 138 (4) of the Constitution of Kenya 2010. The target 50 per cent threshold and not beyond ,and to him this was too low. The candidates do not foster cross-ethnic relations that are sufficient to embed peace in the entire country.<sup>883</sup> To him, two large communities can reach this threshold with minimal support of smaller ethnic groups hence permanently excluding some groups from power .<sup>884</sup>

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<sup>879</sup> Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>880</sup> Respondent B, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>881</sup> Focus Group Discussion, BometChepalungu Constituency, 15 January 2019- Appendix IX.

<sup>882</sup> Respondent C, Bomet County, Chepalungu Constituency, 15 January 2019- Appendix IX.

<sup>883</sup> Respondent A, Bomet County, Chepalungu Constituency, 15 January 2019- Appendix IX.

<sup>884</sup> Respondent C, Bomet County, Chepalungu Constituency, 15 January 2019- Appendix IX..

Similar sentiments were shared by RE2<sup>885</sup>, RE3<sup>886</sup>, R1E1<sup>887</sup> and RIE2<sup>888</sup> who enumerated the circumstances behind the 2013 general elections which were the first under the new constitution. They said that elites from the Kikuyu and the Kalenjin ethnic communities out-competed candidates from the other ethnic communities. The presidential candidate and his running mate from the Kikuyu and Kalenjin ethnic communities exploited their numeric strengths. They posed like peace crusaders for their communities which had borne the brunt of the post-election on conflict.

RE2 proffered that the populace, in the nick of time, remembered the pain that they had gone through during the 2007 post-election conflict and this forced them to associate mutually and vote for the common cause of “peace” .<sup>889</sup> He stated that on the other hand, the reality of the underlying issues that caused the conflict to erupt have never been addressed.<sup>890</sup> People who were uprooted from their farms have never gone back and the real reconciliation geared towards assuring harmonious co-existence has never been done.<sup>891</sup> This thus buttresses the false unity perspective just aimed at assisting presidential elections contestants achieve their objectives.<sup>892</sup>

The sentiments confirm the report of the KNHRC. It stated that the supposed unity of the Jubilee duo of Uhuru Kenyatta and William Ruto was meant to capture the minds of the voters in their ethnic enclaves.<sup>893</sup> To their communities, they preached unity and peace as the reasons for their association which was meant to show some sense of purpose to their co-ethnics. <sup>894</sup> To other parts of the country away from their ethnic groups, they campaigned on the platform of youth empowerment and generational change.<sup>895</sup> The

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<sup>885</sup> RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>886</sup> RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>887</sup> RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>888</sup> R IE1 14<sup>th</sup> January 2019 Kisumu - Appendix IX.

<sup>889</sup> R IE2 14<sup>th</sup> January 2019 Kisumu - Appendix IX.

<sup>890</sup> *ibid* .

<sup>891</sup> *ibid* .

<sup>892</sup> *ibid* .

<sup>893</sup> Kenya National Human Rights Commission (n 618) ch 4.

<sup>894</sup> *ibid* .

<sup>895</sup> *ibid* .

tactical campaigns depicted subtle policy articulation coupled with entrenched ethnic mobilization as the two-pronged approach in their campaigns.<sup>896</sup>

RE3 was of the view that the approach employed by the Jubilee duo during the 2013 campaigns augmented the position of 'first-past-the-post' as encouraging divisive ethnic politics.<sup>897</sup> It exemplified the position of having the main ethnic community groups forming parties to encourage building alliances with few smaller groups chiefly with the aim of outbidding their opponents.<sup>898</sup> The system of elections employed encouraged coalition formation not based on inclusivity but driven by the extent to which the large community groups would accommodate smaller ones with the aim potentiating them to win the elections<sup>899</sup>. The same was confirmed in the research work carried out by Michael Orwa and Charles Wafula<sup>900</sup>. It was entitled "Digital Slogans, Analogue Habits: Youth and the 2013 General Elections". The research brought forth the contrast between the impressions created by the political brand building of the Jubilee party duo.<sup>901</sup> This was with regards to the aspirations of transformation and the digital approach, whereas in the real sense exploitation of ethnicity was a core fulcrum in the campaigns.<sup>902</sup>

Despite the centripetal provisions in the constitution, focus group discussants in Nairobi stated it was ineffective.<sup>903</sup> They said that in 2013 and 2017, there was dissatisfaction by the losers hence the decision of the President and leader of the opposition to undertaking "handshake".<sup>904</sup>

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<sup>896</sup>ibid .

<sup>897</sup>RE 3 11 th March 2019 Nairobi - Appendix IX.

<sup>898</sup>ibid .

<sup>899</sup>ibid .

<sup>900</sup>Michael Orwa and Charles Wafula, 'Digital Slogans, Analogue habits: Youth and the 2013 General Elections' in Fred Otieno (ed) *New constitution, Same Old challenges: Reflections on Kenya's 2013 General Elections* (Society for International Development and URAIA Trust 2015) 190.

<sup>901</sup>ibid .

<sup>902</sup>ibid .

<sup>903</sup>Focus Group Discussion, Nairobi County, 29<sup>th</sup> January 2019- Appendix IX.

<sup>904</sup>ibid .

#### **4.3.2.2 Ranked Choice Voting**

##### **Positive Evaluations**

One international scholar, an American professor of law and politics who responded to this study, stated that Ranked Choice Voting is a complicated subject. He stated that versions of it are being adopted by various United States cities (San Francisco and Oakland, for example) and even states (Maine). He agreed that it should generally have positive effects on intergroup politics. This is because it encourages presidential elections contestants to exchange second preferences. He said that in Australia, it has had centripetal effects for a century. He stated that in San Francisco, it produced much less contentious election contests as candidates did not want to offend supporters of their opponents, because they were hoping to get their second or third preferences. He informed the study that, in the USA, it has been proposed to reduce polarisation and indeed New York state did adopt it recently.

He stated that he had not been to Kenya in many years, though he was invited to help the Committee of Experts when they were working on the 2010 Constitution. He said he had followed Kenya through writings about its politics for a long time and recently researched its constitutional process. He gave possible disadvantages of it for Kenya. It requires a complicated ballot for voters to fill in; if no candidate receives a majority of first preferences, it will require a count away from the polls, which voters may suspect can be rigged.<sup>905</sup>

He stated that if one candidate has a substantial lead over others in first preferences, but after several counts loses the election because others had more second and third preferences, that disappointed candidate and his or her followers may claim the election was illegitimate. This is because under the first-past-the-post system, that candidate would have been the clear winner. He stated that most of the time, the leader on first preferences, even if short of set threshold wins ranked choice elections on later counts. Sometimes that candidate does not win. When that happens, presidential elections candidates and their voters have to understand in advance that this result can happen and is not wrong.

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<sup>905</sup> In a fully automated election, may this can be remedied. Automation comes with costs. In chapter 6 of this study, further research on cost of Ranked Choice Voting in Kenya has been proposed.

The second international specialist in constitutional engineering for ethnically divided society .He is a dean of a faculty of political science in an Australian University . He stated that Kenyan presidential elections are certainly an interesting case study for those interested in ways to ameliorate ethnic conflict. He stated that he did assume that the requirement that winning candidates must gain a spread of votes across the country was still in place(the author responded in affirmative –Article 138 (4) of the Constitution of Kenya 2010).He stated that this requirement is often seen as being a (less effective) way of doing what the Ranked Choice Voting seeks to do, which is to ensure that winning candidates must gain broad support and not rely on only one group for their victory.

The students from Catholic University of Eastern Africa stated that one key merit of this electoral system is its ability to do away with the necessity of a runoff. (This is also referred to as instant runoff system). It can ensure that the desired margin of at least 18per centbetween the victor and second-best contestant in presidential elections in Kenya is achieved, depending on how it is designed in the Constitution. Coalitions of consociational nature can achieve this supermajority win as it happened in 2002 elections in Kenya, but they tend to be unstable like other consociational mechanisms.<sup>906</sup>

This is explained by Benjamin Reilly in his paper ‘Cross-Ethnic Voting: An Index of Centripetal Electoral Systems’. He states that it does compel serious candidates to seek cross-ethnic support since every candidate requires second and third choice votes from other groups to boost his or her chances of winning, apart from the first choice votes which may come from his co-ethnics.<sup>907</sup>This then causes presidential elections candidates to moderate their rhetoric.

Correspondingly, this cures four issues identified by respondents in chapter three of this study as being a link between presidential elections and ethnic conflict in Kenya. Firstly,negative campaigns since contestants will need to moderate their rhetoric instead of attacking their opponents to increase their chances of winning votes across communities.

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<sup>906</sup>See Nick Cheeseman, ‘The Kenyan Elections of 2007: An Introduction’, (2008) 2 *Journal of Eastern African Studies* 166.

<sup>907</sup>Benjamin Reilley, ‘Cross-Ethnic Voting: An Index of Centripetal Electoral Systems’,(2020)1 *Government and Opposition* / Cambridge University Press 1,19.



Secondly, stiff competition is eliminated since ranked-choice voting, with its instant runoff feature, eliminates the need for second-round voting which potentially causes stiff competition. This is because the top two candidates that face off in the runoff may cause stiff campaigns. Thirdly, by creating incentives that reward moderation in presidential contests as opposed to hate-mongering, it addresses the issue of lack of nationalism among voters. Lastly, vernacular radios and their editorial policies often reflect social realities. A shift in voter behavior, which may occur as a result of ranked-choice voting, may as well cause a shift in vernacular radios policies. The only outstanding issue would be the winner –take –all linkage. This may have to be addressed separately.

Students' evaluation of the system was important. However, Monkey Cage did a study that illustrated how young people are known to be less enthusiastic in political voting. This is no matter who is vying and often their overarching political views do not mirror overall societal trends.<sup>908</sup> They did state that the problem is in many other established democracies, irrespective of whether “they tweet or blog, or what the issues may be”.<sup>909</sup>

The students gave the following evaluations:

#### **4.3.3 Positive evaluations**

##### **4.3.3.1 Reflects the will of the people**

All the participants save one, preferred ranked-choice voting. SPI 1, 2, 3, 4 stated that it reflected life realities better (doing odds in respect to several choices) as opposed to a binary choice presented by the first past the post scenario. SP8 stated it moderates "selfishness", in that it forces one to step into their neighbours shoes and see things from his or her reality.

##### **4.3.3.2 Less Partisanship**

It reduces and ameliorates the partisan nature of contestations. This is a crucial element of curing ethnic conflict during elections.

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<sup>908</sup> See Monkey Cage, *Is voting for young people?* (1st Edition, Routledge 2015).

<sup>909</sup> *ibid.*

#### **4.3.4 Negative Evaluations**

##### **4.3.4.1 Novel and Confusing**

SP10 stated that it is cumbersome and complicated. He doubted if it can work where there only two choices. It may cause low voter turnout.

##### **4.3.4.2 Potentially costly**

RE1 stated that it involves extra steps, for instance, data entry clerks.<sup>910</sup> This means more clerks will be employed, and extra data be stored. Technology may be employed to make the system work.

#### **4.3.5 National Building Measures**

##### **4.3.5.1 Positive Evaluations**

##### **4.3.5.2 Promotes ethnic cohesion in the long run**

One respondent was of the view that national building measures can greatly reduce the animosity between various ethnic groups.<sup>911</sup> Through socialization, people would demystify the stereotypes about other communities and this would create a community of friendship.<sup>912</sup> National building measures lessen the hatred between the various ethnic groups as it instills tolerance.<sup>913</sup>

RE2 buttressed the position of the 2010 Constitution having expressive provisions detailing how public appointments should be made to deter patronage, nepotism, cronyism and ethnic favouritism in public appointments.<sup>914</sup> He was of the view that public services were required to be made available nationally.<sup>915</sup> The Constitution equally required the cabinet to be reflective of the ethnic diversity in the country.<sup>916</sup> He held the view that nationalism could be built if all ethnic groups realize optimal training opportunities, access to public service appointments and opportunities for training and related programmes.<sup>917</sup> He stated

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<sup>910</sup>RE 1 26<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>911</sup>Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>912</sup> Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX .

<sup>913</sup>Respondent B, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>914</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>915</sup>ibid .

<sup>916</sup>ibid .

<sup>917</sup>ibid .

that vetting of all the public appointments was put in place as a provision to assure merit in public appointments by way of parliamentary and county assembly scrutiny.<sup>918</sup> This was confirmed by Jared Okello in his article entitled, “Ensure equity in public appointments.”<sup>919</sup>

The Constitution identifies ethnic diversity as a key factor in assuring that the public service is reflective of the country’s ethnic composition. The National Cohesion and Integration Commission (NCIC) Act (2008) stipulates that public offices "should not have more than one-third of its staff from same ethnic community.”<sup>920</sup> These constitutional requirements are meant to foster nation-building by having optimal representation of all ethnic groups in public appointments .<sup>921</sup> This is not what is on the ground as confirmed by the NCIC reports which depict public appointments as being devoid of merit. Public appointments often act as tools for ethnic rewards for allies although Kenyan constitutional provisions that demand ethnic equity have partially worked.<sup>922</sup>

The use of a national language is geared towards bringing people together. It can reduce ethnicity, as people are able to interact easily and conduct trade with people from other parts of the country.<sup>923</sup> A respondent from Siaya informed the study that use of quotas in employment can enable people to work in different parts of the country.<sup>924</sup>

Article 7 of the Constitution is clear that Kiswahili and English are co-official languages. Under the same article, the state is required to promote and protect the diversity of language of the people of Kenya.

#### **4.3.6 Adheres to Human Rights Tenets**

The experts informed this study that unlike consociational mechanisms, nation-building adheres to human rights principles of equality of persons and ethnic groups and political rights of freedom of choosing a leader.

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<sup>918</sup>ibid .

<sup>919</sup>See Jared Okello, ‘Ensure Equity in Public Appointments’, *The Standard* (Nairobi, 22<sup>nd</sup> January 2015) <<https://www.standardmedia.co.ke/article/2000148739/ensure-equity-in-public-appointments>> accessed 9 November 2019.

<sup>920</sup>Act No 12 of 2008, s 7 (2).

<sup>921</sup>ibid.

<sup>922</sup> Rebecca Simson, ‘Ethnic (in)equality in the public services of Kenya and Uganda’, (2019) 118(470) *African Affairs* 75–100.

<sup>923</sup>Respondent C, Siaya County, 14 January 2019- Appendix IX.

<sup>924</sup>Respondent C, Siaya County, 14 January 2019- Appendix IX.

#### 4.3.6.1 Negative Evaluations

#### 4.3.6.2 Ineffective

Having been implemented since Kenya's independence in 1963; and notwithstanding rising levels of education and an expanded middle class, National building measures were viewed as being ineffective in reducing ethnic conflicts by respondents. One respondent stated that "the middle class are the most ethnically minded set of Kenyans."<sup>925</sup> This affirms Nic Cheeseman's critique of Barrington Moore's expression "no bourgeoisie, no democracy"-the idea that an educated and prosperous class ought to exist in a society for democracy to be embedded.<sup>926</sup>

His paper used Kenya as a case study to examine democratic attitudes of its middle class. He stated that an analysis of Afro barometer survey data illustrated that the middle class was likely to hold pro-democratic attitudes. This affirmed Moore's theory that for some African countries, contemporary demographic changes may improve democratic consolidation. However, Nic showed that qualitative evidence from the Kenyan 2013 general elections challenges the resilience of these attitudes. His study on Kenya's middle class showed that it may be more inclined to democratic attitudes than other less well-off classes, but class continues to intersect with ethnicity, and its salience may likely wane as a consequence.<sup>927</sup>

Even if nation-building measures are implemented fully, there would be no instantaneous results but gradual changes in coming elections.<sup>928</sup>

RE2 was of the view that despite nation-building measures intending to reengineer change in the public institutions, they had failed. He claimed that in some institutions and offices people still use vernacular language instead of the national language.<sup>929</sup> The issue of localization of public institutions equally brought to the fore the aspect of resistance by

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<sup>925</sup> Respondent B, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>926</sup> Nic Cheeseman, 'Does the African Middle Class Defend Democracy?', (2014) UNU/WIDER, Helsinki (WIDER Working Paper) <https://www.wider.unu.edu/publication/does-african-middle-class-defend-democracy> accessed 1 Jan 2020 .

<sup>927</sup> *ibid* .

<sup>928</sup> Respondent D, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>929</sup> RE 2 19<sup>th</sup> February 2019 Kiambu County.

locals to embrace other ethnic communities and cultures.<sup>930</sup> Quotas have failed in the employment sector because the county officials employ their friends and relatives.<sup>931</sup> This was captured in the Auditor General's report of 2017 -2018 which cited all the counties as having failed the test of ethnic balance in employment and some excelling in nepotism while employing staff.<sup>932</sup> He stated that the law on inter county transfers should be enacted so that counties do not become ethnic enclaves and a cohesion law should be enforced.<sup>933</sup>

RE2 stated that the measures are ineffective as the elites in society see an advantage in mobilizing people along ethnic lines.<sup>934</sup> The elites take their children abroad for schooling and invest together so they do not hate each other at a personal level.<sup>935</sup> Local media has destroyed national building measures and respondents said they should be compelled to do some Swahili programmes.<sup>936</sup>

#### **4.4. Devolution**

Devolution is appreciated as a constitutional mechanism to take charge of the country's diversity and assure equitable development.<sup>937</sup> It first appears in Kenyan Constitution as a preambular value.<sup>938</sup> The recognition gives mandate to the state "to acknowledge the ethnic plurality that characterises the society it seeks to govern."<sup>939</sup>

RE1, RE2,<sup>940</sup> RE3<sup>941</sup> and RE4<sup>942</sup> stated that although the Constitution does expressly give institutional recognition of ethnic diversity, in the Kenyan context it can institutionalize ethnicity.<sup>943</sup> Devolution does enable various ethnic communities to thrive at the county levels. RE2 stated that the constitution does not enable creation of county units along ethnic

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<sup>930</sup>See Lydia Nyawira, '377 Placements Secured in Extra County Schools', *The Standard* (Nairobi 3 May 2015) <<https://www.standardmedia.co.ke/article/2000150305/377-placements-secured-in-extra-nyeri-county-schools>> accessed 9 November 2019.

<sup>931</sup>Respondent D, Siaya County, 15 January 2019- Appendix IX.

<sup>932</sup>See Auditor General, '2017-2018 County Audit Reports', (*Government of Kenya*, 2018)70.

<sup>933</sup> RE 2 Interview, 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>934</sup> RE 2 Interview, 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>935</sup> RE 2 Interview, 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>936</sup> RE 2 Interview, 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>937</sup> Constitution of Kenya 2010, Art 174.

<sup>938</sup>ibid, Preamble.

<sup>939</sup>ibid.

<sup>940</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>941</sup>RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>942</sup>RE 4 18<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>943</sup> RE 1 26<sup>th</sup> January 2019 Nairobi - Appendix IX.

boundaries.<sup>944</sup> He stated that the constitution calls for unity with a pitch for Kenyans to "live in peace and unity as one indivisible sovereign nation."<sup>945</sup> This provision shows the extent that the constitution places emphasis on unity on the national fabric.<sup>946</sup> The Constitution appreciates diversity regardless of ethnicity.<sup>947</sup> This accorded the constitution the challenge of not having very clear cut provisions for the "institutional accommodation of ethnic diversity".<sup>948</sup>

RE4 was of the view that despite the salient provisions, the Constitution impacts ethnic conflict both positively and negatively through devolution.<sup>949</sup> He stated that devolution assures inclusion into state organs all ethnic communities but it can embed ethnic based political and social activities.<sup>950</sup> He buttressed the position of devolution as the principal tool with regards to the institutional mechanisms that the Constitution has employed for the purpose.<sup>951</sup> He articulated the constitutional objectives of devolution which entail "recognizing the diversity of the Kenyan people and protecting and promoting the interests of minorities and marginalized communities."<sup>952</sup> The study sought to find out the extent to which devolution had affected ethnic conflict in presidential elections in Kenya.

#### **4.4.1 Positive Evaluations**

##### **4.4.1.1 Embeds Ethnic Minorities into State Structures**

One constant complaint in Kenya (like in many ethnically divided societies) is the grievance of exclusion from state structures of some ethnic groups (often minority) by powerful ethnic groups (often large or majority). Upon devolution, ethnic groups that are minority in respect to the entire state, become majority at the sub state level and ultimately get embedded into state structures. All focus groups affirmed that devolution in Kenya had enabled promotion of ethnic peace by inserting ethnic groups into state power structures.

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<sup>944</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County- Appendix IX.

<sup>945</sup>ibid.

<sup>946</sup>ibid.

<sup>947</sup>ibid.

<sup>948</sup>ibid.

<sup>949</sup>RE 4 18<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>950</sup>ibid.

<sup>951</sup>ibid.

<sup>952</sup>ibid.

Michelle and Cornell have argued that in Kenya devolution boosted ethnic peace through inclusion of minorities into state structures.<sup>953</sup> This argument about ethnic inclusion was escalated by Forrest Stuart and others in “Legal Control of Marginal Groups ”.<sup>954</sup> They stated that devolution allows inclusion and participation by marginal ethnic groups.

Devolution is a critical ingredient in spurring economic development. It allows public participation by way of ethnic inclusion. This grows democracies, as explained by Lyon in the works entitled “Devolution and the Strengthening of Consensual, Participatory Local Democracy in the Republic of Macedonia.”<sup>955</sup> Perceptions of devolution as an enabler of greater inclusion led to an accelerated reduction of conflicts and the exercise of groups’ inherent political rights.<sup>956</sup>

The same was evident in United Kingdom. Peter Leyland states that devolution was adopted in UK in 1998 as a pragmatic remedy for grievances of exclusion by Scotland, Wales, and Northern Ireland communities.<sup>957</sup> Similar situation holds in Kenya. Governors now act in concert to defend local interests, as explained by Nic Cheeseman and others.<sup>958</sup> The longstanding Kurdish conflict was equally reduced by the adoption of devolution in Turkey, as posited by Yusoff, Sarjoon, and Hassan.<sup>959</sup>

RE1<sup>960</sup>, RE2<sup>961</sup>, RE3<sup>962</sup>, RE4<sup>963</sup>, RIE1<sup>964</sup>, and RIE2<sup>965</sup> posited that devolution, together with constant peace (and nation-building) messages partially addressed feelings of marginalization among ethnic groups. They stated that desire to avoid a repeat of 2007

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<sup>953</sup> Michelle D’Arcy and Agnes Cornell, ‘Devolution and corruption in Kenya: Everyone’s turn to eat?’, (2016)115 (4590) *African Affairs* 246,272.

<sup>954</sup> Forrest Stuart and others, ‘Legal Control of Marginal Groups’, (2015) 11 *Annual Review of Law and Social Science* 234-254.

<sup>955</sup> Lyon Aisling, ‘Devolution and the Strengthening of Consensual, Participatory Local Democracy in the Republic of Macedonia’ (2015)22(1) *Democratization* 157.

<sup>956</sup> *ibid.*

<sup>957</sup> Leyland (n 300).

<sup>958</sup> Nic Cheeseman and others, ‘Decentralisation in Kenya: the governance of governors’, (2016) 54 (1) *The Journal of Modern African Studies* 1-35.

<sup>959</sup> See Mohammed AYusoff and others, ‘Devolution as a Tool for Ethnic Diversity: A Conceptual Analysis’ (2016) 9(1) *Journal of Politics and Law*.

<sup>960</sup> RE 1 26<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>961</sup> RE 2 19<sup>th</sup> February 2019 Kiambu County - Appendix IX.

<sup>962</sup> RE 3 11<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>963</sup> RE 4 18<sup>th</sup> March 2019 Nairobi - Appendix IX.

<sup>964</sup> R IE 1 9<sup>th</sup> January 2019 Kiambu - Appendix IX.

<sup>965</sup> R IE 2 14<sup>th</sup> January 2019 Kisumu - Appendix IX.

ethnic conflict spurred constitutional reform process which birthed the new constitution 2010. Though not completely providing a remedy, respondents stated that devolution, peace and nation-building messages aided in reduction of ethnic conflict surrounding presidential elections of 2013 and 2017.<sup>966</sup> The sentiments confirmed findings of experiment on the impact of peace messaging on voting behavior by Jorge Gallego and others<sup>967</sup>. Further, it confirms Gabrielle Lynch and others findings about impact of peace messages and devolution in promoting peace during 2013 and 2017 elections.<sup>968</sup>

RE2<sup>969</sup> and RE4<sup>970</sup> were of the view that devolution had done some good work of weakening focus on national presidential elections (stealing some thunder) thus reducing the potential of ethnic conflict. Governor elections now share some thunder, they stated. Certain ethnic groups in counties like Nakuru focus on local politics more.<sup>971</sup> They posited that this paradigm shift as regards to focus is positive.<sup>972</sup>

Evidence towards the same was gathered during the focus group discussions with the participants in Nakuru and Migori counties. The participants stated their preferred candidate for presidential elections has lost twice in 2013 and 2017 but local posts provided by devolution assuage their bitterness.<sup>973</sup> This was positive to them.<sup>974</sup> This forced communities to mutually associate owing to the realization that they shared some political power unlike every community coveted presidency.<sup>975</sup> Similar evidence sufficed in Migori County between the Luo and Kuria ethnic communities.<sup>976</sup> The predominant Luo ethnic group was forced to dangle the position of senator to the minority Kuria and an assurance

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<sup>966</sup>ibid.

<sup>967</sup> Jorge Gallego and others , 'Tweeting for peace: Experimental evidence from the 2016 Colombian Plebiscite', (2019) 62 Electoral Studies 777.

<sup>968</sup> Gabrielle Lynch, Nic Cheeseman, Justin Willis, 'From peace campaigns to peaceocracy: Elections, order and authority in Africa', (2019) 118 (473) African Affairs 603–627.

<sup>969</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County- Appendix IX.

<sup>970</sup>RE 4 18<sup>th</sup> March 2019 Nairobi- Appendix IX.

<sup>971</sup>ibid.

<sup>972</sup>ibid.

<sup>973</sup>FGD Nakuru - Appendix IX.

<sup>974</sup>ibid.

<sup>975</sup>ibid.

<sup>976</sup>FGD Migori - Appendix IX.



of several county executive committee member positions in exchange of votes by the leading candidates from different political parties.<sup>977</sup>

Both RE1<sup>978</sup> and RE2<sup>979</sup> ranked “strengthened devolution” as being the best mechanism in addressing ethnic conflict. In one of the respondents’ opinion, devolution has reduced ethnic conflicts by bringing development closer to the people.<sup>980</sup> People are no longer drawn towards the presidency as it used to be since the county governments are closer to them.<sup>981</sup> The work of the county governments is more visible compared to that of the national government.<sup>982</sup> The respondent claimed that the provision on employing county workers from other ethnic groups reduces ethnicity.<sup>983</sup>

#### **4.4.1.2 Reduced Appeal towards the Presidency**

Respondents stated that devolution had reduced the political ambitions of some leaders from the presidency to county heads. This has eased the pressure of having many presidential candidates.<sup>984</sup> If devolution is effective, people will lessen their interest in the presidency and focus on the gubernatorial seat.<sup>985</sup>

#### **4.4.1.3 Promotes Equitable Development**

Focus groups asserted that presidential elections in Kenya were underpinned by complaints of ethnic marginalization.

Respondents from Mombasa and Kwale pointed that devolution had muted secessionist undertones in the two counties. This explains why a Jubilee governor had been re-elected in Kwale, an opposition leaning coastal county in 2017.

They stated that it had markedly transformed public goods and services provision. In so doing, devolution in Kenya had substantially addressed the causes of inter-ethnic conflicts.

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<sup>977</sup>ibid.

<sup>978</sup>RE 1 26<sup>th</sup> January 2019 Nairobi - Appendix IX.

<sup>979</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County- Appendix IX.

<sup>980</sup>Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>981</sup>Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>982</sup>Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>983</sup>Respondent C, Kisumu County, 16 January 2019- Appendix IX.

<sup>984</sup>Respondent B Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>985</sup>Respondent A, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

The respondent believes that devolution is a good idea for the country. This is because it encourages development in every part of the country. Before devolution, the President would decide on his own where development goes in the country.<sup>986</sup> It brought resources closer to the people. One expert stated that devolution is fundamental but counties should receive more money from the national revenue.<sup>987</sup>

#### **4.4.2 Negative Evaluations**

##### **4.4.2.1 Ineffective**

Respondents from Nairobi pointed out that despite devolution, 2013 and 2017 presidential elections were engulfed by ethnic conflict. They said this was because governors are beholden to presidential candidates and resources devolved so far were insufficient.<sup>988</sup> They stated that governors consult their ethnic-based political party heads in the running of county affairs.<sup>989</sup> According to them, devolution had not lured ethnic elites away from national seats focus.<sup>990</sup>

##### **4.4.2.2 Empowers Negatively Ethnic Minorities in their Fight with the Centre**

Devolution, as an institutional mechanism for the political inclusion of ethnic communities, has a territorial aspect. It entails the structuring of the sub-national boundaries of a country in a manner allowing the territorial accommodation of various ethnic communities of a country. The Constitution thus provides for the creation of 47 counties, spread across Kenya, as the sub-national units of the country. The Kenyan Constitution does not expressly provide that ethnicity should be a factor that informs the demarcation of the boundaries of the counties. The boundaries of the counties were however, demarcated along the boundaries of the former districts. These were based mainly on the colonial districts that were demarcated along ethnic lines. The boundaries of the 47 counties that were finally adopted correspond to the settlement pattern of several ethnic communities of the country.

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<sup>986</sup>Respondent A, Kisumu County, 16 January 2019- Appendix IX.

<sup>987</sup>RE 2 19<sup>th</sup> February 2019 Kiambu County- Appendix IX.

<sup>988</sup>Respondent B, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>989</sup>Respondent B, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>990</sup>Respondent B, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

One respondent stated that devolution has increased negative ethnicity by dividing the country into small ethnic units.<sup>991</sup> The respondents stated that people are now selfishly concerned about the welfare of their own counties instead of the unity of the whole country.<sup>992</sup> One respondent mentioned three counties, namely Turkana, Nandi, and Samburu<sup>993</sup> as counties whose names depict the ethnic communities that are expected to live there. According to them, under the cover of ethnic solidarity, the levels of corruption has increased.<sup>994</sup> This money partially finds its way back to the centre –as part of rents paid to powerful owners of ethnic parties which fuels conflict at presidential contest level. The Kenyan devolved system divides the ethnic communities with large populations into several counties. The division of the larger ethnic communities into several counties is meant to territorially accommodate the ethnic diversity of Kenyans without balkanizing the country into ethnic enclaves. The end result of this arrangement is that ethnic minority elites use corruption money to compete for presidential elections. This intensifies conflict during presidential elections.

#### **4.5. Large Communities are Net losers Comparatively**

Expert ER2 was of the view devolution has not benefitted large ethnic groups as compared with smaller groups. This means large ethnic groups retains the incentive to compete for the presidency. Kiambu, Nairobi, Kisumu and Migori focus group discussants proposed more money should be devolved with more weight being given to population density to make it effective.

The Constitution of Kenya 2010 provides for equitable sharing of revenues raised nationally among the national and county governments.<sup>995</sup> The basis used for sharing revenue among county governments for financial year 2012/2013; 2013/2014; 2014/2015 and 2015/16 were five parameters, -population, poverty, land area, basic equal share, and fiscal responsibility.<sup>996</sup> The essence of the funds' transfer as envisaged in the ideals of

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<sup>991</sup> Respondent C, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>992</sup> Respondent C, Bomet County, Chepalungu Constituency, 14 January 2019- Appendix IX.

<sup>993</sup> Respondent A, Nakuru County, Naivasha Constituency, 16 January 2019- Appendix IX.

<sup>994</sup> Respondent B, Siaya County, 15 January 2019- Appendix IX.

<sup>995</sup> Constitution of Kenya 2010, Art 202(1).

<sup>996</sup> See Commission for Revenue Allocation, '2018 Annual Report', (CRA, 3 June 2019) <https://www.crakenya.org> accessed 18<sup>th</sup> Dec 2019.

devolution were closing the vertical fiscal imbalance, and equalizing fiscal conditions as idealized by the National Assembly in November 2012.

In accordance with powers granted by Article 216 (2 ), Commission for Revenue Allocation in 2018 proposed a review of the parameters of sharing county funds among counties .<sup>997</sup> It recommended various new parameters. They include the county’s terrain, population density in the counties, urbanization levels in the counties and fiscal absorption capacity of counties.<sup>998</sup> If adopted, these measures may favour counties where large communities reside.<sup>999</sup> The weight given to population will be enhanced.<sup>1000</sup>

Since this second generation formulae is not yet adopted, this study sought to analyse the present formulae to ascertain if indeed large ethnic groups are net losers as compared to counties where small ethnic groups reside.

The study sought to interrogate the resource allocations in the counties based on per capita allocations.

**Table 23: Top Ten Counties In Terms Of Resources Allocation & Per capita Allocation of the Year 2018/2019**

No	County	Allocation	Per capita	Percentage allocation per county
1	Lamu	4,288,378,109	42,234	6.3%
2	Isiolo	4,735,572,299	33,048	7.01 %
3	TanaRiver	6,497,229,663	27,063	9.6%
4	Marsabit	7,870,538,914	27,031	11.6%
5	Samburu	5,179,777,289	23,129	7.6%
6	Taita Taveta	4,771,609,264	16,763	7.07%
7	Wajir	9,479,629,840	14,321	14.04 %
8	Turkana	11,739,361,181	13,724	17.3%
9	Garrissa	8,268,735,255	13,271	12.25%
10	Kwale	8,400,144,122	12,925	12.44%
	Total	67, 479, 489	223,509	100%

Source: Author, (2019)

<sup>997</sup> ibid .

<sup>998</sup> ibid.

<sup>999</sup> Mwangi S. Kimenyi, *Kenya Devolution and Resource Sharing Calculator* ,( Foresight Africa Brooking’s publications 2018) 34.

<sup>1000</sup> ibid.

Note :The above cited counties are predominantly inhabited by small ethnic groups like Borana ,Somali,Swahili ,Samburu and Turkana .

The study established that the county with the highest per capita allocation going by the population was Lamu with an assignment of Ksh 42, 234 per resident. It was followed by Isiolo and Tana River, as evidenced by the table above. The basis of revenue sharing is anchored on Article 202(1).<sup>1001</sup> It provides for equitable sharing of revenues raised nationally among the national and county governments.<sup>1002</sup>

Going by the deductions of the study, the counties with the highest per capita allocation are populated by ethnic groups that do not offer candidates with a viable chance of winning presidential elections .

This may demonstrate devolution as currently constituted has not remedied ethnic competition during presidential elections. This situation is positive though .Fruits of devolution now accrue to the previously marginalized ethnic groups. Franzisca Zanker and others shared similar sentiments in a study titled ‘Power, Peace, and Space in Africa: Revisiting Territorial Power Sharing’.<sup>1003</sup> They enumerated how the marginalized ethnic groups had received a shot in the arm and much appreciated the allocations made to them as regards access to equitable resources.<sup>1004</sup>

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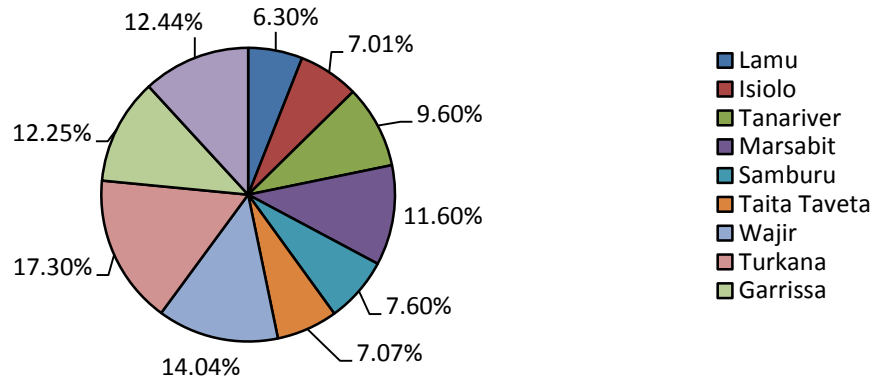
<sup>1001</sup> Constitution of Kenya 2010, Art 202(1).

<sup>1002</sup> *ibid.*

<sup>1003</sup> Franzisca Zanker and others, ‘Power, peace, and space in Africa: Revisiting territorial power sharing’,( 2015) 114 (453) *African Affairs* 72–91.

<sup>1004</sup> *ibid.*

**Percentage Distribution Of Resource Allocation In The Top Ten Counties with regards to per Capita Allocation**



Source: Author, (2019)

**Figure 2: Percentage Distribution of Resource Allocation in the Top Ten counties with regards to per Capita Allocation**

**Table 24: Top Ten Counties In Terms Of Resources Allocation and the Distribution per Number of Registered Voters**

No	County	Allocation(in Ksh)	Allocation Per Registered Voter
1	Lamu	4,288,378,109	61, 459
2	Isiolo	4,735,572,299	62, 857
3	TanaRiver	6,497,229,663	84,241
4	Marsabit	7,870,538,914	55,540
5	Samburu	5,179,777,289	62,567
6	Taita Taveta	4,771,609,264	30,643
7	Wajir	9,479,629,840	58,192
8	Turkana	11,739,361,181	61,322
9	Garissa	8,268,735,255	50,619
10	Kwale	8,400,144,122	29, 889
Totals		67, 479 , 489, 850	557, 329

Source: Author, (2019)

An interrogation of the voter registration numbers gave similar trends with regards to resource allocation per registered voters. The Constitution of Kenya 2010 did not in express terms embed a static revenue sharing formulae. This may have been deliberate on the part of its drafters probably intended for future legislative or judicial intervention. Martin Loughlin, in his article titled 'The Silences of Constitutions', has explained the roles performed by constitutional gaps, silences, and abeyances. He views modern constitutions can be 'a framework for continuing political negotiation' and or as 'facilitator of an evolving administrative order'.<sup>1005</sup>

**Table 25: Bottom Ten Counties In Terms Of Resources Allocation and Per Capita Allocation**

No	County	Allocation(in Ksh)	Per capita allocation	Percentage Per County
1	Nairobi	16,713,531,609	5,326	16.3%
2	Meru	9,276,447,545	6,840	9.5%
3	Kakamega	12,040,517,108	7,250	11.7%
4	Nakuru	11,772,324,751	7,342	11.4%
5	Busia	10,112,060,756	7,354	9.8%
6	Murang'a	7,020,842,493	7,449	6.8%
7	Kiambu	12,040,517,108	7,771	11.7%
8	Homabay	7,550,142,358	7,834	7.4%
9	Kisii	9,137,672,046	7,930	8.9%
10	Siaya	6,732,591,194	7,993	6.5%
Totals		102, 396, 646, 968	73, 089	100%

Source: Author, (2019)

<sup>1005</sup> Martin Loughlin, 'The Silences of Constitutions', (2018) 16 ( 3) International Journal of Constitutional Law, Volume 922-935.

Note :These counties are mainly inhabited by the large ethnic groups like Luo (Siaya and Homa Bay );Kikuyu (Nakuru,Muranga and Kiambu);Luhya (Busia and Kakamega);Kikuyu ,Luhya and Luo (Nairobi);Meru (Meru).

The study established that county resource distribution in the country has not favoured counties where large ethnic groups reside .<sup>1006</sup> The population statistics in the counties mirror a situation of densely populated counties having the stiffest competition for the presidency .<sup>1007</sup> The current President of Kenya is from Kiambu County, which is a densely populated area inhabited by the Kikuyu community. The per capita resource allocation per resident in the county is Ksh 7,771 as compared to Lamu at Ksh 42,234. The difference may be a factor igniting the Kiambu residents' passions for the presidency as an allure for enhanced resource allocation from the national government. The same situation holds for counties like Murang'a, Meru, and Nakuru, which were strong support bases for the current President. Similar scenarios were replicated in Homabay, Kisii, and Siaya, which were formidable support bases for the leading opposition candidate. Yash Pal Ghai, in a book chapter titled 'Devolution in Kenya :Background and Objectives',has affirmed that whereas devolution differs with Majimboism, demands for both historically have been underpinned by ethnic politics which as well fuels presidential contests in Kenya.<sup>1008</sup>

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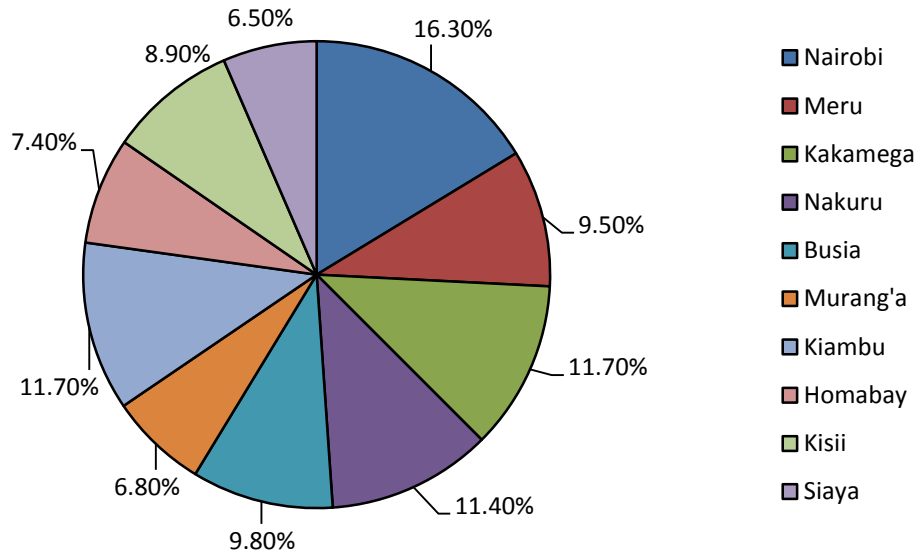
<sup>1006</sup>Commission for Revenue Allocation ,*Report On The Allocation Of Resources To All Counties In 2018/2019*, (Government of Kenya , Nairobi, 2018) ch 2.

<sup>1007</sup> *ibid.*

<sup>1008</sup> Yash Pal Ghai , 'Devolution in Kenya :Background and Objectives' in Yash Pal Ghai and Nico Steytler (eds) , *Kenya –South Africa Dialogue on Devolution*,(Juta Publishers ,2015)ch 3.



**Percentage Allocation For The Ten Counties Which Receive The Least Resources**



**Source: Author, (2019)**

**Figure 3: Percentage allocation for the ten counties**

**Table 26: Bottom Ten Counties In Terms Of Resources Allocation and the Distribution per Number of Registered Voters of the Year 2018/2019**

No	County	Allocation(in Ksh)	Number of registered voters	Allocation per Registered voter
1	Nairobi	16,713,531,609	2, 250,853	5,326
2	Meru	9,276,447,545	702, 480	6,840
3	Kakamega	12,040,517,108	743, 736	7,250
4	Nakuru	11,772,324,751	949, 618	7,342
5	Busia	10,112,060,756	351, 048	7,354
6	Murang'a	7,020,842,493	587, 126	7,449
7	Kiambu	12,040,517,108	1, 180, 920	7,771
8	Homabay	7,550,142,358	476, 875	7,834
9	Kisii	9,137,672,046	546, 580	7,930
10	Siaya	6,732,591,194	457, 953	7,993
Totals		102, 396, 646, 969	8, 247, 189	73,089

Source: Author, (2019)

Similar situations were replicated in the incidence of registered voters. The counties with the highest numbers of registered voters still had the undoing of posting the least allocations in terms of the per capita allocations per voter. Evidence from IEBC records shows Kiambu and Siaya counties, which are captured in the list of counties with low per capita resource allocations, produced formidable presidential candidates in the 2017 general elections<sup>1009</sup>.

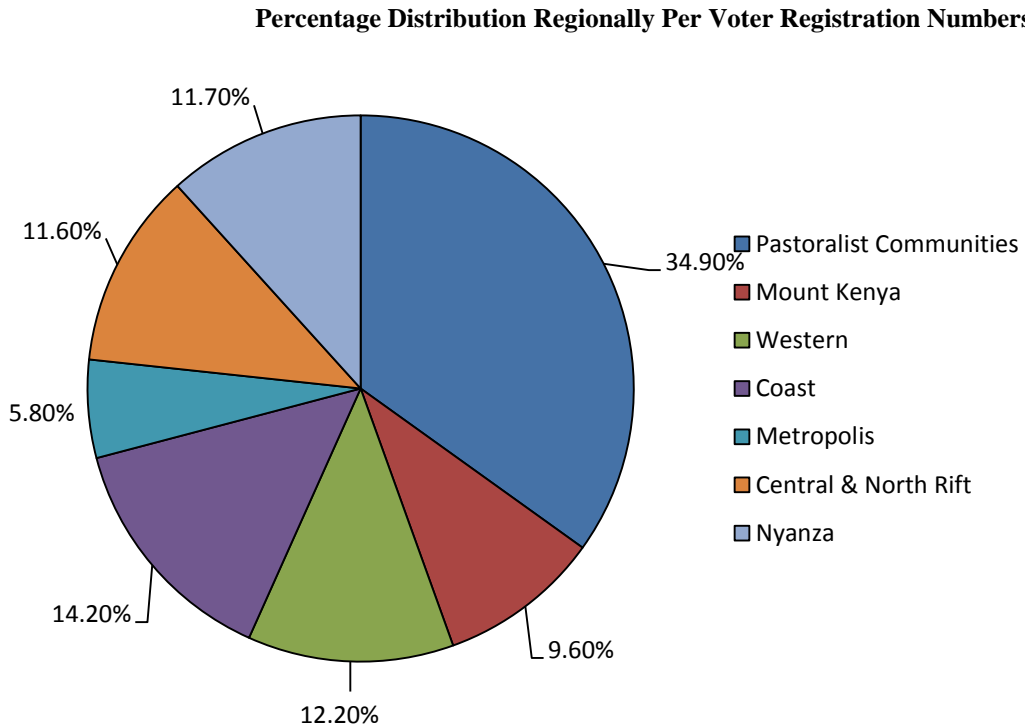
<sup>1009</sup> IEBC, available online in its website . IEBC, ' Downloads - List of Presidential Candidates for 8th August 2017 General elections'(2018) <https://www.iebc.or.ke> accessed 1 Jan 2010.

**Table 27: Regional Distribution of Resources Allocation and the Distribution per Number of Registered Voters of the Year 2018/2019**

No	Region	Allocation(in Ksh)	Number of registered voters	Allocation per Registered voter	Percentage
1	Pastoralist communities Mandera, Wajir, Garrissa, Marsabit, Isiolo, Samburu, West Pokot, Laikipia Turkana, Baringo	74, 881, 057,778	1,471, 907	50, 874	34.9%
2	Mount Kenya Region – Murang'a, Nyandarua, Nyeri, Kirinyaga, Kiambu, Meru, Embu and Tharaka-Nithi	57, 963, 782, 756	4,135, 567	14, 016	9.6%
3	Western – Kakamega, Busia, Bungoma, Vihiga	34, 291, 762, 782	1,927, 043	17, 795	12.2 %
4	Coast – Mombasa, Lamu Kwale, Kilifi, Taita Taveta, Tana River,	35, 376, 159, 238	1, 713, 151	20, 650	14.2 %
5	Metropolis region-Nairobi, Kajiado, Machakos, Makueni and Kitui	35, 295, 361, 429	4, 180, 122	8, 443	5.8%
6	Central and North Rift- Nakuru, Kericho, Bomet, Nandi, Narok, ElgeyoMarakwet, Uasingishu&TransNzoia	50, 174, 534, 949	2,965,754	16, 920	11.6%
7	Nyanza region- Kisumu, Siaya, Homabay, Migori Kisii and Nyamira	45, 859, 382, 153	2,688,104	17, 060	11.7%
	Totals	372, 241, 930,770	19, 611,423	145,758	100%

Source: Author, (2019)

The same skewed resource allocation can be deduced when the data is analysed from a regional angle.



Source: Author, (2019)

**Figure 4: Percentage Distribution regionally per voter**

#### 4.6 Conclusion

The merits and demerits of each of the above mentioned constitutional mechanisms affirms Social Engineering Theory of Law. The theory takes an approach that is transdisciplinary that views law ‘as a sociopolitical phenomenon central to the understanding of power and society’.<sup>1010</sup> Laws have merit and demerits. They can be used to influence particular social behavior on a large scale to produce desired effects in a target population. Within the Kenyan context, the desired result was ethnic peace during presidential elections. The

<sup>1010</sup>Mauricio García-Villegas, ‘A comparison of socio-political legal studies’,( 2016) 12 Annual Review of Law and Social Science.

mechanisms were constitutional provisions on nationalism where groups would cohere into a unified overarching Kenyan identity.

Devolution intended to embed ethnic minorities into the state structures hence reduce intensity of ethnic competition during presidential elections. Centripetalism where it was intended to compel presidential elections contenders to build cross ethnic support.

Consociationalism was intended to cause conflicting ethnic groups to share state positions.<sup>1011</sup> Each of these mechanism has illustrated negative and positive outcomes.

This shows law can shape society. The adverse outcomes justify remaking those mechanisms in a manner that seals the gaps.

This chapter has evaluated consociationalism, centripetalism, devolution, and nation-building measures. The data was obtained from experts, presidential candidates, voters, IEBC officials, and focus group discussions. Data analysis was done simultaneously with data collection. The next chapter dwells on what lessons this study can draw from specific jurisdictions.

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<sup>1011</sup> Reilly (n 523).

**CHAPTER FIVE**  
**BEST PRACTICES FROM OTHER ETHNICALLY DIVIDED**  
**COMMONWEALTH JURISDICTIONS**

**5.1 Introduction**

This chapter drew lessons from select ethnically divided commonwealth states that have had electoral ethnic conflicts.<sup>1012</sup> These states were United Kingdom's Northern Ireland, Nigeria, and Guyana. These nations do have key constitutional differences and similarities with Kenya. On differences, Northern Ireland is not a state on its own. It is a region within the United Kingdom. It is a developed nation with a parliamentary democracy, unlike Kenya's pure presidential model. Guyana is a small third-world country with a parliamentary system, but the president has executive powers.<sup>1013</sup> Nigeria is a country with a vast population, but it has a presidential system.

The three countries have been chosen because, just like Kenya, they have experienced some forms of ethnic political conflict. They are all Commonwealth countries and share some cultural characteristics. This includes English being the language of communication and embracement of the Christian religion. Like Kenya, Guyana ethnic conflict swings between low to high intensity cyclic ethnic conflict, occurring during the period surrounding elections and petering out soon thereafter .

Nations from different continents were picked deliberately so that lessons can be drawn from diverse experiences. Northern Ireland and Nigeria experienced high-intensity ethnic conflict for a prolonged period that ultimately ended. <sup>1014</sup> Guyana has not experienced an all-out ethnic war, but ethnic riots and chaos characterise its politics. It remains an unstable democracy. To address ethnic conflict, UK's Northern Ireland chose consociational and devolution mechanisms, but recently, it has embraced ranked-choice voting. Nigeria opted

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<sup>1012</sup> For more detailed comparative studies on how various countries have used law to deal with ethnic divisions with or without success ,See Karl Cordell and Stefan Wolff(ed),*The Routledge Handbook of Ethnic Conflict*,(2<sup>nd</sup> Ed,London & New York Routledge Taylor & Francis ,2010) (45).

<sup>1013</sup> Miller (n 309).

<sup>1014</sup> Due to populism , UK in 2016 voted to leave the European Union, and this is threatening to unravel the Constitutional settlement. See Neil Walker , ‘Populism and constitutional tension’,(2019) 17 (2) *International Journal of Constitutional Law* 515–535.

for centripetalism and devolution while Guyana neither has consociationalism nor centripetalism.<sup>1015</sup>

To assess a country's democratic credentials, this study relied on the Economist Intelligence Unit Democracy Index. It is an index by a reputable publisher and applies comprehensive, universally accepted standards.<sup>1016</sup> The Index provides a summary of world democracies for 165 independent countries and two territories. It is based on five parameters: pluralism and electoral process, human rights and civil liberties; a functioning government; participation in politics and a country's political culture.<sup>1017</sup>

Hinging on their scores on sixty indicators within these categories, each state is then classified as one of these forms of regimes: full democracy, flawed democracy; hybrid regime and authoritarian regime.

## **5.2 Guyana: The Peril of Ignoring Either Consociationalism or Centripetalism**

### **5.2.1 Constitutional and Social Context of Guyana**

The Co-operative Republic of Guyana is a state on the northern part of South America mainland. It is a member of a regional body called the Caribbean Community, which is comprised mainly of small English speaking Islands and had a population of 740,685 as of 2018.<sup>1018</sup> The regional body has its headquarter in Guyana's capital city of George Town and its ethnic groups are Indians (originally from Asia ) 39.8 per cent, blacks (originally from Africa) 29.3 per cent, mixed ethnic groups which lean either way politically, 19.9 per cent, original inhabitants, Amerindian 10.5per cent, others which include self-identifying Portuguese, white and Chinese 0.5per cent.<sup>1019</sup> It is often viewed as being part of the Caribbean countries due to its strong historical, cultural, and political ties with other Anglo-Caribbean countries. An Ocean borders it to the north, Brazil to the south, and Venezuela

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<sup>1015</sup> The Economist Intelligence Unit rated Guyana as "flawed democracy" in 2016. Economist Intelligence Unit, 'Global Democracy Index', (2017) <https://www.eiu.com/n/> accessed 1 Jan 2020.

<sup>1016</sup> This is a respected magazine, which is a sister publication of "The Economist", The Economist Newspaper Ltd, London, 2019. See <http://www.eiu.com/topic/democracy-index> accessed 7th April 2019.

<sup>1017</sup> *ibid.*

<sup>1018</sup> For details, see Stephen K. Roberts and Paul Seaward (ed), *The Commonwealth At 70: From Westminster To The World* (London, Regal Press, 2019 ) and Derek O'Brien, 'Developments in the Commonwealth Caribbean: The year 2016 in review', (2017) 15 ( 2) *International Journal of Constitutional Law* 506–514.

<sup>1019</sup> *ibid.*

to the west .<sup>1020</sup> It has a landmass of 215,000 square kilometers. It is the third-smallest country on mainland South America after Suriname and Uruguay.

Various indigenous groups historically inhabited Guyana before being settled by the Dutch and the British took control in the late 18th century. Just like other Caribbean countries, its colonial economy was plantation-style settings, and it gained independence in 1966 and joined the Commonwealth in 1970.<sup>1021</sup> The legacy of British rule remains as reflected in its political administration and diverse population.

### **5.2.2 Ethnic Conflict in Guyana and Various Constitutional Attempts to address the Problem**

Ethnic conflict in its electoral affairs can be traced to its pre-independence period. As the World War II came to a close, demands for independence in Guyana grew. During this period, various political parties were founded, some of which exist even today. For instance, Peoples Progressive Party (PPP) was founded on 1<sup>st</sup> January of 1950.<sup>1022</sup> Internal conflicts in the party developed, and in 1957 the People's National Congress (PNC) came into existence as a split-off.<sup>1023</sup> These years marked the beginning of a long and chaotic power struggle between two dominant personalities- Linden Forbes Burnham, an Afro-Guyanese, and Cheddi Jagan, an Indo-Guyanese.<sup>1024</sup> Both leaders came to be seen as champions of their respective ethnic groups. This mirrors Kenya's political domination by Jaramogi's (Luo) and Kenyatta's (Kikuyu) families .

The Political Affairs Committee launched Jagan's career (PAC). Established in 1946, it promoted Marxism and criticized the colony's poor living standards.<sup>1025</sup> In the November 1947 elections, PAC, with its independent candidate, competed with the Labor Party led by a fellow Indian J. B. Singh.<sup>1026</sup> The latter won six of fourteen seats contested and this

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<sup>1020</sup> *ibid.*

<sup>1021</sup> *ibid.*

<sup>1022</sup> Derek (n 297).

<sup>1023</sup> Harri Ramkaraan, 'Seeking a democratic path: constitutional reform in Guyana' ( 2004) 32 *Georgia Journal of International and Comparative Law* 585.

<sup>1024</sup> *ibid.*

<sup>1025</sup> *ibid.*

<sup>1026</sup> *ibid.*



illustrated how electoral elections had become personalized in Guyana.<sup>1027</sup>Jagan won a seat, and the Labour Party's allegiance with the British gradually stripped it of grassroots supporters throughout Guyana, and Jagan took advantage. Fighting for workers' rights in Guyana's sugar plantations allowed him to achieve good standing.<sup>1028</sup>After the 1948 police shootings of five Indo-Guyanese workers near Georgetown, he and the Guyana Industrial Workers Union (GIWU) organized a massive but peaceful demonstration.<sup>1029</sup>Jagan then founded Peoples Progressive Party (PPP) in January 1950 that drew support from both the Afro-Guyanese and Indo-Guyanese ethnic groups. To shore up support among the Afro-Guyanese, Burnham was brought into PPP.<sup>1030</sup>

The PPP was multi-ethnic, with Jagan becoming the leader of the parliamentary group, and Burnham became the party chairman.<sup>1031</sup>Other key party members included Jagan's wife, Janet, and other PAC veterans.

A British commission, in 1950, recommended a change in the country's constitution to allow for universal adult suffrage and the adoption of a parliamentary system.<sup>1032</sup>Once these changes of the constitution were adopted, elections were held in 1953. The PPP's support from the lower-class Afro-Guyanese and rural Indo-Guyanese workers made a formidable constituency. The other major party in the election was the National Democratic Party (NDP), an Afro-Guyanese middle-class organization.<sup>1033</sup> The NDP, together with other fringe parties, were soundly defeated by the PPP, which got eighteen of the twenty-four elective seats while NDP got two seats. The independent party got four seats.

Wary of Jagan and the PPP's radicalism, colonialists and their allies got disturbed by the PPP's programme of expanding the role of the state in the economy.<sup>1034</sup>Intra PPP fights broke out regarding the issue of civil service appointments.This was between Indo-

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<sup>1027</sup> It has been argued this personalization of politics ensures state stability in small countries .See Walter Veenendaal , 'When Things Get Personal: How Informal and Personalized Politics Produce Regime Stability in Small States'(2018) *Government and Opposition* 1-20.

<sup>1028</sup> *ibid.*

<sup>1029</sup>*ibid.*

<sup>1030</sup>Reilley (n 523).

<sup>1031</sup> *ibid.*

<sup>1032</sup>Miller (n 309 ).

<sup>1033</sup>*ibid.*

<sup>1034</sup>*ibid.*

Guyanese supporters of Jagan on the one hand and the mostly Afro-Guyanese backers of Burnham on the other. A compromise was reached, though.<sup>1035</sup>

The introduction of the Labour Relations Bill created a confrontation with the colonialists. The day the bill was introduced to parliament, the Indian leaning GIWU went on strike to pressurize its passage.<sup>1036</sup>The British government interpreted this as a direct challenge to the constitution. After the bill was passed in October 1953, the British suspended the colony's constitution and sent in troops.<sup>1037</sup>

The country was then governed by an interim administration that lasted until 1957 elections.<sup>1038</sup>During this period, a growing rift in PPP between Jagan and Burnham widened into a bitter dispute. Both formed rival wings, and support for each leader was mainly along ethnic lines.<sup>1039</sup>Elections held under a revised constitution demonstrated growing ethnic conflict in Guyana. The Constitution provided limited self-government through a Legislative Council of 24 delegates-15 elected, six nominated, and three ex officio members from the administration.<sup>1040</sup>The two factions of the PPP conducted separate and vigorous campaigns, each attempting to illustrate that it was the real heir to the first party. The factions made appeals to their respective ethnic blocs despite outward display as being national parties. The Jagan faction won thanks to Indo-Guyanese support.<sup>1041</sup>The faction's key campaign platforms were identified as aiding Indo-Guyanese: allocation of more rice land, improved union representation in the sugar sector and improved business environment, and more government jobs for Indians.<sup>1042</sup>

Jagan's decision to veto Guyana's participation in the regional body West Indies Federation comprised mainly by other black majority neighboring countries like Jamaica resulted in total loss of Afro-Guyanese support.<sup>1043</sup>The Indo-Guyanese, a majority in Guyana, were

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<sup>1035</sup>ibid.

<sup>1036</sup>ibid.

<sup>1037</sup>ibid.

<sup>1038</sup>ibid.

<sup>1039</sup>ibid.

<sup>1040</sup>ibid.

<sup>1041</sup>ibid.

<sup>1042</sup>ibid.

<sup>1043</sup>See Gorge K Danna, 'The Impact of Identity, Ethnicity, and Class on Guyana's Strategic Culture' (2014) 4(11)American International Journal of Contemporary Research.

apprehensive of joining a federation in which they would be a minority as compared to people of African descent. Based on the 1957 election results, Burnham learned that he could only win if he was supported by the lower-class, urban Afro-Guyanese combined with middle-class Afro-Guyanese who backed the United Democratic Party.<sup>1044</sup> From 1957 onward, he worked to create a balance between these two classes. To him, socialism would not bind those two groups together against his Marxist opponents.<sup>1045</sup> He discovered something more fundamental: ethnicity.<sup>1046</sup> Burnham's appeals to ethnicity proved highly successful in bridging the class conflict amongst the Afro-Guyanese. This move convinced the dominant Afro-Guyanese middle class to support Burnham, a leader who was more of a radical than they would have ordinarily supported. On the other hand, it neutralized the objections of the black lower class to join an alliance with those representing moderate interests.<sup>1047</sup> Burnham's move was accomplished with the merger of his faction and the United Democratic Party into a new party, the Peoples National Congress (PNC).<sup>1048</sup>

The 1961 elections were a bitter contest between the Afro Guyanese PNC, Indo Guyanese PPP and the United Force (UF), a conservative party representing big business, the Catholic, America Indians, Chinese, and Portuguese voters. Elections were held under yet another new Constitution that marked a return to the degree of self-government that existed briefly in 1953.<sup>1049</sup> The Constitution had a bicameral system of elected 35 -member Legislative Assembly and a 13 member Senate to be appointed by the governor. It had a Prime Minister post to be filled by the majority party in the Legislative Assembly.<sup>1050</sup> With the strong support of the Indo-Guyanese, the PPP again won by a substantial margin. It gained 25 in the Legislative Assembly, compared to 11 seats for the PNC and 4 for the UF . Jagan became Prime Minister.<sup>1051</sup>

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<sup>1044</sup>ibid.

<sup>1045</sup>ibid.

<sup>1046</sup>ibid.

<sup>1047</sup>ibid.

<sup>1048</sup>ibid.

<sup>1049</sup>ibid.

<sup>1050</sup> David Lublin, 'Electoral systems, ethnic diversity and party systems in developing democracies', (2017) 47 Electoral Studies 84-93.

<sup>1051</sup>ibid.

Jagan's administration became increasingly friendly with communist regimes. From 1961 to 1964, his government was confronted with a destabilization campaign conducted by the opposition unions in conjunction with civil unions with reports of USA support.<sup>1052</sup> Ethnic riots against the PPP administration were frequent, and during racial disturbances in 1962 and 1963, mobs destroyed part of the capital city causing US \$40 million damage.<sup>1053</sup>

To counter these riots, PPP formed a trade union called GAWU, whose political mandate was to mobilize the Indo-Guyanese sugarcane field-workers. Pro-opposition unions responded with a one day strike.<sup>1054</sup> PPP government responded in 1964 by publishing a new Labour Relations Bill- an identical bill to the 1953 legislation that caused British intervention. The introduction of the proposed law prompted ethnic riots, followed by a general strike.<sup>1055</sup> By May 9, the governor declared a state of emergency. Conflict continued until July 7, when the Bill was allowed to lapse and the government agreed to consult with union representatives.<sup>1056</sup>

Another round of labor unrest rocked the colony after pro-PPP GIWU called on sugar workers to strike. To add drama, Jagan led a march by workers from the interior to Georgetown. This ignited outbursts of ethnic conflict that soon escalated beyond the control of the authorities.<sup>1057</sup> The governor finally declared a state of emergency, but the situation worsened, and British troops came in to restore order proclaiming a moratorium on all political activity. By the end of the ethnic conflict, 160 people were dead, and more than 1,000 homes destroyed.<sup>1058</sup>

To address ethnic conflict by boosting ethnic minority (Africans) representation in government, the British government modified the constitution to provide for proportional representation and a 53 member unicameral legislature. Despite opposition from the ruling PPP, all reforms took effect, and new elections were held in October 1964.<sup>1059</sup> As Jagan

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<sup>1052</sup> Ivelaw L Griffith, 'Political Change, Democracy, and Human Rights in Guyana', (1997) 18 (2) Third World Quarterly 267-285.

<sup>1053</sup> *ibid.*

<sup>1054</sup> *ibid.*

<sup>1055</sup> *ibid.*

<sup>1056</sup> *ibid.*

<sup>1057</sup> *ibid.*

<sup>1058</sup> *ibid.*

<sup>1059</sup> Danna (n 1043).

feared, the PPP lost the general elections of 1964. PPP won 46 per cent of the vote and 24 seats, making it the largest single party but without an overall majority. PNC, which won 40 per cent of the vote and 22 seats teamed up with UF, which won 11 per cent of the vote and seven seats and formed a coalition. Jagan refused to concede defeat and clung to his post as prime minister. The constitution was revised to allow the governor to remove him from office, and thus Burnham became prime minister on 14<sup>th</sup> December 1964.<sup>1060</sup>

Conditions in the country began to stabilise. In May 1966, independence was achieved, and the country was enjoying economic growth and domestic peace.<sup>1061</sup> However, the administration commenced a process of subverting democracy with a view of suppressing the majority Indian community. In the 1968 elections, PNC won 30 seats, PPP 19 seats, and UF 4 seats, with many observers claiming the polls were manipulated.<sup>1062</sup> PPP consolidated its dominance through gerrymandering, manipulation of balloting process, and manipulation of civil service. A few Indo-Guyanese joined PNC, but it was unquestionably an Afro-Guyanese political force. Although Afro-Guyanese middle class was unhappy with Burnham's leftwing politics, PNC was regarded as a shield against Indo-Guyanese dominance.<sup>1063</sup>

On February 23, 1970, Guyana declared itself a republic and cut all ties to the British. Considered by many experts as a low point in the democratic process, an amendment to the constitution in 1973 after elections abolished legal appeals to the Privy Council in London.<sup>1064</sup> In 1973, a multi-ethnic party and ideologically driven, the Working People's Congress, was founded. This was by nationalistic politicians and intellectuals that advocated ethnic harmony and free elections. Still, it did not gain traction in a highly divided environment.<sup>1065</sup> Outmaneuvered on the parliamentary front, Jagan stated that

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<sup>1060</sup> See Cynthia Barrow-Giles, *Regional Trends In Constitutional Developments In The Commonwealth Caribbean*, (Conflict Prevention And Peace Forum ,Jan 2010).

<sup>1061</sup> *ibid.*

<sup>1062</sup> See Rudolf W. JAMES and Harold A. LUTCHMAN, *Law and the Political Environment in Guyana* ( Guyana: Institute of Development Studies- University of Guyana, 1994) 35

<sup>1063</sup> *ibid.*

<sup>1064</sup> Subhasish Ray, 'Beyond Divide and Rule: Explaining the Link between British Colonialism and Ethnic Violence, ( 2018) 24 ( 4) *Nationalism and Ethnic Politics* 367-388.

<sup>1065</sup> *ibid.*

PPP's policy would change from active oppositionist to critical support of the Burnham regime.<sup>1066</sup>

However, this 'handshake ' did not last for long. When efforts intended to bring about new elections, and PPP participation in the government was ignored, the largely Indo-Guyanese sugar workforce commenced a significant strike. The strike was broken, but sugar production declined steeply. PNC postponed the 1978 elections, opting instead for a referendum viewed by many as fraudulent. It was held in July 1978, its net effect was to keep the incumbent assembly in power.

Guyanese politics took a violent turn in 1979. An opposition leader and an intellectual, Walter Rodney, together with other several professors, were arrested but soon released. The level of conflict continued to escalate. In October 1979, Minister of Education, Vincent Teekah, was mysteriously shot to death. Shortly after that, Walter Rodney was killed by a car bomb damaging Burnham's image abroad.<sup>1067</sup>

In 1980 a new constitution was promulgated. It abolished the ceremonial post of President. It introduced an executive President chosen by the majority party in Parliament . Burnham became Guyana's first executive President.<sup>1068</sup>In elections held on December 15, 1980, the PNC got 77 per cent of the vote and 41 seats. PPP and UF won 10 and 2 positions, respectively. International observers upheld opposition claims of electoral fraud.<sup>1069</sup>

President Burnham died suddenly in 1985, and the new government was formed.<sup>1070</sup>Though it did not wholly abandon the authoritarianism, it did make specific political reforms. It abolished overseas voting and the provisions for widespread proxy and postal voting. Media freedoms were expanded.<sup>1071</sup>On October 5, 1992, a new National Assembly was elected in the first Guyanese elections that observers endorsed as being free

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<sup>1066</sup>ibid.

<sup>1067</sup> Ralph R Premdas, 'The Guyana Ethnic Quagmire: Problems And Solutions For Reconciliation',(2004) 10(2)Nationalism and Ethnic Politics 251-268.

<sup>1068</sup> ibid.

<sup>1069</sup>Sherwood Lowe, 'Examining Lijphart's favourable factors for consociational democracy: Guyana' (2013) 51 (3) Commonwealth and Comparative Politics 362.

<sup>1070</sup>ibid.

<sup>1071</sup>ibid.

since 1964. Jagan was elected as President, reversing Afro-Guyanese hold over Guyanese politics. The poll was, however, marred by ethnic conflict.<sup>1072</sup>

When Jagan died of a heart attack in March 1997, Prime Minister Samuel Hind replaced him, with Jagan's widow as Prime Minister. She was then elected President on fifteenth December 1997 for the PPP. PNC contested the results, and this led to strikes and ethnic riots before a mediating committee was brought in.<sup>1073</sup> Mrs. Jagan resigned in August 1999, and Finance Minister Jagdeo took over. Elections were held on March 19, 2001, and the incumbent won.<sup>1074</sup> In December 2002, the opposition leader Hoyte died with Robert Corbin replacing him as leader of the PNC. He favoured constructive engagement with Jagdeo and the PPP.<sup>1075</sup>

The politics of Guyana in the post-1992 period has been dominated by the Indian party to the chagrin of blacks. Blacks view the 1992 "re-democratization" as merely embedding ethnic majority domination and recent discovery of oil has further made its politics toxic.<sup>1076</sup> In 2015 a centrist coalition headed by a moderate black presidential election candidate called Dr. David Granger won elections by a razor-thin majority of one seat in the polls held after the collapse of the then ruling Indian party's government.<sup>1077</sup> The new government was voted out in a no-confidence motion held late in December 2018, and there is a continuing stalemate; hence, its characterization as a flawed democracy.<sup>1078</sup>

### **5.2.3 Lessons to be drawn from Guyana**

The key lesson to draw from Guyana is that failure to institute any constitutional ethnic conflict management mechanism (either consociational or centripetal) may make conflict cyclic.

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<sup>1072</sup> *ibid.*

<sup>1073</sup> *ibid.*

<sup>1074</sup> Freedom House, 'Freedom Score Card 2018 Report' 2019 <https://freedomhouse.org/report/countries-crossroads/2006/guyana> accessed 4 April 2019.

<sup>1075</sup> Premdas (n 1069).

<sup>1076</sup> Anthony Bryan, 'Guyana: the fast rising Commonwealth petro state. What lies ahead?' (2020) 109(1) *The Round Table*, *The Commonwealth Journal of International Affairs* 88-89.

<sup>1077</sup> *ibid.*

<sup>1078</sup> *ibid.*

Guyana's constitution has the usual majoritarian mechanisms that characterize democracies that have no ethnic conflict. They include proportional representation noting that Article 60, as read with article 160 (1) of the Guyana Constitution, provides for the same.

This electoral system depends on proportional representation alongside its two-party centreed system. It appears, for a prolonged period, it incentivized the ruling minority black party to gerrymander electoral boundaries.<sup>1079</sup> This increased its seats in parliament disproportionately enabling it to form coalition with other small parties locking out ethnic majority Indians from power in 1970's and 1980's.

Under Guyana's electoral system, presidential and parliamentary elections are combined, and the leader of the party with the most significant parliamentary representation becomes president, having been earlier designated the presidential candidate and head of the party list of candidates. There are 65 seats in the unicameral legislature, but only 53 are contested directly. This is done using the list system of proportional representation.<sup>1080</sup>

This Constitution outlines a power-sharing arrangement that has the President, Vice President, and the Prime Minister.<sup>1081</sup> Article 9, as read with section 99 of the Constitution of Guyana, establishes the seat of the President, noting that he is the commander-in-chief. Article 100 creates the position of Prime Minister, the principal assistant of the President and leader of government business in the National Assembly.<sup>1082</sup> The President may appoint Vice-Presidents to assist in discharging his or her functions.<sup>1083</sup>

Articles 138 to 154 of the Constitution establishes human rights with an inclusive style that encompasses civil, political rights, social and economic rights. Still, these have not stopped ethnic conflict from recurring.<sup>1084</sup> The provisions allow opposition parties to campaign freely, and the election commission has been restructured. This has enabled the electoral process to be scrutinized by international observers.<sup>1085</sup>

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<sup>1079</sup> Nat Khuball, *Guyana Politics and Oil Discovery*, (Amazon Digital Services LLC, 2019) ch 2.

<sup>1080</sup> *ibid.*

<sup>1081</sup> Constitution of Guyana, s 89 and 101.

<sup>1082</sup> *ibid.*, s101 (2).

<sup>1083</sup> *ibid.*, s102.

<sup>1084</sup> *ibid.*, Art. 268.

<sup>1085</sup> *ibid.*, Art. 270.



Various statutes have been enacted to effectuate these constitutional principles. The National Registration Act provides for the establishment of the National Register and issuance of identity cards. It establishes offenses within the registration process: breach of duty, illegal registration, destroying identification cards, or personating of officers. The Representation of the People Act governs the election of members of the National Assembly through a system of proportional representation. It outlaws corrupt practices, specifies rules for election expenses, the procedure of voting, and counting of votes. It is the responsibility of the electoral management body to issue identity cards and voter registration cards.<sup>1086</sup> This reduces the incidences of 'dead' voters, as is frequently done in Kenya. It makes it easier to maintain the voting register and keep it pure from corrupt practices. Similar provisions exist in Kenyan law, including chapter 4 of the Constitution, which is devoted to human rights provisions. The lesson for Kenya is that these cannot address the problem of ethnic conflict in presidential elections. There is every likelihood that they have been imported from stable democracies that do not have the problem of ethnicity.

The key lesson Kenya can draw from Guyana's experience is that addressing ethnic conflict requires better designed constitutional reforms.

### **5.3 United Kingdom's Northern Ireland: Consociational in the Short Run, Ranked Choice Voting in the Long Run**

#### **5.3.1 Constitutional and Social Context of United Kingdom's Northern Ireland**

Northern Ireland is part of The United Kingdom (UK or Britain). It is a country lying off the north-western coast of Europe. It is the only part of the United Kingdom that shares a land border with another sovereign state—the Republic of Ireland (a major inspiration of ethnic conflict in the Northern Ireland).<sup>1087</sup> United Kingdom has an area of 242,500 square kilometers. It is a developed society with an estimated 66.0 million inhabitants as at 2017.<sup>1088</sup>

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<sup>1086</sup>Helena Catt and others, *Electoral Management Design*, (International Institute for Democracy and Electoral Assistance Sweden 2014) 4.

<sup>1087</sup> For details, see Mc Donagh (n 437).

<sup>1088</sup> Diarmaid Ferriter, *The Border: The Legacy of a Century of Anglo-Irish Politics*, (Profile Books, 2019) 55.

UK and therefore Northern Ireland, is a parliamentary democracy and a constitutional monarch whose constitution remains unwritten. The United Kingdom consists of four ethnically distinct countries: England, Scotland, Wales and Northern Ireland.<sup>1089</sup> To manage ethnic tensions, apart from England, the countries have their own devolved government each with varying powers.<sup>1090</sup>

There are 14 British overseas territories- the remnants of the British Empire - which at one time encompassed almost a quarter of the world's land mass in the 1920s.<sup>1091</sup> British influence is illustrated in the social and political systems of many of its former colonies including Kenya, Guyana and Nigeria.

The history of conflict in the entire undivided region of Catholic Ireland in its struggle against Anglican England is long and chequered hence beyond the purview of this thesis. Ireland was one undivided region essentially under English rule since Anglo-Norman period of around 1167. It struggled for centuries for independence against English rule. It succeeded in May 1921 with the enactment of Government of Ireland Act which split South and Northern Ireland into two parts. South gained nominal independence, which became full in 1937. North remained under English rule principally because of its huge English settler population who favoured its union with England.<sup>1092</sup>

### **5.3.2 Ethnic Conflict in United Kingdom (Northern Ireland) and Various Constitutional Attempts to Address the Problem**

Northern Ireland conflict, also known as "the troubles," refers to the ethnic conflict that began in the 1960s and ended with the Good Friday Agreement of 1998. Although it primarily took place in Northern Ireland, the conflict spilled over into England, Europe, and parts of the Republic of Ireland.<sup>1093</sup>

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<sup>1089</sup> Feargal Cochrane, *Northern Ireland: The reluctant Peace* (Yale University Press, 2013) 45. On principles of its unwritten constitution, see Walter Bagehot, 'The English Constitution: The Principles of a Constitutional Monarchy', (CreateSpace Independent Publishing Platform 2017).

<sup>1090</sup> *ibid* (Bagehot).

<sup>1091</sup> *ibid*.

<sup>1092</sup> *ibid*.

<sup>1093</sup> Henry Jarrett, 'The Durability of Conflicts: Can They Be Genuinely Resolved?' (2017) 23 (4) *Nationalism and Ethnic Politics* 474-479.

The conflict was essentially ethnic (or confessional) with historical and political underpinnings. A key issue under contest, amongst the warring parties, was the constitutional status of Northern Ireland. Unionists or loyalists, who were mostly Protestants, wanted the region to remain within the United Kingdom. The Irish nationalists or republicans, mostly Catholics, wanted the region to leave the United Kingdom and join the united catholic majority Ireland.<sup>1094</sup>The majority ethnic group in Northern Ireland was the Protestants, and some viewed state machinery (including the security apparatus) as being sympathetic to their cause.<sup>1095</sup>

A state campaign ostensibly aimed at pacifying Catholics triggered the conflict. The authorities were accused of state brutality.<sup>1096</sup>Conflict from loyalists heightened the violence, eventually leading to ethnic riots of August 1969 and deployment of UK troops.<sup>1097</sup>These troops were viewed by the minority as hostile and biased hence the emergence of an armed Catholic organization called the Irish Republican Army (IRA). This escalated the conflict, which lasted for over three decades. There was the Irish National Liberation Army (INLA) on the Catholic side, and on the other hand, the loyalist paramilitaries Ulster Volunteer Force (UVF), Ulster Defence Association (UDA), and the British state security forces.<sup>1098</sup>Republican paramilitaries undertook a guerrilla fight against the British security forces, including a bombing campaign against infrastructure and political targets. Loyalists targeted the wider Catholic community in retaliation.<sup>1099</sup>There were some reports of collaboration between British security forces and loyalists who favoured Northern Ireland to remain in the United Kingdom under British rule. The conflict involved numerous ethnic riots and mass protests that caused segregation and the creation of no-go zones.

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<sup>1094</sup>ibid.

<sup>1095</sup>ibid.

<sup>1096</sup>ibid.

<sup>1097</sup>Liberal ,non-nationalists have complained their non-recognition by historians from the duel. See David Mitchell, 'Non-Nationalist Politics in a Bi-National Consociation: The Case of the Alliance Party of Northern Ireland', (2018) 24 (3) Nationalism and Ethnic Politics 336-345.

<sup>1098</sup> ibid.

<sup>1099</sup>ibid.

An estimated 3,500 people were killed during the conflict-52 per cent civilians, 32 per cent British security forces, and 16 per cent were members of paramilitary groups.<sup>1100</sup>The Good Friday Agreement settlement caused the conflict to abate.

The Good Friday Agreement (GFA) or Belfast Agreement of 10<sup>th</sup> April 1998 created various institutions between Northern Ireland and the Republic of Ireland, and between the Republic of Ireland and the UK.<sup>1101</sup>It consists of two inter-related documents: a multi-party agreement by most of Northern Ireland's political parties (the Multi-Party Agreement) and an international agreement between the UK and Irish governments, both of which have assumed constitutional status.<sup>1102</sup>

It sets out a series of provisions relating to several areas, including the status and system of government of Northern Ireland within the United Kingdom (Strand 1).<sup>1103</sup>Relationship between Northern Ireland and the Republic of Ireland is in Strand 2, and the relationship between the Republic of Ireland and the United Kingdom is in Strand 3.<sup>1104</sup>

The agreement was approved across the island of Ireland in two referendums held on 22 May 1998. In Northern Ireland, voters were asked whether they supported the multi-party agreement.<sup>1105</sup> In the neighboring Catholic dominated the Republic of Ireland, voters were asked whether they would support the necessary constitutional changes to effect it .<sup>1106</sup>

### **5.3.3 Lessons to be drawn from United Kingdom's Northern Ireland**

Devolution is one vital tool used to address ethnicity in Northern Ireland electoral contest. Kenya should consider devolving more funds, like in the case of Northern Ireland. In Kenya the issue is which function ought to be devolved because, logically, money ought to follow a function. Devolving more resources was discussed by the focus group discussants in Kwale, Mombasa, and Kisumu. They stated that more resources should be

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<sup>1100</sup> Joana Amaral , *Making Peace with Referendums: Cyprus and Northern Ireland*, (Syracuse University Press, 2019).

<sup>1101</sup>ibid.

<sup>1102</sup> Adrian Guelke, *Northern Ireland, Brexit, and the Interpretation of Self-Determination*, ( 2019) 25 (4) *Nationalism and Ethnic Politics* 383,390.

<sup>1103</sup>ibid.

<sup>1104</sup> ibid.

<sup>1105</sup>ibid.

<sup>1106</sup>ibid.

devolved to make devolution effective in taming the competition for the centre. The discussants proposed that at least 40 per cent of national revenue should be devolved.

The United Kingdom has effectively devolved its primary and secondary education functions to Northern Ireland. This indicates that this function can be devolved in Kenya too. The national government must retain powers to develop curriculum and set other policies, as explained by Rebecca Loader and others.<sup>1107</sup> In their study entitled "Developing Social Cohesion through Schools in Northern Ireland and former Yugoslav Republic of Macedonia", the scholars state that there is a need for inter-school collaborations and shared curriculum in ethnically divided societies.<sup>1108</sup>

In the 2018 /2019 budget, the education budget in Kenya was Ksh 439 billion (26.2 per cent of the total). If the entire education budget were devolved, the target of devolving at least 40 per cent as proposed by the discussants of national revenue collected would be reached. A portion of the budget (say Ksh100 million) would remain in the national government for organs dealing with policy and research.

Deeply divided Northern Ireland has recently adopted ranked-choice voting. On 2nd March 2017, its citizens did vote for Legislative Assembly using this method.<sup>1109</sup> The Catholic minority, Sinn Fein (SF) party, improved its performance as against the majority Anglican leaning Democratic Unionist Party (DUP).<sup>1110</sup> Moderate parties (Ulster Unionist Party and the Alliance Party of Northern Ireland) improved their performance.

For an aspirant to win, he or she must get votes pre-determined by the number of seats that are due for that.<sup>1111</sup> Five seats are filled in each constituency; voters who are a majority of 50 per cent plus one earn three of five positions.<sup>1112</sup>

In 2017, smaller but moderate parties gained seats while the hardliner majority parties saw their positions decrease.<sup>1113</sup> This method has had a moderating effect between traditional

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<sup>1107</sup> Rebecca Loader and others. 'Developing Social Cohesion through Schools in Northern Ireland and Former Yugoslav Republic of Macedonia', (2018) 4 ( 1) Journal on Education in Emergencies 114.

<sup>1108</sup> *ibid.*

<sup>1109</sup> Donovan and others (n 605).

<sup>1110</sup> *ibid.*

<sup>1111</sup> *ibid.*

<sup>1112</sup> *ibid.*

<sup>1113</sup> *ibid.*

hardliners, and it fosters collaborative policymaking in parliament and guarantees a no return to conflict. The voters' voice was heard with the percentage of seats won by each party being proportional to the first-choice votes.<sup>1114</sup>

It appears the rationale for introducing ranked-choice voting in the region was to address the adverse long term effects of consociationalism. The idea was to take into account Northern Ireland's societal natural evolution, which makes it becomes less ethnic minded. This includes the desire not to embed ethnicity by hoisting group rights over individual choices. The desired outcome of ranked-choice voting is the same – moderate politics and achievement of ethnic peace.

Northern Ireland is considered now a full democracy though Martin Loughlin has taken a more nuanced view.<sup>1115</sup> He states that although constitutional democracies in the world have grown in number over several recent decades, recently there has been a decline marked less by democracies being replaced by an increase in regimes with formal institutional democratic trappings (citing Northern Ireland) but which flout values on which constitutional democracies are hinged upon. Northern Ireland remains ethnically divided but with invigorated democratic credentials.

The above proves that Consociationalism assisted in bringing peace in Northern Ireland in the short run. It gave incentives for the combatants to stop fighting, surrender their weapons and enter into the complete electoral process. Immediately after that, the government started to experiment with ranked-choice voting, probably under the influence of the neighbouring Republic of Ireland. The experience so far indicates that it is working. The lesson which Kenya can draw from Northern Ireland is that consociationalism works in the short run, but Ranked Choice Voting would be the best in the long term.

According to the Economist Intelligence Unit Democracy Index, the United Kingdom, and by extension Northern Ireland, remains a stable democracy with an impressive score of 8.53.<sup>1116</sup> It is a good country to draw lessons from.

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<sup>1114</sup>ibid.

<sup>1115</sup> Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39 Oxford Journal of Legal Studies 435 .

<sup>1116</sup> Economist Intelligence Unit (n 1017) 2019 report .

However, ranked-choice voting ought to be tweaked in a manner that reflects Kenya's conditions. In particular, it must adhere to presidential systems principles as opposed to the Northern Ireland conditions of parliamentary democracy.

## **5.4 Nigeria: Ineffectiveness of Plurality Centripetalism**

### **5.4.1 Constitutional and Social Context of Nigeria**

Nigeria is a federal republic in West Africa, bordering in the north Niger, Chad in the northeast, Benin in the west, and Cameroon in the east. Ethnic conflict in elections has been part of its long history.<sup>1117</sup> The federation consists of 36 states, and its capital city is Abuja.

The modern Nigerian state originated from British colonial rule in the 19th century and took its present territorial manifestation with the merging of the Northern and Southern Nigeria Protectorates in 1914.<sup>1118</sup> The British practiced indirect rule, and Nigeria became an independent country in 1960.<sup>1119</sup> It experienced an ethnic conflict that engulfed the entire country between 1967 and 1970, with some blaming elite love for money and political exclusion as the main causes of its troubles.<sup>1120</sup> Nigeria is a notable state in Africa due to its large population and the most significant African economy. It has 166.2 million inhabitants with more than 90 million of its population under age of 18 years as at 2012- its last official census.<sup>1121</sup> The country is a multi-ethnic country inhabited by 250 ethnic groups, of which the three largest are the Igbo, Hausa, and Yoruba. Like most Commonwealth countries, its official language is English. It is divided roughly in half between Muslims who live mostly in the north and Christians who live mainly in southern parts of the country.<sup>1122</sup> As of 2015, Nigeria was the world's 20<sup>th</sup> largest economy worth about \$500 billion. It is a regional power on the African continent.<sup>1123</sup>

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<sup>1117</sup> Henrik Angerbrandt, 'Deadly Elections: Post-election Violence in Nigeria', (2018) 56 (1) *Journal of Modern African Studies* 143-160.

<sup>1118</sup> *ibid.*

<sup>1119</sup> *ibid.*

<sup>1120</sup> Emmanuel Ekechi Onah and Uche Nwali, 'Monetization of Electoral Politics and The Challenge of Political Exclusion', (2018) 56 (3) *Commonwealth and Comparative Politics*.

<sup>1121</sup> Government of Nigeria, *Population Census Report of 2012*, (Nigeria National Bureau of Statistics, 2013).

<sup>1122</sup> *ibid.*

<sup>1123</sup> *ibid.*

#### 5.4.2 Ethnic Conflict in Nigeria and Constitutional Attempt to Remedy Ethnic Conflict

Several ethnic conflicts always engulf Nigeria during presidential elections. Still, for this study, reference is made mainly to ethnic conflict commonly known as the Biafran War (6 July 1967 – 15 January 1970) - fought between the government of Nigeria and the secessionist state of Biafra.<sup>1124</sup>

The Biafran war was specifically chosen because it was a high-intensity ethnic conflict where many died and property worth millions destroyed. Its cause can be traced to ethnicity, the configuration of its constitution, and the role of its elite –which three issues are recurrent themes of this study.

Biafra state represented the nationalist aspirations of the Igbo people who felt they could no longer co-exist with the Northern-dominated federal government. The conflict had historical dimensions that preceded Britain's colonization. Immediate triggers of the war in 1966 were a military coup and alleged persecution of Igbo in Northern Nigeria. Control over the oil fields in southern regions played a strategic role.

In 1968, the Federal Government troops surrounded coastal oil facilities, and this led to a severe famine. During the war, there were about 100,000 overall military casualties, while between one million and two million Biafran civilians died of starvation.<sup>1125</sup> The civil war can be traced to the British amalgamation, in 1914, of Northern and Southern Nigeria.<sup>1126</sup> Aimed at the betterment of administration by putting close these two distinct protectorates, the amalgamation did not take into account the cultural differences of residents in each area.

After the merger, oil was discovered in the then Eastern Nigeria (now Southern Nigeria).<sup>1127</sup> Competition for its associated wealth triggered a struggle for control amongst

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<sup>1124</sup> Chinua Achebe, *There was a country: A Personal History of Biafra* (Penguin, 2012)24.

<sup>1125</sup>A J Venter, *Biafra war 1967-1970: A Tribal Conflict that left 1 million dead*. (Helion and Company, 2016)100.

<sup>1126</sup>ibid.

<sup>1127</sup>Leese Herten and Dirk Moses, 'The Nigerian –Biafra War: Post Colonial Conflict and the Question of Genocide' (2014)16 (23)Journal of Genocide Research 3.



the regions. As the southern region was not as united as the north, it stood disadvantaged in the power struggle.<sup>1128</sup>

On 1<sup>st</sup> October 1960, Nigeria was granted by the British full independence with a constitution that provided for a federation of three regions (northern, western, and eastern) and a parliamentary form of government.<sup>1129</sup>

The three dominant ethnic groups were the Igbo, comprising about 60–70 per cent of the population in the southeastern region; the Hausa-Fulani, which formed about 65 per cent of the people in the northern part; and the Yoruba, which formed about 75 per cent of the population in the southwestern region.<sup>1130</sup> The Hausa-Fulani in the North were traditionally ruled by a feudal Islamic Emirs hierarchy who, in turn, owed their allegiance to a Sultan.<sup>1131</sup> This Sultan was viewed as a sovereign hence the source of all political and religious authority. The Yoruba political system consisted of monarchs but less autocratic.<sup>1132</sup> In contrast, the Igbo lived mostly in autonomous, democratically organized communities.<sup>1133</sup> A general assembly consisting men made key decisions.

The differing social systems among these peoples produced different customs and political values.<sup>1134</sup> The Hausa-Fulani commoners viewed their leaders in awe. They did not hold their political leaders to account.<sup>1135</sup> Leadership positions were given to loyalists, and the chief function of this system was to maintain conservative values, and economic and social innovation was seen as being subversive or sacrilegious. In contrast, the Igbo participated directly in making the decisions that affected their lives.<sup>1136</sup> The political system was regarded as an instrument for achieving their personal goals. Status was acquired through

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<sup>1128</sup>ibid.

<sup>1129</sup>ibid.

<sup>1130</sup>ibid.

<sup>1131</sup>Olajide Olakanmi, *The Nigerian Constitutions since 1914* ,(LawLords publication 2014 ).37.

<sup>1132</sup>ibid.

<sup>1133</sup>Ibid ch 4.

<sup>1134</sup>Onofere P Okereka, 'Evolution of Constitutional Government in Nigeria: Its Implementation National Cohesion' (2015) 3 (5) Global Journal of Political Science and Administration .

<sup>1135</sup> ibid.

<sup>1136</sup> Godwin Unuoha, 'The Fractured Multi-Ethnic State: Contemporary Igbo Quest for Self-determination in Nigeria' (2013) 11(1) African Identities 19.

having skills of arbitrating village disputes and through acquiring rather than inheriting wealth.<sup>1137</sup>

These tradition-derived differences were perpetuated and perhaps enhanced by colonialism. In the North, the British found it convenient to undertake indirect rule through Emirs hence preserving the indigenous authoritarian political system.<sup>1138</sup> Christian missionaries were excluded from the North, and the area thus remained virtually closed to western influence. At the time of independence, the North was the most underdeveloped area in Nigeria but more cohesive and culturally homogenous and more integrated into the state.<sup>1139</sup>

In the South, the missionaries rapidly introduced education and the Yoruba were the first in Nigeria to adopt Western bureaucratic social norms. They made up the first classes of African elites and professionals. In Igbo areas, missionaries were introduced at a later period because of the Britons difficulty in exerting control over the highly autonomous Igbo communities.<sup>1140</sup> The Igbo people took to Western education and Christianity. Elite amongst the Igbo often sent their sons to UK universities.

By 1966, the ethnic differences between Northerners and the Igbo had combined with additional stratification by virtue of economic class. The independence constitution that divided Nigeria into three regions-North, West and East. This exacerbated the already developed economic, political, and social differences among Nigeria's different ethnic groups.<sup>1141</sup> This division was in a manner that made North to have a slightly higher population than the other two regions combined. Therefore, the Northern region was allocated a majority of the seats in the Federal Legislature.<sup>1142</sup> Within each of the three regions, the dominant ethnic groups formed parties that were largely based on ethnic allegiances: The Northern People's Congress (NPC) in the North; the Action Group in the

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<sup>1137</sup>ibid.

<sup>1138</sup>ibid.

<sup>1139</sup>ibid.

<sup>1140</sup> Judd Devermont, 'The US intelligence community's biases during the Nigerian civil war', (2017)116 (465)

African Affairs 705.

<sup>1140</sup>ibid.

<sup>1141</sup>ibid.

<sup>1142</sup>ibid.

West (AG); and the National Council of Nigeria and the Cameroons (NCNC) in the East.  
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During the 1950s, the Igbo and Yoruba parties were in the forefront of the fight for independence. <sup>1144</sup>They demanded an independent Nigeria organized into several small states so that the North would not dominate the country. <sup>1145</sup>Northern leaders, due to fear of domination by the more Westernized elites in the South, preferred British rule. As a condition for accepting independence, the Northerners demanded that Nigeria remain a divided country comprising three regions with the North having a clear majority. Southern leaders, anxious to obtain an independent country at all costs, accepted. This reflected Kenya's pre-independence Lancaster negotiations between Africans and British where leaders of large ethnic groups acceded to federal demands of the minority groups to hasten freedom. <sup>1146</sup>

Elections that ushered independence were conducted under a context where the Igbo were viewed as the most successful ethnic group. The first prime minister of Nigeria, a Northerner Abubakar Tafawa Balewa, was a founder member of the Northern People's Congress. He formed an alliance with the Igbo National Council of Nigeria and the Cameroons Party, and its popular nationalist leader Nnamdi "Zik" Azikiwe who became the President and Yoruba-aligned Action Group, the third major party, became the opposition. <sup>1147</sup>

The 1964 elections brought ethnic conflict into focus. Widespread reports of fraud tarnished the elections credibility. <sup>1148</sup>Westerners resented the political domination of the Northern People's Congress, many of whose candidates ran unopposed in the election. Ethnic conflict spread throughout Nigeria and this motivated elements within the military to consider decisive action. <sup>1149</sup>

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<sup>1143</sup>Godwin Onuoha, 'Contesting the Space: The "New Biafra" and Ethno-Territorial Separatism in South-Eastern Nigeria', (2011) *Nationalism and Ethnic Politics* 402-422 .

<sup>1144</sup>ibid.

<sup>1145</sup>ibid.

<sup>1146</sup>ibid. .

<sup>1147</sup>Bruce Gilley , 'Chinua Achebe on the positive legacies of colonialism',(2016) 115 (461)*African Affairs* 646–663.

<sup>1148</sup>ibid .

<sup>1149</sup>ibid .

On 15 January 1966, Igbo officers conducted a coup and two major political leaders of the North, the Prime Minister Sir Abubakar Tafawa Balewa and the Premier of the northern region, Sir Ahmadu Bello were executed by Major Nzeogwu.<sup>1150</sup> Meanwhile, the President, Sir Nnamdi Azikiwe, an Igbo, was on an extended vacation in the West Indies.<sup>1151</sup> He did not return until days after the coup. There was widespread suspicion that the Igbo coup plotters had tipped him and other Igbo leaders off regarding the impending coup.<sup>1152</sup> Johnson Aguiyi-Ironsi, an Igbo and loyalist head of the Nigerian Army, suppressed the coup.<sup>1153</sup> The majors surrendered, and Aguiyi-Ironsi was declared head of state on 16 January 1966.<sup>1154</sup>

Aguiyi-Ironsi suspended the constitution and abolished the regional confederated form of government and pursued unitary like policies favoured by the Igbos. The Northern politicians found this decree intolerable. On the night of 29th July 1966, Northern soldiers mutinied, thus precipitating a counter coup.<sup>1155</sup> The counter-coup led to the installation of Lieutenant-Colonel Yakubu Gowon as Supreme Commander of the Nigerian Armed Forces. He was a Northerner and a Christian from a minority ethnic group.<sup>1156</sup> He repealed the Unification Decree, announcing a return to the federal system.<sup>1157</sup>

From June through October 1966, ethnic conflict ensued in Northern Nigeria and an estimated 80,000 to 100,000 Igbo, half of them children, died, This forced between a million to two million people to flee to the Eastern Region.<sup>1158</sup>

Ostensibly to address the underlying ethnic grievances, in particular, domination of politics by Northern Nigeria, on 27th May 1967 Gowon proclaimed the division of Nigeria into twelve states.<sup>1159</sup> This decree carved the Eastern Region in three parts: South Eastern State,

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<sup>1150</sup> Ejitu Nnechi Ocha, *Igbo Ethnicity in Nigeria :Origin ,Evolution and Contemporary Forms in Nigeria* ,(Lap Lambert 2018)67.

<sup>1151</sup> *ibid* 70-74.

<sup>1152</sup> *ibid* 80-89.

<sup>1153</sup> *ibid*90-97.

<sup>1154</sup> *ibid*.

<sup>1155</sup> Brandon Kendhammer, 'Getting Our Piece of the National Cake: Consociational Power Sharing and Neopatrimonialism in Nigeria', (2015) 21 ( 2) Nationalism and Ethnic Politics 143,140.

<sup>1156</sup> *ibid*.

<sup>1157</sup> *ibid*.

<sup>1158</sup> *ibid*.

<sup>1159</sup> Daniel Jordan Smith , 'Corruption complaints, inequality and ethnic grievances in post-Biafra Nigeria', (2014) 35(5)Third World Quarterly 787-802.

Rivers State, and East Central State. <sup>1160</sup>Now the Igbos, concentrated in the East Central State, would lose control over most of the petroleum, located in the other two areas. This triggered the May 1967 Ojukwu declaration of independence of the Republic of Biafra. <sup>1161</sup>

Biafra secessionists were crushed militarily and Nigeria alternated between democratically elected civilian governments and military dictatorships until it achieved a stable democracy in 1999. <sup>1162</sup> That year, a new constitution was promulgated heralding a fourth republic. <sup>1163</sup>

The 1963 constitution (First Republic) had established the country as a federal state. This took effect on 1 October 1963 (Nigeria's third anniversary as an independent nation). It was based on parliamentary system and it continued in operation until a coup in 1966 that overthrew Nigeria's democratic institutions. <sup>1164</sup>The 1979 constitution which brought in the Second Republic, abandoned the Westminster system in favour of a pure presidential system. To avoid the pitfalls of the First Republic, it compelled political parties and cabinet positions to reflect the "federal character" of the nation (parties had to register in at least two-thirds of the States of Nigeria and each state had to have at least one member of the cabinet from it). <sup>1165</sup>

The 1993 constitution was aimed at returning democratic rule to Nigeria with the establishment of a Third Republic, but was never fully implemented. The Junta retained power until 1999 when the 1999 constitution restored democratic rule to Nigeria, and this remains in force today. <sup>1166</sup>

#### **5.4.3 Lessons to be drawn from Nigeria**

The procedure for winning the presidency is set by the Constitution of Nigeria of 1999 and it adheres to centripetalism characteristics. Article 133 provides that ‘A candidate for an election to the office of President shall be deemed to have been duly elected to such office

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<sup>1160</sup>ibid.

<sup>1161</sup>ibid.

<sup>1162</sup>ibid.

<sup>1163</sup>ibid.

<sup>1164</sup>ibid.

<sup>1165</sup>ibid.

<sup>1166</sup>Rotimi Suberu, ‘Managing Constitutional Change in the Nigerian Federation’,(2015) 45(4) *Publius: The Journal of Federalism* 552.

where, being the only candidate nominated for the election -(a) he has a majority of YES votes over NO votes cast at the election; and(b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja’.

Article 134. (1) provides “A candidate for an election to the office of President shall be deemed to have been duly elected, where, there being only two candidates for the election -(a) he has the majority of votes cast at the election; and (b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja. Sub article (2) states that ‘A candidate for an election to the office of President shall be deemed to have been duly elected where, there being more than two candidates for the election-(a) he has the highest number of votes cast at the election;and(b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja’.

Sub article (3) states that ‘In default of a candidate duly elected in accordance with subsection (2) of this section their shall be a second election in accordance with subsection (4) of this section at which the only candidate shall be -(a) the candidate who scored the highest number of votes at any election held in accordance with the said subsection (2) of this section; and (b) one among the remaining candidates who has a majority of votes in the highest number of States, so that where there are more than one candidate with majority of votes in the highest number of States, the candidate among them with the highest total of votes cast at the election shall be the second candidate for the election’.

Sub article (4) states “In default of a candidate duly elected under the foregoing subsections, the Independent National Electoral Commission shall within seven days of the result of the election held under the said subsections, arrange for an election between the two candidates and a candidate at such election shall be deemed elected to the office of President if -(a) he has a majority of votes cast at the election; and(b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja’.

Sub article (5) provides ‘In default of a candidate duly elected under subsection (4) of this section, the Independent National Electoral Commission shall, within seven days of the result of the election held under the aforesaid subsection (4), arrange for another election between the two candidates to which the subsection relates and a candidate at such election shall be deemed to have been duly elected to the office of President, if he has a majority of the votes cast at the election.’”

Horowitz has stated that this Nigerian centripetal constitutional engineering originated from its 1978 Constitution. It is plurality plus territorial distribution in order to create an incentive for the president to have a pan-ethnic outlook. He states it had a positive outcome of addressing ethnic conflict during presidential elections.<sup>1167</sup> He says that devolution in Nigeria often acts as electoral reform because it proliferates devolved units which in turn alters political boundaries. This impacts on the number of political parties, each party’s relative strength countrywide and so forth.<sup>1168</sup>

In Nigeria, between 1960 and 1966 during its first constitution before the civil war, there were only three devolved units (the Northern was dominated Muslims, and the south was dominated by Igbo and the other southern one by Yoruba). Muslim Hausa-Fulani were only about 30 per cent of the total Nigerian population. A majority in the Northern region did control that devolved unit sufficiently to use it as a springboard to gain power at the centre. Afterwards the units were divided further including the Northern Region. The result was a decline in Northerners domination of electoral power. It created greater incentives to Northerners to cooperate with southern ethnic groups to gain power.

Described by Nic Cheeseman and others as a ‘counterfeit democracy’, Nigeria dropped eighteen decimal points between 2015 and 2018 in the Democracy Index of Economist Intelligence Unit.<sup>1169</sup> It had scored 4.62 in 2015 but most recent report indicates a score of 4.44 in 2018 study. Nigeria scored similar points in 2017. In sub saharan Africa it had

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<sup>1167</sup>Donald L. Horowitz, ‘Conciliatory Institutions and Constitutional Process in Post-Conflict States’ (2008) 49 William and Mary Law Review <[https://scholarship.law.duke.edu/faculty\\_scholarship/1868](https://scholarship.law.duke.edu/faculty_scholarship/1868)> accessed 9 November 2019.

<sup>1168</sup>ibid.

<sup>1169</sup>Nic Cheeseman and Brian Klaas, *How to Rig an Election*, (New Haven: Yale University Press 2018) 201-220.

been ranked 20 out of 44 and 108 worldwide.<sup>1170</sup>It was classified a hybrid regime -a combination of democratic traits,like regular elections and authoritarian features, such as political repression. It was behind Kenya and Uganda who were ranked 17th, and 16th respectively hence affirming Obina C D and others view that Nigeria remains ethnically divided during presidential elections.<sup>1171</sup>Therefore this model has not worked effectively.

The lesson Kenya can draw from Nigeria is that pluralistic centripetalism ,which mirrors article 138(4) of the Constitution of Kenya 2010 , may not work hence the need to reform it .

## **5.5. Conclusion**

Lessons from Guyana, Northern Ireland and Nigeria do illustrate social engineering characteristics of law. When the independence constitution of Nigeria was poorly crafted by way of establishment of three federal units whose boundaries coincided with ethnic cleavages, conflict occurred. When a constitutional settlement in 1998 in form of Good Friday Agreement was established in Northern Ireland, peace was achieved.

Drawing lessons from these countries shows the interaction between law and society .This examination is what Roscoe Pound refered to as ‘law in books ,and law in action’ .<sup>1172</sup>The use and misuse of ethnicity by elites in Guyana does affirm the theory of instrumentalism.

This chapter has laid out lessons to be drawn from selected commonwealth countries that are ethnically divided on electoral matters. It has drawn the lesson that the best country to draw positive lessons on how to address ethnic conflict in presidential elections is Northern Ireland.This region has adopted Ranked Choice voting and strengthened devolution by devolving secondary and primary education.

This now forms the premise upon which the study can draw conclusions and recommendations as set out in detail in the next chapter.

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<sup>1170</sup>ibid.

<sup>1171</sup> Obinna CD and others ,‘The 2015 presidential election in Nigeria: Gaining insights with spatial analysis’, (2016) 44 Electoral Studies 455-460.

<sup>1172</sup> Jiri Priban, ‘Roger Cotterrell: Sociological Jurisprudence :Juristic Thought and Social Inquiry’,(2018) 45 (2)Journal of Law and Society 330-337.



## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Introduction

This chapter sets out the recommendations and conclusion of the study. It is divided as follows: summary of the study, findings, conclusion and recommendations. It synthesizes all the data from the previous chapters and forms the final part of the study.

#### 6.2 Summary of the Study

The Research Questions were

- i. What is the linkage between ethnic conflict and Presidential elections in Kenya?
- ii. How adequate are the post-2007 constitutional mechanisms in addressing ethnic conflict in presidential elections in Kenya?
- iii. What lessons can Kenya draw from the constitutional mechanisms of other ethnically divided commonwealth jurisdictions-Northern Ireland, Guyana and Nigeria?
- iv. What legal interventions can be recommended to address the problem of ethnic conflict in presidential elections in Kenya?

The study objectives were drawn directly from the above stated questions.

The study collected data from counties that have been affected by ethnic conflict in presidential elections since 2007: Kiambu, Nairobi , Mombasa, Kwale, Nakuru, Uasin Gishu, Kisumu, Nandi, Bomet, Kericho, Homa Bay and Siaya . Thika in Kiambu was used for piloting. The study collected data by way of interviews, focus group discussions and secondary data review. The respondents were purposively picked voters, experts, officials and presidential candidates who have knowledge of this subject matter. Select students were interviewed and they gave their views on Ranked Choice Voting .

## **6.3 Findings**

### **6.3.1 First objective of the study**

Linkage between Ethnic Conflict and Presidential Elections in Kenya

#### **6.3.1.1 Negative Campaigns**

The first linkage identified by the study is negative campaigns by presidential candidates. This refers to the adoption of a campaign strategy where leaders focus on criticizing other leaders, often of a different ethnic group, instead of emphasizing their own positive qualities. Respondents affirmed frequent use by presidential aspirants during campaigns and their key supporters of outright and coded ethnic hate speech and harsh words. Use of impolite language against their opponents' appeals to supporters' base instincts as opposed to emphasizing their own positive qualities. Such a method of campaign seems more effective than issue driven platforms. This has been affirmed by studies that suggest negative campaigns work better.<sup>1173</sup>

#### **6.3.1.2 Stiff Competition**

The second linkage identified is the one of stiff competition in Presidential Elections. Stiff competition is the intense rivalry in which main presidential candidates try to win the elections using every available method in Kenya. These methods include employment of huge financial and human capital resources and higher media coverage as compared with other campaigns for other seats. The stiffer the campaigns for a seat, the higher the likelihood of disagreements, post, during and after the vote. Fringe candidates (those that do not attract support above 10 per cent) do not offer stiff competition. Stiff competition is often between contestants with realistic chances of winning and who emerge first and second after announcement of results.

Ultimately the disagreements will either turn violent or parties end up in courts. Seats with stiff competition tend to have clear main contestants.

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<sup>1173</sup>Wang and others (n 535).

It was the finding of this study that the margin between the eventual winner and the second contestant matters in predicting the number of deaths in subsequent ethnic conflict that may arise and if ethnic conflict will arise altogether or not.

By analyzing data from various national votes conducted since return of multi-party democracy in 1992, the study used two statistical models. Logistical regression was used to analyze impact of margin on likelihood of ethnic conflict and linear regression for analyzing impact of margin on likely number of deaths that may occur in the period surrounding presidential elections in Kenya.

For logistical regression, the following formula was denoted:

$$Y = \frac{e^{84.915 - 6.163}}{1 + e^{84.915}}$$

From the above output, the odd value is 0.002, which implies that an increase in the margin between the first and the second presidential contestants reduces chances of a conflict in the country by 1 minus the odds value (i.e. 1-0.002) which is 99.8 per cent. There is need to have a significant margin between the first and the second presidential candidates.

For linear, coefficient of determination is 0.2566 (R Square), which shows that the margin between the first and the second contestants contributes to approximate 26 per cent of number of deaths. There are other factors that could be causing deaths which are beyond the scope of this study.

As to what margin ought to be there between the winner and the second contestant so as to decrease likelihood of ethnic conflict or deaths in presidential elections in Kenya, the study sought to get the average margin when ethnic conflict occurs, and when it does not. An average of 6.11 per cent was denoted when it does occur, and 28.24 per cent when it does not. The average of the two is 17.17 per cent. To determine margin of error, the sample size was deemed very small ( $F_n=2$ ).<sup>1174</sup> The study considered the difference of + (plus) or - (minus) 5 per cent (at 95 per cent confidence level). A margin of between 16.15 per cent and 17.85 per cent ought to be there between the winner and second best aspirant to

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<sup>1174</sup> Kalinowski (n 578).

decrease chances of ethnic conflict. This then necessitates enhancing presidential winning threshold to 60 per cent.

This forms the study's significant original contribution to knowledge, both in terms of methods and content. In terms of content, it links ethnic conflict in presidential elections in Kenya with margin of votes between the winner and best loser in presidential elections. By studying voting patterns since reintroduction of multi party elections in 1992, it has uncovered a new theory that shows the higher the margin of votes between a winner and best loser in presidential elections in Kenya, the lower the chances of ethnic conflict and vice versa. Ensuring a margin of about 18 per cent between the two main contestants (super majority) constitutionally has been proposed by the study.

Super majority voting concept exists in law in several ways. First, when crafting decision making rules whether in committees or companies, lawyers do consider super majority rules for certain important matters. Studies have illustrated that simple majority rules are more vulnerable than super majority rules to disproportionate influence of impatient shareholders or members.<sup>1175</sup> Super majority decision voting rules have been found to lead to lengthier deliberation and more accurate decisions under company law or committee decision making.<sup>1176</sup> Second, in legislative rules, some matters require super majority mandate, for example, removal of the President.<sup>1177</sup> This thesis extends this concept into constitutional designs for electoral systems. Argentina and Ecuador Constitutions do provide that outright presidential winners must have a gap of over 10 per cent above their second best rival.<sup>1178</sup> However, they do not have super majority requirements.

This justifies the proposal to amend article 138 (4) of the Constitution of Kenya 2010 to increase the margin of victory of the eventual winner. A super majority system, justified by an analysis of historical electoral data, is an advancement of existing centripetalism theory of constitutional electoral systems which presently advocates either Ranked Choice Voting or 50 per cent plus 1 vote and distributive mechanisms.

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<sup>1175</sup> Jimmy Chan and others, 'Deliberating Collective Decisions' (2018) 85 (2) *The Review of Economic Studies*, Oxford Academic 929–963.

<sup>1176</sup> *ibid.*

<sup>1177</sup> Barber (n 483).

<sup>1178</sup> Andrew and others (n 107).

This is an advancement to the approach of using data in constitutional electoral studies. This is an emerging approach but legal experts in developed countries have been employing this method in litigation, arbitration and commercial law practice.

### **6.3.1.3 Lack of Nationalism**

The third is lack of nationalism by voters. Nationalism is devotion and loyalty to Kenya by placing emphasis on promotion of its interests as opposed to those of its many ethnic groups. The expression “lack of nationalism” denotes disloyalty to Kenya by placing emphasis on promotion of one’s ethnic group interests above those of Kenya.

Though it is largely the leaders who bear most blame for sustenance of ethnic conflict, the role of the people –pressure from below –cannot be ignored. Evidence indicates that in Kenya and in other ethnically divided societies, leaders who pursue nationalistic agenda fare badly in elections as compared to those that pursue the ethnic line of persuasion.

To fortify this finding ,this study analyzed the rate of transition of MPs from 11<sup>th</sup> to 12<sup>th</sup>parliament. It compared the rate of transiting success for MPs with criminal cases related to ethnic hate (linked to presidential elections of 2017)with those without. It arrived at a conclusion that on the exclusion of the MP facing rape charges, the re-election success rate for MPs facing criminal prosecution related to ethnic hate rises to 88 per cent.

### **6.3.1.4 Negative Impact of Local Media**

The fourth is the negative impact of local media ( vernacular Radio). These are radio stations that broadcast in local languages other than English and Kiswahili -official languages as per Article 7 (2) of the Constitution of Kenya 2010. As per the findings in chapter three , radio remains the most popular form of media in Kenya.<sup>1179</sup> Though Kiswahili radio stations remain the most listened to according to Geopoll, <sup>1180</sup>respondents blamed vernacular radio stations for continued influence of ethnicity on politics. The geo poll confirmed older generation (who are more politically active) have a preference of

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<sup>1179</sup>Geopoll (n 634).

<sup>1180</sup>ibid.

vernacular radio stations.<sup>1181</sup>The respondents cited unbalanced guests during local media talk shows that feature during primetime.

### **6.3.1.5 The Winner Take All System**

Finally, the winner take all system was identified. The notion of “winner takes all” refers to two things. As explained in chapter three, unlike the period under the now repealed constitution, presently losers of the presidential race do not have a soft landing in terms of being elected for another position.<sup>1182</sup>Second, it refers to extensive benefits that accrue to the winner in a pure presidential system to the exclusion of the other contestants, including, appointive powers.

### **6.3.2 Second objective of the Study**

Adequacy of the Post-2007 Constitutional Mechanisms in Addressing Ethnic Conflict in Presidential Elections in Kenya

#### **6.3.2.1 Devolution**

Devolution was viewed positively in terms of devolving resources at the local level and ensuring equitable regional development. It embedded ethnic minorities into state structures in a manner not possible in previously centralized Kenya. This inclusivity was viewed as addressing complaints of marginalization that had fueled ethnic conflicts in the past presidential elections. Devolution did reduce, to an extent, appeals to the centre when ethnic elites get accommodation into powerful gubernatorial positions. Despite these positive gains, devolution had not removed the allure of the presidency. By virtue of controlling some devolved governments, ability of the opposition to negate national institutions in its fight for the centre has dramatically gone up hence imperiling the centre more.

The counties that have benefitted most with devolution as measured by allocations both in absolute terms and per capita are those that are not inhabited by major ethnic groups that fight for the presidency. They are Kwale, Turkana, Garissa, Isiolo, Tana River, Marsabit,

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<sup>1181</sup>ibid.

<sup>1182</sup> See Article 131 (3) of the Constitution of Kenya 2010 which states The President shall not hold any other State or public office. See also n 631 .

Samburu, Wajir, and Lamu. Counties inhabited by ethnic groups that undertake stiff competition for the presidency and often conflict occurs ranked poorly in terms of resources allocation. They include Nairobi, Nakuru, and HomaBay, Kiambu, Kakamega and Siaya counties. This suggests that devolution will not incentivize major ethnic groups not to fight for the presidency unless the formula for revenue sharing is changed.

#### **6.3.2.2 Pluralistic Centripetalism and Ranked Choice Voting**

The current centripetalism with pluralistic features was viewed as being good in terms of creating incentives for cross ethnic campaigns. It does not offend the human rights principle of equality of ethnic groups and persons. It was viewed as ineffective due to failure to take into account social and demographic conditions of Kenya. 50 per cent plus 1 vote threshold as provided by article 138 (4) of the Constitution of Kenya 2010 is considered to be too low for a country with five big ethnic groups comprising more than 60 per cent of Kenyan population. Centripetal mechanism of Ranked Choice Voting was viewed as being more reflective of the peoples' will. It was seen as fostering cross-ethnic collaboration. However, it was viewed as being too novel and expensive.

#### **6.3.2.3 Consociationalism**

Consociationalism was viewed as being effective in bringing transitional peace. It was found as a means of promoting inclusivity by ensuring that all ethnic elite are accommodated into the structures of the state. However, it was viewed as being expensive as it tends to expand the executive. It was viewed as fostering immobilism. It did embed ethnicity and countered the human rights principles of equality of persons and ethnic groups and right to political choices.

#### **6.3.2.4 Nation-Building Measures**

Nation-building measures were viewed positively in terms of fostering a national identity –the best guarantee for peace in the long run. It did not counter the principles of human rights. However, it was viewed as ineffective in addressing ethnic conflict in presidential elections especially since Kenya has experimented with the same since independence with no success. It ignores the reality of ethnic politics.

### **6.3.3 Third objective of the Study**

#### **Lessons Kenya Can Draw from the Constitutional Mechanisms of Other Ethnically Divided Commonwealth Jurisdictions**

The study drew lessons from three commonwealth countries that have had the problem of ethnic conflict in their national electoral processes. Namely; Guyana in South America, United Kingdom's Northern Ireland in Europe and Nigeria in Africa. Guyana's ethnic conflict is cyclic and it coincides with elections just like Kenya. The ethnic fault line is between its majority Indian population facing its minority black ethnic group. Northern Ireland conflict has been between Catholics and Protestants. In Nigeria, ethnic conflict is usually between northern Muslim ethnic groups of Hausa –Fulani, Yoruba and Igbo both in the south of the country.

Guyana did illustrate the perils of failing to introduce either centripetalism or consociationalism. Northern Ireland has illustrated that the Consociational Model works in the short term. It enabled combatants to put down their weapons and take the path of democracy. It was a stop gap measure with the region now experimenting with Ranked Choice Voting in the long run, and the outcome has been positive so far. Nigeria adopted pluralistic centripetalism and though it has brought relative peace it remains a hybrid democracy.

There are notable differences between Kenya and Northern Ireland. Firstly, Northern Ireland is a parliamentary democracy, whereas Kenya is a pure presidential democracy. This study adds a new angle to the body of literature regarding centripetalism. It illustrates the importance of analyzing data from previous elections to arrive at an empirical margin that ought to be there between the eventual winner and the second contestant to reduce chances of either deaths specifically or ethnic conflict in the period surrounding presidential elections. Having increased the winning threshold to 60 per cent of the overall votes cast, necessity of a run off is negated. Ranked Choice Voting can be a second option.

This proposal, which seeks to introduce a supermajority win (60 per cent) and an alternative option of Ranked Choice Voting, was shared with the two international scholars interviewed for this study. It was explained that the study findings were that ethnic conflict



is more preponderant when presidential elections are close than if there is a large winning margin.

This is the starting point for making recommendations about electoral reform.

One expert agreed it is certainly the case that close elections are more tense than ones with large winning margins. His view was that this was a function of having a high stakes contest that could easily go either way. He agreed that even under Ranked Choice Voting, close elections (for example a 51-49 result) are likely to be more disputatious than ones with a large winning margin.

This study disagrees with the high stakes contest hypothesis offered by the said expert. It is true presidential elections are high stakes. However, if the law can be tweaked in a manner that gives political incentives for pre-election large multi-ethnic coalitions, like Kenya in 2002, ethnic peace may be achieved. 60 per cent winning threshold as can be set by the Constitution may trigger formations of such large multi-ethnic coalitions. Whereas the proposal, as one expert stated, may make winning presidential elections cumbersome, that is a price Kenya can consider bearing if the alternative is death and loss of property. It is best to err on the side of caution.

The expert did agree Ranked Choice Voting would make sense as an alternative to a runoff in Kenyan presidential elections. However, he held the view that mechanics of the system require a 50 per cent threshold for victory, as it is simply an application of the single transferable vote to a single member election. This means that the requirement to win is always (total votes) divided by (1+1), that is 50 per cent.

It cannot be combined with the above mentioned super majority proposal as a result hence it is an alternative mechanism. The second international scholar did affirm he was not sure how arithmetically one can get up to 60 per cent or to anything beyond 50 percent plus one. He sought for time to do the arithmetic. As at the time of this publication, he had not done it yet.

## 6.4 Fourth Objective of the Study

### Conclusion and Recommendations

The study's recommendations and conclusion are underpinned by several concepts previously discussed.

First, conclusions and recommendations in this study do adhere to various conceptual framework explained in chapter two of this study. Yash's three typologies of constitutions in an ethnically divided society (liberal, nationalistic and consociational) were discussed in chapter 2. The study adopted a liberal conception of a constitution and hence the recommendations have endeavoured to retain the liberal character of the Kenyan constitutional model.

Second, inherent in the conclusions and recommendations is the appreciation that well thought out law changes can engineer social change and promote peaceful presidential elections. This is in adherence to social engineering theory of law as explained in theoretical framework of this study.

Finally, instrumentalisation of ethnicity is assumed by the study will remain a key feature of presidential elections in Kenya. Legal changes that have been proposed by the study are intended to incentivize ethnic elites to act in a manner that promotes cohesion, rather than divisions.

One hypothesis did underpin this study. It was that post-2007 constitutional mechanisms meant to address ethnic conflict in presidential elections are inadequate. This study has affirmed these constitutional mechanisms are indeed inadequate.

The study now does specific recommendations. As explained in chapter 2 of this study, these specific recommendations are framed in a manner that respects separation of powers and the judicial doctrine of 'political question'.<sup>1183</sup> Justice Ojwang' expounded this in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR* as explained in chapter 2 of this thesis (conceptual framework).

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<sup>1183</sup> Musiga (n 243).

## **6.5 Specific Constitutional and Legal Interventions Recommendations**

### **6.5.1 Strengthening centripetalism**

The study recommends strengthening of centripetalism by way of enhancing the winning criteria. This can be done by deletion of article 138 (4) of the Constitution of Kenya 2010 and in its place, inserting a clause that provides a winner must garner 60 per cent. Where no candidate attains this, a repeat election is held and the top two candidates go for a run off .It is expected that major candidates will strive to avoid a run off. Hence this will incentivize major presidential candidates to form large pre-elections multi-ethnic coalitions intended to win during 1<sup>st</sup> round and hence peace may prevail.

An alternative to the foregoing, Ranked Choice Voting has been proposed as an alternative both for present plurality voting and run off.

To address the negative effects of centripetalism feature of winner takes all, it is recommended that best losers in presidential elections be accommodated into power echelons in the Senate. Senate is chosen by virtue of being a house that plays a powerful role of protecting devolution-another key factor in addressing ethnic conflict. Its members are elected by more voters as compared to positions of members of the national assembly hence enjoy more respectability. This can be achieved by amending Article 98 of the Constitution of Kenya 2010 and adding a new sub clause (f) that provides the best loser and his or her running mate in presidential elections in Kenya are automatic members of the senate. Parliament is the key agency in implementing this recommendation. The executive through the office of the Attorney General can as well initiate the process.

### **6.5.2 Strengthening devolution**

Strengthened devolution has been cited as a key way of addressing ethnic conflict in presidential elections. This can be done by reforming the formulae for revenue sharing and devolving more money to the counties. There is a pending proposal by the Commission for Revenue Allocation on how the formulae can be amended to make it fairer to counties with

large ethnic groups which this study endorses.<sup>1184</sup> Recommendations around this issue are excluded.

Devolving more funds remains a good proposal and thus borrowing lessons from Northern Ireland, this study recommends education be fully devolved. This can be achieved by amending article 203 (2) of the Constitution of Kenya 2010 to provide equitable share of the revenue raised nationally that is allocated to the counties shall not be less than 40 per cent of all revenue collected by the national government. Education carries a huge budget hence if devolved, the 40 per cent target of all revenue collected would be realized.<sup>1185</sup> Many counties are handling the docket already through bursaries but without correct legal underpinnings.<sup>1186</sup> This can be achieved by amending schedule four of the Constitution of Kenya so that primary and secondary education gets devolved.

To address the persistent complaints of corruption in the devolved units, there is need for governors to step aside when they face criminal trials. This would ensure they do not tamper with evidence while being in office. Such a proviso would act as a deterrent to governors with intention to steal public funds and in tandem with how other civil servants are treated once they have pending criminal cases in court. This can be achieved by inserting a new clause 181 A in the constitution to provide for suspension of a governor during pendency of a criminal case.

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<sup>1184</sup>The proposed new formulae is  $CA_i = 0.45PN_i + 0.26ES_i + 0.18PI_i + 0.08LA_i + 0.02FE_i + 0.01DF_i$  where  $CA_i$ =Revenue allocated to county,  $i$ = County: 1,,2.....47.,  $PN_i$ =Revenue allocated to a county on the basis of Population Factor,  $ES_i$ = Revenue allocated to a county on the basis of Equal Share factor. This is shared equally among the 47 counties.

$PI_i$ = Revenue allocated to a county on the basis of Poverty Factor,  $LA_i$ = Revenue allocated to a county on the basis of Land Area Factor,  $FE_i$ = Revenue allocated to a given county on the basis of Fiscal Effort,  $DF_i$ = Revenue allocated to a given county on the basis of Development Factor. See Commission for Revenue Allocation, "Revenue Allocation Formula", <https://www.craKenya.org/information/revenue-allocation-formula/> accessed on 3rd May 2019.

<sup>1185</sup>Prof Sihanya states that Counties can manage their other functions so well so as to make a case for the transfer or assignment of further functions from the central or national Government. Ben Sihanya, 'Devolution and Education Law and Policy in Kenya', (Ben Sihanya, 2015) <https://innovativelawyeering.com/attachments/article/19/Devolution%20and%20education%20law%20and%20policy%20in%20Kenya%20working%20draft.pdf> accessed 3rd May 2019.

<sup>1186</sup>Auditor General Report on Counties submitted to the Senate for the financial year 2017/2018, available at on the Senate website .Senate, 'Auditor Reports', (Senate, 1 Jan 2019) <http://www.parliament.go.ke/the-senate> accessed 2nd Dec 2019.

The above proposals on strengthening devolution and centripetalism would be contained in a single Constitutional Amendment bill.

### **6.5.3 Draft Constitutional Bill strengthening devolution and centripetalism**

The bill proposes to amend Articles 98, 138, 181 and 203 of the constitution with the objective of promoting fair representation and equality of vote, strengthening and enhancing accountability at the devolved level. The amendments are as follows;

**Composition of the Senate:** Amend Article 98, on the composition of the senate, by introducing a new paragraph (f) in clause (1) that the second ranking candidate in an election and their running mate become automatic members of the Senate. This is to mitigate the negative effects of centripetalism feature of electoral processes where winners takes all.

**Voting System for Presidential Elections:** Amend Article 138 ( 4) to either increase first round winning threshold ( from 50 per cent plus 1 to 60 per cent). This is by deleting the expression “ more than half” appearing in article 138 ( 4) (a) and in its place introduce the expression “more than 60percent”. This would retain second round voting where this is not achieved in the first round. In the alternative recommendation, provide for the ranked choice voting system and delete second round requirement.

**Governors charged with criminal offences:** Introduce a new Article 181A which provides for the stepping down of a governor who is charged with certain criminal offences.

**Increasing the minimum Equitable Share to County Governments:** Amend Article 203 of the Constitution by enhancing the percentage of minimum equitable share to the counties from 15 per cent to 40 per cent and to devolve primary schools education and secondary education to the counties.

The provisions in the proposed draft bill will have the following financial and policy implications-

- (i) **Clause 3: *Increasing the composition of the Senate by 2members.*** This clause provides that the second ranking candidate in a presidential election and the candidate’s running mates automatically become Senators.

Implication: Increasing the membership of the Senate from the current 67 to 69 will have an incremental cost in terms of salaries and allowances paid to the Senators and other benefits such as an official car grant, a personal car loan, mileage and car maintenance and mortgage.

**(ii) Clause 4 (option 1): *Applying first round super majority win for Presidential races contenders.*** This clause explains the mode of first round super majority wins for the presidential elections in voting and tallying the votes.

**(iii) Clause 4 (option 2): *Applying the Ranked choice voting system.*** This clause explains the mode of using the ranked choice voting system for the presidential elections in voting and tallying the votes. It provides for Parliament to enact a legislation on the same.

Implication: Using this system will have an initial financial implication in terms of cost of technology necessary to ensure that the voting system is electronic, there will be costs associated with creating public awareness, public participation and advertisements.

**(iv) Clause 5: *Provision for a Governor to step aside during criminal proceedings.*** The clause provides that a governor who is charged with a criminal offence shall step aside from office pending hearing and determination of proceedings in court. The governor would be entitled to receive 50 per cent of his remuneration and benefits as a governor. The criminal trial shall be determined within 3 months.

Implication: The country would make a saving of 50 per cent of the remuneration and benefits entitled to that governor for a period of 3 months.

**(v) Clause 6: *Increasing the equitable share from 15 per cent to 40 per cent.*** The clause seeks to increase the minimum allocation of equitable share to county governments from 15 per cent to 40 per cent of the most recently audited revenues received, as approved by the National Assembly.

Implication: For the past three financial years (2016/17, 2017/18 and 2018/19), the equitable share allocation as a percentage of the audited revenues approved by the National Assembly has been an average of 32 percent. However, this has been subject to negotiations and the performance of revenue collection by the national government. The

proposal in this clause would guarantee a higher minimum allocation that is not subjective. Besides, the timely approval of the audited revenues would enhance the equitable share at 40 per cent of the audited revenues. Otherwise, a lagged basis would mean a lower increment.

**(vi) Clause 7: Amending the fourth schedule on the functions of each level of government with regards to Education.** The provision seeks to devolve the Primary Schools and Secondary Schools' functions in Education.

#### Implication

It implies devolving the budget for the two programs, Primary schools, and Secondary schools. This is in line with the provisions of Article 203(d) of the Constitution to ensure that resources follow the functions of county governments.

It would be difficult to separate the function of special education from the primary and secondary school programs. It would be preferable that this function is devolved as well.

Since a considerable percentage of teachers are in the primary and secondary schools, it would be necessary for the bill to speak to whether the Teachers Service Commission will be devolved as well.

The total budget allocation for the two programs for Financial Year 2018/19 was Ksh. 90.77 Billion, i.e. (Ksh. 20.95 Billion for Primary school program and Ksh. 69.82 billion for the Secondary school program). This is an indicative cost of how much will have to be transferred to the Counties.

#### **6.6. Strengthening nation-building measures.**

Kenya Information and Communication Act can be amended to compel vernacular radio stations to have Swahili programs. Second, have a talk show where they have political panels comprised of persons with diverse opinions and compel them to undertake compulsory civic education.

## **6.7 Bodies to undertake the reform processes**

The entities that can move the above mentioned legal processes to amend the law are the office of the Attorney General, Kenya Law Reform Commission, Senate, and the National Assembly.

Article 156 (4) (a) of the Constitution of Kenya 2010 provides that the Attorney General is the principal legal adviser to the Government. Section 6 (1) (h) of the Kenya Law Reform Commission Act 2013 gives the commission the function to, upon request or on its motion, advise the national or county governments on the review and reform of their legislation. Article 96 (2) of the Constitution of Kenya 2010 gives the Senate the role of participating in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113. Article 95 (3) of the Constitution of Kenya 2010 grants the National Assembly the role of enacting legislation in accordance with Part 4 of this Chapter. The foregoing calls for a raft of constitutional and legislative amendment proposals. This study has drafted the said proposals, as indicated below. The following draft bill excludes option 1 since this would be a simple amendment to article 138(4)(a) of the Constitution of Kenya by way of revising the phrasing of the article .



**THE DRAFT CONSTITUTION OF KENYA (AMENDMENT) BILL, 2019**

**A Bill for**

**AN ACT of Parliament to amend the Constitution of Kenya.**

**ENACTED by the Parliament of Kenya, as follows**

Short title.	<b>1.</b> This Act may be cited as the Constitution of Kenya (Amendment) Act, 2019.			
Application.	<b>2.</b> This Act shall apply to the general elections following the coming into force of the Act.			
Amendment of Article 98 of the Constitution.	<b>3.</b> Article 98 of the Constitution is amended in clause (1) by inserting the following new paragraph immediately after paragraph (e)- (f) the second ranking candidate in a presidential election and the candidate’s running mate.			
Amendment of Article 138 of the Constitution.	<b>4.</b> The Constitution is amended by deleting Article 138 and substituting therefor the following new Article- <table border="1" data-bbox="630 842 1490 1879"> <tr> <td data-bbox="630 842 808 1879">Procedure at presidential election</td> <td data-bbox="808 842 1490 1879"> <p><b>138.</b> (1) If only one candidate for President is nominated, that candidate shall be declared elected.</p> <p>(2) If two or more candidates for President are nominated, an election shall be held in each constituency.</p> <p>(3) In a presidential election—</p> <p>) all persons registered as voters for the purposes of parliamentary elections are entitled to vote; and</p> <p>) the poll shall be taken by secret ballot on the day specified in Article 101(1) at the time, in the places and in the manner prescribed under an Act of Parliament.</p> <p>(4) The presidential election shall be conducted by way of ranked choice voting as follows-</p> <p>(a) the ballot shall allow voters to rank at least three candidates in order of choice.</p> </td> </tr> </table>		Procedure at presidential election	<p><b>138.</b> (1) If only one candidate for President is nominated, that candidate shall be declared elected.</p> <p>(2) If two or more candidates for President are nominated, an election shall be held in each constituency.</p> <p>(3) In a presidential election—</p> <p>) all persons registered as voters for the purposes of parliamentary elections are entitled to vote; and</p> <p>) the poll shall be taken by secret ballot on the day specified in Article 101(1) at the time, in the places and in the manner prescribed under an Act of Parliament.</p> <p>(4) The presidential election shall be conducted by way of ranked choice voting as follows-</p> <p>(a) the ballot shall allow voters to rank at least three candidates in order of choice.</p>
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		<p>(b) the commission shall tabulate the votes in sequential rounds;</p> <p>(c) in each round, if –</p> <p>) there are only two continuing candidates, the candidate with the most votes shall be declared the winner of the election; and</p> <p>) if there are more than two continuing candidates, and no candidate receives at least fifty per cent of all the votes cast, the candidate with the fewest number of votes shall be eliminated and a new round shall begin;</p> <p>(d) if a voter’s first choice candidate was the eliminated candidate, then the vote shall be given to that voter’s next-ranked candidate; and</p> <p>(e) the elimination process shall continue until only two candidates are left or one candidate achieves at least 50 per cent of the cast votes.</p> <p>(5) Parliament shall enact legislation providing for all matters necessary to give effect to the ranked choice voting system in respect of presidential elections.</p> <p>(6) A presidential election shall be cancelled and a new election held if—</p> <p>(a) no person has been nominated as a candidate before the expiry of</p>
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		<p>the period set for the delivery of nominations;</p> <p>(b) a candidate for election as President or Deputy President</p> <p>(c) dies on or before the scheduled election date; or</p> <p>(d) a candidate who would have been entitled to be declared elected as President, dies before being declared elected as President.</p> <p>(7) A new presidential election under clause (8) shall be held within sixty days after the date set for the previous presidential election.</p> <p>(8) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall—</p> <p>(a) declare the result of the election; and</p> <p>(b) deliver a written notification of the result to the Chief Justice and the incumbent President.</p>		
<p>Insertion of new Article.</p>	<p><b>5.</b> The Constitution is amended by inserting the following new Article immediately after Article 181-</p>	<table border="1"> <tr> <td data-bbox="873 1688 1065 1858"> <p>Governor to step aside during</p> </td> <td data-bbox="1065 1688 1508 1858"> <p><b>181A.</b> (1) Subject to clause (2), a governor who is charged for a criminal offence shall step aside from office pending</p> </td> </tr> </table>	<p>Governor to step aside during</p>	<p><b>181A.</b> (1) Subject to clause (2), a governor who is charged for a criminal offence shall step aside from office pending</p>
<p>Governor to step aside during</p>	<p><b>181A.</b> (1) Subject to clause (2), a governor who is charged for a criminal offence shall step aside from office pending</p>			

		criminal proceedings.	<p>the hearing and determination of the proceedings in court.</p> <p>(2) Parliament shall, through legislation, specify the offences for which a governor would be required to step aside from office.</p> <p>(3) A governor who steps aside under clause (1) is entitled to continue receiving one-half of the remuneration and benefits of the office of governor.</p> <p>(3) The Chief Justice shall put in place measures to ensure that a criminal trial in which a Governor is an accused person shall be determined within three months.</p>
Amendment of Article 203 of the Constitution.	<p><b>6.</b> Article 203 of the Constitution is amended in clause (2) by deleting the “fifteen” appearing immediately after the words “shall not be less than” and substituting therefor the word “forty”.</p>		
Amendment of the Fourth Schedule of the Constitution.	<p><b>7.</b> The Fourth Schedule of the Constitution is amended-</p> <p>a. in Part I by deleting paragraph 16 and substituting therefor the following new paragraph-</p> <p style="padding-left: 40px;">16. Universities, tertiary educational institutions and other institutions of research and higher learning, special education and special education institutions.</p> <p>b. In Part II by deleting paragraph 9 and substituting therefor the following new paragraph-</p> <p style="padding-left: 40px;">9. Pre-primary education, primary schools, secondary schools, village polytechnics, home craft centres and childcare facilities.</p>		

**MEMORANDUM OF OBJECTS AND REASONS**

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This Bill seeks to amend the Constitution to promote fair representation and equality of vote, strengthen devolution and enhance accountability at the devolved level.

The Bill proposes to amend the Constitution as follows-

- (a) The Bill proposes to amend Article 98, on the composition of the senate, by introducing a new paragraph (f) in clause (1) that the second ranking candidate in an election and their running mate become automatic members of the Senate. This is to address the negative effects of current feature of electoral processes where winners takes all.
- (b) The Bill proposes to amend Article 138, to provide for the ranked choice voting system. This system ensures that the successful candidate represents a broad range of voices in society and addresses the challenge of “split votes”. Under the proposed system, voters rank the candidates in order of choice. The votes are then counted in rounds which entail elimination of the candidate with the least votes. The voters’ first choices are counted, and if no candidate wins by at least 50 per centof the votes cast, the candidate with the least number of votes is eliminated and their votes are distributed to the candidates who were ranked second on those ballots. The elimination process continues until one candidate attains the set threshold of 50per centof all the votes cast. The first candidate to attain the 50per centthreshold is declared the winner. This system avoids a plurality winner for president, as well as costly run-off elections.
- (c) The Bill proposes to introduce a new Article 181A which provides for the stepping down of a governor who is charged with certain criminal offences. This is intended to address the persistent complaints of corruption in the devolved units. The stepping aside of the governor would be for purposes of limiting interference with witnesses or evidence while in office.
- (d) The Bill proposed to amend Article 203 of the Constitution by enhancing the percentage of minimum equitable share to the counties from 15per centto 40 and to devolve primary schools education and secondary education to the counties. This proposal is intended to strengthen devolution by ensuring that more resources are devolved to the counties.
- (e) Dated the ....., 2019.....

**(Mover )**

*The Kenya Information and Communications (Amendment) Bill, 2019*

**THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT)**

**BILL, 2019**

**A Bill for AN ACT of Parliament to amend the Kenya Information and Communications Act and for connected purposes.**

**ENACTED** by the Parliament of Kenya, as follows—

Short title.	<b>1.</b> This Act may be cited as the Kenya Information and Communications (Amendment) Act, 2019.
Amendment of section 2 of No. 2 of 1998.	<b>2.</b> Section 2 of the Kenya Information and Communications Act, hereinafter referred to as the “principal Act”, is amended by inserting the following new definition immediately after the definition of the word “equipment” –
	“ethnic group” means any human society established historically in a particular territorial space and which identifies itself as a people and has developed a common language as a natural means of communication and cultural cohesion among its members;
Amendment of section 46E of No. 2 of 1998.	<b>3.</b> Section 46E of the principal Act is amended – (a) by renumbering the existing provision as sub-section (1); (b) by inserting the following new sub-section immediately after sub-section (1) – (2) The public broadcaster shall – (a) provide civic education programmes to the public; and (b) where programmes are broadcasted in the language of an ethnic group, include programmes broadcasted in Kenya’s national language.
Amendment of section 46I of No. 2 of 1998.	<b>4.</b> Section 46I of the principal Act is amended in sub-section (1) by inserting the following new paragraph immediately after paragraph (e) – (e) where programmes are broadcasted in the language of an ethnic group, include programmes broadcasted in Kenya’s national language.

## **MEMORANDUM OF OBJECTS AND REASONS**

### **Statement of the Objects and Reasons for the Bill**

The principal object of this Bill is to amend the Kenya Information and Communications Act, No. 2 of 1998 to provide for the requirement for a broadcaster who broadcasts in a language of an ethnic group (vernacular) to include programmes in the national language (Kiswahili) and the public broadcaster to provide civic education to the public. This is intended to strengthen nation-building and improve citizen participation in governance.

The Bill proposes to amend the Kenya Information and Communications Act by inserting new provisions in sections 2, 40E and 40I. The proposed amendment to section 2 intends to define ethnic group for purposes of the language of that ethnic group as regards broadcasting. Section 40E of the Kenya Information and Communications Act provide for public broadcasting services to be provided by the Kenya Broadcasting Corporation. This Bill proposes to amend this section so as to obligate the public broadcaster to provide civic education to the public and provide programmes in the national language where establishments of the national broadcaster broadcasts in the language of an ethnic group.

### **Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms**

The Bill does not delegate legislative powers nor does it limit the fundamental rights and freedoms.

### **Statement on how the Bill concerns county governments**

Devolution under the Constitution provide for two levels of governments; the national and county governments. Article 6(1) of the Constitution provides that Kenya the territory of Kenya is divided into the 47 counties as set out under the Fourth Schedule. Article 10 of the Constitution provide for national values and principles of governance which apply to both the national government and county governments. Some of the values and principles of governance as set out under Article 10 of the Constitution are national unity, participation of the people, good governance, transparency and accountability.

This Bill seeks to amend the Kenya Information and Communications Act so as provide for the provision of to civic education to the public and also provide programmes in the

national language where local media broadcasts in the language of an ethnic group. This is geared towards strengthening national unity and enable citizens to effectively participate in governance issues. The Bill concerns county governments in terms of Articles 110(1)(a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Constitution.

The Bill is a Bill concerning county governments in terms of Article 110(1)(a) of the Constitution.

**Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution**

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the ....., 2019.....

*(Mover)*





voting

**A Bill for**

**AN ACT of Parliament to establish the Ranked Choice Voting in  
Presidential Elections and for connected purposes.**

**ENACTED** by the Parliament of Kenya, as follows—

1. Short title

This Act may be cited as Ranked Choice Voting Act 2019.

Interpretation

For the purposes of this Act, unless the context otherwise requires the following terms have the following meanings:

“Abstention” is a ballot without a highest-ranked continuing candidate and either more than one ranking order contains the same candidate or one or more ranking orders did not contain any candidate.

“Continuing candidate” means any candidate that has not been defeated or elected.

“Election threshold” means 50 per cent of all votes cast in a presidential election .

“Exhausted ballot” means a ballot that does not contain a highest-ranked continuing candidate and is not an abstention or an overvote.

“Highest-ranked continuing candidate” means the candidate assigned to the highest ranking order that is neither a skipped ranking nor follows two or more consecutive skipped rankings nor contains an elected or defeated candidate nor contains more than one candidate nor follows a ranking order that contains more than one candidate.

“Inactive ballots” are all ballots that do not contain a highest-ranked continuing candidate, including abstentions, overvotes, and exhausted ballots.

“Overvote” means a ballot that does not contain a highest-ranked continuing candidate because the highest ranking order that is neither a skipped ranking nor contains an elected or defeated candidate contains more than one candidate or follows a ranking order that contains more than one candidate.

“Ranking order” means the number available to be assigned by a voter to a candidate to express the voter’s choice for that candidate. The number “1” is the highest ranking order, followed by “2” and then “3” and so on.

“Round” means an instance of the sequence of voting tabulation beginning with subsection (a)(1) of this section for single winner contests or (b)(1) of this section for multi winner contests.

“Skipped ranking” means a voter has left a ranking order unassigned but ranks a candidate at a subsequent ranking order.

“Surplus fraction” is a number equal to the quotient of the difference between an elected candidate’s vote total and the election threshold, divided by the candidate’s vote total, rounded down to four decimal places, ignoring any remainder.

“Transfer value” means the proportion of a vote that a ballot will contribute to its highest-ranked continuing candidate. Each ballot begins with a transfer value of 1. If a ballot contributes to the election of a candidate under subsection (b)(2), it receives a new transfer value.

### 3. Application

This Act applies only in respect of Presidential Elections in Kenya.

#### 4. Ranked Choice Voting Ballot

In any presidential contest conducted by ranked choice voting, the ballot shall allow voters to rank candidates in order of choice to a maximum of three choices in the order of preference.

### 3: Ranked Choice Voting Tabulation

(1) In any contest conducted by ranked choice voting, tabulation proceeds in rounds each sequentially as follows:

a. Each ballot shall count as one vote for the highest-ranked continuing candidate on that ballot and if two or fewer continuing candidates remain, the candidate with the fewest votes is defeated, the candidate with the greatest number of votes is elected and tabulation is complete.

b. If more than two continuing candidates remain, the continuing candidate with the fewest votes is defeated, and a new round begins .

(2).The candidate who garners in the first round of counting 50per centof all the votes cast will be declared a winner.

(3). If no candidate is elected under subsection (2)above, then the continuing candidate with the fewest votes is defeated, and a new round begins.

(4) In any round of tabulation in a contest conducted by ranked choice voting, a ballot that does not contain a highest-ranked continuing candidate shall not count for any candidate.

#### 4.Civic Education

Independent Electoral Boundaries Commission shall conduct civic education on continuous basis from the date of commencement of this law and using various forums,including and not limited to,-

- a) Radio stations ,
- b) Newspapers ,
- c) Social media ,
- d) Outdoor advertisement,
- e) Television,
- f) Schools and religious forums ,and
- g) Any other forum as may be gazzetted by the Independent Elections and Boundaries Commission who implements this law .

#### 5.Delegated Legislation

With the approval of parliament,Independent Elections and Boundaries Commission (IEBC) may make regulations to make better voting ,balloting and tabulation process while ensuring the integrity and smooth functioning of the election.

**THE RANKED CHOICE VOTING BILL,2019**

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**MEMORANDUM OF OBJECTS AND REASONS**

**Statement of the Objects and Reasons for the Bill**

The principal object of this Bill is to establish ranked choice voting in presidential elections .This is intended to promote moderation in politics and counter negative ethnicity in campaigns by encouraging cross ethnic political alliances.

**Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms**

The Bill does not delegate legislative powers nor does it limit the fundamental rights and freedoms.

**Statement on how the Bill concerns county governments**

Article 138 of the Constitution provides the process through which a president is elected.A president is elected by citizens who reside in all counties .The aim of the bill is to entrench national unity and democracy .Article 10 of the Constitution provides for national values and principles of governance which apply to both the national government and county governments. Some of the values and principles of governance as set out under Article 10 of the Constitution are national unity, participation of the people, good governance, transparency and accountability.

The Bill concerns county governments in terms of Articles 110(1)(a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Constitution.

The Bill is a Bill concerning county governments in terms of Article 110(1)(a) of the Constitution.

**Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution**

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the ....., 2019.....

*(Mover)*

## **6.8 Administrative Recommendations**

### **Strengthening Nation-Building Measures**

On the requirement to have panels that give diverse opinions, the same is provided for under sections 46D(2)(b) and 46I(1)(e) of the Kenya Information and Communications Act. This should be enforced .

National Integration and Cohesion Commission should improve its efficient prosecution of hate speech cases by hiring competent and qualified investigators .It should liaise with the office of the Director of Public Prosecution (DPP) and press for appeals in High Court if it holds the view original cases were determined unfairly by magistrates .

Prosecutors from the office of the DPP who handle hate speech related cases should be competent personnel .One issue highlighted by various experts in regard to poor rate of convictions is the issue of admissibility of videos recorded by private persons and shared on social media. On admissibility of audio visual recorded evidence, the same has been addressed under section 106 B of the Evidence Act and the DPP should make reliance on this section in court .

## **6.9 Policy Recommendations**

### **Strengthening Centripetalism**

Due to complex nature of Ranked Choice voting, Independent Electoral and Boundaries Commission needs to conduct major civic education across the country once article 138 (4) of the Constitution of Kenya is amended. This should be for a prolonged period of time, say two years prior to an election.

### **Strengthening Nation-Building Measures**

The government needs to prepare through a consultative process a civic education curriculum policy paper.Such a process must entail public input from key players like intelligentsia, civil society, presidential elections candidates and religious sector. Once developed, it should be implemented through key societal influencers like civil society.

## **Research**

Government may adopt a policy of continuous research of this topic through its relevant organs ,like public universities .<sup>1187</sup>For example , adoption of ethnic conflict amelioration mechanisms require existence of certain constitutional conditions . This can be researched

### **6.10 Further Research**

This study,being a constitutional work ,did not undertake a study on efficacy on legislative tools that Kenya has applied in addressing ethnic conflict . Article 79 of the Constitution of Kenya 2010 provides that Parliament shall enact legislation to establish an independent Ethics and Anti-Corruption Commission.It shall have the status and powers of a commission under Chapter Fifteen, for purposes of enforcement of the provisions of this Chapter. As a consequence, Ethics and Anti Corruption Commission Act no.22 of 2011 was enacted establishing Ethics and Anti Corruption Commission.Its functions,as per section 11 of the Act , include enforcing constitutional ethics on leaders .Article 73 of the Constitution of Kenya 2010 establishes the responsibilities on leaders to include ( 73 (2) (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;c) selfless service based solely on the public interest,demonstrated by (i) honesty in the execution of public duties;and(ii) the declaration of any personal interest that may conflict with public duties;(d) accountability to the public for decisions and actions;and(e) discipline and commitment in service to the people.

Students, researchers,educational institutions and or governmental bodies can consider initiating research on how effective this body has been in discharging these functions.As explained by the theory of instrumentalization of ethnicity that underpins this study,leaders remain a key focus of ethnic conflict discourse.Such a study would assist in enriching knowledge on how the Ethics and Anti Corruption Commission can improve its ethics enforcement mechanisms .

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<sup>1187</sup> Donald L.Horowitz , ‘Ethnic Power Sharing :Three Big Problems’,( 2014) 25 ( 2) Journal of Democracy.

Finally ,a pilot study needs to be undertaken on applicability in Kenya of Ranked Choice Voting in real life situation .Its financial costs need to be ascertained noting this study suggests the system can best work in a fully automated voting environment.How voters from varying background would interact with this fairly novel system needs to be studied .How Ranked Choice Voting can be combined with a super majority win can be investigated further .

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## APPENDICES

### APPENDIX I: RESPONDENTS' CONSENT FORM

SERIAL NUMBER.....

#### **“Adequacy of Post 2007 Constitutional Mechanisms in Addressing Ethnic Conflict in Presidential Elections in Kenya”**

By Irungu Kang'ata

Supervisors: Dr. Scholastica Omondi, Dr Duncan Ojwang' and Dr. Lois M. Musikali

University of Nairobi School of Law

[irungukangata@yahoo.com](mailto:irungukangata@yahoo.com)

You are kindly requested to participate in the research

**What the study is about:** This is a study on the effectiveness of post-2007 constitutional interventions in managing ethnic conflict in the Presidential elections in Kenya. The study is aimed at fulfilling the requirements of the School of Law (University of Nairobi) for the award of a degree of Doctor of Philosophy.

**What you are required to do as a participant:** The study seeks your voluntary participation. This will go a long way in forming credible conclusions as a result of the information generated by the research and indeed you are a very valuable person to the study.

**Gains and Risks:** The study seeks to generate information that will benefit the scholarly world and if the same is implemented, it may be of great value to the country. No foreseen risks are envisaged the study being purely academic, and your identity will be treated in strict confidence.

**Voluntary Participation:** Your participation, in the study, is wholly voluntary and as a respondent you have the freedom to withdraw from participating at any point when you feel like your rights have been infringed upon or at the advent of undue exposure.

**Rule of Confidentially:** Your participation will be strictly confidential and your identity will not be revealed in any part or at any point of the study. Although the study findings will be made public, your responses will be used, purely, for academic purposes.

**Researchers Contacts for any Correspondence:** The researcher can be reached at the University of Nairobi, School of Law, Parklands Campus, and Department of Public Law. P. O. Box 30197 – 00100, Nairobi or Tel: 020-2314371/72/74/75 or Mobile: 0724-922608/0734-273568 or at deanlaw@uonbi.ac.ke.

**Statement of Consent:** I have been satisfactorily informed of the need for my participation and have duly read the availed information. I willingly consent to participate in the research study on "**Ethnic Conflict in Presidential Elections in Kenya: An Evaluation of Post 2007 Constitutional Mechanisms**"-

Respondent's Signature	<b>Date</b>
Researcher's Signature	<b>Date</b>

## **APPENDIX II: FOCUS GROUP DISCUSSIONS GUIDELINES**

Participants –selected voters, IEBCofficials and an expert totaling 12 each group

### **SERIAL NUMBER.....**

The study seeks to evaluate the adequacy of constitutional mechanisms in place post 2007 in addressing ethnic conflict in presidential elections in Kenya. Kindly assist, to the best of your ability, in providing the information to the questions below.

- a) Since 1992 ,what underpins Kenyans voting behavior generally for national votes ,both in presidential elections and referendums ?
- b) Why do ethnic conflicts erupt in almost every presidential election in Kenya since the return of multi-party democracy? Why is that referendums have resulted into relatively peaceful outcomes in comparison ?
- c) After the 2007 post-election ethnic conflict, a grand coalition government was established. How adequate is such kind of a government in addressing ethnic conflict in presidential elections in Kenya?
- d) The Constitution of 2010 provides that for a candidate to win the presidency, he or she must garner 50per centplus 1 of all votes cast plus win at least 25per centof all total votes cast in at last half of all the counties. How adequate is this provision in compelling candidates to seek cross ethnic support hence address ethnic conflict in presidential elections in Kenya?
- e) What are your views on ranked choice voting?
- f) How adequate is devolution in reducing ethnic conflicts in presidential elections?
- g) How can devolution be improved to reduce ethnic struggle for the presidency?
- h) How adequate are nation-building measures in reducing ethnic conflicts in presidential elections?
- i) What constitutional interventions can be recommended to address the problem of ethnic conflict in presidential elections in Kenya?

### APPENDIX III: INTERVIEW SCHEDULE FOR PRESIDENTIAL CANDIDATES

#### SERIAL NUMBER.....

The study seeks to evaluate the adequacy of constitutional mechanisms in place post 2007 in addressing ethnic conflict in presidential elections in Kenya. Kindly assist, to the best of your ability, in providing the information to the questions below.

- a) Do you come from an ethnic group that often conflict during presidential elections in Kenya ? If yes ,name it ?
- b) Since 1992 ,what underpins Kenyans voting behavior generally for national votes ,both in presidential elections and referendums ?
- c) Why do ethnic conflicts erupt in almost every presidential election in Kenya since the return of multi-party democracy? Why do referendums result into relatively peaceful outcomes in comparison ?
- d) After the 2007 post-election ethnic conflict, a grand coalition government was established. How adequate is such kind of a government in addressing ethnic conflict in presidential elections in Kenya?
- e) The Constitution of 2010 provides that for a candidate to win the presidency, he or she must garner 50per centplus 1 of all votes cast plus win at least 25per centof all total votes cast in at last half of all the counties. How adequate is this provision in compelling candidates to seek cross ethnic support hence address ethnic conflict in presidential elections in Kenya?
- f) What are your views on ranked choice voting?
- g) How adequate is devolution in reducing ethnic conflicts in presidential elections?
- h) How can devolution be improved to reduce ethnic struggle for the presidency?
- i) How adequate are nation-building measures in reducing ethnic conflicts in presidential elections?



- j) What lessons can Kenya draw from other commonwealth countries on how to deal with the problem of ethnic conflict in presidential elections ?
- k) What constitutional interventions can be recommended to address the problem of ethnic conflict in presidential elections in Kenya?

## APPENDIX IV: INTERVIEW SCHEDULE FOR EXPERTS

### SERIAL NUMBER.....

The study seeks to evaluate the adequacy of constitutional mechanisms in place post 2007 in addressing ethnic conflict in presidential elections in Kenya. Kindly assist, to the best of your ability, in providing the information to the questions below.

- a) Since 1992 ,what underpins Kenyans voting behavior generally for national votes ,both in presidential elections and referendums ?
- b) In your opinion, why do ethnic conflicts erupt in almost every presidential election in Kenya since the return of multi-party democracy? Why do referendums result into relatively peaceful outcomes in comparison ?
- c) After the 2007 post-election ethnic conflict, a grand coalition government was established. How adequate is such kind of a government in addressing ethnic conflict in presidential elections in Kenya?
- d) The Constitution of 2010 provides that for a candidate to win the presidency, he or she must garner 50per centplus 1 of all votes cast plus win at least 25per centof all total votes cast in at last half of all the counties. How adequate is this provision in compelling candidates to seek cross ethnic support hence address ethnic conflict in presidential elections in Kenya?
- e) What are your views on ranked choice voting?
- f) How adequate is devolution in reducing ethnic conflicts in presidential elections?
- g) How can devolution be improved to reduce ethnic struggle for the presidency?
- h) If more resources are to be devolved, which function should be devolved and what aspects of that function should remain with the national government?
- i) How adequate are nation-building measures in reducing ethnic conflicts in presidential elections?
- j) What lessons can be drawn from UK, Guyana and Nigeria Constitutional experiences?
- k) What constitutional interventions can be recommended to address the problem of ethnic conflict in presidential elections in Kenya?

## **APPENDIX V: INTERVIEW SCHEDULE FOR THE IEBC OFFICIALS**

**SERIAL NUMBER.....**

The study seeks to evaluate the adequacy of post 2007 interventions in addressing ethnic conflicts in presidential elections in Kenya. Kindly assist, to the best of your ability, in providing the information to the questions below.

- a) Since 1992 ,what underpins Kenyans voting behavior generally for national votes ,both in presidential elections and referendums ?
- b) Why do ethnic conflicts erupt in almost every presidential election in Kenya since the return of multi-party democracy? Why do referendums result into relatively peaceful outcomes in comparison ?
- c) After the 2007 post-election ethnic conflict, a grand coalition government was established. How adequate is such kind of a government in addressing ethnic conflict in presidential elections in Kenya?
- d) The Constitution of 2010 provides that for a candidate to win the presidency, he or she must garner 50per centplus 1 of all votes cast plus win at least 25per centof all total votes cast in at last half of all the counties. How adequate is this provision in compelling candidates to seek cross ethnic support hence address ethnic conflict in presidential elections in Kenya?
- e) What are your views on ranked choice voting?
- f) How adequate is devolution in reducing ethnic conflicts in presidential elections?
- g) How adequate are nation-building measures in reducing ethnic conflicts in presidential elections?
- h) What are your views on electoral systems (plurality /proportional /mixed representations ) and forms of governance (presidential or semi-presidential/ parliamentary systems ) in addressing the issue of ethnic conflict in national elections ?
- i) What constitutional interventions can be recommended to address the problem of ethnic conflict in presidential elections in Kenya?

## APPENDIX VI: INTERVIEW SCHEDULE FOR VOTERS

### SERIAL NUMBER.....

The study seeks to evaluate the adequacy of post 2007 interventions in addressing ethnic conflicts in presidential elections in Kenya. Kindly assist, to the best of your ability, in providing the information to the questions below.

- a. Please describe yourself briefly in terms of level of education ;occupation ; regional locations within this county; age and gender .
- b. Kindly do you come from an ethnic group that often conflict during presidential elections in Kenya ?
- c. Since 1992 ,what underpins Kenyans voting behavior generally for national votes ,both in presidential elections and referendums ?
- d. Since 1992 ,have voted in any presidential elections and or participated in influencing voting patterns for national votes (either presidential vote or referendum or both ) in your area ?
- e. Why do ethnic conflicts erupt in, almost, every presidential election in Kenya since the return of multi-party democracy?Why do referendums result into relatively peaceful outcomes in comparison ?
- f. After the 2007 post-election ethnic conflict, a grand coalition government was established. How adequate is such kind of a government in addressing ethnic conflict in presidential elections in Kenya?
- g. The Constitution of 2010 provides that for a candidate to win the presidency, he or she must garner 50per centplus 1 of all votes cast plus win at least 25per centof all total votes cast in at last half of all the counties. How adequate is this provision in compelling candidates to seek cross ethnic support hence address ethnic conflict in presidential elections in Kenya?
- h. Do you know ranked choice voting and ,if yes ,what are your views about it ?
- i. How adequate is devolution in reducing ethnic conflicts in presidential elections?
- j. How adequate are nation-building measures in reducing ethnic conflicts in presidential elections?
- k. What constitutional interventions can be recommended to address the problem of ethnic conflict in presidential elections in Kenya?

## **APPENDIX VII: INTERVIEW SCHEDULE FOR STUDENTS**

**SERIAL NUMBER.....**

The study seeks to evaluate the effectiveness of ranked choice voting as an electoral mechanism for addressing ethnic conflicts in presidential elections in Kenya. Kindly assist, to the best of your ability, in providing the information to the questions below.

(NOTE: This is not disclosed until after the end of the experiment).

- a) Have you experienced ranked choice voting in any forum?
- b) Are you aware of the general workings of ranked choice voting?
- c) Between ranked choice voting and plural voting, which is better and why?
- d) How does your views in respect to the choices available differ when you apply either ranked choice voting or plural voting?
- e) In an ethnically divided society like Kenya, which one of the two methods would you prefer and why

## **APPENDIX VIII: SECONDARY DATA INTERROGATION GUIDE**

1. Confirm the trends in the voting patterns in the Presidential elections from the year 2007 when constitutional interventions were made in the country to address ethnic conflict, with a view of finding out if the trends mirror ethnic voter mobilization.
2. Confirm the effects of the new constitution on ethnic conflicts in Presidential elections conducted in 2013 and 2017.
3. Confirm evidence of effectiveness of Devolution, Nation-building measures, Consociationalism and Centripetalism on ethnic conflict in the Presidential contests.
4. Check out for evidence of the most appropriate constitutional intervention in Kenya for managing ethnic conflicts in electoral contests in other documented works carried out in this field.

<b>APPENDIX IX: LIST OF PARTICIPANTS</b>	
Date and Venue of the Interview	
Presidential candidates	
PC 1, 16 years leadership experience	17 <sup>th</sup> January 2019 Nairobi
PC 2, 18 years leadership experience	21 <sup>st</sup> January 2019 Nairobi
PC 3, 10 years leadership experience	19 <sup>th</sup> February 2019 Nairobi
PC 4, 20 years leadership experience	6 <sup>th</sup> March 2019 Kirinyaga
PC 5, 10 years leadership experience	28 <sup>th</sup> March 2019 Nairobi
PC 6, 24 years leadership experience	29 <sup>th</sup> March 2019 Nairobi
Expert Respondents	
RE 1, Law lecturer (PhD) –University of Nairobi	26 <sup>th</sup> January 2019 Nairobi
RE 2, Law lecturer (PhD)/Governor -Makueni	19 <sup>th</sup> February 2019 Kiambu County
RE 3, Political Scientist (PhD) -University of Nairobi	11 <sup>th</sup> March 2019 Nairobi
RE 4 Political Scientist (PhD) -University of Nairobi	18 <sup>th</sup> March 2019 Nairobi
IEBC Officers	
Elections manager, 10 years' experience	9 <sup>th</sup> January 2019 – Kiambu town
Returning officer, 9 years' experience	14 <sup>th</sup> January 2019 –Kisumu town

Returning officer, 8 years' experience	15 <sup>th</sup> January 2019 –Bomet Town
Returning officer, 15 years' experience	15 <sup>th</sup> January 2019 - Nakuru Town
Returning officer, 10 years' experience	16 <sup>th</sup> January 2019 –Siaya
Returning officer, 12 years' experience	18 <sup>th</sup> January 2019 –Homa Bay
Returning officer, 7 years' experience	22 <sup>nd</sup> January 2019- Kericho
Elections manager,9 years' experience,	23rd January 2019 –Kwale
Elections manager, 10 years' experience	25 <sup>th</sup> of January 2019- Mombasa
Returning officer, 10 years' experience	26 <sup>th</sup> of January 2019- Uasingishu
National IEBC secretariat staff	
Chairman IEBC	3 <sup>rd</sup> March 2019-Nairobi
Commissioner ,IEBC	3 <sup>rd</sup> March 2019-Nairobi
Voters (Opinion Leaders)	Date and Venue of the Interview
Male middle aged chief( Respondent A)	7 <sup>th</sup> January 2019 -Thika
Male Kikuyu youth leader( Respondent B)	7 <sup>th</sup> January 2019 – Thika
Member of County Assembly( Respondent C)	8 <sup>th</sup> January 2019 – Thika
Middle-aged female business lady( Respondent D)	8 <sup>th</sup> January 2019 – Thika
Male assistant chief( Respondent A)	14 <sup>th</sup> January 2019 -Nyangores
Female gender activist( Respondent B)	14 <sup>th</sup> January 2019 –Nyangores
Member of County Assembly ( Respondent C)	14 <sup>th</sup> January 2019 –Bomet Town



Male youth community policing member( Respondent A)	14 <sup>th</sup> January 2019 –Kisumu town
Businesswoman( Respondent B)	14 <sup>th</sup> January 2019 –Kisumu town
Male middle aged chief ( Respondent C)	14 <sup>th</sup> January 2019 - Kisumu town
Youth clinical officer ( Respondent D)	14 <sup>th</sup> January 2019 –Bomet Town
Member of County Assembly( Respondent A)	15 <sup>th</sup> January 2019 –Nakuru Town
Retired lands registrar( Respondent B)	15 <sup>th</sup> January 2019 –Nakuru Town
Chair of dairy cooperative society ( Respondent C)	15 <sup>th</sup> January 2019 –Nakuru Town
Middle aged male chief ( Respondent A)	16 <sup>th</sup> January 2019 –AlegoUsonga
Aide to member of national assembly( Respondent B)	16 <sup>th</sup> January 2019 –AlegoUsonga
Middle aged business woman ( Respondent C)	16 <sup>th</sup> January 2019 –AlegoUsonga
Youth timber merchant ( Respondent A)	18 <sup>th</sup> January 2019- Homabay Town
Female medical officer ( Respondent B)	18 <sup>th</sup> January 2019- Homabay Town
County administrator ( Respondent C)	18 <sup>th</sup> January 2019- Homabay Town
Assistant chief ( Respondent D)	18 <sup>th</sup> January 2019- Homabay Town
Male youth leader ( Respondent A)	22 <sup>nd</sup> January 2019- Kwale

Middle aged female women's group leader ( Respondent B)	22 <sup>nd</sup> January 2019- Kwale
Male middle aged chief ( Respondent C)	22 <sup>nd</sup> January 2019- Kwale
Large farm manager ( Respondent A)	22 <sup>nd</sup> January 2019- Kericho
Member of County Assembly ( Respondent B)	22 <sup>nd</sup> January 2019- Kericho
Retired senior military man ( Respondent C)	22 <sup>nd</sup> January 2019- Kericho
Retired clergyman ( Respondent A)	24 <sup>th</sup> January Nandi County
Retired university don ( Respondent B)	24 <sup>th</sup> January Nandi County
Property developer( Respondent C)	24 <sup>th</sup> January Nandi County
Businesswoman / political mobilizer ( Respondent A)	25 <sup>th</sup> of January 2019- Mombasa
Member of County Assembly( Respondent B)	25 <sup>th</sup> of January 2019- Mombasa
Labour union leader( Respondent C)	25 <sup>th</sup> of January 2019- Mombasa
Community leader and large-scale farmer ( Respondent A)	26 <sup>th</sup> of January 2019- Uasingishu
Businesswoman / political mobilizer ( Respondent B)	26 <sup>th</sup> of January 2019- Uasingishu
Retired senior military man ( Respondent C)	26 <sup>th</sup> of January 2019- Uasingishu
Elderly female women's group leader and retired ( Respondent A)	29 <sup>th</sup> of January 2019- Nairobi
Male youth student in university ( Respondent B)	29 <sup>th</sup> January 2019- Nairobi

Member of Parliament ( Respondent C)	29 th January 2019- Nairobi
Chief's clerk ( Respondent D)	29 th January 2019- Nairobi
Focus Group Discussants	
<b>Kiambu County - Venue – Kiganjolocationchiefs office</b>	
Male clergyman with Pentecostal church	8 <sup>th</sup> January 2019 – Thika
Male member of NG-CDF	8 <sup>th</sup> January 2019 – Thika
Male businessman with vast enterprises nationally	8 <sup>th</sup> January 2019 – Thika
Female chair village youth polytechnic	8 <sup>th</sup> January 2019 – Thika
Female victim of 2007-2008 post-election conflict	8 <sup>th</sup> January 2019 – Thika
Female youth leader	8 <sup>th</sup> January 2019 – Thika
Male community leader	8 <sup>th</sup> January 2019 – Thika
Male polytechnic tutor	8 <sup>th</sup> January 2019 – Thika
Former councilor (male)	8 <sup>th</sup> January 2019 – Thika
Female polytechnic tutor	8 <sup>th</sup> January 2019 – Thika
<b>Bomet County - Venue – Nyangoreslocationchiefs office</b>	
Male chief	14 <sup>th</sup> January 2019 – Nyangores
Member of County Assembly	14 <sup>th</sup> January 2019 – Nyangores
Male community leader	14 <sup>th</sup> January 2019 – Nyangores
Female youth leader	14 <sup>th</sup> January 2019 – Nyangores

Female business lady	14 <sup>th</sup> January 2019 – Nyangores
Female youth leader	14 <sup>th</sup> January 2019 – Nyangores
Member of County Assembly	14 <sup>th</sup> January 2019 – Nyangores
Male retired teacher	14 <sup>th</sup> January 2019 – Nyangores
Retired policeman (male)	14 <sup>th</sup> January 2019 – Nyangores
Female primary school teacher	14 <sup>th</sup> January 2019 – Nyangores
<b>Kisumu County - Venue –Kondelelocationchiefs office</b>	
Male PWD leader	14 <sup>th</sup> January 2019 –Kisumu
Male village elder	14 <sup>th</sup> January 2019 –Kisumu
Female social worker	14 <sup>th</sup> January 2019 –Kisumu
Middle aged pastor	14 <sup>th</sup> January 2019 –Kisumu
Male youth leader	14 <sup>th</sup> January 2019 –Kisumu
Member of County Assembly	14 <sup>th</sup> January 2019 –Kisumu
Female community health worker	14 <sup>th</sup> January 2019 –Kisumu
Female community political mobilizer	14 <sup>th</sup> January 2019 –Kisumu
Male primary school head teacher	14 <sup>th</sup> January 2019 –Kisumu

<b>Nakuru County Venue –IldimatLocation Chiefs Office</b>	
Pastor of Pentecostal church	17 <sup>th</sup> January 2019 –MaaiMahiu
Male advocacy officer with IDP’s group	17 <sup>th</sup> January 2019 –MaaiMahiu
Female women’s group treasurer	17 <sup>th</sup> January 2019 –MaaiMahiu
Male businessman	17 <sup>th</sup> January 2019 –MaaiMahiu
Member of County Assembly	17 <sup>th</sup> January 2019 –MaaiMahiu
Female leader of PWD	17 <sup>th</sup> January 2019 –MaaiMahiu
Male veterinarian	17 <sup>th</sup> January 2019 –MaaiMahiu
Female primary school teacher	17 <sup>th</sup> January 2019 –MaaiMahiu
<b>Siaya County Venue –AweloLocation Chiefs Office</b>	
Former member of national assembly	16 <sup>th</sup> January 2019 –AlegoUsonga
Businesswoman	16 <sup>th</sup> January 2019 –AlegoUsonga
Male Youth leader	16 <sup>th</sup> January 2019 –AlegoUsonga
Middle aged male community leader	16 <sup>th</sup> January 2019 –AlegoUsonga
Middle aged male pastor	16 <sup>th</sup> January 2019 –AlegoUsonga
Youth female political activist	16 <sup>th</sup> January 2019 –AlegoUsonga
Middle aged male village elder	16 <sup>th</sup> January 2019 –AlegoUsonga
Female PWD leader	16 <sup>th</sup> January 2019 –AlegoUsonga
Member of National Assembly	16 <sup>th</sup> January 2019 –AlegoUsonga
Businesswoman	16 <sup>th</sup> January 2019 –AlegoUsonga

<b>Homabay County Venue –Central Location Chiefs Office</b>	
Female Youth leader	18 <sup>th</sup> January 2019 –Homabay
Community leader	18 <sup>th</sup> January 2019 –Homabay
Clergyman	18 <sup>th</sup> January 2019 – Homabay
Businesswoman	18 <sup>th</sup> January 2019 – Homabay
Male village elder	18 <sup>th</sup> January 2019 – Homabay
Male PWD leader	18 <sup>th</sup> January 2019 – Homabay
Member of County Assembly	18 <sup>th</sup> January 2019 – Homabay
Local chief	18 <sup>th</sup> January 2019 – Homabay
<b>Kwale County Venue –Baraza Park</b>	
Female youth leader	22 <sup>nd</sup> of January 2019- Kwale
Middle aged male village chairman	22 <sup>nd</sup> of January 2019- Kwale
Elderly male village chairman	22 <sup>nd</sup> of January 2019- Kwale
An elderly male representative of PWD	22 <sup>nd</sup> of January 2019 - Kwale
Middle aged male land rights activist	22 <sup>nd</sup> of January 2019- Kwale
Elderly male, retired teacher	22 <sup>nd</sup> of January 2019- Kwale
Elderly male, nyumbakumi elder	22 <sup>nd</sup> of January 2019- Kwale
Elderly male, nyumbakumi elder	22 <sup>nd</sup> of January 2019- Kwale
Middle aged female, women’s group leader	22 <sup>nd</sup> of January 2019- Kwale
Elderly male, madrasa teacher	22 <sup>nd</sup> of January 2019- Kwale

<b>Kericho County Venue –KapkugerwetLocation Chiefs Office</b>	
Youth leader	23 <sup>rd</sup> January 2019 – Ainamoi
Large scale farmer	23 <sup>rd</sup> January 2019 – Ainamoi
Civil rights activist	23 <sup>rd</sup> January 2019 – Ainamoi
Retired teacher/businessman	23 <sup>rd</sup> January 2019 – Ainamoi
Businesswoman cum political mobilizer	23 <sup>rd</sup> January 2019 – Ainamoi
Retired engineer /businessman	23 <sup>rd</sup> January 2019 – Ainamoi
Member of County Assembly	23 <sup>rd</sup> January 2019 – Ainamoi
Chief	23 <sup>rd</sup> January 2019 – Ainamoi
<b>Nandi County Venue –KabiyetLocation Chiefs Office</b>	
Business woman cum women group leader	24 <sup>th</sup> January 2019 – Mosop
Student leader in college	24 <sup>th</sup> January 2019 – Mosop
Businessman cum PWD leader	24 <sup>th</sup> January 2019 – Mosop
Retired teacher	24 <sup>th</sup> January 2019 – Mosop
Muslim religious leader	24 <sup>th</sup> January 2019 – Mosop
Business man	24 <sup>th</sup> January 2019 – Mosop
Village elder	24 <sup>th</sup> January 2019 – Mosop
Businessman cum political activist	24 <sup>th</sup> January 2019 – Mosop
<b>Mombasa County Venue -MagogoniLocationChiefs Office</b>	
Elderly female leader of MaendeleoyaWanawake	25 <sup>th</sup> of January 2019- Kisauni
Middle aged female community leader	25 <sup>th</sup> of January 2019- Kisauni

Member of County Assembly	25 <sup>th</sup> of January 2019- Kisauni
Male youth leader	25 <sup>th</sup> of January 2019- Kisauni
Elderly female representative for PWD	25 <sup>th</sup> of January 2019- Kisauni
Middle aged male, 2017 MCA aspirant	25 <sup>th</sup> of January 2019- Kisauni
Middle aged male, community health worker	25 <sup>th</sup> of January 2019- Kisauni
Male youth catechist at local church	25 <sup>th</sup> of January 2019- Kisauni
Former member of national assembly	25 <sup>th</sup> of January 2019- Kisauni
<b>Uasin Gishu County Venue –ZiwaLocationChiefs Office</b>	
Cereal farmer’s association chair	27 <sup>th</sup> January 2019 Soy Sub County
Landlord’s association chairman	27 <sup>th</sup> January 2019 Soy Sub County
Member of County Assembly	27 <sup>th</sup> January 2019 Soy Sub County
Community athletics coach	27 <sup>th</sup> January 2019 Soy Sub County
Businessman cum political mobilizer	27 <sup>th</sup> January 2019 Soy Sub County
Pastor with Pentecostal church	27 <sup>th</sup> January 2019 Soy Sub County
Muslim religious leader	27 <sup>th</sup> January 2019 Soy Sub County
Women group leader	27 <sup>th</sup> January 2019 Soy Sub County
Student leader in local university	27 <sup>th</sup> January 2019 Soy Sub County
<b>Nairobi County Venue –KiberaLocationChiefs Office</b>	
Male youth leader who took part in election demonstrations	29 <sup>th</sup> of January 2019- Kibera
An elderly female chairlady of a women’s group Kibera	29 <sup>th</sup> of January 2019- Kibera



Middle aged businessman victim of post- election conflict	29 <sup>th</sup> of January 2019- Kibera
Middle aged male pastor at a local church	29 <sup>th</sup> of January 2019- Kibera
Member of County Assembly	29 <sup>th</sup> of January 2019- Kibera
A female youth working at the MCA's office	29 <sup>th</sup> of January 2019- Kibera
An elderly male nyumbakumi initiative elder	29 <sup>th</sup> of January 2019- Kibera
An elderly female representative for PWD's	29 <sup>th</sup> of January 2019- Kibera

**APPENDIX X: PLAN TO COMPLETION**

<b>Activity</b>	<b>Completion Date</b>
Research Proposal -1 <sup>st</sup> draft -2 <sup>nd</sup> draft	10 <sup>th</sup> October 2017 30 <sup>th</sup> October 2017
Proposal defense -1 <sup>st</sup> Defense -2 <sup>nd</sup> Defense -submission of corrected proposal	November 2017 2 <sup>nd</sup> April 2018 20 <sup>th</sup> April 2018
Field work -piloting instruments -focus group discussions -interviews -interrogation of secondary data	15 <sup>th</sup> May 2018 16 <sup>th</sup> July 2018 16 <sup>th</sup> November 2018 16 <sup>th</sup> January 2019
Completion of thesis writing -collation of data -synthesis with related scholarly works -1 <sup>st</sup> draft -2 <sup>nd</sup> draft -final draft	18 <sup>th</sup> February 2019 18 <sup>th</sup> March 2019 19 <sup>th</sup> April 2019 20 <sup>th</sup> May 2019 19 <sup>th</sup> August 2019
Hard Cover Bound Work Submission	30 <sup>th</sup> October 2019

Signed by the Supervisee: .....

Date:

Signed by -

1<sup>st</sup> Supervisor: .....

Date:

2<sup>nd</sup> Supervisor: .....

Date:

3<sup>rd</sup> Supervisor: .....

Date:

**APPENDIX XI: RESEARCH AUTHORIZATION LETTER**

**REPUBLIC OF KENYA**



**THE PRESIDENCY**

**MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT**

E-Mail [cc.siaya@yahoo.com](mailto:cc.siaya@yahoo.com)

When replying please quote date & ref.

COUNTY COMMISSIONER  
SIAYA COUNTY  
P O Box 83-40600  
SIAYA

CC/SC/A.31 VOL.II/152

20<sup>th</sup> December, 2018

All Deputy County Commissioners,  
**SIAYA COUNTY.**

**RE: RESEARCH AUTHORIZATION – FRANCIS KANGATA IRUNGU**

The person referred to above from The University of Nairobi has been authorized by the Director General/CEO, National Commission for Science, Technology and Innovation vide letter Ref. No. NACOSTI/P18/0689/27103 dated 24<sup>th</sup> November, 2018 to carry out research on "***Adequacy of post 2007 constitutional mechanisms in mitigating ethnic conflict in presidential elections in Kenya***" for the period ending 24<sup>th</sup> November, 2019.

The purpose of this letter therefore is to ask that you accord him the necessary support as he carries out research in your Sub County.

A handwritten signature in black ink, appearing to read 'W.G. Wachira'.

W.G. WACHIRA  
For: COUNTY COMMISSIONER  
**SIAYA COUNTY**

Copy to: Francis Kangata Irungu,  
University of Nairobi,  
P.O. BOX 30197 – 00100,  
**NAIROBI**

County Director of Education.  
**SIAYA COUNTY**

## APPENDIX XII: RESEARCH PERMIT

### THE SCIENCE, TECHNOLOGY AND INNOVATION ACT, 2013

The Grant of Research Licenses is guided by the Science, Technology and Innovation (Research Licensing) Regulations, 2014.

#### CONDITIONS

1. The License is valid for the proposed research, location and specified period.
2. The License and any rights thereunder are non-transferable.
3. The Licensee shall inform the County Governor before commencement of the research.
4. Excavation, filming and collection of specimens are subject to further necessary clearance from relevant Government Agencies.
5. The License does not give authority to transfer research materials.
6. NACOSTI may monitor and evaluate the licensed research project.
7. The Licensee shall submit one hard copy and upload a soft copy of their final report within one year of completion of the research.
8. NACOSTI reserves the right to modify the conditions of the License including cancellation without prior notice.

National Commission for Science, Technology and innovation  
P.O. Box 30623 - 00100, Nairobi, Kenya  
TEL: 020 400 7000, 0713 788787, 0735 404245  
Email: dg@nacosti.go.ke, registry@nacosti.go.ke



REPUBLIC OF KENYA



National Commission for Science,  
Technology and Innovation

RESEARCH LICENSE

Serial No.A 22014

CONDITIONS: see back page

#### THIS IS TO CERTIFY THAT:

**MR. FRANCIS KANGATA IRUNGU**  
of UNIVERSITY OF NAIROBI, 0-100  
Nairobi, has been permitted to conduct  
research in *Bomet , Homabay , Kericho*  
*, Kiambu , Kisumu , Kwale , Mombasa*  
*, Nairobi, Nakuru , Nandi , Narok ,*  
*Siaya , Uasin-Gishu Counties*

on the topic: **ADEQUACY OF POST 2007  
CONSTITUTIONAL MECHANISMS IN  
MITIGATING ETHNIC CONFLICT IN  
PRESIDENTIAL ELECTIONS IN KENYA**

for the period ending:  
24th November, 2019

.....  
Applicant's  
Signature

Permit No : NACOSTI/P/18/0689/27103  
Date Of Issue : 24th November, 2018  
Fee Received : Ksh 2000



.....  
  
Director General  
National Commission for Science,  
Technology & Innovation

## APPENDIX XIII: NACOSTI AUTHORIZATION



### NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Telephone: +254-20-2213471,  
2241349, 3310571, 2219420  
Fax: +254-20-318245, 318249  
Email: [dg@nacosti.go.ke](mailto:dg@nacosti.go.ke)  
Website : [www.nacosti.go.ke](http://www.nacosti.go.ke)  
When replying please quote

NACOSTI, Upper Kabete  
Off Waiyaki Way  
P.O. Box 30623-00100  
NAIROBI-KENYA

Ref. No. **NACOSTI/P/18/0689/27103**

Date: **24<sup>th</sup> November, 2018**

Francis Kangata Irungu  
University of Nairobi  
P.O. Box 30197-00100  
**NAIROBI.**

#### **RE: RESEARCH AUTHORIZATION**

Following your application for authority to carry out research on “*Adequacy of post 2007 constitutional mechanisms in mitigating ethnic conflict in presidential elections in Kenya*” I am pleased to inform you that you have been authorized to undertake research in **selected Counties** for the period ending **24<sup>th</sup> November, 2019**.

You are advised to report to **the County Commissioners and the County Directors of Education of the selected Counties** before embarking on the research project.

Kindly note that, as an applicant who has been licensed under the Science, Technology and Innovation Act, 2013 to conduct research in Kenya, you shall deposit **a copy** of the final research report to the Commission within **one year** of completion. The soft copy of the same should be submitted through the Online Research Information System.

**DR. STEPHEN K. KIBIRU, PhD.**  
**FOR: DIRECTOR-GENERAL/CEO**

Copy to:

The County Commissioners  
Selected Counties.

The County Directors of Education  
Selected Counties.