

UNIVERSITY OF NAIROBI

**INSTITUTE OF DIPLOMACY AND INTERNATIONAL
STUDIES**

**// POST- CONFLICT RECOVERY THROUGH CONSTITUTIONAL REFORM: A
COMPARATIVE ANALYSIS OF THE SOUTH AFRICAN AND KENYAN
EXPERIENCES //**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE AWARD OF MASTERS IN ARTS IN INTERNATIONAL STUDIES (MA. IS)
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NOVEMBER 2012

DEDICATION

This work is dedicated to all my lecturers at the University of Nairobi who opened my eyes to the complexities of the modern international system and provided the tools on how I may deal with them. I would like to particularly dedicate it to the late Prof. Olewe Nyunya whose patience, wisdom and generosity of spirit still inspires us.

DECLARATION

I **CRISPINE ODHIAMBO** hereby declare that this Thesis is my original work arrived at through research. It has not been presented to any university or other institution of higher learning for any academic accreditation. All information obtained from other sources have been disclosed


.....

Signature

Signed this 13th day of November 2012

APPROVAL

This Thesis has been submitted for Examination with my approval as University Supervisor

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.....

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Signed this 13 day of November 2012

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This work would not have been possible without the support and encouragement of many people.

I am truly grateful

I am particularly grateful to my supervisor Dr. Kamudhayi for painstakingly guiding me in this research.

To my family and friends without whose support I could never have had the fortitude to complete this work

The opinions, views, expressions, interpretations, inaccuracies and errors in this study are entirely my own and nothing expressed here should attribute them to any of the persons I have acknowledged

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ABBREVIATIONS

ANC	Africa National Congress
APRM	African Peer Review Mechanism
BBC	British Broadcasting Corporation
CIPEV	Commission of Inquiry Into Post Election Violence
CODESA	Convention for Democratic South Africa
ECK	Electoral Commission of Kenya
FIDA	Federation of Women Lawyers
GOK	Government of Kenya
IDP	Internally Displaced Person
KANU	Kenya African National Union
KBC	Kenya Broadcasting Corporation
KHRC	Kenya Human Rights Commission
KICC	Kenyatta International Conference Centre
KNCHR	Kenya National Commission on Human Rights
MOU	Memorandum of Understanding
MP	Member of Parliament
NARC	National Rainbow Coalition
NCCK	National Council of Churches of Kenya
NGO	Non-Governmental Organisation
NSIS	National Security Intelligence Service
ODM	Orange Democratic Movement
PNU	Party of National Unity

CHAPTER ONE

1.1 Introduction and Background to the Study

This study examines conflict transformation in societies after protracted conflict and in particular the impact of constitutional reforms. The study reflects on the experiences of South Africa and Kenya to analyze the impact of constitutional reforms. The choice of the two comes from their long history of racial and ethnic divisions, their elaborate constitutional reform processes and protracted conflict. Conflict transformation for this study is taken to mean a process by which societies move from a conflict-habituated system to a peace system. This understanding draws from the realization that conflicts that are deep rooted or intractable requires transformation rather than resolution or management because the conflict has created patterns that have become part of the social system. Systematic change to the society is thus the only means of achieving sustainable peace.

In many conflict countries, the enactment of a new constitution is usually considered major milestone in the post conflict recovery phase. Kenya, South Africa, Rwanda, Uganda, East Timor, Angola, Kosovo, Serbia amongst a host of other countries have all embraced constitutional reform as a major event in their post-conflict recovery. The impact of constitutional reform in transforming conflicts in fractured societies has not yet been adequately assessed in literature. Constitutional reform plays an important role in conflict transformation in countries undergoing post-conflict recovery by altering the structures in the society that supports the continuation of violent conflict. This is because constitution making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get

there. The transformative role of a constitution arises because a democratic constitutional reform process changes the structure of the society by addressing underlying causes of the conflict such as inequitable access to resources, unjust laws and human insecurity. Such a constitutional reform process accomplishes several things. For example, it drives the transformative process from conflict to peace by shaping the governance framework that will regulate access to power and resources and thus removing key reasons for conflict. It also puts in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.

The nature of most modern conflicts require a systematic look at the social, economic and political identities of the conflict societies in order to transform them. This is because, most conflicts occur within certain historically constructed and thus deeply entrenched ethnic or racial identities in the society that make conflict transformation a challenging task. In such circumstances, dealing with the conflicts require more than the reframing of positions and the identification of win-win outcomes. The very structure of the parties and relationships may be embedded in a pattern of conflictual relationships that extend beyond the particular site of conflict itself. Constitutional reform is thus seen as an appropriate way of engaging with and transforming relationship, interests, discourses and if necessary the very constitution of society that supports the continuation of violent conflict.

1.2 Statement of the Research Problem

The problem addressed in this study is this: what impact does constitutional reform have in transforming conflicts in societies with have protracted conflicts. Using two countries namely South Africa and Kenya as case studies, this study aims to assess the impact of constitutional

reform on post-conflict recovery in conflict societies through a comparative analysis of the experiences of the two countries, the study will consider how constitutional reform further the aims of post-conflict reconstruction as a stage that not only seeks to rebuild the country from the effects of the war but also create institutions that facilitates a culture of peace thus removing the phenomenon of return-to-conflict.

After decades of violent racial struggle, South Africa finally ushered in a new era with the adoption of a new Constitution in 1996. The peaceful conclusion of the constitutional process despite dire warning from pessimists led to the country being hailed in many quarters as 'the miracle nation' and in the words of President Mandela as the 'Rainbow Nation'. South Africa's 1996 Constitution, was hailed as one of the most progressive in the world. It enshrines a wide range of social and economic rights as well as civil and political freedoms. In many respects constitutional reform in South Africa transformed its conflict by bringing about political and economic reforms

Kenya on the other hand has had a more recent constitutional reform process. Kenya plunged into a constitutional and political crisis which saw the country paralysed in a wave of violence following the disputed presidential election in 2007. To end the violence and provide a more lasting solution, the country's two main political parties signed the National Reconciliation and Accord Agreement in February 2008 which identified four main agenda items that were to be the guiding principles in bringing sustainable peace to the country. Agenda four of the item is of particular interest as it emphasized the need to address long term issues that caused the conflict through constitutional and institutional reform. Since the end of the overt violence in 2008 Kenya has taken significant steps in post-conflict reconstruction most importantly the enactment

of the new Constitution in August 2010. It is still early days however to fully assess the impact of the constitutional reform process on post –conflict recovery given the relatively short time since the enactment of the new constitution. There are emerging trends of constitutionalism that bodes well for the future despite the initial challenges to the transition to the new order.

The question that this research seeks to answer is whether constitutional reform has an impact on conflict transformation and bring about long-term peace . related to the first question is what features of constitutional reform is necessary for it to have a transformative role.

1.3 Objectives of the Study

The main objective of this study is to analyse the impact of constitutional reform and constitutionalism in transforming conflicts in fractured societies. A constitutional reform process can drive the transformative process from conflict to peace, and/or shapes the governance framework that will regulate access to power and resources and ultimately eliminating causes of conflict.

By focusing on the experiences of two countries, South Africa and Kenya the study aims specifically to:

- (a) Compare the constitutional reform processes in South Africa and Kenya
- (b) Identify the factors that have made the South African constitutional reform process successful or unsuccessful
- (c) Establish the impact of the constitutional reform process in conflict transformation.

1.4 Literature Review and Justification of the Study

The literature for this study can be categorized into three main themes namely; a) literature on conflict transformation; b) literature on constitutional reform; and c) country specific literature on South Africa and Kenya.

1.4.1 Conflict transformation

Conflict transformation refers to the process of moving from conflict-habituated systems to peace systems. It focuses on systems change given that deep-rooted or intractable conflicts create patterns that becomes part of the social system and thus dealing with such conflicts require systematic change or transformation in the society. In the 1990s a number of theorists including Galtung¹, Rupesinghe², Schwerin³, Spencer and Spencer,⁴ and Väyrynen⁵, have solidified Lederach's⁶ shift toward conflict transformation in the field and practice of peace research and conflict resolution. The first references to transformation in the literature normally appeared in a somewhat indirect or circuitous fashion. Burton⁷ for example contends that "by the resolution of conflict, we mean the transformation of relationships. However, the idea of transforming conflict in order to mitigate or even end protracted social conflicts has now become an integral part of the

¹ Galtung, J., (1996), *Peace by Peaceful Means*, London, Sage pp. 70 -126

² Rupesinghe, K. (ed), (1995), *Conflict Transformation*, London, Macmillan Publishers pp. 3- 13, 41 – 49, and 119 – 133.

³ Schwerin, E. (1995), *Mediation, Citizen Empowerment, and Transformational Politics*. Westport, CT: Praeger.

⁴ Spencer, D., and Spencer, W., (1995), *Third-Party Mediation and Conflict Transformation: Experiences in Ethiopia, Sudan, and Liberia.* In Rupesinghe, K., ed., *Conflict Transformation*. New York: St. Martin's Press., p.111

⁵ Väyrynen, R., (1991), *To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts.* In Väyrynen, R., ed., *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation*. London: Sage, p.161

⁶ Lederach, J., P., (1995), "Conflict Transformation in Protracted Internal Conflicts: The Case for a Comprehensive Network." In Rupesinghe, K., ed., *Conflict Transformation*. New York: St. Martin's Press p. 201

⁷ Burton, J., (1990), *Conflict: Resolution and Prevention*. New York: St. Martin's Press, pp 2-3

lexicon used in peace and conflict studies field. Galtung⁸ contends that underlying the idea of conflict resolution is an assumption that every conflict has a finite life and a clear end and can, therefore, be solved or declared intractable. However he points out that conflicts are never-ending waxing and waning in social interactions, the ongoing flow ideas, energy and behavioral contradictions that arise from this is not be amenable to resolution, but needs to be transformed. Citing Curle⁹, Kriesberg¹⁰ and Rupesinghe¹¹, Lederach¹² observes that this theoretical concept has “emerged in the search for an adequate language to explain the peacemaking venture.” According to him, transformation closely acknowledges what social scientists such as Coleman¹³ and Boulding¹⁴ have suggested about the role and dynamics of social conflict; namely that it moves through certain predictable phases, transforming relationships and social organization.

However critics of conflict transformation like Mitchell¹⁵ view the concept of conflict transformation as a corruption of the conception of resolution. In his view the new term of ‘transformation’ is a reaction to the growing misuse of the term ‘resolution’ Miall¹⁶ on his part questions whether currently a theory of conflict transformation exists and if it does, what its distinctive nature and practice could be. Noting that the foundations of conflict transformation have been laid, he nevertheless observes wide variety of theoretical approaches based on

⁸ Supra note 1 at p. 51

⁹ Curle, A., (1971), *Making Peace, London*, Tavistock Publishing pp. 39-41

¹⁰ Kriesberg, L., Terrell N., and Thorson, S., eds. (1989), *Intractable Conflicts and Their Transformation*. Syracuse: Syracuse University Press pp 61 – 63

¹¹ Rupesinghe, K. (ed), (1995), *Conflict Transformation*, London, Macmillan Publishers pp. 3- 13, 41 – 49, and 119 – 133.

¹² Lederach, J., P., (1995), “Conflict Transformation in Protracted Internal Conflicts: The Case for a Comprehensive Network.” In Rupesinghe, K., ed., *Conflict Transformation*. New York: St. Martin's Press p. 17

¹³ Coleman, J., (1956), *Community Conflict*, New York: Free Press, p. 47

¹⁴ Boulding, K., (1962), *Conflict and Defense*, New York: Harper and Row p. 17

¹⁵ Mitchell, C.. (2002), Beyond Resolution: What Does Conflict Transformation Actually Transform?” *Peace and Conflict Studies*, Vol. 9, No 1, pp. 1-23 at p. 1

¹⁶ Miall, H., (2004), *Conflict Transformation: A multi-dimensional task*, Berghof Research Centre for Constructive Conflict Management, Berlin pp 2 -12

different schools of thought and practice in the field. These include conflict management theorists, conflict resolution theorists and conflict transformation theorists. Miall's conclusions are useful for this study as he advocates for conflict transformation as a comprehensive approach addressing a range of dimensions from micro – to macro issues, local to global levels, grassroots to elite actors, and short-term to long-term issues. Conflict transformation therefore seeks to support structural change rather than to facilitate outcomes or merely deliver settlements.

Ramsbotham, Woodhouse and Miall¹⁷ on their part argue that conflict transformation is in fact the deepest level of the conflict resolution tradition, rather than as a separate venture, as conflict transformation proponents argue. Conflict transformation proponents on their part see it as a significant departure from conflict resolution. Diamond¹⁸ for instance defines conflict resolution as activities that “seek to discover, identify and resolve the underlying root causes of the conflict”, while conflict transformation “seek to change the conditions that give rise to the underlying root causes of the conflict.” According to this distinction, conflict resolution activities are problem-solving or conflict analysis workshops; research, training, and educational programs; inter-group dialogue; reconciliation; and peacebuilding. Consequently, conflict transformation processes are seen more in terms of nation building, national reconciliation and healing, change agency, and social transformation. For Lederach¹⁹, the term conflict transformation emerged from a search for a more precise term to describe the overall peacemaking and peace-building venture. They assert that transformation more holistic approach and understanding that extends beyond the management or resolution of conflict. In conclusion,

¹⁷ Ramsbotham, O., Woodhouse, T., and Miall, H., *Contemporary Conflict Resolution* (2011) Polity Press, Cambridge UK pp. 3 – 11

¹⁸ Diamond, L., (1994), *The Global Imperative: Building a Democratic World Order*, *Current History*, Vol 93, pp. 1-7 at p. 3

¹⁹ *Supra* notes 9 -12 above

the definitions and pronouncements concerning the term conflict transformation though now clearly demarcated from conflict resolution and management are still in the process of being refined.

1.4.2 Constitutionalism

Until recently constitutional theory has focused on constitutions in stable political contexts. This realist approach, views constitutions as reflections of the balance of power at their time of drafting and thus does not consider them to have any particular transformative role²⁰. On the other hand, the idealist perspective recognizes the transformative role of constitutionalism, providing a break between the old conflictual order and laying the foundation of new political order. As regards the second view on constitutionalism, there is a growing number of literature on transitional constitutionalism as one that not only has a conventional constitutionalism constitutive role but also a transformative one²¹.

Teitel²² for instance challenges the prevailing realist accounts²³, and argues that law is not a mere product of, but itself structures political transition in periods of radical political transformation mainly after conflict. He suggest that consitutionalism play an extraordinary transformative role in moving societies from a totalitarian and fractured past to a liberal cohesive one.. Bachler²⁴ agrees with Teitel's position noting that effective state reform mainly achieved through constitution making can establish proper structures, values and attitudes that transforms a conflict by providing tools to different groups within a society to handle their conflicts

²⁰ See Lihphart, A., (1984), *Democracies: Patterns of Majoritarian and Consensus Governments in Twenty One Countries*, New Haven, Yale Univerity Press, p. 63

²¹ Ackerman, B., (1992), *The Future of Liberal Revolution*, Yale University Press, New Haven, Yale pp. 57 – 65

²² Teitel R.G, *Transitional Justice*, (New York, Oxford University Press, 2000 pp. 191 – 212

²³ For the realist account see Lihphart, A., (1984), *Democracies: Patterns of Majoritarian and Consensus Governments in Twenty One Countries*, New Haven, Yale Univerity Press, pp. 61 – 69

²⁴ Bachler, G, (2001), *Conflict Transformation Through State Reform*, Berghof Centre for Constructive Conflict Management, Berlin pp. 7- 12

peacefully. Such state reform sets the stage for establishment of participatory and legitimized nation building processes while also establishing norms of behavior such as negotiations, compromise, and co-operation amongst political actors.

Issacharoff²⁵ take the debate further by arguing that constitutionalizing democracy is the only real road to sustainable peace in fractured societies. By viewing constitutionalism as the enabling ground rules for democratic governance, he argues for strong form of constitutional constraint in stabilizing democratic governance in fractured societies. Constitutionalism is useful in providing checks to majority dictatorship and thus giving reassurance to the minority. It restricts the capacity of the majority to exercise its political will and thus serves a very useful purpose in securing legitimacy for exercising of political power in fractured societies characterized by deep racial, ethnic, or religious animosities.

Samuels²⁶ also argues that constitutional reform after conflict therefore remains a critical step in political and governance transition as it provides an opportunity to create a common vision of the future of a state and the roadmap on how to get there. She cautions though that such constitution making can only play a transformative role if the process itself is democratic and the outcome agreed upon by all major parties. Samuels' position is similar to the one Hart²⁷ takes. By examining recent practices of constitution making in select conflict countries across the world she concludes that in conflict transformation, the process is as much of importance if sometimes not more as the outcome of the constitution making. How the constitution is made determines its

²⁵ Issacharoff, S., (2004), 'Constitutionalizing Democracy in Fractured Societies', *Journal of International Affairs*, Volume 58 No. 1, Fall 2004, pp.73-93

²⁶ Issacharoff, S., (2004), 'Constitutionalizing Democracy in Fractured Societies', *Journal of International Affairs*, Volume 58 No. 1, Fall 2004, at page 83

²⁷ Hart, V., (2003), *Democratic Constitution Making*, United States Institute for Peace, Special Report No. 107, July 2003 pp. 2 – 9

legitimacy and therefore its acceptance by the warring groups. Taking the example of South Africa which is widely regarded to have a model text constitution, she hails the process which led to it noting that the process had genuine public participation and build confidence during the transition from Apartheid to a democratic society. On the other hand, a manipulated constitution making process in Zimbabwe in 1999 led to the rejection of the draft constitution in a referendum in September 2009 throwing that country into a political crisis that continues to date.

1.4.3 Country Texts

Dowden ²⁸, has compared the post colonial socio- political and economic experiences of many Sub-Saharan African countries including Kenya and South Africa. He examines the successes and failures of African countries through the experiences of ordinary citizens and common place activities noting that the socio-economic and political conditions of most African countries including South Africa can be explained by three main factors namely: their colonial legacies (in the case of South Africa apartheid legacy), the global structural factors such as the cold war and lastly the political competence or lack thereof of their leaders since independence.

Sparks ²⁹ provides a sober assessment of the South African transition from Apartheid to democratic rule and assesses the many problems and challenges that it faces after its 1996 Constitution. He is not convinced that constitutional reform has altered the socio-economic conditions of South Africa sufficiently to say that the conflict in that country has been transformed . He unflinchingly describes the conundrums still facing post-apartheid Africa including faulty educational system and high crime rates and present both as legacies of

²⁸ Dowden R, *Africa: Ordinary Lives Altered States*, (London, Portbello Books, 2010) pp 167 – 191 and 245 – 289

²⁹ Sparks A, *Beyond the Miracle: Inside the New South Africa*, (Chicago, University of Chicago Press, 2003) pp. 43 – 112 in particular

apartheid. On his part Ebrahim³⁰ argues that constitution making process of the country has transformed the conflict and led to the rebirth of modern South Africa. The constitution establishes a system of government that allows South Africa to become one of the world's leading democracies. Also celebrating the miracle of the South African constitution process is Jervis³¹ who considers that the way the constitutional negotiation process proceeded and ended were fortuitous and can be rightly considered miraculous. Historically few internal conflicts end with negotiated settlements much less democracy. In South Africa in particular the conditions for a negotiated settlement were not ideal. There was a legacy of polarization – rooted in deep socio-economic inequalities, reinforced by a state founded on racial discrimination and inflamed by a history of political violence – conditions that could hardly have provided a less promising foundation for a stable democracy. Yet the leading figures behaved in ways that previous experience would not have predicted, and a number of fortuitous events helped the process along and led to its happy conclusion

For Kenya Hellsten³² cautions against seeing the post election violence as one time unique phenomenon, she notes that since the establishment of multi party democracy in the country in 1991, Kenya has witnessed violent conflicts during election times. The violence is linked to long-standing grievances and failures of governance that run deeper than mere electoral politics. She describes the Kenyan situation as 'libertarian communitarianism' that is a mixture of African communitarian cultural traditions within the new western individualistic politico-economic

³⁰ Ebrahim H, *The Soul of a Nation: Constitution making in South Africa*, (Cape Town, Oxford University Press, 1998)

³¹ Jervis, D.T., (2006), 'Miracle or Model? South Africa's Transition to Democracy,' *International Third World Studies Journal and Review*, Volume 16, 2006, Rockford Illinois pp. 2 – 17

³² Hellsten, S., (2008) *Ethnicity, Inclusion and Post-conflict reconstruction: the kenyan case, Capability Approach*, available online at www.capabilityapproach.com/pubs/sirkku-pdf pp. 9 – 13, accessed on 10 June 2012

framework. In this situation rational self-interest of classical liberalism is set in the context of communitarian traditional solidarity in a manner that expands the Hobbesian social contract framework from individuals to collectives such as ethnic communities with shared interests, and who do not trust each other but need to agree on some central authority to move away from the state of nature of everyone against everyone. In this prism the legitimacy of the state tends to remain minimal and superficial.

Also rejecting the notion that the 2007/2008 post election violence in Kenya was a unique one-off is Prunier³³ who notes that systematic realities of violence in Kenya dates many decades. He blames the confusion 'presentism', that is a way of explaining present reality by present reality by a tautological concentration on the 'latest news'. Presentism he argues is particularly influential in the Kenyan case because the country was for a long time perceived as a figment of the west's imaginations, hopes, fears and quick-fix solutions. For the west, Kenya has long been a necessary bulwark of stability and ally in a hostile but geopolitically important location. That's why series of politically instigated violence right from the country's independence in 1963 have not received much comment

Dlamini³⁴ provides a more recent analysis of Kenya's Power sharing Agreement in the context of the consociational framework. Consociational model is taken as an applied political mechanism of generating co-operation in divided societies such as Kenya in the post-election period of early 2008. She finds that there is a problem of identity politics – an ethnic problematic

³³ Prunier, G., Kenya: Histories of a hidden war, Open Democracy, February 2008, available http://www.opendemocracy.net/article/democracy/kenya_behind_the_crisis accessed on 4th May 2012

³⁴ Dlamini, N.S., *Kenya Power Sharing Agreement 2008: A Consociational Formula?* (Unpublished Dissertation), University of Kwa-Zulu Natal, December 2010

– which informed the pattern of political violence in 2007. There is thus ongoing debate whether Kenya's violence was caused by a bungled election or by entrenched tribalism. Nonetheless the study argues that identity politics in form of ethnic identities is sufficiently significant in the Kenyan context to warrant investigation. The work accepts Prunier's³⁵ summation that ethnic patterns of inclusion and exclusion have been a feature of Kenyan politics since independence and have contributed to its political conflicts. In this context of identity politics leading to politics, the majoritarian model of democracy is not necessarily suitable option. The idea of consociational democracy as Uzodike³⁶ has argued appears therefore to be a potentially useful phenomenon in addressing African countries such as Kenya's societal segmentation.

1.4.4 Justification of the Study

Though there is a substantial literature on the roles of political systems and constitutional reform in social change, this has not been given much attention by conflict transformation theorists. Indeed the work of most conflict transformation theorists is lacking in interdisciplinarian perspectives and the link between conflict transformation theory and constitutional reform as one of its practical application appears weak

The complexity of contemporary ethnic conflicts in particular requires the special consideration of politicisation of racial and ethnic identities and mechanisms for depoliticising essentialist discourses of historically constructed identities in order to achieve real and sustainable post-conflict reality. The depoliticisation of such essentialist discourse for conflict transformation can be achieved through constitutional reform processes. Apart from securing legitimacy for exercise

³⁵ Ibid Note 30 at p. 2

³⁶ Uzodike, Ufo Okeke. 2004. Cultural Diversity, Conflict, and Sustainable Peace in Africa: Consociational Democracy Re-Visited. (In J.M. Mbatia and S.C. Saxena (eds.), *Africa at the Crossroads: Between Regionalism and Globalization*, Praeger. pp 287 – 313.)

of political power, such constitutionalism provide ground rules for democratic governance because of the limitations it imposes on democratic choice. Rather than allow the majority to do as they may wish and thus create sense of marginalization and disenchantment within the minority which would be a sure incentive for return to conflict, such constitutions restricts the political will of the majority through certain hard-to-amend provisions.

This study therefore aims to consider the practical utility of constitutionalism in conflict transformation theory. It is proposed to do this by analyzing the impact and role of constitutional reform in conflict transformation in South Africa and Kenya as case studies. The experience of South Africa which is considered as one of the major success stories in conflict transformation through constitutional reform provides a good case study for identifying the key success factors for post-conflict reconstruction through constitutional reform.

1.5 Hypothesis of the Study

This study will consider the following three hypotheses:

Hypothesis One - Constitutionalism has no impact on conflict transformation Positive

Hypothesis Two - Constitutionalism has positive impact in conflict transformation

Hypothesis Three – constitutionalism has a negative impact on conflict transformation

The literature reviewed suggests that there is a positive correlation between constitutionalism and conflict transformation. This is because a participatory constitutional reform process has the potential to drive the transformative process from conflict to peace by shaping the governance framework that will regulate access to power and resources and remove underlying causes of

conflict. It will also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence

1.6 Theoretical Framework

The theoretical framework for this study engrains in conflict transformation theory and its impact of constitutionalism as a practical application. Conflict transformation theory is a process of engaging with and transforming the relationships, interests, discourses and if necessary the very constitution of the society that supports the continuation of violent conflict. The theory recognizes that conflicts are transformed gradually through a series of smaller or larger changes as well as specific steps by which a variety of actors would play a part.

Two of the models that can be applied in conflict transformation in divided societies are the consociational model and constitutionalism. The consociational model, commonly referred to as power-sharing model, is an applied political mechanism of generating co-operation in divided societies³⁷. As a theory consociationalism seeks consensus democracy by bringing on board major groups within a power structure and is normally preferred especially in transition arrangements. Constitutionalism on the other hand concerns itself with the creation of ground rules for democratic governance that seeks to curb any majoritarian excesses by restricting the extent to which the majority can exercise its political will. This helps to reassure minorities that democracy would not be a mere charade and cloak for their continued domination or exclusion

³⁷ Lemarchand, R. 2006., Consociationalism and Power Sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo. *African Affairs*, Vol. 106 (422), p.1- 20.

by the majority groups and thus they have nothing to lose in rising up in rebellion leading to further conflicts³⁸.

To understand the context of conflicts in divided societies and thus identify appropriate conflict transformation strategies, a constructivist approach is a useful theoretical lens in understanding the true nature of things³⁹. When agents (individuals, groups or nations) and events are contextualized in a normative and material structure, it becomes easier to understand and even evaluate the resulting actions whether of co-operation or conflict. For instance rebellious behavior may be better understood in the context of corrupt, insensitive, oppressive and patrimonial behavior of inept power elite in a situation of resource scarcity and economic deprivation. Constructivism emphasizes understanding and not necessarily explanation.

1.7 Research Design and Methodology

1.7.1 Research Design

From the two types of research design, empirical study and non-empirical study, the study will use the non empirical one; this includes conceptual analysis and theory building. This approach proceeds from the premise that empirical studies are observational or experimental rather than theoretical, whereas non empirical studies are based on theory⁴⁰.

³⁸ Issacharoff, S., (2004), 'Constitutionalizing Democracy in Fractured Societies', *Journal of International Affairs*, Volume 58 No. 1, Fall 2004, at page 87

³⁹ The constructivist approach is discussed at length in Korostelina, K.V. (2007) *Social identity and conflict: structures, dynamics, and implications*. New York: Palgrave Macmillan, pp. 114 – 116

⁴⁰ As explained in Moulton, H.G., (1946), 'Some Comments on Research Methods' in *Economic Research and the Development of Economic Science and Public Policy*, National Bureau of Economic Research, 1946, pp. 35- 52

1.7.2 Research Methodology

This is literature and interview based study. As indicated by the literature review, there are numerous sources available on conflict transformation theory and constitutionalism and thus there is an adequate basis in the literature from which to draw an analysis of impact of constitutional reform in conflict transformation in Kenya and South Africa. The study will deploy a comparative approach between the experiences of South Africa and Kenya in conflict transformation. Interviews with select individuals who have knowledge on the impact of constitutional reform on political and socio-economic indicators in Kenya and South Africa will also be conducted. These will be mainly academics, political analysts, government officials and researchers.

1.7.3 Data Sources

The study shall rely on published government reports and official data, comparator reports by credible international organizations such as the United Nations, UN Organs, Mo Ibrahim Governance Index, and Society on International Developments State of East Africa 2012. The study will also rely on internet and print media sources.

1.8 Chapter Summary

This Study is divided into five Chapters. This first introductory chapter introduces the background information on the study and set out its objectives, justification, and the research problem. Literature informing the study will be also be summarized in this chapter. Chapter two will be concerned with the theoretical framework for the study by analyzing constitutionalism and conflict transformation theories.

Chapter three is concerned with case studies of conflict transformation in South Africa and Kenya and in particular the impact of constitutional reform in a number of critical underlying factors that drives conflicts in the two countries. In chapter four the focus shall be in analysis in light of the theoretical framework and the findings in chapter three of the impact of constitutionalism in transforming conflicts by addressing select underlying causes have of conflict in the two countries. The findings and conclusions of the study shall be provided in chapter five of the study. Given that South Africa has had its post-conflict constitution in place for over fifteen years the lessons from its experience would be useful in informing post-conflict constitution implementation in Kenya which relatively speaking is taking baby steps in implementing a new constitution .

CHAPTER TWO

APPROACHES AND THEORIES IN THE STUDY OF CONFLICT TRANSFORMATION

2.1 Introduction

Conflict transformation can be described as a complex process of constructively changing relationships, attitudes, behaviours, interests and discourses in violence-prone conflict settings. Importantly, it also addresses underlying structures, cultures and institutions that encourage and condition violent political and social conflict. The term is used in the works of several “founding figures” in peace and conflict studies Curle⁴¹, Galtung⁴², Kriesberg⁴³, Rupesinghe⁴⁴, Väyrynen⁴⁵, but it has been elaborated most specifically in the works of Lederach⁴⁶ and Francis⁴⁷. It is a multi-dimensional process involving many different actors in moving from “latent and overt violence to structural and cultural peace”, It is particularly pertinent in situations of protracted and asymmetric conflict involving social justice issues. Especially in such settings, it is an approach that calls for long-term engagement and political skill.

As an approach, conflict transformation professes the goal of transforming the conflict into something desired in a longer timeframe, focusing not only on the content of the conflict but

⁴¹ Curle, A., (1971), *Making Peace*, London, Tavistock Publishing

⁴² Galtung, J., (1996), *Peace by Peaceful Means*, London, Sage

⁴³ Kriesberg, L., Terrell N., and Thorson, S., eds. (1989), *Intractable Conflicts and Their Transformation*. Syracuse: Syracuse University Press pp

⁴⁴ Rupesinghe, K. (ed), (1995), *Conflict Transformation*, London, Macmillan Publishers

⁴⁵ Väyrynen, R., (1991), “To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts.” In Väyrynen, R., ed., *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation*. London: Sage

⁴⁶ Lederach, J., P., (1995), “Conflict Transformation in Protracted Internal Conflicts: The Case for a Comprehensive Network.” In Rupesinghe, K., ed., *Conflict Transformation*. New York: St. Martin's Press p. 17

⁴⁷ Francis, D., (2010), *From Pacification to Peacebuilding: A Global Call to Transformation*. London: Pluto Press. New York

more importantly on the context and relationship between the actors involved⁴⁸. Compared with the conflict resolution perspective, the crucial innovations of the conflict transformation approach include, first adding to the goal of solving undesired disputes a more important one of building sustainable peace, second shifting the focus from issue/content of the conflict onto contextual relationship that underlies the conflict, and third expanding the relatively short period of time to deal with the conflict into a longer timeframe. The field incorporates some of the core ideas of the contemporary conflict resolution approach, but it focuses attention on large-scale, protracted and destructive conflicts and how they change so that they are conducted constructively, in large measure. The term refers both to the processes of transition to relatively non-destructive conduct and to a relationship between adversaries that is regarded as largely non-contentious

The first set of issues that arise from literature on conflict transformation concerns the conceptual framework of conflict transformation in other words what is meant by conflict transformation, how it works in practice, who does it, and why it should be done. The first objective in this chapter therefore, is to review the various approaches to conflict transformation taken in the literature in order to understand the concept of conflict transformation. The second objective of this chapter is to identify an appropriate analytical framework for analysing the impact of constitutional reform in conflict transformation using Kenya and South Africa as case studies. Before we consider the concept of conflict transformation, an understanding of protracted social conflicts is necessary given that it is such conflicts that is the focus of analysis..

⁴⁸ See for instance Mitchell, C., (2002), Beyond Resolution: What Does Conflict Transformation Actually Transform?" *Peace and Conflict Studies*, Vol. 9, No 1, pp. 1-23 at p. 5

2.2 Understanding Social Conflicts

Three characteristics of conflicts are particularly pertinent to understanding how large-scale conflicts can become transformed. First, conflicts are generally fluid; they move through a series of stages as conflicts emerge, escalate, de-escalate and are settled. These stages in turn become the basis for more enhanced peace, or for new conflicts⁴⁹. Conflict transformation therefore includes several strategies which may include changes in the perceptions of the adversaries or in the structure of the society. Second, every conflict is interlocked with many others. Smaller conflicts are nested in larger conflicts, each party in a conflict has its own set of other antagonists, each conflict is one in a series of earlier struggles, and each side has its own internal fights. In this mix of simultaneous and sequential fights, the adversaries and intermediaries must decide which are the primary issues that requires transformation to move to sustainable peace. Third, as contenders in a conflict generally rely on diverse strategies to achieve their goals, it is important for transformationists to identify which incentives they may offer to the parties so as to achieve their objectives while abandoning violent conflict.

2.3 The Concept of Conflict Transformation

The concept of conflict transformation should be viewed in the context of the much broader approach to managing and resolving social conflicts, generally identified as conflict resolution⁵⁰. Practitioners, analysts and proponents of this approach stress that conflicts are not only inevitable in human societies, but often desirable when they are well conducted. Thus, justice, freedom, and

⁴⁹ See for instance Kriesberg, L., (2007), . *Constructive Conflicts: From Escalation to Resolution*. 3rd edition. Lanham, MD: Rowman & Littlefield pp. 42 -47 and Francis, D., (2010), *From Pacification to Peacebuilding: A Global Call to Transformation*. London: Pluto Press. New York p. 95

⁵⁰ See for instance Crocker, C., Hampson, F.O., and Aall, P.(eds.) 2005. *Grasping the Nettle: Analyzing Cases of Intractable Conflicts*. Washington, DC: United States Institute of Peace Press at p. 45 - 61

more equitable and integrated relations may be advanced by well-waged conflicts⁵¹. Furthermore, conflicts are recognised to vary greatly in their destructiveness as they undergo transformation and differ in the level of contention that the adversaries regard as acceptable. The conflict transformation approach focuses on the value of thinking and acting inclusively in order to initiate and sustain transformations. It also emphasises the value of long-term time perspectives in undertaking and continuing conflict transformation efforts. The approach further stresses analysing the adversaries in a specific conflict and prioritising the focal conflict among a number of linked conflicts.

The field of conflict transformation is generally perceived to include studying how destructive conflicts change and become relatively constructive and also how people conduct themselves so as to foster such changes⁵². In the context of this broad conflict transformation approach, there are numerous analytic concepts and empirical findings regarding social conflicts and there are many tools and practices consistent with those thoughts. Many of these ideas and applications are examined in several recent books about conflict resolution and peace building⁵³. The studies though show that there is no grand theory in the field. Rather, there are many isolated propositions and empirical generalizations and also innumerable analyses of various social processes. These propositions which can be summarized as the principles of conflict transformation discussed in the following section .

⁵¹ Kriesberg, L., (2007), *Constructive Conflicts: From Escalation to Resolution*. 3rd edition. Lanham, MD: Rowman & Littlefield. p. 34

⁵² Kriesberg, L., (2009), *The Evolution of Conflict Resolution*, in: Bercovitch, J., Kremenjuk, V., and Zartman, I. W., (eds.). *Sage Handbook of Conflict Resolution*. London: Sage, pp 15-32.

⁵³ See for instance Sandole, Dennis J. D., Sean Byrne, Ingrid Sandole-Staroste and Jessica Senehi (eds.) 2008. *Handbook of Conflict Analysis and Resolution*. New York: Routledge at pp. 118 and Ramsbotham, Oliver, Tom Woodhouse and Hugh Miall 2005. *Contemporary Conflict Resolution*. 2nd edition. Cambridge, UK: Polity, at p.27

2.4 Principles of Conflict Transformation

As has been noted above, though there is no grand theory or approach in the study or practice of conflict transformation, a number of key principles have emerged as defining the field. However it has become clear that Conflict transformation is not just an approach and set of techniques, but a way of thinking about and understanding conflict itself. It encourages the understanding that conflict should not be regarded as an isolated event that can be resolved or managed, but as an integral part of society's on-going evolution and development. Nor should conflict be understood solely as an inherently negative and destructive occurrence, but rather as a potentially positive and productive force for change if harnessed constructively. Conflict transformation though is always a non-violent process, which is fundamentally opposed to violent expressions of conflict; For theorists in this area, conflict transformation goes beyond merely seeking to contain and manage conflict, instead it seeks to transform the root causes themselves - or the perceptions of the root causes - of a particular conflict. Conflict transformation is therefore seen as a long-term, gradual and complex process, requiring sustained engagement and interaction. Given its nature, Conflict transformation is particularly suited for intractable conflicts, where deep-rooted issues fuel protracted violence. This is because conflict transformation adjusts to the ever changing nature of a conflict, particularly during pre- and post-violence phases and at any stage of the escalation cycle;

In practice conflict transformation addresses a range of dimensions - the micro-, meso- and macro-levels; local and global. As Varynen⁵⁴ has argued, conflict transformation is concerned with five specific types of transformation, focusing upon the structural, behavioural and attitudinal aspects of conflict. These are first actors transformation by modifying actors' goals

⁵⁴ Ibid note 31 at p.73

and their approach to pursuing these goals, including by strengthening understanding as to the causes and consequences of their respective actions; second is transformation in contexts by challenging the meaning and perceptions of conflict itself, particularly the respective attitudes and understandings of specific actors towards one another; issues – transformation redefines the issues that are central to the prevailing conflict, and reformulating the position of key actors on those very issues while rules transformation changes the norms and rules governing decision-making at all levels in order to ensure that conflicts are dealt with constructively through institutional channels. Understood in this form, conflict transformation also require adjusting the prevailing structure of relationships, power distributions and socio-economic conditions that are embedded in and inform the conflict, thereby affecting the very fabric of interaction between previously incompatible actors, issues and goals.

Conflict transformation stresses the human dimension by reminding parties of the compatible nature of their needs, instead of emphasizing their opposing interests, and by rejecting unilateral decisions and action, particularly those representing a victory for one of the parties to the conflict. The attractiveness of the conflict transformation approach is that it does not resort to a predetermined set of approaches and actions, but respects and adapts to the particularities of a given setting but looks beyond visible issues and is characterized by creative problem-solving, incorporating the perspectives a broad array of actors, including those typically marginalized from such considerations. In summary conflict transformation represents an ambitious and demanding task, which is better equipped to contend with the asymmetric, complex and protracted nature of contemporary conflicts than prevailing techniques and approaches. Some of the types of transformation are discussed in detail in the following section.

2.5 Types of Transformation

There are four types of transformation that have been suggested in literature that require to be considered in analyzing conflict transformation theory. These are issue, actor, rule and structural transformation discussed in the following sections.

2.5.1 Issue Transformation

Schmid⁵⁵ defines issue transformation as a change in the political agenda of the conflict, downplaying the importance of original conflict issues and emphasizing shared concern for new issues. However, for issue transformation to aid any conflict transformation process the particular types of conflict must be accurately understood and analysed. Issues of identity, security, religion, ecology and others also often need to be transformed. The main thrust of issue transformation is to make areas of conflict less salient while making concordant issues better perceived and appreciated. Issue transformation also entails the dexterous handling or manipulating of issue structure and contents to enhance the possibility of conflict transformation. A good example of issues transformation is the handling historical injustices in Kenya. The 2010 constitution has set up a number of independent institutions such as the National Land Commission, the Truth and Justice Commission and the Commission on Administrative Justice to deal with such historical issues.

In most protracted and intractable conflicts, parties lose interest in peacemaking processes when the issues are not constructively handled for transformation. As a result of this, conflicts fester and violence persists. Issue transformation in the whole gamut of conflict transformation

⁵⁵ Schmid, A. (2000), *Thesaurus and Glossary of Early Warning and Conflict Prevention Terms*. London: Forum on Early Warning and Early Response at p.11

indisputably determines the success of the whole process. Therefore, skilful and informed handling of the issue transformation processes is very germane to the whole process of conflict transformation. In this context, the personnel and the timing are some of the central factor

2.5.2 Rule Transformation

Rule transformation as part of the whole process of conflict transformation involves a change in the norms involved in the conflict and the limits within which the parties conduct their relations. Vanynen⁵⁶ describes rule transformation as one of the measures to restructure a conflict. Rule transformation tries to redefine the norms which actors in a conflict are expected to follow in their mutual interactions. Vaymen argues that rules can have independent impact on inter-actor relations thus a significant transformation of rules can be expected to alter actor behaviour and hence create a new basis for managing the conflict. A good example of rule transformation is the repeal of apartheid laws in South Africa in the early 1990s which had significant effect on the conflict in South Africa.

2.5.3 Structure Transformation

Studies show that one of the causes of many violent conflicts is structural imbalance, especially in plural societies. This structural imbalance could be in terms of representation in institutions such as the army, civil service and other national or juicy (plum institutions)⁵⁷. For example, the protracted and very violent intra-state conflict in many African countries are connected to structural imbalance in terms of who gets what in the highly centralized and seemingly unitary

⁵⁶ Varynen, R. (1991). *New Directions in Conflict Theory*. London: Sage Publications Ltd. pp. 21 - 49

⁵⁷ See for instance Galtung, J., (1996), *Peace by Peaceful Means*, London, Sage pp. 89 -92

presidential systems of those countries⁵⁸. Structural transformation also entails the influencing of structures officially to prevent any win – lose outcome or feeling in the post – conflict phase. The common concerns of the transformation school includes can be categorised into two⁵⁹. These are the need for sustainable structural and attitudinal change within society and institutions in order to address outstanding issues connected to the conflict. The second concern is an advocacy for the political, social and economic mechanisms and attitudes that discourage the use of violence in resolving or handling conflicts.

Therefore, structural transformation implies profound changes in the entire structure of inter-actor relations in a conflict setting or formation. Structural transformation is very central to conflict and its transformation especially social conflicts and is the main distinguishing characteristic of the conflict transformation approach. It is one of the fundamentals of conflict transformation that makes it different from conflict resolution and conflict management. The explicit commitment to effecting structural transformation goes a long way in transforming any conflict. This is even one area where consensus exists between conflict resolution theorists and practitioners on one hand and proponents of conflict transformation. This is because a durable peace can only be achieved with some level of structural change either political or socio-economic.

⁵⁸ Ibid at p.91

⁵⁹ Kriesberg, L., (2009), *The Evolution of Conflict Resolution*, in: Bercovitch, J., Kremenyuk, V., and Zartman, I, W., (eds.). *Sage Handbook of Conflict Resolution*. London: Sage, p. 41

2.5.4 Actor Transformation

Central to conflicts either at the inter-personal or community level are human. The way human beings view and handles any conflict determines whether it will be destructive or constructive conflicts. One of the main factors to be transformed in any conflict therefore is man or the actors. Either at the inter-personal or inter-group levels there are actors involved. Particularly, conflicts at the inter-group, inter-community and inter-national levels have the common features of leaders and followers or primary and shadow parties. At the inter-personal level, a transformation of the actors or parties has direct and positive effects on the conflict. This can be achieved by strengthening actors' capacity to analyse situations and make effective decisions for themselves and to appreciate the views of others. It focuses on improving the actor's sense of empowerment or self-determination, and their abilities for recognition or responsiveness to others.

At the broader level, transformation of actors should include the general promotion of natural empathy and understanding between parties particularly among leaders, opinion makers and grassroots individuals, including a sense of shared responsibility for the origins and dynamics of the conflict in the first place. However conflict transformation processes is carried out, the first and by far the most important requirement is to guide against re-occurrence of conflict in the nearest future. The attainment and sustainability of peace depends largely on the extent at which the abilities of actors in conflict are strengthened, empowered and stimulated for proper recognition or responsiveness to eliminate difficult circumstances and reduce human differences and jointly come up with a lasting solution.

2.6 Constitutional approach to Conflict transformation

Until recently, constitutional theory focused on constitutions in stable political contexts rather than the importance of constitutions in transforming conflicts⁶⁰. This was based on a realist approach that views constitutions as reflections of the balance of power at their time of drafting and thus do not consider them to have any particular transformative role. Modern constitutional theorists such as Arendt⁶¹ and Ackerman⁶² have challenged this approach by making a strong normative claim for constitution making as foundational to democratic revolution. This idealist perspective sees the role of constitutionalism as providing a break with the old conflictual order and laying the foundation.

This view of modern constitutionalism in periods of radical political change is informed by a transitional conception of constitutional justice. Constitutional law in this context is conceptualized as the most forward looking for of law. For Issacharof, in societies undergoing post conflict recovery, constitutionalism plays an important role because of the limitations it imposes on democratic choice which helps to minimize flare up of violent conflict. constitutionalism creates the basic law that restricts the capacity of the majority to exercise of its political will in disregard of the wishes of the minority. In deeply divided societies the stakes of mediating historical divides is incomparably high and lack of legitimacy in exercise of political power would trigger either collapse of the central government or open rebellion by disaffected groups. In such societies constitutionalism serves an important but often overlooked role that is of securing legitimacy for the exercise of political power

⁶⁰ See Lihphart, A., (1984), *Democracies: Patterns of Majoritarian and Consensus Governments in Twenty One Countries*, New Haven, Yale University Press, p. 63

⁶¹ Lihphart, A., (1999), *Patterns of Democracy: Government Forms and Performance in Thirty Six Countries*, New Haven, Yale University Press, pp. 32-33

⁶² Ackerman, B., (1992), *The Future of Liberal Revolution*, Yale University Press, New Haven, Yale pp. 57 – 65

Perhaps Gurr⁶³, provides the clearest rationale for the development of new constitutional orders in transforming conflict societies. He sees the need to develop democratic mechanisms, institutions and attitudes rooted in accountability to citizens and which can maintain the momentum of peace. He argues that longer-term conflict transformation and the growth of peaceful societies require the rooting of peace constituencies, effective civil institutions, and the development of cultures of dialogue to resolve potentially violent disputes. A democratic constitution making process is usually able to bring about conflict transformation because it builds effective governance institutions and provides mechanisms for arbitrating disputes which are likely to encourage violence such as those on access to public goods.

A case in point of conflict transformation through constitutional reform according to Van der Merwe⁶⁴ is the South African transition process from apartheid to democratic rule. A year before President De Klerk announced the end of apartheid in South Africa, he observed that “the term ‘conflict resolution’ does not apply to fundamental social problems in South Africa.” He argued that without radical change the underlying causes of conflict could not be completely removed in South Africa. Because apartheid caused gross inequalities and injustices that were built into the social and political institutions of South Africa, he concluded that “fundamental structural change was essential for constructive accommodation of conflict”⁶⁵ Since then, the conflict transformation process that van der Merwe was in essence advocating has culminated in new political institutions at all levels of government in which all South Africa’s population groups participate, regardless of their race and ethnicity.

⁶³ Gurr, T.R.(1996), *Transforming Ethno-political Conflicts: Exit, Autonomy or Access*, London, Sage Brush

⁶⁴ van der Merwe, H. (1989), *Pursuing Justice and Peace in South Africa*. London: Routledge. p. 115 – 123

⁶⁵ Ibid at p. 116

2.7 Conclusion

The focus of this chapter has been to identify a conceptual framework for the study of conflict transformation. In the chapters that follow these will be applied as indicated to the South African and Kenyan contexts. In the next chapter the focus will be on the case studies of conflict transformation in South Africa and Kenya and how the constitutional reform processes in the two countries have impacted on those transformations.

Among the theories of post-conflict reconstruction, the conflict transformation school⁶⁶ seeks to respond to the hybrid nature of conflicts by adopting a constructivist perspective⁶⁷. Conflict transformation theorists argue that contemporary conflicts require more than reframing of positions and the identification of win-win outcomes. As *Miall* has noted, 'the very structure of the parties and their relationships may be embedded in a pattern of conflictual relationships that extend beyond the immediate conflict'⁶⁸. Conflict transformation therefore is seen as a process of engaging with and transforming the relationships, interests, discourses, and if necessary, the very constitution of the society that supports the continuation of violent conflict⁶⁹.

⁶⁶ Conflict transformation school is distinguished from other related theories such as conflict management and conflict resolution for going further and providing for a process for engaging with and transforming the relationships, interests, discourses and if necessary the very constitution of society that supports the continuation of violent conflict.

⁶⁷ See Lederach, J.P., (1995), *Preparing for Peace: Conflict Transformation Across Cultures*, New York, Syracuse University Press p. 87

⁶⁸ Miall, H., (2004), *Conflict Transformation: A multi-dimensional task*, Berghof Research Centre for Constructive Conflict Management, Berlin

⁶⁹ Galtung, J., (1996) for instance suggests that conflicts form from contradictions in the structure of the society and it is those contradictions that require addressing. He therefore emphasizes the relationship between conflicts and larger conflicts in the structure of the world economy; See Galtung, J., (1996) *Peace by Peaceful Means*, London, Sage. Curle (1971) takes forward Galtung's approach and traces how asymmetric relationships can be transformed through a shift from unbalanced to balanced relationships achieved through a process of conscientisation, confrontation, negotiation and development; See Curle, A., (1971), *Making Peace*, London, Tavistock Publishers

CHAPTER THREE

CASE STUDIES OF THE IMPACT OF CONSTITUTIONAL REFORM ON CONFLICT TRANSFORMATION IN SOUTH AFRICA AND KENYA

3.1 Introduction

This chapter provides case studies of the impact of constitutionalism in transforming conflicts in South Africa and Kenya by considering how constitutional reform has altered key conflict triggers in the two countries. In both countries before constitutional reform, a conflict system had taken root in the society due to a number of systematic factors including discriminatory laws and policies, socio-economic inequalities, weak state institutions and human rights violations and violence. The study has picked 1994 and 2010 as baseline years for South Africa and Kenya respectively being the years when their respective constitutional reform occurred. It then considers what has changed in the study parameters since the baseline years by comparing the practice before and after the constitutional reform.

3.2 Constitutional Reform in South Africa

The South African Constitution of 1996 is widely regarded as a model constitutional text⁷⁰. Likewise, the process by which it was made has been hailed as a key part of the successful transition from the oppression of apartheid to a democratic society⁷¹. Looking at the constitution making process in South Africa, we appreciate the context and challenges of democratic constitution making in a post-conflict environment. The South Africa Constitution making

⁷⁰ Ebrahim H, *The Soul of a Nation: Constitution making in South Africa*, (Cape Town, Oxford University Press, 1998 at p. 13

⁷¹ *Ibid* p.15

process took time and faced numerous obstacles before final conclusion. In all, it took seven years, from 1989 to 1996, to achieve the final constitution. Almost five years elapsed between the first meeting of Nelson Mandela and Prime Minister P. W. Botha in 1989 and agreement on an interim constitution and the first nonracial election in 1994. Throughout these years, outbreaks of violence threatened the process.

In a key phase from 1990 to 1994, agreements on process were negotiated in private and public sessions between former adversaries. These included a 1990 agreement to negotiate about constitutional negotiations; prolonged arguments from 1991 through 1992 about the form the constitution-making process should take; agreement in April 1993 on procedures; and in December 1993 agreement on an interim constitution including principles and procedures binding on the final constitution-making process. In April 1994, the first non-racial election for parliament was held with a voter turnout of about eight six percent. The following month, the new parliament met for the first time as the Constitutional Assembly.

From 1994 through 1996 the Constitutional Assembly numerous submissions, from individuals and many advocacy groups, professional associations, and other interests. In the final phase from 1994 through 1996, in tandem with the participatory campaign, committees of the assembly drafted a new constitution within the parameters attached to the 1994 interim constitution⁷²; a first working draft was published in November 1995, leaving aside sixty eight issues for further work; a revised draft was produced in April 1996; and a final text in May 1996. From July through September 1996 the Constitutional Court reviewed the text⁷³; the court then returned the

⁷² Act No. 200 of 1993

⁷³ *Re Ex parte Chairperson of the Constitutional Assembly: In the Certification of the Constitution of the Republic of South Africa*, SA 774

text to the assembly for amendments, which were made in October. In November, the court gave its final certification and in December, President Mandela signed the constitution into law⁷⁴.

3.3 Constitutional Reform in Kenya

The history of modern constitutional reform in Kenya can be traced to 1990 when political pressure for the restoration of multiparty democracy intensified and in 1991, section 2A of then Constitution was repealed⁷⁵. Following the 1992 multi party elections, attention became focused on spearheading comprehensive constitutional reforms though the process got bogged down due to political bickering. On 4 August 1997, the Constitution of Kenya Review Act was published after intense negotiations between the government and the opposition. This Act was part of the minimal constitutional and legislative reforms package adopted prior to the 1997 general elections under the aegis of the Inter-Party Parliamentary Group (IPPG) reforms. In October 1999, the political momentum generated by this development led to the formation of a multi-party Parliamentary Select Committee on Constitutional Review, which had the mandate to recommend how the Constitution should be reviewed under a legislative framework provided by the Constitution of Kenya Review Commission Act.

The work of the Constitution of Kenya Review Commission was disrupted by the 2002 general elections which ushered a coalition of parties under the banner of NARC into power. Though the new ruling coalition promised a new constitution within one hundred days of coming into power, political bickering put paid to such grand plans and ultimately due to fall out between the

⁷⁴ Act No. 108 of 1996

⁷⁵ See the Final Report of the Committee of Experts, Constitutional Review Kenya, May 2010, Government of Kenya Printer

two major factions in the coalition, a draft Constitution was rejected in a 2005 referendum by substantial majority. The unsuccessful 2005 referendum and the discontent it caused were recognized as one of the main contributing factors to the conflict between December 2007 and February 2008. By the time of the negotiation to end the Post –election conflict in 2008 through the National Dialogue and Reconciliation Forum, Kenya had come full circle. Years of constitutional reform struggle appeared to have been for nothing when the draft Constitution was rejected in 2005.

Following the end of the post-election violence and having recognized constitutional reform as imperative for long term peace in Kenya, Parliament enacted two key pieces of legislation in 2008 namely: the second Constitution of Kenya Review Act and the Constitution of Kenya (Amendment) Act. The purpose of the 2008 Review Act was “to facilitate the completion of the review of the Constitution of Kenya.⁷⁶” The Act set up the Committee of Experts as an organ of review with the mandate to identify and resolve outstanding issues before preparing a draft Constitution for adoption by Parliament and ratification in a national referendum. The Constitutional Amendment Act established a procedure for the replacement of the former constitution with a new one and was critical to the review process. First, it contemplated comprehensive reforms – the replacement of the Constitution and not mere amendment. Most importantly, the Act required a new constitution to be adopted by the people of Kenya in a referendum. In addition, the Interim Independent Constitutional Dispute Resolution Court was intended to protect the process from unfounded legal challenges and was granted exclusive original jurisdiction to hear and determine matters arising from the constitutional review process.

⁷⁶Section 3 of the Act

Although the process was characterized by disputes between various groups including religious and political groups, the review steps were completed successfully and on August 4th 2010 the public overwhelmingly voted in the affirmative for a new Constitution in the national referendum. The Constitution was promulgated with considerable fan fare on 27th August 2010.

3.4 The Impact of Constitutionalism in transforming Conflict in South Africa

To measure the impact of constitutional reform in transforming conflict in South Africa, this Study has adopted the results of the South African Reconciliation Barometer Survey 2010⁷⁷. This is a nationally-representative public opinion survey conducted by the Institute for Justice and Reconciliation (IJR) since 2003. The Reconciliation Barometer measures citizen attitudes to political and socioeconomic transformation, and how these impact on national unity and reconciliation in post apartheid South Africa. Conducted bi-annually in 2003 and 2004, and once every year thereafter, the survey is an important resource for tracking socio-political trends, and is used by policy-makers, academics and researchers, and civil society organisations alike.

Four key measurement parameters have been selected due to their prominence in literature as the underlying cause of conflict in South Africa. These are:

1. Racial divisions
2. Socio –economic inequalities
3. Political violence and Human Rights Violations
4. Weak and non-independent civil Institutions

⁷⁷ Lefko-Everett, K, Lekalake, R., Penfold, E., and Rais, S., (2011), SA Reconciliation Barometer: Tenth Round Report, Insititute for Justice and Reconciliation, Johannesburg

3.4.1 Racial Divisions

Racial tensions and conflict was a feature of South African society for many decades. Some suggest it still is. Though racial segregation had been a feature of South African life since the turn of the 20th century, Apartheid only became official state policy in the 1940s⁷⁸. In 1948 the Afrikaner National Party (NP) came to power, introduced the policy of apartheid, and enacted such a number of discriminatory laws including the Suppression of Communism Act, the Group Areas Act, the Separate Registration of Voters Act, the Bantu Authorities Act, the pass laws, and the stock limitation laws. With the enactment of apartheid laws in 1948, racial discrimination was institutionalized and became part of the fibre of South African society. These laws touched on every aspect of social life, including a prohibition of marriage between non-whites and whites, and the sanctioning of 'whites-only' jobs. The 1950 Population Registration went further and required that All South African be racially classified into one of three categories: white, black (African) or colored (of mixed descent). Classification into these categories was based on appearance, social acceptance, and descent. For example, a white person was defined as; "in appearance obviously a white person or generally accepted as a white person." A person could not be considered white if one of his or her parents were non-white. The determination that a person was 'obviously white' would take into account "his habits, education, speech, deportment and demeanor." The department of home affairs was responsible for the classification of the citizenry and non-compliance with these laws was dealt with harshly. Blacks were required to carry 'pass books' containing finger prints, photo and essential information on them.

⁷⁸ A detailed account of the spectrum of apartheid laws is to be found in Ebrahim H, *The Soul of a Nation: Constitution making in South Africa*, (Cape Town, Oxford University Press, 1998)

The country's constitution, adopted in 1996 sought to dismantle apartheid and reduce racial divisions. It enshrines a wide range of social and economic rights as well as civil and political freedoms. Discrimination is banned not only on the grounds of race, gender, age and belief, but also of pregnancy, marital status, sexual orientation and culture. Every one of the country's people is guaranteed equal protection under the law.

According to the South African Reconciliation Barometer Survey 2010, less than half of South Africans believe that race relations in the country have improved since the end of apartheid⁷⁹. On a typical day, the survey reports, one in four people never spoke to others of different races, and two in five generally found other races "untrustworthy". The report suggests there is waning confidence in the ideal of the "rainbow nation". It shows that the belief that relations between racial groups have been improving has declined in recent years, saying that social and geographic divisions persist, fifteen years after the end of apartheid. The authors of the report say the levels of inter-racial contact have remained "relatively static" since the first survey, in 2003. "While this is symptomatic of a lack of progress in social integration, it also speaks to continued physical separation and exclusion," they say. Only 49% of respondents in the survey said they thought race relations were now healthier than they had been in 1994. In 2006, 61% of South Africans agreed that "the relationship between the various races" was improving, but this had fallen to 49% by 2010. Confidence in a "happy future for all races", which peaked at 86% in 2005, has now fallen to 62%. The survey found 24% of South Africans indicating that they never spoke to people of other races "on a typical day during the week, whether at work or otherwise",

⁷⁹ Lefko-Everett, K, Lekalake, R., Penfold, E., and Rais, S., (2011), SA Reconciliation Barometer: Tenth Round Report, Insititute for Justice and Reconciliation, Johannesburg at p.29- 43

and 46% "never socialising" with people of other races in their own homes or friends' homes. Just 28% said they would talk to people of other races more often if given the choice.

The report argues that "few inroads" have been made towards promoting greater understanding, trust and integration between different races. Apparently, it is "difficult to understand the customs and ways" of people of other races, according to 59% of the respondents⁸⁰. Additionally, 39% regard people of other race groups as untrustworthy, a rise from 2003, and, reflecting a mild rise, 42% could "never imagine being part of a political party" made up mainly of people of other races. The authors conclude that even though it has been over fifteen years since the end of apartheid, questions still remain as to the extent that South Africa has indeed continued in transforming the 'jangling discords of the nation'

3.4.2 Socio- economic inequalities

To measure how constitutional reform has addressed socio-economic inequalities in South Africa since the end of Apartheid, we consider the findings of Treiman and the South African Reconciliation Barometer Survey 2010. Treiman⁸¹ has analyzed socio-economic disparities in South Africa based on data from the 1996 census. Conducted two and a half years after the April 1994 election, the study provides as a description of the extent and pattern of racial inequality at the point of transition in South Africa.

Treiman's study provides a summary of the socioeconomic characteristics of twenty eight groups two years after the 1994 transition from apartheid. The groups are arrayed by race and

⁸⁰ Ibid at p.51

⁸¹ Treiman, D.,(2005), *The Legacy of Apartheid: Racial Inequalities in the New South Africa*, California Centre for Population Research, On-Line Working Paper Series, UCLA, California

within race by median income. It shows that even the least advantaged White groups had far higher incomes than any non-White group, and on average Whites have about twice the incomes of Asians, nearly four times the incomes of Coloureds, and more than five times the incomes of Blacks. Whites are also far less likely to be unemployed, followed in order by Asians, Coloureds, and Blacks, among whom more than forty percent are unemployed. Finally, there are substantial differences both between and within racial groups in the likelihood of working at high status occupations—non-manual jobs and also professional and managerial jobs. In education Whites enjoy a nearly two year advantage over Asians, who in turn have a two year advantage over Coloureds and a three year advantage over Blacks with regard to the average number of schooling each group gets.

In the 2010 the Reconciliation Barometer survey, data on economic security suggests that citizen of South Africa evaluations of change in the economy though initially positive have become increasingly negative in recent years. In the survey, only 38% of South Africans believe their personal economic circumstances have improved since 1994, 27% that the gap between rich and poor has been narrowed, and 26% that access to employment opportunities has become better than before. When asked about economic change over the sixteen years since the transition to democracy, only about one-fourth (27%) of South Africans believe there has been an improvement in reducing the gap between rich and poor, and a comparable percentage (26%) that access to employment opportunities has improved. Conversely, 40% believe socioeconomic inequality has worsened over this period, and 50% that access to employment opportunities has worsened. The percentage of respondents who positively evaluate prospects for finding employment, improved personal financial circumstances, and future economic opportunities have dropped overall, while perceived likelihood of unemployment has increased

3.4.3 Political Violence and Human Rights Violations

Political violence and other forms of human rights violations have been a feature of South African life for decades. The root cause of political violence in South Africa can be located within its social matrix and the long history of oppression, poverty and exploitation of the majority black community by the minority apartheid governments. From 1948 when the apartheid government entrenched racially-based social inequality, the state used vertical institutional violence to maintain this inequality and social control. The state repressed those opposed to it through detentions, convictions, bannings and even state-sanctioned assassinations. In the face of this repression, liberalization organizations such as the ANC resorted to armed struggle and defiance campaigns. The cumulative consequence was that on both sides of the political divide, violence was sanctioned and legitimized as a means of either maintaining power or achieving change. Violence became socially sanctioned as a means of solving problems in South Africa.

At the outset of the SA Reconciliation Barometer in 2003, the survey confirmed that first political crimes have reduced significantly while other forms of crimes have remained high though not as high as during the apartheid era. There is thus relatively high levels of perception of insecurity among South Africans, particularly in relation to the other forms of crime other than political violence. Recent data suggests that, while crime rates have fallen slightly overall, numbers of contact crimes committed – including murder and aggravated robbery – have remained high, and numbers of sexual offenses reported have continued to rise. In 2010, 39% of South Africans feel there has been an improvement in their personal safety levels since the country's democratic transition in 1994; 35% feel personal safety levels have stayed the same,

and 25% that conditions have in fact worsened over this period. The national crime statistics aside, an overview across the 2010 survey shows moderate, but overall improvement in perceptions about personal safety among respondents.

3.4.5 Low Confidence in Political Institutions

The Apartheid system was based on the premise that South Africa belonged to its minority Afrikaner population that had 'won it' in war against the British in the late 19th Century. Its policies had the goal of securing as much as possible preferential treatment for whites in the country. It thus no wonder that confidence in state institutions was minimum amongst the black majority South Africans

The 2010 Reconciliation Barometer survey found that from the point of transition in 1996 confidence in political institution steadily rose and reached its apex in 2006. Since 2006 though there has been declining confidence in many of South African political institutions, as well as in political leadership, potentially to the detriment of progress in both reconciliation and democratic consolidation since the 1994 political transition. In the survey declines in confidence in institutions and political persisted and lower levels of trust in political leadership were reported, and citizens indicated an increased willingness to protest in instances in which they felt their human rights were being violated.

In the 2010 survey, the broadcast media and religious institutions garner the highest level of public confidence, with 73% of South Africans reporting that they have either "a great deal" or "quite a lot" of confidence in both. Moderately high levels of confidence were reported across all spheres of government, including the presidency (67%), national government (66%) and

Parliament (65%), as well as for the Constitutional Court (64%) and the legal system overall (60%).

The survey results can be contrasted with the World Bank's Governance Effectiveness Index 2010⁸², which shows South Africa's overall government effectiveness to be in the middle of the index range at 3.25 in 2010 and expected to rise to 3.32 and 3.41 in 2015 and 2020. Since the abolishment of apartheid and the signing of the new constitution in 1996, the report notes that democracy has been stable in South Africa. However, the latest Transparency International reports showed corruption, while not as bad as many countries in the world, has gotten slightly worse since the transition in 1996. On a scale of 1 to 10 with 10 being least corrupt, South Africa ranked slightly below the midline at 4.5 in 2010.

3.5 The Impact of Constitutionalism in transforming Conflict in Kenya

The Commission of Inquiry into Post Election Violence in its 2008 report found four main root causes of violent conflict in Kenya. First has been the growing politicization and proliferation of violence in Kenya over the years, second is the growing power and personalization of power around the Presidency; Third, is a feeling among certain ethnic groups of historical marginalization, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services and lastly is the increasing problem of a growing population of poor, unemployed and youth, educated and uneducated, who agree to join militias and organized gangs. This was consistent with other reports that have found similar explanation for the violence in Kenya. The underlying causes of violence in Kenya therefore which can then be assessed can be summarized to include:

⁸² Accessed at www.worldbank.org/countrydataindex/sa/governanc on 27th July 2012

1. Ethnic Divisions
2. Socio-economic inequalities
3. Political violence and human rights violations
4. Weak state institutions

To measure the impact of constitutional reform in Kenya, this study adopts the survey results of the Institute of Economic Affairs in 2010 Kenya Divides Study⁸³. In the aftermath of the post-election crisis in 2007, the Institute of Economic affairs undertook a study of the issues that divide Kenyans in order to determine how they could be addressed. The study is basically an investigations of people's perceptions regarding the most evident divisions during the post-election violence. The study identified six divides including; religious; ethnic, class/socio-economic; inter-generational; and regional divisions.

3.5.1 Ethnic Divisions

The IEA survey found that among Kenyans, probably the most discussed cleavage in society today is that of ethnicity. In order to establish what Kenyan's perceptions of different ethnic groups were – individuals were asked a series of questions to explore their views of ethnic groups other than their own. When asked whether ethnic tensions existed in Kenya, about 63.9% of the respondents agreed. Ethnic tensions were pronounced and were mostly blamed on politicians and past political regimes. The study further found that apart from being very divided along ethnic lines, most Kenyans do not hold other ethnic groups in high regard. Only two ethnic communities namely the Luo and the Masai were seen positively by the majority of

⁸³ IEA, (2009) , The Kenya Divides,: Perception Study (Volume 1A) , Institute of Economic Affairs, June 2009

respondents. The other groups were not seen positively by most respondents and more problematic also had very high negative ratings.

On the other hand when asked whether they were willing to marry or do business with other communities, most claimed (89%) that they are willing to do business, marry, live with and be led by individuals from different ethnic communities. The report explains that some of this may be partially due to the nature of the question? The questions on whether one was willing to live or marry a person of another ethnic groups could be interpreted by the respondent as a question of how tolerant are you? Given that no one wants to be seen as a tribalist and therefore negatively there may be an upward bias in these numbers. Also because each ethnic group has at different times stereotypes of which other groups are problematic and which are good, the answers may capture the idea that people are willing to do business, marry, live with and be led by individuals from a different specific ethnic community but not necessarily any ethnic community.

Has ethnic animosity reduced since 2010? The answer is no based on recent developments. First is the ethnic identity of most political parties, second is the tribal solidarity shown to the suspects of before the International Criminal Court during so called 'prayer rallies' and lastly is the ongoing tribal clashes in various parts of the countries the most serious and recent being the Tana Delta Clashes that left over one hundred people dead. It is clear that though no follow up study on citizen's perception on ethnic rivalry has been conducted since the 2010 IEA survey, there has been minimum change in this parameter.

3.5.2 Socio -economic inequalities

Perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services and the increasing problem of a growing population of poor,

unemployed and youth has been prominently identified as a root cause of violence in Kenya. Over the years since Kenya became independent, there has been a growing perception of deliberate unfairness and inequality in the distribution of national resources. There is widespread perceptions that after 47 years of Independence, Kenya remains a dual economy with wide disparities in economic, social and infra-structural development across regions. After little or no progress fighting poverty during the 1980s and 1990s, the most recent national study shows that national poverty is on a downward trend, falling from 56% in 2000 to 46% in 2006. The few studies on inequality in Kenya show that it is manifested in various forms including: income, lack of equal access to productive assets, social and political exclusion, and inability of certain groups of the society to access key social services..

The IEA survey sought to discover respondent's definitions of socio-economic classes, own perceptions of the socio-economic class the respondents belonged to, how different socio-economic classes were perceived, and how equally socio-economic groupings were treated. On the socio-economic divide, most respondents perceived themselves to be middle class (61.6%) or poor (34.5%) and yet 61.6% of the incomes as cited by the same respondents were below Kshs. 10,000.00. The definition of the different socio-economic classes was in terms of material possessions and acquisitions i.e. issues of lifestyle and sources of income or livelihoods. Both the rich and the poor were viewed negatively, the difference being that the former was seen as a vicious victor while the later was perceived to be the victim. The middle class were generally seen as working extremely hard to climb the ladder and ensure that they did not become poor. The survey noted the sharp reality of inequality in the findings. It found significant awareness of both the economic and political inequality as well as the perceptions of inequality.

In the two years since the enactment of the constitution, the country's gini coefficient has not moved. In most national surveys, citizens still cite socio-economic challenges like high cost of living and lack of jobs as their key concerns. It thus clear that constitutional reform has so far had minimum effect on socio-economic issues.

3.5.3 Political Violence and other Human rights Violations

Political violence has been a common occurrence in Kenya especially just before, during and after elections⁸⁴. To some extent violence has been a preferred political tool in Kenya since the colonial era⁸⁵. Violence indeed became a means of securing political power and winning elections. Elections related violence occurred in 1992 , 1997, 2002 and 2007. In to compound matters, despite reports from NGOs such as the Kenya Human Rights Commission, Human Rights Watch, and two Government Inquiries - the Kiliku Parliamentary Committee and Akiwumi Commission - no one was ever punished for such political violence⁸⁶. This led to a culture of impunity whereby those who maimed and killed for political ends were never brought to justice.

⁸⁴ Numerous reports have detailed out along history of political violence in Kenya. These include Government of Kenya, *Final Report of the Commission of Inquiry into the Post Election Violence*, Government Printer, 15th October 2008; Human Rights Watch (2008), *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governace*, Volume 20 No. 1 (A); International Crisis Group. 2008. *Kenya in Crisis*. Africa Report No. 137

⁸⁵ CIPEV (2008) supra note 12

⁸⁶ See generally Human Rights Watch (2008), *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governace*, Volume 20 No. 1 (A), Klopp, J. and Kamungi, P., 2008. Violence and Elections: Will Kenya Collapse? *World Policy Journal*, Vol. 24 (4), pp 11-18; Throup, D. 1993.. Elections and Political Legitimacy in Kenya. *Africa: Journal of the International African Institute*, Vol. 63, (3), pp. 371-396 and International Crisis Group. 2008. *Kenya in Crisis*. Africa Report No. 137.

Apart from political violence, other human rights violations has also been prevalent in Kenyan political culture. The most serious human rights problems have been abuses by the security forces, including unlawful killings, torture, rape, and use of excessive force; mob violence; and the abridgement of the right of citizens to change their government in the 2007 election. Other human rights problems included police corruption; harsh and life-threatening prison conditions; arbitrary arrest and detention; prolonged pretrial detention; executive influence on the judiciary and judicial corruption; arbitrary interference with the home and infringement on citizens' privacy; restrictions on freedom of speech, press, and assembly; abuse and forced resettlement of internally displaced persons (IDPs); abuse of refugees, including killing and rape; official corruption; violence and discrimination against women; violence against children, including female genital mutilation (FGM); child prostitution; trafficking in persons; discrimination against persons with disabilities; interethnic violence; discrimination based on ethnicity, sexual orientation, and HIV/AIDS status; lack of enforcement of workers' rights; forced and bonded labor, including of children; and child labor.

Though the constitution of Kenya enacted in 2010 gives prominence to protection of fundamental rights of the individual and outlaws all forms of violence, no significant transformation in the country can be detected. Since August 2010, political violence continues to be reported, inter-ethnic massacres in the Tana Delta occurred in August and September 2012 and there has been several reports that the government or its agents committed arbitrary and unlawful killings.

3.5.4 Lack of confidence in Public Institutions

The Commission on Post Election Violence (2008) in its report found that in Kenya political power has been personalized around the presidency and this has been increased by changes in the Constitution under each President since independence. Laws were routinely passed to increase executive authority. This led to a situation where the personal power of the President and his close associates trumped the law. Hence, the checks and balances normally associated with democracies increasingly became very weak in Kenya and deliberately so. Individuals in various parts of Government whether in the civil service, the judiciary, and even in Parliament, understood that, irrespective of the laws, the executive arm of government determined what happens. Hence, the state was no longer seen as a neutral dispenser of public goods but as the preserve of those in power. This has led to a sense of lawlessness that has led to Government institutions and officials being seen as lacking in integrity and autonomy and thus not viewed as legitimate.

This lack of legitimacy in state and public institutions became one of the main issues that the Constitutional reform process sought to address. The constitution has sought to enhance confidence in state institutions by greatly limiting presidential powers, protecting the independence of the judiciary and creating a host of independent commissions and bodies.

To assess the impact of the constitutional reform in enhancing public confidence in public institutions, this study considers the results of the Afro-Barometer Round 5 Kenya Survey carried out between November 4 and December 5, 2011 and conducted by the University of Nairobi's Institute of Development Studies (IDS). According to the study majority of respondents don't trust most public institutions in Kenya deeming them corrupt. The study which touched on corruption, citizen trust for leadership, government performance and service delivery

found, 68 per cent of Kenyans said the police were corrupt, while 48 per cent said MPs participated in graft. On the other hand it revealed that judges and magistrates are viewed as the least corrupt in the republic with an overwhelming 78 per cent saying they were free of corruption. This is a significant turnaround for the judiciary since previous reports especially from Transparency International's Corruption perception index had placed the judiciary quite high in corruption perception.

The survey found out that Media was still the most trusted non-state actor at 77 per cent followed by the civil society. On service delivery, most Kenyans were certified with the ongoing infrastructure development around the country. Another 51 per cent blamed government officials for participating in corruption while 49 per cent blamed councillors. The authors of the report noted that "People said they did not believe police could deliver services unless they are bribed based on their experiences. This is consistent with previous surveys,⁸⁷" and "Ironically this is not the same with officials of the judiciary who people have began to trust, especially after the promulgation of the constitution.⁸⁸" Kenyans also pointed a finger at parliament based on mega scandals that have been associated with some MPs. "Kenyans who associated the Kenya Revenue Authority (40 per cent) with graft said the officials took advantage of their ignorance because they did not understand the on goings at the office,"⁸⁹. On citizen's trust for leadership, 61 per cent said they still trusted President Kibaki while 57 per cent they trusted the Prime Minister Raila Odinga. Those who said they trusted Vice President Kalonzo Musyoka were 46 per cent. However, 49 per cent trusted MPs with another 38 per cent saying they trusted their local government authorities. On party affiliation, 45 per cent said they trusted the Grand

⁸⁷ Remarks of Dr. Paul Kamau on 12th February 2012 when presenting the report in Nairobi

⁸⁸ Ibid

⁸⁹ Remarks of Dr Adams Oloo

Coalition, 42 on Orange Democratic Party while 37 per cent trusted Party on National Unity Alliance. The other 28 Per cent had trust for other parties. Over 2,400 repondents were interviewed in the survey in 44 counties, excluding, Mandera, Samburu and Lamu due to insecurity at the time

3.6 Conclusions

The research in this part has shown mixed impact of constitutional reform on conflict transformation in the two case studies. While it is no doubt true that it is still early days to assess the impact of constitutional reform in Kenya given that only two years have elapsed since the enactment of the new constitution, the early score card is not promising. For South Africa though in the immediate aftermath of the 1994 transition there was much more positive perceptions of the impact of the constitutional reform, increasingly the constitutional experiment is being viewed negatively and there is growing perception that the constitution has not delivered as much as it could. In summary the findings of this research are: first, constitutional reform especially where participatory methods are used do have a positive impact in restoring legitimacy to the exercise of political power in a conflict society , second, constitutional reform also has a positive impact on strengthening other institutions other than the executive including Parliament and the Judiciary which are important in improving confidence in state institutions. Constitutional reform however appears to have minimum effect on eliminating socio-economic inequalities in the society finally while constitutional reform does minimize political violence due to changes in the electoral laws, it seem to have no impact on other forms of violence and human rights violations.

CHAPTER FOUR

ANALYSIS OF CONFLICT TRANSFORMATION THROUGH CONSTITUTIONAL REFORM : THE CASE SOUTH AFRICA AND KENYA

4.1 Introduction

Constitution reform is a useful instrument for conflict transformation because if sustainable peace is desired, parties have to negotiate on structures of state and divisions of powers, matters which are the substance of constitutions. Constitution making also plays a more substantive role, providing agreement on national values, even national identity, and new institutions and procedures that not only consolidate peace but also provide for future co-existence and co-operation. Through the entrenchment of the settlement in a fundamental document not susceptible to easy amendment, constitutions address underlying causes of conflict and can bring an effective transformation of the conflict situation

The role of Constitution making in conflict transformation can be looked at within the transformation model proposed by Varynen⁹⁰ who charts four ways in which transformations happen namely : *Actor Transformation*, *Issue Transformation*, *Rule Transformation*, and *Structural Transformation*. Inherent in Varynen's approach to conflict transformation lies the notion that personal, relational, and structural transformation is essential to deal effectively with conflicts. The utility of constitutional reform in conflict transformation therefore is that it can bring about the various forms of transformations suggested by Varynen. It can bring about actor

⁹⁰ Väyrynen, R., (1991), To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts." In Väyrynen, R., ed., *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation*. London: Sage, p.161

transformation by encouraging the participation of previously excluded parties in governance, issue transformation by resolving competition for power or injustices through democratization, rule transformation by setting up new systems for dealing with society disputes and finally structural transformation by addressing underlying causes of conflict such as historical injustices.

A number of factors explain the impact of constitutional reform in conflict transformation in the two case studies of South Africa and Kenya. These include how democratic the constitution reform process was; the institutional framework for governance put in place, the nature of the major divide whether racial or ethnic, the institutional and governance framework set up by the constitution and the role of political elites. These factors are the focus of this analytical chapter.

4.2 Constitutional reform and Structural Transformation

The main focus on constitution making is based on the realization that social structural changes are an integral part of transitioning to peace, as well as addressing the underlying causes that may have fueled conflict in the first place. Indeed, constitutional reform is an acceptance that sustainable peace building must involve systemic change that helps create and sustain a new social reality. An integral part of minimizing violent conflict is transforming those structures and dynamics that govern social and political relations, as well as access to power and resources. These sorts of systemic changes typically involve policy or institutional adjustments, as well as the creation of new institutions to meet basic political and socioeconomic needs. These social structural reforms aim to address the conflict's underlying causes and conditions and restructure the system of social relationships that has broken down.

A good way to achieve structural transformation is to re-organizes the state administrative system and redistribute power is through constitutional reform. This can involve a process of

national dialogue, allowing competing perspectives and claims to be aired and incorporated. It can also be part of national education with respect to concepts of government, the concerns of different groups, the development of civil society and citizen responsibility, and norms of human rights and tolerance. All of these features can be incorporated into a constitutional reform process that address power inequities and promote political inclusion.[34] Constitutional reform can help political systems and the institutions within them to evolve in response to demands that reflect human needs. In the South African case, for example, systemic change came in the form of major constitutional reform and reallocations of power. The abandonment of apartheid is thus seen as a prime example of major social structural change.

4.3 An Analytical framework of conflict transformation through constitutional reform

Bachler⁹¹ has provided a suitable analytical framework for conflict transformation through constitutional reform. He argues that the potential of conflict transformation through state reform itself depends on the proper establishment of structures, values and attitudes that can enable the different groups within the society to handle their conflicts peacefully. State reform must therefore encompass more than just a reorganization of the administrative system or of the way in which resources are allocated. Rather, it must set the stage for the establishment of participatory and legitimised nation-building processes. By forging democratic development, the participation of the population and rule of law, it will also develop structures that can offer an effective means for the peaceful management of deep-rooted conflicts. As democracy takes root, it will itself have a pacifying effect since it is based on values such as pluralism, tolerance,

⁹¹ Bachler, G, (2001), *Conflict Transformation Through State Reform*, Berghof Centre for Constructive Conflict Management, Berlin

inclusiveness and compromise, and because it helps to establish norms of behaviour such as negotiation, compromise and cooperation among the political actors.

Bachler and others have suggested five key factors that determine the success of constitutional reform in transforming conflicts. First is the process itself. Making the case for democratic constitution making process, he argues that if a transition process to peace and development is to be sustainable, it must enjoy the support of the entire population and not only of the political elite. This is the call for a democratic constitutional reform process. A democratic constitution making process is critical to the strength, acceptability and legitimacy of the final product⁹². Due to increased political sophistication of the public, for a constitution to have legitimacy, the process as well as the final text must be seen to have been democratic. A democratic and transparent constitution-making process, in addition can always be of great help in efforts to foster national education, develop a civil society, and promote citizens' responsibility and tolerance for and among different societal and identity groups.

The second factor Bachler notes is institutional reform which is critical for the reconstruction and conflict transformation in conflict states. If we are to solve the problems caused by the breakdown of government and ensuing civil strife, structures must be established in order to re-legitimise state power and make the peaceful management of conflicts possible. A third factor is strengthening of civil society. When civil society is absent or inactive, it is a clear sign of the dominance of an oppressive regime, in a nation likely to be characterized by widespread insecurity, and in which aggravated exploitation of ethnic and cultural differences is also likely to create a climate of distrust and suspicion. In contrast, a strong civil society can serve as a

⁹² In a number of cases where the process was not inclusive or was manipulated by the executive or military, the constitutional reform process failed. Examples include Zimbabwe in 1999/2000, Haiti in 2001, Kenyan first referendum in 2005 and Angola first Peace process in 2005.

guarantee for a sound societal fabric, one that can support civil conflict resolution. Civil society encompasses all elements of active citizenship, reaching from the local level (for example, councils of elders), across the mid-level (NGOs, intellectuals), to the top level. It combines various societal sectors, including the business world, trade unions, women's associations, churches, peace and human rights activists, journalists and scientists. Within the framework of multi-track diplomacy civil society may play a crucial role in building bridges between polarised groups, promoting dialogue and reconciliation across various societal levels, and fostering good governance at the official level.

A fourth factor is the promotion of the rule of law. This is quite important because ineffective justice systems unfortunately encourage people to take the law into their own hands. If this is to be prevented, justice systems must effectively protect, support and promote the rights of individuals within their societies, and be accessible to all. They must also be impartial and politically independent. Last in Bachler's matrix of factors is the effective implementation of the constitution. He notes starkly that If the implementation of the constitution is not embedded in socio-economic and institutional transformation at the local level (as well as in political transformation at the medium and the top levels), it will probably not be worth the paper it is written on.

Bachler's⁹³ views are shared by Samuels⁹⁴ who places special emphasis on two key factors; that is democratic constitution making process and the outcome of the process in the content of the constitution. She argues that democratic constitution making is important in providing an

⁹³ Ibid

⁹⁴ Samuels, K., 'Post-conflict Peace- building and Constitution Making', *Chicago Journal of International Law*, Vol. 6 No. 2 pp 1- 20, Winter 2006

opportunity for societal dialogue that is necessary in sustainable peace-building. The process of constitution-building can provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence. It can also lead to the democratic education of the population, begin a process of healing and reconciliation through societal dialogue, and forge a new consensus vision of the future of the state. A few critical studies have shown that the more representative and more inclusive constitution building processes resulted in constitutions favoring free and fair elections, greater political equality, more social justice provisions, human rights protections, and stronger accountability mechanisms.

On the outcome, Samuels⁹⁵ is of the view that the content of a constitution, and the extent to which it sets up a democratic process rather than merely divides the spoils between political elites, will impact its transformative role i.e the state's chances of long-term peace and the quality of the democracy created. The design of the constitution is therefore important both to create new democratic institutions and to assure their protection in the longer term. Unless they are carefully designed and implemented, democratic institutions can ferment conflict in sharply divided societies. A poor governance framework will undermine the sustainability of the peace. It can exacerbate fault lines, divisions, and tensions in society; entrench conflict-generating electoral or governance models, or provide a basis for contesting the government.

4.4 The Case of South Africa

South Africa's past was succinctly described by the Constitutional Court as 'a deeply divided society characterized by strife, conflict, untold suffering and injustice which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a

⁹⁵ Issacharoff, S., (2004), 'Constitutionalizing Democracy in Fractured Societies', *Journal of International Affairs*, Volume 58 No. 1, Fall 2004, at page 87

legacy of hatred, fear, guilt and revenge'⁹⁶. Since the end of Apartheid and the transition to democratic rule in 1994, South Africa has made great progress in structural transformation of the country. Using Bachler's analytical framework for conflict transformation the impact of constitutional reform transformation of the conflict in South Africa can be explained by looking at the four factors that Bachler has identified as being necessary for a successful conflict transformation through state reform. These are:

- a) Democratic Constitution making
- b) Strengthening of State Institutions
- c) Promotion of the Rule of Law
- d) Strengthening of Civil Society
- e) Effective Implementation of the Constitution

4.5.1 Democratic Constitution making

The South African Constitution of 1996 is widely regarded as a model constitutional text. Likewise, the process by which it was made has been hailed as highly democratic. As noted in the previous chapter the South Africa Constitution making process was highly participatory. The constitution reform process involved all major political groups and civil society through the CODESA process. There was also widespread consultations and negotiations between the Government, ANC and other political groups that led to consensus on key constitutional principles set out in the Interim Constitution of 1994. Of great importance was the participation of the public in the constitutional process through various media including public events, submissions and radio and television broadcasts. The participation of the public in the drafting of

⁹⁶ In Re: Certification of the Constitution of the Republic of South Africa 1996 1996 (10) BCLR 1253 (CC) at para. 13.

the constitution was a crucial component of the process and significantly contributed to nation-building in south Africa. It helped define the national identity and of common popular aspirations for the future among the populace and promoted democratic empowerment.

4.5.1 Strengthening of State Institutions

The Constitution which South Africa enacted in 1996 was aimed at addressing centuries of racial discrimination and undemocratic political system that favoured minority white communities at the expense of the black majority. Various state institutions intended to 'strengthen constitutional democracy' have been created under Chapter Nine of the Constitution (and are commonly known as the Chapter Nine institutions)⁹⁷. They include a human rights commission, a commission on gender equality, a commission to protect cultural, religious and linguistic rights, and an independent broadcasting authority (which is mandated to ensure 'fairness and a diversity of views broadly representing South African society'). In addition, the chapter makes provision for a public protector, who is empowered to investigate any alleged 'impropriety or prejudice' in the conduct of state affairs. The Constitution also makes the auditor general one of the Chapter Nine institutions, and requires him to audit and report on the financial management of all public funds at all levels of government. The last of the Chapter Nine institutions is an electoral commission, which is responsible for conducting elections, ensuring that they are free and fair, and declaring their results.

Another key institution that has been strengthened by the Constitution is the Judiciary. Judicial authority is vested in the courts, which are enjoined to be independent and to apply the law impartially and 'without fear, favour, or prejudice'. The courts include the Constitutional Court,

⁹⁷ Chapter 9 of the 1996 Constitution

the Supreme Court of Appeal (which replaces the Appellate Division of the Supreme Court), the High Courts (which replace the provincial divisions of the Supreme Court) and the magistrates' courts

(a) Promotion of the Rule of Law

The Rule of Law, in its most basic form, is the principle that no one is above the law⁹⁸. The rule follows logically from the idea that truth, and therefore law, is based upon fundamental principles which can be discovered, but which cannot be created through an act of will. The Rule of Law preserves and protects the rights and property of individuals and corporations. It safeguards against arbitrary governance, dictatorship and mob rule and is central to the stability of government, the preservation of human rights and the economic and social development of society. The World Justice Project, which has its mission, the promotion of the rule of law worldwide through multi-disciplinary partnerships, research and the compilation of the Rule of Law Index, has identified four universal principles that lie at the heart of the rule of law. These are: The government and its officials are accountable under the law, the laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property, the process by which the laws are enacted, administered and enforced is accessible, fair and efficient, and access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The Rule of Law Index is a means of measuring the extent to which any given country complies with the rule of law, not only insofar as the written law is concerned, but also as regards its

⁹⁸ *Black's Law Dictionary*, Fifth Edition, , West Publishing Company (1979), page 1196.

implementation in practice as experienced by the public. It is in this connection that the incidence of service delivery protests is significant. If the best laws in the world are not properly implemented at grass roots level then in practice the rule of law is not being adhered to properly. South Africa is one of the countries in which there is a Rule of Law Index score. The aspects on which South Africa scores best are that we have a constitution which can only be amended according to law, rights can only be suspended as the constitution dictates, government powers are defined and limited, freedom of thought and religion are protected and the government is subject to independent audits. Where we score worst is in respect of court access without undue procedural hurdles, insufficient competent judicial officers, the punishment of crimes against persons, safe and accessible courts and the sanctioning of police and the military for misconduct.

c) **Strengthening the Civil Society**

When South Africa adopted its post-apartheid Constitution in 1996, it was remarkable for both the inclusive and consultative process by which it was adopted as well as for its content. The process involved a massive public participation campaign in which the role of civil society was paramount. In relation to content, the South African Constitution is manifestly transformative and declares itself committed to the continued inclusion of civil society in governance. In the light of the provisions of the Constitution, this paper looks at the extent to which civic society meaningfully participates in structures of governance in post-apartheid South Africa. Civil society' is used here in a broad sense, to include all organizations and associations that exist outside the State. This would include NGOs, cultural, political, social and religious groupings both formal and informal, as well as the labour unions.

The Constitution protects the continued involvement of the public and civil society in governance in various ways. It is committed to access to information and just administrative action. It dedicates a chapter to the basic values and principles of public administration in South Africa, including transparency and the right of the public to participate in policy-making. Several State institutions supporting constitutional democracy are also set up in terms of the Constitution. These are independent, and 'subject only to the Constitution and the law' (section 181(2)). They are accountable to the National Assembly and must present a report on their activities and performance of their functions annually (section 181(5)). Among these institutions are the Human Rights Commission, the Commission on Gender Equality and the Public Protector (a type of ombudsperson). It is clear from the above that the Constitution appears to envisage a continued relationship of cooperation between State and civil society. This relationship is premised on civil society having a crucial role to play in service delivery and policy-making with the State, where similar goals of transformation and change are shared.

e) Effective implementation of the Constitution

South Africa benefited from two main enablers for its effective implementation of the constitution. First was the role of inspired individuals led by President Mandela and second was the system of constitutional supremacy with judicial review adopted in the constitution. The role of individuals in making this history was extremely significant. Nelson Mandela had extraordinary abilities of statesmanship, as well as a democratic vision based on reconciliation and inclusiveness. He became a celebrity on the world stage, winning with de Klerk the 1993 Nobel Peace Prize. De Klerk's decision to break with the past and negotiate with the ANC was

also important. Those who forged the peace process include a diverse group of remarkable personalities including Archbishop Tutu

4.5 The Case of Kenya

The 2010 Constitution was an ambitious and bold state re-engineering project following the 2008 PEV which nearly all state and national institutions were discredited. It sought to transform the country so that the phenomenon of violence and injustice may be broken. Today the euphoria of 2010 is being replaced by a creeping mood of despair and cynicism. As one analyst has noted, there is a sense that the miracle didn't happen for most Kenyans . Today it feels that Kenya didn't take that big step forward in 2010. Public skepticism towards power gives the impression that all that the country has done since 2008 is to reinvent the past. But a critical analysis of the factors that have made South African Constitutional reform a success show different reality

- a) Democratic Constitution making
- b) Strengthening of State Institutions
- c) Promotion of the Rule of Law
- d) Strengthening of Civil Society
- e) Effective Implementation of the Constitution

a) Democratic Constitutional reform process

On August 4, 2010, Kenyans went to a referendum and voted to adopt a new Constitution to replace the previous one that had been negotiated at independence from the British in 1963. The Constitution was the result of a struggle that lasted for at least two decades, it was also part of

Agenda Four of the National Dialogue and Reconciliation Mediation Process that former UN Secretary-General Kofi Annan chaired after Kenya's disputed 2007 presidential elections and the widespread violence that followed. As shown in the previous chapter the constitution reform process was democratic especially given that the public was given a final say during the referendum to either vote for or against the new constitution.

(b) Strengthening of State Institutions

Various Constitutional Commissions and Independent offices have been established by the Constitution to have responsibility for discharge of specified constitutional mandates. These include the Kenya National Human Rights and Equality Commission which is to ensure the universal realization of the Bill of Rights, the Independent Electoral and Boundaries Commission to be responsible for the electoral process. The Judicial Service Commission and Parliamentary Service Commission with mandate over the judiciary and parliament respectively, the Commission of Revenue Allocation, the Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission and the National Police Service Commission. Two independent offices of the Auditor- General and the Controller of Budget are also established. Judicial Authority is vested in an independent judiciary consisting of a Supreme Court at the apex, the Court of Appeal, the High Court and subordinate courts. To prevent interference from other branches of government, the judiciary is to be managed by an independent judicial service commission and has its own dedicated judiciary fund to meet its administrative expenses.

(c) Promotion of the Rule of Law

The Commission on Post Election Violence (2008) in its report found that in Kenya political power has been personalized around the presidency and this has been increased by changes in the Constitution under each President since independence. Laws were routinely passed to increase executive authority. This led to a situation where the personal power of the President and his close associates trumped the law. Hence, the checks and balances normally associated with democracies increasingly became very weak in Kenya and deliberately so. Individuals in various parts of Government whether in the civil service, the judiciary, and even in Parliament, understood that, irrespective of the laws, the executive arm of government determined what happens. Hence, the state is not seen as neutral dispenser of public goods but as the preserve of those in power. This has led to a sense of lawlessness that has led to Government institutions and officials being seen as lacking in integrity and autonomy and thus not viewed as legitimate

The new Constitution establishes the framework for the restoration of constitutional democracy in Kenya. It provides for new devolved system of government⁹⁹; reduced presidential powers¹⁰⁰ and better separation of powers between the three arms of the government; a restructured and vetted judiciary; an expanded, enforceable bill of rights that includes social, economic, and cultural rights; security sector and land reforms; environmental protection; and other key changes.

The new Constitution establishes national values and principles of governance¹⁰¹ that seek to diffuse ethnic tensions often fueled by perceptions of marginalization and exclusion; provisions

⁹⁹ Chapter 11 of the 2010 Constitution

¹⁰⁰ The President's powers of appointment of state officers are now limited and subject to parliamentary approval.

Sections 131 and 132 of the 2010 Constitution

¹⁰¹ Section 10 of the 2010 Constitution

for reformed electoral system, land reform and a devolved government system aimed at enhancing fairness in the sharing national resources. Further, it seeks to facilitate government accountability, by seeking to circumscribe the exercise of power in the three branches of government in general, and the security agencies in particular. In doing so, the new Constitution promises to prevent future violation of human rights and the commission of economic crimes.

The “national values and principles of governance,” established by Article 10 of the Constitution are binding in the exercise of state power and justiciable in the sense that the enactment, application, and interpretation of statutory law, and the formulation and implementation of public policy decisions all must adhere to them. Failure to do so would entitle any citizen to seek judicial intervention. These values and principles include sharing and devolution of power, participation of the people, equity, social justice, inclusiveness, nondiscrimination, and protecting the marginalized. Further the constitution prohibits all forms of discrimination by the state or *private actors* including discrimination based on grounds of ethnicity or social origin. In this article, the new Constitution debunks the orthodox view in constitutional law, which is that a constitution imposes *direct* constitutional duties only on government and not on private actors

On government structure ,the new Constitution establishes a system of devolved government that seeks to give power of self-governance to the people and enhance their participation. It establishes three main institutions to facilitate the realization of devolution objectives: county governments, a Senate, and a Commission on Revenue Allocation. Article 176 establishes a county government for each of the 47 counties that consists of a County Assembly (or legislative branch) and a County Executive (or executive branch). The Senate is established by Article 93 as one of the two houses of Parliament, the other house being the National Assembly. Its role is to

represent and protect the interest of the counties and their governments. It also initiates, debates, and approves legislative proposals (or bills) concerning counties (Article 96). Another critical Senate function is to determine the allocation of national revenue among the counties and maintain oversight over such revenue. It also plays a role in governmental accountability: the Senate participates in the consideration and determination of resolutions to remove the president or deputy president from office (Article 145).

On imperial presidential powers, the new Constitution seeks to end presidential hegemony through a number of mechanisms. First, Article 143(4) limits presidential immunity in criminal cases; the protection of the president from criminal proceedings does not extend to crimes for which he or she may be prosecuted under a treaty that prohibits such immunity. Second, the president's powers to appoint and dismiss public officers (including judicial officers) require the approval of the legislature. Third, Article 152 caps the number of cabinet secretaries (or ministers under the old Constitution) at twenty two, thereby curtailing a power that previous presidents have used as a resource to dispense political patronage and subvert the democratic process by depleting the ranks of the opposition. Fourth, Article 152 requires the president to dismiss a cabinet secretary when a majority of National Assembly members adopts a resolution—based on the recommendations of a select committee—that requires the president to do so. In particular, this article would seal a loophole in the existing legal framework that has allowed ministers who have lost the confidence of the legislature (for example, because they have engaged in corruption or participated in ethnic clashes) to stay in the government. Fifth, Article 135 seeks to facilitate accountability by requiring that all the president's decisions "shall be in writing and shall bear the seal and signature of the President." Because the old Constitution did not have similar restrictions on the exercise of presidential powers, it was exceedingly

difficult to hold the president accountable for human rights violations since his decisions were invariably verbal and therefore difficult to attribute to him. Finally, Article 145 provides that the president can be impeached for a “gross violation” of the Constitution or other law, or committing a crime under national or international law, or “gross misconduct” as determined by the National Assembly.

4.6 Comparing South Africa and Kenya

For both South Africa¹⁰² and Kenya¹⁰³, before the constitutional reform, a culture of violence had taken root in the society. This violence could trace its history to many decades and had become entrenched and common place. Further violence took a familiar racial or ethnic pattern. The politicization of violence also became common place with many political disputes being resolved through violent means¹⁰⁴. Though their constitutional reform process and the outcome show remarkable similarities, a two key underlying factors explain why the impact of Constitutional reform in the two countries may turn out remarkably different. These are the question of racialism in South Africa as opposed to ethnicity in Kenya and the role of individuals especially the political elite of the two countries:

¹⁰² Simpson (1993) traces the root causes of political violence in South Africa to the social matrix of that country and the long history of oppression, poverty and exploitation of the majority black community. Central to the political violence, he notes that from 1948, the apartheid government denied the majority of South Africans access to central political authority and entrenched racially-based social inequalities. To maintain this inequality, racial superiority and social control, the state used institutionalized vertical violence and in response the African National Congress (ANC) and other liberation organizations resorted to reactive violence. See Simpson, G., (1993), *Explaining endemic Violence in South Africa*, Johannesburg, Centre for the Study of Violence and Reconciliation.

¹⁰³ For Kenya See for instance Human Rights Watch (2008), *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governace*, Volume 20 No. 1 (A); International Crisis Group. 2008. *Kenya in Crisis*. Africa Report No. 137; Prunier *supra* Note 10; and Murithi, T. 2009., *Kenya- A Year after the Crisis: The Quest for Electoral Reform and Transitional Justice*” Situational Report. *Institute for Security Studies*. 14 January 2009.

4.6.1 Ethnicity and Racialism

Ethnicity and racialism¹⁰⁵ are the two main identities underlying conflict in Kenya and South Africa¹⁰⁶. In Kenya the problem of ethnic rivalry has been blamed for its culture of political violence especially since the return of multi-party rule in 1991 while the problem of racialism is the more important cleavage in South African political life. Ethnicity has been defined by Smith (1986)¹⁰⁷ as designating a historical community of cultural similarities with a shared sense of solidarity and belonging, memories and symbols of myths of descent. Racialism on the other hand is the practice of racism in a discriminatory behavior and flows from definition of the latter as the pseudo –scientific ideology of inferiority or superiority whether based on alleged biological or cultural stereotypes of group differences. Ethnoracialism therefore designates the overlap of ethnic and racial perceptions¹⁰⁸.

While racialism is easier to expose and analyse, ethnicity poses its own challenges. Ethnicity manifests itself in different settings with different historical role. Of particular importance is that ethnicity is distinguishable from other historically shaped social characteristics in its manipulatability. Ethnic identity waxes and wanes not only in response to group members' own

¹⁰⁵ While the two concepts of ethnicity and racialism are distinct, there are some instances in which they overlap and differentiation is a challenge such as in South Africa. Ethnicity manifests itself in different settings with different historical roles thus most scholars tend to treat it according to prevailing political concerns of the day. Racialism on the other hand is an overt discriminatory policy based on physical attributes as most apartheid laws provided for. See generally Adam, H., 'The Politics of Ethnic Identity: Comparing South Africa,' *Ethnic and Racial Studies*, Volume 18 No. 3, July 1995

¹⁰⁶ Prunier (2008), with regard to violence in Kenya though cautions against looking at Kenya's violence only through ethnic lenses. Though violence especially during elections have tended to take ethnic features, they are not wholly ethnic based. He notes that 'Kenya's politics are not ethnic but ethno-fragmentary: that is winners and losers are tribal segments or sub-groups rather than whole tribes' See Prunier, G., Kenya: Histories of a hidden war, Open Democracy, February 2008, available http://www.opendemocracy.net/article/democracy/kenya_behind_the_crisis accessed on 4th May 2012

¹⁰⁷ Smith, A., (1986), *The Ethnic Origins of Nations*, London, James Curry Publishers

¹⁰⁸ Supra Note 10 at 463

perceived needs, both instrumental and symbolic, but also in response to imposed identities by outsiders. Whether a group feels stigmatized or accepted, marginalized, discriminated against or treated equally, celebrated or not by the main stream is affected by its self-perception. Given the extreme fluidity of ethnicity, it thus no surprise that no general theory of an essentialist ethnicity can be contemplated when multiple and hybrid identities interest with constantly changing social conditions

Self-conscious ethnic groups in multicultural states may or may not be a source of conflict. This will depend on whether the phenomenon which Horowitz (1985)¹⁰⁹ terms 'ranked and unranked ethnicity' is present. The latter case is where ethnic collectivities co-exist side by side with equal recognition while in the former ethnic collectives are treated in practice differently. The sad reality in most countries with multicultural groups, is that ranked ethnicity with subordination of some groups is quite common. The 'separate but equal' ideology in such plural societies merely obfuscates the inequality in the allocation of resources and life chances in what amounts to a ranked ethnic stratification. With the spread of norms of equality and values of achievement measured by competitive performance, conflictual relationship between ethnic collectivities is to be expected when some groups are differentially valued or dominated. Apart from material or political injustices, perceptions of loss of dignity also drive ethnic conflict. Such sociopsychological factors of hurt and denial of status make ethnonationalist conflicts intractable.

¹⁰⁹ Horowitz, D., (1985), *Ethnic Groups in Conflict*, Berkeley, California, University of California Press at pp 76- 78

In South Africa, Adam (1995)¹¹⁰ argues that debate on ethnicity has been submerged in the larger debate of ethnoracialism. The issue of race in South Africa has therefore been called ‘perhaps the subject of our time’ leaving out debate on ethnicity as ‘...probably the greatest enigma of our time’. Nonetheless South Africa as many other countries around the world and in particular African countries, has an ongoing tug-of war between an ethnic nation and a civic nation. While an ethnic nation is based on blood and ancestry, a civic one is based on consent not descent, based on equal individual rights regardless of origin and equal recognition of all cultural traditions in the public square. In South Africa as ethnic differences overlap with racial perceptions, there are additional obstacles to full racial and national reconciliation.

Despite the diminished status of debate of the role of ethnicity in South African conflict, it is clear that violence in South Africa in the period leading to the elections in 1994 were not all about race. Judging by who lost their lives, the political conflict in the period between 1990 and 1994 seemed to have little to do with race. As Adams (1995) has noted “Tragically more than 95 per cent of the 14,000 killings in South African political violence since 1990 have occurred among blacks, mainly in strife between Nkatha –supporting Zulu traditionalists and ANC supporters..”¹¹¹

For Kenya competition for political power has mainly led to violence along ethnic lines because of a situation which Hellsten (2008)¹¹² has described as one of ‘libertarian communitarianism’ (i.e that is a mixture of African communitarian cultural traditions with the

¹¹⁰ Adam, H., ‘The Politics of Ethnic Identity: Comparing South Africa,’ *Ethnic and Racial Studies*, Volume 18 No. 3, July 1995

¹¹¹ Ibid

¹¹² Hellsten, S., (2008), *Ethnicity, Inclusion and Post-conflict reconstruction: the Kenyan case*, Capability Approach, available online at www.capabilityapproach.com/pubs/sirkku-pdf

new western individualistic politico-economic framework). According to Hellsten, in libertarian communitarianism, rational self-interest of classical liberalism is set in the context of communitarian traditional solidarity in a manner that could be seen to be expanding the Hobbesian social contract framework from individual to social collectives (communities, groups, and assemblies) who do not trust each other, but need to agree on some central authority in order to move away from the state of nature of continuous war of everyone against everyone.

In the libertarian communitarianism context, the legitimacy of the state tends to remain minimal and superficial. As long as conflicts and inequality, greed and grievances, between the various groups and communities are not solved, the state sovereign can only rule by authoritarian means while simultaneously remaining (at least partly) hostage to its own supporters. This means the sovereign and the state can never be fully impartial and non-partisan in the distribution of resources. This creates a vicious cycle of unjust and biased distribution that maintains fierce (often tribal, ethnic or regional) competition between the groups and political manipulation of ethnicity.

4.6.2 The Role of Political Elite

The reform experiences of South Africa and Kenya can also be explained by the role of individuals . While the South African political leaders led by President Mandela provided inspired leadership during the early days of the constitution, faithfully exercising their powers not only within the letter but also in the spirit of the law, the same cannot be said of Kenya. Indeed there is widespread perception in Kenya that the political elite especially the executive arm of the government is not keen to implement let alone live within the confines of the new constitution.

4.7 Conclusions

This chapter has revealed a number of important things. First it has been shown that constitutional reform has transformative role in societies in post-conflict recovery stage. Indeed constitutional reform has had significant impact in both South Africa and Kenya. In South Africa the constitutional reform process swept away the discriminatory apartheid system and ushered in democratic governance system. In Kenya constitutional reform has strengthened key public institutions and enhanced confidence in them. This is particularly evident in the enhanced confidence in the judiciary since it was reformed under the new constitution.

The analysis in this chapter has shown a number of conditions that enhances the transformative role of constitution making in societies with protracted conflict. First the process itself matters, where the process has been democratic and transparent like in the South Africa and Kenya, the outcome also tended to meet the expectations and obtain the confidence of the public. The institutional structure set up by the constitution and in particular how it sets up independent offices also determines its success.

While constitution can transform certain aspects of a society, there are a number of problematic areas where the utility of constitutions have been minimal. These include structural transformation in the socio-economic areas such as inequalities, violence and racial and ethnic divisions in which in both countries the constitution has had limited impact. Furthermore, constitution implementation which is crucial in translating the aspirations of a the document into concrete benefits for citizens seem to rely to an unhealthy level on the chance of individual temperaments of the political elite. In South Africa where there was inspired leadership in Mandela, the constitution was largely implemented only for their to be relapse due to incompetent leadership of his successors. Kenya has had a less than stellar implementation record due to what many perceive as the reluctance of the political elite.

CHAPTER FIVE

FINDINGS AND CONCLUSIONS

5.1 Introduction and summary of findings

The objective of this research as stated in Chapter one has been to examine conflict transformation in societies undergoing post-conflict recovery with South Africa and Kenya being case studies. A number of authors have made as strong case for the transformative role of constitution making in societies with protracted conflict. Samuels for instance has proposed that adoption of participatory democratic governance structures through constitutional reform is best able to ensure long-term peace in a society. The process of constitution making she argues, can provide a forum for the negotiation of solutions to the divisive or contested issues that has led to violence. It can also begin a process of healing and reconciliation through societal dialogue, and forge a new consensus vision of the future of the state.

The design of a constitution and constitution-making process is now widely accepted as an integral part of the political and governance transition in peace-building. However, it is also a particularly difficult aspect because there is little understanding of the impact of constitutional processes and constitutional designs in post-conflict states. Broadly speaking, this research has shown that constitution making serves conflict transformation in two principal ways – the procedural and the substantive. The first aspect can be broadly categorized as actor and rule transformations and helps to identify the parties for negotiations and provides opportunities for them to meet in somewhat structured contexts. It also defines the agenda or a framework for defining the agenda. The more substantive aspect concerns outcomes, principally through the

resolution of differences, agreement on national values, even national identity, and new institutions and procedures that not only consolidate peace but also provide for future co-existence and co-operation. This second aspect is concerned with issue and structural transformations. Constitution making thus transforms the conflict by acknowledging that enduring peace can only be achieved through negotiations on the re-design of the state and the allocation of power thus inevitably highlighting the status of the constitution. The findings and conclusions of the research is summarized in the following sections.

5.2 Findings

The experiences of both countries in constitutional reform have shown remarkable similarities both in the process of constitution making and in the texts of the constitution themselves. First the constitutional reform process in both countries were democratic and highly participatory. The processes involved negotiations by the political elite, public outreach campaigns that received numerous submissions and a final document that was widely accepted. The democratic nature of the constitution making process itself has had significant in transforming conflict in both countries. For instance in South Africa, apartheid was for a long time the main issue leading to violent conflict, with the negotiations leading to a new constitution in 1996, apartheid was outlawed and the issue removed.

A second area in which the constitutional reform process has profound impact on is on enhancing state institutions which had lost credibility due to executive capture. The South African and Kenyan Constitutions has established independent judiciaries and other constitutional institutions such as Ombudsman offices, human rights commissions and land

commissions which have turned out to be the best defenders of constitutional democracy in the two countries.

A third area in which the constitutional reform process has significant and positive impact is in promotion of the rule of law. This is closely tied to the strengthening of independent institutions such as the judiciary. In both Kenya and South Africa, the courts and other independent bodies have asserted themselves in defence of the rule of law and held the executive and security sector players accountable. This has enhanced the rule of law by restoring the citizens faith that the law treats all equally.

Constitution making though is not the solution to all underlying conflict causes as it proponents argue. Despite the strong arguments made by a number of analysts, constitution reform does not appear to have much impact on structural causes of conflict such as socio-economic inequalities, racial or ethnic tensions, and even political violence. In South Africa which has had a longer period since its constitution reform, socio-economic conditions appear not to have improved. This has in turn led to periodic violence such as the recent Miners' strike at a number of important mines in the country leading to loss of many lives. It appear therefore that socio-economic conditions a structural condition leading to conflict need to be tackled by other means other than constitutional reform.

Constitutional reform also doesn't appear to have improved human security by minimizing violence in either of the countries. Though there is greater respect for the rule of law within public authorities, the research shows no significant reduction in violence. Indeed in Kenya violence seemed to have infact increased since the enactment of the new constitution

Lastly the research has shown that national reconciliation that constitution making is supposed to enhance by providing societal dialogue is not enhanced by constitutional reform. In South Africa increasingly racial suspicions are increasing rather than decreasing. In Kenya, ethnic mobilization for political ends has greatly increased since the enactment of the constitution in 2010. It appears that no matter how democratic a constitution reform process is, the constitution itself would not be enough to foster true reconciliation.

A number of other strategies are necessary for this aim to be achieved.

The research therefore shows that constitutional reform has a significant and positive role in conflict transformation in countries undergoing post-conflict recovery. It however is not the panacea for all underlying causes of the conflict.

5.3 Conclusions

This research has shown the utility and limitations of constitutional reform in conflict transformation. A number of conclusions can be drawn from this study. These include:

- a) First conflict transformation as a theory offers a useful conceptual framework for understanding and dealing with protracted conflicts
- b) Second in societies recovering from protracted conflict, constitutional reform would be very important in establishing a democratic governance system with independent institutions such as the judiciary.

- c) Constitutional reform should however not be taken as the panacea for all causes of conflict in a given society. Indeed constitution making would not be well suited to address structural cause of conflict such as socio-economic inequalities
- d) Fourth it is beneficial for purposes of conflict transformation to broaden the number of key stakeholders participating in the constitution-making process. Key groups should be included both for purposes of conflict transformation and for ensuring that a substantive consensus on key principles has been achieved. When dominant groups are excluded, the constitution adopted has few chances of success.
- e) Fifth, a process of consultations and negotiations among key stakeholders leading to a consensus on key constitutional principles is beneficial. If constitution-making allows sufficient time for consultations, a genuine agreement among stakeholders may be reached. In this manner, constitution-making may contribute to peace-building and reconciliation. Some of the more successful post-conflict constitutions have resulted from lengthy political negotiations among political elites addressing key constitutional principles
- f) Sixth, the participation of the public in the drafting of the constitution is a crucial component of the process. Experience demonstrates that the constitution-making process may significantly contribute to nation-building. It assists the definition of a national identity and of common popular aspirations for the future. Finally, constitution-making is an exercise in democratic empowerment. When the population feels that its views are reflected in the constitution-drafting process phase, democratic participation is enhanced

- g) Seventh, past experience demonstrates the importance of universal principles of human rights, including the right to participation, and democratic governance, both in the process of drafting a constitution and in the content of the final constitution adopted. It is important that new constitutions are compatible with international law.**
- h) And lastly, constitutions should be supported by other strategies in peace building in order to achieve complete conflict transformation in a society recovering from conflict.**

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