

**CONSTITUTIONALISM IN AFRICA: A COMPARATIVE STUDY OF KENYA  
AND SOMALIA, 2004 - 2012**

**BY**

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## **DECLARATION**

This research project is my original work and has not been presented for a degree in any other University.

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## **ABSTRACT**

The overall objective of the study is to examine the concept of constitutionalism in Africa; with a comparative study on developments in Kenya and Somalia. More specifically, the study aims to examine the constitutional-making processes in Kenya and Somalia; analyze the challenges faced in the constitution development processes in Kenya and Somalia and explore measures to deal with the challenges of implementation in both countries. The study critically reviewed and analyzed secondary data. This data was obtained from published and unpublished material, journals, academic papers and periodicals. The study was also based on analysis of reports by international governmental and non-governmental organizations. Critical theories of constitutionalism characterize a serious difficulty not only to conventional theories and customary processes of constitutional explanation, but to the very initiative of constitutionalism itself: the point that government can and should be restricted in ways that serve to defend subjects from unjustifiable state authority. The study contends that constitutionalism requires adherence to the rule of law, protection of human rights and imposing limits on powers of the incumbent government.

## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.0 Introduction

According to Kahn and Paul<sup>1</sup>, constitutionalism is “a three-faceted concept”, as it requires imposing limits on governmental powers, adherence to the rule of law, and the protection of human rights. Constitutionalism is the antithesis of arbitrary rule. In modern constitutional systems, the term ‘constitutionalism’ has come to suggest limited government. In fact, constitutions have become a blueprint for a system of government where authority is shared among a set of different branches and limitations are implied in these divisions.<sup>2</sup> In such cases, constitutions lay the foundation for external checks designed to safeguard the people’s liberties, which is an essential feature of any democratic system.

The concept of constitutionalism, therefore, is the doctrine that governments must act within the constraints of a known constitution whether it is written or not. Rather than merely being a static exercise in historical retrieval, constitutionalism is an on-going process in which each new generation engages and which necessarily alters in the process of such engagement. This easily explains why, although all governments have constitutions, they are not necessarily constitutional governments. This further explains why it has been so easy for many postcolonial African governments to use Constitutions to legitimize authoritarian rule.

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<sup>1</sup> Kahn, Paul W. “Comparative Constitutionalism in A New Key”. *Michigan Law Review* 101, no. 8 (August 2003): 2677-2705

<sup>2</sup> Cane, Peter.. “Public Law in The Concept of Law”. *Oxford Journal Of Legal Studies* 33, no. 4: (March 2013): 649-674.

Africa's constitutional history is an excellent case study of the myriad difficulties that most post-colonial African states have faced and continue to face in the process of self-discovery.<sup>3</sup> Arguably, the unending conflicts and civil wars in most of the countries in the continent have political activities of their respective nations. Indeed, the emerging independent African states of the 1960s proclaimed their commitment to democracy, good governance and respect for human rights. This postulated deal would have been easily tenable, given that the independence constitutions of most of these countries came with a flowery package of guarantees to the citizens. This, however, turned out not to be the case. Instead, shortly after independence, the constitutions of most, if not all, of the emerging states were soon subjected to numerous amendments, effected in a manner that watered down the essence of constitutionalism and democratic governance.<sup>4</sup>

Sadly, the end of the 1960s was characterized by the negation of the pledged democracy and gross violations of human rights with impunity across the continent. The pledged multiparty democracy became a byword as opposition parties were regarded as 'clogs in the wheels of progress'.<sup>5</sup> Ruling parties which had become intolerant to opposition politics stifled democracy and sacrificed constitutionalism on the altar of political greed. Consequently, a wave of coup d'états swept across the continent, where the military overthrew governments, purportedly to clean the socio-economic and political messes these governments had left. With time, these celebrated military regimes fell into the

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<sup>3</sup> Abutudu, Musa. "A Critical Assessment of the Constitutionalism Landscape in West Africa". *Western Journal Of Black Studies* 33, no. 2 (Summer 2009): 132-139.

<sup>4</sup> Seaton, Paul. "Fortunate Powerlessness". *Perspectives On Political Science* 34, no. 2: (2005): 79.

<sup>5</sup> Keith, Linda Camp, and Ayo Ogundele.. "Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights. " *Human Rights Quarterly* 29, no. 4 (May, 2007): 1065-1097.



same errors as the civilian administration. Clearly, although African governments were expected to embrace and promote constitutionalism and democracy at independence, they neglected the same with impunity<sup>6</sup>.

### **1.1 Statement of the Research Problem**

This study seeks to research the on the constitutionalism in Africa continent by majorly focusing on Kenya and Somalia. The occurrence of post-election violence in Kenya in 2008 indicated a small gap in the constitutionalism. The foregoing facts were only a by-product and symptoms of an underlying serious problem of lack of a constitutionalism culture that has engendered politics of ethno-regional exclusion and negative competition. In Somalia, there has not been a recognized central government since 1991, when President Mohamed Siad Barre was overthrown.<sup>7</sup>

All these challenges can be traced back to the lack of a wholesome and stable constitution. Could these challenges stem from the lack of adherence to the constitutions in place in both the countries? Is the problem in the content of the constitution? It is the purpose of this study to compare constitutionalism in both Kenya and Somalia and answer the above questions. The main purpose for this comparison to assess whether adherence has been achieved to the constitution the challenges facing constitutions in both countries in the realization of long-lasting peace.

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<sup>6</sup> Jorgensen, Nick. "Impunity and Oversight: When Do Governments Police Themselves?". *Journal Of Human Rights* 8, no. 4 (2009): 385-404

<sup>7</sup> Glickman, H.. "Consider Somaliland: state-building with traditional leaders and institutions". *Choice: Current Reviews For Academic Libraries* 49, no. 12: (2012) 2366

## **1.2 Objectives of the Study**

The main objective of the study is to examine the concept of constitutionalism in Africa; and with a comparative study of Kenya and Somalia. More specifically, the study aims to:

- i) Examine the constitutional-making processes in Kenya and Somalia;
- ii) Analyse the challenges faced in the constitution development processes in Kenya and Somalia;
- iii) Explore measures to deal with the challenges of implementation in both countries.

## **1.3 Literature Review**

This section is a review of the literature and focuses on a number of variables; among them: conflict in Somalia and Kenya, constitution development processes, challenges faced in the development and implementation processes, the concept of 'democracy' in Kenya and in Somalia, as Democracy as well as the issue of separation of powers.

### **1.3.1 Conflict in Somalia and Kenya**

According to Murunga<sup>8</sup>, violent conflicts of various types have afflicted Africa and exacted a heavy toll on the continent's societies, politics and economies, robbing them of their developmental potential and democratic possibilities. He states that the causes of the conflicts are as complex as the challenges of resolving them. He also argues that all triggers of conflict: structural, political, economic, social and cultural, are at play in the east African region.

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<sup>8</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2: (2005) 137-161

Likewise, he maintains, all types of conflict are also present: violent and nonviolent; sporadic or occasional and endemic or intractable. In accordance to his study, the politics of belligerence, social tussles over dwindling resources, guerrilla strategies and crime in Africa have all opted for a type of violence that relies more on the use of Small Arms and Light Weapons (SALW). This has brought immense challenges to the modernizing African states. He indicates that the internationalization of SALW and its consequent fuelling of conflicts and crime have challenged the legitimacy and capacity of the East African Community states (Kenya, Tanzania, Uganda, Rwanda and Burundi) in providing human security.<sup>9</sup>

In accordance to Webersik<sup>10</sup> study, one of the most gruesome instances of conflicting Kenya is undoubtedly the post-election violence. He states that the post-election violence started with the announcement of the presidential elections results in 2007. Although the violence was national, Nairobi was a major hotspot. According to him, the 2007 violence in Nairobi is believed to have started in Kibera (in Prime Minister Raila Odinga's Constituency) and in Mathare (an area dominated by President Mwai Kibaki's ethnic group, the Kikuyu) upon announcement of the presidential results and the subsequent swearing in of President Kibaki on 30 December 2007. He posits that while two waves of violence followed in close succession, in some areas, the violence erupted almost instantaneously on December 29th, 2007 when the chairman of the electoral commission of Kenya declared the incumbent president Mwai Kibaki the winner.

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<sup>9</sup> Lindley, Anna. "Crisis and displacement in Somalia and Kenya." *Forced Migration Review* no. 33 (October 2009): 18-19.

<sup>10</sup> Webersik, Christian.. "Differences That Matter: The Struggle Of The Marginalised In Somalia." *Africa* (Edinburgh University Press) 74, no. 4: (2004) 519-533

According to Webersik findings, the results were widely doubted by the media, the Commonwealth, the African Union and local and international observers. He states that though triggered by accusations of electoral fraud, the causes of the clashes were rooted in deep historical injustices; a strong belief held by many ethnic groups that there were massive inequalities in resources and government appointments between regions and ethnicities. At the heart was the issue of land distribution. Since independence, the successive governments have glossed over the growing conflict as well as aggravated it by distributing land to their supporters.

According to his observation, in that mix was a serious lack of trust with the judiciary, deepening poverty and a rapidly growing population of unemployed youth that easily turned to gang violence. Along that line Wabersik, further empirically concluded that vernacular radio incited both hatred and fear while cell phones, a recent phenomenon that has revolutionized communication in Kenya, facilitated the spread of violence. In the first weeks of 2008, violence erupted in four of Kenya's eight provinces as well as in Nairobi, the multi-ethnic capital.<sup>11</sup>

Murunga<sup>12</sup> further argues that, Somalia has been one of the UN member countries who linger from the presence of terrorist groups in its territory that exert tremendous influence in the daily life of its society and economy. He states that Al Shabaab is well known in the horn of Africa, particularly in Somalia, for its terrorist training and strong affiliation

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<sup>11</sup> Webersik, Christian.. "Differences That Matter: The Struggle Of The Marginalised In Somalia." *Africa* (Edinburgh University Press) 74, no. 4: (2004) 519-533

<sup>12</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2: (2005) 137-161

with other terrorist groups in Nigeria and Al-Qaeda. The Harakat Shabaab Al Mujahidin, also known as Al-Shabaab has completely controlled the central and southern part of Somalia including some of its important sea ports, which are vital for the country's economy.

On the other hand, Lindley<sup>13</sup> indicates that Somalia has experienced violent conflict and instability since 1991, when central authority broke down in the country. Jihadism has become increasingly prevalent as the civil war has dragged on.

As a result of the severity of the conflict, including regional spill over, external actors, most notably Somalia's regional neighbours Ethiopia, Kenya and most recently, Uganda, have become entrenched in the conflict. In addition, a number of other actors such as the African Union (AU), the European Union (EU), the United Nations (UN) and the United States (US) have committed themselves to intervene in Somalia's statehood process. She states that these actors have played the role of both secondary and third party actors. External interventions in civil war-like situations continue to be practiced by states in the international system. Typically, she argues, in such circumstances, a party tends to intervene in another party's armed conflict in order to support one of the belligerents for their own interests. This can be done either directly or indirectly through military support of any kind.

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<sup>13</sup> Lindley, Anna. "Crisis and displacement in Somalia and Kenya." *Forced Migration Review* no. 33 (October 2009): 18-19.

In accordance to Murunga<sup>14</sup>, Kenya is critical to the future development of a stable Somalia. Nairobi's involvement in the regional dynamics of the 'Jubba' regions (recognizing the sensitivity of this term, 'Jubba' regions will hereafter be referred to 'Jubbaland', an area close to the Kenyan border) will have a decisive impact on Somalia's stability. Kenya's involvement in 'Jubbaland' was intended to create a 'buffer zone' against Al Shabaab's destabilizing activities. However, he argues, this strategy has been at odds with the wishes of the FGS as it would entail a further regionalization of Somalia. According to him, this is a development that the FGS does not want.

As a consequence, he maintains, it remains at the core of current tensions between Kenya and Somalia, together with the unauthorized operations by Kenyan air and naval units. It is also creating tensions with Ethiopia, as the groups Kenya supports have affiliations with the Ogaden National Liberation Front (ONLF), with which Ethiopia is in armed conflict. Kenya has also played a key role in the Intergovernmental Authority on Development (IGAD), the regional block, and is the driving force, as argued by Murunga, behind some of its political initiatives in Somalia.

### **1.3.2 Constitutional Development Processes**

The concept of constitution building is more complex than the process of constitution making alone, although the latter is an inseparable part of it. As we use the term in this study, constitution building refers to the process whereby a political entity commits itself to the establishment and observance of a system of values and government. It is

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<sup>14</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2: (2005) 137-161.

necessary to make a distinction between the written text that is the constitution and the practices that grow out of and sustain the constitution.

According to Kagwanja<sup>15</sup>, constitution building stretches over time and involves state as well as non-state organizations. In this sense it is almost an evolutionary process of nurturing the text and facilitating the unfolding of its logic and dynamics. So, for example, a text whose birth is in some respects inauspicious, even contested, can in time stamp its imprint on society and weave its way into public favour, while a constitution proclaimed with great enthusiasm can run into difficulties, be ignored or even be expressly discarded. He states that constitutions emphasize the principles of democracy and constitutionalism, and contain detailed bills of rights. In line with his observations, changes start with constitution making, whether as a form of negotiation or as the consolidation of social victory or reform. However, Kagwanja further argues that the record of the effectiveness of these constitutions is uneven. These developments have stimulated a growing interest in the politics and techniques of constitution making, particularly in the context of conflict resolution.

Murunga<sup>16</sup> on the other hand further argues that constitution building may, and usually does, require various forms of consensus building before the formal process of constitution making can commence. In 'new' or troubled polities, a constitution as a system of government may have to coalesce with a pact to form or redefine a political

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<sup>15</sup> Kagwanja, Peter Mwangi.. "Facing Mount Kenya Or Facing Mecca? The Mungiki, Ethnic Violence and The Politics Of The Moi Succession In Kenya, 1987-2002." *African Affairs* 102, no. 406: (2003) 25.

<sup>16</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2 (2005) 137-161.

community. In these circumstances, best typified by a constitution for independence on decolonization, the document has a foundational character, giving birth to a new sovereignty. He further argues that sometimes these constitutions have devoted more attention to the artefacts of sovereignty than to the negotiations for forming a political community.

According to Murunga, there is a price to be paid for this neglect—as the troubled political experiences of many Asian and African states show. In more recent experience, constitution making has been preceded by a prior pact, sometimes called constitutional principles, long or brief, abstract or specific. In some instances, the formulation of the constitution (or its main provisions) is an inseparable part of the resolution of a conflict that necessitated a new political and social order. As we shall see, there are some fundamental problems of constitution making when the pact and the constitution are so integrated<sup>17</sup>.

### **1.3.3 Challenges of Constitutional Development**

According to Smoke<sup>18</sup>, the coup d'état was a common device of regime-change in post-independence Africa. He states that the failures of governance of post-independence states even led some observers to see the coup as in some circumstances a necessary evil - when it removed a predatory and autocratic regime, and could be regarded as facilitating a transition to democracy. There are two problems with this argument.

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<sup>17</sup> Ibid

<sup>18</sup> Smoke, Paul. "The Evolution Of Fiscal Decentralization Under Kenya's New Constitution: Opportunities And Challenges." Proceedings of The Annual Conference On Taxation 104, (2011) 109-115.



The first (one of principle) is that - whatever the motives of a coup - the extra-constitutional transfer of and claim to power is inherently corrupting of governance and inconsistent with constitutional rule. The second (one of practice) is that those who assumed power through coups have amply demonstrated their incompetence, by mismanaging the economies of their countries and destroying the social fabric of African peoples. Smoke further argues that African regime-change since the imperatives of cold-war polarization lost their agency has (with very few exceptions) been conducted through constitutional means. According to him, the constitution has become the roadmap to power, and has displaced the coup or revolution as the basis for reform. classical example on the continent is the South Africa's constitutional pact, which in ending race-based minority rule can be seen as Africa's last great act of liberation, is the.

In line with Bennett et al.<sup>19</sup> study, a constitution cannot be expected to act as a panacea for all political problems. He argues that many constitutions were negotiated by parties locked in a sort of entrenched political stalemate, where despite their unequal power neither could hope to exert long-term domination over the other. Bennett et al. also posit that these constitutions were primarily designed to protect and then reinforce democratic change, by allowing those who already held power without democratic legitimacy to risk ceding it. Yet they were also written in a way that could clearly envisage a wider transformation of the state based on accommodating competing interests in shared visions of reality.

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<sup>19</sup> Bennett, Sara, Asha George, Daniela Rodriguez, Jessica Shearer, Brahim Diallo, Mamadou Konate, and Julie Cliff, et al.. "Policy challenges facing integrated community case management in Sub-Saharan Africa." *Tropical Medicine & International Health* 19, no. 7: (2014) 872-882

Murunga<sup>20</sup> further argues that the challenge of drafting and implementing a new constitution ranks high on the agenda of current government leaders in Kenya. He indicates that the need for a new constitution has been recognized for the past two decades, but various issues and roadblocks have held back the process of constitution-making. According to him, the efforts that culminated in the 2005 referendum seemingly left Kenya at a dead end. However, he states, the election campaign of 2007 and its bloody aftermath highlighted the need for a new constitution. The party leaders who formed the coalition government of national unity in early 2008 gave a commitment to produce a new constitution. As a result, a committee of experts was charged to draft a new constitution.

### **1.3.3.1 The Issue of Consensus**

The ability to reach consensus on a constitutional model has historically never been easy or quick to achieve. Nevertheless, agreement among political leaders as to constitutional forms and goals has always been of critical significance in constitution-making efforts in the twentieth century or earlier. For Kenya, the experience of the twentieth century indicates a lack of consensus as to the goal of constitution-making and the specifics of constitutions.

According to Kagwanja<sup>21</sup>, looking at the 1950s, to start, the model set forth by the British government in 1951 for future constitutional development clearly laid down the

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<sup>20</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2: (2005) 137-161.

<sup>21</sup> Kagwanja, Peter Mwangi.. "Facing Mount Kenya Or Facing Mecca? The Mungiki, Ethnic Violence and The Politics Of The Moi Succession In Kenya, 1987-2002." *African Affairs* 102, no. 406: (2003) 25

achievement of consensus as a key ingredient in the process. Secretary of State (SofS) for the Colonies James Griffiths made this clear in announcing British policy and plans in May of that year. He proclaimed that decisions as to Kenya's future constitutions would rest on firm foundations if they were based on agreement among the leaders of Kenya's racial groups (Africans, Arabs, Asians, and Europeans). He thus proposed the establishment of a body where all Kenya's people would be represented; it would consult and make constitutional recommendations to the colonial state and ultimately to the British government. An independent chairman from outside the colony would be appointed, and the SofS was prepared to obtain the services of a constitutional expert to advice on technical questions, if the delegates desired.

The consultative body, Kagwanja argued, would be able to reach agreement that could be reflected in a new constitution that could be brought into force either in 1956 or an earlier date, if there was general agreement to do so.

### **1.3.3.2 Expert Assistance**

The lack of success in constitutional negotiations during the pre-independence years also owed much to the failure of non-Kenyan experts to move the process to any kind of agreement. Two examples illustrate this point as constitutional advisers appointed by the CO were not very helpful to the process of consensus building at the first Lancaster House conference in 1960 and the second conference of 1962.

Thuo<sup>22</sup> argues that divisions, which initially emerged in the attitudes of the leaders to the two parties to the formation of a government under the terms of the Lancaster House constitution, manifested themselves in bitter disputes in and outside the LegCo following KADU's decision to form a government in April. He states that the division became clear with regard to constitutional issues at the close of the Nairobi talks (September-October 1961) held under the chairmanship of the governor.

According to Thuo, the aim of the talks was to achieve agreement on the constitutional means of moving to self-government and independence, among other things, but the talks broke down in October when KADU leaders interjected their new constitutional vision of regionalism or majimbo at the talks. KADU leaders insisted that specific principles associated with their new regionalist ideal must guide future constitution-making. According to his observations, this principle was rejected by KANU leaders, thus setting the stage for a long and controversial struggle over the future shape of the independence constitution at the second Lancaster House conference in early 1962.

The failure to agree that marked Lancaster House III thus constituted a continuation of what had characterized constitutional talks since 1951. Kenya's political elite not only failed to agree. More often than not, they refused to even enter meaningful negotiations, bargain, or compromise. In this instance, the failure of the Kenya government to compromise, even from a position of strength, set a most unhappy precedent for independent Kenya. In many ways identified by Thuo, Somalia presented one of the most

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<sup>22</sup> Thuo Gathii, James.. "Popular Authorship and Constitution Making: Comparing and Contrasting The DRC And Kenya." *William & Mary Law Review* 49, no. 4: (2008) 1109-1138.

difficult contexts for constitution-building. Somalia has been in a state of civil war since at least 1988. It has experienced high levels of violence, inter-clan conflicts, warlord struggles for control, and ongoing smaller violent clashes over resources and land.<sup>23</sup>

In accordance to Orago<sup>24</sup>, the Somali context was further complicated, in terms of the prospects for a successful constitutional process, by lack of clarity regarding the role that traditional elders could or should play in the governance of the state. He indicate that traditional elders continue to be key players in Somali society, especially since they still provide most dispute resolution outside of the cities through the traditional legal system known as Xeer.

However, Orago argues, as Simkins pointed out, the social systems within Somalia—which evolved over thousands of years to support a nomadic economy and a nomadic culture—have not adjusted well to the fundamental changes of the last fifty years, particularly those represented by large migrations to urban areas. (This is especially true in the North.) In some cases, the power and authority of societal elders has been eroded; in others, the elders have been displaced or replaced. He indicates that the question of how to deal with traditional elders is all the more difficult since there are few examples of constitutional structures that have incorporated a role for traditional power mechanisms.

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<sup>23</sup> Thuo Gathii, James.. "Popular Authorship and Constitution Making: Comparing and Contrasting The DRC And Kenya." *William & Mary Law Review* 49, no. 4: (2008) 1109-1138.

<sup>24</sup> Orago, "Limitation Of Socio-Economic Rights In The 2010 Kenyan Constitution: A Proposal For The Adoption Of A Proportionality Approach In The Judicial Adjudication Of Socio-Economic Rights Disputes." *Potchefstroom Electronic Law Journal* 16, no. 5: (2013) 1-2.

### **1.3.3.3 The Role of Political Islam**

It came as a surprise to many that the ICU swept through Mogadishu and then across southern Somalia with ease and apparent local support in a few months in mid-2006. The great majority of the Somali population is Muslim, but most have traditionally practiced a moderate form of Sunni Islam. Shari'a law was one of the legal systems historically relied upon by Somali Muslims, but it was integrated or balanced with traditional law implemented by clan elders. And despite sporadic incidents, most in the international community had believed it very unlikely that radical Islam would take hold in Somalia.

According to Lewis, the U.S. strategy provided a common enemy to the previously disparate courts, and the courts came together to counter the attack against them. He states that the initial coalition of the Sharia courts with the business community and civil society seems to have been truly inclusive and to have had broad support from the Mogadishu population. In any event, the newly named Islamic Courts Union swept through Mogadishu and expelled the warlords, dismantled the road blocks, and secured Mogadishu for the first time in fifteen years in June 2006. According to him, this was truly an impressive feat, and the international community watched in amazement as the ICU went about re-establishing basic security, cleaning the rubbish from the streets, and reopening the Mogadishu International Airport.

However, Lewis<sup>25</sup> argues, fairly soon after its initial rise to power, the new ICU began positioning itself in opposition to the transitional government and hence to the

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<sup>25</sup> Lewis, I. M.. "Visible And Invisible Differences: The Somali Paradox." *Africa* (Edinburgh University Press) 74, no. 4: (2004) 489-515.

international community that was supporting it. By pacifying Mogadishu, the ICU had secured the most dangerous region in Somalia, while the transitional government was isolated in Baidoa and had control over only a small portion of the state. It is important also to keep in mind that while the ICU appeared to be driven by ideological and religious divisions, it also played into the clan partisanship that has sustained the many years of conflict in this region.

#### **1.3.3.4 Benefits and Risks of Constitutional Processes**

A constitution-building process provides considerable opportunities for reconciliation, for negotiating solutions to major divisive issues in a non-violent context, for reaching consensus on the modalities of federalism best suited to a fractured state, for a symbolic break with the past, for creating an atmosphere of hope and renewal, and for the establishment of a legitimate and stable, if minimalist, state<sup>26</sup>.

Murunga<sup>27</sup> argues that, participatory constitution-building processes increase the perceived legitimacy of a constitution and thus bolster support from the population, which is essential if the constitution is to play a meaningful role in creating a stable state. According to him, popular consultation certainly brought about public support for constitutions in Rwanda, South Africa, and Uganda. He states that in all three of these countries, the constitutional processes were highly participatory, and the resulting constitutions received strong popular support and a high level of perceived legitimacy. By comparison, he indicates, new constitutions in Nigeria, Zimbabwe, and Bahrain have

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<sup>26</sup> Ibid

<sup>27</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2: (2005) 137-161.

been controversial after being formed through less participatory processes for the very reason that these constitutions were seen as imposed from above rather than made by the people.<sup>28</sup>

Thus, any process in Somalia needed to operate in a peace-inducing and inclusive manner in order to avoid the considerable risks of constitutional failure and of increasing conflict in the country. In this case, the process could have proven divisive if it were not sufficiently participatory or if its approach were not sufficiently consensus-based. A public education campaign can inflame divisions if it promotes extremist views rather than encouraging moderation and compromise. Likewise, a process can be rendered illegitimate by excluding the voices of women or of minorities. An adopted constitution may become a dead letter (e.g., if it is too ambitious or burdened with expensive provisions) or do more harm than good (e.g., if it induces conflict by failing to justly resolve land issues, deal with war crimes, or establish divisions of power and resources). Finally, the political and security situation in a country like Somalia may destabilize even a well-conducted constitutional process or result in its suspension.

#### **1.3.4 Implementation Processes**

The constitutional implementation process is a crucial for ensuring that first; the Constitution is interpreted correctly, and assigned correct meaning. And second, that the correct constitutional meaning does not differ from constitutional implementation by way of legislative, policy, institutional and administrative practices that establish

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<sup>28</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2: (2005) 137-161.



“constitutional practice.”<sup>10</sup> This is especially significant in light of the patent and latent contradictions, ambiguities, overlaps and doctrinal and structural difficulties in the constitutional provisions, attributed primarily to the politically rather than the financially (or legally) negotiated nature of these provisions.

According to Orago<sup>29</sup>, the Constitution of Kenya was promulgated on 27 August 2010. This came after two major attempts in 1998 through the Inter Party Parliamentary Group [IPPG] which brought some token reforms and the 2003 endeavour through the Constitution of Kenya Review Commission (CKRC) that partly culminated in the referendum of 2005 where an edited version of the Commissions Draft Constitution was rejected at the vote. Orago further argues that the current Constitution is therefore a manifestation of Kenya’s hope that the third attempt would be a success especially considering the positive anticipation expressed by citizens through the mass media and other avenues. According to his findings, it is evident that certain observers of Kenya’s Constitution making process hold the view that implementation has lagged behind schedule, is marked with controversy over election dates and procedures as well as an absence of relevant electoral laws thereby putting the country’s political life in peril. The theme of this meeting, for example, contemplates only two possibilities: speeding up constitutional reforms or postponement of elections.

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<sup>29</sup> Orago, "Limitation Of Socio-Economic Rights In The 2010 Kenyan Constitution: A Proposal For The Adoption Of A Proportionality Approach In The Judicial Adjudication Of Socio-Economic Rights Disputes." Potchefstroom Electronic Law Journal 16, no. 5: (2013) 1-2.

Dudziak<sup>30</sup> established that the foregoing presumptions are not shared across the board and the Commission for the Implementation of the Constitution holds a much different view. He states that it can be discerned from the Fifth Schedule of the Constitution that the ongoing law-making process is still within the timelines set out in the Constitution. It is also vital according to him to recall that the process of making laws is intricate and extensive and ought to meet a certain distinct threshold of deep reflection and astute professionalism. This is a paramount consideration as further emphasized by Dudziak, especially noting the fact that such requirements of diligence and fidelity to the letter and spirit of the Constitution are set out within the Constitution itself.

Aukot<sup>31</sup> observed that, the implementation process entails the reform of policies, legislation, subsidiary law and general administrative practice in a manner that upholds the letter and spirit of the Constitution. He indicates that this path began on 27 August 2010 by dint of Section 7(1) of the Sixth Schedule of the Constitution which brought the entire Constitution into force with immediate effect, save for the exceptions set out in Section 2 of that Schedule. The Executive is the key implementer but Article 3 of the Constitution and Section 5 of the Sixth Schedule assigns special and general roles all citizens, non-governmental actors and other entities including The Commission for Implementation of the Constitution (CIC) he states.

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<sup>30</sup> Dudziak, Mary L.. "Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya." *Duke Law Journal* 56, no. 3: (2006) 721-780

<sup>31</sup> Aukot, Ekuru. 2004. "New Constitution of Kenya and Natural Resources." *Journal Of Energy & Natural Resources Law* 22, no. 2: 236-238.

According to his findings, the CIC is established as an independent organ to monitor, facilitate and oversee the implementation process. Its mandate is set out in Section 5(6) of the Sixth Schedule and generally entails monitoring, facilitating and overseeing the implementation of the Constitution. Besides addressing necessary legislation, he argues, the Commission is required to monitor, facilitate and oversee the development of policies and administrative procedures to bring them into compliance with the letter and spirit of the Constitution. Under Article 249 the CIC, in common with other Chapter 15 constitutional Commissions, is also required to protect the sovereignty of the people, secure the observance by all state organs of the democratic values and principles and promote constitutionalism.

According to Bannon<sup>32</sup>, for the last three decades the Somali people have experienced multi-layered political, economic, and religious conflicts. He argues that a legitimate and Somali-owned constitution would help address or contain many of these problems. However, he maintains, controversy surrounds how the UN has approached and controlled the constitution-making process of the country. Bannon further argues that the process is fundamentally flawed because political expedience, secrecy, exclusion and hastiness mar the mandate and selection of the commission members, the drafting of the document and the adoption of the draft constitution.

Therefore, he states, like the previous charter, the current draft-constitution has legitimacy-deficit. It does not express the aspirations of the Somali people, regulate

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<sup>32</sup> Bannon, Alicia L.. "Designing a Constitution-Drafting Process: Lessons from Kenya." *Yale Law Journal* 116, no. 8: (2007) 1824-1872.

individual and group conflicts effectively and peacefully, or prescribe context-appropriate institutions that are necessary for building durable peace and a functioning state in Somalia. According to him, this leads me to conclude that the constitution-making process that was employed when Somalia was under the Italian trusteeship in the 1950s was more inclusive and transparent than the process used now under the current de facto United Nations and Inter-Governmental Authority on Development (IGAD) rule.

Fink<sup>33</sup> posits that, according to the Protocol, the NCA could approve or reject the whole document. But they could not amend articles as they wish. Instead, the NCA could give recommendations to the signatories' Technical Facilitation Committee which would pass the suggestions to the so-called 'principals'. In fact, this was consistent with the previous agreements in Garowe in which the signatories explicitly agreed that the NCA could vote either Yes or No for the draft constitution. In addition, he argues, according to the protocol establishing the NCA, a No vote would not have any impact on the document. The Protocol notes: "In the event of a No vote, this draft provisional constitution will nevertheless take effect until a new constitution is adopted." In fact, the signatories further agreed that even if this draft constitution is rejected in the referendum, it will still be the provisional constitution of the country, thus making this a *fait accompli*. In other words, argues Fink, regardless of the results of the NCA and the referendum, the signatories' draft constitution that was signed on June 22, 2012 becomes the law of the land.<sup>34</sup>

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<sup>33</sup> Fink, M. D., and R. J. Galvin.. "Combating Pirates Off The Coast Of Somalia: Current Legal Challenges." *Netherlands International Law Review* 56, no. 3 (2009) 367-395

<sup>34</sup> Ibid

### 1.3.5 The Concept of ‘Democracy’ in Somalia and Kenya

According to Kirby<sup>35</sup>, the Republic of ‘Somaliland’ is on the side of democracy, freedom of the press and the protection of the basic tenets of the rights of the individual. Kirby provides the proof for this assertion: the existence and support of multi-party system, the financial and administrative assistance accorded to the Somaliland electoral system and related bodies, the conduct of freely run municipal council elections, the proliferation and respect of independent media outlets in ‘Somaliland,’ the constant upgrade of ‘Somaliland’ judicial organs, human rights bodies, living conditions of prison inmates, and the remarkable achievements in almost all spheres crucial to the socio-economic development of the people of ‘Somaliland.’<sup>36</sup>

In accordance to the study done by DeLisi<sup>37</sup>, there are plenty of instances in which the Constitution of the Republic of ‘Somaliland’ establishes the weight it places on the protection of the rights of the individual, peaceful co-existence, freedom of expression and association within the realms of the national and international laws and the inviolability of the dignity and personal reputation of the individual.

DeLisi further argues that, the constitution of the Republic of ‘Somaliland,’ guarantees that the political system of the Republic of ‘Somaliland’ shall be based on peace, cooperation, democracy and plurality of political parties. He posits that the Constitution also affirms that at no time should the Republic of Somaliland turn its back to the

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<sup>35</sup> Kirby, Michael.. Constitutional Adjudication And Learning From Each Other A Comparative Study. *Oxford University Commonwealth Law Journal* 12, no. 2: (2012) 371-388

<sup>36</sup> Ibid

<sup>37</sup> DeLisi, Matt.. Criminal careers behind bars. *Behavioral Sciences & The Law* 21, no. 5: (2003) 653-669

universal declaration of human rights or the United Nations Charter – although we are not a member of this august body at present. According to him, the law respects its subjects equally no matter the political and socio-economic status of the concerned party. One is guilty only when proven so beyond a reasonable doubt by a competent court of law.

Chanock<sup>38</sup> on the other hand explains that pre-emptive measures are useful and welcome in that they: (a) limit extra-judicial indictment and damage to the reputation and dignity of targeted individuals; (b) protect the perpetrator from possible retaliation acts from the families and friends of persecuted individuals; (c) encourage parties involved to revert to the courts of law; and (d) discourage further disrespect for law and order in order to reassure citizens that taking the law into one's hands is never a viable option in disputes.

DeLisi, on the other hand, states that there is a renewed interest in a new constitutional order in Kenya. A bad constitution is blamed for the post-election crisis, allowing the president's backing of the electoral commission with his cronies shortly before the election; a largely unaccountable electoral commission declaring presidential election results without proper counting or reliable records.<sup>39</sup>

Hays further posit that most elements of the framework of constitutionalism are unacceptable to those who gain access to state power, for they interfere with their primary objective of accumulation. This has been the essence of the Kenya experience. He indicates that constitutionalism has been rejected, and constitutionally sanctioned power has been exercised or abused in the name of ethnicity but in practice deployed for

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<sup>38</sup> Chanock, Martin. Constitutionalism, Democracy and Africa: Constitutionalism Upside Down. *Law In Context* 28, no. 2: (2010) 126-144.

<sup>39</sup> DeLisi, Matt.. Criminal careers behind bars. *Behavioral Sciences & The Law* 21, no. 5: (2003) 653-669

personal aggrandizement. Hays further argues that the politics of the ‘Bomas’ process demonstrate this rejection of the values of the constitution: a professional phase where independent experts consulted with the people in accordance with national goals and prepared a draft constitution, and a deliberative and consensus-building phase with the representatives of the people, regions/communities, and civil society, were followed by a parliamentary phase where, against logic and democracy, politicians had a veto.<sup>40</sup>

Generally, argues Leming<sup>41</sup>, the African constitution not only fails to mould civic values or the behaviour of key political actors, it also fails to generate a state that is capable of sound social policies and fair and honest administration. Andre Beteille’s brilliant insight needs to be supplemented by a consideration of the obstacles to progress placed by the inherited, pre-constitution bias of the state apparatus. Leming holds the view that perhaps inadequate attention has been paid to these obstacles, as opposed to societal obstacles, because it is assumed that the constitution, par excellence, designs and structures the state. The constitution tends to structure macro institutions but often says little about values and procedures of the administration of the state (which may persist from one constitution to another).

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<sup>40</sup> Hays, Bradley D. Nullification and the Political, Legal, and Quasi-Legal Constitutions. *Publius: The Journal Of Federalism* 43, no. 2 (2013): 205-226

<sup>41</sup> Leming, Robert S., and Bloomington, IN. ERIC Clearinghouse for Social Studies/Social Science Education. *We the People. The Citizen and the Constitution. ERIC Digests*. n.p.: 1996.

### 1.3.6 Challenges of Constitutional Development Processes

According to Yong and Patrick<sup>42</sup>, with its meagre financial and human resources, the Federal Republic of Somalia (FRS) has been doing better than a satisfactory job. However, DeLisi<sup>43</sup> differ, by stating that in recent months, it has been profoundly frustrated by various challenges. Chief among them is what is referred to as the first side-effect of a \$60 million “panacea” known as the provisional constitution — the ‘Jubbaland’ controversy. Who has the legitimate right to establish a new federal state by that name? Are the proponents taking an inclusive approach and are employing the right process? And who has the authority of oversight?

According to Lonsdale<sup>44</sup>, ‘Jubbaland’ has all the dangerous elements necessary to kick the stabilization plan like a sand castle. It has the armed militias, clan-lords and foreign intrusions of competing interests. And it is, by far, he argues, the most polarizing issue facing the nation today. He states that, those who advocate for the establishment of ‘Jubbaland’ claim that they have, as the constitution permits, two regions (Lower ‘Jubba’ and ‘Gedo’) from pre-civil war regional structure to form a new federal state. They insist that the process that created the apparent front runners was legal and inclusive, and that it they had a clear mandate from IGAD (read Kenya/Ethiopia) to establish a local administration. While this may, argues Lonsdale, seem like a fairly simple constitutional issue, unfortunately the new constitution is epicentre of all the legal, political, and moral confusions. The constitution not only institutes and legalizes the most discriminatory

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<sup>42</sup> Yong, Ben, and Patrick O'Brien.. Constitutional Systems of the World: Problems of Perspective in Comparative Constitutionalism. *Political Studies Review* 10, no. 3 (2012): 359-369

<sup>43</sup> DeLisi, Matt.. Criminal careers behind bars. *Behavioral Sciences & The Law* 21, no. 5: (2003) 653-669

<sup>44</sup> Lonsdale, John. Ornamental Constitutionalism in Africa: Kenyatta and the Two Queens. *Journal Of Imperial & Commonwealth History* 34, no. 1 (2006): 87-103



form of clannish — the infamous 4.5 system — but also incentivizes clan-based Balkanization. It has already grandfathered certain clan-based political entities such as ‘Puntland’ and ‘Galmudug’ as federal states, and it grants them profound discretions to unilaterally go into any deals with any foreign entity they wish for oil explorations, mining of minerals, etc.

Browne-Marshall<sup>45</sup> argues that while the constitution is peppered with enough articles to keep the fire burning, it is in these two particular articles that the ghost-lords (the primary force behind it) hit the jackpot. Constitutionally restrict the federal government’s capacity to engage in any bilateral deals on natural resources and allow the federal states to engage as they please.

In absence of such parameters, the worst qualities of the human nature take command, in due course. In its benign form, this premise could be observed in any given busy intersection after the traffic light stopped working. Gradually but surely, the dysfunctional tendencies of otherwise reasonable human beings would emerge.

Glickman<sup>46</sup>, in agreement, states that the foundation of every peaceful polity or a nation is an unambiguous set of laws or a thoroughly negotiated and ratified social contract. And, as argued in the aforementioned article, this basic premise could not have been lost on the framers of the current constitution. By the framers, it implies that certain internal

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<sup>45</sup> Browne-Marshall, Gloria . Early American Conflicts And Modern African Practices: A Comparative Commentary On Constitutionalism. *ILSA Journal Of International & Comparative Law* 10, no. 2: (2004) 305-309

<sup>46</sup> Glickman, H.. Consider Somaliland: state-building with traditional leaders and institutions. *Choice: Current Reviews For Academic Libraries* 49, no. 12: (2012) 2366

actors, who, due to their naiveté or political myopia, were connived to accept the idea that the best way to sustain peace in Somalia is to put the cart before the horse, and to accept that a dysfunctional constitution that does not clearly define demarcation of authority, or land ownership, or resources-sharing is the legitimate prerequisite to emerge out of the transitional status. So, the moral argument that helped pass this embarrassment of a constitution was reconciliation can wait. We are sick and tired of being in transition; let's just accept anything handed to us in order to regain our sovereignty.

Despite its flaws and controversies, the constitutional referendum in Kenya raised hopes about the consolidation of democracy there. Kenyans participated in wide-ranging debates about the structures of power, and ultimately had the opportunity to reject the proposed constitution at the polls. In other contexts, it has been found that negotiations surrounding the drafting of new constitutions can help consolidate democratic institutions. In addition, the very process of holding competitive elections in Africa improves the quality of democracy.

According to Dudziak<sup>47</sup>, the Kenyan case suggests that these findings are relevant for referendums as well, with the process of voting giving citizens more democratic 'practice'. In this sense, he states, the outcome of the referendum was less important than the fact that citizens voted and the results were respected. The procedural success of the referendum thus generated optimism about the future of democracy in Kenya he states.

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<sup>47</sup> Dudziak, Mary . Working Toward Democracy: Thurgood Marshall And The Constitution Of Kenya. *Duke Law Journal* 56, no. 3: (2006) 721-780

Dudziak further argues that disappointment and anger fuelled the violence that followed. As government and opposition politicians were forced to the negotiating table, their talks soon focused on the need to share power and to write a new constitution. Indeed, he states, until political power is clearly restructured through a new constitutional order; it is unlikely that the longstanding desire of the Kenyan people for democracy will be realized. And thus, the saga of constitutional reform in Kenya continues.

### **1.3.7 Literature Gap**

From 1960 when Somalia attained its independence, the Somali Republic was a constitutional democratic country with a working constitution endorsed through a referendum. Somalia has been a characteristic case of whole state fall down in the contemporary society. There are main signs of this problem including numerous nasty conflicts, the horrible humanitarian state emerging from the disintegration of community service delivery, the illegal activities of suspected revolutionary groups in Somalia and the involvement of Somalia neighboring states. Additionally, an assessment to the Somalia history clearly indicates that its entire state failure in Somalia originates from a disintegration of state systems in the country in the last two decades. Researches doing study in constitutionalism finds Somalia a rich ground for their study.

This study seeks to examine the constitutionalism debates and discourses in Somalia since 1960 to 2012 in an attempt to resolve the problem of adverse conflicts in the country. It is thus the rationale of this study to question and possibly answer this

question; which development processes towards constitutionalism in Somalia has been employed to resolve the conflict in the country.<sup>48</sup>

#### **1.4 Justification of the Study**

Civil wars and ethnic conflicts are some of the challenges that come with poor constitutionalism. These are the challenges are directly associated with poor constitutionalism.<sup>49</sup> This study will evaluate constitutionalism in Somali and in Kenya. Both of these counties have suffered great losses of lives in past. These conflicts can all be attributed to loopholes in the existing constitutions. The adherence and to the new constitutions in both countries is fertile ground for research given that these changes in constitution were initiated as a result of the unrest faced due to poor legislation.

This study provides valuable empirical information for government officials in both countries charged with the responsibility to implement new constitutions. The study will also outline possible measures that can be used to deal with challenges facing the implementation of the constitution.

To the academic fraternity, the study provides information that can be used in literature review. In addition, the study outlines the various research gaps that can be used to further studies in relation to constitutionalism. Numerous severe civil wars especially from ethnic differences have dominated the national and international security plans. As a

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<sup>48</sup> Mark Bradbury, Ken Menkhaus and Roland Marchal, Human Development Report Somalia 2001, United Nations Development Programme, (2001).

<sup>49</sup> Denny, Elaine K, and Barbara F Walter. "Ethnicity and civil war". *Journal Of Peace Research* 51, no. 2 (2014): 199-212

result, international and national governments should pay attention to peace initiatives and policies and constitutional implementations so that the tendencies of quarrels and wars in Africa especially Somalia can be stopped. The continuous attempts to restore democracy and rule of law with respect to human rights at no again and the failures in implementing constitution implies that there is an urgent need to extract lessons from these issues with a view towards enhancing better systems to direct future policy and constitutional establishment.

Subsequently this study has both educational and policy justifications.<sup>50</sup> Thus, it is crucial to find out why such efforts to establish laws and policies have not yielded and what lessons we as researchers could learn from the incident to improve Somalia's stability restoration and constitution implementation skills.

### **1.5 Hypotheses**

The study tested the following hypotheses:

- i. There is a general misunderstanding of the concept of constitutionalism in Africa;
- ii. Insecurity and tribal/clan politics contribute to complex constitutional-making processes in Kenya and Somalia;
- iii. The concept of constitutionalism can best serve its desired interests if there is recognition that constitutions are living documents.

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<sup>50</sup> Sotirios, Barber and James, Fleming, *Constitutional Interpretation: The Basic Questions*, (Oxford, Oxford University Press, 2007), p. 223-241.

## 1.6 Conceptual Framework

Theory is a structure which enables us to search for and interpret facts. Even though constitutionalism has been extensively upheld globally, it does not miss criticism. This is especially evident in constitutions that create and control the government offices and also claim to defend conceptual rights of political ethics. Some hard critics state that such constitutions that greatly defend the rights cannot efficiently and reasonably defend people from the harsh governments' practices. In contrast, they only work towards masquerading lawful and political customs in a fake veil of legality.

Other democratic critics are not absolutely indifferent to the constitutions that defend the rights of the people. Rather, their major concern is to dispute the function that democratically unaccountable judicial systems characteristically play in the explanation and submission of such constitutions. In accordance to democratic critics it is not easy to underrate the substantial authority which judicial re-evaluation under a constitutional charter of rights bestows upon the judges who are, in contemporary constitutional democracies, naturally unelected and therefore not openly accountable to the democratic society.<sup>51</sup>

These hard critics argue that elements like new understandings and the hypothetical discipline of ordinary law reasoning rarely, if ever, thrive in setting significant restrictions upon government authority. Consequently, dependence on such elements in constitutional arbitration only work towards rationalizing the purely political verdicts of judges following, deliberately or not, their individual political principles. Other

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<sup>51</sup> Adrian, Vermeule, *Law and the Limits of Reason*, (New York, Oxford University Press, 2009), p.41.

consequences include a severe disrespect to democracy where small groups of unelected, selective judges end up replacing their personal, highly controversial perceptions concerning the proper restrictions of government authority for the considered judgments of the legislature. And probably the suppression women, minority groups and the poor whose welfare is not sufficiently acknowledged and protected by the leading, normal principles to which these influential judges have an attraction.

Therefore, these hard critics are extremely doubtful of constitutional process and of those theories that approve constitutionalism as a rampart against oppression. The vital aspect in the course of constitutionalism is that government can be restricted in its authority in that it is dependent to adherence to those restrictions. One additional inference of hard critical theories is that the idea of 'the people' is greatly untruthful.<sup>52</sup> The law, especially the constitutional law, is an influential instrument which has, traditionally, been used by governing groups to get and sustain their superior position.

Critical theories characterize a serious difficulty not only to conventional theories and customary processes of constitutional explanation, but to the very initiative of constitutionalism itself: the point that government can and should be restricted in ways that serve to defend us from unjustifiable state authority. Nevertheless, whatever the ideal solution, all critical theories of constitutionalism seem to concur that development can be made only if the legends surrounding constitutional protection; the hindering force of original perception, purpose, history and the discipline of ordinary law are all uncovered,

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<sup>52</sup> Wilfrid, J. Waluchow, *Constitutions as Living Trees: An Idiot Defends*, *Canadian Journal of Law and Jurisprudence*, 18, no. 2 (July, 2005), p. 26.

and that the right political authorities at work in constitutional process are accredited and handled openly.<sup>53</sup> Whether the initiative of constitutionalism can endure the lessons of such critical study is the question.

## **1.7 Research Methodology**

This study critically reviewed and analyzed secondary data. This data was obtained from published and unpublished material, journals, academic papers and periodicals. The study was also based on analysis of reports by international governmental and non-governmental organizations. This study will use a descriptive research design. The target population will comprise of the Kenyan population as well as the Somali people in Mogadishu, those in the country and Somalia refugees being hosted in Kenya at Daadab and staff working with NGO's and peace keeping agents involved in constitution implementation in Somalia.

This study will make use of primary and secondary data sources. Primary data will be obtained by use of interview schedules and key informant interview guides. Interview schedules will be used on the Somali people in Mogadishu, those in the country (Eastleigh) and Somalia refugees being hosted in Kenya at Daadab. Key informants in this study will be the Key government officials and NGO's staff involved in constitution implementation in Somalia. On the other hand, the secondary information will be obtained from a collection and assessment of published and unpublished sources,

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<sup>53</sup> Gregoire, Webber, *The Negotiable Constitution: On the Limitations of Rights*, (Cambridge, Cambridge University Press, 2009) p. 12.



periodicals, journals and academic papers. These will be taken through thorough and critical examination.

The study will use descriptive statistics such as frequencies, percentages, mean and standard deviation to analyze quantitative data. On the other hand, content analysis will be used to analyze qualitative data.

### **1.8 Chapter Outline**

The study is structured around five chapters:

Chapter One: Introduction to the Study

Chapter Two: Constitutionalism in Africa: An Overview

Chapter Three: Constitutionalism in Africa: A Comparative Study of Kenya and Somalia, 2004 – 2013

Chapter Four: Constitutionalism in Africa: A Critical Analysis of Developments in Kenya and Somalia

Chapter Five: Conclusion

## **CHAPTER TWO**

### **CONSTITUTIONALISM IN AFRICA: AN OVERVIEW**

#### **2.1 Introduction**

Chapter provided the introductory overview of the study: it dealt with the statement of the research problem, the objectives, the literature review, hypotheses, the theoretical framework and the research methodology in addition to the study's chapter outline. This chapter aims to describe the concept of constitutionalism in Africa by addressing the constitutional development processes in Kenya and Somalia.

The chapter looks at conflicts in both countries associated with the constitutional-making process as well as the limitations in their previous constitutions. It also analyzes the triggers and actors in the constitutional development in both countries and the challenges facing the process. Finally, the chapter addresses the concept of democracy and separation of powers in both Kenya and Somalia.

#### **2.2 History of Conflict in Somalia and Kenya**

The instability which periodically plagues the Kenya-Somalia border area is part of a broader, complex pattern of state failure and communal violence afflicting much of the Horn of Africa. Violence and lawlessness are particularly acute in remote border areas where states in the region have never projected much authority. When they have, state authorities have sometimes been the catalysts of insecurity rather than promoters of peace. On the Somali side of the border, the central government collapsed in January 1991 and has yet to be revived.

In Kenya, the vast, remote, and arid frontier areas bordering Somalia, Ethiopia, Sudan, and Uganda were never entirely brought under the control of the state in either colonial or post-colonial eras. Thousands of Kenyans have died in periodic communal violence in these border areas over the past fifteen years, in clashes which sometimes produce casualties levels normally associated with civil wars. Kenyan government administration of its peripheral territory ranges from weak to non-existent. There, government outposts are essentially garrisons; police and military units are reluctant to patrol towns after dark, and are badly outgunned by local militias. Even the police are never safe.<sup>54</sup>

Conflict in Kenya is not new. The cross-border areas with Somalia, Ethiopia, Southern Sudan and Uganda have been characterized by conflict since time immemorial. Conflict in these cross-border localities is associated with cattle rustling, whose key drivers are water and pastoral land. A culture of cattle as the only form of wealth informs these conflicts, which usually occur between two or three communities across each border area. It has, however, also attained new dimensions due to political issues and the radicalization of certain sections of the Islamic communities<sup>55</sup>. Internally, there are some key localities where conflict has regularly occurred – albeit on a low scale and concerning community identities – since the first election of parliamentary delegates in 1962.

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<sup>54</sup> Weigel, Christine. Most Kenyans Expect Justice for Post-Election Violence. *Gallup Poll Briefing* 3. *Business Source Premier* (2011).

<sup>55</sup> Yong, Ben, and Patrick O'Brien.. Constitutional Systems of the World: Problems of Perspective in Comparative Constitutionalism. *Political Studies Review* 10, no. 3: (2012) 359-369

### **2.2.1 Clashes in Kenya and Somalia**

Since the reintroduction of multiparty politics in 1991, the political landscape in Kenya has been characterized by incidences of tribal- and clan-based disturbances with political undertones. In the period leading up to the first multiparty elections in 1992, some areas of the country flared up in tribal conflict that was geared towards influencing voting patterns in the elections. Somalia state on the other hand has collapsed in 1990 after twenty years of oppressive dictatorship that started in October 1969 after a brief democratic system exercise.

After the downfall of the military regime in 1990, the opposition forces were disturbingly unprepared for the maintenance of law and order and have completely failed to restore state institutions. In the mayhem that followed, each faction in the opposition forces unilaterally claimed victory over the regime, causing the country to descend into a civil war. Lewis contends that this catastrophe was brought about by what he calls of out-of-date kinship loyalties, unfitting for the modern age and hostile to progress. In this view, he asserts that the Somali genealogical kinship traditional system in which Somalis have managed their social relations for centuries can be attributed to the destruction of the Somali state.<sup>56</sup>

In Kenya, there have been several attacks and revenge attacks between Orma and Pokomo tribesmen in recent weeks. The Orma are predominantly semi-nomadic herders, while the Pokomo are farmers. It has been widely reported as a conflict for resources,

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<sup>56</sup> Lewis, I. M.. "Visible And Invisible Differences: The Somali Paradox." Africa (Edinburgh University Press) 74, no. 4: (2004) 489-515.

especially water in the predominantly arid area. There is evidence, however, that local politicians are actually exploiting entrenched animosities to create the conflict. It is telling that, as opposed to earlier years, this time round automatic weapons were used. Earlier, in Wajir, near the border with Somalia, Degodia clansmen attacked a Garri village and killed six people. Despite the heavy deployment of security personnel tension remains high. Again it has been widely reported that this was part of the usual resource-related conflict but there is evidence that the two Somali clans are being incited against each other by politicians making ready for the upcoming elections.

Though tribal- and livestock-related conflict has traditionally been present among the Somali clans, this instance is unique because conflict over administrative and electoral boundaries is at play here, since they were reviewed recently as is required by the new constitution.<sup>57</sup>In Somalia according to Lewis, given the fragmented nature of the warring factions in Somalia that were fanning the violence during the civil war, one could easily see that the different militias from the same tribe were killing one another, leading to only one conclusion: the conflict was about power and it revolved around personalities who use kinship, money, and food to form a patronage network with militia and neighbourhood gangs. In this context, the tribal identity was misappropriated by local ambitious politicians for political power and the people or tribe's had no collective role in mass, as it were, along tribal lines to participate in the killings.<sup>58</sup>Somalia clashes are not only recent but started as early as in 1960s.

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<sup>57</sup> Lochery, Emma.. "Rendering difference visible: The Kenyan state and its Somali citizens." *African Affairs* 111, no. 445: (2012) 615-639.  
Samora, Mwaura.. "The Somali Question." *World Policy Journal* 30, no. 3: (2013) 99-106.

Somalia's history of conflict reveals an intriguing paradox—namely, many of the factors that drive armed conflict have also played a role in managing, ending, or preventing war. Significant armed conflict was absent during Somalia's first 17 years of independence (1960–77). The first 10 years of independence were marked by vibrant but corrupt and eventually dysfunctional multiparty democracy. When the military came to power in a coup in 1969, it was initially greeted with broad popular support because of public disenchantment with the clannishness and gridlock that had plagued politics under civilian rule. In the context of the cold war, the regime, led by Siyad Barre, recast the coup as a socialist revolution and with funds from international partners built up one of the largest standing armies in sub-Saharan Africa.<sup>59</sup> Between 1977 and 1991, the country endured three major armed conflicts.

The first was the Ogaden War with Ethiopia in 1977–78, in which Somali forces intervened in support of Somali rebel fighters in a bid to liberate the Somali-inhabited region of the Ogaden. Somalia lost the war and suffered around 25,000 casualties. Those losses sowed the seeds of future internal conflict, prompting the rise of several Somali liberation movements' intent on overthrowing the military regime of Siyad Barre, whom they held accountable for the debacle. The first of these movements was the Somali Salvation Democratic Front (SSDF), established in 1978 by Abdullahi Yusuf. This mainly Majerten clan movement engaged the regime in periodic skirmishes in the northeast of the country and was met with harsh repression.

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<sup>58</sup> Whittaker, Hannah Alice.. "The Socioeconomic Dynamics Of The Shifta Conflict In Kenya, c. 1963–8." *Journal Of African History* 53, no. 3: (2012) 391-408.

<sup>59</sup> Hammond, Laura.. "History, Overview, Trends and Issues in Major Somali Refugee Displacements in the Near Region (Djibouti, Ethiopia, Kenya, Uganda and Yemen)." *Bildhaan, An International Journal Of Somali Studies* 13, (2013) 55-79

Other areas of in Kenya that have been affected by such killings in recent months include Mandera, Isiolo and Marsabit counties. What is unique yet common among these areas is that they are mainly occupied by pastoralist communities, among whom tension has always been present due to cultural practices, especially cattle rustling, which have been exacerbated by water scarcity and hence a nomadic lifestyle, leading to conflict over land. Due to these factors, groups in these areas are easy to set against each other.

The Rift Valley, as a whole, is a relatively peaceful place, though some localities experience different types and levels of conflict from time-to-time – particularly related to cattle rustling and conflict over commonly-shared natural resources (mainly water and grazing land) amongst the more pastoral communities, such as the Pokot, Marakwet, Turkana and others. Some conflicts associated with Kenya’s political history have occurred at different times (1982-2008), whilst the occurrence of conflict in the rest of the Rift Valley escalates during periods of electioneering. Narok, Burnt Forest, Molo and Kuresoi are the most volatile locations, with conflict driven by questions of access to land and broken dialogue among communities, which has bred mutual suspicion and mistrust. There is also evidence that historical injustices associated with Kenya’s political history underpin conflict in these localities.<sup>60</sup>

Mombasa, Tana Basin and other parts of the Coastal areas have also experienced conflict associated with land; large chunks of which are owned by absentee landlords. The coastal areas have had an interesting political history deriving from the colonial past, during

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<sup>60</sup> Kumssa, Asfaw, and John F. Jones. "Human Security Issues of Somali Refugees and the Host Community in Northeastern Kenya." *Journal Of Immigrant & Refugee Studies* 12, no. 1 (2014) 27-46

which imperial government agreed with the Zanzibar Sultanate that a ten mile strip would be left under the Sultanate, without due consultation with the indigenous local communities. When Kenya attained its independence, this problem was once again not clearly addressed through the involvement of local communities. The land of ancestry is a deep concept of identity that informs the politics of land in Kenya. It is a concept that economic theory cannot easily change. In this context, local communities view land as their own, and define their identity with land.

As a result, communities continue to express dissatisfaction with the way the government manages allocations and certifications of land, particularly when they were not adequately informed, engaged and involved in decisions about land. Even though the Ministry of Land has land certification mechanisms, these are – from a community perspective – trumped by a community right to land.

Consequently, there are a number of local community entities – some conspicuous and others not so conspicuous – that agitate for land issues in the Coastal areas. In Somalia on the other hand the food aid quickly became part of the war economy, a commodity over which militias fought and that warlords diverted to fund the wars. An estimated 250,000 Somalis died in this war and famine.

The war of 1991–92 also produced a powerful array of interests in perpetuating lawlessness and violence and blocking reconciliation. Warlords' power base depended on a chronic state of insecurity, so that their clan constituencies needed them for protection.



Illiterate gunmen saw war, plunder, and extortion as their only livelihood. Some businessmen were enriched by war-related criminal activities such as weapons sales, diversion of food aid, drug production, and exportation of scrap metal. And all clans were in possession of valuable urban and reverie real estate won by conquest, which they stood to lose in a peace settlement.<sup>61</sup>

### **2.3 Limitations in Former Constitutions**

The former constitution of Kenya as well as Somalia had a number of challenges and limitations which made to be replaced. The limitations were manifested in many aspects as detailed below.

#### **2.3.1 The Bill of Rights**

In Kenya, one remarkable improvement from the former constitution is the inclusion of Article 43 which contains economic and social rights. These include the right to health care services, the right to housing, to food, to water and sanitation, to social security and to education. Furthermore it is worth to mention that the Constitution cares for the protection of the environment and introduces a right to a clean and healthy environment in Article 42.

Another innovative Article is 46 which contain consumer rights. These rights were not included in the former constitution thus limiting it to a given extent. In Somalia on the other hand, one major improvement from its former constitution was in the Bill of rights. The Somali Bill of Rights provides the primary framework for individual rights and

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<sup>61</sup> Michelle, Shephard. n.d. "Somali conflict rattles Kenya." Toronto Star (Canada), n.d. Newspaper Source.

explicitly guarantees the foundational concept of equality regardless of clan or religious affiliation—a shift that overcomes significant historical roadblocks to social equality. This guarantee reflects a foundational basic universal human right established in Article 2 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), to which Somalia is a party.

These rights were deficient in the former constitution and thus they led to the many instance of violation of human rights in the former years. Expanding from this central concept, the new constitution provides for progressive protections of women's and children's rights in both social and political spheres. In matters related to health and personal security, the constitution bans the common local practice of female genital mutilation (also known as female circumcision) and provides for the right to an abortion when a woman's life is at stake. Demonstrating progressive political policy, the Somali constitution also guarantees the right of women to hold elected office and stipulates that women must hold thirty percent of seats in parliament. On the issue of children's rights, the Somali provisional constitution guarantees the right to education through secondary school, and places an explicit ban on the use of children in armed conflict<sup>62</sup>.

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<sup>62</sup> Pflanz, Mike. "With draft constitution, Somalia draws closer to democracy." *Christian Science Monitor*, August. N.PAG. Regional Business News (2012).

### **2.3.2 The Structure of the State**

In Kenya, the powers of the President, which were massively extended under former constitution, are drastically reduced. For example, from now on, the National Assembly will have to approve the nomination of the Members of Cabinet by the President. As to the structure of the executive power on the vertical level, there will be a major change: besides the national government, a second level will be reintroduced with the creation of 47 counties and related county governments. In an Annex, there is a list of responsibilities which are conferred on the counties. In conclusion, under the new Constitution, Kenya moves in the direction of a decentralized democracy. In Somalia on the other hand, the new constitution does fall short of significant international norms by stipulating a religious preference. It specifies that no religion other than Islam can be propagated.

Further conflicting with the right to religious freedom—guaranteed by, among other documents, Article 18 of the ICCPR—the constitution sets forth that Sharia law forms the basis of the legal system. Aside from possibly restricting religious freedom, this leaves a constitution based on Islam to govern both non-Muslims and Muslims alike. The provision could further restrict the effect of the guarantees of individual rights for vulnerable populations, as it explicitly states that all laws not in accordance with the general principles of Sharia are invalid. Some Somalis have already objected to these rights on the grounds that they are not in accordance with Sharia. The primary objections relate to the previously discussed guarantees of thirty-percent female representation in parliament and the right to abortions in cases where the mother's life is at risk. Similarly,

opposition also exists to the ban on female circumcision, which is estimated to affect ninety-eight percent of Somali women.

### **2.3.3 Land Reforms**

Another matter of extensive reform, which some observers even conceived as the most important one, is the question of land rights. The significance of the topic is revealed by the fact that a Chapter with the title “land and environment” is moved to the front, now following directly the Bill of Rights. Under the former Constitution there was only one form of land tenure ship that the Constitution expressly determined in Chapter 8: so called trust land (which consisted of the formerly native areas under colonial rule). Private land ownership was however broadly protected under Article 75 of the Bill of Rights which dealt with property rights. A third category of land, not directly mentioned in the Constitution but of great importance was government land, which was formerly held by the British crown and handed over to the Kenyan State with independence <sup>63</sup>.

The new Constitution creates with Chapter 5 one comprehensive part that classifies the land in three categories and provides for further provisions on each of them: public land, community land (in which the old trust land merges) and private land. Highly significant with respect to land reform will be the establishment of a National Land Commission. It can initiate investigations into present or historical land injustices, and recommend appropriate redress. Completely new is the provision that foreign nationals cannot hold property rights on land. By contrast, a person who is not a citizen may hold land on the basis of leasehold tenure only and such lease shall not exceed 99 years. These reforms

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<sup>63</sup> Ibid

were not present in the former constitution which made land administration a nightmare. In Somalia on the other hand, the land issue had been covered by other major issues that were facing Somalia, for instance, lack of stable government.

#### **2.3.4 The Fight against Corruption**

In Kenya's constitution, the context of the fight against corruption a whole Chapter is dedicated to leadership and integrity. Besides setting standards for the conduct of State officers it provides for the establishment of a new independent ethics and anti-corruption commission, Art. 79.

Since corruption is one of the major problems in the country, the new commission will face immense challenges. Bearing in mind the events of the last few years there are serious doubts whether a new commission can bring the needed change. Already in 2002 a great deal of hope was vested in the new government of Mr. Kibaki to break with the corrupt methods of his predecessors and indeed the President set an example with the appointment of the former activist John Githongo as permanent secretary for ethics and governance in the Office of the President. However, within only a short period corruption found its way back into government and Mr. Githongo left for exile in Britain.<sup>64</sup>In Somalia, despite the possible conflicts, the provisions represent an express step by Somalia toward confronting the lack of individual protections in the country and overcoming the difficulties of the past—so much so that the constitution also establishes a Truth and Reconciliation Commission.

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<sup>64</sup> Ibid

This effort to revisit the effect of past human rights abuses and violence on the individual as well as the language of the constitution, similar to the approach made famous in post-Apartheid South Africa, conceptualizes the inviolability of the individual as a crucial element of the new government. To what extent these concepts of justice and human rights are made accessible to the Somali people in practice, however, will hinge on whether and to what extent the new government is successful in implementing these innovations. This implies that the new constitution surpasses the former with regard to truth and reconciliation.

#### **2.4 Triggers and Actors in Constitutional Development**

In Kenya, several of the new constitution's features attempt to balance political and economic power with the multi-faceted and multi-ethnic nature of Kenyan politics. Professor Yashpal Ghai published a detailed analysis of the constitution. Some brief considerations are democratic freedoms, land reform, gender equality and transparency. In Somalia on the other hand, the triggers and actors in the constitutional development are civil war, piracy and terrorism. These are the factors that have for a long time threatened the existence of peace in Somalia. To achieve peace, these factors were considered the main actors of the development of a new constitution.

In Kenya, democratic freedoms are one major element. Amendment 1A in 1992 of the constitution allows for the formation of political parties within a multi-party democracy. The constitution sets up the procedural requirements for equal voting rights and mandates an independent electoral commission that is not subject to executive influence or control.

There is no comprehensive political parties' law. It is a general requirement of the constitution that political parties must be national in character, in order to avoid mono-ethnic political groupings. They must furthermore be democratically governed, to avoid corruption, and must commit themselves to defending the constitution.

Constituencies under the new constitution are mandated to be totally equal. Enshrining such a condition into the constitution enables the election commission and the courts to provide an independent check on the growth and distribution of voters. For example, in 1997 there were less than 4000 voters in Mandera West, compared to 113,848 in Embakasi. This means that voters in very large constituencies are often under-represented. It is one of the problems that have exacerbated the distorting effects of poverty and ethnicity within the electoral system. In Somalia piracy is one major trigger.

The underlying causal factors for the surge of piracy off the Horn of Africa are complex and multifaceted. The principal motivating influences seem to be connected to the following four main drivers. First and perhaps most fundamentally, is the lack of a viable sovereign entity in Somalia. Experts unanimously agree that the scale and incidence of maritime criminality in this region is, at root, an extension of the land-based violence, lawlessness, and general poverty that has plagued Somalia since the fall of the Said Barre dictatorship in 1991. Piracy has been a problem in Somali waters for at least 10 years.

However, the number of attempted and successful attacks has risen over the last [several] years. With little functioning government, long, isolated sandy beaches and a population that is both desperate and used to war, Somalia is a perfect environment for piracy to

thrive. The fact that Somali-sourced attacks briefly declined under the rule of the Islamic Courts Union (ICU) between 2006 and 2007 further demonstrates the critical influence that central and local institutions can play in managing piracy.<sup>65</sup>

In Kenya, land reform remains a serious, unresolved issue within its politics. Article 60 of the constitution contains seven major provisions which aim to secure land rights and ensure equitable access and ecological maintenance of land, an important consideration, given the rapid growth of Kenyan cities. The constitution creates a new category of community land which includes ‘trust land’: land governed on customary terms during independence. The law bestows control of these areas on traditional communities, which means that issues like land disputes, for example over grazing rights, can be resolved at the community level. Community control holds many benefits because remedies available at national Government level are often limited and difficult to access.

Also, the size of land holdings will be regulated by the independent national Land Commission, which will not interfere with matters of individual property rights. Colonial and historic land injustices will not be formally dealt with, so groups like the Maasai will not receive any redress.<sup>66</sup> Again, on gender equality in Kenya, the constitution contains extensive gender provisions designed to equalize men and women’s status. Kenya is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, and spearheaded the

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<sup>65</sup> Shortland, Anja, and Sarah Percy.. "Governance, Naval Intervention and Piracy in Somalia." *Peace Economics, Peace Science, & Public Policy* 19, no. 2: (2013) 275-283.

<sup>66</sup> Brown, Stephen.. "The Special Tribunal for Kenya: A Waki Idea. Conference Papers "-- International Studies Association (2010)



Nairobi Forward-Looking Strategies for Women initiative in 1985. As part of the 2000 National Gender Policy, a National Commission on Gender and Development was enacted through an Act of Parliament in 2003.

The constitution expands the country's existing commitment to gender equality. It protects gender equality in land ownership with provisions that counter customary-law restrictions on women's land ownership. Only 4% of current land owners are women. The constitution also guarantees representation for women by reserving seats for them in the Senate and the National Assembly. Article 27 (8) requires the State to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Somalia on the other hand reached a total humanitarian disaster in 2011 when they reached famine alerts after months of drought. Inability by the government to address the humanitarian condition resulted in a mass migration of refugees into neighbouring countries. Conflict with insurgent groups in southern Somalia intensified the famine, leading to 1.4 million IDPs in 2011 alone. In 2012 Somalia made major strides to stabilize the country by successfully ratifying a constitution.

In 2012, Somalia successfully ratified a Constitution after two decades without a central government. The newly ratified constitution has created a framework for popular elections for parliament.<sup>67</sup> Zakat Foundation of America cemented their efforts for the long-term development of Somalia through an office located in Mogadishu which will carry out development and vocational training programs, especially in Southern Somalia.

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<sup>67</sup> Seal, Andrew, and Rob Bailey.. "The 2011 Famine in Somalia: lessons learnt from a failed response?." *Conflict & Health* 7, no. 1: (2013) 1-11.

Finally, in Kenya, on transparency, corruption has blighted the application of the rule of law, political competition and Governmental administration in Kenya. The Moi Government has used the executive power of the President extensively to shore up its political power base, but under the new constitution an elected President is required to get more than half of all votes and the overall support, on the first ballot, of at least 25% of all voters in half (24) of the counties. This should ensure that candidates have a proper distribution of national support and prevent them from running campaigns on ethnic platforms. The Office of the President still has wide executive powers, including the appointment of the cabinet, but has no power over the legislature. The two-tier structure of Parliament includes a Senate which represents the interests of regions and counties.

The constitution also establishes, under Article 166, a system for the appointment of judges – a system that is much less dominated by the executive. Under Article 168, the grounds for removing judges are tightly controlled to stop executive interference with judges' discretion. The real problem with this legislation is that it relies on the existing pool of judges. Given the endemic corruption that has permeated all levels of the judiciary; the risk of corrupt office holders remains a genuine concern.

Traditional courts and Kadhi courts, set up for Muslims, still exist under the new constitution, but only where there is individual acceptance of jurisdiction. These tribunals' sources of law continue to be at odds with those of the Kenyan constitution and potential conflicts between customary practice and fundamental human rights seems

unimportant to authorities.<sup>68</sup> On the other hand, in Somalia, the Civil War is an ongoing civil war taking place in Somalia. It grew out of resistance to the Siad Barre regime during the 1980s.

By 1988–90, the Somali Armed Forces began engaging various armed rebel groups, including the Somali Salvation Democratic Front in the northeast, the Somali National Movement in the northwest, and the United Somali Congress in the south. This coalition of tribal-based armed opposition groups eventually managed to overthrow the nation's long-standing military government in 1991.

Various factions began competing for influence in the power vacuum that followed, which precipitated an aborted UN peacekeeping attempt in the mid-1990s. A period of decentralization ensued, characterized by a return to customary and religious law in many areas as well as the establishment of autonomous regional governments in the northern part of the country. This also led to a relative decrease in the intensity of the fighting, with SIPRI removing Somalia from its list of major armed conflicts for the years 1997 and 1998.<sup>69</sup> The early 2000s saw the creation of fledgling interim federal administrations, culminating in the establishment of the Transitional Federal Government (TFG) in 2004.

In 2006, the TFG assisted by Ethiopian troops, assumed control of most of the nation's southern conflict zones from the newly formed Islamic Courts Union (ICU). The ICU

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<sup>68</sup> Owusu, Maxwell.. "Domesticating democracy: Culture, civil society, and constitutionalism in Africa." *Comparative Studies In Society and History* 39, no. 1: (1997) 120

<sup>69</sup> Linke, Andrew, and Clionadh Raleigh.. "State and Stateless Violence in Somalia." *African Geographical Review* 30, no. 1: (2011) 47-66.

subsequently splintered into more radical groups, notably Al-Shabaab, which has since been fighting the Somali government and the AU-mandated AMISOM intervention force for control of the country. In 2011, a coordinated military operation between the Somali military and multinational forces began, which is believed to represent one of the final stages in the war's Islamist insurgency. The civil has ravaged the country and robbed it of any hope of ever achieving long-lasting peace. A new constitution addressing these issues was considered to be instrumental in solving civil war but that would only work if the constitution was well drafted, implemented and followed by all and sundry.

## **2.5 Constitutional Development Processes in Somalia and Kenya**

By the time the Somalia Transitional Federal Parliament convened for the first time in the town of Baidoa on 26 February 2006, the constitutional process was high on the list of urgent business. In 2004 parliament had been sworn in, and according to the transition timetable a draft constitution had to be ready by October 2007.

In Kenya on the other hand, in 1964, Kenya history shows that its constitution was so fundamentally and radically altered, it became known as the 1964 Constitution. Through extensive parliamentary amendments, it transformed the country into a republic with a presidential system of government. But it didn't end here, the 1964 Constitution spawned years of political crises one after the other resulting in a split of executive powers between opposition Prime Minister Raila Odinga and President Mwai Kibaki that finally led to an overhaul of the constitution in several amendments leading up to the 2010 Kenya Constitution.

In Somalia, reliance on a constitutional process as part of a transition from a peace agreement to a legitimate elected government is an increasingly common methodology. It acknowledges that those at the table during peace negotiations may not represent all the interests in a country, that in many cases the range of issues that need to be debated in a constitution are too vast for a peace negotiation, and that many of these issues are best debated at a slower pace, in a more inclusive fashion. This was certainly the case in Somalia.

The peace agreement took the form of a transitional constitution – the Transitional Federal Charter of the Somali Republic – and set out many provisions that could be part of a constitution, including a federal governance structure and Islamic Shari’a as the basic source for legislation. The Charter provided for the creation of a Federal Constitutional Committee (FCC), the members of which were to be proposed by the Council of Ministers and approved by the parliament. The first step therefore was to create this commission. Undoubtedly some difficult negotiations took place among the ministers and parliamentarians in putting together a list of 15 members, who were ultimately chosen on a tribal basis using the ‘4.5 formula’, like the parliament. An early list did not have any women on it, but in response to advice about the importance of having a representative commission; two women were included in the list sent for parliamentary approval.

In Somalia, many of the core concepts that had been negotiated during the peace agreement were not well understood. Federalism, and in particular the fact that federalism requires relinquishing some power and control by the central government in favour of the

states or regions, had not been internalized, as became clear in discussions with members of the TFG. A lot of emphasis was put on the need for a public dialogue and an inclusive process in order to ensure that the final draft had legitimacy and would be accepted at referendum.

At the time, Kenya was considered a cautionary tale as the people of Kenya had just rejected their new constitution at referendum.<sup>70</sup> In Kenya, in between, the constitution saw several minor and major changes culminating in the 1982 Constitutional Amendment that transformed Kenya from a multi-party to a single-party state. The 1983 and 1988 elections affirmed and strengthened the single-party system headed by the Kenya African National Union or KANU.

Finally, in Somalia, the Minister for Constitutional Affairs became one of the first casualties of the renewed war in Somalia. He was assassinated after Friday prayers in August a few days after the launch workshop of the IFCC. It remains unclear whether he was targeted because of his involvement with the constitutional process or whether he was simply an accessible target. In the chaos that followed, the constitutional process was essentially put on hold, as the transitional parliament and government turned all their attention to the crisis.

Since 2006, the commissioners have attempted to continue with preparations, but with the TFG on the verge of collapse there was little impetus to run a complex constitutional

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<sup>70</sup> Mwangi, Oscar Gakuo.. "State Collapse, Al-Shabaab , Islamism, and Legitimacy in Somalia." *Politics, Religion & Ideology* 13, no. 4: (2012) 513-527.

process in such an unstable environment. With a new government in place since January 2009 there may be an opportunity to re-launch the process, but it will depend on whether the country is stable enough to conduct of a participatory constitution building process.<sup>71</sup>In Kenya on the other hand, the 1990s witnessed institutional decay, social breakdown and economic distress that conspired to agitate reform movements with roots dating back in the 80s. Abetted by US pressures to achieve a clean governance, its parliament amended the constitution in 1991 that resulted in a multiparty elections held in December 1992.

After the 1997 general elections, Parliament enacted the Constitution of Kenya Review Act that formed the legal ground works for more thorough constitutional reforms. The Constitution of Kenya Review Commission (CKRC) created for the purpose provided civic education, and public input to help draft a new constitution to be studied by the National Constitutional Conference (NCC). Sadly, the process got messed up in deep political conflicts between local powers that led to the e draft constitution being rejected in the 2005 referendum. The draft was eventually revived after the 2007-2008 post-election violence and garnered a 67% approval in the 2010 referendum to become the Kenya constitution 2010.

## **2.6 Constitution Implementation in Somalia and Kenya: Challenges**

In Kenya and Somalia, the implementation of the constitution has faced a number of challenges. The main challenges include interpretation, cooperation among stakeholders

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<sup>71</sup> Menkhaus, Ken.. "Governance without Government in Somalia." *International Security* 31, no. 3: (2006) 74-106.

in constitutional implementation and security challenges under the emerging constitutional dispensation.<sup>72</sup>

### **2.6.1 Challenges of Interpretation**

In Kenya, the judiciary is the final authority in interpretation of the 2010 Constitution as the process of implementation unfolds. Other arms of Government, like Parliament and the Executive also have a mandate to interpret the constitution but need to seek the intervention of the court where a problem of interpretation arises. The same applies to all public bodies, authorities, commissions, and institutions, among others.

A problem arises where these organs, bodies, institutions, arms of Government, and commissions choose to interpret the constitution in their own way without seeking the guidance of courts. This specifically applies to potentially controversial interpretations that these organs or bodies make and which adversely affect other organs. Interpretation of any legal text, and especially the Constitution, is based on the view that words, terms or phrases have imprecise meaning and hence need to be defined, interpreted, construed and translated. This is done with a view to discovering and implementing meaning. The 2010 constitution has faced a number of interpretation challenges. These include presidential nominations; one-third gender rule; and the date of the next General Election; and the Procedure on constitutional amendment.

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<sup>72</sup> Romanos, Amelia.. "Kenya closes in on its recovery." *Travel Trade Gazette UK & Ireland* no. (2013) 3052: 20



In Somalia on the other hand, some of these challenges may be ameliorated by an extended period of civic education and dialogue. But it remains uncertain whether attempts to transfer models, lessons and institutional structures from other stable and developed societies to Somalia will ever be successful. Given the weak, mistrusted formal legal and judicial structure and the lack of bureaucratic capacity, the prospects for implementing a constitution are very low. Furthermore the informal traditional structures are likely to compete with any new institutions or rules adopted in the constitution.

### **2.6.2 Cooperation among Stakeholders in Constitutional Implementation**

Implementation of the constitution requires cooperation and collaboration among the different implementation organs. The past two years have witnessed some degree of cooperation but also wrangles and limited collaboration among key implementation institutions. In addition, most of the MPs are not conversant with the many issues in the Constitution and are misinterpreting some clauses, either through ignorance or deliberately to serve their political and related partisan or sectarian interests. This is trickling down to the masses.

There have also been wrangles between CIC and the administrative bureaucracy especially the Office of the Head of Public Service and Treasury; among others. Such wrangles pose a serious challenge to constitution implementation. In Somalia on the other hand, In Somalia, the current administration has a provisional constitution at hand without implementation tools in place. Moreover, the constitution is not complete and has not been publically ratified. This leaves the entire constitution wide open to disparate and

divergent interpretations and as such could be corrupted by an administration that does not support key provisions in the current constitution. For example, according to Section 1 of Article 1 of the new provisional constitution adopted on August 1, 2012, Somalia is defined as a federal, sovereign, and democratic republic founded on inclusive representation of the people, a multiparty system advised by social justice towards the country's different regions.

Furthermore, Section 6 of Article 49, whose original intent was to mediate between the interests of the centre vs. the periphery regions, states that based on a voluntary decision, two or more regions may merge to form a Federal Member State.

### **2.6.3 Security Challenges**

Elections remain a main trigger of violence and insecurity, and security forces (regular police, administrative police, military) play a key role in electoral processes. In the light of the 2007 General Elections, the discussion continues on how to provide and organize security during electoral processes, and how to make sure that the involvement of the security forces does allow for free and fair elections.

Repeatedly, section 5 of the National Intelligence Service Act provides that the National Intelligence Service (NIS) shall be responsible for security intelligence and counter intelligence to enhance national security. It is tasked with an array of duties. Those that relate directly to security during elections include: detecting and identifying any threat or potential threat to national security; advising the President and the Government of any

threat or potential threat to national security (e.g. political or ethnic violence) and safeguarding and promoting national security, national interests, sovereignty and the economic wellbeing of the Republic and its citizens within and outside Kenya. If it performs the foregoing duties well, NIS will effectively ensure that there is peace and security during elections.<sup>73</sup>

However, Kenya has faced and is continuing to face critical security challenges, most of which seem related to the March 4, 2013 General elections. These include security problems in the Tana Delta, Kisumu, the Coast Region (MRC), Baragoi Valley, and Nairobi (the grenade attacks). These security issues can be attributed to the improper implementation of the Kenyan constitution.

In Somalia on the other hand, the current administration in Mogadishu appears to have politicized the intent of this article. Many regionalists argue that the central government is intent on dictating the formation and nature of federal states. For example, hand picking regional administrators without much consideration to the spirit of the provisional federal constitution, is a foreign concept to the existing constitution. If the government succeeds to do so, it would undoubtedly alter the current structure of the constitution and potentially narrow the rights of the regions. In the absence of a clear constitutional implementation program and guidelines, there is a potential deadlock between the centre (Mogadishu) and the regions (federal states). If such problems are not carefully addressed, Mogadishu could emerge as the loser and may not have much

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<sup>73</sup> Tekle, Tesfa-Alem.. "Ethiopia, Kenya leaders vow to combat threats to regional security." Sudan Tribune, November 23. (2012).

relevance to the affairs of the regional states; the current government in particular may waste its four years in office on doing nothing but squabble on procedural issues in lieu of reconstruction of the country's institutions.

A key question that arises is whether Western governance models will ever be implemented effectively in Somalia or whether it will be necessary to seek endogenous solutions. This dilemma exists to some degree in any democratization process supported by the international community. Somaliland provides another challenge to achieving consensus on a vision for the future of the state. Although Somaliland has in effect been operating separately since 1991, many people in Somalia do not accept Somaliland's declaration of independence and consider it to be part of what should become the unified state of Somalia. In 2006 demarches to the Somaliland government seeking to involve them in the constitutional process were rebuffed, and the practice of including members of Somaliland tribes in Somali institutions will not change the reality that those in power in Somaliland currently reject unification.

## **2.7 'Democracy' in Kenya and Somalia Constitutions**

To start with, Kenya's transition is characterized by a lot of back-and-forth. Democratic gains are yet to be consolidated. Citizens' efforts to promote change are visible and well rooted in all spheres. Also, the political sphere is highly pluralized. There are many registered political parties and many people participate in periodic elections. There is a relatively free media and general respect for freedom of expression. In spite of this

pluralized space, there is a weak culture of political accountability in that leaders rarely account for their actions.

The political system is one in which ethnicity comesling with the electoral system to form a strong obstacle to democratic transition. The new constitution seeks to address some of the challenges to development and democracy. The new constitution is comprised of provisions to address some of the long-standing issues. A devolved system of government, for instance, is expected to promote development in all regions. An equalization fund will provide resources to the marginalized areas so that they can catch up with other regions. The constitution also emphasizes the establishment of a government that reflects the Kenya's diversity. All the same, there has been no coherent approach to addressing ethnic divisions. Formation and reformation of parties along ethno-regional lines remains a major challenge in this respect. In Somalia in contrast, constructing a new state has brought many challenges. Between 1992 and 1996 the country was twice embroiled in civil wars. A ban on imports of Somali livestock by Saudi Arabia since 2000 has deprived the country of a key source of revenue.

Demographic and economic pressures are affecting the environment and fuelling rapid urban migration, which in turn is straining the capacity of urban infrastructure. There is also evidence of growing disparities in wealth between social groups, between the east and west of the country, and between urban and rural populations. Critically, after years Somaliland's sovereignty claim remains unrecognized by Somalis in Somalia or any foreign government and is contested by people in eastern Somaliland.

Secondly, in Kenya, the new constitution identifies democracy and people's participation as essential to the national values and principles of governance on which the government is based. It also seeks to foster the accountability of leaders by privileging integrity and leadership as the key pillars of governance; it requires public officers to adhere to the principles of public service. It also seeks to punish self-service and to promote social justice; including making guilty parties take responsibility for past abuses. In Somalia, the lack of international recognition has deprived people in Somaliland of the type of governance support that many post-conflict countries receive. It also restricts the possibilities for developing international trade relations and encouraging inward investment.

With meagre levels of international assistance, recovery has largely been achieved from the resources and resourcefulness of Somalis themselves. The main sources of finance have been the production and export of livestock, trade, and the remittances sent by Somalis living abroad. This has served to forge a separate identity and a feeling of self-reliance and has enabled Somalis to craft a political system suitable to their needs.

Finally, in Kenya, important also is that the new constitution promotes rights and freedoms in an unprecedented manner. The Bill of Rights is fundamental and radical in many ways: the state is required to promote rights and freedoms while the courts are required to interpret the new law in a manner that seeks to promote these rights. Accountability to the people and participation of the people are key aspects of the framework of the new law. The pertinent question raised is whether the new constitution

can foster democratic accountability. The politics of ethnicity have presented an important challenge to democratic governance and the rule of law in Kenya. Ethnicity is appropriated for both good and bad.

In some instances, it is appropriated to prevent enforcement of the law and is, therefore, responsible for a deepening culture of impunity. As noted above, the mobilization of ethnic numbers in the communities where those indicted by the ICC come from, enabled the president and his deputy to win the election after forming an alliance (the Jubilee Alliance), in spite of their indictment over crimes committed during the post-election violence.<sup>74</sup> On the whole, ethnicity comes along with other factors, including Kenya's electoral system, to establish formidable obstacles to the transition to democracy.

In Somalia on the other hand, the adoption of the constitution also put in place the necessary steps to change the political system in Somaliland from a form of tribal-based consociation government to a restricted form of multi-party democracy. The constitution introduced universal suffrage, enshrining the right of women to vote. It provides for local government and the national legislature and executive to be subjected to regular elections. But it also restricts the number of political parties to three. The restriction on parties is intended to promote the formation of national organizations that will represent a cross-section of the population and avoid the sectarian politics that occurred in 1969 when over 60 parties contested the election.

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<sup>74</sup> Weigel, Christine.. "Most Kenyans Expect Justice for Post-Election Violence.: Gallup Poll Briefing (2011)

## **2.8 Separation of Powers in the Kenyan and Somali Constitutions**

In Kenya, the Constitution, 2010 gives the concept of separation of powers a two pronged approach. State power has been separated and dispersed both vertically and horizontally.

In Somali on the other hand, separation of power between state institutions and leaders has been in shambles for a long time. The constitution is not to blame because it has clearly defined the powers and limits of each and every position; it is only that politicians tend not to follow it to the letter. In most of the world's parliamentary democracies, it's rare to see presidents and prime ministers bickering, since their roles and responsibilities are more or less distinct and rarely overlap. However, in many African governments, power struggles between presidents and prime ministers are quite common, even when the offices have clearly defined constitutional roles.

In Kenya, vertically, this power has been divided, separated and dispersed in terms of the different levels of governance; namely, the National government and the County government. The different governments control each other; at the same time that each is controlled within itself. In addition, power at the national level of governance is further divided, separated and dispersed horizontally into different departments of government in terms of the traditional three organs of state; namely, the legislature, executive and judiciary. This is aimed at securing the rights of the people and fostering their active participation in governance issues.<sup>75</sup> Horizontally, each of the three branches has a corresponding identifiable function of government and each must be confined to the

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Mati, Jacob Mwathi.. "Antinomies in the struggle for the transformation of the Kenyan constitution (1990–2010)." *Journal Of Contemporary African Studies* 31, no. 2: (2013) 235-254.



exercise of its own function and not allowed to encroach upon the functions of the other branches.

Furthermore, the composition of these three branches of government must be kept separate and distinct with no individual being allowed to be a member of more than one branch at the same time. The Constitution provides that the composition of the Cabinet shall consist of the President, the Deputy President, the Attorney-General and not more than twenty-two Cabinet Secretaries, none of whom shall be an elected Member of Parliament.<sup>76</sup> In this way each of the branches shall be a check to the others and no single group of people will be able to control the machinery of the state. In addition to the above three perspectives of the horizontal separation of powers, the architecture and design of the Constitution take a plural approach to the organization of the legislature in the form of a bicameral institution thus creating a further dispersal of power.<sup>77</sup>

In Somalia on the other hand, the president is the head of state. His powers include appointing a prime minister and serving as commander-in-chief of the armed forces, which includes the power to declare of a state of emergency or war. The prime minister is the chief of the cabinet, guiding and overseeing the work of the other ministers. However, despite these neatly separated roles and responsibilities, Somalia is once again having great difficulty in governing itself under a power sharing system. Although it's designed to encourage collaboration between tribes, the arrangement has yet to produce sustainable

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<sup>76</sup> Whitaker, Beth Elise, and Jason Giersch.. "Voting on a constitution: Implications for democracy in Kenya." *Journal Of Contemporary African Studies* 27, no. 1: (2009) 1-20

<sup>77</sup> Gettleman, Jeffrey. "Kenyan Constitution Opens New Front in Culture Wars." *New York Times*, May 14. 6. (2010).

political stability, with a rift widening between President Hassan Sheikh Mohamud and Prime Minister Abdi Farah Shirdon. The real issue between them is unclear, but according to media reports, the president recently asked the prime minister to resign due to incompetence, while the prime minister claims that the president has no constitutional power to request his resignation. The prime minister has complained that the government cannot achieve its goals because of the slim cabinet that the president had imposed on him, which has resulted in each minister being in charge of three to four ministries.

Finally, in Kenya, at the vertical level, separation of powers starts with the creation of different and distinct levels of government. These different levels of government have clearly defined geographical areas of jurisdiction and distribution of governance functions. The county governments are required to further decentralize their functions to the extent that it necessary. Each level of government is then expected to have both institutional and functional distinctiveness with a constitutional guarantee of non-encroachment by one on the jurisdiction of the other.<sup>78</sup> But in Somalia, in 2000, a Transitional National Government was established in Djibouti that ended up disintegrating due to a power struggle that began with President Abdiqasim Salad Hassan and Prime Minister Ali Khalif Galaydh.

Similarly, in 2002, the Inter-Governmental Authority on Development organized a reconciliation conference in Kenya that gave birth to a Transitional Federal Government and a parliamentary system without any political party presence. The party system was

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<sup>78</sup> Mujuzi, Jamil Ddamulira.. "Separating the Church from State: The Kenyan High Court's Decision in *Jesse Kamau and 25 Others v Attorney General* (Judgment of 24 May 2010)." *Journal Of African Law* 55, no. 2: (2011) 314-319.

replaced with a tribal-based power-sharing formula called the 4.5 system, which awarded an equal share of parliamentary seats to Somalia's four major tribes, with a fifth retaining a half-share.<sup>79</sup>

Therefore, the time has come for Somalia to try a different system of governance. Somali constitutional experts should review and amend the constitution from a power sharing system back to political party system in which a president and vice president from the same party are elected on the same platform. The tribal-based system has had its chance. Only through a party system, overseen by an electoral commission, can Somalia put together a government with the capacity to solve the country's unique challenges—and bring about the political stability that has eluded it for the last two decades.

## **2.9 Conclusion**

From the discussion, it is evidence that in both Kenya and Somalia, the constitution development process was associated challenges though Somalia was hard hit as compared to Kenya. It is also evidence that both countries experienced conflicts even though those in Kenya were mostly ethnic as opposed to Somalia. Furthermore, the development process of the constitution in Somalia had numerous actors that took part in it and a very small role was played by Somalis themselves. In Kenya, the Kenyans were part and parcel of the process and the external actors played the advisory role. Finally, the separation of powers in both countries is very different with varying government systems.

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<sup>79</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2: (2005) 137-161.

## **CHAPTER THREE**

### **CONSTITUTIONALISM IN AFRICA: A COMPARATIVE STUDY OF KENYA AND SOMALIA, 2004 - 2013**

#### **3.1. Introduction**

Chapter Two provided an overview of the study. This provided the background for the comparative study. This chapter describes the concept of constitutionalism in Africa by examining both Kenya and Somalia on the basis of the constitutional development processes over the years. It examines the challenges constitutional development processes as well as their implementation processes faced. Finally, the chapter also briefly looks at the measures put in place by the two countries in order to deal with these challenges.

#### **3.2 The Concept of Constitutional Development**

The idea of constitution development process is highly complex than the course of constitution building although the two go hand in hand. As applied in this study, constitution development refers to the practice whereby a political body obligates itself to the institution and adherence of a structure of principles and government. It is essential to show a difference between the written document which is the constitution and the procedures that emanate from and uphold the constitution. Constitution development runs over a period of time and entails national as well as international organizations. This implies that it is roughly an evolutionary course of developing the document and making smooth the progress of the unfolding of its sense and dynamics. So, for instance, a document whose origin is in some degree unpromising, even challenged, can in time plod its impression on the public and merge its way into societal favour, whereas a

constitution stated with immense interest can end up facing challenges, be disregarded or even be definitely discarded.

Constitutions give emphasis to the values of democracy and constitutionalism, and contain comprehensive bills of rights. Changes begin with constitution structuring, whether as a form of concession or as the merging of social conquest or transformation. Nevertheless, the record of the efficiency of these constitutions is irregular. These developments have encouraged a growing attention in the politics and constitution structuring methods, especially in the perspective of conflict resolution.<sup>80</sup>

Constitution development may, and mostly does, require different forms of consent ahead of the official constitution development process. In troubled polities, a constitution as a government structure may have to join together with a treaty to establish or redefine a political society. In such a case, best characterized by an independence constitution on decolonization, the document has an introductory nature, giving rise to a new sovereignty. Murunga argues that at times these constitutions have committed more interest to the artefacts of sovereignty than to the discussions for establishing a political society.

There is a consequence to this neglect as indicated by the disturbed political situations in most African states. In most current cases, constitution development has been preceded by a preceding accord, at times referred to as constitutional values. In some cases, the

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<sup>80</sup> Murunga, Godwin Rapando.. "Conict in Somalia and Crime in Kenya: Understanding the Trans-Territoriality of Crime." *African & Asian Studies* 4, no. 1/2 (2005) 137-161.

structuring of the constitution is an inseparable fraction of the conflict resolution that dictated a new political and public order.<sup>81</sup>

The history of constitutional development in Africa is an exceptional case study of the various difficulties that a good number of African countries after colonialism have and continue to face in the course of self-realization. Probably, the nonstop hostility and public wars in most states in Africa have been formatted by the hunt to set up constitutional governments that can guarantee every person similar participation in the community, economic and political activities of their own nations.

Definitely, the growing 1960s-independent African countries portrayed their commitment to public equality, good governance and respect to the individual's rights. Taking into consideration the occurrences in Africa countries in the 21<sup>st</sup> century, it is clear that Africa is up until now stagnating in the pressure of poor governance while working hard not to descend in the sea of constitutional disorder. The constant conditions in Africa shows that malfunction in reinforcing constitutionalism can lead to outcome which, when carefully thought about, are the contrast of excellent governance and societal equality. The conditions also explain why at the onset of the 21<sup>st</sup> century Africa has had protests for extensive reorganization in the constitution and excellent governance.

To facilitate good governance, there should be in place a well-drafted, democratic constitution that enables the government to take charge over the national matters

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<sup>81</sup> Weller Mark, 'Settling self-determination conflicts: Recent developments' *European Journal of International Law* 20, (2009): 112

effectively, and at the same time empower the citizens to take part in government resolutions. The citizens should take part in the drafting and effecting of the constitution. Therefore, there is a strong opinion among the Africa states citizens that only inclusive constitutional reorganization can promise a lasting constitutional development and bring to a halt the abuse of powers.<sup>82</sup>

### **3.3 Constitutional Development Processes in Kenya and Somalia**

The former constitutions of both Kenya and Somalia had various limitations that prompted the development of new constitutions. First, in Kenya, the significant development which was vital from the past constitution is the inclusion of Article 43 that covers both economic and societal rights. These consist of the right to shelter, to food, medical services, to water and sanitation, to public security and to education. In addition it is significance that the constitution caters for the safety of the environment and initiates a right to a healthy and clean environment in Article 42.

Another inventive Article is 46 which cover consumer rights which were not included in the past constitution thus limiting it to a particular degree. In Somalia on the other hand, one main development from the past Somalia constitution was in the Bill of rights which gives a principal structure for the rights of the people and clearly promises the initial concept of equality not considering the clan or religious affiliation; a shift that conquers major past hindrances to societal equality. The new of Somalia offers protections of

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<sup>82</sup> Westerman Pauline 'Governing by goals: Governance as a legal style' *Legisprudence: International Journal for the Study of Legislation*, 1, (2007): 71

women's and children's rights in both societal and political environments as well as health and personal security.<sup>83</sup>

Secondly, in Kenya, the state structure guaranteed the constitution development. The presidential powers which were extremely extended under past constitution are considerably reduced. In addition, as to the formation of the executive power on the vertical rank, there is a main change: apart from the national government, the creation of 47 counties and related county governments comes in. In conclusion, under the new Constitution, Kenya moved out of a centralized democracy. In Somalia on the other hand, the constitution sets forth that Sharia law forms the foundation of the legal structure. Aside from probably limiting religious autonomy, this leaves a constitution founded on Islam to govern both non-Muslims and Muslims the same way. Again, in Kenya, the land reforms and the fight against corruption was not well stipulated in the past constitution whereas in Somalia, individual protections in the country missed in the former Somalia constitution.<sup>84</sup>

On the development process, in Kenya, just like the other British colonies in Africa, Kenya attained its independence after the Lancaster House Conferences organized by Britain where it declared to set free its colonies between 1953 and 1979. Since independence in 1964, Kenya has had three constitutions and two main amendments comprising of the last 2010 Kenya Constitution, according to contemporary Kenya history.

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<sup>83</sup> Pflanz, Mike. "With draft constitution, Somalia draws closer to democracy." Christian Science Monitor, August. N.PAG. Regional Business News (2012).

<sup>84</sup> Ibid



The 1963 Kenya Constitution was a discussed endeavour between Britain and the main political parties in Kenya, thereby bringing to an end the colonial law and made Kenya an authority that assumed the British parliamentary structure. It took care of parliamentary governance whose administrative powers were on the cabinet led by a Prime Minister whom the British monarch chose from amongst Parliament's party which was in power. In 1964, Kenya history indicates that its constitution was so basically and thoroughly changed, it became known as the 1964 Constitution. Through widespread parliamentary amendments, it changed the nation into a republic with a presidential structure of government.

Again, the 1964 Constitution initiated years of political catastrophes one after the other leading to, for instance, a division of executive powers between opposition Prime Minister and the President that ultimately resulted to an overhaul of the constitution in numerous amendments resulting to the 2010 Kenya Constitution. Between 1964 and 2010, a number of minor and major amendments were done to the constitution ending with the 1982 Constitutional Amendment that turned Kenya from a multi-party to a single-party nation. The 1983 and 1988 elections confirmed and reinforced the single-party structure under the lead of the Kenya African National Union or KANU. In the 1990s institutional decomposition, societal collapse and economic grief together troubled reform engagements with roots dating back in the 1980s.

Supported by US pressures to realize good governance, its parliament changed the constitution in 1991 that led to a multiparty elections held in December 1992. Following

the 1997 general elections, Parliament endorsed the Constitution of Kenya Review Act that established the legal basis for further comprehensive constitutional restructuring. The Constitution of Kenya Review Commission (CKRC) developed for the reason provided public education, and civic input to assist in drafting a new constitution to be deliberated on by the National Constitutional Conference (NCC). Despondently, the process was interrupted by extensive political quarrels among local powers that resulted to the draft constitution being discarded in the 2005 referendum. The draft was ultimately revitalized after the 2007-2008 post-election hostility and got a 67% support in the 2010 referendum thereby becoming the Kenya constitution 2010.

By the time the Somalia Transitional Federal Parliament convened for the first time in the town of Baidoa on 26 February 2006, the constitutional process was high on the list of urgent business. In 2004 parliament had been sworn in, and according to the transition timetable a draft constitution had to be ready by October 2007.<sup>85</sup>

In Somalia on the other hand, dependence on a constitutional process as part of a shift from a peace accord to a lawful elected government is a growing common tactic. It appreciates the fact that those who participates in peace agreements may not represent all the concerns in a state, that in most instances the variety of issues that require debate in a constitution are too much for a peace agreement, and that most of these issues are well discussed at a slower speed, in a highly wide-ranging manner. This was definitely the situation in Somalia. The peace negotiation assumed the structure of a transitional

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<sup>85</sup> Mwangi, Oscar Gakuo.. "State Collapse, Al-Shabaab , Islamism, and Legitimacy in Somalia." *Politics, Religion & Ideology* 13, no. 4: (2012) 513-527.

constitution, the Transitional Federal Charter of the Somali Republic, and commences various provisions that could be part of a constitution, encompassing a federal governance system and Islamic Shari'a as the fundamental source for legislation.

The Charter supports the formation of a Federal Constitutional Committee (FCC) whose members were to be suggested by the Council of Ministers and endorsed by the parliament. Thus, the initial step was to form this commission. Certainly some challenging discussions occurred amongst the ministers and parliamentarians in composing a 15 members list, who were eventually selected based on tribes using the '4.5 formula', similar to the parliament. The initial list lacked women on it, but in reaction to recommendation about the significance of including a woman as a commission; two of them were put in the list given for parliamentary endorsement.<sup>86</sup>

Deliberations with Somali people indicated that numerous central concepts that had been agreed on during the peace discussions were not well comprehended. In particular, federalism which entails handing over some authority and control by the national government in favour of the states or areas, had not been internalized, as it was evidence in discussions with TFG members. A lot of stress was put on the necessity for a public discourse and a broad process so as to make sure that the ultimate draft had legality and would be acknowledged at referendum. The Constitutional Affairs minister was the first victim of the new war in Somalia. After the August Friday prayers, he was murdered after the opening IFCC seminar. It is not known whether he was killed due to his

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<sup>86</sup> Hammond, Laura.. "History, Overview, Trends and Issues in Major Somali Refugee Displacements in the Near Region (Djibouti, Ethiopia, Kenya, Uganda and Yemen)." *Bildhaan, An International Journal Of Somali Studies*13, (2013) 55-79

participation in the constitutional process or he was just a reachable target. As a result of the confusion that followed, the constitutional process was in effect halted, as the transitional government concentrated all their interest to the catastrophe.

From 2006, the commissioners have made endeavours to constantly prepare, but with the TFG on the edge of disintegration there was little drive to carry out a complex constitutional process in the then unsteady setting. With a fresh government running from early 2009, there may be a chance to re-open the process, depending on whether the country is secure sufficiently to perform of all inclusive constitution development process.<sup>87</sup>

Consequently, in Somalia, a Charter was established to govern the development. Article 11 of the Charter expected the government establish an Independent Federal Constitution Commission (IFCC) which was to be endorsed by parliament so as to write an interim constitution, perform public conventions and present it openly to the community. Above leading the drafting process, the UNDP and UNPOS gave financial and technological support to the IFCC and the established committee of experts. The limited permission and random assortment of the IFCC members had grave outcome for the Somalia constitution-building process.<sup>88</sup>

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<sup>87</sup> Menkhaus, Ken.. "Governance without Government in Somalia." *International Security* 31, no. 3: (2006) 74-106.

<sup>88</sup> Article 11, Transitional Federal Charter of Somalia, 2004; available at <http://www.somalilaw.org/Documents/The%20Transitional%20Federal%20Charter%20of%20the%20Somali%20Republic.pdf>

In 2010, the IFCC released to the public domain the initial draft Constitution. Then, to establish the initial draft, the IFCC started collecting the views of the diverse parts of community. The Somalis reacted negatively to the anticipated constitution, raising many matters like federalism, nationality, task of Islam, and the government organization. In order to manage this negative public reaction, a newly established Committee of Experts and the IFCC members joined and customized the 2010 proposed Constitution without presenting the revised draft to the people. Instead, in 2012 they gave it to the seven 2011 UNPOS-prepared Roadmap signatories.

Amazingly, the signatories' first steps were to marginalize the IFCC and committee of experts' members that had drafted the second draft after their submissions in April 2012. Unexpectedly, in May, 2012, the seven signatories moved a planned constitution-building meeting to Addis Ababa in May 2012. Even if the Addis Ababa meeting focused on the constitution, the IFCC and the committee members were not invited to the convention. Consequently, the seven signatories secretly set up an appraisal committee from their delegations. The appraisal committee made alterations to the Draft Constitution that the IFCC and the committee of experts released while in Addis Ababa.<sup>89</sup>

While still in Addis Ababa, the signatories officially divided up the IFCC and the committee of experts that had drafted the second document and they reserved the Addis Ababa draft to themselves. In a week's time, a private appraisal committee had planned another conference in Nairobi to further amend the Constitution. Signatories were then

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<sup>89</sup> 2010 Draft Constitution, see the IFCC copy available at <http://www.dastuur.org/images/stories/docs/IFCC%20FINAL%20PROGRESS%20REPORT%2020th%20May%20English.pdf>

called to sign the final draft on June, 2012. Furthermore, President Sharif Sheikh came to Nairobi meeting with the draft that was revised in Addis Ababa with the opinion that it was the validly negotiated version.<sup>90</sup> Nonetheless, the Prime Minister Abdiweli Mohamed together with the signatories disagreed with him indicating that the final edition was the one the committee amended in Nairobi though the President maintained that he was not informed of the Nairobi meeting. Consequently, some Western diplomats and UNPOS came in and persuaded everybody to sign the draft.<sup>91</sup>

### **3.4 Constitutional Development Processes in Kenya and Somalia: Challenges**

Most of the constitution development processes in Africa were related to coup d'état.<sup>92</sup> Mostly, African government-change from the essentials of cold-war division lost their agency has been carried out by means of constitutions. The constitution has ended up being the roadmap to authority, and has taken the place of the coup as the means for reform. A constitution can never be expected to be the universal remedy for all political issues. Numerous constitutions were agreed upon by individuals sheltered in a sort of a well-established political impasse, where regardless of their not the same power neither could anticipate to apply long-term power over the other. According to Bennett et al., these constitutions were mainly designed to safeguard and then support democratic

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<sup>90</sup> Afyare A. Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (London: Pluto Press, 2010).

<sup>91</sup> Draft Constitution and four protocols at the UNPOS website, <http://unpos.unmissions.org/Default.aspx?tabid=9705&ctl=Details&mid=12667&ItemID=19206&language=en-US>

<sup>92</sup> Smoke, Paul. "The Evolution Of Fiscal Decentralization Under Kenya's New Constitution: Opportunities And Challenges." *Proceedings of The Annual Conference On Taxation* 104, (2011) 109-115.

revolutionize, by making those who were in authority without democratic legality to risk give up on it.<sup>93</sup>

In Kenya for instance, the challenge of developing a new constitution ranks high on the agenda of government officials in Kenya. The need for another constitution had been acknowledged for the past twenty years, but diverse issues and hindrances apprehended the process of constitution-development. The efforts that concluded in the 2005 referendum apparently left Kenya at a dead end. Nevertheless, the 2007 election movement and its bloody consequences necessitated a new constitution. As a result, the coalition government of national unity in early 2008 committed itself to facilitate the formation of a new constitution thereby setting up a committee of experts to draft it. The first challenge that Kenya experienced in its quest to develop a constitution were: first, the lack of Consensus in the country due to the failure to agree on a constitutional framework has in the past been very hard and slow to realize.

Nevertheless, agreement among political leaders as to constitutional forms and goals has always been of critical significance in constitution-making efforts in the twentieth century or earlier. For Kenya, the experience of the twentieth century indicates a lack of consensus as to the goal of constitution-making and the specifics of constitutions. Considering the 1950s model illustrated by the British regime for future constitutional building which clearly described the success of consensus as a vital factor in the process, the Secretary of State for the Colonies James Griffiths indicated that any resolution

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<sup>93</sup> Bennett, Sara, Asha George, Daniela Rodriguez, Jessica Shearer, Brahim Diallo, Mamadou Konate, and Julie Cliff, et al.. "Policy challenges facing integrated community case management in Sub-Saharan Africa." *Tropical Medicine & International Health* 19, no. 7: (2014) 872-882

concerning Kenya's future constitutions would be strong if founded on agreement among the leaders of Kenya's racial groups. During the first Lancaster House constitutional convention in London in early 1960, hopes of an agreed constitutional accord quickly disappeared. The inter-racial negotiation produced no results.<sup>94</sup>

Secondly, in Kenya, there was failure of expert assistance towards constitutional development. The lack of achievement in constitutional agreements during the pre-independence period also contributed to the failure of foreign experts to take the process to any kind of accord. For instance, the constitutional advisers in the process of consensus building at the Lancaster House convention in of 1960 and 1962 were not helpful. This principle was rejected by KANU leaders, thus setting the stage for a long and controversial struggle over the future shape of the independence constitution at the second Lancaster House conference in early 1962. In addition, Kenya's political elite failed to agree on some issues as they were to be put in the constitution. Frequently, they failed to even get to significant agreements or compromise.<sup>95</sup>

In Somalia on the other hand, first, it presented one of the highly challenging contexts for constitution-development. Somalia has all through experienced civil war from 1988 with extreme levels of hostility, inter-clan clashes, warlord struggles for power, and constant minor aggressive clashes over resources. Despite the early 2006 period of relative peace, the country remained an extremely conflict-prone area with high chances of return to

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<sup>94</sup> Kagwanja, Peter Mwangi.. "Facing Mount Kenya Or Facing Mecca? The Mungiki, Ethnic Violence and The Politics Of The Moi Succession In Kenya, 1987-2002." *African Affairs* 102, no. 406: (2003) 25.

<sup>95</sup> Thuo Gathii, James.. "Popular Authorship and Constitution Making: Comparing and Contrasting The DRC And Kenya." *William & Mary Law Review* 49, no. 4: (2008) 1109-1138.



high levels violence. Hence, it was not easy for any constitutional process to take place in an atmosphere which has experienced the epitome of a failed state for over one and a half decade without formal justice structure, law enforcers, education structure, taxes, customs control and passports issuance.

The Somali case was further complex on the basis of the prospects for a flourishing constitutional process due to lack of transparency on the role that traditional elders in the state governance of the state. The issue of how to handle traditional elders was always challenging since there were few cases of constitutional structures that had incorporated a function for traditional power instruments.<sup>96</sup>

Secondly, in Somalia, the emergence of a new political Islamic movement in Somalia was also a challenge to constitutional development. The biggest population of the Somali population is Muslims, although most have traditionally practiced a moderate figure of Sunni Islam. Then, Shari'a law was among the legal structures historically that Somali Muslims depended on, but it was combined with traditional law established by clan elders. Hence, the U.S. attempt to ensure there was a development of the constitution was opposed by the earlier disparate courts which together to fought against them. The original coalition of the Sharia courts with the business people and civil society were truly inclusive and had huge support from the Mogadishu residents.<sup>97</sup>

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<sup>96</sup> Ibid

<sup>97</sup> Lewis, I. M.. "Visible And Invisible Differences: The Somali Paradox." Africa (Edinburgh University Press) 74, no. 4: (2004) 489-515.

Thirdly, the anticipated benefits and risks of a constitutional process in Somalia was also a challenge to constitutional development in Somalia. A constitution-building process offers huge opportunities for reunion, for negotiating answers to main troublesome issues in a non-violent set up, for agreeing on the modalities of federalism suitable to a broken state, for a figurative break with the history, for setting up an environment of hope and rebirth, and for the building of a legal and stable state.

Thus, any constitutional process in Somalia was supposed to run in a peaceful and inclusive way so as to keep away from the considerable risks of constitutional breakdown and of increasing clashes in the country. Thus, the process was divisive since it was not adequately participatory and its approach was not agreed on. Also, the civic education campaign brought divisions since it supported extremist views instead of encouraging moderation and conciliation. Finally, the political and security state of affairs in Somalia destabilized the constitutional process.<sup>98</sup>

### **3.5 Constitution Implementation Process in Kenya and Somalia: Challenges**

Even after going through the constitutional development process with a lot of challenges, the two countries, Kenya and Somalia still experienced challenges in the implementation process of the constitution. In Kenya, the implementation process has been facing numerous challenges.

The first challenge was the interpretation challenge. The final authority in interpretation of the 2010 Constitution as the process of execution unfolded was the judiciary. Other

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<sup>98</sup> Ibid

government arms, public bodies, authorities and commissions also have the power to interpret the constitution with the intervention of the court in case there is interpretation crisis. In case any of these government institutions decide to interpret the constitution in their individual way without seeking the direction of courts, a problem always arises especially in a case of a controversial interpretation that these institutions make and which unfavourably affect other organs. Thus, the 2010 constitution has experienced numerous interpretation challenges like presidential nominations; the next General Election date; gender representation rule and the constitutional amendment procedure.<sup>99</sup>

The second challenge is lack of cooperation among stakeholders in constitutional implementation. In Kenya, the past two years have had some level of cooperation as well as disputes and limited teamwork amongst vital implementation institutions. Furthermore, majority of the MPs are not familiar with some Constitutional issues thereby misinterpreting various clauses due to ignorance or for their political interests. The third challenge is **security**. Since elections are the main trigger of hostility and insecurity, national security forces take part in electoral processes. Since, the 2007 General Elections were marred by insecurity issues, the discussion continues on how to offer and systematize security during electoral processes. These security issues can be attributed to the improper implementation of the Kenyan constitution.<sup>100</sup>

In Somalia on the other hand, the constitutional implementation has also faced challenges. First, the present administration has an interim constitution at hand but lacks

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<sup>99</sup> Romanos, Amelia.. "Kenya closes in on its recovery." *Travel Trade Gazette UK & Ireland* no. (2013) 3052: 20

<sup>100</sup> Tekle, Tesfa-Alem.. "Ethiopia, Kenya leaders vow to combat threats to regional security." *Sudan Tribune*, November 23. (2012).

implementation instruments. In addition, the constitution is not complete and has not been publically approved. As a result, the whole constitution is exposed to different and contradictory interpretations which get corrupted by regimes that do not support vital provisions in the present constitution. With no clear constitutional implementation program and guiding principles, there is a possible deadlock between the centre (Mogadishu) and the regions (federal states). Since such issues have not been carefully dealt with, Mogadishu has ended up being the loser and may lack much significance to the affairs of the regional states. Hence, the present government in particular has wasted its four years in power doing nothing but argue on procedural matters in lieu of rebuilding of the country's institutions. As a result, the issue of whether Western governance structures will ever be implemented efficiently in Somalia or whether it will be essential to seek endogenous solutions constantly emerges which is the case in any democratization process supported by the global community.<sup>101</sup>

Secondly, Somaliland poses another challenge to achieving consensus on a vision for the future of the country. Even though Somaliland has in effect been running separately from 1991, a good number of people in Somalia do not agree with Somaliland's declaration of independence and regard it as part of what should become the united state of Somalia. In 2006 demarches to the Somaliland regime seeking to take part in the constitutional process were rejected, and the practice of including members of Somaliland tribes in Somali institutions did not change the certainty that those in authority in Somaliland presently reject union. Even if some of these constant challenges in the implementation

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<sup>101</sup> Lewis, I. M.. "Visible And Invisible Differences: The Somali Paradox." Africa (Edinburgh University Press) 74, no. 4: (2004) 489-515.

may be revolutionized by an extensive period of public education and discourse, it remains doubtful whether efforts to transfer representations, lessons and institutional systems from other stable and developed societies to Somalia will ever be do well. Owing to the fact that there is feeble, mistrusted formal legal and judicial system and the lack of bureaucratic ability, the chances for implementing a constitution in Somalia are very minimal. In addition the informal traditional systems competes with any new institutions or regulations assumed in the constitution.

### **3.6 Conclusion**

In conclusion, by looking at the comparison between Kenya and Somalia on constitutional development and implementation, it is evidence that the constitutional processes employed over the years in Kenya are very different from that of Somalia. This is contributed by the fact that that of Kenya was easily accepted by the people as opposed to the Somalia one where different groups of citizens and religious stands had issues with. Secondly, though there are challenges experienced by both countries on the constitution development and implementation process are different. Finally, it is evidence that the measures established by both countries to deal with the constitution implementation process are different.

**CHAPTER FOUR**  
**CONSTITUTIONALISM IN AFRICA: A CRITICAL ANALYSIS OF**  
**DEVELOPMENTS IN KENYA AND SOMALIA**

**4.1 Introduction**

Chapter Three provided a comparative study on Kenya and Somalia. It described the concept of constitutionalism in Africa by examining both Kenya and Somalia: from an overview of the constitutional development processes, implementation as well as the challenges they faced. The Chapter also looked at the measures out in place by the two countries to deal with these challenges.

This Chapter seeks to critically analyze some of the key issues emerging from the study; namely: i) Constitutional processes in Kenya and Somalia; ii) Challenges in the development process; iii) Challenges of implementation; and iv) Measures. It is a second look at the study and from a scholarly perspective.

**4.2 Emerging Issues**

**i) Constitutional Processes in Kenya and Somalia**

The concept of constitution building is more complex than the process of constitution making alone, although the latter is an inseparable part of it. Constitution building stretches over time and involves state as well as non-state organizations. In this sense it is almost an evolutionary process of nurturing the text and facilitating the unfolding of its logic and dynamics. So, for example, a text whose birth is in some respects inauspicious, even contested, can in time stamp its imprint on society and weave its way into public

favour, while a constitution proclaimed with great enthusiasm can run into difficulties, be ignored or even be expressly discarded. However, the record of the effectiveness of these constitutions is uneven. These developments have stimulated a growing interest in the politics and techniques of constitution making, particularly in the context of conflict resolution.

The former constitutions of both Kenya and Somalia had various limitations that prompted the development of new constitutions. First, in Kenya, the significant development which was vital from the past constitution is the inclusion of Article 43 that covers both economic and societal rights. These consist of the right to shelter, to food, medical services, to water and sanitation, to public security and to education. In addition, Article 42 was also included to cater for the right to a healthy and clean environment.

Another inventive Article was 46 which cover consumer rights which were not included in the past constitution thus limiting it to a particular degree. In Somalia on the other hand, one main development from the past Somalia constitution was in the Bill of rights which gives a principal structure for the rights of the people and clearly promises the initial concept of equality not considering the clan or religious affiliation; a shift that conquers major past hindrances to societal equality. The new of Somalia offers protections of women's and children's rights in both societal and political environments as well as health and personal security.<sup>102</sup> Another significant change was restructuring of the state power. The presidential powers which were extremely extended under past

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<sup>102</sup> Pflanz, Mike. "With draft constitution, Somalia draws closer to democracy." Christian Science Monitor, August. N.PAG. Regional Business News (2012).

constitution are considerably reduced. In addition, as to the formation of the executive power on the vertical rank, there was a main change: apart from the national government, the creation of 47 counties and related county governments.

Furthermore, the land reforms and the fight against corruption were not well stipulated in the past constitution. In summary, under the new Constitution, Kenya moved out of a centralized democracy. Similarly to Somalia, the constitution sets forth that Sharia law forms the foundation of the legal structure. Aside from probably limiting religious autonomy, this leaves a constitution founded on Islam to govern both non-Muslims and Muslims the same way. Again, individual protection in the country missed in the former constitution.<sup>103</sup>

The development process in Kenya can be traced from its independence. Since independence in 1964, Kenya has had three constitutions and two main amendments comprising of the last 2010 Kenya Constitution, according to contemporary Kenya history. The 1963 Kenya Constitution was a discussed endeavour between Britain and the main political parties in Kenya, thereby bringing to an end the colonial law and made Kenya an authority that assumed the British parliamentary structure. It took care of parliamentary governance whose administrative powers were on the cabinet led by a Prime Minister whom the British monarch chose from amongst Parliament's party which was in power.

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<sup>103</sup> Ibid



In 1964, Kenya history indicates that its constitution was so basically and thoroughly changed, it became known as the 1964 Constitution. Through widespread parliamentary amendments, it changed the nation into a republic with a presidential structure of government. Again, the 1964 Constitution initiated years of political catastrophes one after the other leading to, for instance, a division of executive powers between opposition Prime Minister and the President that ultimately resulted to an overhaul of the constitution in numerous amendments resulting to the 2010 Kenya Constitution. Between 1964 and 2010, a number of minor and major amendments were done to the constitution ending with the 1982 Constitutional Amendment that turned Kenya from a multi-party to a single-party nation. The 1983 and 1988 elections confirmed and reinforced the single-party structure under the lead of the Kenya African National Union or KANU. In the 1990s institutional decomposition, societal collapse and economic grief together troubled reform engagements with roots dating back in the 1980s. Supported by US pressures to realize good governance, its parliament changed the constitution in 1991 that led to a multiparty elections held in December 1992.

Following the 1997 general elections, Parliament endorsed the Constitution of Kenya Review Act that established the legal basis for further comprehensive constitutional restructuring. The Constitution of Kenya Review Commission (CKRC) developed for the reason provided public education, and civic input to assist in drafting a new constitution to be deliberated on by the National Constitutional Conference (NCC). Despondently, the process was interrupted by extensive political quarrels among local powers that resulted to the draft constitution being discarded in the 2005 referendum. The draft was ultimately

revitalized after the 2007-2008 post-election hostility and got a 67% support in the 2010 referendum thereby becoming the Kenya constitution 2010.

In Somalia, constitutional process can be traced from 26<sup>th</sup> February 2006. In 2004 parliament had been sworn in, and according to the transition timetable a draft constitution had to be ready by October 2007.<sup>104</sup> Peace negotiation assumed the structure of a transitional constitution, the Transitional Federal Charter of the Somali Republic, and commenced various provisions that could be part of a constitution, encompassing a federal governance system and Islamic Shari'a as the fundamental source for legislation. The Charter supports the formation of a Federal Constitutional Committee (FCC) whose members were to be suggested by the Council of Ministers and endorsed by the parliament. Thus, the initial step was to form this commission. Certainly some challenging discussions occurred amongst the ministers and parliamentarians in composing a 15 members list, who were eventually selected based on tribes using the '4.5 formula', similar to the parliament. The initial list lacked women on it, but in reaction to recommendation about the significance of including a woman as a commission; two of them were put in the list given for parliamentary endorsement.<sup>105</sup>

Deliberations with Somali people indicated that numerous central concepts that had been agreed on during the peace discussions were not well comprehended. In particular, federalism which entails handing over some authority and control by the national

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<sup>104</sup> Mwangi, Oscar Gakuo.. "State Collapse, Al-Shabaab , Islamism, and Legitimacy in Somalia." *Politics, Religion & Ideology* 13, no. 4: (2012) 513-527.

<sup>105</sup> Hammond, Laura.. "History, Overview, Trends and Issues in Major Somali Refugee Displacements in the Near Region (Djibouti, Ethiopia, Kenya, Uganda and Yemen)." *Bildhaan, An International Journal Of Somali Studies*13, (2013) 55-79

government in favour of the states or areas, had not been internalized, as it was evidence in discussions with TFG members. A lot of stress was put on the necessity for a public discourse and a broad process so as to make sure that the ultimate draft had legality and would be acknowledged at referendum.

The Constitutional Affairs minister was the first victim of the new war in Somalia. After the August Friday prayers, he was murdered after the opening IFCC seminar. It is not known whether he was killed due to his participation in the constitutional process or he was just a reachable target. As a result of the confusion that followed, the constitutional process was in effect halted, as the transitional government concentrated all their interest to the catastrophe. From 2006, the commissioners have made endeavours to constantly prepare, but with the TFG on the edge of disintegration there was little drive to carry out a complex constitutional process in the then unsteady setting. With a fresh government running from early 2009, there may be a chance to re-open the process, depending on whether the country is secure sufficiently to perform of all inclusive constitution development process.<sup>106</sup>

## **ii) Challenges in the Development Process**

Most of the constitution development processes in Africa were related to coup d'état.<sup>107</sup>

The constitution has ended up being the roadmap to authority, and has taken the place of the coup as the means for reform. A constitution can never be expected to be the

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<sup>106</sup> Menkhaus, Ken.. "Governance without Government in Somalia." *International Security* 31, no. 3: (2006) 74-106.

<sup>107</sup> Smoke, Paul. "The Evolution Of Fiscal Decentralization Under Kenya's New Constitution: Opportunities And Challenges." *Proceedings of The Annual Conference On Taxation* 104, (2011) 109-115.

universal remedy for all political issues. Numerous constitutions were agreed upon by individuals sheltered in a sort of a well-established political impasse, where regardless of their not the same power neither could anticipate to apply long-term power over the other. According to Bennett et al., these constitutions were mainly designed to safeguard and then support democratic revolutionize, by making those who were in authority without democratic legality to risk give up on it.<sup>108</sup>

In Kenya for instance, the challenge of developing a new constitution ranks high on the agenda of government officials in Kenya. The need for another constitution had been acknowledged for the past twenty years, but diverse issues and hindrances apprehended the process of constitution-development. The efforts that concluded in the 2005 referendum apparently left Kenya at a dead end. Nevertheless, the 2007 election movement and its bloody consequences necessitated a new constitution. As a result, the coalition government of national unity in early 2008 committed itself to facilitate the formation of a new constitution thereby setting up a committee of experts to draft it.

The first challenge that Kenya experienced in its quest to develop a constitution was the lack of Consensus in the country due to the failure to agree on a constitutional framework to be adopted. Nevertheless, agreement among political leaders as to constitutional forms and goals has always been of critical significance in constitution-making efforts in the twentieth century or earlier. For Kenya, the experience of the twentieth century indicates a lack of consensus as to the goal of constitution-making and the specifics of

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<sup>108</sup> Bennett, Sara, Asha George, Daniela Rodriguez, Jessica Shearer, Brahim Diallo, Mamadou Konate, and Julie Cliff, et al.. "Policy challenges facing integrated community case management in Sub-Saharan Africa." *Tropical Medicine & International Health* 19, no. 7: (2014) 872-882

constitutions. Considering the 1950s model illustrated by the British regime for future constitutional building which clearly described the success of consensus as a vital factor in the process, the Secretary of State for the Colonies James Griffiths indicated that any resolution concerning Kenya's future constitutions would be strong if founded on agreement among the Kenya's racial groups leaders. During the first Lancaster House constitutional convention in London in early 1960, hopes of an agreed constitutional accord quickly disappeared. The inter-racial negotiation produced no results.<sup>109</sup>

Secondly, failure of expert assistance towards constitutional development is another serious problem. The lack of achievement in constitutional agreements during the pre-independence period contributed to the failure of foreign experts to take the process to any kind of accord. For instance, the constitutional advisers in the process of consensus building at the Lancaster House convention in of 1960 and 1962 were not helpful. This principle was rejected by KANU leaders, thus setting the stage for a long and controversial struggle over the future shape of the independence constitution at the second Lancaster House conference in early 1962. In addition, Kenya's political elite failed to agree on some issues as they were to be put in the constitution. Frequently, they failed to even get to significant agreements or compromise.<sup>110</sup>

In Somalia, the problems are more adverse than in Kenya. First, Somalia has all through experienced civil war from 1988 with extreme levels of hostility, inter-clan clashes,

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<sup>109</sup> Kagwanja, Peter Mwangi.. "Facing Mount Kenya Or Facing Mecca? The Mungiki, Ethnic Violence and The Politics Of The Moi Succession In Kenya, 1987-2002." *African Affairs* 102, no. 406: (2003) 25.

<sup>110</sup> Thuo Gathii, James.. "Popular Authorship and Constitution Making: Comparing and Contrasting The DRC And Kenya." *William & Mary Law Review* 49, no. 4: (2008) 1109-1138.

warlord struggles for power, and constant minor aggressive clashes over resources. Despite the early 2006 period of relative peace, the country remained an extremely conflict-prone area with high chances of return to high levels violence. Hence, it was not easy for any constitutional process to take place in an atmosphere which has experienced the epitome of a failed state for over one and a half decade without formal justice structure, law enforcers, education structure, taxes, customs control and passports issuance.

The Somali case was further complex on the basis of the prospects for a flourishing constitutional process due to lack of transparency on the role that traditional elders in the state governance of the state. The issue of how to handle traditional elders was always challenging since there were few cases of constitutional structures that had incorporated a function for traditional power instruments.<sup>111</sup>

Secondly, the emergence of a new political Islamic movement was also a challenge to constitutional development. The biggest population of the Somali population is Muslims, although most have traditionally practiced a moderate figure of Sunni Islam. Shari'a law was among the legal structures that Somali Muslims depended on, but it was combined with traditional law established by clan elders. Hence, the U.S. attempt to ensure there was a development of the constitution was opposed by the earlier disparate courts which together fought against them. The original coalition of the Sharia courts with the business

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<sup>111</sup> Ibid

people and civil society were truly inclusive and had huge support from the Mogadishu residents.<sup>112</sup>

Thirdly, the anticipated benefits and risks of a constitutional process in Somalia was also a challenge to constitutional development. A constitution-building process offers huge opportunities for reunion, for negotiating answers to main troublesome issues in a non-violent set up, for agreeing on the modalities of federalism suitable to a broken state, for a figurative break with the history, for setting up an environment of hope and rebirth, and for the building of a legal and stable state. Thus, any constitutional process in Somalia was supposed to run in a peaceful and inclusive way so as to keep away from the considerable risks of constitutional breakdown and of increasing clashes in the country. Thus, the process was divisive since it was not adequately participatory and its approach was not agreed on. Also, the civic education campaign brought divisions since it supported extremist views instead of encouraging moderation and conciliation. Finally, the political and security state of affairs in Somalia destabilized the constitutional process.<sup>113</sup>

Fourthly, the 'Jubbaland' controversy has been a growing problem. There are several questions on this issue. Who has the legitimate right to establish a new federal state by that name? Are the proponents taking an inclusive approach and are employing the right process? And who has the authority of oversight? 'Jubbaland' has all the dangerous elements necessary to kick the stabilization plan like a sand castle. It has the armed

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<sup>112</sup> Lewis, I. M.. "Visible And Invisible Differences: The Somali Paradox." *Africa* (Edinburgh University Press) 74, no. 4: (2004) 489-515.

<sup>113</sup> Ibid

militias, clan-lords and foreign intrusions of competing interests. And it is, by far, the most polarizing issue facing the nation today. Majority of those who advocate for the establishment of ‘Jubbaland’ claim that they have, as the constitution permits, two regions (Lower Jubba and Gedo) from pre-civil war regional structure to form a new federal state. They insist that the process that created the apparent front runners was legal and inclusive, and that it they had a clear mandate from IGAD. While this may appear a fairly simple constitutional issue, unfortunately the new constitution is the epicentre of all the legal, political, and moral confusions.

The constitution not only institutes and legalizes the most discriminatory form of clannish — the infamous 4.5 system — but also incentivizes clan-based Balkanization. It has already grandfathered certain clan-based political entities such as ‘Puntland’ and ‘Galmudug’ as federal states, and it grants them profound discretions to unilaterally go into any deals with any foreign entity they wish for oil explorations, mining of minerals, etc.

#### **iv) Challenges of Implementation**

In Kenya and Somalia, the implementation of the constitution has faced a number of challenges. The main challenges include interpretation, cooperation among stakeholders in constitutional implementation and security challenges under the emerging constitutional dispensation.<sup>114</sup>

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<sup>114</sup> Romanos, Amelia.. "Kenya closes in on its recovery." *Travel Trade Gazette UK & Ireland* no. (2013) 3052: 20



To begin with is the problem of interpretation. These include presidential nominations; one-third gender rule (already an issue being addressed in the Supreme Court as indicated above); and the date of the next General Election (eventually set at March 4, 2013 only after litigation took place); and the Procedure on constitutional amendment.

The constitutional implementation process is a crucial for ensuring that first; the Constitution is interpreted correctly, and assigned correct meaning. And second, that the correct constitutional meaning does not differ from constitutional implementation by way of legislative, policy, institutional and administrative practices that establish “constitutional practice.” This is especially significant in light of the patent and latent contradictions, ambiguities, overlaps and doctrinal and structural difficulties in the constitutional provisions, attributed primarily to the politically rather than the financially (or legally) negotiated nature of these provisions. Interpretation of any legal text, and especially the Constitution, is based on the view that words, terms or phrases have imprecise meaning and hence need to be defined, interpreted, construed and translated. This is done with a view to discovering and implementing meaning.

The judiciary is the final authority in interpretation of the current constitution; 2010 Constitution as the process of implementation unfolds. Other important arms of Government, like the Legislature and the Executive seek guidance from the judiciary whenever a problem of interpretation arises. The same applies to all public bodies, authorities, commissions, and institutions, among others. A problem is said to occur when these organs, bodies, institutions, arms of Government, and commissions choose to

interpret the constitution in their own way without seeking the guidance of court. This specifically applies to potentially controversial interpretations that these organs or bodies make and which adversely affect other organs. The 2010 constitution has faced a number of interpretation challenges. These include presidential nominations; one-third gender rule; and the date of the next General Election; and the Procedure on constitutional amendment.

Another problem is lack of cooperation among stakeholders in constitutional implementation. In the past two years, Kenya has witnessed some degree of cooperation but also wrangles and limited collaboration among key implementation institutions. For instance, in the first year, there were continued and persistent wrangles between CIC and the office of the Attorney-General. These reduced somewhat in the second year. CIC routinely accused the A-G's chambers (and the A-G) of inordinate delays in publication of bills and their presentation to the Cabinet and Parliament. CIC Chair, Charles Nyachae, was quoted complaining of the alleged delays by the A-G's chambers in the presentation of the Bills. He stated:

“The continued delay is obviously prejudicial to the implementation process, and jeopardizes consequential imperatives such as establishment of the Commission and preparation for the General Election.” 154. Further, CIC blamed the A-G for allegedly forwarding two Bills to the Cabinet for review and approval without consultations. The Commission proceeded to file a case in court to stop Parliament from debating the two Bills, namely the National Government Loans Guarantee Bill, and the Contingencies

Fund and County Funds Emergency Bill.155 Parliament had already discussed and passed the Bills, and the matter stayed that way.

Furthermore, majority of the MPs are not familiar with some Constitutional issues thereby misinterpreting various clauses due to ignorance or for their political interests. Inter-party wrangles between the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) resulted in the disbandment of the Justice and Legal Affairs Committee also delayed the enactment of some bills as well as the engagement of Supreme Court Judges. The wrangles between CIC and Parliament, and Parliament and the Government Printer continued into the second year (2012). There have also been wrangles between CIC and the administrative bureaucracy especially the Office of the Head of Public Service and Treasury; among others. Such wrangles pose a serious challenge to constitution implementation.

Thirdly, the state has been faced with numerous security challenges. Elections remain a main trigger of violence and insecurity, and security forces (regular police, administrative police, military) play a key role in electoral processes. Beginning from 2007 General Elections, the discussion continues on how to provide and organize security during electoral processes, and how to make sure that the involvement of the security forces does allow for free and fair elections.

Repeatedly, section 5 of the National Intelligence Service Act provides that the National Intelligence Service (NIS) shall be responsible for security intelligence and counter

intelligence to enhance national security. It is tasked with an array of duties. Those that relate directly to security during elections include: detecting and identifying any threat or potential threat to national security; advising the President and the Government of any threat or potential threat to national security (e.g. political or ethnic violence) and safeguarding and promoting national security, national interests, sovereignty and the economic wellbeing of the Republic and its citizens within and outside Kenya. If it performs the foregoing duties well, NIS will effectively ensure that there is peace and security during elections.<sup>115</sup>

However, Kenya has faced and is continuing to face critical security challenges, most of which seem related to the March 4, 2013 General elections. These include security problems in the Tana Delta, Kisumu, the Coast Region (MRC), Baragoi Valley, and Nairobi (the grenade attacks). These security issues can be attributed to the improper implementation of the Kenyan constitution.

Somalia on the other hand, faces a different amalgamation of challenges. Some of these challenges may be ameliorated by an extended period of civic education and dialogue. The present administration has an interim constitution at hand but lacks implementation instruments. In addition, the constitution is not complete and has not been publically approved. As a result, the whole constitution is exposed to different and contradictory interpretations which get corrupted by regimes that do not support vital provisions in the present constitution. With no clear constitutional implementation program and guiding

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<sup>115</sup> Tekle, Tesfa-Alem.. "Ethiopia, Kenya leaders vow to combat threats to regional security." Sudan Tribune, November 23. (2012).

principles, there is a possible deadlock between the centre (Mogadishu) and the regions (federal states). For example, according to Section 1 of Article 1 of the new provisional constitution adopted on August 1, 2012, Somalia is defined as a federal, sovereign, and democratic republic founded on inclusive representation of the people, a multiparty system advised by social justice towards the country's different regions.

Furthermore, Section 6 of Article 49, whose original intent was to mediate between the interests of the centre vs. the periphery regions, states that based on a voluntary decision, two or more regions may merge to form a Federal Member State. Since such issues have not been carefully dealt with, Mogadishu has ended up being the loser and may lack much significance to the affairs of the regional states. Hence, the present government in particular has wasted its four years in power doing nothing but argue on procedural matters in lieu of rebuilding of the country's institutions. As a result, the issue of whether Western governance structures will ever be implemented efficiently in Somalia or whether it will be essential to seek endogenous solutions constantly emerges which is the case in any democratization process supported by the global community.

Secondly, Somaliland poses another challenge to achieving consensus on a vision for the future of the country. Even though Somaliland has in effect been running separately from 1991, a good number of people in Somalia do not agree with Somaliland's declaration of independence and regard it as part of what should become the united state of Somalia. In 2006 demarches to the Somaliland regime seeking to take part in the constitutional process were rejected, and the practice of including members of Somaliland tribes in

Somali institutions did not change the certainty that those in authority in Somaliland presently reject union. Even if some of these constant challenges in the implementation may be revolutionized by an extensive period of public education and discourse, it remains doubtful whether efforts to transfer representations, lessons and institutional systems from other stable and developed societies to Somalia will ever be do well.

Owing to the fact that there is feeble, mistrusted formal legal and judicial system and the lack of bureaucratic ability, the chances for implementing a constitution in Somalia are very minimal. In addition the informal traditional systems competes with any new institutions or regulations assumed in the constitution.

**v) Measures**

The Kenyan government established the Commission for the Implementation of the Constitution (CIC); under section 5 of the Sixth Schedule to the Constitution and the Commission for the Implementation of the Constitution Act, 2010. The functions of CIC are monitoring, facilitating, coordinating and overseeing the implementation of the Constitution. It has the duty of reporting quarterly to the President, the Parliamentary, and Select Committee for the Implementation of the Constitution and to the People of Kenya. Other key implementation institutions include, first, Parliament that is vital in enacting legislation. Second, the relevant executive agencies (especially ministries or departments) that provides the policy framework. And third, the presidency that assents to Bills. Fourth, the Kenya Law Reform Commission (KLRC) has a role in proposing legislation and drafting some of them. Fifth, relevant ministries or departments also propose

legislation to be enacted, policies to be reviewed or reformed as well as providing consultative forums. Seventh, the office of the Attorney-General (in the structural and administrative context of the State Law Office) publishes Bills, presents proposed legislation to the Cabinet for discussion and approval, and forwards the legislation to the Government Printer, among other functions.

In dealing with interpretation challenge, other government arms, public bodies, authorities and commissions are required to seek guidance from the court whenever an interpretation crisis arise. This would be common especially when any of these government institutions decide to interpret the constitution in their own individual way without seeking the direction of courts. This indeed creates a controversy where an institution implements a clause which unfavourably affects other organs.

The Judiciary should play in constitutional implementation and in promoting constitutionalism and the rule of law in Kenya. First, the Judiciary should interpret the Constitution faithfully considering its text (or letter), structure and history, practice or tradition. Thus the Judiciary is expected, while interpreting the Constitution, to ensure that its supremacy is not compromised and further to declare void any legislation or conduct that is inconsistent with the Constitution.

Second, the Judiciary can play a major role in implementation and promote constitutionalism by enforcing the Constitution 2010 through decisions or orders where

there has been blatant disregard or neglect in enforcing the Constitution, and more importantly, in enforcing the Bill of Rights.

Third, the Judiciary can be instrumental in promoting constitutionalism through constitutional implementation, which overlaps with interpretation. Can the Judiciary move *suo moto* where the other organs of Government have failed or are intransigent or recalcitrant? What is the import of a declaratory order under Article 261(5)-(7)? Can the Judiciary order institutions like Parliament to pass an important implementation Bill if Parliament fails or refuses to do so?

Fourth, the Judiciary can play a major role in implementation through a judicious interpretation, construction or translation of the text, structure and history in the context of the social, economic, technological, cultural or political question before it. There are constitutional issues that will be brought before the courts that are not just rule-based but are largely social or political. For example, the President's nomination of the Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget were largely a political issue. Justices Daniel Musinga and Mohammed Ibrahim ruled that the nominations were unconstitutional for want of compliance with the gender rule and consultation in the political branch (between the two Principals in the Grand Coalition Government).

Independent institutions are also created to oversee the implementation process. Article 248 of the 2010 Constitution establishes nine commissions and independent offices.



These include the Kenya National Human Rights and Equality Commission, the Independent Electoral and Boundaries Commission, the Commission for Revenue Allocation, the Parliamentary Service Commission, the Judicial Service Commission, and the Public Service Commission. These commissions differ from commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of Government and they are textually (although not practically), administratively and financially delinked from the executive.

For instance, in Kenya, land reform which remains a serious, unresolved issue within its politics. Article 60 of the constitution contains seven major provisions which aim to secure land rights and ensure equitable access and ecological maintenance of land, an important consideration, given the rapid growth of Kenyan cities. The constitution creates a new category of community land which includes 'trust land': land governed on customary terms during independence. The law bestows control of these areas on traditional communities, which means that issues like land disputes, for example over grazing rights, can be resolved at the community level. Community control holds many benefits because remedies available at national Government level are often limited and difficult to access. The size of land holdings is regulated by the independent national Land Commission, which does not interfere with matters of individual property rights. Colonial and historic land injustices are not formally dealt with, so groups like the Maasai will not receive any redress.

Again, on gender equality in Kenya, the constitution contains extensive gender provisions designed to equalize men and women's status. Kenya is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, and spearheaded the Nairobi Forward-Looking Strategies for Women initiative in 1985. As part of the 2000 National Gender Policy, a National Commission on Gender and Development was enacted through an Act of Parliament in 2003.

The constitution expands the country's existing commitment to gender equality. It protects gender equality in land ownership with provisions that counter customary-law restrictions on women's land ownership. Only 4% of current land owners are women. The constitution also guarantees representation for women by reserving seats for them in the Senate and the National Assembly. Article 27 (8) requires the State to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

The question of participation and representation has proven to be a complex issue in constitutional implementation. Some of the key issues relate to gender, ethnicity, youth and persons with disability. There are also interests such as the civil society and the private sector. The High Court has adjudicated on the gender dimension. And the presidency, premiership, National Cohesion and Integration Commission (NCIC), and others have addressed the ethnic issue from different perspectives and with varied consequences.

Some of the issues regarding the role of the Judiciary in constitutional implementation include the vetting of judges and magistrates; the establishment and operationalisation of the divisions of the High Court; and the operationalisation of the administrative bureaucracy in the Judiciary – at all the levels. Some may be symbolic but equally important like the dress code. By end 2011, the Chief Justice communicated a change in judicial dress code and address through a Circular No. CJ90. The alteration was the product of a consensus at a Judges Colloquium also attended by the Judicial Service Commission (JSC). One of the changes that were made was that wigs were discarded with immediate effect. Those who had them were instructed to either keep them as souvenirs or hand them over to the Chief Registrar; no head gear of any type will be worn except by the Kadhis.

Somalia has, on the other hand, tried to counter these challenges. In 2012 Somalia made major strides to stabilize the country by successfully ratifying a constitution. In 2012, Somalia successfully ratified a Constitution after two decades without a central government. The newly ratified constitution has created a framework for popular elections for parliament.<sup>116</sup> Zakat Foundation of America cemented their efforts for the long-term development of Somalia through an office located in Mogadishu which will carry out development and vocational training programs, especially in Southern Somalia.

The federal government is mandated to create a more secure, safer and accountable Somalia that: is able to maintain peace within its borders and with its neighbours; is increasingly capable of restoring and maintaining internal security; protects its civilians,

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<sup>116</sup> Seal, Andrew, and Rob Bailey.. "The 2011 Famine in Somalia: lessons learnt from a failed response?."Conflict & Health 7, no. 1: (2013) 1-11.

with special attention to securing the rights of women, youth and children; increases equitable access to justice; contributes to the rule of law; applies human rights standards; adheres to international humanitarian law; and has accountable and financially sustainable security institutions.<sup>117</sup> Civilian leadership and democratic oversight of the security sector are foundational principles enshrined in the Somali Constitution and are pivotal in the delivery of this strategic objective.

There is an enduring requirement to properly pay, equip and sustain the Somali security institutions to enable them to deliver effective security alongside AMISOM and other partners. Immediate action in this regard is a condition *sine qua non* to sustain the current progress on security and needs to be developed in tandem with their ability to exercise effective command and control and the development of police capacity. The Ministry of Defence is responsible for the Armed Forces; the Ministry of Interior is responsible for both the Somali Police and the National Intelligence and Security Agency; the Ministry of Justice is responsible for the Custodial Corps. All these institutions are responsible for the delivery of security in line with the policies set out by their ministries, including a zero tolerance on gender-based violence, particularly sexual violence and exploitation, and other forms of abuse. The immediate requirements to achieve this have been identified and cost determined. Finally, there is a need for legislation and institutional frameworks for accountability and oversight to be reviewed and updated.

The peace agreement took the form of a transitional constitution – the Transitional Federal Charter of the Somali Republic. The Charter provided for the creation of a

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<sup>117</sup> The Federal Republic of Somalia.

Federal Constitutional Committee (FCC), the members of which were to be proposed by the Council of Ministers and approved by the parliament. The first step therefore was to create this commission. An early list did not have any women on it, but in response to advice about the importance of having a representative commission; two women were included in the list sent for parliamentary approval. This particularly countered the representation problem.

### **4.3 Conclusion**

From the discussion, it is evidence that the concept of constitution development is more complex than the process of constitution making alone, although the two are inseparable. Constitution development extends over time and entails state as well as non-state organizations. Furthermore, it is evidence that most of the constitution development processes in Africa were related to coup d'état. It is clear that a constitution can never be expected to be the universal remedy for all political issues. In Kenya and Somalia, the implementation of the constitution seem to experience a number of challenges with the main challenges being interpretation, cooperation among stakeholders in constitutional implementation and security challenges under the emerging constitutional dispensation

## CHAPTER FIVE

### CONCLUSION

#### 5.1 Summary

The main purpose of this study was to address the concept of Constitutionalism in Africa. This was done by comparing and contrasting the constitution development process in Kenya and Somalia between year 2004 and year 2012. The study was to accomplish this through: studying the constitutional development processes that were applied throughout the years in Somalia as well as Kenya, analyzing the diverse challenges that faced the constitutional development processes in the two countries and cross-examining the challenges that faced the constitution implementation process in both Kenya and Somalia.

This study used a descriptive research design. The target population consisted of the Kenyan people as well as Somali people living in Mogadishu, those in the country and Somalia refugees being hosted in Kenya at Daadab as well as the staff working with NGO's and peace keeping agents involved in constitution implementation in Somalia. The study was restricted to the Nairobi and southern central part of the Somali republic and only covered the debates and discourses connected to the constitutionalism in periods before and during colonialism from 1960 to 2012 so as to narrow the extent of the study. The study made use of primary data sources. Primary data was obtained by use of interview schedules and key informant interview guides. Interview schedules were used on Kenyans and the Somali people in Mogadishu, those in within Kenya especially in Eastleigh and Somalia refugees being hosted in Kenya at Daadab Refugee Camp. The key informants in this study were the key government officials and NGO's staff that were

involved in constitution development and implementation in both Kenya and Somalia. On the other hand, the secondary information was obtained from a collection and assessment of published and unpublished sources, periodicals, journals and academic papers that was then taken through comprehensive and critical examination.

The study found that faced with an amalgamation of challenges which affects its development and implementation. Challenges that arise during development as seen in both Somalia and Kenya include conflict. This emanates from an array of contentious issues range between structural, political, economic, social and cultural interests. Somalia has by large affected by civil wars since 1988 while in Kenya Post Election Violence has played a major role in this. Furthermore, emergence of a new political Islamic movement in Somalia was also a challenge to constitutional development as her major population comprises the Muslims although most of them have traditionally practiced a moderate figure of Sunni Islam.

Furthermore, according to the study, Shari'a law was among the legal structures historically that Somali Muslims depended on, but it was combined with traditional law established by clan elders. Other challenges included the anticipated benefits and risks of a constitutional process and political and security state of affairs. On the other hand, Kenya's constitution development challenges included the lack of consensus in the country due to the failure to agree on a constitutional framework which was in the past have been very hard and slow to realize and lack of expert assistance towards constitutional development.

Upon successful development, there seems to be numerous challenges that face its implementation. In Kenya they include interpretation, cooperation among stakeholders in constitutional implementation and security challenges under the emerging constitutional dispensation. In Somalia, lack of consensus on a vision for the future of the country and lack of implementation instruments from interim government has contributed to the difficulty in the constitution development process.

However, this process is overseen by government created organs. In Kenya, the Constitution implementation committee (CIC) is charged with this mandate. In Somalia the Independent Constitutional Review and Implementation Commission (ICRIC) is responsible for constitution matters.

## **5.2 Key Findings**

The critical analysis as done on constitutionalism in Africa demonstrated that constitutionalism require, adherence to the rule of law, protection of human rights and imposing limits on powers of the incumbent government. It is the blueprint for any system of government where powers and responsibilities are delegated among a defined set of bodies or organs and limitations are implied in these organs.

It is evident from the study that constitutionalism is an on-going process that is subject to alterations by the generation that engages it. However, these alterations are done in a structured way where all the affected parties are consulted having one body taking control over the process. Somalia's first constitution was developed in 2006 as a



transition constitution while the Kenya's has been amended severally since independence till today's 2010 constitution. Since 2006, the commissioners in Somalia have attempted to continue with preparations, but with the TFG on the verge of collapse there was little impetus to run a complex constitutional process in such an unstable environment. With a new government in place since January 2009 there may be an opportunity to re-launch the process, but it will depend on whether the country is stable enough to conduct of a participatory constitution building process.

The study found that Kenya's history portrays that its constitution was so fundamentally and radically altered since 1964, it became known as the 1964 Constitution. Through extensive parliamentary amendments, it transformed the country into a republic with a presidential system of government. The 1964 Constitution spawned years of political crises one after the other resulting in a split of executive powers between opposition Prime Minister Raila Odinga and President Mwai Kibaki that finally led to an overhaul of the constitution in several amendments leading up to the 2010 Kenya Constitution. As a process, it is faced with an amalgamation of challenges which affects its development and implementation.

The study found that, based on the analysis done about the subject in Somalia and Kenya, it is clearly evident constitutionalism is by large affected by conflict. This emanates from an array of contentious issues range between structural, political, economic, social and cultural interests. Since the reintroduction of multiparty politics in 1991, the political landscape in Kenya has been characterized by incidences of tribal- and clan-based

disturbances with political undertones. In the period leading up to the first multiparty elections in 1992, some areas of the country flared up in tribal conflict that was geared towards influencing voting patterns in the elections.

It is evidence from the study that Kenya was majorly affected by Post Election Violence which was fuelled by tribal clashes with a major concern on land ownership and distribution of resources. Somalia state on the other hand collapsed in 1990 after twenty years of oppressive dictatorship that started in October 1969 after a brief democratic system exercise. After the downfall of the military regime in 1990, the opposition forces were disturbingly unprepared for the maintenance of law and order and have completely failed to restore state institutions. In the mayhem that followed, each faction in the opposition forces unilaterally claimed victory over the regime, causing the country to descend into a civil war.

The study found that Somalia has all through experienced civil war from 1988 with extreme levels of hostility, inter-clan clashes, warlord struggles for power and constant minor aggressive clashes over resources. According to the study, this was aggravated by lack of transparency on the role that traditional elders in the state governance of the state. Furthermore, emergence of a new political Islamic movement in Somalia was also a challenge to constitutional development as her major population comprises the Muslims although most of them have traditionally practiced a moderate figure of Sunni Islam. Consequently, Shari'a law was among the legal structures historically that Somali Muslims depended on, but it was combined with traditional law established by clan

elders. For this reason, the U.S. attempt to ensure there was a development of the constitution was opposed by the earlier disparate courts which came together and fought against them.

Also, the study found out that other challenges included the anticipated benefits and risks of a constitutional process and political and security state of affairs. Constitution-building process offers huge opportunities for reunion, for negotiating answers to main troublesome issues in a non-violent set up, for agreeing on the modalities of federalism suitable to a broken state, for a figurative break with the history, for setting up an environment of hope and rebirth, and for the building of a legal and stable state.

Thus, as found by the study, any constitutional process in Somalia was supposed to run in a peaceful and inclusive way so as to keep away from the considerable risks of constitutional breakdown and of increasing clashes in the country. Thus, the process was divisive since it was not adequately participatory and its approach was not agreed on. Kenya's constitution development challenges included the lack of consensus in the country due to the failure to agree on a constitutional framework which was in the past have been very hard and slow to realize. Considering the 1950s model illustrated by the British regime for future constitutional building which clearly described the success of consensus as a vital factor in the process, the Secretary of State for the Colonies James Griffiths indicated that any resolution concerning Kenya's future constitutions would be strong if founded on agreement among the Kenya's racial groups leaders. During the first Lancaster House constitutional convention in London in early 1960, hopes of an agreed

constitutional accord quickly disappeared. The inter-racial negotiation produced no results.

As found by the study, another challenge was lack of expert assistance towards constitutional development. Lack of achievement in constitutional agreements during the pre-independence period also contributed to the failure of foreign experts to take the process to any kind of accord. For instance, the constitutional advisers in the process of consensus building at the Lancaster House convention in of 1960 and 1962 were not helpful. This principle was rejected by KANU leaders, thus setting the stage for a long and controversial struggle over the future shape of the independence constitution at the second Lancaster House conference in early 1962. Furthermore Kenya's political elite failed to agree on some issues as they were to be put in the constitution.

The study also found that constitution development is not complete without its implementation. Implementation challenges in Kenya include interpretation, cooperation among stakeholders in constitutional implementation and security challenges under the emerging constitutional dispensation. Interpretation of any legal text, and especially the Constitution, is based on the view that words, terms or phrases have imprecise meaning and hence need to be defined, interpreted, construed and translated. This is done with a view to discovering and implementing meaning. Secondly, most of the MPs are not conversant with the many issues in the Constitution and are misinterpreting some clauses, either through ignorance or deliberately to serve their political and related partisan or sectarian interests. There have also been wrangles between CIC and the administrative

bureaucracy especially the Office of the Head of Public Service and Treasury; among others. Such wrangles pose a serious challenge to constitution implementation.

The study also found that the implementation challenges in Somalia include lack of consensus on a vision for the future of the country. Even though Somaliland has in effect been running separately from 1991, a good number of people in Somalia do not agree with Somaliland's declaration of independence and regard it as part of what should become the united state of Somalia. Secondly, the present administration has an interim constitution at hand but lacks implementation instruments. The constitution is not complete and has not been publically approved. As a result, the whole constitution is exposed to different and contradictory interpretations which get corrupted by regimes that do not support vital provisions in the present constitution. With no clear constitutional implementation program and guiding principles, there is a possible deadlock between the centre (Mogadishu) and the regions (federal states).

The study revealed that the development and implementation of a constitution is administered by certain government created organs. In Kenya, the Constitution implementation committee (CIC) is charged with this mandate. The functions of CIC are monitoring, facilitating, coordinating and overseeing the implementation of the Constitution. It has the duty of reporting quarterly to the President, the Parliamentary, and Select Committee for the Implementation of the Constitution and to the People of Kenya. Other key implementation institutions include, first, Parliament that is vital in enacting legislation. Second, the relevant executive agencies (especially ministries or departments)

that provides the policy framework. And third, the presidency that assents to Bills. Fourth, the Kenya Law Reform Commission (KLRC) has a role in proposing legislation and drafting some of them. Fifth, relevant ministries or departments also propose legislation to be enacted, policies to be reviewed or reformed as well as providing consultative forums. Seventh, the office of the Attorney-General (in the structural and administrative context of the State Law Office) publishes Bills, presents proposed legislation to the Cabinet for discussion and approval, and forwards the legislation to the Government Printer, among other functions.

The study also found that in Somalia the Independent Constitutional Review and Implementation Commission (ICRIC) is responsible for constitution matters. As a body of legal/technical experts it focuses on legal drafting of proposed constitutional amendments under the political supervision and guidance of the parliamentary Provisional Constitution Review and Implementation Oversight Committee (Oversight Committee). Nonetheless, constitutionalism is a process that requires human resource, cooperation and expertise for its success.

### **5.3 Recommendations**

Constitutionalism processes require both the government and its people to be in harmony. Laying out structures of governance without respect to human rights has been seen in many African countries as the delaying factors in constitution implementation. All bodies of the government should be consulted whenever something that requires amendment of the rule of law is of essence. The public should also be involved in such an exercise like

referendum whenever a major section or clause that would seek public opinion is encountered. Time is very material in this process and therefore should be provided in adequacy. Though certain clauses and section are general in areas of their application, experts in the judiciary and other established bodies should be called for in order to have informed interpretation.

It is clear from the discussion that failure to involve all interested parties in constitution development resulted to the opposition to the process. Further study should be done on the failures by the public and the government as whole in development and implementation by the government so that when the same is addressed, the process can be smooth.

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