

**CONSTITUTIONALISM IN SOMALIA: DEBATES AND DISCOURSES, 1960-2012**

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## DECLARATION

I, Omar I. Hanshi, do hereby certify that this project is my original work and has never been presented to any other institution or university.

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## ABSTRACT

Since her independence in 1960, the Republic of Somalia was a constitutional democratic state with a constitution approved through a referendum. From 1960 to 1969, the constitution got rid of a civilian, legislative governance structure and the protected human rights under the rule of two consecutive and democratically elected governments. In 1969, bloodless military takeover took place and suspended the constitution. Today, Somalia is a typical case of total state collapse in the modern society. There are major indicators of this problem including numerous cruel conflicts, the terrible humanitarian condition emerging from the collapse of community service delivery, the unlawful activities of suspected rebel groups within Somalia and the participation of Somalia neighbouring countries. The main objective of the study was to evaluate the constitutionalism debates and discourses in Somalia so as to resolve the continuous conflicts within the state emanating from different platforms and ensure to establish a concrete constitution and legal structures in tandem with the international standards that the people of Somalia can govern themselves with. The study also sought to provide an overview of the constitutional processes that has been employed over the years in Somalia; to analyze the various constitutional debates and discourses that has taken place in Somalia; and to interrogate strategic measures and difficulties experienced in the implementation of the constitution.

The study has been organized into five chapters with each touching on specific topic. In chapter One, it's the introduction of the study, chapter Two gives an overview constitutionalism, chapter Three provides debates and discourses related to Constitutionalism in Somalia, chapter Four gives a critical analysis of the debates and discourses in constitutionalism in Somalia and Lastly, chapter Five gives a conclusion of the entire study with some key recommendations.

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## **DEDICATION**

I dedicate this research work to my family for the sacrifice they made for me to complete this project. Their love, care, concern, support, encouragement and enthusiasm inspired me to take this path and achieve my objectives within the stipulated timeframe.

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## LIST OF ABBREVIATIONS

|                |   |
|----------------|---|
| <b>CDD:</b>    | Centre for Democracy and Development              |
| <b>CLSA:</b>   | Centre for Labour Studies and Advocacy in Nigeria |
| <b>DFID:</b>   | British Department for International Development  |
| <b>ECOWAS:</b> | Economic Community of West African States         |
| <b>ICU:</b>    | Islamic Courts Union                              |
| <b>IFCC:</b>   | Independent Federal Constitution Commission       |
| <b>IGAD:</b>   | Intergovernmental Authority on Development        |
| <b>NCA:</b>    | National Constituent Assembly                     |
| <b>NGO's:</b>  | Non-Governmental Organisations                    |
| <b>SIDA:</b>   | Swedish International Development Agency          |
| <b>SNM:</b>    | Somali National Movement                          |
| <b>TFC:</b>    | Transitional Federal Charter                      |
| <b>TFG:</b>    | Transitional Federal Government                   |
| <b>TNC:</b>    | Transitional National Charter                     |
| <b>UN:</b>     | United Nations                                    |
| <b>UNDP:</b>   | United Nations Development Programme              |
| <b>UNOSOM:</b> | United Nations Operation in Somalia               |
| <b>UNPOS:</b>  | United Nations Political Office for Somalia       |
| <b>US:</b>     | United States                                     |

## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.0 Introduction

According to Mitchel, constitutionalism is the particular manner of thinking and hypothesizing regarding the constitution<sup>1</sup>. While constitutions may assume various forms and may, for instance, also represent authoritarian structures of government, constitutionalism is affiliated to the initiative of limited government by applying systems such as a mixed constitution which entails balancing various groups in public, division of powers, human rights and among others. In the current constitutional structures, constitutionalism implies limited government. Richard argue that in actual fact, constitutions have emerged to be an outline for a government structure where power is shared among a group of various branches and restrictions are set in these groups<sup>2</sup>. In such instances, constitutions become the basis for external scrutiny designed to protect the people's liberations, which is a critical element of any democratic structure. Thus, the concept of constitutionalism is the principle that governments must operate within the restrictions of a given constitution. Additionally, constitutionalism is a continuous process where every new generation is involved and which basically changes as the involvement progresses. This clearly shows that, even if all governments have well designed constitutions, they are not essentially constitutional governments, thus, it has been difficult for most free governments in Africa to apply these constitutions to authorize the dictatorial rule.

Certainly, the self-governing countries in Africa of the 1960s committed themselves to equality, excellent governance and reverence for human rights. Nevertheless soon after independence,

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<sup>1</sup> Berman, Mitchel, Originalism is Bunk, *NYU Law Review*, 84 (September, 2009), p. 1-96.

<sup>2</sup> Fallon, Richard, *Constitutional Implementation*. (Cambridge, Harvard University Press, 2001), p. 33-61.

most states subjected their constitutions to various amendments that weakened the spirit of constitutionalism and free governance. Several countries in Africa, for instance, Somalia have been characterised by the reversal of the promised democracy and disgusting abuse of human rights with impunity being part of their governance. With the suspension of the constitution after the military takeover, the country has bade farewell to any fundamental democratic institutions and outright human rights violations against a quota of the population was rife dragging the country into civil strife.

### **1.1 Background**

Nick indicates that before colonization, Somali nomadic-pastoralist lifestyle was a typical case of a stateless culture<sup>3</sup>. The contemporary plan of a state as a means of governance through political institutions was established by the European colonial powers in the name of an export-related economy founded on domestic animals production. Somali political affairs before and during the colonial periods were characterized by nomadic-pastoralists and agro-pastoralists atmosphere. Mark argues that before the onset of colonialism in Somalia, the clan was a major basis of social institution<sup>4</sup>. Political organization was, despite the sultanates operating in the 12<sup>th</sup> century, a changeable, family-founded and not centralized. Financial and political practice was basically founded on changeable coalitions and many levels of clan distinctiveness. Traditionally, political calm and social affairs were enhanced through kinship structures, through joint social bodies and through equal, rule-based conduct outlined in traditional law. According to Schlee, a body of traditional law called *Xeer Soomaali*, which connected to fundamentals of Shari'ah founded rules<sup>5</sup>, described the crucial social standards and principles. Besides *Xeer*, customary principles

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<sup>3</sup> Barber, Nick, *The Constitutional State*, (Oxford, Oxford University Press, 2001), p. 27.

<sup>4</sup> Bradbury, Mark, *Becoming Somaliland*, (London, Progression, 2008), p.15.

<sup>5</sup> Gunther Schlee, *Regularity in Chaos: The Politics of Difference in the recent History of Somalia*, (Halle / Saale,

and system of social behaviour also provided mitigation to quarrels and uphold community order. In the period before and during colonial nation-establishment, this customary public organization experienced changes. Jutta argues that the traditional Somali model of statehood which emanated from this practice and revealed its political uniqueness and the union between the country and the public was a combination of three fundamental<sup>6</sup>: the initiative of a bigger Somalia, the notion of communalist Somalia and the supposed homogeneity of its nomadic citizens.

The state organizations which performed the legislative, judicial and the executive controls of Somali came to a close after the events of conflict in 1991. Government staffs, the majority of whom were somehow connected to the politically influential clans controlled Mohamed Siad Bare's rule, ran away from the fighting that was stimulated by sensations of hatred and vengeance. His departure led to lack of infrastructure and a jockeying for authority amongst the clans. The state organizations stopped their operations where both private and public properties were plundered as the country was plagued by the civil war. These cases were an intense destruction of the organizational structure of Somalia. The implosion of efficient government has resulted to the appearance of a country entirely without a government and the state as a supreme body failed. Consequently, previous Somalia changed from state-based to statelessness. Adler and Kenneth point out that it could be regarded as a stateless country<sup>7</sup>, lacking efficient essential government thereby making it the longest operating case of entire state collapse in African history after colonialism. Basically, from the 1991 state failure, the country split into its

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Max Planck Institute for Social Anthropology, 2001), p.3.

<sup>6</sup> Bakonyi, Jutta, 'Violence and Social Order beyond the State: Somalia and Angola', *Review of African Political Economy*, 32, (2005) p.359, 364.

<sup>7</sup> Matthew, Adler and Himma, Kenneth, *The Rule of Recognition and the U.S. Constitution*, (New York, Oxford University Press, 2009) p. 175-192.

constituent clans and aligned themselves into regional structures whose duties should be considered in the current Somalia's politics.

In this kind of an environment, an establishment of a progressive and sound constitution offers significant chances for reconciliation, for agreeing on resolutions to main troublesome matters in a non-violent environment. This will enhance and facilitate concrete mechanisms in reaching an agreement on the modalities of centralized structures or other kinds of decentralization fit to a collapsed state, for a figurative disconnect with the past, for setting up an environment of optimism and rebirth, and for the institution of a legal and stable state. Therefore, any constitutional process in Somalia should happen in a peaceful and participatory approach so as to evade the significant dangers of constitutional collapse and of rising political disagreements in the country. Trevor argues that for nearly 20 years<sup>8</sup>, each effort put to restore a cohesive Somalia has failed. Somalia, thus, symbolizes the largely extended example of a failed country with no countrywide organizations, but has experienced the coming out of numerous official and non-official domestic governance structures which are rarely known globally or recognized in the state collapse debate.

## **1.2 Statement of the Research Problem**

Since her independence in 1960, the Republic of Somalia was a constitutional democratic state with a constitution approved through a referendum. From 1960 to 1969, the constitution got rid of a civilian, legislative governance structure and protected human rights under the rule of two consecutive and democratically elected governments. In 1969, bloodless military takeover took place and suspended the constitution. As a result of the oppressive rule of Siad Bare, there was

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<sup>8</sup> Allan,Trevor, *Constitutional Justice: A Liberal Theory of the Rule of Law*, (Oxford, Oxford University Press, 2001), p. 116.

massive dissatisfaction and revolt locally and also minimum participation of the global community in resolving the disaster that was building up in the country. According to Balkin, the military regime ran up to 1991 when clan-founded armies brought down the military authoritarianism thereby leading to the collapse of national state power and the rising of clan-founded systems that alternately disputed and managed restricted Somali regions<sup>9</sup>.

Somalia has been a typical case of total state collapse in the modern society. There are major indicators of this problem including numerous cruel conflicts ranging from clan-based that ignited the political crisis to recent Islamic extremism, the grave humanitarian conditions emerging from the collapse of public service delivery, the unlawful activities of suspected rebel groups within Somalia and the military-political participation of Somalia's neighbouring countries. The present federal government is experiencing serious problems in governing the regions of the country under its rule. Barak<sup>10</sup> indicates that communities are yet to resolve issues with each other and this stimulates the conflicts. Furthermore, with such dire political and social conditions, unemployment is increasing day by day with very low levels of human growth and an overreliance on donations.

Additionally, an evaluation of the Somalia history evidently shows that its entire state failure emanates from a disintegration of state structures in the country in the last two decades. 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 conflicts in the

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<sup>9</sup> Jack, M. Balkin, *Living Originalism*, (Cambridge, Harvard University Press, 2011) p. 33-38.

<sup>10</sup> Aharon, Barak, *Purposive Interpretation in Law*, (Princeton, Princeton University Press, 2001), p. 324.

country.<sup>11</sup>

### **1.3 Objectives of the Study**

The main objective of the study is to evaluate the constitutionalism debates and discourses in Somalia so as to resolve the continuous conflicts within the state. More specifically, the study aims to:-

- i. Provide an overview of the constitutional processes that have been employed over the years in Somalia.
- ii. Analyze the various constitutional debates and discourses that have taken place in Somalia.
- iii. Interrogate strategic measures and difficulties experienced in the implementation of the constitution.

### **1.4 Literature Review**

This section examines the concept of constitutionalism as discussed by different writers and critically examines their views under the following topics: constitutionalism, conflict in Somalia, source of conflict, role of external actors, constitution development in Somalia and the literature gap that exists in Somalia.

#### **1.4.1 The Concept of 'Constitutionalism'**

Different from the case in Somalia, majority of the Southern African countries have superior and working democratic constitutions. Nevertheless, an excellent constitution or constitutionality may not imply the state of constitutionalism. An uncommitted democrat who has at his disposal an excellent democratic constitution may not automatically be devoted to constitutionalism

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<sup>11</sup> Melissa,W. Waters, 'Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties', *Columbia Law Review*, 107, (March, 2007), p. 628.

practice. Mostly, such democrats make efforts to find mistakes in the democratic constitution they are expected to observe and uphold. Constitutionalism surpasses an excellent constitution and constitutionality of a state's regulations. Bellamy advocated that the discourse on the constitution should surpass concern with official legitimacy of regulations to constitutionalism<sup>12</sup>. It is factual that paying attention to formal legitimacy of the rules and governmental practice is not likely to aid in the improvement of the constitution, a crucial element for a constitution as a living tool. Weller argues that currently<sup>13</sup>, any state where there is an excellent constitution but lacking constitutionalism, the governing leaders, although it appears like they are devoted to the values of the constitution, ignore the requirements of the constitution in their quest for selfish objectives hiding behind the unfortunate and illiterate majority. It is only through well-established constitutionalism that a nation's constitution may justly serve as the highest law of the land, evaluating and controlling government with the people at heart. A crucial fortification of constitutionalism is having in place a well organized and efficient system regulating and coercing conformity with the constitutional epistle and spirit. Christiano argues that there is no constitutionalism based on giving regard to constitution and principles and ethics that are in it if there are no safe re-evaluation systems<sup>14</sup>, whether by normal or specialized courts, that can autonomously impose the requirements of the constitution, while inspecting and managing any abuses of its requirements. Certainly, unlike Somalia, several Southern African countries have stipulated in their constitutions for specialized constitutional judicial systems.

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<sup>12</sup> Richard, Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, (Cambridge, Cambridge University Press, 2007), p. 87-93.

<sup>13</sup> Marc, Weller, 'Settling self-determination conflicts: Recent developments', *European Journal of International Law*, 20 (May, 2009), p. 112.

<sup>14</sup> Thomas, Christiano, *The Constitution of Equality: Democratic Authority and Its Limits*, (Oxford, Oxford University Press, 2008), p. 37-85.



### **1.4.2 Conflict in Somalia**

Armed conflict constantly hits a bigger part of Somalia, but from 1995 the nature, period and magnitude of conflict have changed considerably. Currently, apart from in a few cases, armed conflicts are highly domestic in nature, raising sub-clans against each other in a highly uneven political atmosphere. This decentralization of clan conflict implies that armed conflicts end up taking a much shorter time and are not very deadly partly due to limited assistance they get from roots members for such domestic squabbles, partly due to clan elders being better placed to get involved and partly due to some of the clans having efficiently combined their work and control over region and for the moment experience reduced resistance. In addition, funds and strong weapons are scarcer thereby reducing the period a conflict takes.<sup>15</sup>

Also, constant killings of civilians still take place although they are less frequent than it was in the past since there are high chances of fighters and their being held responsible for such offences by means of blood payments. Furthermore, pillaging is less frequent since most of the available resources are under the control of businessmen with remunerated security forces safeguarding them. From 1999, warlords are not a major factor from the time businessmen in Mogadishu, animated by their increasing wealth and displeased with the lawlessness brought about by militias, hired militiamen different from militia organizers and surrendered them to domestic Sharia courts to work as police. Currently, armed conflicts in Somalia are not very easy to differentiate from armed criminality. Presently, majority of the most horrible conflicts commenced as cases of burglary or killings that resulted to retaliation, which lead to a cycle of fighting between clans. Even if armed conflicts have changed considerably from the mid-1990s, Somalia has been for a long time lacking an efficient central government. Nevertheless,

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<sup>15</sup> International Crisis Group Africa Report No. 59. March 6, 2003. "Negotiating a Blueprint for Peace in Somalia."

governance systems have developed in fascinating ways in the last 10 years. Mark shows that domestic policies, commonly including Sharia courts have emerged in urban areas and neighbourhoods in most parts of southern Somalia, resulting to irregular and uneven law and order levels<sup>16</sup>.

The most determined effort to restore official government in southern Somalia was by putting in place the Transitional National Government (TNG) from 2000 to 2003, which experienced significant resistance from both internal groups and neighbouring states. Since in the Arta peace process did not involve important actors such as Puntland, Somaliland and a several militia heads in Mogadishu, it has ever experienced a lot of opposition. In addition, TNG was more attentive to securing foreign assistance and external acknowledgment, instead of taking part in the demanding process of reforming a central government. Consequently, the TNG has never been in a position to enlarge its power beyond Mogadishu and ultimately became basically immaterial. In the northern part of Somalia, the self-declared nation of Somaliland has made it in upholding what looks like a lasting internal peace, regardless of a crisis due to highly competitive national elections in the year-2003. Centre for Research and Dialogue (CRD) indicate that even if armed clashes in Somalia is not highly fatal and invasive than in the past, a major issue is the trend in the growing participation of external actors to assist local Somali citizens<sup>17</sup>.

### **1.4.3 Source of Conflict**

Somalia's history of clash discloses a fascinating paradox in that most of the drivers of armed conflict have taken part in controlling, stopping or preventing conflict. For example, clannism is a major source of warfare that works towards segregating Somalis, stimulating common conflicts

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<sup>16</sup> Bradbury, Mark. Overcoming State Failure: Somaliland and Puntland. A Report for DFID. December 2003.

<sup>17</sup> Centre for Research and Dialogue (CRD). 2004. Conflict Analysis Regional Report – South central Somalia.

over resources and supremacy and organizing militia thereby making widespread reconciliation very challenging to realize. Majority of Somalia's armed conflicts from 1991 have been carried out in the name of clan, frequently due to manipulation of clans by politicians manipulating clannism for their own political gain. However, customary clan elders are a major source of clashes or conflicts mediation with clan-related traditional law acting as the foundation for agreed settlements, and clan-related blood-compensation groups acting as prevention to armed conflict. Similarly, the central state is traditionally seen as a possible source of rule of law and nonviolent distribution of resources, although, sometimes in Somalia's history, it was a key source of fighting. On the other hand, economic interests have had an unclear connection with clashes in Somalia. According to Ken, in some areas, war economies have come out like they propagate fighting and lawlessness<sup>18</sup>, whereas in other cases business interests have appeared as the motivating factors for tranquillity, calmness and rule of law.

As a result of not having a central government in Somalia, there is limited or no bylaws (legal frameworks) that govern the waters off the Somalia's coastline. This has resulted to a propagation and escalation of piracy activities along the extended coastal line of Somalia thereby causing commotion for nations in the area dependent on the trade in the Red and Arabian Seas as well as for the nations allowing their residents and ships into pirate dominated waters. Therefore, piracy not only results from conflict but also leads to conflict since most Somalis make a choice to engage in piracy activities as a source of income. In addition, the resources that are essential to survive are greatly limited in Somalia than other places in the world. This makes them a major source of conflict since being a country with an extensive coastline and that the ocean is greatly depended on for resources by Somalis and other parties in business. As a result, this leaves

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<sup>18</sup> Menkhaus, Ken.. "Vicious Circles and the Security-Development Nexus in Somalia." *Journal of Conflict, Security, and Development*. Summer 2004

resources susceptible to pirates in Somalia who illegally benefit from the efforts of legitimate enterprises. Finally, the impact of the external actors around Somalia has taken part in stimulating or curbing conflicts.<sup>19</sup>

#### **1.4.4 The Role of External Factors**

The most significant area to consider while looking for the most relevant external factors is in discussing neighbouring states to Somalia, international organizations, non-regional foreign powers as well as non-state actors. In considering the neighbouring states, Ethiopia has major reasons of it taking with a lot of seriousness the happenings in Somalia. First, the two states engaged in war in 1977 with Somalia being the one that started the aggression. For Ethiopia, due to some reasons, it must have concerns about impact of a strong Somali state. First, the fact that the Somali claims to the Ogaden region in the Northeast Ethiopia has never been neglected. Secondly, Somali may stimulate conflict among the ethnic groups of Ethiopia particularly the Somalis. Thirdly, since the two are neighbours, any refugees coming from Somalia can move to Ethiopia thereby causing ethnic imbalances. Fourthly, Ethiopia is worried about the severe lawlessness of Somalia thereby causing a major difficulty to the law enforcement bodies of Ethiopia as a result of the extensive border between the two states. While a strong and aggressive Somalia would be the worst option of Ethiopia, a strong and friendly Somalia is what they would prefer though they would wish to have a weak country, which is entirely dependent on Ethiopia. Ethiopia was actively involved in the taking into power the Transitional Federal Government and also it looks like it had an influence in its supporter's Abdullahi Yusuf election as the president. Eritrea on the other hand seems like it has a rare stakes in the Somalia conflict. Therefore it

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<sup>19</sup> Ministry of National Planning and Coordination.. Somaliland in Figures., Puntland Development Research Center (PDRC). 2004. Conflict Analysis Regional Report –Puntland.

seems as the cause of the hostility in the relationships with Ethiopia.<sup>20</sup> Rather than starting again direct conflict, the two states seem to have been waging substitute conflicts against one another from 2000, with Somalia being the major battlefields. Even though the whole Djibouti territory is also covered by the irredentist Somali state project there is no actual hostility between the two states. It has continually tried to play the function of sincere broker and has hosted conventions with an objective of Somali state-building. Sudan function seems to have been moderately insignificant and remaining neutral throughout the warfare playing the function of genuine broker of facilitating mediation talks. Finally, Kenya has played an important role through IGAD. Nevertheless, it has closely worked with the US by assisting to close the border Somalia and arresting suspects aligned with terrorists. It has also been greatly participated in renditions of fleeing Somalis to both Ethiopia and Somalia.

Secondly, on the international organizations, UN's participation has been low-key, concentrating mostly on humanitarian issues with its agencies and subsidiaries being the main actors. Furthermore, Somalia has been constantly on the strategies of the UN Security Council. Also, when the UN mission has been absent, the AU has been in charge. However, the real role of AU was quite reserved mostly due to the lack of resources and armed forces. From the beginning, IGAD was greatly inclined to the Transitional Federal Government request for arms and favouring the relaxation of the arms restriction on Somalia so as to enhance a development of a armed forces loyal to Yusuf and his followers. Thirdly, on non-regional foreign powers that play a great function at individual capacity rather than as participants in global initiatives, the United States has been significant though its security plans has been counterproductive from 1990s. Apart from US, numerous states have sent warships to defend their personal shipping via Somali

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<sup>20</sup>Report of the Panel of Experts on Somalia pursuant to U.N. Security Council Resolution No. 1425. 2002.

waters and the Aden Gulf though their impact has been very limited in line with the situation in Somalia. Finally, on non-state actors, due to the absence of a functioning state in Somalia, there have been great chances for various non-state actors to impede local affairs in this nation with stateless atmosphere.<sup>21</sup>

#### **1.4.5 Constitution Development in Somalia**

In 1960, Somalia got its independence and changed its name to the Somalia Republic due to the joining up of two territories, the Italian-controlled UN Trust Territory of Somalia and the British Protectorate of Somaliland. During this time, the Somalia Republic was a constitutional democracy. Den-Otter approved through a referendum, the constitution got rid of a civilian<sup>22</sup>, legislative governance structure and protected human rights. Under this democracy, two consecutive and democratically elected governments governed Somalia between 1960 and 1969. In 1969, a bloodless military takeover took place under the leadership of Siyad Barre, which suspended the constitution and the state name was changed to the Democratic Republic of Somali. Twenty-two years later, forces founded on the clans took over power from the military authoritarianism of president Siyad Barre. This military take over led to the fall of national state authority and the rise of clan-based systems that alternately disagreed with and regulated restricted Somali regions. Eisgruber at the same time in 1991, the upper western ex-British protectorate acknowledged its sovereignty as Somaliland<sup>23</sup>. Seven years later, the leadership of Puntland region, upper eastern part of Somalia, declared itself as an independent state.

From 1991, frequent efforts have been made to return normalcy and Somali central authority has

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<sup>21</sup> United Nations Development Program/World Bank. Draft Report on Socio-Economic Assessment in Puntland. Produced by PDRC. April 2004.

<sup>22</sup> Ronald, Den-Otter, *Judicial Review in the Age of Moral Pluralism*, (Cambridge, Cambridge University Press, 2009), p. 56.

<sup>23</sup> Christopher, Eisgruber, *Constitutional Self-Government*, (Cambridge, Harvard University Press, 2001) p.123.

not been successful. In the year-2000, a Somali National Peace Conference was held in Djibouti. The results of this conference were the formation of Transitional National Government in 2000, which ordered several national and global supports. Westerman argue that at the same conference<sup>24</sup>, the 4.5 authority sharing structure of unchanging relative clan representation was established where same number of positions in parliament and other transitional government positions were given to every Somali clan amongst the main four, with a half given to the minority clans. From 2002 to 2004, the Intergovernmental Authority on Development supported stability talks in Kenya with major political players who governed the region and private armies in Somalia or had the reinforcement of their relevant clans. Huscroft and Brodie point out that in the year-2004<sup>25</sup>, those involved in conference settled on a structure paper, the Transitional Federal Charter, which set the lawful foundation for the development of a Federal Transitional Government and a Federal Transitional Parliament consisting of 275 members.

Also, the Charter calls for the establishment of a sovereign Federal Constitution Commission. This Charter expects that a rough copy of federal constitution founded on it be concluded within a period 2 ½ years and assumed through a referendum during in the last year of the transitional era. The drafting process of Somalia's constitution commenced in difficult situations since the nation had been without a successful government for almost two decades. Also, clashes in Somalia were severe and the new Federal Transitional Government had no power over in most parts of Somalia. In 2006, the Federal Constitution Commission consisting of 15 people based on 4.5 representation methods was included in the Constitutional Commission Act of Somalia with a responsibility to prepare a constitution for the country. Huscroft and Bradley indicate that the

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<sup>24</sup> Pauline, Westerman, 'Governing by goals: Governance as a legal style' *Legisprudence*, *International Journal for the Study of Legislation*, 1 (March, 2007), p. 7.

<sup>25</sup> Grant, Huscroft and Ian, Brodie, *Constitutionalism in the Charter Era*, (Markham, Ontario, Butterworth's, 2004) p. 55-90.

Act stated the guiding ethics for the Commission such as the Charter<sup>26</sup>, the ideologies of Islam, democratic state and social impartiality. It also suggested a practice that encourages public involvement, transparency and liability to the public, contains the multiplicity of Somalis and their views and upholds steadiness, peace and rebuilding.

In 2006, the commission decided on a broad civic training program to train the people on the constitution-drafting process with an aim of setting up national dialogue. It then focussed on creating a draft constitution to form the reference of the continuing civic education. In this process, there was an increase in instability in Somali's capital with the assassination of the Constitutional Affairs Minister. According to Aileen<sup>27</sup> this brought about an immediate stoppage of the constitutional process.

In the year-2008, the transitional president stepped out of power and the UN facilitated peace talks between the Federal Transitional Government and the Re-liberation of Somalia Alliance, which was concluded in a reconciliation conference in 2009 that took place in Djibouti where a power-sharing Accord was established. With the establishment of that Accord, Al- Shabaab movement criticized it and unleash cruel fight against the then TFG. The Islamist Movement opposed to the establishment of transitional authority, controlled large swathes of territories in South-central Somalia and immediately declared their allegiance to Al-Qaeda group. The Constitution Commission size was raised to 30 members in the same conference and commenced its task again in 2010 with their base in Djibouti and with a plan to have concluded the draft towards the end of 2011. As a result of insecurity state of affairs in most part of Somalia, did not

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<sup>26</sup> Grant, Huscroft and Miller, Bradley, *Expounding the Constitution: Essays in Constitutional Theory*, (Cambridge, Cambridge University Press, 2008), p. 87.

<sup>27</sup> Kavanagh, Aileen, 'The Idea of a Living Constitution', *Canadian Journal of Law and Jurisprudence*, 16 (June, 2003), p. 55.



involve the public as it had planned. It also didn't reveal any information to do with the draft process.<sup>28</sup> This made it be criticized on the basis of whether Somali citizens were aware of their constitution drafting leave alone being done in a foreign land.

Towards the end of 2010, the commission give out a rough draft, which outlined the facts to encourage public debate and remarks. This draft gave options on matters like a presidential or parliamentary government structure, the capital status of Mogadishu as well as outlining definite principles of federalism. The commission embarked on this public consultation since it acknowledged the importance to concentrate on civic education to inform the people of the draft and the general importance of constitutionalism, which was a difficult task with the Al-Shabaab making it dangerous even to talk about the draft. Thus, its website facilitated the submission of remarks on the draft. According to Sager, the media created successive programming on constitutionalism and a SMS servicing was established to inform the public of the draft constitution<sup>29</sup>.

Towards the end of 2010 to early 2011, the Commission ran consultation forums throughout Somalia on the draft Constitution. It held a meeting with the Somalia's Transitional organizations in Somalia as well as with the traditional leaders and social society institutions, together with women and youth groups and groups representing the disabled, Somali forces and Federal Transitional Parliament members. In early 2011, the Federal Transitional Parliament prolonged its term for three years so as to create uncertainty in the draft constitution timelines. In mid-2011, the President and the parliament speaker signed an Accord to mark the devotion to

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<sup>28</sup> Larry, Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (New York, Oxford University Press, 2004) p. 38.

<sup>29</sup> Lawrence, Sager, *Justice in Plainclothes: A Theory of American Constitutional Justice*, (New Haven, Yale University Press, 2004) p. 81.

assume a constitution towards the end of 2012. Strauss argues points that according to the Transitional Federal Charter<sup>30</sup>, for a new constitution to be endorsed, there must be a referendum, which is not possible due to insecurity. This poses the challenge of Somali's drafting and implementation of the constitution.

#### **1.4.6 Literature Gap**

All the way from 1960 when Somalia attained its independence, Somalia Republic was a constitutional democratic country with a working constitution endorsed through a referendum.

Somalia turned out to be a characteristic case of whole State that fell down completely in the contemporary society. According to Bradbury, Menkhaus and Marchal There are main signs of this problem including numerous nasty conflicts<sup>31</sup>, 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 neighbouring States. Additionally, an assessment of 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.

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<sup>30</sup> David, Strauss, *The Living Constitution*, (New York, Oxford University Press, 2010), p. 35.

<sup>31</sup> Mark Bradbury, Ken Menkhaus and Roland Marchal, *Human Development Report Somalia 2001*, United Nations Development Programme, (2001).

### **1.4.7 Research Questions**

The study will be guided by the following pertinent questions on debates and discourses of constitutionalism in Somalia:

- i. What are the main features of the constitutional development processes in Somalia?
- ii. What are the challenges encountered in writing/drafting the current Provisional Federal Constitution?
- iii. What has been the role of the external actors in the process?
- iv. What are the emerging issues in regards to the Provisional Federal Constitution?
- v. What lessons can be drawn from this process for similar future engagements?

### **1.5 Justification of the Study**

Numerous severe and protracted civil wars especially from ethnic differences have dominated the national and international security plans. As a result, international and national governments should pay attention to peace initiatives and policies and constitutional implementations so that the tendencies of misunderstandings and wars in Africa especially Somalia can be stopped. Justification of this study is to gain insight on the Somalia conflict between 1990 and 2004 and the reconstruction of the war torn state through the implementation of the constitution. Barber and Fleming argue that the continuous attempts to restore democracy and rule of law with respect to human rights was in vain 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<sup>32</sup>. Subsequently this study has both educational and policy justifications. 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

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<sup>32</sup> Barber and James, Fleming, *Constitutional Interpretation: The Basic Questions*, (Oxford, Oxford University Press, 2007), p. 223-241.

the incident to improve Somalia's stability restoration, constitutional development and constitutional implementation abilities.

While studies on debate and discourses in constitutionalism have received considerable academic attention in the West and in other parts of Africa, it has received very low coverage in Somalia. Most studies in Somalia have focused on conflict and terrorism but little exists on debates and discourses in the constitutionalism in Somalia. This study aimed at benefiting a large number of people in the academic fraternity and researchers as it contributes highly in providing knowledge on debates and discourses in the Constitutionalism in Somalia.

To the government of Somalia, the study outlines debates and discourses in the constitution development and implementation. This information can be used to formulate policies to deal with discourses in the implementation of the constitution. Although the government of Somalia is implementing the constitution, more policies need to be formed to ease the implementation of the constitution.

The conflict in Somalia has also cost the Horn of Africa countries dearly in terms of security due to proliferation of small arms, and economically due to the influx of refugees and lost trade. Kenya in particular has borne the brunt of these effects and the settlement of the conflict is of utmost importance. This study therefore is useful as a reference on how horn of Africa countries can use constitutionalism in Somalia as a security strategy.

## **1.6 Conceptual Framework**

Theory is a structure that 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. Vermeule indicates that 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<sup>33</sup>, in contemporary constitutional democracies, naturally unelected and therefore not openly accountable to the democratic society.

Waluchow these hard critics argue that elements like new understandings and the hypothetical discipline of ordinary law reasoning rarely<sup>34</sup>, 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 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

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<sup>33</sup> Adrian, Vermeule, *Law and the Limits of Reason*, (New York, Oxford University Press, 2009), p.41.

<sup>34</sup> Wilfrid, J. Waluchow, *Constitutions as Living Trees: An Idiot Defends*, *Canadian Journal of Law and Jurisprudence*, 18, no. 2 (July, 2005), p. 26.

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. 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 citizens 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, and that the right political authorities at work in constitutional process are accredited and handled openly.<sup>35</sup> Whether the initiative of constitutionalism can endure the lessons of such critical study is the question.

## **1.7 Research Methodology**

This study used a descriptive research design. The target population comprised of the Somali people in Mogadishu, those in other parts of the country and Somali refugees being hosted in Kenya at Daadaab refugee camps in Northeast, Kenya and staff working with NGO’s and peace-keeping missions involved in constitution implementation in Somalia.

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<sup>35</sup> Gregoire, Webber, *The Negotiable Constitution: On the Limitations of Rights*, (Cambridge, Cambridge University Press, 2009) p. 12.

The study was restricted to the South-central part of the Federal Republic of Somalia and only covered the debates and discourses related to the constitutionalism in post-colonial period from 1960 to 2012. The choice of this area of study narrows the extent of the study.

This study utilised both primary and secondary data sources. Primary data was obtained by use of interview schedules and key informant interview guides. Interview schedules was used on the Somali people in Mogadishu, those in the country (Eastleigh) and Somali refugees being hosted in Kenya at Daadaab refugee camps in Northeast, Kenya. Key informants in this study were the Key government officials and NGO's staff involved in constitution development and implementation processes in 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. These were taken through thorough and critical examination.

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

## **1.8 Chapter Outline**

Chapter one gives the details of the introduction, background information, and problem statement, objectives of the study, justification of the study, literature review, conceptual framework, hypothesis and the methodology. Chapter two gives an overview of constitutionalism in Somalia. Chapter three gives an analysis of debates and discourses in the constitutionalism. Chapter four gives a critical analysis constitutionalism in Somalia. Chapter five presents a conclusion of the study.

## CHAPTER TWO

### CONSTITUTIONALISM IN SOMALIA: AN OVERVIEW

#### 2.1 Introduction

Chapter one provided an introduction to the study. The chapter comprised of the background to the study, statement of the problem, objectives of the study, literature review, justification of the study, conceptual framework, research methodology and chapter outline.

This chapter gives an overview of the concept of constitutionalism in Somalia by focusing on the conflict in Somalia in the period before 1991 and the resulting UN operations. It also addresses the conflicts, development process, implementation, debates and discourses that will be associated with the constitution in Somalia.

#### 2.2 Conflict in Somalia

The Somalia's history associated with clashes exposes a fascinating contradiction that most of the causes of armed clashes have participated in controlling, stopping or preventing conflict. For example, clannism and family cleavages are a major cause of clashes that divided the people of Somalia, stimulated widespread conflicts over resources and supremacy, gathered together the militia groups thereby resulting to difficulties in realizing multi-ethnic reconciliation. A good number of Somalia's armed conflicts from 1991 were clan-based, frequently due to political leaders using clannism for their personal gain. Nevertheless conventional clan elders are the main source of clashes mediation with clan-related traditional law serving as the foundation for bargained settlements and the clan-based blood-payment groupings serving as the prevention to armed conflict. Similarly, the central state is normally seen as a possible source of rule of law and diplomatic distribution of resources, although, at times in Somalia's history, it was a source



of conflict and predation. In addition, economic interests have had an indefinite connection with clashes in Somalia. Samatar and Samatar indicate that in some areas<sup>36</sup>, conflict economies that perpetuate hostility and anarchy has appeared, while in other cases, commercial interests have been a motivation to tranquility, stability and rule of law. Being aware of conditions under which these and other variables become escalators and/or de-escalators of conflict is the subtle challenge conflict study experiences in the context of Somali.

### **2.2.1 Armed Conflict in the Pre-1991 Period**

From 1977 to 1991, Somalia went through three main armed conflicts. The initial one was the Ogaden War with Ethiopia from 1977 to 1978, where Somali forces got involved in aid of rebel fighters of Somali in an offer to set free the Somali-populated area of the Ogaden region in Northeast Ethiopia. Consequently, Somalia lost the battle and suffered approximately 25,000 victims. That massive loss of lives set precedence for future domestic conflict, prompting the ascension of numerous Somali freedom fighters movements with an objective of removing from power the military system of Siyad Barre, whom they held responsible for the catastrophe. The second main armed violence was the conflict between the Somali forces and the Somali National Movement (SNM) that commanded the northwest Somalia. The SNM, which was established in 1981 by members of the Isaaq clan after the Ogaden War was to quell the brutal powers employed by the national government. The Isaaq clan complaints intensified in the 1980s, when the Siyad Barre government set the northwest under forces command and made use of the forces government to attack the Isaaq and take over businesses from them. The civil conflict built up by the SNM commenced in May 1988 resulting to full-blown civil war. Government armed forces committed murder against civilians with an estimate of 50,000 to 60,000 Somalis dying,

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<sup>36</sup> Abdi I. Samatar and Ahmed Ismaiel Samatar, Somali Reconciliation: Editorial Note, *Bildhan: An International Journal of Somali Studies*, Vol. 3 (2003): 1–14.

especially from Isaaq clan, which was the main support for the SNM. Additionally, aerial attacks crumbled the Hargeysa city with 400,000 Somalis being forced to flee past the border of Ethiopian as refugees, while a further 400,000 were dislocated internally. According to Elmi these murders stimulated the Isaaq clan demands for secession in what resulted to the self-affirmed state of Somaliland in the year 1991<sup>37</sup>.

The third armed violence before 1991 pitted besieged government armed forces against an increasing number of clan-related freedom fighters movements in years 1989 and 1990. The most powerful of these movements were the Hawiye clan, United Somali Congress (USC), the Ogadeni clan, Somali Patriotic Movement (SPM), and the Majerten clan, Somali Salvation Democratic Movement. This multi-clans conflict signified the voracious raiding and banditry that typified the conflict in the year 1991 and 1992.

### **2.2.2 The United Nations Operations in Somalia (UNOSOM)**

The United Nations involvement in Somalia was primarily impelled by the need on the part of the global community to guard food relief and stop the famine ruining southern Somalia. Initially, it was United States-led and a United Nation-authorized joint involvement concerning practically 30,000 troops. In the month of May 1993, the operation was officially handed over to the U.N. Berdal shows that the United Nations responsibility was highly extensive in helping Somalis support national reconciliation, reconstruction of the central government and boosting the economy<sup>38</sup>.

The period after the UNOSOM involvement resulted to numerous key developments. Initially, it

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<sup>37</sup> Afyare A. Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (London: Pluto Press, 2010).

<sup>38</sup> Berdal, M., 'Lessons not learned: the use of force in "peace operations" in the 1990s', *International Peacekeeping*, Special issue on Managing Armed Conflicts in the 21st Century, vol. 7, no. 4 (winter 2000), pp. 56, 68–70.

started an unsuccessful pattern of externally financed national reunion conferences. Over 12 similar conferences were organized with only a single one, the 2000 Arta Peace Conference appearing to yield results. The conferences have been inclined to aggravate conflict within the nation, averting the political leaders' powers from governing regions they assert to be in control, to jockeying for posts in a proposed state and raise the ranks of factional and militia leaders, whom a few people think that they are the problem and not the solution. Secondly, UNOSOM's sociopolitical work lead to the empowerment of a small but expanding Somalia civil society, which has all through been a key force for peace-campaign in the country. Thirdly, UNOSOM's huge involvement transformed the economy being in Somali in ways that aided in weakening the war economy and restructure interests in superior security levels and rule of law. According to Ram, traders who from 1991 to 1992 had taken advantage of diverted food relief and raiding then made small riches in quasi-justifiable business enterprises<sup>39</sup>, from procurement and production to payments and import-export trade. Their changing interests assisted in controlling armed clashes and anarchy in the post intervention period.

### **2.3 The 2012 Somali Constitution**

The draft Constitution of the Somalia Republic is its supreme law. It offers the legal basis for the being of the Federal Republic and foundation of legal right. It sets out the rights and duties of its citizens, and defines the structure of government. In August, 2012, a National Constitutional Assembly in Mogadishu accepted the draft Constitution. Somalia's draft Constitution acknowledges a government parliamentary system with the President as the head of state and

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<sup>39</sup> Sunil Ram, *The History of United Nations Peacekeeping Operations from Retrenchment to Resurgence: 1997 to 2006* (UNITARPOCI, 2007) p. 134.

an elected Prime Minister as the government head.<sup>40</sup>

Previously, Somalia had made attempts to have a constitution. In 1961 and by a popular referendum, the Somalia citizens approved a new Constitution, which was initially drafted in 1960. This Constitution upheld a parliamentary democracy, with the Prime Minister and Council and the cabinet being chosen from the legislature. In addition, the legislature also selected the president of the republic. After the president, Abdirashid Ali Shermarke, was overthrown by the military organized coup, the Major General Siad Barre took over and dissolved the parliament and suspended the Constitution. In 1979, a new Constitution was propagated through which the elections for a People's Assembly were conducted. The 1979 Constitution acknowledged a presidential system where the president was the head of government and state and he appointed the cabinet, which he was the chair. The final Constitution of the Somalia Federal Republic upholds human rights, general code of worldwide law, the rule of law, justice, all inclusive consultative government, the legislature power separation, executive and an autonomous judiciary, so as to guarantee liability, effectiveness and receptiveness to the citizen's interests. The Somalia Federal Republic has a semi-presidential structure where much of the executive authority is with the Prime Minister.<sup>41</sup>

## **2.4 Issues in the Somali Constitution**

Even though Somalia had not gone back to war, it would have experienced considerable barriers to setting up an efficient constitution. Organizing elections, drafting new institutions and selecting the most excellent constitutional language will not essentially lead to conditions for

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<sup>40</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>

<sup>41</sup> Ambassador Ahmedou Ould-Abdallah presented a paper at the Lund Conference on Somalia on June 2, 2010. I was one of the discussants on the panel.

tranquility and stability. The clannism style of Somali society offers a challenge to foreseeing a consistent Somali state, as does Somalia's unconstructive practice of governance. For example, in interviews on the blueprint of the constitution a number of Somalis indicated that whereas they desired a state, they did not desire one that had something to do with them.

According to Samatar and Samatar, a key issue that occurs is whether Western governance structures will ever be executed efficiently in Somalia or whether it will be essential to look for endogenous answers<sup>42</sup>. This problem exists to some levels in any democratization course upheld by the global community.

Discrepancy between local issues and principles and Western forces frequently implies that the institutions established do not survive when the global community leaves. To be sustainable, the institutions should not be plain shells forced from outside, but should be well understood and believed by the people. In Somalia a severe separation has always emerged between official power designs and the certainty of authority on the ground. For nearly all parts, unofficial and conventional government systems have more or less controlled authority, handled issues and frequently enhanced a minimum of certainty and authority. Somaliland offers a great problem to attaining agreement on a dream for the hope of the state. Even though Somaliland has been working separately from 1991, most Somalia citizens do not embrace Somaliland's independence declaration and regard it to be part of what should become the cohesive Somalia state. According to Elmi some of the Somali issues may be ameliorated by a comprehensive era of civic education and discourse<sup>43</sup>. A campaign on civic education could arouse divisions if it

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<sup>42</sup> Abdi I. Samatar and Ahmed Ismaiel Samatar, "Somali Reconciliation: Editorial Note", *Bildhan: An International Journal of Somali Studies*, Vol. 3 (2003): 1–14.

<sup>43</sup> Afyare A. Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (London: Pluto Press, 2010).

assumes revolutionary views instead of encouraging temperance and negotiation.

## **2.5 Constitution Development Processes in Somalia**

In a period of thirty years the Somalis had gone through numerous political, financial and religious quarrels. A lawful and a constitution owned by Somalis would aid in controlling most of these issues. Nevertheless, disagreements surrounded the way UN approached and managed the constitution-development process of the nation. The process was basically inconsistent since politics; confidentiality, segregation and rashness ruined the consent and selection of the members of the commission, the drafting of the paper and the implementation of the draft constitution. According to Cottrell and Ghai like the preceding charter, the draft-constitution had authenticity-insufficiency<sup>44</sup>. It failed to express the objectives of the people of Somali, normalize personal and group conflicts efficiently and calmly or stipulate context-suitable institutions that are essential for putting up long-lasting tranquility and an operation state in Somalia.

The Somalia's constitution-development process has gone through the phase of authorization and choice of the commission members and the drafting of the constitution articles phase. In 2004 a Kenya hosted peace process committee was charged with the duty to draft a new Transitional Federal Charter (TFC). This drafting was so controversial since there were divisions that led to establishment of a group of Somali experts to bring together the different documents from the committee. Nevertheless, due to political considerations, the harmonization did not take place and the TFC became the law of the land in the following years. Consequently, a Charter was established. Article 11 of the Charter called for the government to put in place an Independent

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<sup>44</sup> Jill Cottrell and Yash Ghai, *Constitution Making and Democratization in Kenya (2000–2005)*, Democratization, Vol. 14, No. 1, p. 19. See also Nicolas Haysom and Sajit Choudhry, "Mechanisms for Resolving Divisive Issues in Constitutional Negotiation", *Constitution-making in Focus: Issue Paper*, by Interpeace, 2010; available at [http://www.interpeace.org/constitutionmaking/sites/default/files/guidance\\_papers/InFocus\\_HaysomChoudhry\\_FINAL.pdf](http://www.interpeace.org/constitutionmaking/sites/default/files/guidance_papers/InFocus_HaysomChoudhry_FINAL.pdf)

Federal Constitution Commission (IFCC) which was to be approved by parliament so as to draft an interim constitution, carry out public discussions and present it openly to the public. In addition to leading the drafting process, the UNDP and United Nations Political Office for Somalia (UNPOS) offered monetary and technological support to the IFCC and the constituted committee of experts. The limited mandate and random selection of the IFCC members had grave repercussions for the Somalia constitution-development process.<sup>45</sup>

In 2010, the IFCC released the initial draft Constitution to the people of Somali. After that, to develop the initial draft, the IFCC started gathering the views of the various parts of society. The Somali people reacted pessimistically to the proposed constitution, raising numerous matters like federalism, nationality, function of Islam, and the government structure. So as to manage this unconstructive public response, a newly formed Committee of Experts and the IFCC members joined and modified the 2010 proposed Constitution without releasing the revised draft to the people. Instead, in 2012 they forwarded it to the seven 2011 UNPOS-prepared Roadmap signatories. Surprisingly, the signatories' initial steps were to marginalize the IFCC and committee of experts' members that had drafted the second document after their submissions in April 2012. Unexpectedly, in May, 2012, the seven signatories moved a planned constitution-development convention to Addis Ababa in May 2012. Even if the Addis Ababa meeting concentrated on the constitution, the IFCC and the committee members were not called to the convention. As a result, the seven signatories privately set up an assessment committee from their delegations. The assessment committee modified the Draft Constitution that the IFCC and

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<sup>45</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>

the committee of experts released while in Addis Ababa.<sup>46</sup>

While still in Addis Ababa, the signatories formally split up the IFCC and the committee of experts that had prepared the second draft and they reserved the Addis Ababa draft to themselves. In a week's time, a secret assessment committee had organized another conference in Nairobi to further revise the Constitution. Signatories were then invited to sign the final document of the constitution on June, 2012. In addition, Elmi indicates that President Sharif Sheikh came to Nairobi convention with the draft that was revised in Addis Ababa maintaining that it was the authentically negotiated version<sup>47</sup>. Nevertheless, the Prime Minister Abdiweli Mohamed together with the signatories differed with him arguing that the final version was the one the committee edited in Nairobi though the President argued that he was not aware of the Nairobi meeting. As a result, some Western diplomats and UNPOS came in and coaxed everybody to sign the draft.<sup>48</sup>

## **2.6 The Issues of Constitution Implementation**

With regard to the constitution's interim implementation, the seven signatories agreed to set up a puppet congress that would hold up their draft with no alterations. They signed a set of rules where they set up a National Constituent Assembly consisting of 825 members. Somalia's conventional clan elders were to choose the members using the 4.5 clannish formulae. But, paradoxically, Technical Facilitation Committee of the signatories controlled the implementation process and the constitution minister was the National Constituent Assembly (NCA) chair.

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<sup>46</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>

<sup>47</sup> Afyare A. Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (London: Pluto Press, 2010).

<sup>48</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>



According to the set of rules, the NCA could endorse or decline the entire document. However, they could not modify any article as they desire. As an alternative, the NCA could give suggestions to the Technical Facilitation Committee of the signatories which would present the recommendations to the principals since NCA had power to vote either Yes or No for the proposed draft. Additionally, in accordance to the rules establishing the NCA, a No vote would not have adverse effect on the draft since in case of a No vote, the draft interim constitution will nonetheless operate until a new constitution is put in place. Actually, the signatories further approved that even though the draft was rejected in the referendum it will still be the interim constitution of the nation. Hence, despite the consequences of the standing of the NCA and the referendum, the signatories' document signed on June 2012 was to become the law of the Somaliland.

## **2.7 Debates and Discourses**

During the opening session of the Somali Constituent Assembly delegates in July 2012 in Mogadishu, the draft constitution was read. Within a period of one week in constitutional debate, the delegates were already checking on the thorny matters in the draft paper. During the same time, after many years of the new Somalia constitution, over 800 delegates representing all the country's clans and areas gathered to debate, appraise and vote on the draft. Nevertheless, a few delegates indicated some discontent over numerous articles in the constitution which they maintained that they breached the Islamic teachings while other opposite parts of the draft involved the statues of the Mogadishu capital and language, amongst others.<sup>49</sup>

On the other hand, the government of Somali maintained that it did not take sides on the debates

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<sup>49</sup> Article 26 and article 49 of the Draft Constitution in Somali language, available at [http://unpos.unmissions.org/LinkClick.aspx?fileticket=1\\_2yjnyPFfk%3d&tabid=9705&language=en-US](http://unpos.unmissions.org/LinkClick.aspx?fileticket=1_2yjnyPFfk%3d&tabid=9705&language=en-US)

but only acted as a facilitator to the process of executing the roadmap proposed to result to establishment of a new parliament and the voting of a president. Despite the fact that the Somalia draft constitution prohibited the issue of female circumcision by portraying it as nasty and demeaning customary practice and tantamount to affliction, some members supported some form of the practice referred to as "the Sunni circumcision" thereby pushing for its legitimacy. Female circumcision extensively took place in Somalia where a good number of girls were frequently circumcised before they reach age seven. One of the delegates from semi-independent Somalia state of Puntland, Abdelaziz Salah, addressed some of the articles on female circumcision that they disagreed with since they were against the Islamic teaching thereby vowing to change it. Some delegates also disagreed with the draft's definition of a child as a person below 18 years but upheld the Islamic teaching definition, which defines a child to be below 15 years of age.

The new Somali draft constitution gave the right to abort to women in Somalia if the practice main objective was to save the mother's life. This article attracted a lot of condemnation from religious leaders who argued that the article promoted extramarital sexual tolerance within the communities. Another debatable issue was the status of Mogadishu town, which the proposed draft constitution did not term as the republic's capital but was to be determined in the review process of the constitution. In addition, the proposed draft constitution gave the women in Somali 30% representation in the forthcoming parliament and in government vacancies. This was not possible since some clan elders who are charged with the responsibility of choosing the parliament were opposed to that.<sup>50</sup>

After the proposed draft was published, the President, Sheikh Sharif was one of those who were

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<sup>50</sup> Mohamud Uluso, "Provisional Constitution Heightens Tensions in Somalia", International Policy Digest, available at <http://www.internationalpolicydigest.org/2012/08/08/provisional-constitution-heightens-tensions-in-somalia/>

partially opposed to it. He indicated that there were still several faults that were worth reassessing. Later on, within the same period, the Minister of State for the Constitution, Hassan Mahmud indicated that several changes had been effected to the contentious clauses. For instance, the clause on the requirements for presidential candidates was changed to indicate that candidates can never be foreigner and if they belong to another nationality, it must be revoked six months ahead of their candidature declaration. The other clauses that had raised debate were on nationality. Furthermore, most delegates claimed that the proposed draft language was imprecise and could result to interpretation disagreements and that the Committee of Experts and the Independent Federal Constitutional Commission had not elucidated the main issues. Uluo argues that amidst the draft constitution process, there have been some disruptions by militia groups like Al-Shabaab<sup>51</sup>. But, the IGAD, UN and AU have cautioned that they will inflict sanctions on any party making effort to interrupt the constitutional process.

During the time when the Transitional Federal Parliament of Somalia organized a meeting for the first time in Baidoa town on 26 February 2006, the constitutional development process was a priority in the agenda. In year 2004 parliament had been affirmed, and in accordance to the transition schedule, a draft constitution had to be in place by October 2007. Dependence on a constitutional development process as means of a changeover from a peace accord to a legally elected government was increasingly the best option. It admitted that those at the peace negotiations meetings could not stand for all the interests in a state. Arman reveal that in most cases the series of matters that required to be discussed in a constitution were too enormous for a peace negotiation<sup>52</sup>, and that most of these matters were best discussed at a slower rate and in a

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<sup>51</sup>Ibid

<sup>52</sup> Abukar Arman, "A Constitution of Ambiguity and Deferment", Foreign Policy Association, available at <http://foreignpolicyblogs.com/2012/08/07/a-constitution-of-ambiguity-and-deferment/>. See Mary Harber, "Somalia:

highly comprehensive approach.

Undoubtedly, this was the case in Somalia. The peace accord assumed the structure of a transitional constitution, the Somali Republic Transitional Federal Charter and set out various requirements that could be component of a constitution, incorporating a federal governance formation and Islamic Shari'a as the essential basis for legislation. Nonetheless, the Charter had been adopted by unelected members in a peace negotiation forum and lacked the endorsement and contribution of the Somali citizens and did not have the authenticity needed to set up an effective peace and a feasible state. Therefore, Article 71(2) of the Charter stipulated that a federal Constitution founded on the Charter was to be written down within a period 2.5 years and assumed by referendum in the final year of the transitional phase. The TFG had an association of donors, international agencies and non-governmental organizations established to support the process.<sup>53</sup>

The Charter gave a chance for the formation of a Federal Constitutional Committee (FCC), the associates of which were to be recommended by the Ministers Council and endorsed by the parliament. The initial step was to form this commission. Certainly various complicated discussions took place amongst the parliamentarians and ministers in establishing a list of 15 members, who were eventually selected based on clans by the use of the 4.5 formulae, as done in the parliament. The initial list lacked any women representative, but in reply to recommendation of having an all-inclusive commission, two women were included prior to parliament endorsement. Most of the main ideas that had been discussed during the peace negotiations were

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Failed state or fantasy land?" BBC, available at <http://www.bbc.co.uk/news/world-africa-19099442> . See also Sadia Ali Aden, "Somalia: The Consequences of a Crooked Constitution", Think Africa Press, August 14, 2012; available at <http://thinkafricapress.com/somalia/consequence-crooked-constitution>

<sup>53</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>

not well understood by most Somalis. Owing to the fact that Federalism needed the surrendering of some power and command by the central government in favor of the regions, it had not been well understood, as the discussions with TFG members indicated. The importance of public discourse and a wide-ranging process was to make sure that the final draft had legality and would be embraced at referendum. In June 2006, parliament set up the FCC in the Somalia Constitutional Commission Act. Bryden argues that this instituted guiding values for the Commission, such as to consist of: the Charter<sup>54</sup>, the code of Islam, democracy and societal justice, and a practice that encouraged public involvement, transparency and liability to the people, upheld the diversity of the Somali people and their views and enhanced stability, tranquility and rebuilding.

Amongst the first resolutions of FCC was to change their identity to the Independent Federal Constitutional Commission. In course of the workshop, the IFCC outlined their policies of procedure and settled on the some procedural steps. The first step was establishing a civic education curriculum that would operate for three years up to the end of 2009 and empower the Somalia citizens to know why a constitution was being established and what their governance options were. This was to be supervised by the commission but executed by a Secretariat jointly with a civil society. The second step was a nine months discussion process following a first phase of civic education, in which the commission was to kick off a national discourse to bring segregated and divided groups together to talk about a common future for the country. According to Uluso the third step was the establishment of the draft constitution<sup>55</sup>, which would take half a year, and the commission was to ask for relative and expert aid as they identified their

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<sup>54</sup> Matt Bryden, "New Hope for Somalia? The Building Block Approach", *Review of African Political Economy*, Vol. 26, No. 79 (1999), pp. 134–140.

<sup>55</sup> Mohamud Uluso, "Provisional Constitution Heightens Tensions in Somalia", *International Policy Digest*, available at <http://www.internationalpolicydigest.org/2012/08/08/provisional-constitution-heightens-tensions-in-somalia/>

requirements. The draft was to be the theme of extra civic education before the referendum. There was debate of an envoy legalization meeting ahead of the referendum, but it had not been determined.

These resolutions were well embraced by the Constitutional Affairs minister, Derro, and signified an optimistic beginning of the constitutional process. The global association agreed to embrace the process on this basis and awarded a considerable budget. Nevertheless, all of this process was happening against the setting of the mounting of the Islamic Courts Union (ICU) in Mogadishu in the mid-2006 and its disagreement with the TFG. Even as the process of constitutional development appeared to be opening up a chance for discussion and negotiation among all Somalis, together with the Islamists, it was clear that the ICU and the TFG were getting into a new circle of conflict. From 2006, the commissioners have made efforts to carry on with preparations, but with the TFG on the edge of disintegration there was modest momentum to run a multifaceted constitutional process in such an unbalanced setting. According to Felman, from 2009, with a fresh government in place from January 2009 there was an indication of a chance to re-initiate the process<sup>56</sup>, but it was dependent on whether the nation was sufficiently stable to perform an all inclusive constitution making process.

## **2.8 Conclusion**

Considering constitutionalism in Somalia, it is evidence that constitution development process in Somalia was faced by constant conflicts from as early as 1999 and the process has been ongoing amidst challenging experiences as a result of diverse interests that the individuals taking part in

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<sup>56</sup> Noah Feldman, "Imposed Constitutionalism", *Connecticut Law Review*, Vol. 37, pp. 857-889; see also Simon Chesterman, "Imposed Constitutions, Imposed Constitutionalism, and Ownership", *Connecticut Law Review*, Vol. 37, pp. 947-954; and Zaid Al-Ali, "Constitutional Drafting and External Influence", in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Northampton: Edward Elgar, 2011). Abdi I. Samatar and Ahmed Ismaiel Samatar, "Somali Reconciliation: Editorial Note", *Bildhan: An International Journal of Somali Studies*, Vol. 3 (2003): 1-14.

the process may have in their endeavour to develop it. It is also clear that international organizations like UN such as United Nations came in an attempt to calm the situation in Somalia and effect the constitution development in Somalia. It is also clear that from the case in Somalia shows that even if various governments have well documented constitutions in place, they hardly ever uphold the constitutions, thereby making the government unconstitutional. In Somalia, it is evidence that its constitution development process encountered a good number of concerns thereby resulting to frequent questions that prompted continuous debates and discourses to address the same.

## **CHAPTER THREE**

### **CONSTITUTIONALISM IN SOMALIA: DEBATES AND DISCOURSES, 1960 - 2012**

#### **3.1 Introduction**

Chapter two above provided an overview of the constitutionalism in Somalia. The chapter comprised of the conflict in Somalia that outline the armed conflict in the pre-1991 period and the United Nations Operations in Somalia (UNOSOM). This was followed by areas touching on the 2012 Somali constitution, issues in the Somali constitution, constitution development processes in Somalia, the issues of constitution implementation and debates/discourses.

This chapter describes the concept of constitutionalism from three perspectives: the global and regional perspectives as well as the Somalia experience. It also analyses the constitution development process in Africa by considering several African states but focuses on debates and discourses in relation to constitution development in Somalia.

#### **3.2 The Concept of Constitutionalism**

In the contemporary constitutional structures, constitutionalism simply implies limited government. Indeed, constitutions looks like an outline for a government structure where power is distributed among a set of various departments and restrictions are indicated in these divisions. In such instances, constitutions set the basis for external appraisals intended to protect the people's freedoms, which is an important characteristic of any democratic structure. Thus, the concept of constitutionalism is the set of guidelines that governments must operate within the limitations of an acknowledged constitution drafted or not. Instead of simply being a still execution in past retrieval, constitutionalism is a continuous process in which every upcoming age group engages and which essentially amends during the engagement process. This simply



states why, even if all governments have in place constitutions, they are not automatically constitutional governments. In addition, according to Markit elucidates why it has been so simple for numerous postcolonial governments especially in Africa to make use of Constitutions to legalize dictatorial rule<sup>57</sup>.

The history of constitutionalism in Africa is an outstanding case study of the numerous challenges that a good number of African nations after colonialism have experienced and continue to encounter in the process of self-realization. Possibly, the continuous violence and social wars in the majority of the nations in Africa have been schemed by the search to institute constitutional governments that can assure everybody the same involvement in the social, political and economic activities of their own countries. Certainly, the rising independent African nations of the 1960s showed their dedication to social equality, good governance and reverence to the rights of the people. Considering the happenings in Africa states in the 21<sup>st</sup> century, it is evidence that Africa is up until now wallowing in the steam of poor governance while putting efforts not to sink in the sea of constitutional confusion. The continuous state of affairs in Africa indicates that failure to strengthen constitutionalism can result to consequences which, when cautiously reflected on, are the contrast of good governance and social equality. The state of affairs also illustrates why at the beginning of the 21<sup>st</sup> century Africa has had demonstrations for broad restructuring in the constitution and good governance. In order to have good governance, there must be a well-drafted, democratic Constitution that helps the government to control the issues of the nation efficiently, and simultaneously empower the people to be part of government resolutions. The people should be part of the drafting and execution of the Constitution. Hence, there is a strong principle among the Africa people that only complete constitutional

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<sup>57</sup> Weller Mark, 'Settling self-determination conflicts: Recent developments' *European Journal of International Law* 20, (2009): 112

restructuring can guarantee a sustainable constitutionalism and bring to a stop the misuse of powers.<sup>58</sup>

### **3.3 Global, Regional and National Perspectives**

#### **3.3.1 Global Perspective**

According to Pauline, of late the entire globe is hard to govern entirely due to the alternative to the conventional international law structures<sup>59</sup>. Furthermore, it is evident that the purposes and ideologies of the UN Charter are not being served adequately in light of new worries. The text assumed in 1945 does not express the picture of a world plagued by terrorists. In addition, it does not reveal the highly conventional critical dedications to good governance, environmental duty and a freer and fairer world trade structure. More and more, the global law community appreciates the need to put in place new precedence in the growth of international law. Hence, it is vital to review the need for making strong the constitutional structure of standards and institutions that appeared to suggest the promise of achievement towards the end of the 20th century. The 1990s post-Cold War rapture has practically evaporated in the tension of new worries at an era when countries embracing the UN structure are of late not able to deal with these issues.

Discussions on constitutionalism have been evidence across the globe. The global legal system is debatably in an era of changeover from the conventional inter-autonomy affairs paradigm. Nevertheless, the transition process is slow and there is modest approach of understanding towards what the structure is changing. The difficulty of this truth is compounded by two

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<sup>58</sup> Westerman Pauline 'Governing by goals: Governance as a legal style' *Legisprudence: International Journal for the Study of Legislation*, 1, (2007): 71

<sup>59</sup> Christine Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 (3) *International Journal of Constitutional Law* forthcoming; Christine E. J. Schwöbel, 'Organic Global Constitutionalism' *Leiden Journal of International Law* (LJIL) 23, (2010): 530–533.

contradictory experiences. On one side is the internationalization course, like the cession of power from states to global institutions and the ever-growing, broadening and amplifying body of global law; on the other side is the increase of US domination. Tomuschat argues internationalization course confront ordinary ideas on order and the position of authority in the global legal structure<sup>60</sup>. On contrary, Fukuyama argues that US domination and the way in which it has been applied disputes the legal equality of countries, which is the lynchpin of the inter-autonomy affairs paradigm<sup>61</sup>.

According to Allan the organizational and normative situations that strengthen constitutionalism can traditionally be searched from Europe as both the results of the consolidating power of totalitarianism and its contrast<sup>62</sup>. It was in the current of the great effort led by the developing commercial bourgeoisie against the principle of great rights that supported the unrestricted powers of utter sovereigns that a push of political and constitutional principles, which as the time went, formed constitutionalism, materialized. The first of these principles, the rule of law, wanted to manage the whims of leaders by subordinating their conduct towards the law.

Regardless of the significance of ideas like local rights, self-government and the constitution as a state autobiography, constitution development process has constantly entailed some element of global participation. The autobiographies of a good number of the post-1990 constitutions consist of the details of the global processes that brought them forward in addition to the endeavours of their own people. For example, the 1993 Constitution of Cambodia entails both global and domestic ideas. According to Jeremy that constitution was brought about by an

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<sup>60</sup> Christian Tomuschat, 'Multilateralism in the Age of US Hegemony', in *World Constitutionalism*, 31 at 71–75; see, in contrast, Glennon, 'Why the Security Council Failed', 82 *Foreign Affairs* (2003) (May/June).

<sup>61</sup> Fukuyama Francis quoted by Marks Susan. *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000) 16.

<sup>62</sup> Hutchison Allan, "Judges and politics: an essay from Canada" in *Legal Studies: The Journal of the Society of Legal Scholar* 24, Issues 1 and 2, (March 2004): 284.

elected Constituent Assembly, with participation from most global sources including dominant contribution from French lawyers<sup>63</sup>. Later, the 1991 Paris Agreements followed, UN Security Council Resolution 745 and a statement of the UN Secretary-General (S/23613), which define particular conditions and processes with a transitional authority to carry out elections and global finances for worldwide police, military and civilian workforce and associated expenses, all of which can be regarded as constitution development.

In the same manner, the 1990 Namibia Constitution was formed by roughly forty years of UN processes and worldwide international relations, a regional conflict, a revolutionary struggle and Cold War opposition. As an issue of law, this Constitution was established by a Constituent Assembly selected by UN overseeing the elections. At its options on the constitution development process, it should be left to the extent that is viable to state actors. International IDEA initial summit, the Assembly collectively agreed to apply as a structure the 1982 Constitutional Standards detailed in a statement from the Security Council's Secretary-General and certified by Resolution 435 of the UN's Security Council. These constitutional standards had emanated from agreements among the Western Contact Group, forefront countries, the ancient Soviet Union and discussants of Namibia. The functions put into effect by external parties, and the restrictions obliged by such parties, remain uncertain. For several bodies, like the UN Development Programme (UNDP), the Swedish International Development Agency (SIDA), the World Bank and the British Department for International Development (DFID), development on governance is openly linked to development aid. Peters argues that on several instances, the objective is to hold up the constitution development process so as to support a peace

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<sup>63</sup> Webber Jeremy, "Supreme Courts, independence and democratic agency" in *Legal Studies: The Journal of the Society of Legal Scholar* 24, No 1 and 2, (March 2004): 60.

development<sup>64</sup>.

An exceptional constitution development bloom emerged after the conclusion of the 1989 Cold War. For instance, in most states in South America, Brazil's 1988 constitution development process was immediately followed by that of Chile in 1989 and subsequent amendments through the 1990s, Colombia in 1991, Argentina in 1994, Peru in 1993, Ecuador in 2008 and Bolivia in 2009. In Africa states, the constitution development process of 23 out of 52 states was accompanied by domestic violence by 1994. In all areas, constitution development process repeatedly followed peace negotiations. In the Eastern part of Europe, new nations appeared and current ones were changed significantly and new constitutions were propagated in all cases. In the continent of Asia, Thailand process was in 1991 with amendments in 1997, 2006 and 2007, Fiji constitutionalism process was in 1997, Indonesia went through the process from 1999 to 2002, Mongolia in 1992, Afghanistan in 2004, Nepal from 2006 and the process is still ongoing, Myanmar in 2008 undertook constitution development process, Solomon Islands in 2009 and Pakistan in 2010.<sup>65</sup>

These constitution development processes are situated within broader evolutions, occasionally democratic and over and over again in post-violence environment. Somalia could be deemed to be an element of the flourish, but its constitution development process has been constant. Here the constitution development process is being checked as mechanisms for realizing a common dream of statehood. Therefore, the differences among the most local forces have provided proof too wide to overpass by a constitution development process. One lesson that can be learnt from

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<sup>64</sup> Anne Peters 'Global Constitutionalism Revisited' 11, *International Legal Theory* (2005): 39

<sup>65</sup> Saul (fn 41) 32. Castells Manuel in Muller Johan, Cloete Nico and Badat Shireen (eds) "The new global economy" in *Challenges of globalisation* (Cape Town, 2001) agrees that globalisation is, among others, a code word for the emerging world system and at the same time the banner to rally the determined march of global corporate capitalism 3, (2003): 415

Somalia is that approval is the lynchpin of every constitution development process, particularly if there are inadequate local or global pressures to sustain all the players at the negotiating convention and then execute the outcome. Current processes in Darfur, Sudan are signs of related issues.<sup>66</sup>

According to Fukuyama<sup>67</sup> the increase of new constitutions, setting up government by approval, may strengthen the downward movement in brutal conflict<sup>67</sup>. Nevertheless, ongoing conflicts and their consequential peace processes imply that there is a possibility of having more constitution development processes in the near future, perhaps, for instance, in Fiji, Zimbabwe, Madagascar, Somalia South Sudan, Kyrgyzstan, Cyprus and the Philippines. Constitutional problems ensuing from assertions for self-commitment are also well acknowledged, for instance, the Kurds in regions of Turkey and Iraq and several Muslim clans in regions of Mindanao in the southern Philippines. If the tendency persists and armed violence continues to greatly decline, then the place of constitution development process on the international agenda will revolutionize. The intensity of political commitment in constitution development processes by, for example, the United Nations Security Council may go down.

### **3.3.2 Regional Perspective**

This part looks into the constant development of constitution creation and constitutionalism in Africa. The past 2 decades have been characterized by a constitutional rebirth in Africa, weighed down by neither the unswerving mistreatment of colonialism nor the treatment of the Cold War. African states have been as free to describe their own nation and constitutional disposition as any time in past. Ghana, South Africa and Namibia are normally quoted as

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<sup>66</sup> Saul John Ralston, *The Collapse of Globalism and the Reinvention of the World* (London, 2005): 19.

<sup>67</sup> Fukuyama Francis quoted by Marks Susan. *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000) 16.

constructive cases for their constitution creation procedures, whereas in some states, such as Kenya and Ivory Coast, the breakdown of constitutional development has been associated with instability and political conflict. These issues have resulted to a tripartite partnership between some African governments like Switzerland, South Africa and ACCORD which is an organization based in South Africa which is addresses Preventive Diplomacy, Peacekeeping and Conflict Resolution across Africa. Tom, Zachary and Justin<sup>68</sup> argue that this was among the few programs that created mutual relationships between civil society and government to practically deal with the managing of conflict in Africa.

Tom, Zachary and Justin also indicate that taking to consideration that most African states are still in the course of building themselves<sup>69</sup>, it is very vital that the constitutional and political structure should be put in place in a way which strikes a balance between unity and countrywide diversity and which promotes a commonality to which all parties can boldly recognize. When state parties find themselves susceptible to minority category, segregated or marginalized, they would rather fight back against the national structure and depart if they have the opportunity to take part in armed resistance. This has constantly caused a grave challenge to the authenticity of the nation, and has resulted to wars in various African states. The key point is that whereas constitutional democracy, generally defined on the basis of normative standards or values, is collectively valued, it requires to be made significant to the African authenticity and normative circumstance to make it more home-based and reflective of state diversities. Allan argues that this is one of the major challenges affecting constitutionalism in Africa and one that needs dynamic support and commitment of African researchers on matters affecting Africa and Africa

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<sup>68</sup> Ginsburg Tom, Elkins Zachary and Blount Justin, 'Does the Process of Constitution-making Matter?' *Annual Review of Law and Social Science* 5 (2009): 201–223.

<sup>69</sup> Ibid

supporters from the global community<sup>70</sup>.

### **3.4 The Somalia Experience**

For a state rising from civil conflict, a constitutionalism offers chances for reunion, for establishing negotiated resolutions to discordant issues, and for reaching consensus on the most areas of disagreements. From 2006, efforts have been made by even the international parties to create a constitution for Somalia. This was an era of relative harmony in the state, but there had been slight local embrace to the globally supported peace conventions in Kenya, which lead to establishment of the Transitional Federal Government (TFG) and a Transitional National Charter (TNC). Mark, Adan and Haroon assembled for the initial time in Baidoa town in the year-2006, the constitutional development was high on the agenda as an urgent issue<sup>71</sup>. Parliament had been ushered to office, and in line with the transition schedule, a draft constitution had to be in place by year-2007.

Dependence on a constitutional development as part of a changeover from a peace accord to a legally selected government is a more and more common approach. It appreciates the fact that those present at the time of peace negotiations may not stand for all the interests in a state, that in most instances the variety of matters that require to be discussed in a constitution are too enormous for a peace negotiation, and that most of these matters are well discussed at a slower speed, in a highly inclusive way. This was definitely the picture in Somalia. The peace agreement assumed the shape of a transitional constitution-the Somali Republic Transitional Federal Charter, and set out numerous requirements that could be included in a constitution, as well as a federal governance framework and Islamic Shari'a as the fundamental basis for

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<sup>70</sup> Hutchison Allan, "Judges and politics: an essay from Canada" in *Legal Studies: The Journal of the Society of Legal Scholar* 24, Issues 1 and 2, (March 2004): 284.

<sup>71</sup> Bradbury Mark, Abokor Adan and Yusuf Haroon, "Somaliland: Choosing Politics over Violence" in *Review of African Political Economy* 30, no. 97, (2003): 455-478.



legislation. Nevertheless, borrowing from the reality on the ground, it was clear that most of the central ideas that had been agreed on during the peace accord were not well comprehended. Federalism, and particularly the reality that it needs handing over some command and power by the government in favour of the areas and states, had not been well understood indicated mostly by the TFG parties. A lot of stress was put on the necessity for a national dialogue and a comprehensive procedure so as to make sure that the final draft had legality and would be acknowledged at referendum.

### **3.5 Constitution Development in Africa**

As indicated by Ralston most states in Africa have had debates on constitutionalism<sup>72</sup>. In the mid, 2014 the Friedrich Ebert continued the sequence of Abuja debates and for a second time offered a podium for civil society representatives, prominent officials and the politicians and intellectuals to exchange unofficially on the progress of West Africa Constitutional Democracy. The Centre for Labor Studies and Advocacy in Nigeria (CLSA), Discussants and Centre for Democracy and Development (CDD) visitors, from European Embassies and West Africa and Trade Unions, Reporters and youth organizations accepted the call and enthusiastically made contributions to a productive and demanding debate. The declaration of armed violence and civil wars in West Africa has opened the way for nonviolent transitions of governments through elections. Alternatively, a few State heads still exceeded the maximum years in power. For instance, Benin has been viewed as well-running young West Africa democratic system. According to Ralston the 1990 constitution, together with the constitutional court<sup>73</sup>, has been considered as the stability basis. Surprisingly nevertheless, constant debates on constitution in

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<sup>72</sup> International Crisis Group, “Somalia: To Move beyond the Failed State”, in Africa report No. 147, (Nairobi/Brussels, Dec 2008) retrieved from <http://www.crisisgroup.org/~media/Files/africa/horn-ofafrica/Somalia/Somalia%20To%20Move%20Beyond%20the%20Failed%20State.ashx> (April 2011)

<sup>73</sup> Saul John Ralston, *The Collapse of Globalism and the Reinvention of the World* (London, 2005).

various states, like Benin and Burkina Faso, are rousing resistance and conflict. Mali and Guinea-Bissau faced coups d'état in the recent past, indicating that the military participation into politics is common of late.

Considering these advancements, which are jeopardizing the democratic development, the coming presidential elections in 2015 in various ECOWAS Member States, have ignited debates on the general democracy sustenance and, by expansion, on West Africa regional peace. Following the for FES West Africa, Mrs. Idayat Hassan, the Executive Director of CDD, statement by Mr. Simon Asoba the current political progress in West Africa was shocking thereby raising the issue whether democracy this part of Africa was retreating. Consequently, an evolving debate was carried on by a panel comprising of Mouftaou Laleye, Benin Ambassador in Nigeria, Burkina Faso, Seni Ouedraogo, Ouagadougou University Lecturer and Mr. John Odah, Vice-President of constitutional development in Burkina Faso and Nigeria's Director of the Center for Labor Studies and Advocacy. The initial panel debate cycle came to conclusion in the approval of the strong resistance movements, presently not supporting unconstitutional restructuring across the region. Mentioning the case of Burkina Faso, Seni Ouedragao emphasized that the final attempt of amending the constitution had essentially been the initial among seven similar attempts in the last two decades, which could be effectively prevented. An outstanding subject all over the debate was the efforts made by West African presidents to surpass the legal period of presidential terms. Mr. Odah appraised that the transition in leadership was a major characteristic of democracy; however most cases had indicated that democratically chosen leaders had taken advantage of democratic constitutions to continue in power. A practical account was found in the common support and patrimonial frameworks, which had made power very attractive on monetary basis. The addressees participated in the discussion by stressing the

significance of civil society political education to make sure that there is a sustainable democracy and to be in a position to add to its evolution. Lastly, ECOWAS vowed to change from a state-related ECOWAS to a people-related ECOWAS and to execute very efficient endorsements and manage systems for the good of Constitutional Democracy. The debate ended with the broad reaction that there was no looming weakening of democracy in West Africa and in other African states, but fairly a raising cognizance among civil society on the constitution benefit.<sup>74</sup>

The Project on Africa's Constitutionalism was due to a tripartite association among the Switzerland and South Africa governments and the ACCORD. This was a single program among a few that brought mutual relations between civil society and governments to reasonably deal with conflict managing in Africa. This project was run from 2000 to end 2002 under the funding by the Swiss Foreign Affairs Federal Department. The project was anchored in the idea that Africa constitutions are as a result of a colonial inheritance, which depicts the reason why they were short of ownership, legality and significance to the African situation. ACCORD's supposition was that the dysfunction of the countries in Africa could be rectified if African states could have their bodies' ownership and if those bodies were to be appropriate to the circumstances in Africa and the desires of the people of African. According to Tom, Zachary and Justin<sup>75</sup> it is evident that the colonial nation legacy should be conquered if an African new beginning is to be achieved and that it involve seeking optional independent and truly African structures of constitutional autonomy. This project was facilitated through the help of African and global specialists' panel, drawn from various sectors. The panel was chaired by Francis Deng, the UN Secretary General Special Advisor and co-chaired by Jakes Gerwel, the former

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<sup>74</sup>Ginsburg Tom, Elkins Zachary and Blount Justin, 'Does the Process of Constitution-making Matter?' *Annual Review of Law and Social Science* 5 (2009): 201–223.

<sup>75</sup> Hatchard John, Ndulo Muna and Slinn Peter, *Comparative Constitutionalism and Good Governance in the Commonwealth: An East and Southern African Perspective* (Cambridge: Cambridge University Press, 2004)

Director General to late Nelson Mandela when he was in office. Other panel member was Nicholas Haysom, who was Mandela's former legal advisor and Richard Sizani, the KwaZulu Natal Provincial and Local Government Director General. The project depended on the proficiency of chosen panel members to offer help to the Constitutional and Legal Commission of Rwanda, the Swiss-facilitated Constitutional and Technical Working Group in Somali and the Constitutional Review Commission of Kenya. In the final stages of the project, a Sudan Expert Reference Group, led by Francis Deng, was established to significantly cross-examine the constant peace process in Sudan and put together standards that could lead the transitional constitution drafting in that state.

Several states were involved in the project, for instance, in Lesotho, in the run up to the May 2002 elections. The Project personnel participated in a cycle of meetings whose objectives was to establish a multi party agreement on the new electoral structure ahead of the elections. A post-election inspection, which scrutinized the extent to which the new electoral structure had brought about steadiness in Lesotho was formed and distributed in the region. Other countries of involvement included Sudan peace process for drafting transitional constitution and Tanzania in Mwalimu Nyerere Foundation to build a Constitutional Development National Platform. The first funding from the Swiss Foreign Affairs Department to institute the Constitutionalism in Africa has formally ended. ACCORD, nonetheless, continues to deal with constitutionalism in Africa on its own, or in partnership with donors. For example, project personnel are presently participating in a German-financed program to make known the South Africa Administrative Justice Act Promotion. Secondly, a chosen set of periodicals that were created at the project period were being printed and distributed for extensive use. Project personnel are also concluding plans for a study project that will engage in the constitutionalism dynamics in

particular states of the Great Lakes area. The project will be both exploratory and policy leaning and will depend on practical field study and policy distribution that will cut across Uganda, Rwanda, Burundi and DRC. The idea is to cross-examine structures that could put together the African normative framework and contemporary constitutional thoughts in an all-inclusive structure. Madaru argues that as a result, the ACCORD will still be relevant to its obligation for optional democratic and justly African constitutional democracy structures that could set up a foundation for broader policy engagement<sup>76</sup>.

### **3.6 Constitution Development in Somalia: Debates and Discourses**

In 2012, after realizing that their nation on the threshold of transition, youths of Somali residing in the country participated in conventions prepared by the Somali Youth National Council to debate on articles of the new constitution that were to conclude the intermediary phase in Somalia. Ali argued that it was important to have youths handling the processes<sup>77</sup>. He maintained that the citizens out there were ignorant of the draft holding the view that it was a worldly and Christian draft. Somalia had schedules to go through the intermediary government phase, assume a new constitution and vote for a president in August the same year. After its approval the new draft was to serve temporarily awaiting a state referendum. In numerous hotels, the citizens of Somali read through the new draft and debated how appropriate some of the articles were. Some of the debatable issues in the constitution were the function of religion in it and the lowest educational level for a presidential aspirant. Mohammed argued that it was vital for the citizens

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<sup>76</sup> Mluvi Maduro, "The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism" *International Journal of Constitutional Law* 3, (2005): 332, 340.

<sup>77</sup> Mohamed Ali "An 18-year-old Shari`ah law and jurisprudence student at the University of Mogadishu" Interview: Nairobi, June 2014

to debate over constitutional clauses and the function of an experts committee.<sup>78</sup>

In addition, Somalis living overseas were apprehensive of the drafting of the constitution and they strongly criticized the participation of the traditional elders in the practice. For instance, Bashir indicated that constitution was vital and if the citizens of Somali failed to vote it in, then a committee of experts with the necessary skills should peruse it and endorse it<sup>79</sup>. Also, Khadar showed a lot of interest in the way the new constitution was to deal with the matter of dual citizenship by stating that there were numerous Somalis who lived overseas with foreign passports but it was not clear what their function and rights were to be in their mother country<sup>80</sup>. Moreover, other citizens of Somali viewed the new draft as a chance to solidify the development of their nation.<sup>81</sup>

After the final draft of the transitional constitution of Somalia, some criticisms had already come up but the government, in its efforts to bring together traditional elders to organize the Assembly to consider and then vote for the draft endorsement, had made several amendments in the draft to cater for the criticisms. After the constitution was made in print, President Sheikh Sharif was also stated that he was not fully contented with it arguing that there were still some faults that needed rearrangement. A convention financed and organized by the Somalia UN Political Office whose operation base is Nairobi, Kenya held in Somalia Capital in September 2011 was the initial Consultative Meeting on Ending the Transition amidst the grave famine crisis ever in Somalia. This convention was meant to gather together political stakeholders in Somalia to plan

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<sup>78</sup> Westerman Pauline, 'Governing by goals: Governance as a legal style' *Legisprudence: International Journal for the Study of Legislation*, 1, (2007): 71

<sup>79</sup> Diini Bashir "medicine student in Egypt" (interview: Mogadishu, June, 2014)

<sup>80</sup> Khadar Mohamed "who had lived in London for a period of over eight years" (Interview: Nairobi, June, 2014)

<sup>81</sup> Hatchard John, Ndulo Muna and Slinn Peter, *Comparative Constitutionalism and Good Governance in the Commonwealth: An East and Southern African Perspective* (Cambridge: Cambridge University Press, 2004)

for a roadmap to bring to a conclusion the transitional authority terminating in a countrywide constitutional referendum and fair elections. Delegates taking part in this plan were restricted to four assemblies from the numerous Somali disagreeing groups together with the current Transitional Federal Government, State of Galmudug, State of Puntland, Ahlu Sunna Wal-Jamai' and about 35 stakeholders from the global society and additional regional firms in accordance to the roadmap.<sup>82</sup>

After a consecutive three days of consultations the convention proposed and assumed a roadmap that summarizes four vital functions like safety measures, constitution, reunion and good governance with standards and timeframes for execution, all to be passionately implemented within a year. Owing to the fact that this Mogadishu exercise was planned to control or get rid of conflict amongst opposing parties and put together legal national institutions, this convention lacks assurance in this case. Not any of the Somali units that were part of this convention asserts to legally represent the people of Somali, nor feel embracing the process. In actual fact, the consultation convention was not all-inclusive, not Somali-owned and most of the resolutions proposed in this roadmap do not deal with the main political goals in Somalia. The Somalia UN Envoy and the present TFG disagreed for a while concerning the involvement process in the Consultation Convention as the recent TFG president was forced to acknowledge regional states as political contemporaries in the process of set up a legal government. However, Somalia lacks well-built regional states and engaging simply two regions to the Consultation Convention makes the whole process illegal in the views of the extensive people of Somali. As a result, some states that new roadmap, grandly; hunt for to enforcing a Somalia new political structure through

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<sup>82</sup> Reno William, "Somalia: State Failure and Self-determination in the Shadow of the Global Economy" in *Globalisation, Violent Conflict and Self-Determination*, ed. FitzGerald, V., Basingstoke: Palgrave Macmillan, (2006): 147-178.

unelected politicians devoid of legality in Somalia. The Somalia conflict is very multifaceted and it seems impossible sometimes. Thus, there should be a practical political resolution in Somalia with calculated and accountable global assistance. Considering the increasing need for peace and steadiness by the people of Somali, the main goal should be reinstating law and order through a well-established constitution.<sup>83</sup>

In mid 2006, the Somali parliament set up the FCC in the state's Constitutional Commission Act. This Commission's conventional guiding standards were that it was to comprise: the Charter, the Islam principle, social fairness and democracy, and a process that will carry out several functions like, upholding public involvement, transparency and liability to the people; embracing the Somalis diversity and their views and upholding firmness, peace and rebuilding. The FCC members would not be seeking for power in their clans, but they were esteemed members of each clan with skilled backgrounds that included ex-judges and ex-religious leaders. They initially met for a whole week in a convention organized by the UN Development Program (UNDP) in the month of August year-2006.

The commission members confirmed to be committed and attracted; cognizant of the dangers and difficulties they encountered and ready to assume their tasks seriously. Among their initial initiatives was to amend their identity to the Independent Federal Constitutional Commission. In the convention, the IFCC formulated their policies of course of action and settled on several methodology and practical steps. In the first step was a program on public education program from 2006 to end 2009 that would allow the Somalis to be aware of why a constitution was being formed and what their options of governance were. This process was to be supervised by the

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<sup>83</sup> International Crisis Group "Somaliland: Democratization and its Discontents" in Africa Report no. 66 Nairobi/Brussels. Retrieved from <http://www.crisisgroup.org/~media/Files/africa/horn-ofafrica/somalia/Somaliland%20Democratisation%20and%20Its%20Discontents.ashx> (April 2011)



commission but executed by a Secretariat, which worked in partnership with the civil society. In their second step, there was to be a nine months discussion after the public education, where the commission would commence a state dialogue to reconcile divided and disagreeing groups to talk about a state's common future. In the third step, there was to be a half-year draft constitution preparation, and the commission would ask for proportional and expert support as they indicated their requirements. Erika<sup>84</sup> argues that the draft was to be the topic of additional public education ahead of the referendum.

There was debate of a representative confirmation meeting ahead of the referendum, but it had not been agreed on. These resolutions were well embraced by the Constitutional Affairs Minister Derro, and symbolized an optimistic beginning for the constitutional development process. The worldwide consortium decided to aid in the process on this foundation and set apart enough funds to do the same. Nonetheless all of this process was going on against the setting of the growth of the Islamic Courts Union (ICU) in Mogadishu in the mid 2006 and its disagreement with the TFG. Although the constitutional process appeared to be creating a chance for discourse and negotiation among all Somalis, counting the Islamists, it was evident that the TFG and ICU were getting to a new conflict cycle. In actual fact the Constitutional Affairs Minister was among the initial victims of the transformed conflict in Somalia and was murdered a few days after the IFCC opening convention. In the violence that emanated, the constitutional process was in effect withheld, as the transitional government shifted their concentration to the emergency. According to Grimm, from 2006, the commissioners have made efforts to continue with planning, although with the TFG almost crumbling, there was little drive to run a composite process of

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<sup>84</sup> Erika De Wet "The International Constitutional Order", *International and Comparative Law Quarterly* 55, (2006): 51-76

constitutional development in such an unstable atmosphere<sup>85</sup>.

Tom, Zachary and Justin indicate that among other issues, the new constitution put down firm procedures for the formation and approval of fresh states for the Federal constitution<sup>86</sup>. Puntland was the only one offered the status of an acknowledged state. Galmudug was acknowledged as the only state that will be in a position in the future to meet all the requirements for a complete federal state as set in the charter. Some of these requirements are hosting a sustainable reunion process and comprising of two regions, which have reunited. There were also numerous minor administrations that made assertions of a prospective or authentic state status. Nevertheless, no single minor state would meet the anticipated constitutional requirements.

Towards the end of the year 2012 a joint statement indicated that Somalia was at a significant stage and it was essential that the peace process be prevented from slipping back. The IGAD, the UN and the AU gave a caution that they would enforce sanctions on anybody who attempted to interrupt the constitutional development. In an interrogation, the Somalia UN Special Envoy, Ambassador Mahiga, indicated that the caution was partially intended for several MPs in Somalia. He indicated that there were still a few calibres in Parliament threatening to set up their personal government not within the roadmap and lengthen their personal office terms. The new draft would stridently lower the parliamentary seats from 550 to 225. Ambassador Mahiga maintained that there were a few previous warlords in agreement with MPs. Also, there were teams bent on disrupting the entire exercise around the constitutional development process. He indicated that there were plans to invite them in positive dialogue as an alternative to their just

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<sup>85</sup> Dieter Grimm, "The Constitution in the Process of Denationalization", (2005) 12 *Constellations* 447; M. Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State" in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: CUP, 2009): 258-325.

<sup>86</sup>Ginsburg Tom, Elkins Zachary and Blount Justin, 'Does the Process of Constitution-making Matter?' *Annual Review of Law and Social Science* 5 (2009): 201–223.

frustrating and diverting the positive course. According to Maduro the same time, a TFG spokesperson indicated the TFG's commitment to keep on with the process and sanction or even put to book the politicians fighting the August closing date for the conclusion of the transitional era<sup>87</sup>.

In June 2014 the Max Planck Foundation planned and supported an eight-day conference for the draft Constitution Assessment and Implementation Supervision Committee in Uganda. The Oversight Committee was tasked to set up and lead the constitutional assessment and execution process as stipulated in the draft Somalia Constitution. The Max Planck Foundation has funded the Oversight Committee from mid-2013 by assisting the scrutiny and discussion of the Somali draft Constitution and coming up with ideas and proposals for the analysis of the Constitution. During this conference, the Committee debated Chapters 6, 7 and 8 of the Somali draft Constitution, regarding the guideline for, and the link between, the legislative, the executive and the arms of the Republic of Somali. This extremely political subject was discussed from a relative constitutional law point of view with the Max Planck Team as the intermediary so as to make up a substantive, purposeful discussion. In course of the conference, Mohamed Osman, the Federal Parliament speaker, paid a visit to the Committee and discussed with it the most recent improvements of the Somali constitutional assessment and execution process.<sup>88</sup>

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<sup>87</sup> Mluvi Maduro, "The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism" *International Journal of Constitutional Law* 3, (2005): 332, 340.

<sup>88</sup> Dieter Grimm, "The Constitution in the Process of Denationalization", (2005) 12 *Constellations* 447; M. Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State" in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: CUP, 2009): 258-325.

### **3.7 Conclusion**

Considering constitutionalism from global and Africa perspective, it is clear that constitution development process is an ongoing process which is mostly a challenging process as a result of different interests that the involved parties may have in their task to develop it. Also, it is evidence that the concept of constitutionalism is the policies that governments should observe whether the constitution is in writing not. This constitutionalism process is continuous with each upcoming generation engages through amendments. The case in various African states and especially Somalia clearly indicate that even if most governments have well drafted constitutions in place, they rarely respect the constitutions, thereby making them unconstitutional governments. Considering the Somali case, its constitution development process was faced by a lot of issues thereby resulting to numerous questions that resulted to constant debates and discourses. Its constitution making process was not an easy task amidst conflicts thereby calling for international involvement in the drafting.

## **CHAPTER FOUR**

### **CONSTITUTIONALISM IN SOMALIA: CRITICAL ANALYSIS**

#### **4.1 Introduction**

Chapter three above provided the debates and discourses in the constitutionalism in Somalia between the year 1960 and 2012. The chapter starts with a section that highlights global and regional perspectives as well as the Somalia experience, followed by constitution development in Africa and debates and discourses in the constitution development in Somalia.

This chapter seeks to critically analyse four key emerging issues from the study of constitutionalism in the Federal Republic of Somalia. These issues include: actors in the constitution development in Somalia, constitution development process in Somalia, debates on constitutionalism in Somalia and finally the discourses in the implementation of the constitution in Somalia.

#### **4.2 Emerging Issues**

##### **4.2.1 Actors in the Constitution Development in Somalia**

From the study, it is evidence that various actors were involved in the constitutional development in Somalia. From the discussion, the most significant actors include; the neighbouring states to Somalia, the international organizations, the non-regional foreign powers and other non-state actors. It is evidence from the study that neighbouring states, for instance, Ethiopia has key reasons of it getting involved with a lot of significance the occurrences in Somalia. The study indicates that in 1978 it had war with Somalia and it is the one that started the attack. The study further shows that for Ethiopia, as a result of various reasons, it was anxious of the influence of Somali as a country being strong. The study indicates that Ethiopia anxiety was as a result of the

constant Somali claims to the Ogaden, the fact that Somali would arouse clashes amongst the Ethiopia tribes especially the Somalis and finally the fact that refugees from Somalia would move to Ethiopia and this would have resulted to cultural imbalances. The study further indicates that Ethiopia was also anxious of the harsh Somalia lawlessness, which would cause a main challenge to the Ethiopia law enforcers due to its extensive border with Somalia. The study indicates that Ethiopia would not prefer a powerful and violent Somalia but a powerful and friendly country but they greatly preferred a weak Somalia, which would end up depending on them thereby giving Ethiopia an upper hand in the politics of the Horn of Africa.

From the study, Ethiopia participation in the affairs of Somalia is clear in the way they actively take part in the assumption of power by the Transitional Federal Government and their apparent support for Abdullahi Yusuf as the president. On the other hand, it is evidence that Eritrea also takes part in the Somalia affairs. The discussion indicates that Eritrea has rarely takes part in the Somalia clashes thereby ending up having hostility in its relationships with Ethiopia.<sup>89</sup> The discussion further shows that instead of commencing again direct quarrels, the two countries were waging alternative quarrels against each other from 2000, with Somalia as the main combat zone. Furthermore, the study shows that even though the complete area of Djibouti is too faced with the irredentist Somali project, thus exist no definite aggression between the two countries. The study shows that it has frequently made efforts to look like a genuine broker and has been the host of meetings with an aim of developing the Somali state. In addition, it is clear from the study that Sudan role is reasonably of no consequence and that it has been impartial throughout the conflict behaving like a fair broker liable to facilitating the negotiation talks. Finally, the discussion shows Kenya as an important player through IGAD. However, from the study, it is

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<sup>89</sup>Report of the Panel of Experts on Somalia pursuant to U.N. Security Council Resolution No. 1425. 2002.

evidence that Kenya has directly co-worked with the US in that it assisted in closing the border to Somalia as well as arresting suspects associated with terrorism. Also it is evidence from the study that it has been greatly involved in renditions of fleeing Somalis to Ethiopia as well as to Somalia.

Furthermore, the discussion from the study presents the international organizations as another type of actors. It is clear from the study that the UN's involvement has been minimal, greatly concentrating on humanitarian matters with its agencies and ancillaries as the major actors. In addition, the study shows that Somalia has been continuously on the policies of the UN Security Council. Also, the study indicates that when the UN mission presence has not been in Somalia, the AU has been present. On the other hand, from the study the genuine function of AU was somewhat reserved mainly as a result of the failure to have funds and armed forces. The discussion further shows that from the beginning, IGAD was significantly leaning towards the Transitional Federal Government appeal for arms and supporting the lessening of the arms curb on Somalia in order to render the growth of armed forces faithful to Yusuf and his supporters.

In addition, the discussion presents non-regional foreign powers as actors too. The study shows that they play a grand role at personal level rather than as contributors in worldwide initiatives. From the study, it is clear that the United States has been considerable even if its security measures have not been successful from 1990s. Furthermore, the study shows that apart from US, many other countries have dispatched warships to guard their individual shipping by use of Somali waters and the Aden Gulf even if their influence has been very restricted in accordance to the state of affairs in Somalia. Finally, according to the study, non-state actors have played a role in Somalia. It is clear that due to the lack of a working state in Somalia, there have been huge opportunities for different non-state actors to hinder local dealings in the nation with stateless

environment.<sup>90</sup>

#### **4.2.2 Issues in the Constitution Development Processes**

The study indicates that during the 1960s the Somalia Republic was a constitutional democracy approved through a referendum where the constitution eliminated a civilian, legislative governance structure and protected human rights. The study further shows that two consecutive and democratically elected governments ruled Somalia between 1960 and 1969. From the discussion, it is evidence that in 1969, a bloodless military conquest happened under the leadership of Siyad Barre, which suspended the constitution and the state name was changed to Somali Democratic Republic of Somalia.<sup>91</sup> Eisgruber indicates that over two decades later, forces founded on the clans took over power from the military authoritarianism of Siyad Barre<sup>92</sup>.

On the other hand, Westerman indicates that from 1991, regular efforts have been made to return normalcy and Somali central authority but it has been challenging<sup>93</sup>. The study shows that the year-2000 Somali National Peace Conference in Djibouti led to the formation of a Transitional Government in 2000, which ordered several national and global supports and the 4.5 authority sharing structure of unchanging relative clan representation was established where same number of positions in parliament and other transitional government positions were given to every Somali clan amongst the main four, with a half given to the minority clans. According to Huscroft and Brodie it is also clear from the study that 2002 to 2004, the Intergovernmental Authority on Development supported stability talks in Kenya with major political players who

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<sup>90</sup> United Nations Development Program/World Bank. April 2004. Draft Report on Socio-Economic Assessment in Puntland. Produced by PDRC.

<sup>91</sup> Ronald, Den-Otter, *Judicial Review in the Age of Moral Pluralism*, (Cambridge, Cambridge University Press, 2009), p. 56.

<sup>92</sup> Christopher, Eisgruber, *Constitutional Self-Government*, (Cambridge, Harvard University Press, 2001) p.123.

<sup>93</sup> Pauline, Westerman, 'Governing by goals: Governance as a legal style' *Legisprudence*, *International Journal for the Study of Legislation*, 1 (March, 2007), p. 7.



governed the region and private armies in Somalia or had the reinforcement of their relevant clans<sup>94</sup>.

Huscroft and Bradley further indicate that clashes in Somalia were severe and the new Transitional Federal Government had no powers in most parts of Somalia until in 2006<sup>95</sup>, the Federal Constitution Commission consisting of 15 people, based on 4.5 clan representation methods, was included in the Constitutional Commission Act of Somalia with a responsibility to prepare a constitution for the country<sup>96</sup>.

In accordance to the study, in 2006, the commission decided on a broad civic training program to train the people on the constitution-drafting process with an aim of setting up national dialogue. The study shows that it then concentrated on creating a draft constitution to set the reference of the regular civic education. Aileen shows clearly that as a result of this process, there was an increase in instability in Somali's capital with the assassination of the Constitutional Affairs Minister. This brought about an immediate stoppage of the constitutional process<sup>97</sup>.

Kramer indicates that the transitional president stepped out of power and the UN facilitated peace talks between the Federal Transitional Government and the Re-liberation of Somalia Alliance<sup>98</sup>, from 2008 till the talks were concluded in a reconciliation conference in 2009, which was hosted by Djibouti where a power-sharing agreement was established. Nevertheless, the discussion clearly revealed that the accord was criticized by Al-Shabaab movement, who then

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<sup>94</sup> Grant, Huscroft and Ian, Brodie, *Constitutionalism in the Charter Era*, (Markham, Ontario, Butterworth's, 2004) p. 55-90.

<sup>95</sup> Grant, Huscroft and Miller, Bradley, *Expounding the Constitution: Essays in Constitutional Theory*, (Cambridge, Cambridge University Press, 2008), p. 87.

<sup>96</sup> Ibid

<sup>97</sup> Kavanagh, Aileen, 'The Idea of a Living Constitution', *Canadian Journal of Law and Jurisprudence*, 16 (June, 2003), p. 55.

<sup>98</sup> Larry, Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (New York, Oxford University Press, 2004) p. 38.

governed most part of the South-central Somalia and moments later announced their allegiance for Al-Qaeda group thus putting its development and implementation into jeopardy. The study shows that the end result was the Constitution Commission size being raised to 30 members in the same conference and commenced its task again in 2010 with their base in Djibouti and with a plan to have concluded the draft towards the end of 2011. The discussion indicate that failure to involve the public and to reveal any information about the draft process due to insecurity state of affairs in most part of Somalia faced a lot of criticism on the basis of whether Somali citizens were aware of their constitution drafting leave alone being done in a foreign land.

According to Sager the commission gave out a rough draft, which outlined the facts to encourage public debate and remarks in end 2010<sup>99</sup>. According to the discussion, this draft gave options on matters like a presidential or parliamentary government structure, the capital status of Mogadishu as well as outlining definite principles of federalism. The study shows that the resulting step was for the commission embarked on this public consultation since it acknowledged the importance to concentrate on civic education to inform the people of the draft and the general importance of constitutionalism through its website, media among others. It is evidence from the discussion that this campaign was a difficult task with the Al-Shabaab making it dangerous even to talk about the draft.

It is also clear from the study that the Commission did discussion forums throughout Somalia on the draft Constitution towards end 2011 and early 2011. The discussion indicates that the commission did a meeting with the Somalia's Transitional organizations in Somalia as well as with the traditional leaders and social society institutions, together with women and youth groups

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<sup>99</sup> Lawrence, Sager, *Justice in Plainclothes: A Theory of American Constitutional Justice*, (New Haven, Yale University Press, 2004) p. 81.

and groups representing the disabled, Somali forces and Federal Transitional Parliament members. The study reveals that the Federal Transitional Parliament extended its term for three years thereby creating uncertainty in the draft constitution timelines with the President and the parliament speaker signing an agreement to mark the devotion to assume a constitution in the end of 2012.

#### **4.2.3 Debates and Discourses**

From the discussion several debates took place in an effort to establish a working constitution in Somalia. It is evidence that after realizing that their nation on the threshold of transition, youths of Somali residing in the country took part in conventions prepared by the Somali Youth National Council to debate on articles of the new constitution that were to conclude the intermediary phase in Somalia in 2012. It is evident from the discussion how young people rose to the occasion in these debates by revealing how Mohamed Ali an 18-year-old Shari`ah law and jurisprudence student at the University of Mogadishu, stated on the importance of having youths handling the issue. The study reveals that this student indicated that the citizens out there were not informed of the draft since they thought it was worldly and Christian draft. The discussion further reveals that Somalia had timelines to go through the conciliator government stage, take up a new constitution and vote for a president within the same year. The discussion reveals how Somalis were eager to learn about the content of their constitution in the way the citizens in different gatherings in hotels read through the new draft and debated the suitability of some of the articles were. Pauline also indicates that some of the debatable issues in the constitution were the function of religion in it and the lowest educational level for a presidential aspirant as seen in

the Somalis arguments in the discussion<sup>100</sup>.

Hatchard, Muna and Peter shows that even the Somalis living in foreign states were eager to know about their constitution as shown by how apprehensive they were of the drafting of the constitution and how they strongly criticized the involvement of the traditional elders in the practice<sup>101</sup>. Bashir states how crucial the constitution was crucial and any failure by citizens of Somali to vote it in, would give way to the committee of experts with the necessary skills to peruse it and endorse it. The discussion also gives the case of a 28-year-old Somali, Khadar Mohamed from London showing great interest in the way the new constitution was to handle the matter of dual citizenship by stating that there were numerous Somalis who were in foreign states with foreign passports and they were not informed of their function and rights in their mother country.

The discussion further reveals that there was great criticism to the final draft and how the government had made efforts to make amendments and bring together traditional elders to organize the Assembly that was to consider and then vote for the draft endorsement. The study shows how President Sheikh Sharif showed his partial contentment with the final printed draft arguing that there were still some faults that required rearrangement. From the study, it is clear that a convention financed and organized by the Somalia UN Political Office whose operation base is Nairobi, Kenya held in Somalia Capital in September 2011 was the initial Consultative Meeting on ending the Transition in course of a grave famine crisis ever in Somalia. According to the discussion, the convention's aim was to gather together political stakeholders in Somalia

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<sup>100</sup> Westerman Pauline, 'Governing by goals: Governance as a legal style' *Legisprudence: International Journal for the Study of Legislation*, 1, (2007): 71

<sup>101</sup> Hatchard John, Ndulo Muna and Slinn Peter, *Comparative Constitutionalism and Good Governance in the Commonwealth: An East and Southern African Perspective* (Cambridge: Cambridge University Press, 2004)

to plan for a roadmap to bring to a conclusion the transitional authority terminating in a countrywide constitutional referendum and fair elections. According to William lack of transparency in the process since delegates taking part in this plan were restricted to four assemblies from the numerous Somali disagreeing groups together with the current Transitional Federal Government<sup>102</sup>, State of Galmudug, State of Puntland, Ahlu Sunna Wal-Jamai' and about 35 stakeholders from the global society and additional regional firms in accordance to the roadmap.

The study further reveals the proposals of the consultations in the convention as four vital roles that included the safety measures, constitution, reunion and good governance with standards and timeframes for execution, all to be passionately implemented within a year. Again, it is clear from the discussion that there was no single Somali unit that was involved in the convention to legally represent the Somalis or feel part of the process. It is evidence from the study that, the discussion convention was impartial, not Somali-owned and most of the resolutions proposed in this roadmap did not address the main political aims in Somalia. Further, the discussion reveals the disagreement between Somalia UN Envoy and the present TFG concerning the participation process in the Consultation Convention as the then TFG president was pushed to acknowledge regional states as political contemporaries in the process of establishing a legal government. It is also clear from the discussion that Somalia lacked well-established regional states and involving only two regions to the Consultation Convention made the entire process illegal as most Somalis indicated. The discussion finally reveals that there should be a practical political resolution in Somalia with calculated and accountable global support with the main objective being to

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<sup>102</sup> Reno William, "Somalia: State Failure and Self-determination in the Shadow of the Global Economy" in *Globalisation, Violent Conflict and Self-Determination*, ed. FitzGerald, V., Basingstoke: Palgrave Macmillan, (2006): 147-178.

reinstate law and order by means of a well-established constitution.<sup>103</sup>

#### **4.2.4 The Issue of the Implementation**

The study reveals the responsibility of the Somali parliament in setting up the FCC in the state's Constitutional Commission Act whose conventional guiding standards were that it was to consist the Charter, the Islam principle, social fairness and democracy, and a process that will carry out several functions like, upholding public involvement, transparency and liability to the people; embracing the Somalis diversity and their views and upholding firmness, peace and rebuilding. The study also stipulates the FCC members' mandate in that they were not supposed to seek for power in their clans, but they were esteemed members of every clan with skilled backgrounds that included ex-judges and ex-religious leaders. It is also evident from the study the FCC constant meetings in a convention organized by the UN Development Program (UNDP) in the month of August year-2006. In addition, the discussion reveals FCC initial initiative to be the amendment of their identity to the Independent Federal Constitutional Commission. It also reveals the initiatives at the convention as the formulation of their policies action course, which they ended by settling on several methodology and practical steps towards the endorsement of the constitution. In addition, Erika indicates these practical steps as a program on public education program from 2006 to end 2009 under the supervision of the commission and under execution of a Secretariat as well as a nine months discussion after the public education to reconcile divided groups<sup>104</sup>.

The discussion reveals that there was also a debate of a representative confirmation meeting

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<sup>103</sup> International Crisis Group 2003, "Somaliland: Democratization and its Discontents" in Africa Report no. 66 Nairobi/Brussels. Retrieved from <http://www.crisisgroup.org/~media/Files/africa/horn-ofafrica/somalia/Somaliland%20Democratisation%20and%20Its%20Discontents.ashx> (April 2011)

<sup>104</sup> Erika De Wet "The International Constitutional Order", *International and Comparative Law Quarterly* 55, (2006): 51-76

ahead of the referendum, but it had not been agreed on. It also indicates how these resolutions were well embraced by the Constitutional Affairs Minister Derro, symbolizing an optimistic beginning for the constitutional development process. It is also evident from the discussion that a global consortium made decision to aid in the process on this foundation and set apart enough funds to do the same. Furthermore, it is clear that this initiative was against the setting of the growth of the Islamic Courts Union (ICU) in Mogadishu in the mid 2006 and its disagreement with the TFG. The study shows that the constitutional process seemed to be creating a chance for discourse and negotiation among all Somalis, counting the Islamists, but the TFG and ICU were getting to a new conflict cycle. Grimm reveals some of the grave consequences of the disagreements like the murder of Constitutional Affairs Minister a few days after the IFCC opening convention. It also reveals that the emergence of violence was a contributing factor to the stoppage of the constitutional since the transitional government shifted their concentration to the emergency<sup>105</sup>.

From the study, it is also clear that among other issues, the new constitution put down firm procedures for the formation and approval of fresh states for the Federal constitution with Puntland as the only one offered the status of an acknowledged state and Galmudug being acknowledged as the only state that will be in a position in the future to meet all the requirements for a complete federal state as set in the charter. The study indicates that some of these requirements were hosting a sustainable reunion process and comprising of two regions, which had reunited. It is also evident from the discussion that there were also numerous minor

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<sup>105</sup> Dieter Grimm, "The Constitution in the Process of Denationalization", (2005) 12 *Constellations* 447; M. Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State" in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: CUP, 2009): 258-325.

administrations that made assertions of a prospective or authentic state status.<sup>106</sup>

The discussion further shows that this instability in Somalia towards the end of the year 2012 showed that the country was at a critical stage and it was necessary that the peace process be prevented from slipping back. The study reveals IGAD, the UN and the AU as the international bodies gave caution to enforce sanctions on anybody who attempted to interrupt the constitutional development in Somalia. This discussion clearly show the part this bodies played through the interrogation of the Somalia UN Special Envoy, Ambassador Mahiga, who indicated that the caution was partially intended for several MPs in Somalia and that there were still a few calibres in Parliament that were giving threats to set up their personal government not within the roadmap and lengthen their personal office terms. Also, the study reveals that there were teams bent on disrupting the entire exercise around the constitutional development process and that the international bodies had plans to invite them in positive dialogue as an alternative to their just frustrating and diverting the positive course. Maduro reveals that the TFG's commitment to keep on with the process and sanction or even put to book the politicians fighting the August closing date for the conclusion of the transitional era<sup>107</sup>.

Again, it is clear that efforts were being made by external forces to restore Somalia, for instance the June 2014 Max Planck Foundation eight-day conference for the draft Constitution Assessment and Implementation Supervision Committee in Uganda. It is also clear from the study the constant financial support by Max Planck Foundation to the Oversight Committee that was tasked to set up and lead the constitutional assessment and execution process as stipulated in the draft Somalia Constitution. The discussion also reveals the chapters of the constitution that

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<sup>106</sup>Ginsburg Tom, Elkins Zachary and Blount Justin, 'Does the Process of Constitution-making Matter?' *Annual Review of Law and Social Science* 5 (2009): 201–223.

<sup>107</sup> Mluvi Maduro, "The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism" *International Journal of Constitutional Law* 3, (2005): 332, 340.



were debated by the committee during this conference with regard to the legislative, the executive and the arms of the Republic of Somali. The study reveals that this extremely political subject was discussed from a relative constitutional law point of view with the Max Planck Team as the mediator so as to establish a substantive, focused discourse.<sup>108</sup>

### **4.3 Conclusion**

According to the study, it is clear that various actors took part in the constitutional development process in Somalia. The study presents the most significant actors includes: the neighbouring states to Somalia, the international organizations, the non-regional foreign powers and other non-state actors. In addition, the study indicates that in the 1960the Somalia Republic was a constitutional democracy approved through a referendum where the constitution eliminated a civilian, legislative governance structure and protected human rights after which the country fell under threat of conflicts until 2006 through 2012 when a draft was put in place through the continuous participation of external actors amidst very high opposition by parties in Somalia who had hidden interests with the state. Again, from the discussion numerous debates took place in an effort to put in place a working constitution in Somalia. The study also reveals the role of the Somali parliament in setting up the FCC in the state's Constitutional Commission Act whose conventional guiding standards were that it was to consist the Charter, the Islam principle, social fairness and democracy, and a process that will carry out several functions like, upholding public involvement, transparency and liability to the people; embracing the Somalis diversity and their views and upholding firmness, peace and rebuilding.

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<sup>108</sup> Dieter Grimm, "The Constitution in the Process of Denationalization", (2005) 12 Constellations 447; M. Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State" in J. L. Dunoff and J.P. Trachtman (eds) Ruling the World? Constitutionalism, International Law, and Global Governance (Cambridge: CUP, 2009): 258-325.

## **CHAPTER FIVE**

### **CONCLUSION**

#### **5.1 Summary**

The main purpose of this study was to assess the constitutionalism debates and discourses in Somali with the main aim being to offer a resolution to the constant conflicts in the state. The study was to accomplish this through: studying the constitutional processes that were applied throughout the years in Somalia, analysing the diverse constitutional debates and discourses that took place in Somalia and cross-examining strategic measures and challenges that were encountered in the implementation of the Somalia constitution.

This study used a descriptive research design. The target population consisted of the Somali people living in Mogadishu, those in the country and Somalia refugees being hosted in Kenya at the Daadab refugee camps in Northeast, Kenya as well as the staff working with NGO's and peace-keeping missions involved in constitution implementation in Somalia. The study was restricted to the 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 the Somali people in Mogadishu, those in within Kenya especially in Eastleigh and Somalia refugees being hosted in Kenya at Daadab Refugee Camps. The key informants in this study were the key government officials and NGO's staff that were involved in constitution implementation in 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 were then taken through comprehensive and critical examination.

The study found out that various actors took part in the constitutional development in Somalia. These actors included: first, the neighbouring states to Somalia such as Ethiopia which had key reasons of it getting involved with a lot of significance the occurrences in Somalia since it was anxious of the influence of Somali as a country being strong as a result of the constant Somali claims to the Ogaden region, the fact that Somali would arouse clashes amongst the Ethiopian tribes especially the Somalis and finally the fact that refugees from Somalia would move to Ethiopia and this would have resulted to cultural imbalances. Also, the study found out that, it is evidence that Eritrea also takes part in the Somalia affairs. The discussion indicates that Eritrea has rarely takes part in the Somalia clashes thereby ending up having hostility in its relationships with Ethiopia and that even though the complete area of Djibouti is too faced with the irredentist Somali project, there exist no definite aggression between the two countries. It also found that Sudan role is reasonably of no consequence and that it has been impartial throughout the conflict behaving like a fair broker liable to facilitating the negotiation talks and Kenya as an important player through IGAD. The study also found out that the International Organizations, the non-regional foreign powers and other non-state actors participated in Somalia affairs.

Further, the study found out that the constitution development in Somali was faced by conflict as early as in 1969 when a bloodless military conquest happened under the leadership of late Siyad Barre who suspended the constitution and the name of the State was changed to Somali Democratic Republic of Somali. It also found out that despite the constant efforts by international actors to bring normalcy in Somalia, there were numerous challenges that faced the process. The study further found that clashes in Somalia were severe and the new Federal

Transitional Government had no power over most parts of Somalia until after 2006. From the findings, in 2006, after the commission decided on a broad civic training program to train the people on the constitution-drafting process with an aim of setting up national dialogue, there was an increase in instability in Somali's capital with the assassination of the Constitutional Affairs Minister thereby bringing about an immediate stoppage of the constitutional process. The study also found out that the militant al-Shabaab group linked with Al-Qaeda terror organization were opposed to the international involvement in the Somali constitutional development process. The study found that the Commission did discussion forums throughout Somalia on the draft Constitution towards the end of 2010 and early 2011 where the commission did a meeting with the Somalia's Transitional organizations in Somalia as well as with the traditional leaders and social society institutions, together with women and youth groups and groups representing the disabled, Somali forces and Federal Transitional Parliament members. They revealed that the Federal Transitional Parliament extended its term for three years thereby creating uncertainty in the draft constitution timelines with the President and the parliament speaker signing an agreement to mark the devotion to assume a constitution in the end of 2012.

The study also found that there were various discussions and discourses that accompanied the constitutional development in Somalia. The study found out that after realizing that their nation on the threshold of transition, youths of Somali residing in the country took part in conventions prepared by the Somali Youth National Council to debate on articles of the new constitution that were to conclude the intermediary phase in Somalia in 2012. The study revealed how young people rose to the occasion in these debates by revealing how Mohamed Ali an 18-year-old Shari`ah law and jurisprudence student at the University of Mogadishu, stated on the importance of having youths handling the issue. The study also revealed that Somalis living overseas were

apprehensive of the drafting of the constitution and they strongly criticized the participation of the traditional elders in the practice. It indicated how a 25-year-old Somali, Diini Bashir who was a medicine student in Egypt indicated that constitution was vital and if the citizens of Somali failed to vote it in, then a committee of experts with the necessary skills should peruse it and endorse it. Also, a 28-year-old Somali, Khadar Mohamed, who had lived in London for a period of over eight years showed a lot of interest in the way the new constitution was to deal with the matter of dual citizenship by stating that there were numerous Somalis who lived overseas with foreign passports but it was not clear what their function and rights were to be in their mother country.

Also, the study found that there was great criticism to the final draft and that the government had made efforts to make amendments and bring together traditional elders to organize the Assembly that was to consider and then vote for the draft endorsement. It found out how President Sheikh Sharif showed his partial contentment with the final printed draft arguing that there were still some faults that required rearrangement. Furthermore, the study revealed the responsibility of the Somali parliament in setting up the FCC in the state's Constitutional Commission Act whose conventional guiding standards were that it was to consist the Charter, the Islam principle, social fairness and democracy, and a process that will carry out several functions like, upholding public involvement, transparency and liability to the people; embracing the Somalis diversity and their views and upholding firmness, peace and rebuilding. The study found out that there was also a debate of a representative confirmation meeting ahead of the referendum, but it had not been agreed on. It also revealed how these resolutions were well embraced by the Constitutional Affairs Minister Derro, symbolizing an optimistic beginning for the constitutional development process. Also, the study revealed that the instability in Somalia towards the end of the year 2012

showed that the country was at a critical stage and it was necessary that the peace process be prevented from slipping back hence IGAD, the UN and the AU as the international bodies gave caution to enforce sanctions on anybody who attempted to interrupt the constitutional development in Somalia.

In summary, the study found out that the constitution development process in Somalia was interrupted by a lot of forces both within and outside the country as well as constant international involvement.

## **5.2 Key Findings**

Considering the critical analysis of constitutionalism in Somalia, it is evidence that from its foundation, Somalia's constitution-development process was extremely flawed. The process was planned, financed and managed by UNPOS with support from the regional organization IGAD and the neighbouring states like Kenya, Eritrea and Djibouti among others. In the beginning, the constitution-development process intended to keep off politicians in the whole process. The analysis reveals that the process fell in the hands of six unreliable politicians from Somali and the UN's SRSR who dominated the Somalia constitution-development process. According to the analysis, they barred public, Islamist and political forces and secretly and hurriedly agreed on the sections of the constitution and forced in a poor document through a fraud process by setting up a dummy constituent assembly. The analysis also reveals that as a result of the political expediency, confidentiality and hurriedness, both the IFCC and CoE who were charged with the responsibility of setting up the draft and numerous public and political forces disagreed with the UN-managed constitution-development process. In summary, it is evidence that an inconsistent processes results to unlawful outcomes, which was the case in the UN-controlled constitution-development process in Somalia. The study indicates that the process was problematic due to the

failure to control individual, organizational and group disagreements as well as an increased risk of extra conflicts, especially if plans to set up another chamber are put into practice.

The discussion has also analysed the role of international actors to the development process. It is clear that majority of Somalis were not in agreement with these actors like NGOs, neighbouring states among others thereby resulting to a lot of opposition to the draft. There were a lot of disagreements between politicians, clan elders, and natives of Somalia as well as the Somalis living overseas. The whole process was therefore accompanied by continuous conflicts that sometimes resulted to the stoppage of the drafting process. Also, the Federal Transitional Government of Somalia that was put in place faced a lot of challenges in ensuring that the country ran smoothly especially on the issue of constitution development. According to the analysis, constant debates and discourses came up throughout the Somalia constitution development process. The natives of Somali as well as the Somalis living abroad had discussions on the constitutional articles they did not agree with. As a result various parties like students studying abroad raised their issues in conventions in regard to the draft constitution. Consequently, a civic education program was rolled out to inform the public of the draft so as to make their decisions from an information point of view. Generally, despite the constant debates and discourses in the process, the draft constitution was implemented though it was associated with constant conflicts.

### **5.3 Recommendations**

It is clear from the discussion that failure to involve all interested parties in constitution development and lack of home-grown inputs into the process resulted to massive challenges and opposition to the constitutional development process. This study recommends that for there to be a smooth constitution development process, the opinions of the interested parties should be put to

consideration. From the discussion, some of the processes of drafting the constitution were even done without the knowledge of Somalis who were afterwards expected to pass the same draft through a referendum. This study recommends thorough awareness campaign on educating the public about the process and outcomes and that the public should be made aware of the process long before it starts and even make the public knowledgeable of their role during the drafting and even at the implementation period.

In addition, the discussion reveals that the actors should get to the ground and get the findings from the citizens on how they would wish their country be managed and the model of governance to be established. Such citizenry involvement and all-inclusive participation process allows building a uniform consensus towards the path the country should take, allowing to generate home-grown process where the Somali people will be comfortable with. Some of the actors based their involvement in the process from a point of neighbourhood, international roles among others. This study gives a recommendation that the actors should act on the behalf of the common citizens' interest without considering their own interests. Since the country has been in civil strife for over two decades now and that constitutional development process was hindered by conflicts and terrorists related issues, something that has slide back the country then the study recommends that a comparative study of countries that have undergone the same situation and came up with a good constitution should be done to give direction to achieve a realistic document for the country.

It is evident from the discussion that the implementation of the draft in Somalia was not very smooth since the roles of different committees and the parliament too were not well defined since there seem to be overstepping and overlap of each groups mandate in the process. In line with this, this study recommends that a study on States that have gone through constitutional



development and implementation process successfully amidst chaos should be carried out to reveal the roles each involved party should play so as to avoid such conflicts as they are in Somalia to ensure no hitches and barriers are encountered in the entire process. In addition, the study recommends that the parliament should put in place legal frameworks and guidelines on any party they endorse to carry out the constitution development and implementation processes. Such legal structures ensure parties to work within it and failure to do so compel them to face legal actions as stipulated in the laid-down legal structures.

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