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**THE ROLE OF ETHNICITY IN DEMOCRATIZATION IN AFRICA: A CASE
STUDY OF THE KENYAN CONSTITUTIONAL REVIEW PROCESS (1990-2005)**

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**UNIVERSITY OF NAIROBI
EAST AFRICANA COLLECTION**

**A Dissertation Submitted in Partial Fulfillment of the Requirement of the Degree of Master
of Arts in International Studies at the Institute of Diplomacy and International Studies
(IDIS), University of Nairobi**

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DEDICATION

This work is dedicated to my Boss, friend and mentor John Harun Mwau. CBS, OGW, HSC for giving me endless opportunities to succeed.....to my dad the late Benson Mwangi and mum Esther Njeri. They bore me, raised me, supported me, taught me and loved me.

DECLARATION

I Mwangi, Lucy Wangari hereby declare that this dissertation is my original work and has not been submitted for a degree to any other University.



MWANGI, LUCY WANGARI

9th November 2007

DATE

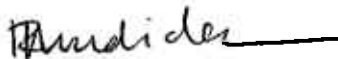
This dissertation has been submitted for examination with my approval as University Supervisor.



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Abstract

The constitution-making process in Kenya has not only been unsuccessful but has also stalled at several points while bearing the characteristic of sporadic violence between different ethnic groups. This study sets out to investigate the role of ethnicity in constitution-making in Kenya with the period under review being between 1990 to 2005.

The study establishes that ethnicity has been used as a political tool in Kenya since the colonial times. In the post-independence period, this was exhibited by ethnic political appointments in all the regimes that have ruled the country. It was also evident in the voting patterns during presidential elections and the constitutional referendum that ethnicity is a central line of cleavage. The hesitancy and stalemate in the constitution-making process in Kenya stems from the fear that if any thorough economic and political reforms are implemented, most powerful politicians will lose credibility. The study concluded that the results of the 2005 referendum suggest that ethnicity is important in explaining constitutional choice in Kenya. The association between ethnic identity and political affiliation in Kenya has provided the underlying logic for politically motivated ethnic violence. Such violence has also affected the constitution-making process both negatively and positively. The study also identified possible solutions to the ethnic conflicts in multi-ethnic societies and specifically the Kenyan case including new constitution, devolution and so on.

Abbreviations

4Cs	Citizens' Coalition for Constitutional Change
AU	African Union
CKRC	The Constitution of Kenya review Commission
CSO	Civil Society Organization
DP	Democratic Party
DRC	Democratic Republic of Congo
FORD	Forum for Restoration of Democracy
GEMA	Gikuyu, Embu and Meru Association
ICJ	International Commission of Jurists
IMF	International Monetary Fund
IPPG	the Inter-Parties Parliamentary Group
JKML	Jomo Kenyatta Memorial Library
KADU	Kenya African Democratic Union
KAMATUSA	Kalenjin, Maasai, Turkana and Samburu
KANU	The Kenya African National Union
KHRC	Kenya Human Rights Commission
KNLS	Kenya National Library Service
KPU	Kenya People's Union
LDP	Liberal Democratic Party
LSK	Law Society of Kenya
MA	Master of Arts
MODAN	Movement of Dialogue and Non-violence
MOU	Memorandums of Understanding
NAK	National Alliance of Kenya
NARC	National Rainbow Coalition
NCC	National Constitutional Conference
NCEC	National Convention Executive Council
NCPC	National Convention Preparatory Committee
NDP	National Democratic Party
NGO	Non-Governmental Organizations
OAU	Organization of Africa Unity
ODM-K	Orange Democratic Movement of Kenya
PS	Permanent Secretary
SID	Society for International Development
UN	United Nations
UNDA	United Democratic Alliance
USAID	United States Agency for International Development

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CHAPTER ONE

ETHNICITY AND DEMOCRATIZATION IN AFRICA

1.0 Introduction

The history of independent Africa reveals that nearly all African states have experienced devastating political crises and upheavals. State failure, internecine wars, bitter and violent conflicts for political power and massive human rights violations have been the dominant features of their political landscape.¹ These crises wracked one country after another from Nigeria to Ethiopia, Algeria to Sudan, Chad to Democratic Republic of Congo (DRC), Rwanda to Burundi, Liberia to Somalia, Angola to Sierra Leone, and Uganda to South Africa. Many of these troubles that the state in Africa has experienced since the end of colonialism are largely rooted in issues related to ethnicity. Some of these conflicts are based on the demands of ethnic minorities and other marginalized groups for collective ethnic entitlements such as the one in Ethiopia, Sudan and Nigeria.² For this reason, historians and anthropologists have joined political scientists in a discussion about the ways in which democracy can develop in multicultural societies. In their book, Berman and others address why ethnicity represents a political problem, how the problem manifests itself, and which institutional models offer ways of ameliorating the challenges that ethnicity poses to democratic nation-building.³

The current constitutional review process in Kenya does not mark the first time that global and local forces have converged to impel constitutional changes in the country. Between 1940s and 1963, Kenya underwent a process of constitutional debates and constitutional changes that culminated in the

¹ O. Furley, *Conflict in Africa* (London: Taurus Publications, 1995) p. 15

² E. Asbjorn, 'Minority Situations: In Search of Peaceful and Constructive Solutions' *Notre Dame Law Review*, Vol. 66, 1991, p. 1311

³ B. Berman et al, *Ethnicity and Democracy in Africa* (Athens: Ohio University Press, 2004) p. ix

three constitutional conferences at Lancaster House in London, ending with the independence constitutional arrangement of 1963.⁴

The independence constitution was negotiated within the context of global impulses and local demands in colonial Kenya that ultimately coupled constitution making and constitutional changes to ethnic demands. With the formation of the United Nations (UN) in 1945, Kenyan nationalists sought independence from British colonial rule within the global paradigm of the rights of people to choose. Locally however, different groups, arranged along ethnic cleavages, became located in different standpoints to the proposed constitutional changes while they in turn proposed competing alternative constitutions that made for much disagreements, bargains and negotiations in order to arrive at a final constitutional arrangement negotiated to accommodate the ethnic equation in Kenya.⁵ Besides, political parties were formed on ethnic lines. Consequently, Kenya's Independence Constitution was more of a compromise between Kenya's would be Black, ruling class and the white settler community, than a social contract for Kenyans.⁶

Soon after independence, the country started making changes to the independence constitution and up till the 90s it had made about 30 amendments. In December 1991, both KANU and parliament reversed the contentious section 2(A) to pave way for multi-partyism thereby ending eight and a half years of *De Jure* one party system. However, a thorough examination of the constitution to determine other provisions that needed amendments was not done. This gave way to the major step toward repairing the constitution that was made in 1997 when the National Convention Executive Council forced the Moi-KANU regime to acknowledge the need to rewrite the constitution. Four pressing reasons were cited as impetus to this major constitutional change. These include the weakness of the

⁴ S. Chanan, 'The Republican Constitution of Kenya: Historical Background and Analysis' *The International and Comparative Law Quarterly* Vol. 14 No. 3, 1965 pp. 878-949:902

⁵ K. Kivutha et al, *In Search of Freedom and Prosperity : Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) p. 25

⁶ R.M. Maxon, 'The Colonial and Foreign Offices: Policy & Control' in Ogot et al (eds) *Kenya, The Making of a Nation: A Hundred Years of Kenya's History, 1895 – 1995* (Maseno: Institute of research & Postgraduate Studies, Maseno University, 2000) p. 6

checks upon the president, the total concentration of power in only one individual, the structural deficiencies in the constitutional and legal structure and the unlawful subversion of democratic processes.⁷ With the activism, and mass action, they unified many sectors of Kenyan society and political community, which transcended religious, party, class and ideological lines. The NCEC proposed their 'sovereignty of the people: constituent assembly model' to take charge of writing the constitution. Consequently, the National Convention Assembly which the NCEC advocated for was created. With eventual compromise and capturing of the process of constitutional reform, the KANU regime formed the Inter-Parties Parliamentary Group (IPPG) which together with the Kenya Constitution Review Commission Act (1997), attempted to take the constitution making process to parliament, but allowed for the creation of an executive controlled commission to oversee the constitution making process.⁸

With the eventual demise of the IPPG proposal, and the realization of the implications and eventual problematization of the Constitution of Kenya Review Commission Act (1997), the evolutionary process was adopted to facilitate the review of the constitution. This saw the parliament as the major actor in the process of constitution making. Some statutory reforms negotiated between the president and the IPPG called for repealing some colonial-era legislation used to restrict freedom of association, expanding the composition of the Electoral Commission, and establishing a framework for a comprehensive constitutional review and reform process. However, these reforms neither established any means to redress problems in voter registration procedures that left some two to four million Kenyans disenfranchised; nor lessened the constitutional powers of the executive.⁹

With the impetus for constitutional review not addressed, a new quest for these amendments was launched. Given that the IPPG was parliamentary-centered, it made it imperative that the search for

⁷ K. Kibwana et al, *In Search for Freedom and Prosperity: Constitutional Reform in East Africa* op. cit., p. 386

⁸ F. Jonyo, and Owuochi S., *Politics in Kenya: A Perspective* (Nairobi: Azinger Ltd, 2004) p. 38

⁹ S. Lamba, 'Towards New Constitution of Kenya: Essential Ideas of Justice, Principle and Process' *Mazingira Institute* 2005 p. 2

constitutional amendments be all inclusive. After the 2002 elections, the people-centered process to constitutional making was embraced. A draft constitution – designed to replace the country’s independence constitution emerged from a national conference inaugurated after the 2002 election of the new president, Mwai Kibaki. But the draft was subsequently amended by the attorney-general Amos Wako to reverse any reduction in the powers of the president. The proposed new constitution was voted down by a 58% majority of Kenya's voters.¹⁰

1.1 Statement of the Research Problem

This study investigates the role of ethnicity in democratization by specifically evaluating the impact of tribal cleavages to the constitution making process in Kenya. As highlighted in the literature review, ethnicity could potentially be de-stabilizing to democratization which holds that sovereignty lies with the people not with the government. The constitution is the main instrument of democratization which ensures that the government does not have power to take away the sovereignty of the people. Other than establishing structures and institutions aimed at guaranteeing the conditions of democracy, the constitution is also a proper and legitimate vehicle for strengthening democracy and the sense of national unity and purpose in a country. While questioning where sovereignty lies, Kenyans have attempted severally to review their constitution. This process of constitutional review has not only been unsuccessful but has also stalled at several points while bearing the characteristic of sporadic violence between different ethnic groups. In addition to these conflicts, ethnicity has been the central locus of cleavage during constitutional debates in Kenya. Due to this, the study seeks to analyze the role of ethnicity in the constitutional review process of Kenya in the transition period from 1990 to 2005 by responding to the question ‘How have ethnic divisions contributed to the stagnation of the process of constitutional reform in Kenya?’

¹⁰ Kamoche K., Kenya's Naked Constitution *Generator 21 Africa* June 15, 2007 also available at <http://g21.net/africa108.html>

1.2 Objectives

1.2.1 General Objective

This study has as its main objective the analysis of the role of ethnicity to the constitutional review process in Kenya between 1990 to 2005.

1.2.2 Specific Objectives

Specifically, this study seeks to:

1. Examine how ethnicity is in Kenya and the factors through which it manifests itself in order to influence the constitutional review process in Kenya.
2. Review constitutional reform efforts in Kenya from 1990 to 2006.
3. Investigate the ways in which ethnic cleavages can be mitigated in the Kenyan democratization process.

1.3 Literature Review

This section reviews literature that contributes to the ongoing debates on contentious issues in the area that the study intends to research on. It considers literature from different categories including published books, papers, journals and constitutions of various African countries. It is divided into three themes; the first part examines the concept of ethnicity by analyzing the different views which include primordialism, instrumentalism, constructivism and objectivism. This part also establishes a link between ethnicity and democracy. The second part presents a conceptual analysis of democracy, its different forms and its genre in Africa. It then evaluates the relationship between democracy and constitutions. The third part starts by a look at constitutional reforms in Africa and ends by a specific evaluation of constitutional review process in Kenya.

1.3.1 The Concept of Ethnicity and its Link to Democracy and Constitutions

An important reason for the current academic interest in ethnicity and nationalism is the fact that such phenomena have become so visible in many societies that it has become impossible to ignore

them. Boulding holds that in the early twentieth century, many social theorists held that ethnicity and nationalism would decrease in importance and eventually vanish as a result of modernization, industrialization and individualism. This never came about. On the contrary, ethnicity and nationalism have grown in political importance in the world, particularly since the Second World War.¹¹

The concept of ethnicity is contentious and there is no hard line definition for it. Stavenhagen identifies two schools of thought on the meaning and nature of ethnicity – the primordialists and instrumentalists.¹² Van de Goor defines primordialists as those who hold that members of the same ethnic group have a common primordial bond that determines their personal identity and turns the group into a natural community of a type that is older than the modern nation or modern class systems. He however argues that instrumentalists are those who see ethnicity essentially as a means for people, especially leaders to pursue their own purpose such as forming, mobilizing and manipulating groups of people for political ends.¹³

On the other hand, Hameso asserts that the traditional distinction between primordialists and instrumentalists is the fact that one side says what ethnic groups are and the other says how ethnic groups or ethnicity might be used. He nevertheless argues that each category is misleading because instead of addressing the original problem of what ethnic groups are, the two schools muse over the question of the reality of ethnic groups. But this begs the issue of their existence, which has become increasingly the important issue in the discourse.¹⁴

On the other hand, Barth posits that the instrumentalists categorization is misleading since it prioritizes an element in the discourse which is of secondary importance. It suggests that an ethnic group is an ephemeral phenomenon conjured up at will as an exploitable resource. This school

¹¹ E. Boulding, 'Ethnicity and New Constitutive Orders: An Approach to Peace in the Twenty-First Century' in U. Hisakazu and V. Takeo (Eds) *From Chaos to Order* (Tokyo: Yuskindo Publishers, 1990) pp. 56-61

¹² R. Stavenhagen, *Ethnic Conflict and the Nation-State* (New York: St Martin's Press, 1996) p. 29

¹³ L. Van De Goor et al., *Between Development and Destruction: An Enquiry into the Causes of Conflict in Post-Colonial States* (The Netherlands: Ministry of Foreign Affairs and Netherlands Institute of International Relations, 1996) p. 18

¹⁴ S. Hameso, *Ethnicity and nationalism in Africa* (New York: Nova Science Publishers, 1997) p. 33

emphasizes on exploitability or manipulability, which cannot be a useful definition of ethnicity. Besides, ethnicity is not always exploited or exploitable.¹⁵

Sanda identifies other two schools that seek to define ethnicity; the objectivists and constructionists. The thorny issue, he argues, is not the instrumentalization of ethnicity but its construction, the assertion that it is contrived, a mere ideological representation, or as some put it, imagined rather than real. In the light of these considerations, it is more useful to think in terms of objectivists who objectify the ethnic group, insisting that it is real, and the constructionists who insist that the ethnic group is contrived, imagined or a social construction.¹⁶

Within the objectionist literature such as in Diamond's book, there is a wide range of objective characteristics of ethnic groups. However, they all agree that the ethnic group is defined by putative commonalities such as the congruities of blood, speech, custom, myths, memories, values, symbols, belief in a common ancestry, a common history with common heroes and enemies and historical attachment to a particular territory among others. According to them, the concept of ethnicity is somewhat multidimensional as it includes aspects such as race, origin or ancestry, identity, language and religion. It may also include more subtle dimensions such as culture, the arts, customs and beliefs and even practices such as dress and food preparation.¹⁷

Analyzing constructionists, Anderson contends that they do not posit and justify the existence of ethnic groups. They mainly have to deny it. They say that ethnicity is a figment of the imagination and support it by showing how ethnic identities wax and wane, how ethnic boundaries are porous, shifting and unsustainable, how ethnic markings are arbitrary and how the common past and traditional values

¹⁵ F. Barth, *Ethnic Groups and Boundaries* (Boston: Little, Brown and Co. 1969) p. 20

¹⁶ A. E. Sanda, *Ethnic Relations in Nigeria* (Ibadan: Ibadan University Press, 1976) p. 13

¹⁷ L. Diamond et al, (eds) *Nationalism, Ethnic Conflict and Democracy* (Baltimore: The John Hopkins University Press, 1994) pp. 96

on which members of the ethnic groups anchor their identity may have very little to do with historical realities and much more with invention.¹⁸

It is very difficult to prove the reality of ethnic groups for all we can see is some evidence of shared consciousness which rises and falls, often as a result of manipulation, sometimes constituting the primary group identity of those who share it, sometimes receding behind other identities and sometimes disappearing all together. Ogot acknowledges that ethnicity is an ideological phenomenon and is created by people but it is real. The ways in which it is made vary, and so do the possibilities for invention and remaking. Ethnicity is also dynamic and in a constant state of flux. It will change as a result of new immigration flows, blending and intermarriage, and new identities may be formed. It begins, becomes and passes away, and it can only be understood and interpreted through the complex dialectics of its being, dissolution and reconstitution.¹⁹

This study adopts Crawford's²⁰ definition of ethnicity by acknowledging that it rests upon a variable list of shared cultural attributes. Language is primarily, although not invariably present as a marker. One may recollect that Hutu and Tutsi share the same speech code in Rwanda and Burundi, as do Serbs and Croats in former Yugoslavia. The Hutu and the Tutsi spoke virtually the same verbal language and were engaged in very different non-verbal communication. They have a shared language but not shared communication. These are people divided by culture but not by language. Other frequent defining common properties include ancestry and kinship ideologies, cultural practices, symbolic repertoires, or modes of religious observation. Secondly, ethnicity is defined by an active consciousness of collective selfhood. The group is invariably named, and its members hold a self-awareness of their collective affiliation. Absent consciousness, and shared attributes cannot constitute groupness. In

¹⁸ B. Anderson, *Imagined Communities* rev. ed. (London: Verso Books, 1991) p. 6

¹⁹ B. Ogot et al (eds) *Kenya, The Making of a Nation: A Hundred Years of Kenya's History, 1895 – 1995* (Maseno: Institute of research & Postgraduate Studies, Maseno University, 2000) p. 6

²⁰ Y. Crawford, 'Nationalism, Ethnicity, and Class in Africa: A Retrospective' *Cahiers D'Etudes Africaines* Vol. 26 No. 3 1986 pp. 421-495

addition, ethnicity is defined by boundaries. "They" constitute the "us"; whom one is depends upon whom one is not.

Literature on ethnicity and democracy has established three links between ethnicity and democratization. First is a positive link whereby ethnicity provokes democratization. For instance Agbango observes that in multi ethnic societies, an alternative to the refusal of democratization, be it multiparty politics or adherence to other forms of participatory principles, implies endless personal rule and decay. The rebellion against this position calls for democratization.²¹

The second link, as purported by Boulding, is that the quest for democracy crystallizes ethnicity. He notes that in societies just emerging from totalitarian rule, processes of democratization can act as a vehicle for the flourishing of nationalism or separatism because they encourage ethnic self-consciousness which, in turn, threatens to overwhelm democracy by encouraging conflict and violence.²² Paradoxically, therefore, pluralistic revolutions can in certain circumstances reignite explosive national conflicts and fuel anti-pluralist tendencies.

Contradicting Boulding's link between the two, Berman argues that democracy has an equally important role to play in the eradication of the evil of tribalism or ethnicity, which he calls divisive pluralism. He suggests that in addition to having entrenched state principles that proscribe ethnic politics, another way of averting this danger is to provide for power-sharing arrangements in the constitution in such a way that no particular ethnic group can feel permanently excluded from government.²³

²¹ G. A. Agbango, *Issues and Trend in Contemporary African Politics: Stability, Development and Democratizations* (New York: Peter Lang, 1997) p. 163

²² E. Boulding, 'Ethnicity and New Constitutive Orders: An Approach to Peace in the Twenty-First Century' in Hisakazu U. and Takeo V. (Eds) *From Chaos to Order* op. cit., pp. 56-61: 60

²³ B. Berman et al, *Ethnicity and Democracy in Africa* op. cit., p. 308

1.3.2 Democracy in Africa

Democracy describes a series of related forms of government. With origins in ancient Greece, Rome and south Asia, democracy has generally grown and expanded throughout history. Today, democracy is the predominant form of government in the world. Although the term democracy is typically used in the context of a political state, its principles are also applicable to other groups and organizations.

Diamond and others hold that though democracy may be a word familiar to most, it is a concept still misunderstood and misused in a time when totalitarian regimes and military dictatorships alike have attempted to claim popular support by pinning democratic labels upon themselves especially in Africa.²⁴ In the dictionary definition, democracy is "government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system."²⁵ In the phrase of Abraham Lincoln, democracy is a government "of the people, by the people, and for the people."

In addition, Dahl asserts that freedom and democracy are often used interchangeably, but the two are not synonymous. Democracy is indeed a set of ideas and principles about freedom, but it also consists of a set of practices and procedures that have been molded through a long, often tortuous history. In short, democracy is the institutionalization of freedom. For this reason, it is possible to identify the time-tested fundamentals of constitutional government, human rights, and equality before the law that any society must possess to be properly called democratic.²⁶

Similarly, Schumpeter establishes that democracies fall into two basic categories, direct and representative. In a direct democracy, all citizens, without the intermediary of elected or appointed officials, can participate in making public decisions. Such a system is clearly only practical with

²⁴ L. Diamond and F. Marc, *The global resurgence of democracy* (Baltimore and London: The Johns Hopkins University Press, 1993) p. 95

²⁵ *The New Oxford Dictionary of English* (Oxford: Oxford University Press, 1998) p. 967

²⁶ R. Dahl, *Democracy and its critics* (New Haven: Yale University Press, 1989) p. 71

relatively small numbers of people where members can meet in a single room to discuss issues and arrive at decisions by consensus or majority vote. Ancient Athens, the world's first democracy, managed to practice direct democracy with an assembly that may have numbered as many as 5,000 to 6,000 persons perhaps the maximum number that can physically gather in one place and practice direct democracy.²⁷

The modern society with its size and complexity, offers few opportunities for direct democracy. Diamond notes that the most common form of democracy today is representative democracy, in which citizens elect officials to make political decisions, formulate laws, and administer programs for the public good. In the name of the people, such officials can deliberate on complex public issues in a thoughtful and systematic manner that requires an investment of time and energy that is often impractical for the vast majority of private citizens. How such officials are elected can vary enormously. On the national level, for example, legislators can be chosen from districts that each elect a single representative. Alternatively, under a system of proportional representation, each political party is represented in the legislature according to its percentage of the total vote nationwide. Provincial and local elections can mirror these national models, or choose their representatives more informally through group consensus instead of elections. Whatever the method used, public officials in a representative democracy hold office in the name of the people and remain accountable to the people for their actions.²⁸

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Although scholars have not agreed on a specific definition of democracy, a number of pillars have been identified. These include; sovereignty of the people, government based upon consent of the governed, majority rule, minority rights, guarantee of basic human rights, free and fair elections, and equality before the law, due process of law, constitutional limits on government, social, economic, and political pluralism, and values of tolerance, pragmatism, cooperation, and compromise.

²⁷ J. Schumpeter, *Capitalism, socialism and democracy* (London: Routledge, 1994) p. 26

²⁸ L. Diamond and F. Marc, *The global resurgence of democracy* op. cit., p. 98

Following these principles has however raised debates especially in Africa. For example, Nasong'o contends that an elected government is not necessarily democratic due to the numerous complaints about the electoral processes that raise questions as to the credibility and integrity of the electoral systems. Attention, he argues, is now shifting away from mere holding of elections, albeit an important event, to the whole process, the structure and the playing fields as a whole.²⁹ In the same vein, Fareed Zakaria points out that in Africa there is illiberal democracy, which combines authoritarianism with regular elections. He observes that unchecked majority rule often brings authoritarianism and disorder, and suggests that excessive deference to popular sentiment can undermine the balance in many societies.³⁰ To support this contention, Ake argues that the usual result of majoritarian democracy is a scramble, among potential demagogues to manipulate the largest following among the most susceptible in the general population.³¹ In addition, Lumumba-Kasonga brings to the fore the contention that in many of these newly democratizing states it is easier for the rich to get themselves elected, organize political parties and fund candidates. In many cases, people "are voting without choosing". They get the chance to vote for the elite or groups of elite who will oppress them for many years in a row.³²

Superseding ethnic loyalties with a civic identity, however, presents great difficulties. Democracy fails in multiethnic states, which require a strong regime to coordinate competing groups. Conflicts and unrest since 1991 prompted Robert Kaplan to ask whether liberal democracy marked only a passing era that would fade under growing social and economic strain.³³ Democracy is based on the practice of constitutionalism. A constitution being an agreement between the rulers and the ruled on

²⁹ S. Nasong'o, *Contending Political Paradigms in Africa: Rationality and the Politics of Democratization in Kenya and Zambia* (UK: Routledge, 2006) p. 27

³⁰ Z. Fareed, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W. W. Norton & Company Inc., 2003) p. 218

³¹ C. Ake, *The Feasibility of Democracy in Africa* (Senegal: CODESRIA, 2000) p. 79

³² T. Lumumba-Kasonga, *Liberal Democracy and its Critics in Africa: Political Dysfunction and the Struggle for Social Progress* (UK: Zed Books, 2005) p. 92

³³ R. Kaplan, 'Was Democracy Just a Moment?' *Atlantic Monthly* 1997

how to be ruled, ensures democracy which according Abraham Lincoln, is a government "of the people, by the people, and for the people."

In examining the role of constitution-building in democratization, Igbuzor establishes that democratic culture needed for the blossoming of democracy requires dialogue and consensus building. Meanwhile, constitution making and reform is very important in any nation because the constitution is the fundamental law of the land, which contains the rules, conventions, and other practices by which a society governs itself. The constitution of a country is perhaps the most important instrument of governance since any other law or policy that is inconsistent with the provisions of the constitution is null and void and of no effect.³⁴

1.3.3 Constitutional Reforms in Africa

At independence, most African states obtained what came to be popularly known as the independence constitutions, otherwise first generations constitutions. The constitutional rules adopted at this time did not have the legitimacy, which according to Sundhaussen, usually derives from the "understanding and voluntary acceptance of the constitution by the people as a prescription for settling conflict within society." Hence, while these constitutions were legal instruments, they lacked legitimacy. It was inevitable that these rules would fail to reflect the values of the people to be governed by them because constitution-making at this time was top-down, elite driven and not participatory. Only in rare instances were these elites elected by the people; usually they were appointed by the colonial state, based on their willingness to establish a post-independence political and economic structure that would actually enhance the ability of the departing Europeans to have adequate access to the resources

³⁴ O. Igbuzor, 'The Role of Constitution Building Processes in Democratization' Paper presented at the Dialogue for Constitutional Reform in Nigeria also available online at <http://www.idea.int/conflict/cbp/>

of the former colony. The rules were designed externally—in fact the process was usually undertaken at a location in the métropole—and imposed on the Africans.³⁵

Le Vine argues that most of the emerging countries based their constitutions on European models, producing rules that did not reflect the realities or specificities of the colony in question. It is true that borrowing ideas from other countries and cultures was not the continent's main problem; the critical issue was that these models did not reflect the values of the relevant stakeholder groups, that is, the people whose lives would be governed by the rules selected. In fact in many cases, especially in the French colonies, the final document was a thinly disguised version of the constitution of the new country's former colonizer.³⁶

Barnett suggests that most of the constitutional rules adopted by African countries at independence may have been a result of political exigency. According to this school of thought, Africans were so eager to gain independence and rid themselves of the European exploiters that they were willing to temporarily postpone democratic and participatory constitution-making until after independence and the capture of the apparatus of government by indigenous elites.³⁷

Second Generation Constitutions: True to this word, the constitutions of most African countries were repealed, amended and jettisoned by the newly independent African states only a few years after independence. Baloro observes that at the initial stages, most countries put in place a one-party regime which nominally espoused one political ideology or the other. For example Socialism-cum-African Union in Kwame Nkrumah's Ghana, African Socialism and Ujamaa in Julius Nyerere's Tanzania and Humanism in Kaunda's Zambia.³⁸

³⁵ U. Sundhaussen, 'Democracy and the Middle Class: Reflections on Political Development' *Australian Journal of Politics and History* Vol. 31 No. 1, 1991 pp. 100–117: 108

³⁶ V. LeVine, *The Cameroons: From Mandate to Independence* (Los Angeles: University of California Press, 1964) p. 299

³⁷ R. Barnett, *Restoring the Lost Constitution: the Presumption of Liberty* (Princeton: Princeton University Press, 2004) p.

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³⁸ M. Sinjenga, 'Constitutionalism in Africa: Emerging Trends-The Evolving African Constitutionalism' *The Review* Vol. 60 No. 23, 1998 pp. 12-28: 17

The constitutions that were subsequently constructed rejected the fundamental premise of constitutionalism. Ihonvbere and others observed that even in countries in which some form of protection of human rights survived, political and legal or extra judicial practice had been so removed from the letter of the constitution that African scholars even suggested that the study of African constitutions, as they appear on paper, should be abandoned altogether for they "bore but an obscure relation to governance and politics on the continent". As proved by them, constitutions existed in the notoriously violent and oppressive states such as apartheid South Africa, authoritarian regimes and military dictatorships, including those of Sani Abacha in Nigeria, Idi Amin in Uganda, and Jean-Bedel Bokassa in the Central African Republic had constitutions. While these so-called constitutions were legal documents, they were not legitimate instruments of governance.³⁹

There are various explanations as to why and how our governments abandoned notions of constitutional governance in favour of authoritarian regimes based on one-party rule, which were nothing but smoke-screens for one-man despotic rule. Ekeh argues that the leadership who assumed state power after colonial rule had very little understanding of the function of a constitution in the process of governance and they had no clear conceptions of democracy around which to construct an enduring constitutional vision.⁴⁰

Third Generations Constitutions: The writing of constitutions in Africa in the 1990s became fashionable after years of one-party rule, military dictatorships and no-party regimes. African states engaged in the process of crafting new and democratic constitutions in search of democratic and legitimate governance based on the free will of the peoples, and to foster democratic traditions.⁴¹ In virtually all countries, organizations, individuals, groups, and communities that had hitherto been

³⁹J. Ihonvbere, *Towards a New Constitutionalism in Africa* (London: Centre for Democracy and Development, 2000) p. 139

⁴⁰ P. Ekeh, *The Constitution of Civil Society in African History and Politics* (Nigeria: CRELU, 1992) p. 43

⁴¹ J. Oloka-Onyango, *Constitutionalism in Africa: Creating Opportunities Facing Challenges* (Uganda: Fountain Publishers, 2001) p. 45

excluded from participation started taking part in public deliberations or vigorously protesting their continued marginalization.

Mbaku observed that constitutions were amended not only to concentrate power in the hands of the person of the President (as was the case with the colonial governor), but also spread this power to virtually all spheres of political, social and economic life. Matters of state security were widely defined to embrace all spheres of life, be they economic, social or political. Africa sought to revisit its tradition in search for all that is constructive and useful and that can serve as the building blocks of a truly African constitutional order. The Organization of African Unity for instance increasingly signified that it will not tolerate illegitimate dictators in its ranks.⁴²

Along this road, African countries had also to grapple with the issue of ethnicity in their constitutions. For example, Agbango notes that the concept of indigenous versus the strangers built in the new constitution made certain Cameroonians strangers in their own country, and further exasperated ethnic conflict in the country. Although the ethnicization of state power is a reality in many African countries, the creation of a trans-ethnic group may undermine the particularistic ethnic factor, and this would be conducive to the strengthening of democracy. He cites Kurds and Turkuman in Iraq and Syria.⁴³

The new generation of African Constitutions includes for example the Constitution of the Republic of Namibia (1991), the Constitution of the Republic of South Africa (1996); the Constitution of the Federal Democratic Republic of Ethiopia (1994); the Constitution of the Republic of Uganda (1995); and the Constitution of Burkina Faso (1991). In these Constitutions, the Preamble serves not just as an entry-point into the text of the Constitution, but as a set of declarations recalling a nation's past historical experience and committing it to a new life in which past errors are eschewed.

⁴² J. Mbaku, 'Constitutional Engineering and the Transition to Democracy in Post-Cold War Africa', *The Independent Review* Spring 1998

⁴³ G. A. Agbango, *Issues and Trend in Contemporary African Politics: Stability, Development and Democratizations* op. cit., p. 173

Kenya followed the same route as other African countries. Lonsdale observed that Kenya's Independence Constitution rested on three firm pillars that were similar to older members of the Commonwealth: a Parliament-centered governance system; a dual Executive structure intimately linked to the control systems of Parliament; and an aloof judicial edifice guided by the principles of the common law and by evidence, and with a full mandate to interpret and pronounce on the law - a judiciary that is the key purveyor of the free play of the general law.⁴⁴

Numerous changes to the Constitution subsequently took place, especially between 1965 and 1967. According to Oloka and others, the result was that by 1970, Kenya no longer had a Westminster Model Constitution - founded on multi-partyism, the central role of Parliament, the Executive's accountability to Parliament, the autonomy of the Judiciary. By 1970 the controlling environment for the functioning of constitutionalism and power checks - and - balances, namely the buoyant play of a multi-party political system, had vanished. Kenya was now a settled one-party system with a unicameral Parliament and a much scaled-down institutional base for autonomous constitutional agencies. The 1965-1970 period may be regarded as the watershed period in the flowering of power concentration in the hands of the Executive, in post-independence Kenya's entire historical profile. Thereafter and up to 1992, Kenya's history was marked by a constriction in space for political activity - and thus for the exercise of civil rights linked to political activity. In the whole time-span running from 1965 to 1997, there have been piecemeal changes to the Constitution, providing for momentary power-shift demands; and these have emanated mainly from government although sometimes also from Parliament or from civil society.⁴⁵

Kenyans have been seeking a third generation constitution since July 7, 1990. In 1991 Moi was forced to repeal section 2A and allow other parties to be registered. Popular forces wanted even more democratic change. They demanded a new constitution which would effectively put political and

⁴⁴ B. Berman and J. Lonsdale, *In Unhappy Valley: Conflict in Kenya and Africa* (Nairobi: Heinemann, 1994) p. 132

⁴⁵ J. Oloka, K. Kibwana and C. Maina, *Law and the Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996) p. 3

economic power in the hands of the people. Throughout the 1990s these demands were elaborated.⁴⁶ Finally the broad coalition of Kenyan civil society organizations succeeded in December 2002 in electing a coalition government on the major demand that a new constitution transform the political order completely. The Constitution was to be subjected to a reform initiative, that is, the rectification of those aspects of the governance scheme which were considered unsatisfactory.

The CKRC was established to examine the present Constitution and analyze the many submissions made by the people, individually and collectively. Then it drafted a constitution ('CKRC' draft) to reflect people's recommendations and the reform agenda inscribed in the Review Act. After prolonged public debate, the National Constitutional Conference ('NCC') met to debate and adopt it. The NCC took its own time to consider the draft, endorsed it on the whole, but made some modifications and additions. Towards the end of its work, a faction of the government took exception to some provisions of the draft or decisions of the NCC. Having been defeated on one or two of its motions, its members walked out. The NCC continued its proceedings and adopted a draft in accordance with the law, by two-thirds majority vote ('Bomas' draft).⁴⁷ The opponents of the draft, with the assistance of the courts, prevented the submission of the Bomas draft to the National Assembly for formal enactment as provided in the Review Act. Subsequently the National Assembly amended the Review Act to give itself additional powers to change the Bomas draft before submitting it to a referendum. In meetings of parliamentarians at Naivasha and Kilifi amendments were proposed although there was subsequent disagreement as to what exactly had been agreed. The Attorney General was deputed to revise the Bomas draft to incorporate the Naivasha agreement ('Wako' draft) which

⁴⁶ W. Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Nairobi: SAREAT, 1999) p. 51

⁴⁷ S. Lamba, 'Towards New Constitution of Kenya: Essential Ideas of Justice, Principle and Process' *op. cit.*, p. 2

without further scrutiny was to be submitted to the referendum.⁴⁸ The 2005 Kenyan constitutional referendum was held on 21 November 2005. The proposed new constitution was voted down by a 58% majority of Kenya's voters. After voters rejected a draft constitution, President Mwai Kibaki dismissed his entire cabinet and deputy ministers.

1.4 Justification

This study has both academic and policy justifications.

1.4.1 Academic Justification

From the literature review, it is apparent that scholars have researched on the different manifestations of democracy in Africa as opposed to the first world, the intricacies in the relationship between ethnicity and democratization and the role of ethnicity in democratization in various African countries. Although various scholars have covered these areas, evidence indicates the absence of a comprehensive detailed analysis on the ethnic force in the conflict surrounding constitutional reforms in Kenya. The study is therefore justified by the existence of this lacuna, which it intends to fill. Consequently, the study will contribute to the literature and data that will be useful for researchers, students and implementers and will form a basis for future studies of a similar nature.

1.4.2 Policy Justification

The issue of identity has been one of the most central in human society. It lies at the root of most of the conflicts that have bedeviled the world. Africa has been no exception to this global phenomenon. Particularly since independence in the 1960s, the Continent has been rocked by both intra-state and inter-state conflicts, many of them concerned with the issue of identity. The post-colonial state has not been particularly successful in establishing a pluralist order that could accommodate multiple identities. Indeed, identity has tended to be manipulated by the political elite in the service of political power. This

⁴⁸ Kituo cha Katiba, 'Constitutional review Process in Kenya: Report of the Fact Finding Mission of the Kituo Cha Katiba on the Progress of the Constitutional review Exercise in Kenya' also available at <http://www.kituoachakatiba.co.ug/kenyap.htm>

partly explains the persistence and virulence of identity-based conflicts side by side with the formal declarations of African leaders to forge regional and continental unity. Examples of such conflicts include the 30-year old Eritrean struggle to forge an independent state, the equally long civil war in neighboring Sudan, the Rwanda genocide, and the civil war in Côte d'Ivoire. Yet, pre-occupation with the all-absorbing and often oppressive present can easily conceal both the deep-rooted character of the problems of identity and the mutations they have undergone over time. This study therefore addresses the interaction between multiple identities in the quest for democratization with the aim of giving priority to ethnicity in policy discourse. The findings of the study will directly call on policy makers to take major steps that may mitigate this problem in Africa as well as in the world.

1.5 Conceptual Framework

This study invents a conceptual framework which it uses as its guide by borrowing the tenets of the various theories of ethnic conflict. The conceptual framework is hinged on assumptions that have been borrowed from the various theories of ethnic conflict. The causes of ethnic conflict are debated by political scientists who generally fall into one of three schools of thought: primordialist, instrumentalist, and constructivist. More recent scholarship draws on all three schools in order to increase our understanding of ethnic conflict.

Horowitz argues that where ascribed ethnic loyalties are strong, they generate party systems reflecting rigid group boundaries. He offers one of the most influential theories about the relationship between ethnicity, party systems, and voting behavior in developing societies. For Horowitz, ethnicity exerts a strong *direct* impact on electoral behavior in ethnically-segmented societies, through generating a long-term psychological sense of party loyalty anchoring citizens to parties, where casting a vote becomes an expression of group identity. By implications, other social divisions become subsumed as

secondary to ethnicity. This Section tries to justify Horowitz's contentions using the tenets of theories of ethnic conflict.⁴⁹

First, Rothchild contends that ethnic conflict is most often caused by collective fears of the future. As groups begin to fear for their safety, dangerous and difficult to resolve strategic dilemmas arise. Ethnic activists and political entrepreneurs, operating within groups, build upon these fears of insecurity to polarize the society towards forming institutions that the community believes will take care of this threat.⁵⁰ These include political parties, civil society organizations and associations which raise the political saliency of ethnicity. Besides, the fears necessitate members of the group to take a similar position against what they feel is the source of threat. This may involve voting for the same ideals.⁵¹

Ethnic conflict theories also assert that competition for resources lies at the heart of ethnic conflict. Property rights jobs, scholarships, educational admissions, language rights, government contracts, and development allocations all confer benefits on individuals and groups. All resources are scarce and thus objects for competition and occasionally struggle between individuals and, when organized, groups. In a society where ethnicity is an important basis for identity, group competition often forms along ethnic lines.

Since the state controls access to resources and groups that possess political power can often gain privileged access to these goods, ethnic groups fight to amass more power through well formed political parties. Moreover, individuals from a specific ethnic group will disagree with arrangements that seem not to favor his group in terms of distribution of such resources.⁵²

⁴⁹ D. Horowitz, *Ethnic groups in conflict* (Berkeley: University of California Press, 1985) p. 15

⁵⁰ A. David and D. Rothchild, 'Containing Fear: The Origins and Management of Ethnic Conflict' *International Security*, Vol. 21, No. 2 (Fall 1996), pp. 41-75: 41

⁵¹ S. Lipset et al, *Party Systems and Voter Alignments* (New York: Free Press, 1967) p. 71

⁵² A. Reynolds and Reilly B., *Electoral Systems and Conflict in Divided Societies* (Washington, DC: National Academy Press, 1999) p. 38

All individuals desire to belong to groups, but the strength of this desire differs. In a model of ethnic dissimilation, Timur Kuran demonstrates that ethnic activists – individuals with especially strong needs to identify with ethnic kin- can manipulate such desires to produce a process of social polarization that is rapid, apparently spontaneous, and essentially unpredictable. By persuading others to increase their public ethnic activity in order to maintain standing within the group, Kuran argues, ethnic activists can drive individuals to represent falsely their true preferences. Ethnicity often provides a key marker for self aggrandizing politicians seeking to build constituencies for attaining or maintaining political power.⁵³ Instrumentalists therefore posit that political entrepreneurs reflect and stimulate ethnic fears for their own aggrandizement.

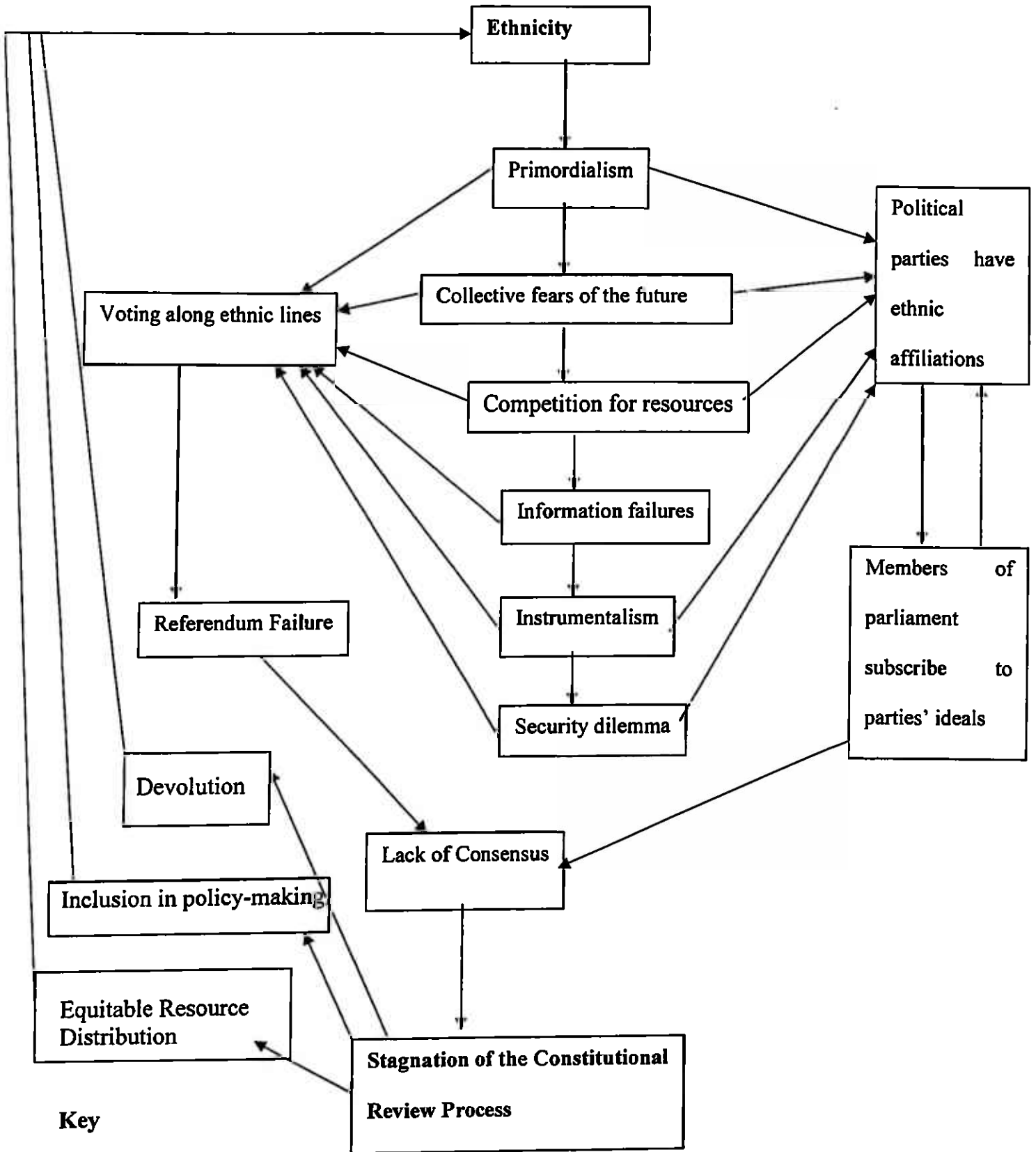
UNIVERSITY OF NAIROBI
EAST AFRICANA COLLECTION

Constitution building is now increasingly recognized as negotiated social contract, where the process by which the constitution is made is as important as the provisions in the constitution. Traditionally, constitutions were conceptualized as social contracts among the polity or between the polity and political elites. The constitution was thus regarded as a means of providing public goods such as national defence. However, if a constitution is a contract, then who enforces the terms of that contract? The classical (that is, legal) theory of contracts leaves this question unanswered, or answers it only in the context of some over-arching authority with the power to enforce a contract's provisions. It is better to conceive of constitutions as coordination mechanism because establishing it is a massive act of coordination that creates a convention which depends for its maintenance on its self-generating incentives and expectations.⁵⁴

⁵³ K. Timur, 'Ethnic dissimilation and its international diffusion' in David A. Lake and Donald Rothchild (eds.), *Ethnic Conflict: Fear, Diffusion, and Escalation* (Princeton: Princeton University Press, 1998): 35-60

⁵⁴ Hardin 1989

Figure 1 Conceptual Framework Model



Key

a → b

Shows relationships between variables. That a necessitates to b.

It is acknowledged that political entrepreneurs can exaggerate the hostility of others and magnify the likelihood of conflict – thereby distorting public debate and images of other groups and driving co-ethnics toward them for power and support. This misinformation and subsequent ethnic animosity provokes individuals in an ethnic group to acquire the same standing against the other groups. This also engenders political parties with ethnic reliance.

Security dilemma rests on the information failures propagated by politicians and problems of credible commitment. Faced with a choice between two politicians of the same standing morally and in integrity, one may choose the one in his ethnic group due to the lack of mutually beneficial agreements that can be reached between different ethnic groups. There always is the risk that the one belonging to the other ethnic group will renege on the agreement and exploit it at a future date.⁵⁵

These factors have shown the viability of individuals in an ethnic group to form ethnic political parties as well as take the same position in voting. Voting along ethnic lines without reflecting someone's true preferences for example in a referendum, leads to its failure or success. A referendum failure denotes lack of consensus which in turn cuts short a people-centered constitution-making process because the constitution is a consensual document. On the other hand, when faced with challenges, even centrist politicians can be driven to embrace a more 'ethnic' position and defend communal interests more vigorously, a phenomenon often referred to as ethnic outbidding. Moreover, politicians subscribe to ideals of their political parties that are ethnic oriented. Therefore, if the process of constitutional review is parliamentary-centered, ethnicity will still affect its

⁵⁵ A. David and D. Rothchild, 'Containing Fear: The Origins and Management of Ethnic Conflict' *op. cit.* p. 52

outcome. The lack of agreement on a constitution in turn exacerbates ethnic conflict because the problems that were to be addressed in the review still exist.

Viewed in the light of the Social Contract Theory, the Constitution may be considered as the Social Contract itself in the sense that it is the very basis of the decision to constitute a civil society or State, breathing life to its juridical existence, laying down the framework by which it is to be governed, enumerating and limiting its powers, and declaring certain fundamental rights and principles to be inviolable. On the other hand, the Constitution, as a political document, whether embodied in a single code or scattered in numerous fundamental or organic acts, may be considered as the concrete manifestation or expression of the Social Contract or the decision to abandon the state of nature and organize and found a civil society or State. In a democracy where all parties are included in the policy process, the construction of a constitution is a function of the people because the people exercise the sovereignty and, as a result, decide what rules and principles they want government to follow. A portion of this constituent power is delegated by the people to the legislature by allowing it to participate in the process of amending the constitution. The constitution also takes care of matters of resource distribution.

1.6 Hypotheses

The study makes the following assumptions:

1. Ethnicity has stagnated the constitutional review process in Kenya.
2. Politicians use ethnicity as an instrument to maintain themselves in power.
3. The constitution must have provisions for settling conflict in the society.

1.7 Research Methodology

The main purpose of this study is to examine the role of ethnicity in democratization in Africa. It is specifically intended to investigate the relationship between

ethnicity and the stagnation of constitutional review processes. Such issues are best investigated through a case study research design which in this case is the Kenyan constitutional review process between 1990 to 2005. The design will enable the researcher to analyze smaller samples, be concrete and contextual. The case study research design generally entails intensive, descriptive and holistic analysis of a single entity otherwise known as the bounded case. Although the design may suffer from lack of representation, this is insignificant compared to its contributions to this study.

This study will rely on both primary and secondary sources of data. Primary data will be collected through unstructured interviews with the aim of finding out the impetus of constitution reforms in Africa particularly in Kenya and the impact of ethnicity to the processes through which these reforms seek to be attained. Even though unstructured questionnaires are easy to develop, they present a high risk of bias during analysis of data. This study however attempts to address this loophole by using qualitative means to analyze data. The main respondents will be from government departments and civil society organizations that were involved in constitutional reforms. Simple random sampling in which all elements of the frame are treated equally was used to select four of these departments and organizations. These include the Constitution of Kenya Review Commission (CKRC), the Citizens' Coalition for Constitutional Change (4Cs Trust), the National Convention Executive Council (NCEC) and a donor agencies, Konrad Adeneur.

Two respondents from each department or organization will be interviewed. These respondents will be selected using stratified sampling in order to ensure that particular groups within the departments or organizations are adequately represented in the sample, and to improve efficiency by gaining greater control on the composition of the sample. One respondent will then be chosen from each strata using convenience sampling that

relies on the availability and/or accessibility of the respondents at the time of the interview. Although this criterion does not ensure representation of the whole, it has been applied on a small stratum which is already representative of the department or organization.

In addition, published books such as Mutunga's *Constitution Making from the Middle* and Kibwana's *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, papers such as Coleman's *Concept of Ethnicity*, journals such as the *International and Comparative Law Quarterly* and *Journal of Conflict Management*, internet and unpublished works such as MA theses from the Institute of Diplomacy and International Studies among others will be used as secondary data sources. Other secondary sources will include the constitution of the Republic of Kenya and its amendments, the draft constitutions, reports from the CKRC and other NGOs dealing with the subject. Apart from the Jomo Kenyatta Memorial Library (JKML), other libraries such as the Kenya National Library Service (KNLS) will be visited during this research.

1.8 Definition of Terms

Ethnicity: Although no common definition of ethnicity exists, it is generally described as the awareness on the part of a particular community of having a separate identity on the basis of common history, race, language, religion, culture and territory. Osaghae defines ethnicity as the employment or mobilization of ethnic identity and difference to gain advantage in situations of competition, conflict or cooperation.⁵⁶ Anderson views the ethnic group as a figment of the human imagination.⁵⁷ Ethnicity becomes a form of nationalism when it assumes a political (and often territorial) dimension that challenges the

⁵⁶ E. Osaghae, *Structural Adjustment and Ethnicity* (Uppsala: Nordic Africa Institute, 1995) p. 11

⁵⁷ B. Anderson, *Imagined Communities* op. cit., p. 14

status quo, and, in some cases, the legitimacy and stability of the state in question by becoming a catalyst for intra- or inter-state conflict.

Democracy: The late Abraham Lincoln described democracy as a system of ruling as a government of the people, by the people and for the people.⁵⁸ While there is no universal agreement on one uniform definition there are certain universal attributes of a democratic society namely: equality of all citizens before the law without regard for race, ethnicity, religion, region, gender, or any other social or biological differences, the supremacy of the rule of law, full participation of people in how they are governed, the principle of separation of powers between the executive, legislature and judiciary, freedom of expression, association, conscience and affiliated family of rights and periodic elections as a means of choosing alternative ideas for public policy.⁵⁹ Any society that claims to be democratic must have all of these elements. Those that aspire to build a democratic society must have most of these elementary things in place or be taking genuine steps towards their achievement.

1.9 Chapter Outline

Chapter One: Ethnicity and Democratization in Africa

This chapter provides an insight into the structure of the dissertation. It lays the background in which the introduction, statement of the problem, objectives, hypotheses, justification, literature review, theoretical framework, research methodology and chapter outline are discussed.

⁵⁸ L. Diamond, *Developing Democracy: Toward Consolidation* (Baltimore, MD: Johns Hopkins University Press, 1999) p. 76

⁵⁹ J. Haynes, *Towards Sustainable Democracy in the Third World* (UK: Palgrave, 2001) p. 4

Chapter Two: Debates in Ethnicity, Democracy and Constitution Reforms in Kenya

This chapter presents a conceptual analysis of ethnicity, democracy and constitution making. Other than defining these concepts, the chapter identifies the major theories on the relationship between ethnicity and democracy.. Finally the chapter investigates the link between constitutionalism and democratization. To affirm the already studied relationship between ethnicity, democracy and constitution making, the chapter reviews constitutional reform efforts in Kenya from 1990 to 2005 with particular focus on the reform movements, government institutions as well as civil society organizations that have actively participated in advancing constitutional reform agenda. These approaches are then applied to democratization in multiethnic states in Africa but narrows down to the Kenyan context. Finally the chapter investigates the link between constitutionalism and democratization.

Chapter Three: Ethnicity and Constitution-Making in Kenya

This chapter examines the roots of ethnicity in Kenya through a historical trajectory of ethnic identity in politics. In addition, the emotive ethnic issues are identified with the aim of studying their impact on the emerging debates in constitutional review in the country. Besides, it presents an analysis of how the independence constitution of Kenya, the Bomas and the Wako draft constitutions attempt to manage ethnic conflicts.

The role of the government and the space given to citizens to participate in the reforms will be examined. All this will be evaluated on the back drop of the emergence of identity crisis between groups in the course of the constitutional review process.

Chapter Four: A Critical Analysis of Ethnicity in Constitutional Reforms in Kenya

This chapter summarizes the relationship between the variables under study in this dissertation: ethnicity, constitutionalism and democratization. The main crux of the study involves a critical cross-examination of the emotive ethnic issues in the country with the

major debates arising from the constitutional review process. It then suggests the best ways to deal with ethnic conflicts in Kenya.

Chapter Five: Conclusions and Recommendations

Following the findings in the previous chapter, this chapter offers a conclusion. After assessing the very findings, it also proffers recommendations on how best ethnicity can be dealt with in a democratic society.

CHAPTER TWO

DEBATES IN ETHNICITY, DEMOCRACY AND CONSTITUTION REFORMS IN KENYA (1990-2006)

2.0 Introduction

This chapter presents a conceptual analysis of ethnicity, democracy and constitution making. Other than defining these concepts, the chapter identifies the major theories on the relationship between ethnicity and democracy. These approaches are then applied to democratization in multiethnic states in Africa. Finally the chapter investigates the link between constitutionalism and democratization.

The importance of definitions here is crucial not just for the intrinsic sake of theory but for an elementary need for clarification. It is indeed important to define the nature of a phenomenon whose complexity is overconfused by a fuzzy and misleading terminology. For instance it is contended that the definition of democracy in the third world is different from that of the western world. In fact, many Africans consider the Western model of political democracy to be extremely narrow and even alien to African cultures and causes

major divisions along tribal lines.⁶⁰ On the other hand, constitutions have failed to incorporate the diverse ethnic interests in the societies especially in Africa. Similarly, ethnicity is a recently forged term that is deemed vague.⁶¹ Therefore, for the study to successfully achieve its objectives and test its hypotheses, it must analyze these terms and adopt specific definitions for use in this research. Besides, theories of ethnic conflict which will be examined in the analysis give theoretical guidelines to the study since some of their tenets concur with the hypotheses of the research.

2.1 Discourses on Democracy in Africa

Democracy is a disputed term. Collier and Levitsky point out that the most widely employed definitions of democracy focus on the procedures of governance.⁶² Similarly, Finley concurs by acknowledging the various perspectives from which democracy is defined but holds that all have the same objective.⁶³ Like many other democratic theorists, Dahl largely equates democracy with the institutions and processes of democratic government. If citizens can participate equally in free and fair elections, and if elections direct the actions of government, then this is the essence of democracy.⁶⁴ This institutional/procedural definition of electoral democracy is often accepted as a minimum measure of a democratic system. From Schumpeter to Przeworski, democracy is typically equated with the electoral process. Similarly, the democracy building activities of governments and the international NGO community often focus on the creation of electoral institutions as the defining element of democracy. From this perspective, it might be

⁶⁰ L. Diamond, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press, 1999) p. 50

⁶¹ V. Pareto, *The Mind and Society: A Treatise on General Sociology* (New York: Dover Publications, 1963) p. 1837

⁶² D. Collier and L. Steven, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' *World Politics* 1997, 49 pp. 430–51:447

⁶³ M. Finley, *Democracy Ancient and Modern* (New Brunswick, N.J.: Rutgers University Press, 1973) p. 7

⁶⁴ R. Dahl, *Democracy and Its Critics* (New Haven, Conn.: Yale University Press, 1989) p. 36

expected that citizens identify democracy with the institutions and processes of democratic governance. These individuals would cite “free and fair elections”, “responsive government”, “multiparty competition”, and “popular control” or “majority rule” as key elements in defining democracy.⁶⁵

Second, in contrast to defining democracy in terms of its institutions and procedures, people might focus on its outcomes. Democracy includes an emphasis on freedom and liberty as its essential goals, with the institutions of democracy a way to achieve these goals. In principle, other forms of government might seek to achieve these same goals; but in practice it is contradictory for autocratic regimes to encourage and allow the liberties and freedom of the citizenry. If people focus on the goals of democratic government, this would produce different definitions of democracy. Democracy might be defined in terms of the individual rights and liberties protected by a democratic form of government, such as freedom of speech, religion, and freedom of assembly. The protection of individual liberty and rights by the rule of law is essential to democracy.

Third, other definitions of democracy such as that of T. H. Marshall focus on the social dimension to democratic citizenship. In addition to civil and political rights, democracy can include social rights, such as social services, providing for those in need, and ensuring the general welfare of others.⁶⁶ This approach argues that unless individuals have sufficient resources to meet their basic social needs, democratic principles of political equality and participation are meaningless. A social definition of democracy has some theoretical basis, and some analysts claim that contemporary expressions of support for democracy in developing nations are merely expressions of support for a higher standard

⁶⁵ J. Schumpeter, *Capitalism, socialism and democracy* (London: Routledge, 1994) p. 26

⁶⁶ T. Marshall and T. Bottomore, *Citizenship and Social Class* (London: Pluto Press, 1992) p. 126

of living. To the extent that democracy is identified with affluent, advanced industrial societies, the endorsement of democracy is presumed to mean a desire to achieve this same economic standard but not necessarily the same political standard.⁶⁷ Thus, this orientation would lead citizens to cite economic improvement, social welfare, and economic security as key elements of their definition of democracy.

These three alternatives—procedures/institutions, freedom and liberties, and social benefits—constitute the primary theoretical choices in defining democracy. Certainly other responses will appear in mass opinion surveys. However, the extent to which democracy is defined in terms of these three broad choices provides a framework for assessing the high levels of public support for democracy and the implications of these democratic aspirations. Each alternative has different implications for the interpretation of public opinion toward democracy and the principles that guide the democratization process.

Similarly, democracies fall into two basic categories, direct and representative. In a direct democracy, all citizens, without the intermediary of elected or appointed officials, can participate in making public decisions. Such a system is clearly only practical with relatively small numbers of people where members can meet in a single room to discuss issues and arrive at decisions by consensus or majority vote. Ancient Athens, the world's first democracy, managed to practice direct democracy with an assembly that may have numbered as many as 5,000 to 6,000 persons perhaps the maximum number that can physically gather in one place and practice direct democracy.⁶⁸

The modern society with its size and complexity, offers few opportunities for direct democracy. The most common form of democracy today is representative democracy, in

⁶⁷ D. Fuchs and E. Roller, 'Learned democracy? Support for democracy in Central and Eastern Europe' *International Journal of Sociology* 36, 2005 pp. 70-96:77

⁶⁸ J. Schumpeter, *Capitalism, socialism and democracy* op. cit., p. 26

which citizens elect officials to make political decisions, formulate laws, and administer programs for the public good. In the name of the people, such officials can deliberate on complex public issues in a thoughtful and systematic manner that requires an investment of time and energy that is often impractical for the vast majority of private citizens. How such officials are elected can vary enormously. On the national level, for example, legislators can be chosen from districts that each elect a single representative. Alternatively, under a system of proportional representation, each political party is represented in the legislature according to its percentage of the total vote nationwide. Provincial and local elections can mirror these national models, or choose their representatives more informally through group consensus instead of elections. Whatever the method used, public officials in a representative democracy hold office in the name of the people and remain accountable to the people for their actions.⁶⁹

Democracy is a disputed term. The literature offers multiple definitions that range from a minimalist concern with election procedures to sweeping requirements for socio-economic equality. Nor do analysts agree on the reasons underlying the consolidation of democracy. Some scholars point to effectiveness of government at economic delivery as the key to democratic durability. Others see the ability of citizens to exercise basic political rights as the *sine qua non* of legitimation. This section tests these propositions in Africa.

Adam Przeworski proposes that democratization and liberal economic reforms are contradictory. In order to deliver material benefits, elected governments must exercise economic reforms. Even if market-oriented policies enjoy initial popular backing, such support is likely to erode over time in the face of unemployment and income gaps. Besieged, fragile governments lapse into policy vacillation, which is politically

⁶⁹ L. Diamond and F. Marc, *The global resurgence of democracy* op. cit., p. 98

destabilizing. Finally, “authoritarian temptations are inevitable”.⁷⁰ On the other hand Stiglitz holds that the sequence of reforms in a democracy, whether political or economic affect its outcome in terms of economic growth. He notes that China first opened its economic system to the rest of the world, and later thought about political reform. Russia instead jumped into democracy, and only then worried about replacing socialism with a market system. There was probably no other way to do it in Russia, but he argues that the Chinese path seems much more likely to lead to lasting economic success. This does not mean that democracy is unimportant. But the sequence of reforms is critical for successful economic development, with economic reforms coming first. When an open and well functioning market system is in place, democracy has a much better chance to lead to lasting prosperity.⁷¹

In Elster’s words, “democracy will be undermined if it cannot deliver the goods in the economic sphere”.⁷² Consistent with this position, Claude Ake argues that Africans view democracy in economic and instrumental terms. Contending that Africans are seeking democracy as a matter of survival, he posits that the democracy movement in Africa will emphasize concrete economic and social rights rather than abstract political rights; it will insist on the democratization of economic opportunities, the social betterment of people, and a strong social welfare system.⁷³ In this formulation, democracy is valued not so much for what it is but for what it can do.

⁷⁰ A. Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (New York: Cambridge University Press, 1991) p. 189

⁷¹ J. Stiglitz, *Globalization and Its Discontents* (New York: Norton, 2002) p. 19

⁷² J. Elster, “The Necessity and Impossibility of Simultaneous Economic and Political Reform” in Greenberg D. (ed.) *Constitutional Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993), pp. 265-302:268

⁷³ C. Ake, *Democracy and Development in Africa* (Washington, D.C.: The Brookings Institution. 1996), p.

The weakness of Ake's position is that it grants no inherent worth to political values. It cannot move beyond a static portrayal of African politics as a "politics of the belly" that is driven mainly by material deprivation. Ake writes of the indignities of underdevelopment but he fails to acknowledge that humans are complex beings who do not live by bread alone thus contradicting the Burton's theory of human needs which states that violence is a tragic expression of unmet human needs such as protection, identity, recognition, participation and understanding.⁷⁴ This implies that all actions undertaken by human beings are attempts to satisfy their needs. Additionally, Ake does not seem to regard democratization as endowing citizens with anything more than a louder voice in debates over economic development. Yet empowerment has a broader connotation: it involves citizens attaining a new measure of self-confidence and a wider scope for taking control of their own lives. Africans, like people anywhere, value the opportunity to speak and act without constraint and not only on some collectively mandated "development agenda".

Taking an opposite tack, Diamond regards beliefs about democracy as central factors in consolidation. In a meta-analysis of findings from public attitude studies in new democracies worldwide he concludes that the most striking finding here is the autonomy of the political, which often overpowers the country's level of socio-economic development, the individual's socioeconomic status, and the regime's economic performance.⁷⁵

In Africa, elections have been used to justify or legitimize the same old rulers and ruling elite. For instance due to its periodic elections, Kenya was deemed democratic despite its undemocratic practices through human rights violations as well as on electoral

⁷⁴ J. Burton, 'Conflict Resolution: The Human Dimension' *International Journal of Peace Studies* Vol. 3, No. 1, 1998 pp. 1-5:3

⁷⁵ L. Diamond, *Developing Democracy: Toward Consolidation* op. cit., p. 162

procedures themselves. Moi inherited power from Kenyatta after his death in 1978. Although the country had its periodical elections without fail, the president turned Kenya into a one-party state by law and set up a committee to bar from electoral politics any individual who criticized his policies. He even abandoned the secret ballot in primary elections replacing it with a 'queuing system' under which voters were required to line up behind the agents of candidates holding pictures of each contestant, a procedure open to an enormous amount of abuse. Elections were commonly manipulated to ensure that only his placemen were chosen.⁷⁶ However, is an elected government democratic? Schumpeter understands democracy to be the "institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." He holds that free and fair elections remain the litmus test of democracy.⁷⁷

However, there are numerous complaints about the electoral processes that raise questions as to the credibility and integrity of the electoral systems. Attention is now shifting away from mere holding of elections, albeit an important event, to the whole process, the structure and the playing fields as a whole.⁷⁸ In fact in Africa there exists illiberal democracy, which combines authoritarianism with regular elections. Senegal is a country with a very legalistic tradition that probably has by African standards quite clean elections by and large. It has a fairly good human rights record, and is very punctilious when it comes to respecting the niceties of what the law says, what the Constitution says. Unfortunately, because the incumbent government enjoys such a large majority, it changes

⁷⁶ M. Meredith, *The State of Africa: A History of Fifty Years of Independence* (London: Free Press, 2005) p. 308

⁷⁷ J. Schumpeter, *Capitalism, Socialism, and Democracy* op. cit., p. 269

⁷⁸ S. Nasong'o, *Contending Political Paradigms in Africa: Rationality and the Politics of Democratization in Kenya and Zambia* (UK: Routledge, 2006) p. 27

the law the institutions at will. It is difficult to imagine a constitution which is amended more often than the Senegalese one and it's amended for election and political purposes. The disappearance and reappearance of the Senegalese Senate all depends on an election calculus. Whether it is in fact necessary to have the second chamber of parliament or not is in the interest of the government. Its parliament has disappeared and reappeared every 2 or 3 years for the past two decades.⁷⁹ Unchecked majority rule often brings authoritarianism and disorder, and suggests that excessive deference to popular sentiment can undermine the balance in many societies.⁸⁰ Moreover, majoritarian democracy necessitates a scramble among potential demagogues for the masses in the general population.

Although traditional concerns of Western liberal democratic culture also insist on having more than one political party, competitive politics in Africa are questionable. Social construction in Africa made opposition unthinkable or when it existed it was frequently equated with an act of treason. Thus opposition faced severe punishment and repression. Ruthless autocratic regimes and their rulers criminalized dissent by portraying opposition leaders and their members or supporters as criminals, thugs and sometimes terrorists.⁸¹ Although presently multi-partyism is accepted in most African countries, promising opponents against the incumbent presidents or regime face severe torture or even assassination. For instance, in 2005, Uganda's leading opposition politician and presidential candidate, Dr. Kiiza Besigye, was arrested slightly before elections on capital

⁷⁹ M. Meredith, *The State of Africa: A History of Fifty Years of Independence* op. cit., p. 271

⁸⁰ F. Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W. W. Norton & Company Inc., 2003) p. 218

⁸¹ J. Mbaku, *Multiparty Democracy and Political Change: Constraints to Democratization in Africa* (USA: Africa World Press, 2006) p. 37

charges: treason for his alleged ties to Ugandan rebel groups and rape for an incident that allegedly occurred in 1997.⁸²

Besides, it is immaterial to have many political parties when all the political parties represent the same elite interests. In addition, in most cases the rich not only get themselves elected but also organize political parties and fund their pet candidates.⁸³

2.2 Ethnicity: Theoretical and Conceptual Perspectives

It seems to be generally agreed that what is called ethnicity is an extraordinarily elusive concept and very difficult to define in any precise way.⁸⁴ In the light of this, many attempts have been made by scholars from various disciplines to analyze, describe, and define, in concrete terms, the term ethnicity. In terms of definitional analysis, however, the term ethnicity points to other related terms of germane interest of which ethnic groups, nationhood and identity are prominent. Critical reflection on these terms is needed at this stage for clarity.

This section evaluates what ethnicity is and what ethnic groups are in an attempt to critically underscore the relation between the politicization of ethnicity and the existence of a peculiar diacritic in citizenship notions. In the opening pages of his work, Okwudiba Nnoli conceives of ethnicity as a social phenomenon associated with some forms of interaction between the largest possible cultural-linguistic communal groups (ethnic groups) within political societies such as nation-states.⁸⁵ According to Young, ethnicity

⁸² Human Rights Watch, 'Uganda: Opposition Leader Arrested' New York, November 14, 2005

⁸³ T. Lumumba-Kasonga, *Liberal Democracy and its Critics in Africa: Political Dysfunction and the Struggle for Social Progress* (UK: Zed Books, 2005) p. 92

⁸⁴ T. Parsons, 'Some Theoretical Considerations on the Nature and Trends of Change of Ethnicity' In N. Glazer and D. Moynihan (eds), *Ethnicity: Theory and Experience* (Cambridge, Mass: Harvard University Press, 1975) p. 53

⁸⁵ O. Nnoli, *Ethnicity and Development in Nigeria* (Aldershot: Avesbury, 1995) p. 1

refers to the active sense of identification with some ethnic units.⁸⁶ In the same vein, Sanda defines it as a strong feeling of allegiance to ones ethnic group.⁸⁷

Barth gives the impression that ethnicity is to be understood in terms of structural relationship. According to this scholar, boundary-maintenance and identity formation are critical factors in explaining ethnicity than cultural factors.⁸⁸ A contrary view was that of Geertz whose view can be referred to as the primordialist Approach. This approach places importance on culturally distinctive characteristics such as myths of origin, ritual, religion or genealogical descent in distinguishing one group from another.⁸⁹ Keyes also noted that the primary defining characteristics of an ethnic group is culture.⁹⁰ The running theme in these opposing views, in essence, is the awareness of a common identity, hence, the knowledge that the basic function of ethnicity is to bind the individual to a group.

On the other hand, Parsons reiterates the view that the term may refer to the organization of plural persons into distinctive groups.⁹¹ Subjectively, the critical features of ethnicity are that it is ascriptive and exclusive: its continuity is centred on the maintenance of a boundary based on values and identity. In the objective sense, it refers to one or more of six different criteria, including race, kinship, religion, language, customary mode of living, and regionalism. Nnoli contends that ethnic groups are social formations distinguished by the communal character of their boundaries. The relevant communal factor may be culture, language or both.⁹²

⁸⁶ C. Young, *The Politics of Cultural Pluralism* (Madison, Wisconsin and London: The University of Wisconsin Press, 1976) p. 79

⁸⁷ A. E. Sanda, *Ethnic Relations in Nigeria* (Ibadan: Ibadan University Press, 1976) p. 33

⁸⁸ F. Barth, *Ethnic Groups and Boundaries* (London: George Allen & Unwin, 1969) pp. 9-38

⁸⁹ C. Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1963) p.153

⁹⁰ C. Keyes, 'Towards a New Formulation of the Concept of Ethnic Group' *Ethnicity* Vol. 3, 1976 pp. 202-13: 209

⁹¹ T. Parsons, 'Some Theoretical Considerations on the Nature and Trends of Change of Ethnicity' In N. Glazer and D. Moynihan (eds), *Ethnicity: Theory and Experience* op. cit., p. 53

⁹² O. Nnoli, *Ethnicity and Development in Nigeria* op. cit., p. 1

Ethnicity is now popularly conceived as something constructed, invented or created. Often associated with this view is the notion that the ethnic group does not have a concrete existence but is rather a figment of the human imagination.⁹³ This is a view of reality as it appears within the colonial situation in Africa. Ethnic groups are inventions and constructions in some measure, but they are also decidedly real, even in the sense that states are said to be. Before the colonial era, some parts of Africa had what may be described as ethnic polities - political societies with governmental institutions in a local space where territoriality and ethnic identity roughly coincided. Colonial rule, which amalgamated disparate ethnicities into the colonial state, largely created the fluid abstract ethnicity which is so evident today by dissociating ethnicity from autonomous polity and territoriality.

From an international relations context, substantialists see the impact of ethnicity as the main organizing force of international politics and view the states as principally ethnocentric units, driven by ambitions of large ethnic groups. On the contrary, relationists question these assumptions and seek to depoliticise the notion of ethnicity. Rather than concentrating on states or large ethnic groups in international politics, they take an individual as the main unit of analysis and argue that ethnicity is a choice, not a destiny.⁹⁴ Ethnic conflicts of the post-Cold War period have generally been encouraged by the inability of the Nation-State to perform its fundamental natural functions as the overriding source of law and order, economic prosperity, social justice and collective identity.⁹⁵

⁹³ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991) p. 27

⁹⁴ M. Mukharyamov, 'Ethnicity and the study of international relations in the post-soviet Russia' *Communist and Post-Communist Studies* Vol. 37, Issue 1, March 2004, pp. 97-109:98

⁹⁵ E. Brown, 'The Causes of Internal Conflict: An Overview' in E. Brown (ed) *Nationalism and Ethnic Conflict* (Cambridge: MIT Press, 1997) pp. 20-23:21

The four constructions of ethnicity reviewed above (primordialism, instrumentalism, constructionism and objectionism) have diverse implications on the study. Primordialists such as Geertz hold that members of the same ethnic group have a common primordial bond that determines their personal identity and turns the group into a natural community. This justifies the common fear that acts as a basis for ethnic grouping. On the other hand, instrumentalists suggest that an ethnic group is an ephemeral phenomenon conjured up at will as an exploitable resource. This implies that ethnicity is essentially a means for people, especially leaders to pursue their own purpose such as forming, mobilizing and manipulating groups of people for political ends. This meaning of ethnicity provides a guideline to the analysis of this study as it attempts to find out the causes of ethnic cleavage in constitutional making processes in Africa. Other views include the objectivists who objectify the ethnic group, insisting that it is real, and the constructionists who insist that the ethnic group is contrived, imagined or a social construction. The implications of the objectivist view to this study is similar to that of the primordialists since they all agree that the ethnic group is defined by putative commonalities such as the congruities of speech, custom, myths, memories, values, symbols and historical attachment to a particular territory among others. For the constructionist however, ethnicity being a figment of the imagination allows for manipulation and exploitability by the elite to garner their own interests. This view concurs with that of instrumentalists.

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Other than the different conceptual and theoretical perspectives of ethnicity as evaluated, there are various causes of ethnic conflicts which impact on the processes of democratization. The paper now turns to examine these various causes of ethnic conflict. In the first place, there are those who hold the view that ethnicity is inherently conflictual

and necessarily problematic. According to Smith, in modern times, even the smallest ethnic communities have adopted an aggressive, if not always expansionist, posture.⁹⁶ In other words, it is believed that conflict in ethnically diverse societies is inevitable. Studies that perceive a connection between ethnicity and conflict rely on the idea of what Van Den Berghe called ethnic competitive mistrusts. Destructive competition among ethnic groups gives rise to ethnicity and produces antisocial effects such as jealousy and deprivation. It becomes possible for the in-group to accept the expression of hostility toward the out-group.⁹⁷

Rothchild and Lake believe that modern ethnic conflict arises from competition over scarce resources such as property, jobs, language rights, and so on.⁹⁸ Thus, the conflict can be resolved if the parties find a mutually agreeable compromise that will allow both sides access to the given scarce resource. But in many conflicts such as the Abkhazian and Karabakh conflicts, it is hard to find such a resource lying at the center of tensions. Some hold that government independence can be classified as a scarce resource. The government becomes a scarce resource when one ethnic group defines their national identity and the state in terms that exclude other groups from the state. In other words, ethnic conflict drives groups to define the state as a scarce resource. The argument that ethnicity is inherently conflictual and necessarily problematic justifies the constant competition for resources such as jobs, scholarships, educational admissions, language rights, government contracts among others.⁹⁹ Apparently, this competition is the major force behind constitutional review and amendment.

⁹⁶ A. Smith, *The Ethnic Revival in the Modern World* (Cambridge: Cambridge University Press, 1981) p. 15

⁹⁷ O. Nnoli, *Ethnicity and Development in Nigeria* (Aldershot: Avesbury, 1995) p. 3

⁹⁸ D. Lake and D. Rothchild, 'Containing Fear' op. cit., Vol. 21 no. 2 Fall 1996 pp. 41-75:44

⁹⁹ D. Lake and D. Rothchild, 'Containing Fear' *International Security* Vol. 21 No. 2 Fall 1996 pp. 41-75:44

There is another school of thought that posits that ethnicity is equivalent to the modern notion of nationalism which some describe as ethno-nationalism. According to this viewpoint on ethnicity, ethnic groups adopt the posture of nationalism because of a sense of dissatisfaction within the larger host society. In other words, the desire for autonomy or self determination stems from an increasing sense of alienation.¹⁰⁰ In this perspective, ethnic groups regard themselves as potential candidate for nationhood.

Marx viewed the structure of society in relation to its major classes, and the struggle between them as the engine of change in this structure. Conflict was not deviational within society's structure, nor were classes functional elements maintaining the system but the structure itself was a derivative of and ingredient in the struggle of classes. The force transforming latent class membership into a struggle of classes is class interest which make individuals to act similarly. People in the same class develop a mutual dependence, a community, a shared interest interrelated with a common income of profit or of wages.¹⁰¹ From this common interest classes are formed, and for Marx, individuals form classes to the extent that their interests engage them in a struggle with the opposite class.

In recent times, the interests in the critical implication of Marxists view on the salience of class and class conflict has influenced Marxist writers to contend most strongly the view that whereas, in African countries, the idea of ethnicity has gained prominent attention, what ought to be given a serious intellectual attention and academic analysis is the idea of class. In line with this perspective, Sklar argued that ethnicity was classified as a derivative of the class struggle, and its political role as a weapon forged and wielded by classes and fractions of classes for their own interests. Such conscious manipulation was

¹⁰⁰ F. Riggs, *Ethnonationalism, Industrialism, and the Modern State* (Honolulu: University of Hawaii, 1994)

p. 9

¹⁰¹ R.J. Rummel, *Conflict In Perspective* Vol. 3 (Beverly Hills: Sage Publications, 1977) p. 471

attributed to remnants of the traditional ruling class and its successors, the petty bourgeoisie.¹⁰² Hence, according to this interpretation, the real motivating force is that of class formation. A deeper reflection however shows that although ethnicity is powerful, it is neither absolute nor immutable. Ethnic consciousness and loyalties lend themselves to easy manipulation particularly because other loyalties are either weak or altogether absent.¹⁰³ This Marxist argument that ethnic consciousness is used to camouflage fundamental and objective interests of competing classes is analogous to the instrumentalist contention whereby ethnic activists (politicians) manipulate the desire to belong to a group for self aggrandizement, attaining or maintaining power. With such a conclusion, the research can then infer the role of ethnicity in the constitution making process that may be achieved through voting, activism or otherwise.

Annie Paul asserts that a rise in ethnic conflict is usually not related to economic distress rather ethnic tensions seem to rise in times of political transition, when the power of one group relative to the other was shifting.¹⁰⁴ There are different explanations for this phenomenon. One is that when the transition is accompanied by a transformation of political institutions (such as from communism to democracy), ethno-nationalism and the consequent ethnic tension is used by the political elite to distance themselves from the old regime.¹⁰⁵ Another explanation is that in a time of transition, when political institutions that usually channel social conflict do not exist, conflict has no peaceful avenue to travel and thus becomes violent. Yet another explanation is that institutions and ideologies that

¹⁰² R. Sklar, 'Political Science and National Integration: a radical approach' *The Journal of Modern African Studies* 1967, 5(1) pp. 1-11: 6

¹⁰³ O. Kokole, 'Ethnic Conflicts versus Development. in Africa: Causes and Remedies' in L. V. De Goor. et al. (eds.) *Between Development and Destruction: An Enquiry into the Causes of Conflict in Post-Colonial States* (Great Britain: The Netherlands Ministry of Foreign Affairs, 1996) pp. 126-140:126

¹⁰⁴ A. Paul, 'Psychology's own Peace Corps: Global ethnic conflict' *Psychology Today*, v 31, no 4 (July 1998) pp. 56-60: 57

¹⁰⁵ M. Rabie, *Conflict Resolution and ethnicity* (Westport, CT: Praeger Publishers, 1994) p. 14

were used in the past to mobilize the masses are either de-legitimized or nonexistent during political transition and, thus, rising politicians use the only means currently available for political mobilization – ethnicity. It helps to point out that modern ethnic conflicts do not exist solely in states in transition. David Lake and Donald Rothchild have pointed out that the same tensions that play out in transition states also seem to exist in "weak" states which according to them is one that must rely on "manifest coercion rather than legitimate authority".¹⁰⁶ East Timor in Indonesia or the Kurds in Iraq accurately typify this type of conflict. However, to complicate the picture even further, modern ethnic conflict even exists in stable, strong (that is, politically legitimate) states, such as Northern Ireland and Turkey.

A common thread in ethnic conflicts of varying countries can be found in "collective fear." In each state mired in ethnic conflict, fear is the major catalyst for social action. This fear may originate from different sources. In states in transition, individuals fear the uncertainty of the future because they have lost the old reliable social and political institutions and have not become accustomed to the new institutions, if new ones have even succeeded to materialize. In weak states, individuals fear the arbitrary hand of a ruthless dictator. In strong states, individuals fear real or perceived discrimination based on their ethnic identity. Time and time again, the social group most commonly turned to in times of collective fear is based on ethnicity. It remains to explain why, in times of insecurity, people within a state turn to ethnic groups and not other groups based on class, religion, or even political beliefs (like along liberal or social lines). One interesting theory states that individuals tend to cling to ethnic ties more strongly than others when there is a threat to security because these individuals are forced to think about the possibility of their

¹⁰⁶ D. Lake and D. Rothchild, 'Containing Fear' op. cit., Vol. 21 no. 2 Fall 1996 pp. 41-75:43

own mortality. Therefore, they turn to ethnic ties because, unlike religious or civil ties, "ethnicity is passed on biologically to offspring, promising a kind of immortality".¹⁰⁷ While this may be a little far fetched, it brings out a crucial point. Ethnic ties are biological, and thus, unchangeable. All other ties are theoretical and may be changed or completely abandoned at any given time.

2.3 Constitution Reforms

Stated simply, a constitution is the basic law on which all other laws are based. Nabweze holds that a constitution is a system that establishes the rules and principles that govern an organization or political entity.¹⁰⁸ When an official act is found to be unconstitutional, perhaps by a court, that act is considered null and void, and the nullification is from inception, not from the date of the finding. It was never "law", even though, if it had been a statute or statutory provision, it might have been adopted according to the procedures for adopting legislation.

Most commonly, the term constitution refers to a set of rules and principles that define the nature and extent of government. Most constitutions seek to regulate the relationship between institutions of the state, in a basic sense the relationship between the executive, legislature and the judiciary, but also the relationship of institutions within those branches.¹⁰⁹ For example, executive branches can be divided into a head of government, government departments/ministries, executive agencies and a civil service/bureaucracy. Most constitutions also attempt to define the relationship between individuals and the state, and to establish the broad rights of individual citizens. It is thus the most basic law of a

¹⁰⁷ A. Paul, 'Psychology's own Peace Corps: Global ethnic conflict' *Psychology Today*, v 31, no 4 (July 1998) pp. 56-60: 60

¹⁰⁸ B. O. Nabweze, *Constitutionalism in the Emergent States* (London: C. Hurst & Co. Publishers, 1973) p.

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¹⁰⁹ Baker, Thomas E. *Constitutional Analysis in a Nutshell*. St Paul, MN: Thomson/West, 2003.

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territory from which all the other laws and rules are hierarchically derived; in some territories it is in fact called "Basic Law".

A fundamental classification is codification or lack of codification. A codified constitution is one that is contained in a single document, which is the single source of constitutional law in a state.¹¹⁰ Most states in the world have a codified constitution. Only three nations, Israel, New Zealand and the United Kingdom, have uncoded constitutions. The most obvious advantages of codified constitutions are that they tend to be more coherent and more easily understood, as well as simpler to read (being single documents). However, although codified constitutions are relatively rigid, they still yield a potentially wide range of interpretations by constitutional courts.

On the contrary, an uncoded constitution is one that is not contained in a single document, consisting of several different sources, which may be written or unwritten. Such constitutions are the product of an "evolution" of laws and conventions over centuries.¹¹¹ By contrast to codified constitutions, in the Westminster tradition that originated in England, uncoded constitutions include written sources such as constitutional statutes enacted by the Parliament (House of Commons Disqualification Act 1975, Northern Ireland Act 1998, Scotland Act 1998, Government of Wales Act 1998, European Communities Act 1972 and Human Rights Act 1998); and unwritten sources such as constitutional conventions, observation of precedents, royal prerogatives, custom and tradition, such as always holding the General Election on Thursdays.

In a democracy, the construction of a constitution is a function of the people because the people exercise the sovereignty and, as a result, decide what rules and

¹¹⁰ Kurland, Philip B. and Ralph Lerner. *The Founders' Constitution*. Indianapolis: Liberty Fund, [2000]. P. 91

¹¹¹ *Ibid.*, p. 92

principles they want government to follow. A portion of this constituent power is delegated by the people to the legislature by allowing it to participate in the process of amending the constitution. In the case of countries, the constitution defines the fundamental political principles, and establishing the structure, procedures, powers and duties, of a government. Most national constitutions also guarantee certain rights to the people.¹¹²

A constitution provides for the structure of the organization. In government, it establishes the legislative, the executive, and the judicial branches. The structure of each of these branches is spelled out, for example, for the legislature two houses are provided and named and the functions to be performed by each are specified as well as restrictions on their functions. The executive offices are established and the functions of these offices specified and restrictions may be stated. Courts are established and their functions and restrictions given.¹¹³

Besides, the methods of selection of the individuals to fill the positions in the structure are specified. The requirements those individuals must meet to fill those offices and the length of terms is stated. The functions to be performed by each, the restrictions on them, and the relationship to other functions within the structure are given. A bill of rights is also included in the constitution. These rights are usually stated as restrictions on the state, although some of the rights are stated directly. The constitution may contain statements of various duties of the citizens of the state or activities in which they may not indulge. Because all states have subordinate governments, (counties, cities, towns, and so on), it is necessary to include in the constitution the means of creating and eliminating these organizations. Their functions, duties and responsibilities are spelled out or

¹¹² E. Jan. 'Ways of Constitution-Making' in A. Hadenius, (ed.) *Democracy's Victory and Crisis* (Cambridge: Cambridge University Press, 1997) pp. 123-142

¹¹³ K. Kibwana, *The Citizen and the Constitution* (Nairobi: Claripress, 1995) p. 48

permission given to the legislature to establish these by later laws. Moreover, the methods of amending or replacing the constitution are also provided by the constitution itself.¹¹⁴

The Social Contract Theory is nearly as old as philosophy itself. In general, it is the view that persons' moral and/or political obligations are dependent upon a contract or agreement between them to form society. As a modern political theory, it has taken its full shape in the writings of the three main social contract theorists: Thomas Hobbes, John Locke and Jean-Jacques Rousseau. According to the latter, "Man was born free, and he is everywhere in chains". Rousseau argues that humans are essentially free, and were free in the State of Nature, but the progress of civilization has substituted subservience to others for that freedom, through dependence, economic and social inequalities, and the extent to which we judge ourselves through comparisons with others. Since a return to the State of Nature is neither feasible nor desirable, the purpose of politics is to restore freedom to us, thereby reconciling who we truly and essentially are with how we live together. The most basic covenant, the social pact, is the agreement to come together and form a people, a collectivity, which by definition is more than and different from a mere aggregation of individual interests and wills. This act, where individual persons become a people is "the real foundation of society".¹¹⁵

Viewed in the light of the Social Contract Theory, the Constitution may be considered as the Social Contract itself in the sense that it is the very basis of the decision to constitute a civil society or State, breathing life to its juridical existence, laying down the framework by which it is to be governed, enumerating and limiting its powers, and declaring certain fundamental rights and principles to be inviolable. On the other hand, the

¹¹⁴ H. Goran and D. Venter, *Constitution-Making and Democratization in Africa* (Pretoria: Africa Institute of South Africa, 2001) p. 53

¹¹⁵ J. J. Rousseau, *The Social Contract and Discourses* (New York: E. P. Dutton, 1950) p. 16

Constitution, as a political document, whether embodied in a single code or scattered in numerous fundamental or organic acts, may be considered as the concrete manifestation or expression of the Social Contract or the decision to abandon the state of nature and organize and found a civil society or State. However, one clarification is in order to avoid confusion or inaccuracy. A common denominator to all the above treatises on the Social Contract is that the social contract to form a civil society is a contract that is theoretically entered into between and among the people themselves. It does not include the State per se as a party. The social contract precedes the very existence of the State and the government. Having preceded the existence of the State and the government, the social contract could not have had the State or the Government as a party. It is therefore inaccurate or even a mistake to regard the State or the Government as a party to the social contract.

Therefore, the dictum that “the Constitution, aside from being an allocation of power is also a social contract whereby the people have surrendered their sovereign powers to the State for the common good” should not be understood as a social contract between the people and the State or the Government. If it is to be consistent to the original thoughts and conceptions of the great social contract theorists, it must be understood as a social contract between and among the people themselves whereby they have agreed to form a State and surrendered certain powers to the State for the common good.

2.3.1 Constitutional Reforms in Kenya

When Kenya gained independence from Britain in 1963 it was under a constitution that established a federal (*majimbo*) framework with an executive prime minister and the British monarch as head of state. It was also grounded in liberal institutions such as a bill

of rights, entrenched separation of powers, and a delineated balance between regional and central government powers.¹¹⁶

This independence constitution was a product of a number of conferences between Kenyans and the colonial masters. Although it contributed positively to the lives of Kenyans, the independence constitution was forged by colonial masters to serve their interests and not those of Kenyans.¹¹⁷ However, despite the apparent exclusion of most Kenyans in the negotiating process that led to the independence constitution, it had some positive points. First, it recognized Kenya as a federal state with a bicameral parliament and a central government which effectively devolved powers to the districts and provinces.¹¹⁸ This constitution established Kenya as a welfare state with the government providing free social services, education, health and water putting into consideration the welfare of people first.¹¹⁹

Despite these positive contributions, African governments have to keep reviewing their constitutions in order to tighten their grips and control on national social, economic and political institutions. There is need for constitutional amendments today because societies, their aspirations and visions are dynamic yet these are the elements that a constitution reflects. Besides, when economic and political reforms are embraced, constitutional reforms are inevitable since the constitution must reflect them.¹²⁰ In addition, the challenge that confronts most African States today is the achievement of a stable political and constitutional order that promotes development and aids the conquest of

¹¹⁶ Kivutha K. et al, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) p. 79

¹¹⁷ Wambua Paul Musili is a former Commissioner of the CKRC and a Lecturer of Law at the University of Nairobi. This comment is based on an interview conducted by the researcher on 25 July 2007, Nairobi

¹¹⁸ Wanjiku Kabira is a professor of Literature at the University of Nairobi and a former Commissioner of the CKRC. Interview held on 16 August 2007, Nairobi

¹¹⁹ Githu Muigai is a professor of Law at Parklands Campus, University of Nairobi, a former Commissioner of the CKRC and an expert in constitutional law. Interview held on 11 August 2007, Nairobi

¹²⁰ Interview with Wambua Musili conducted by the researcher on 25 July 2007, Nairobi

poverty, hunger, disease and ignorance, while also guaranteeing citizens the rule of law and government through law regardless of their sex, color and ethnic origin.¹²¹ On the other hand, constitutions are a product of change, turmoil, upheavals and revolutions. They are an expression of radical changes in society. Experiences over the last century suggest that constitutions have emerged from a changing social order usually at both a local and regional level.¹²²

Constitutional law is always in a state of flux. This means that the process of constitution-making by definition is never over. The eventual production of a document does not end the process of creation of constitutional law. It might, at most, be a convenient way for lawyers to indicate a new phase.¹²³ For example, in Africa the fundamental constitutional issues of the State, both in terms of legitimacy and of extension are not solved. Most of the borders of the African States are mere colonial legacies culturally connected with a nineteenth century European ideal of nation State that has always been entirely foreign to Africa. Nations and ethnic groups are almost always located across the borders so that the boundaries of the nation and those of the state practically never overlap.¹²⁴ The consequences of this unprincipled importation of the Western State are extended unrest, war and genocide. Examples are easy to find and the Rwanda-Burundi-Congo saga between Tutsi and Hutu is just the most recent and bloody.¹²⁵ Borders are often the object of armed controversy such as that involving now

¹²¹ Interview with Githu Muigai held on 11 August 2007, Nairobi

¹²² Lenaola Isaac is a Judge of the High Court and a former Commissioner of the CKRC representing marginalized groups. Interview held on 12 August 2007, Nairobi

¹²³ Interview with Wanjiku Kabira held on 16 August 2007, Nairobi

¹²⁴ M. Makumi, *Theory, Processes and Institutions of Management* (Nairobi: Watermark Publications, 2000)

p. 61

¹²⁵ L. Melvern, *Conspiracy to Murder: The Rwandan Genocide* (New York: Verso, 2004) p. 7

Eritrea and Ethiopia. This has been the case for Kenya as well since the attempts to amend and review the constitution have been on going since independence.

The Constitution of Kenya was amended twenty eight times between 1964 and 1997. Barely nine months after independence, the first amendment sought to establish Kenya as an independent republic. The second amendment was the deconstruction of Majimboism or regionalism which was soon followed in June 1965 with an amendment that completely eliminated the regional structure. The third to the tenth amendments had the objective of expanding presidential powers by eliminating the senate and imposing executive powers on the parliament. Others focused on the revision of the constitution, lowering of voting age and making Kiswahili the official language of the national assembly. This was later refuted since bills were to be presented in English and debated either in English or in Kiswahili. This was subject of another amendment under the Moi regime later in the decade. Other than making Kenya a *de jure* one party state, the High Court was made the final court as far as hearing and determining election petitions regarding membership of the national assembly were concerned. The amendments that followed provided for acquisition of citizenship of a person born after 11 December 1963, removed the security of tenure of the Attorney-General, the Auditor General and judges but this was restored in a later amendment, made all offences under the Penal Code, which are punishable by death non-bailable, return to multi-party politics and finally expanding the scope of liberty of the country's politics.¹²⁶

However, soon after an overwhelming victory in independence elections, KANU moved quickly to dismantle the federal constitution and establish a sovereign republic with

¹²⁶ See M. Githu, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution' PhD Dissertation University of Nairobi Chapters 4 and 5

an executive president, reducing and subsequently eliminating the powers of regional governments, and absorbing the largest opposition party in parliament.¹²⁷

These reasons may be seen as what led to the 1982 coup which affected constitutional arrangements in Kenya because it focused the nation to the fact that the enactment of section 2A earlier in the year declaring Kenya a *de jure* one party state, was unacceptable, anachronistic and undemocratic. The coup sowed the seed of future struggles to change the Kenyan constitution for the purposes of greater political participation through multi-party democracy which was later achieved in the 90s.¹²⁸ Disbanding the air force, sentencing to death twelve soldiers and jailing over 900 of them introduced the ethnic factor in the Kenyan military because the replacements were made hastily and with nepotism. The coup was also a direct cause for the snap elections in 1983.¹²⁹

By mid 1982, the Kenyan economy was in a very sorry state. The rate of foreign exploitation had been increasingly steadily throughout the seventies. Kenya's trade deficit increased four times in the same period from. To finance the outflow of profits and the foreign trade deficit, the KANU government kept on borrowing. Having been trapped by the loan sharks at the IMF, the KANU government found itself paying an increasing amount of Kenya's hard earned export earnings just to keep up with the interest payments on these loans which were primarily serving the interests of the multinationals.¹³⁰

Due to increasing autocratic rule, there were persistent calls for reforms to allow for multi-partyism and civil society independence as well as reduction in presidential powers. Before 1990, constitutional amendments had always been in the hands of the executive

¹²⁷ W. Oyugi et al., *The Politics of Transition in Kenya: From KANU to NARC* (Nairobi: Heinrich Boll Foundation, 2003) p. 14

¹²⁸ Interview with Wambua Musili conducted by the researcher on 25 July 2007, Nairobi

¹²⁹ Interview with Githu Muigai held on 11 August 2007, Nairobi

¹³⁰ Interview with Wanjiku Kabira held on 16 August 2007, Nairobi

branch government, which as aforementioned was manipulated repeatedly. Matters came to a head in the 1990s with the blatant detention of those opposed to the authoritarian regime, as well as their legal representatives.¹³¹ Resistance to the authoritarian regime became bolder when donors, international Human Rights groups, the alternative press and the civil society all called for a return to multi-partyism, which they felt would increase the democratic space in the country. On July 7, 1990, there was a huge meeting convened at Kamukunji grounds Nairobi to demand a return to multi-party politics.

Consequently, since the 1991 constitutional reform there has been a clear correlation between elections and violence. Ethnic violence was used to rally the populace against those calling for constitutional change. This was especially so in 1992 when President Moi was under pressure to transform Kenya into a pluralist state. Political tribalism has been used more so by politicians who want to rally support within their ethnic cleavages.¹³²

In 1991, Section 2A of the Constitution was repealed which returned Kenya to multi-partyism. This opened the door for those opposed to Moi's regime to convince Kenyans that they were a better choice of leadership. Constitutional reform was not foremost on the opposition's minds at this time as they were confident of electoral victory in the 1992 elections, hence the reforms could wait till they assumed power.¹³³ The opposition's failure to dislodge Moi from power made them realize that drastic measures were needed to get rid of the oppressive structures entrenched in the constitution that the

¹³¹ K. Murungi, *In the Mud of Politics* (Nairobi: Acacia Stantex Publishers, 2000) pp 23-26 Murungi recalls an incident on June 21, 1990 when Special Branch officers stormed lawyer Paul Muite's office and arrested him with his clients Kenneth Matiba and Charles Rubia, vocal opponents of the KANU/Moi regime, on the basis of meeting "illegally".

¹³² M. Kagwanja, *Killing the Vote: State sponsored Violence and Flawed Elections in Kenya* (Nairobi: KHRC, 1998) pp.10-11

¹³³ K. Murungi, *In the Mud of Politics* op. cit., p .72

Moi autocracy thrived on. After the elections, the opposition formed a National Opposition Alliance to challenge the electoral results. However this did not last due to disunity and lack of trust among the opposition leaders. A United Democratic Alliance (UNDA) of Ford -Kenya, Ford-Asili and the Democratic Party (DP) formed in 1994 to present a single opposition candidate also failed due to the same reasons.

The 1997 elections saw Moi and KANU regain their hold on power despite the reforms that had been passed. The elections however saw KANU weakened in the legislature prompting it to woo opposition parties. The result was a merger with the National Democratic Party (NDP) led by Raila Odinga, who had been detained by the KANU regime on several occasions in the single-party era. This pre-empted the opposition's hopes of making the passing of bills difficult in parliament as a means of controlling the regime's excesses. After the elections Moi did not keep his promise of undertaking comprehensive constitutional review to the chagrin of the civil society.

2.3.2 Emerging Debates in the Kenyan Constitutional Review Process

Since the genesis of constitutional reform in Kenya, there have been major themes that have dominated the reform process. One trend focuses on how political power is apportioned, while the second emphasizes citizenship questions, with a particular focus on how individuals and groups relate to state power. The third is a debate over the process by which new constitutions will be formulated.¹³⁴

The Executive under the Kenya Constitution started off with a dual character, under the Independence Constitution in 1963. The day-to-day operation of government was conducted under the direction of a Prime Minister, who was the leader in Parliament of the

¹³⁴ Stephen N. Ndegwa and Ryan E. Letourneau, 'Constitutional Reform' in Paul J. Kaiser and Wafula Okumu (eds) *Democratic Transitions in East Africa* (Aldershot : Ashgate, 2004) pp. 84-103:86

political party with the largest number of seats in the house. The more occasional, symbolic and constitutional acts of government, such as formally naming the Prime Minister, proroguing or dissolving Parliament, were conducted by the Governor-General, representing the Queen of England, who operated in the capacity of Head of State.

The Executive organ was a diverse entity with a clear scope for checks-and-balances. This feature, however, was taken away with the inauguration of Republican status on December 12, 1964.¹³⁵ Henceforth, the Executive of the Kenyan State consisted solely in the President, who was his own Prime Minister while in his other capacity, he was the Head of State and Commander-in-Chief of the Armed Forces. An unqualified monolithic structure was thus installed upon the constitutional system.

If this monolithicism was at first essentially instrumental, it was to be confirmed in place, firstly by the changed politics that brought the single party system, and then by a series of amendments that enhanced and consolidated the executive powers of the President and gave him the upper hand in his interplays with the Legislature. In the few years following the establishment of Republican status, all the main elements of diversity in the constitutional system, such as the semi-federalist structure and the bicameral Parliamentary system, were removed and the outstanding and greatly empowered profile of the President, became the main landmark of the constitutional order. It is precisely the monolithicism of the immediate post-independence years that prompted the public to initiate clamours for change, leading to the re-introduction of the multi-party system and a re-dedication to the principle of pluralism.¹³⁶

¹³⁵ Kivutha K. et al, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) p. 17

¹³⁶ F. Jonyo, and S. Owuoché, *Politics in Kenya: A Perspective* (Nairobi: Azinger Ltd, 2004) p. 7

The executive in Kenya is quite pervasive and tends to be unaccountable. Formal power is highly concentrated and rests primarily in the executive. For most of Kenya's post-colonial existence, the executive has largely succeeded in reducing the effective checks-and-balance powers vested in the judiciary and the legislature. Effectively, these two arms of government have become appendages of the executive and have continued to operate as such even where the existing Constitution and some relevant legislation provide much scope for them to assert themselves vis-à-vis the executive.¹³⁷

A number of mutually reinforcing factors conspired to facilitate the emergence of an all-powerful executive. First was the history of central authoritarianism inherited from colonial powers, which had acquired an institutionalized life and a presence in the minds of both the new leadership and citizens. The second factor had to do with the imperatives of political control and regime entrenchment, which has meant that alternative sites for the exercise or moderation of power are decapitated or co-opted. This has been evident particularly in respect to civil society organizations that commanded some mass following of note. Third was the emasculation, followed by the total absence and, in the later years, weakness of organized opposition.

In 2002, NARC drove their campaign on the pledge to reduce the powers of the presidency by rewriting the Constitution. However, after attaining power, President Kibabki retreated from this pledge to create a powerful prime minister's post to dilute executive authority. Besides, one of the main factors that facilitated the failure of the 2005

¹³⁷ I. Shivji, *Constitutional Development in East Africa for Year 2000* (Dar-es-Salaam: Kituo cha Katiba, 2003) p. 11

referendum was a renege on this promise. Therefore today, the Constitution of Kenya retains the limited - scope Executive.¹³⁸

A close study of Kenya's history reveals that all constitutional negotiations have been accompanied by clamour for majimboism. It was the central theme of the Lancaster House Constitutional Conference in 1962, ahead of Kenya's independence, and has jinxed the constitutional reform process in the multi-party era. When Kenya gained independence from Britain in 1963 it was under a constitution that established a federal (*majimbo*) framework with an executive prime minister and the British monarch as head of state.¹³⁹

In the end, the majimbo experiment neither pleased its proponents in KADU nor did it win its opponents in KANU. The system was not only expensive in terms of money and personnel, but also prevented the growth of nationhood and retarded economic development. It was "too legalistic and cumbersome, literally requiring a battery of legal experts and clerks at the Centre and Regions to interpret the dos and the don'ts hidden in the myriad legally worded clauses if it was ever to work.

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The failure of majimbo is attributed to the high-handedness and opposition by Kenyatta's Kikuyu-dominated oligarchy. While most of former KADU leaders seized and consolidated the reigns of power after Kenyatta, in the entire 1978-1990 period, not a single constitutional amendment to re-introduce majimboism reached the floor of parliament.¹⁴⁰

The Bomas draft Constitution prescribed a system of government in which powers are devolved both vertically and horizontally. In many ways the devolved system of

¹³⁸ W. Mitullah, M. Odhiambo and O. Ambani, *Kenya's Democratization: Gain or Loses? Appraising the Post Kanu State of Affairs* (Nairobi: Claripress, 2005) p. 64

¹³⁹ Stephen N. Ndegwa and Ryan E. Letourneau, 'Constitutional Reform' in Paul J. Kaiser and Wafula Okumu (eds) *Democratic Transitions in East Africa* op. cit., p. 89

¹⁴⁰ J. Oloka-Onyango, K. Kivutha and C. Maina, *Law and the struggle for democracy in East Africa* (Nairobi: Claripress, 1996) p. 18

government is proposed as an antidote to concentration of powers in central government which has been a feature of Kenya's constitutional arrangements since it became a British colony in 1920. Such concentration of powers has made government in Kenya easily prone to authoritarianism and has accentuated political and economic polarization along racial and ethnic lines. Devolution of powers is therefore recommended as an additional reason to help in managing social diversity. As a system of devolving state power horizontally, federalism is viewed as accommodating and inclusive of diverse cultures and identities. It, therefore, suits large countries or those with competing racial or religious identity problems and is widely prescribed for ethnically divided societies in Africa.¹⁴¹

Land is the single most valuable asset to the human being. It is a sure guarantee to life. It is the grabbing of land and the total expropriation of the same by the colonial regime that forced a section of Kenyans to go to the forest and fight for freedom. The majority of those interviewed complained bitterly about a repeat of what happened during the colonial period. People in positions of authority are grabbing land left, right and centre. This includes trust land and national forests. The case of Karura Forest and others were cited. It was suggested to the Mission that the land question should be high on the agenda in all discussions of the constitution of Kenya. It is only a clear and fair policy of land acquisition, expropriation, appropriation, distribution and alienation that can guarantee peace in the country. The Mission hopes that the Commission will appreciate the sensitive nature of land and come up with constitutional proposals that will be acceptable to the majority of Kenyans.

2.4 Ethnicity, Democracy and Constitutional Reform: The Linkages

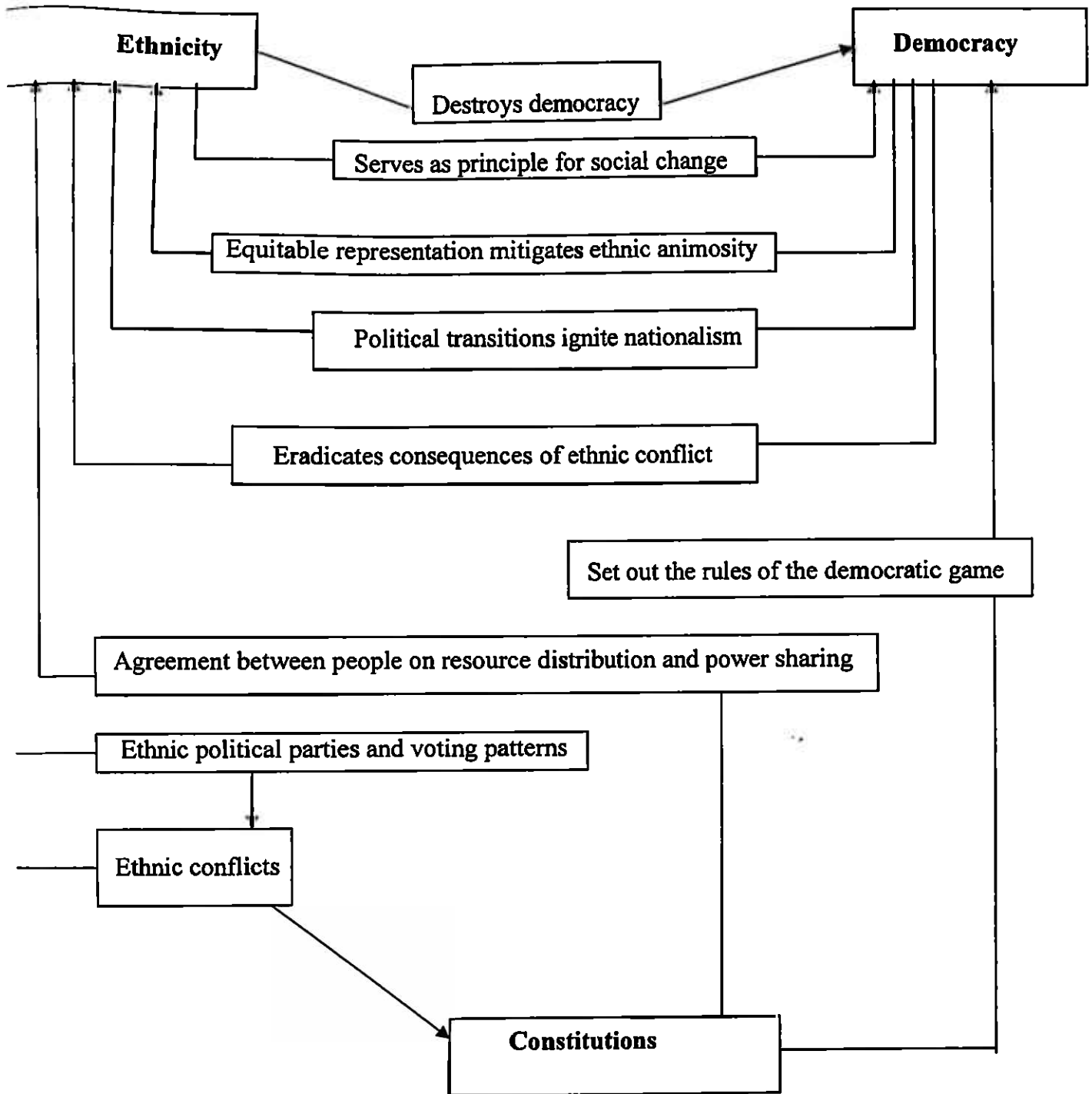
¹⁴¹ E. Soja, 'The Geography of Modernization in Kenya: A Spatial Analysis of Social, Economic, and Political Change' *The American Political Science Review*, Vol. 68, No. 1 (Mar., 1974), pp. 331-332

This section examines the linkages between ethnicity, democracy and constitutions. Figure 2 below is a summary of the theoretical relationship between the three variables. These are discussed throughout this part of the analysis.

Some scholars contend that ethnicity lays a basis for democracy. For instance Agbanga argues that the major reason why incumbent leaders undermine the case for multiparty democracy is that it is a recipe for ethnic conflict. In multi-ethnic societies, an alternative to the refusal of democratization, be it multiparty politics or adherence to other forms of participatory principles, implies endless personal rule and decay. The rebellion against this position calls for democratization. When multiparty democracy fails to democratize the state for instance by encouraging human rights violations, ethnicity serves as an alternative organizing principle of social justice and change.¹⁴²

¹⁴² G. Agbanga, *Issues and Trend in Contemporary African Politics: Stability, Development and Democratizations* (New York: Peter Lang, 1997) p. 163

Figure 2: Theoretical Relationships between Ethnicity, Democracy and Constitutions



Competition among ethnic groups is not always malign as is often assumed. In Nigeria for example, it has made some modest contributions to human rights and democracy. As the prospects of independence improved in Nigeria, attention shifted from uniting against colonialism to manoeuvres for getting a good share of the spoils of the nationalist struggle. In the course of these rivalries those ethnic groups which did not feel that they were strong competitors for power in the post-colonial *era* began to worry about marginalization and domination. Thus ensued a rash of minority movements making a wide variety of demands - separatism, federalism, confederalism, the guarantee of human rights, minority rights, affirmative action for minorities, strong local autonomy within the regional framework, and so on. Moreover, Nnoli argues that this kind of ethnic democracy concerns the right of the members of each ethnic group to be secure in their lives and property, as well as secure from arbitrary arrest and punishment and for them to enjoy equal opportunity in real terms in trade, business, employment, schooling and the enjoyment of social amenities. All these can only be attenuated by the consistent application of democratic principles, norms and values and procedures in socio-economic and political life.¹⁴³ In this sense, ethnicity complements other forms of representation. On the overall however, the impact of ethnicity in Nigeria was negative considering the effects of the numerous civil wars it has had with the major occurrence of the Biafran war, 1967-1970, which resulted in 100, 000 military casualties and between 500, 000 and 2 million civilians died from starvation during the war.

One of the positive methods to deal with ethnicity is seeking ways to courageously represent an otherwise legitimate feeling and reality. Such an action is palliative for it takes the steam out of abusive and oppressive post-colonial state. Elliot Skinner states that

¹⁴³ O. Nnoli, *Ethnic Conflicts in Africa* (Dakar: CODESRIA Books, 1998) p. 222

without a compromise that would ensure 'ethnic justice' neither so-called 'liberal democracy' nor other species of government will succeed in Africa.¹⁴⁴ Rothchild observes that democracy will have mechanisms to overcome economic discrimination of ethnic groups and make sure that the rights of ethnic or other constituent groups are respected.¹⁴⁵

Boulding presents an antithesis to this contention by positing that in transition societies, democratization can fuel nationalism or separatism because it encourages ethnic self-consciousness which, in turn, threatens to make democracy obsolete by encouraging violence and conflict.¹⁴⁶ For example, the spate of elections held immediately after the collapse of communism were won in the Soviet Union and Yugoslavia by nationalist separatists and resulted in the breakup of those countries. This was not in and of itself bad, since those countries had been bound together by force. But the rapid secessions, without guarantees, institutions, or political power for the many minorities living within the new countries, have caused spirals of rebellion, repression, and, in places like Bosnia, Azerbaijan, and Georgia, war. Paradoxically, therefore, pluralistic revolutions can in certain circumstances reignite explosive national conflicts and fuel anti-pluralist tendencies.

In fact, Ekiert suggests that a rapid decomposition of state power, especially when aggravated by serious economic decline, is hardly conducive for the establishment of viable democratic regimes. The rapid disintegration of party-states has produced a power vacuum which has been hastily permeated by highly fragmented political forces prone to radicalization not only around political and economic issues, but also around ethnic and

¹⁴⁴ E. Skinner, 'African Governance and Political Cultures' *Global Bioethics* Vol. 13, No. 1, 2000 pp: 55-62:56

¹⁴⁵ D. Rothchild, *Facing ethnic conflicts: Perspectives from research and policy-making* (Germany: Center for Development Research, 2000) p. 3

¹⁴⁶ E. Boulding, 'Ethnicity and New Constitutive Orders: An Approach to Peace in the Twenty-First Century' in U. Hisakazu and V. Takeo (Eds) *From Chaos to Order* (Tokyo: Yuskindo Publishers, 1990) pp. 56-61

religious cleavages. Hence, the tasks facing new democratically elected governments are so drastic that some form of coercive policies may be necessary in order to accomplish a fundamental restructuring of political and economic systems.¹⁴⁷

Hameso contends that another inherent danger contained in the transition to a democratic system, particularly in heterogeneous societies, concerns the rights of minorities. While democracy is based on majority rule, it also implies respect for the rights and interests of minority groups. It is the lack of sufficient constitutional guarantees for minority rights, combined with discrepancies in economic conditions between different regions and ethnic groups, which has been one of the principal causes of inter-ethnic tensions within and between states. For instance the major cause of Eritrea's secession from Ethiopia was minority rights issues. While an advanced democratic system may eventually achieve some form of social, economic and political equilibrium between majority and minority ethnic interests, this may be extremely difficult to attain at the early stages of democratic institution-building. In such a situation, political freedoms might actually be used on the part of the majority as a pretext to vent ethnic or cultural prejudice - and hence, to curtail the freedom of minority groups, a development which may eventually provoke a counter-nationalist backlash rather than to institutionalize political and cultural pluralism.¹⁴⁸

On the contrary, Berman argues that democracy eradicates the bad consequences of ethnic conflict by entrenching state principles that proscribe ethnic politics and by

¹⁴⁷ G. Ekiert, 'Democratization Processes in East Central Europe: A Theoretical Reconsideration' *British Journal of Political Science* Vol. 21, Part 3, 1991 pp. 288-312:301

¹⁴⁸ S. Hameso, *Ethnicity and Nationalism in Africa* (New York: Nova Science Publishers, 1997) p. 40

providing for power-sharing arrangements in the constitution in such a way that no particular ethnic group can feel permanently excluded from government.¹⁴⁹

An African perspective treats ethnicity as a form of African identity.¹⁵⁰ Berman observes that countries such as Nigeria, Zaire, Kenya, Tanzania, Ethiopia, Sudan, Somalia, Rwanda and Burundi have suffered decades of misrule and conflicts due to an inadequate understanding of ethnicity and the management of ethnic relations. Indeed, if properly guided, politicized ethnicity can serve various objectives, such as mobilizing resources to do away with oppressive rule and assisting in economic development. He gives examples of some religious sects in Lebanon which have acquired some sense of ethnic identity such as Maronites and Druze over time. In countries like Ethiopia, Liberia, and Somalia, ethnicity has proved a potent weapon for sorting out the vagaries of personal rule although not without lamentable repercussions.¹⁵¹

To many Africans today, the tribe is more important than the nation in which he or she lives. This is because the nations that exist in Africa now did not exist before the coming of the Europeans. Makumi argues that the realities of the African ethnic context were enshrined at the 1884-5 Berlin Conference, where Africa was carved up by imperial powers. In dividing African territories, the imperial powers paid little heed to ethnic, cultural, geographic or other factors. As a result many tribes were split up and found themselves in different countries.¹⁵² In other cases, like Rwanda, different tribes were grouped together in the same nation. On the contrary however, some scholars argue that ethnic constructs are recent and dynamic. In fact Nabweze asserts that colonialism was the

¹⁴⁹ B. Berman et al, *Ethnicity and Democracy in Africa* (Athens: Ohio University Press, 2004) p. 308

¹⁵⁰ S. Hameso, *Ethnicity and Nationalism in Africa* op. cit., p. 35

¹⁵¹ B. Berman, *Ethnicity and Democracy in Africa* op. cit., p. 309

¹⁵² M. Makumi, *Theory, Processes and Institutions of Management* (Nairobi: Watermark Publications, 2000) pp. 66-7

glue that stuck human units together. Now the glue is dissolving and many of these units are falling apart. This, he argues, is the problem underlying the disturbing phenomena of coups and secessions which characterize governments in Africa.¹⁵³

Sanda notes that in Nigeria, no tribe wants another tribe to dominate the government of the country. In elections people often support those candidates from their own tribe rather than voting for the person best suited for the job.¹⁵⁴ Salih holds that no explanation of military ascendance and democratic success or failure in Nigeria is complete without reference to ethnic and religious factors. Just like in other African societies, democracy in Nigeria is confronted with the formidable challenge of containing rather than augmenting ethnic conflicts. One of the potential areas of conflict between democracy and ethnicity is that both are institutions of inclusion and exclusion.¹⁵⁵ In the same thinking, Horowitz comments that democracy is about including all groups of people in terms of ethnicity, gender and class, access to power, privileges that go with inclusion and the penalties that accompany exclusion. In severely divided societies, ethnic identity provides clear lines to determine who will be included and who will be excluded.¹⁵⁶

Okpu contends that in Nigeria, Islam and ethnicity are unifying factors that bring along with them a large number of voters, a political resource that transcends economic and social differentiation. The collective sentiments of an ethnic or religious group can also be mobilized through the creation of a real or imagined enemy, and the need for collective protection against this 'enemy' from a different ethnicity or a different religion. He claims that the northern elite consciously aims to keep job opportunities in government and

¹⁵³ B. O. Nabweze, *Constitutionalism in the Emergent States* op. cit., p. 83

¹⁵⁴ A. E. Sanda, *Ethnic Relations in Nigeria* (Ibadan: Ibadan University Press, 1976) p. 131

¹⁵⁵ M. Salih, *African Democracies and African Politics* (London: Pluto Press, 2001) p. 128

¹⁵⁶ D. Horowitz, 'Democracy in Divided Societies' in Larry Diamond et al, (eds) *Nationalism, Ethnic Conflict and Democracy* (Baltimore: The John Hopkins University Press, 1994) pp. 96-118:103

universities for northerners. A covert 'northernisation' policy has been at play since the 1970s, in which citizens from the south were hired into jobs that required higher qualifications, but only until a northerner was sufficiently trained to take over.¹⁵⁷

Bening observes that in 1960 roughly 100 linguistic and cultural groups were recorded in Ghana. Although later censuses placed less emphasis on the ethnic and cultural composition of the population, differences of course existed and had not disappeared by the mid-1990s. Competition to acquire land for cultivation, to control trade routes, or to form alliances for protection also promoted group solidarity and state formation. The creation of the union that became the Asante confederacy in the late seventeenth century is a good example of such processes at work in Ghana's past.¹⁵⁸

Boaten argues that one of the legacies of Kwame Nkrumah era was that his regime made it a point to keep ethnicity outside in national politics. A Ghanaian was employed in government institutions as Ghanaian, with no regard to his ethnic origins. Despite the diverse ethnic groups present in Ghana and the fact that some political parties could address the interests of certain ethnic groups, ethnically based political parties are unconstitutional under the present Fourth Republic. This is one of the legacies of Kwame Nkrumah who detribalised politics in Ghana by making it illegal to organize political parties along tribal lines.¹⁵⁹

Ethnic rivalries of the pre-colonial era, variance in the impact of colonialism upon different regions of the country, and the uneven distribution of social and economic amenities in post-independence Ghana have all contributed to present-day ethnic tensions.

¹⁵⁷ U. Okpu, *Ethnic Minority Problems in Nigerian Politics: 1960-1965* (Stockholm: LiberTryck AB, 1977) p. 8

¹⁵⁸ R. B. Bening, *Ghana Regional Boundaries and National Integration* (Accra: Ghana Universities Press, 1999) p. 92

¹⁵⁹ B. Abayie, *Ethnicity and Ethnic Conflicts in Africa: Ghana's Example* (Legon: University of Ghana, 1995) p. 54

As Chazan observed, undifferentiated recourse to ethnic categories has obscured the essential fluidity that lies at the core of shared ties in the country. Evidence of this fluidity is in the heterogeneous nature of all administrative regions, in rural-urban migration that results in interethnic mixing, in the shared concerns of professionals and trade unionists that cut across ethnic lines, and in the multi-ethnic composition of secondary school and university classes.¹⁶⁰ Nkwi asserts that the debate in Cameroon on the concept of “electoral village” whereby urbanized people cast their votes along ethnic lines enhances that the village, the lineage, the clan and the ethnic group still constitute vital variables in the political system. This decision has given rise to new political struggle within the ruling class.¹⁶¹

Another challenge is the ways in which ethnicities are constituted and transformed through confrontation or struggles over the organization of political community, power, and resources in colonial and post-colonial state formation. The imprints of ethnicity on nation building and politics are state-society relations, and popular perceptions of inter-relationship of class and communal differences.¹⁶² African states should cautiously respond to ethnic demands by equitably distributing national resources in order to ensure economic and social justice. States which tend to ignore or fail to accommodate ethnic claims are almost certainly doomed to political instability and perhaps collapse.

According to Meyer, democracy without constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power,

¹⁶⁰ N. Chazan, ‘Democracy and Democratic Rule in Ghana’ in Diamond L. et al, (eds.) *Democracy in Developing Countries: Africa* (Boulder: Lynne Rienner Publishers, 1988) pp. 93-139:124

¹⁶¹ N. Nkwi, ‘Ethnicity and Party Politics in Cameroon: The Politics of Divide and Rule’ in Nkwi N. et al, (eds) *Regional Balance and National Integration: Lessons Learned and the Uncertain Future* (Yaounde: ICASSRT, 1997) pp. 138-149: 140

¹⁶² J. Richard, *Radical Nationalism in Cameroun: Social Origins of the UPC Rebellion* (Oxford: Clarendon Press, 1977) p. 65

ethnic divisions, and even war. Perhaps no better defense of democracy exists than Thomas Jefferson's. It was his belief that majority rule is not perfect, but it is the best form of government. The only other alternatives are rule by the minority (which is worse) or rule by one person (which is even worse). Requiring unanimous consent to pass laws is not practical, since universal agreement on an issue is extremely rare, and government would become paralyzed on controversial issues.¹⁶³ To get around this, constitutionalism through the protection of every individual's rights by a constitution is advocated.

A central part of Jürgen Habermas's argument is that in a constitutional democracy, constitutionalism and democracy must be co-original, that is, mutually enabling rather than constraining.¹⁶⁴ Among other things, this thesis serves to make sure that the addressees of the laws can view themselves simultaneously as the authors of the laws. However, there remains a gap between constitutionalism and democracy; even if there is a relation of mutual imbrication, the two cannot be reconciled. As a result, the relationship between them is undecidable in Derrida's sense of the term.

Constitutionalism and democracy have been interpreted as both related yet contradictory. On the one hand constitutions are said to set out the rules of the democratic game, on the other as constraining the power of the demos and their representatives to rule themselves - including by reforming the very processes of democracy itself. Meanwhile, constitutionalists themselves differ on how far any constitution derives its authority from, and should itself be subject to democratic endorsement and interpretation. For instance most independence constitutions in Africa were not subject to democratic endorsement given the scarce inclusion of only the elite in their formulation. They also dispute whether

¹⁶³ D. Meyer, *The Constitutional Thought of Thomas Jefferson* (USA: University of Virginia Press, 1995) p.

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¹⁶⁴ J. Habermas, (Translated by William Rehg) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge Mass.: MIT Press, 1996) p. 305

constitutions should refer solely to democratic processes, or also define and limit democratic goals.¹⁶⁵

Contemporary western democracies are constitutional democracies, but 'democracy' and 'constitutionalism' are, historically and conceptually, distinct ideas. While a constitution is an instrument to limit, control, and diffuse the power of governments, democracy, at least in its populist version, tends to concentrate potentially unlimited power in the hands of the current majority. According to the populist model, majorities should be able 'to control all of government -- legislative, executive and, if they have a mind to, judicial and thus to control everything politics can touch'.¹⁶⁶ By contrast, constitutional rules are exempted from the majoritarian controls that govern ordinary legislation, and are enforced by those quintessentially non-majoritarian institutions, the constitutional courts. The effect of constitutional rules is to remove certain decisions, for example concerning fundamental rights, from the electoral process and thus to tie the hands of the current majority.

Holmes posits that it is not difficult to understand why some democrats consider the expression 'constitutional democracy' a combination of contradictory ideas. Yet, a moment's reflection shows that a constitutionally-unconstrained democracy is not only more unstable but also less efficient than a liberal, constitutional democracy. Like other constraints, constitutional rules are not only limiting but also enabling. It is only an apparent paradox that Holmes, the first modern theorist of sovereignty and absolutism, was the first to point out that limited power is more powerful than unlimited power, and that by closing off some options a ruler can open up others. By allowing his power to be restricted

¹⁶⁵ B. O. Nabweze, *Constitutionalism in the Emergent States* op. cit., p. 24

¹⁶⁶ A. Lijphart, 'Majority Rule in Theory and Practice: the Tenacity of a Flawed Paradigm' *International Social Science Journal*, 1991 pp.129: 483-94

in certain specific ways, a sovereign increases the likelihood of social compliance with his wishes. This is indeed the central paradox of Holmes' theory of sovereignty: less power is more power. He wrote: 'The prince may not make any false money, no more than he may kill or rob, neither can he alter the weight of his coin to the prejudice of his subjects, and much less of strangers, which treat with him and traffic with his people, for that he is subject to the law of nations, unless he will lose the name and majesty of a king'.¹⁶⁷ This is a perfect illustration of a self-imposed restriction. To achieve his objectives a king must cultivate a reputation for trustworthiness, and this requires him to play by the rules. By committing himself in advance to coins of fixed value, the king can successfully resist pressures to depreciate, cultivate the confidence of creditors, and retain better control of the economy. In similar fashion, constitutional constraints improve the efficiency of the modern sovereign, the sovereign people, by guaranteeing property and basic civil rights, limiting arbitrary executive discretion, and enhancing the credibility of long-term policy commitments.

Constitutionalism is one of the characteristics of democracy. A constitution presents an agreement between peoples about distribution of their resources, distribution of power and respect for human rights. From what has been discussed above, it is essential that these elements be addressed for a divided society to be democratic and peaceful. According to Igbuzor, for democracy to take root, it should be based on consensus building. This is also the major element in constitution-making.¹⁶⁸ This means that without a consensual constitution, a country cannot claim to be democratic. In addition, Nabweze argues that national unity may be described as the infrastructure for constitutionalism; it is

¹⁶⁷ S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago, ILL.: The University of Chicago Press, 1995) p. 114

¹⁶⁸ O. Igbuzor, 'The Role of Constitution Building Processes in Democratization' Paper presented at the Dialogue for Constitutional Reform in Nigeria also available online at <http://www.idea.int/conflict/cbp/>

a condition precedent for viable constitutionalism. Therefore, different ethnic groups should seek to unify themselves by cleaving as closely as possible to the national foundations.¹⁶⁹

¹⁶⁹ B. O. Nabweze, *Constitutionalism in the Emergent States* op. cit., p. 81

CHAPTER THREE

ETHNICITY AND CONSTITUTION-MAKING IN KENYA

3.0 Introduction

The main objective of this study is to examine the role of ethnicity in the constitutional review process in Kenya. The previous chapter presented a conceptual analysis of the terms in question: ethnicity, democracy and constitution making and pictured the linkages between them. This chapter draws the historical trajectory of constitutional amendments in Kenya since independence and brings out the factors affecting the current constitutional reform processes in the country. These include politicians' interests, ethnic violence, civil society organizations and ethnic voting. Government initiatives towards constitutional change such as the IPPG, CKRC and NCC are also explored and their influence on the constitutional process is investigated.

3.1 The Origins of Ethnicity in the Kenyan Context

Ethnicity has long been understood as playing a crucial role in structuring party politics in Africa.¹⁷⁰ However, recent research has suggested that the impact of ethnic identities is extremely complex and variable. Norris and Mattes find that ethnicity does play key role in determining support for ruling parties, but that ethnicity is not always the primary cleavage in African polities.¹⁷¹ Gibbon demonstrates that both ethno-political fragmentation and the geographical concentration of ethnic groups are important factors in explaining the number of political parties.¹⁷²

¹⁷⁰ D. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985) p. 92

¹⁷¹ P. Norris and R. Mattes, 'Does Ethnicity Determine Support for the Governing Party?' 2003 *Afrobarometer Working Paper* No. 26 also available at www.afrobarometer.org

¹⁷² P. Gibbon, *The new local level politics in East Africa: Studies on Uganda, Tanzania and Kenya* (Uppsala: Nordiska Afrika Insitutet, 1994) p. 74

Kenya is a multi-ethnic society. There are many ethnic groups lumped together not only on the basis of shared historical origins and cultural practices, but also on the basis of the expediencies of British colonial administration. The groups in terms of percentage share of the population are the Kikuyu (21%), Luhya (14%), Luo (12%), Kamba (11%), and Kalenjin (12%), Kisii (6%), Meru (5%) and the Miji Kenda (5%).¹⁷³ Each group is keen to get access to and control state power so as to 'acquire development' resources. The notion of "it's our turn to eat" has therefore become the organizing principle of national politics. Competition is explained by this logic.

The problem of ethnicity, having emerged during the colonial period, was accentuated in the post-independence period with the emergence of ethnicity as a factor in national politics. Ethnicity in Kenya became a national concern during the colonial period but was accentuated in the post-independence period by the implementation of the policy of Africanization. Ethnic tensions developed especially around the structure of access to economic opportunities and redistribution of some of the land formerly owned by the white settlers.¹⁷⁴

The mobilization of ethnicity as a means of political manipulation did not end after independence but was perpetuated by those who assumed power then. As aforementioned, the uneven access to the tools of development shaped post-colonial political alignments and post-colonial political organization was negotiated in the midst of such ethnic acrimony. At independence in 1963, Kenya had a *majimbo* (Kiswahili for federal) form of government and two main political parties, the Kenya African National Union (KANU) which drew a bulk of its membership, leadership and support from the Kikuyu and Luo

¹⁷³ These are based on the 1989 population census. The 1999 census data would have been more accurate but the results were not tabulated on ethnic categories

¹⁷⁴ W. Oyugi, 'Ethnicity in the Electoral Process' *African Journal of Political Science*, Vol. 2, No. 1, 1997, pp. 41-69: 47

and the Kenya African Democratic Union (KADU) which represented minority ethnic groups joined by fear of domination by the Kikuyu and Luo.

The Kenya African Democratic Union (KADU) was founded in 1960, to challenge KANU. KADU's aim was to defend the interests of the tribes so-called KAMATUSA (an acronym for Kalenjin, Maasai, Turkana and Samburu), against the dominance of the larger Luo and Kikuyu tribes that comprised the majority of KANU's membership. KANU won the independence elections in 1963. Upon assuming power, the party leadership, in favour of a unitary state, dismantled federalism.¹⁷⁵ Further, in 1964, KADU dissolved itself and its leaders joined KANU. Factionalism emerged within KANU and one faction led by the first Vice President, Jaramogi Oginga Odinga, a Luo, resigned from the government and formed the Kenya People's Union (KPU) in 1966. The government, headed by Jomo Kenyatta, a Kikuyu, proscribed the party in 1969. No new opposition parties were formed after 1969, and KANU became the sole political party.

The basis for fairness of ethnic groups in the post-independence Kenyan Parliament was the distribution of parliamentary electoral constituencies in the different ethnic regions. This had an effect on the number of seats that each ethnic group occupied *vis-à-vis* its population size. It is important to point out that the number of parliamentary seats increased from 113 in 1963 (House of Representatives) to 158 in 1969. This increase favoured especially the Kikuyu and the Kalenjin. As a result of the newly established parliamentary seats, the number of seats held by members of the Kikuyu community increased by 36 percent (from 20 in 1963 to 32 in 1969). This also favoured the Kalenjin—their numbers increased by about 35 percent during the period. Other groups did not

¹⁷⁵ Y. Ghai, and B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) p. 18

benefit significantly. The Luhya increased by 16 percent—from 15 to 18 seats while the Luo got only one seat.¹⁷⁶

Lack of trust between Kikuyu and the Luo ethnic groups continued to shape most of the political events in Kenya. Daniel arap Moi, a Kalenjin, acceded to the presidency in 1978 and proscribed the main ethno-regional associations including Luo Union, the Abaluhya Union and the Gikuyu, Embu and Meru Association (GEMA), all of which articulated the political interests of the various ethnic elite during the Kenyatta period. The motive was political. Its main target was GEMA and its economic outfit, GEMA Holdings.¹⁷⁷ By proscribing these associations, Moi undercut the socio-political influence of the Kikuyu, thus serving notice that he would henceforth mobilize loyalty through other ethnic constituencies. Moi constituted a new group of loyalists, ironically, including Kikuyu senior politicians who had not been influential during Kenyatta's period but lacking support from their ethnic constituencies. A new loyal grouping from among the Kalenjin ethnic group was then recruited. Parallel to this strategy, Moi brought the Luo and Luhya ethnic groups into his strategy. An overall strategy whereby one ethnic group was played against another evolved.¹⁷⁸

Poor governance and ethnicization of the governance process became a characteristic feature of the Moi regime. The mode of governance by Moi and his deliberate strategy of creating disparities in the distribution of public positions gave rise to the mobilization of dissent. Dissent was not confined to any ethnic group although certainly the Kikuyu had more complaints about marginalization than other groups.

¹⁷⁶ M. Ngunyi, *Interpreting political liberalization in Kenya* (Nairobi: mimeo, 1996) p. 34

¹⁷⁷ K. Kanyinga, 'Ethnicity, Patronage and Class in a Local Arena: "High" and "Low" Politics in Kiambu, Kenya, 1982-92' in P. Gibbon, *The new local level politics in East Africa: Studies on Uganda, Tanzania and Kenya*, (Uppsala: Nordiska Afrika Insitutet, 1994) p. 70

¹⁷⁸ *Ibid.*, p. 70

In 1991, following domestic and international pressure, the government reintroduced multiparty democracy.¹⁷⁹ This transition had its own costs. The political elite from the President's Kalenjin community interpreted this to mean a strategy to hound Moi and the Kalenjin out of political power. They consequently advocated the creation of federal states (*majimbo*) whose boundaries would be defined by territorial claims existing before colonial rule. This resulted in ethnic land clashes in which large groups of Kikuyu families were evicted from the Rift Valley, their title deeds to land notwithstanding. It is noteworthy that the electoral rule underlines that a winning candidate must get 25 percent or more votes per province in at least five of the eight provinces. The land clashes, therefore, could have been instigated with this view in mind; to ensure none of the other candidates got 25 percent votes in the populous province and therefore minimize their chances of winning the election.¹⁸⁰

The successful use of ethnic and regional coalitions in 2002 to drive KANU out of power justified the use of ethnicity as a tool for consolidating power. But it turned out to be a double-edged sword because when the National Rainbow Coalition (NARC) collapsed midstream with President Kibaki at the helm, the same ethnic sensibilities that informed its creation were used to scatter and marginalize its architects. This turbulent period triggered a transition phase in Government that resulted in the alteration of the structure of governance institutions because the incoming elite felt insecure to govern using a framework it had little control of.¹⁸¹ Kibaki's leadership, just like those of its predecessors,

¹⁷⁹ M. Chege, (1994) 'Return of multiparty politics' in Barkan, J. D., *Beyond capitalism vs socialism in Kenya and Tanzania* (Nairobi: East African Educational Publishers, 1994) pp. 17-41:19

¹⁸⁰ F. Jonyo, and S. Owuochi, *Politics in Kenya: A Perspective* (Nairobi: Azinger Ltd, 2004) p. 25

¹⁸¹ SID, *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* (Nairobi: Society for International Development, 2006) p. 359

is largely bent on benefiting his own ethnic community and rewarding political friends and his sympathizers.

Distribution of Cabinet positions as a patronage resource and distribution of Cabinet positions on basis of ethnic consideration is a phenomenon that dates back to 1964. The dissolution of KADU in 1964 was followed by the incorporation of many of the erstwhile opposition leaders in the Cabinet to underwrite their belonging in KANU. The Kikuyu constituted the majority in the Cabinet during the Kenyatta period. The Luhya and the Luo did not have significant numbers in the Cabinet towards the end of Kenyatta's regime. Ascendancy of Moi to the presidency halted the Kikuyu dominance in the Cabinet. With the entry of Moi, the Kalenjin emerged to dominate Cabinet positions both in numbers as well as occupation of strategic ministries. While the Kikuyu were about 30 percent in the first government of Moi in 1979, their number decreased to about 20 percent in the middle of 1980s. After firm consolidation of Moi's political power, the number decreased further to about 14 percent in 1988 in tandem with the increase of the Kalenjin; the Kalenjin numbers rose from about 11 percent in 1979 (almost equivalent to their share of national population) to 17 percent in 1994 and 22 percent in 1998.¹⁸²

The coming to power of an ethno-regional coalition, the National Rainbow Coalition (NARC) after the 2002 elections, had the effect of creating a balanced representation of the main groups in the Cabinet. The Kibaki administration did away with equitable distribution of Cabinet and other public positions after the government's attempt to campaign for the ratification of the proposed new constitution failed.¹⁸³

¹⁸² M. Macharia, *The Politics of Transition in Kenya, 1995-1998* (Nairobi: Friend-of-the Book Foundation, 2001) p. 104

¹⁸³ P. Asingo, 'The Political Economy of Transition in Kenya' in W. Oyugi, *The Politics of Transition in Kenya: From KANU to NARC, 2003* (Nairobi: Heinrich Böll, 2003) p. 37

Table 1: Ethnic Composition of the Cabinet after the November 2005 Referendum

Ethnic Group	Number	Percentage	Ethnic Group	Number	Percentage
Kikuyu	6	18.1	Turkana	1	3.1
Luhya	7	21.2	Somali	2	6.1
Kamba	4	12.1	Luo	1	3.1
Maasai	2	6.1	Embu	1	3.1
Meru	2	6.1	Kalenjin	2	6.1
Kisii	2	6.1	Miji Kenda	3	9.0

Source: SID, *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* (Nairobi: Society for International Development, 2006)

The report says that although the coming to power of NARC was meant to end these inequalities, internal problems in the coalition stepped up the appetite to firm up ethnic tendencies. The SID report argues that to entrench tribalism, the Kibaki government was encouraging individuals to gather votes from their ethnic communities first before seeking votes elsewhere.¹⁸⁴

Following the establishment of what the Kibaki faction of the ruling coalition called the Government of National Unity, the government made changes in the position of PSs. However, ethnic influenced changes were made after the referendum in 2005. Tables 2 and 3 below show the number of PSs from different ethnic groups before and after the referendum.

Table 2: Composition of PS positions during the first year of Kibaki administration (2003-2004)¹⁸⁵

Ethnic Group	No.	%	Ethnic Group	No.	%
Kikuyu	6	22	Kisii	1	4
Luhya	2	7	Meru	4	15
Luo	4	15	Somali	1	4
Kamba	4	15	Miji Kenda	1	4
Kalenjin	4	15			
Total: 27					

¹⁸⁴ SID, *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* op. cit., p. 359

¹⁸⁵ Republic of Kenya, *Structure of Government 2003 and 2004* (Nairobi: Government Printers, 2004) p. 45

Table 3: Composition of PS positions after the referendum in November 2005¹⁸⁶

Ethnic Group	No.	%	Ethnic Group	No.	%
Kikuyu	7	18.7	Somali	3	9.3
Luhya	2	9.3	Kisii	3	9.3
Kamba	4	12.5	Maasai	2	6.2
Luo	3	9.3	Kalenjin	2	6.2
Meru	2	6.2	Coastal	4	12.5
Total: 32					

The referendum conducted in November 2005 resulted in further reorganization of the government. The number of Kikuyu PSs increased by 1. However, the share of the Meru dropped significantly from 15 to 6 percent. One factor accounting for alteration of the structure of composition of the positions of PSs after the referendum was the factions in the National Alliance (party) of Kenya (NAK) coalition—the second faction in NARC—bargained to have equitable distribution of positions. Aware that the groups may turn down the positions and by that fragment the numeric strength of the government in Parliament, President Kibaki agreed to allocate more positions to each of the partner parties. In line with this thinking, there were other beneficiaries too such as the Kisii, who were not in the coalition, and the coastal groups.

This examination shows that ethnicity has been an integral part of Kenya's political landscape both during the colonial era and after independence. While there is nothing wrong with the idea that ethnicity is an important part of one's identity, ethnic chauvinism – manifested as tribalism – has emerged as a key issue in the country's politics.

¹⁸⁶ Republic of Kenya, Structure of Government 2005 (Nairobi: Government Printers, 2005) p. 31

3.2 Ethnic Issues in Kenya

Ethnicity in Kenya has been acknowledged as a cause for conflict and an influence to politics. The examination of ethnicity in politics done above brings out a number of areas in which ethnicity has been oscillating. This section looks at these areas in depth with the aim of finding out their genesis. Ethnic issues surround matters of resource distribution especially land, exclusion of minority ethnic groups from the policy process and instrumentalization of ethnicity for political gain.

Post-colonial leaders sought to retain (and strengthen) the unitary governments bequeathed by the colonialists. This resulted in highly centralized political systems. Therefore, the leader of the ethnic group that heads the state controls an enormous amount of resources. These have been distributed in a skewed manner, favouring particular groups. Instead of unifying the ethnic groups, the opposite has been achieved. The favoured group sees the reaction of the other group as a threat to its continued stranglehold over the resources. Thus, the discriminatory allocation of resources in Kenya has been a primary source of conflicts. The conflicts are a result of the nonfulfilment of basic human needs – needs of autonomy, group (ethnic) identity, participation, recognition, security and, of course, poverty.¹⁸⁷

¹⁸⁷ K. Kanyinga, *Ethnicity, Inequality and Public Sector Governance in Kenya* (Geneva: UNIRISD, 2003) p.

Apart from their easy access to land, the economic success of the Kikuyu region in the first 10 years of Kenya's independence was envied by other ethnic groups. The Kikuyu also enjoyed abundant school and education facilities, electricity, expanded health services, good modern roads, piped water, and so on. Moreover, the Gikuyu, Embu, Meru Association (GEMA) helped its members to acquire land and businesses.¹⁸⁸ They visibly outdistanced other ethnic groups at a pace that posed immediate political risks to their newly acquired positions in the government structures. In sharp contrast, Nyanza province (that is the home of among others, the Luo ethnic group) suffered severe repression and neglect, for trying to challenge and question the enrichment of one region out of the 'national cake'. This followed the fall-out between Kenyatta and Oginga Odinga. In 1966, Oginga Odinga, the Luo leader at the time, who had hitherto been the Vice President of the nation, and of KANU (the ruling party), lost both posts. Odinga responded by forming a political party – the Kenya Peoples Union (KPU). The arguments between Odinga and Kenyatta over the KPU heightened Luo–Kikuyu ethnic animosities, which sometimes degenerated into open confrontations.¹⁸⁹

This form of exclusion has been a part of the major ethnic issues raised in the country. The common denominator among Kenya's excluded communities is poor access to resources and opportunities, insecurity of tenure and alienation from the state

¹⁸⁸ S. Ndegwa, 'Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics', Vol. 91, No. 3 (Sep., 1997) pp. 599-616: 605

¹⁸⁹ Ibid., p. 606

administration. Their weak voice in governance restricts their ability to address most of these issues and increases their vulnerability in the face of environmental, economic and political problems. As noted previously, the social exclusion in Kenya today is a byproduct of the socioeconomic order imposed by British colonialism, which embraced Western economic, social, organizational, linguistic, religious and cultural traits. These distinguish, to varying degrees, Kenya's dominant population from the marginalized population. The latter suffer from low levels of income; and poor health and nutrition, literacy and educational performance, and physical infrastructure. The developmental gaps tend to increase between the highlands and the lowlands; the latter occupied largely by minority or indigenous communities. Social exclusion is also a function of people's distance from Nairobi. As a rule, these marginalized societies tend to live in remote areas of the country.¹⁹⁰

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Another emotive ethnic issue concerns land appropriation in the country. Land is a source of ethnic conflict in Kenya. As discussed, under colonialism, large tracts of fertile land (i.e. the White Highlands) were alienated and many Kenyans were pushed into 'native reserves' that were not conducive for arable farming. The displaced populations lived as casual workers, farm labourers, tenants and squatters.¹⁹¹ The process of land alienation was also extended to the pastoral ethnic groups including the Maasai, Nandi, Pokot, Samburu,

¹⁹⁰ K. Murungi, *In the Mud of Politics* (Nairobi: Acacia Stantex Publishers, 2000) pp 23

¹⁹¹ K. Kanyinga, *Re-Distribution of Land from Above: Politics of Land Rights and Squatters in Coastal Kenya* (Uppsala: Nordic Africa Institute, 2000) p. 78

and other Kalenjin-speaking communities. Like their agricultural counterparts, the pastoralists were pushed to the less conducive reserves. The expectation during the struggle for independence was that the land would be freely distributed to the people since it had in the first place, been forcefully taken from them. However, this was not to be the case; under the independence agreement with Britain, the Kenyan government was to buy it from the settlers. This meant that there was no free land for distribution and the price tag made land very scarce. This is the critical point at which land tenure became a factor of ethnicity and led to the intensification of ethnic animosity.

Land redistribution was skewed in favour of the Kikuyu. They were the main beneficiaries of the government's settlement plan for the landless. They expanded their land ownership and settlement beyond their traditional home – Central province – into the Rift Valley and Coast provinces, apart from their widespread networks in Kenya's cities. The distribution of land formerly occupied by the white settlers mainly to Kikuyu, was perceived by other ethnic groups as unfair and there were parliamentary debates that called for equal distribution. Unfortunately, these debates did not address the issue of ethnic imbalance, and led to ethnic conflicts between the Kalenjins and the Kikuyu in the Rift Valley.¹⁹²

¹⁹² Ibid., p. 79

The Maasai sought compensation from Britain over the injustices they suffered from the colonialists maintaining that the Agreements signed in 1904 and 1911, under which their land was given to the settlers, have expired and should not be renewed. The disputed land is currently the site of large ranches under the control of white settlers and a few extremely wealthy black Africans. Several Maasai demonstrators have subsequently been charged in court with various offences such as participating in an unlawful assembly. A large number have also been charged in other courts allegedly for trespassing onto those ranches to which they lay claim. Their livestock has also been confiscated. There have also been reports of human rights abuses (such as rape and torture) committed by the security forces seeking to stop the Maasai from enforcing their demands.

From the coast to the Northern Rift, Kenya has since 1991 been wrecked by ethnic violence that has seen over 5000 people die, property worth millions destroyed and thousands of its citizens displaced. The Chagamwe raid came in the same month as the Pokot raids on the Marakwet in the western part of the country displaced 10 000 people and forced the President to send in the military which in turn came just two or so months after ethnic violence in the Rift Valley where over a 100 people were left dead. The land question needs to be addressed adequately and urgently, if further ethnic conflicts are to be avoided.¹⁹³

¹⁹³ J. Oucho, *Undercurrents of Ethnic Conflict in Kenya* (The Netherlands: Koninklijke, 2002) p. 35

Another arising issue in ethnic interaction is the instrumentalization of ethnicity by politicians to reach their own selfish ends. Some politicians have demonized ethnicity as a division that could easily lead to the break-up of the country or inter-communal violence. On the return to multi-party politics in 1991, President Moi predicted that there would be tribal warfare. Clashes did erupt later that year and continued sporadically until the 1997 elections.¹⁹⁴

3.3 The Independence Constitution, the Bomas and the Kilifi/Wako Drafts: Attempting to Manage Ethnic Conflicts in Kenya

Using Kenya's constitution, this section examines the extent to which the government has the capacity to manage ethnic relations. It explores this in terms of the economic, social and political contexts in which various groups interact in order to achieve specific or general goals. Equally significant is the extent to which Kenya uses its constitution to distinguish what is *inherent* and therefore not susceptible to change from provisional issues that may change through a constitutional amendment process. For example, if a country is able to institutionalize process-led and inclusive constitutional provisions, ratified by the majority of the citizens, its constitution and government's legitimacy will be enhanced before its citizens. This is because an inclusive approach establishes an enabling governance framework that transfers ownership of the constitution to the people. A constitution created in this manner can rightly be claimed to represent all the citizens and is not subject to military overthrow and/or abrogation. The point here is that, making the Kenyan constitution a living document that guides the management of

¹⁹⁴ B. ogot, *Ethnicity, nationalism, and democracy in Africa* (Maseno: Institute of research & Postgraduate Studies, Maseno University, 2000) p. 50

conflict resolution and/or orderly management and implementation of public policies is facilitated if Kenyan citizens or their elected representatives are *a priori* consulted and their support gained for the establishment of the rules and institutional framework for governance. Accepting a constitution as a nation's supreme legal document becomes a contentious issue when its rules for resource allocation are disputed or seen as unfair by any segment of the population.

Devolution was a "hot" issue in Bomas because it concerns fair and equitable distribution of natural resources, it involves a desire to ensure participation of people in their governance at a local level and ensures transparency and accountability of government. Among the problems with the current constitution are; the lack of clarity of the provincial administration regarding functions, lack of independence from central government and lack of accountability.

According to Bomas, the government was to be devolved with 3 levels of devolution (regions, districts, locations). The Senate was the link between the devolved governments and the national government in national law and policy-making. Besides, chapter 14 of the Bomas Draft gave extensive provision for a devolved government where the national government would not have been able to suspend the district or other regional government.¹⁹⁵

On the other hand, the current constitution establishes a unitary state. Local governments are established under statute and the provincial administration coordinates implementation of government programmes at provincial, district and lower levels - right up to the village. Provincial administration not provided for in the constitution but is an

¹⁹⁵ Republic of Kenya, *Bomas Draft* (Nairobi: Government Printers, 2005) chapter 14

ever-present phenomenon at the local level, with a history of repression and other ills.¹⁹⁶ The Kilifi/ Wako draft denotes that government will be devolved with one level of devolution (districts). There is no Senate, but a National Forum for District Governments that can be suspended by the central Government.

Summarily, the devolution of government was a key feature of the Bomas draft in which a cardinal objective was to give powers of self-governance to the people at all levels and enhance the participation of people in the exercise of the powers of the state. The Wako draft contradicts this principle and downgrades devolved government to subordinate governments. Whereas the Bomas draft declares the district the principal level of devolution, the Wako draft shackles it by empowering the President to suspend a district government without the approval of Parliament.

The main issue why Kenyans wanted a new constitution was the extremely strong presidency/concentration of power in the executive and the lack of checks and balances. Kenya still has a dual system of development and justice – one for the rich and one for the poor. Those who benefit are those who support the president. The goals of the movement for constitutional change were: reconstructing the Kenyan State; ensuring that the people remain at the center of the review process; ensure that the process was lawful and legitimate and wanted to bring not just regime change, but also systematic change. The kind of constitution expected out of the process was a product that entrenches the sovereignty of the people; and end ethnic chauvinism of the political elite.

Under the Current Constitution, the president is both the head of state and government who cannot be impeached, can hold office in a political party and all public servants serve at his pleasure. The vice president has no defined roles, besides being

¹⁹⁶ Government of Kenya, *The Constitution of Kenya*, revised edition (Nairobi: Government Printers, 1992)

principal assistant and there is no provision for a prime minister. Although the parliament can pass a vote of no confidence by a majority of all the members, the president does not have to leave office and can dissolve parliament instead.

The Bomas Draft institutes power sharing between the President (head of state with delineated powers) and the Prime Minister (Head of government) with executive authority vested in the President, the Deputy President, the Prime Minister, and Ministers, all of whom, in the performance of their respective functions are required to “work in the harmony for the good of Kenya and the progress of the people of Kenya.” The Deputy President has defined roles and both the President and his Deputy are barred from holding office in a political party. The president can be impeached on the motion of 2/3 of the national assembly and he cannot dismiss the Prime Minister at will. Moreover, key appointments require parliamentary approval.¹⁹⁷

The Kilifi/Wako Draft borrows from both the current and the Bomas draft on this matter. First, the President is both the head of state and head of government with sole executive authority therefore he can hire and fire the Prime Minister at will. Although there is no power sharing, the Wako draft establishes the Prime Minister merely as the Chief Minister/first amongst equals. Both the President and his Deputy are barred from holding office in a political party and the president can be impeached on the motion of over 50% of the members of the national assembly. Key appointments will require parliamentary approval.¹⁹⁸

Contrary to the Bomas virtual unanimity on the need to limit Presidential powers, the Wako draft reincarnates the imperial presidency in which “executive authority of the

¹⁹⁷ Republic of Kenya, *Bomas Draft* op. cit.,

¹⁹⁸ Republic of Kenya, *Wako Draft* (Nairobi: Government Printers, 2005)

Republic is vested in the President.” The Wako draft enhances the Presidency by conferring upon it powers that by implication mean that a people elected Parliament could be converted to an executive organ by the President as there is no limit to the number of ministers he can appoint.¹⁹⁹ As for impeachment, under Bomas the lower house would originate the accusations while the senate does the hearing. Under the Kilifi draft, first there is no bicameral legislature so the process is completely different. There is no due process since one body is responsible for bringing forth the accusations and conducting the “trial”.

Young people in Kenya form a majority of the population and any developments towards ethnic conflict resolution should begin with the youth. This section examines how the three constitutions; the independent constitution, the Bomas and the Wako draft addressed issues of the youth.

The current Constitution is generally not youth-friendly since it ill-represents the young people. It does not define youth or deal with youth concerns in a specific way but places age barriers to access to youth leadership at the presidential level that can only be accessed with a minimum of 35 years.²⁰⁰ Besides, there is no special recognition of youth at local level.

Fortunately, sub-sections 30 and 39 of the Bomas draft recognized the special status of youth, provided for equal treatment and endeavored to ensure their participation in national affairs. Young peoples’ participation rights are protected through affirmative action, especially in elections and representation under sub-sections 101, 102 and 219. They are also specifically protected even at the district level.²⁰¹

¹⁹⁹ Republic of Kenya, *Bomas Draft* op. cit.,

²⁰⁰ Government of Kenya, *The Constitution of Kenya* op. cit., Article xii

²⁰¹ Republic of Kenya, *Bomas Draft* op. cit., Sub-Secs 30 and 39

The Wako/Kilifi Draft also recognizes the special status of youth and provides for equal treatment and endeavors to ensure their participation in national affairs. Sub-section 40 of the Wako draft gives special recognition to youth concerns and rights. Although this draft does not specifically provide for the youth, they could be part of the special interests to whom affirmative action applies.²⁰² The country is being governed mostly by people who represent only 3% of the population as far as age-group is concerned, that is, mostly above 60. Notably, only 40 parliamentarians are under 45. This fact distrusts the current legislators to operationalize the Constitution in a way that touches on the concerns of the majority of Kenyans who are people under 45.

Women are constructed as passive elements subordinated to a male power always apprehended within more active dynamics. As a result, women are mostly associated with maternal capacity only, thus secluding them from political activities and official peace negotiations. The Study of the UN Secretary General on women, peace and security concludes that this “biological fate” of women is a major asset for peace building and conflict resolution. Consequently, the inclusion of women in the constitution is important to the peaceful cohesion of different ethnic groups.²⁰³ Overall there is a “net loss” for women when you compare the Bomas Draft with the Wako Draft.

Not only does the Bill of Rights discard emphasis to the rights of women²⁰⁴ but also sections 89 and 90 of the current constitution lays provisions on citizenship that discriminate against women. The legal status of women is negated by exceptions relating to recognition of customary law in respect to personal law matters. Gender equality is only

²⁰² Republic of Kenya, *Wako Draft* op. cit., sub-sec 40

²⁰³ Women, Peace and Security, Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000)

²⁰⁴ P. Kameri-Mbote, ‘Gender Considerations in Constitution-Making in Kenya: Engendering Women’s Rights in the Legal Process’ University of Nairobi Law Journal 2003 also available at <http://www.ielrc.org/content/a0303.pdf>

recognized with respect to nominated MPs and there are no guaranteed seats for women on constitutional commissions or other public bodies.²⁰⁵

Under the Bomas Draft, the Bill of Rights emphasizes the rights of women and minorities in chapter 6. The draft also prohibits any law (including customary law) that treats men and women differently and accords recognition and protection to property rights of women. It determines that at least 1/3 of the affirmative action seats are reserved for women while representation in the senate should include at least two women from each region. Under Bomas, gender balance was a criteria for political party funding. Women also have guaranteed seats on constitutional commissions and other public bodies.²⁰⁶ The Kilifi/ Wako draft had similar provisions to the Bomas draft except that it mentions gender balance as important but not as a specific criteria to party funding.

As earlier established, land has been the source of conflict in Kenya between different ethnic groups therefore if land issues are addressed adequately by the constitution ethnic conflicts can be mitigated. Under the Current Constitution, the President has special powers under ordinary legislation to make grants of government land to individuals. There is no recognition of environmental rights and no requirements on regulation of land use, no requirement for neither a national land policy nor a National Land Commission. It is not clear who land belongs to and designations in ordinary laws are equally unclear. Property rights of spouses not protected and could actually be whittled down by recognition of customary law. Land use is unregulated and non-citizens can hold any interest in land for any term.²⁰⁷

²⁰⁵ Government of Kenya, *The Constitution of Kenya* op. cit., sections 89 and 90

²⁰⁶ Republic of Kenya, *Bomas Draft* op. cit., chapter 6

²⁰⁷ Government of Kenya, *The Constitution of Kenya* op. cit., Sec 39

On the contrary, the Bomas Draft expanded the recognition of land as a national resource²⁰⁸, meaning it belongs to Kenya as a nation and is designated as public, community or private. This was also achieved in the Wako draft.²⁰⁹ The draft emphasized the need for a national land policy, a national Land Commission and a National Environment Commission. Other than regulating land use and protecting property rights of spouses, non-citizens are to hold land on leasehold for not more than 99 years. Although the Wako draft retained most of the provisions that were in the Bomas draft, it does more than protect the right to property – women’s property rights and the protection of the environment are specifically mentioned.

3.4 Factors Contributing to Kenya’s Constitutional Crisis

Kenya’s overall constitutional experience has been influenced by several key factors, that have brought to the limelight various parties’ interests, as well as raising valid concerns about the political class’ commitment to the process; whether they are truly representative of the citizens’ interests or are out to maintain their personal interests. Factors such as political interference, ethnicity, creation of deliberate impasses to the process, exclusion of necessary actors, such as minority groups, and court cases that seek to challenge the legality of the whole process are all pertinent to the constitution making process and without their resolution, a new constitution may be nothing but a pipe dream.²¹⁰

²⁰⁸ Bomas - Chapter 7, Sec 58

²⁰⁹ Wako - Chapter 7, Sec 38

²¹⁰ K. Kibwana et al, *In Search for Freedom and Prosperity: Constitutional Reform in East Africa* op. cit., p. 386

3.4.1 Political Class' Commitment to the Reform Process

Constitution making in Kenya has depended a lot on the commitment of the political class to the process. Politicians only call out for constitutional reforms when they know they will gain more power as a result. Despite the fact that the Kenyan Constitutional Reform debate was initiated by civil society due to concerns about excessive power in the hands of the executive and abuse of those opposed to the regime, it was treated with suspicion by the political class both in the ruling party and the opposition. According to Macharia Munene, the emergence of the NCEC was as a result of the political class' failure to institute the much-needed reforms, as they did not want to threaten their political pre-eminence; hence they willingly allowed civil society to spearhead the debate, although with differing levels of support. The politicians only took charge of the process when they were signs of compromise on President Moi's part.²¹¹

The NCEC's growing popularity despite State-instigated violence and repression saw it emerge as an alternative centre of power with overwhelming public support. It became a valid threat to the politician's strategies who viewed its member as 'outsiders'. A second National Convention Assembly convened by religious groups and the NCEC between August 25 and 28 1997, resolved to transform themselves into a constituent assembly that would push for comprehensive reforms instead of the minimum reforms they had been previously agitating for. This alarmed the politicians who had begun to buy the KANU argument that only leaders of political parties or elected politicians should participate in reform negotiations.²¹² Instead, politicians, acting as ethnic leaders, showed

²¹¹ M. Munene, *The Politics of Transition in Kenya 1995-1998* op. cit., p.46

²¹² Ibid, pp.61-62

no commitment to producing a new constitution and had short-term interests of settling political scores and advancing political ambitions.

To counter the NCEC's popularity, the KANU government supported the formation of an alternative pressure group, the Movement for Dialogue and Non-Violence (MODAN), led by a small group of politicians who included two KANU assistant ministers and a few opposition members. This however did not work as its leaders lacked credibility and seemed preoccupied with undermining the NCEC. To stem pressure from the civil society, the government set up the IPPG, which came up with the minimum reforms that paved the way for the elections. This neutralized the NCEC as a political force and the political class was free to compete for power the best way it knew how.²¹³

President Moi and KANU regained power in 1997 in an election mired in violence and irregularity claims. Despite claims that it had been rigged, out of the fourteen opposition presidential candidates, only one, Mwai Kibaki, challenged the results in a court petition that was thrown out as the summons needed to be served to the respondent President Moi, personally, which was next to impossible. This gave credence to the view that despite the passing of the IPPG reforms, President Moi was not committed to comprehensive reforms that would compel him to include the opposition in decision-making. He continued to govern the country as an autocratic state characterized by personal rule disregard for the opposition's right to political participation.²¹⁴

Opposition parties were denied the freedom to obtain grass root support in various parts of the country and to do this several strategies were employed. One strategy was to deem some areas "Security Operation zones" hence not open to outsiders, including

²¹³ Ibid, p.63

²¹⁴ C. O. Mbai, 'The Rise and Fall of the Autocratic State in Kenya' in Oyugi, et al (ed), *The Politics of Transition in Kenya: From KANU to NARC* op. cit., p. 67

politicians. This mostly happened in areas that had been rocked by electoral and ethnic violence. By making such areas off limits, President Moi ensured the opposition's inability to enter and campaign in what he perceived to be KANU strongholds.²¹⁵

Another strategy was to condemn the opposition parties as nothing more than tribal groupings, each more loyal to the tribe than to the Kenyan nation as a whole. According to Prof. W. Oyugi, throughout 1992 to 2002, President Moi refused to accept the opposition as legitimate political actors, called them agents of tribal conflict and damned political pluralism as a foreign imposition.²¹⁶ Another strategy used was only negative, if any, coverage at all by the Kenya Broadcasting Corporation (KBC) which had nationwide media coverage. The government-controlled media house denied the opposition freedom to air already paid advertisements but aired those views that portrayed the opposition in a negative light. This was despite the IPPG accord under which the broadcasting house was required to maintain a balance in allocation of air time to all including those of a different political dispensation.²¹⁷

The Parliamentary Review process, backed by KANU and NDP established a Parliamentary Select Committee that led to the creation of the Constitutional Review Commission of Kenya (CKRC), the body that was to oversee the reform process. The CKRC came up with Draft Constitution that was to be debated at a national constitutional conference but two days before the process was to start, President Moi dissolved parliament. This draft constitution was the foundation of the power sharing agreement

²¹⁵ P. Kagwanja, 'Politics of Marionettes: Extra-legal Violence and the 1997 Elections in Kenya' in M. Rutten et al (ed), *Out For the Count: The 1997 General Elections and Prospects for Democracy in Kenya* (Kampala: Fountain Publishers, 2001) p.86

²¹⁶ W. Oyugi, 'The Politics of Transition in Kenya, 1992-2003: Democratic Consolidation or Deconsolidation?' in Oyugi et al (eds), *The Politics of Transition in Kenya: From KANU to NARC* op. cit., p.

360

²¹⁷ Ibid p. 360

made by the National Rainbow Coalition (NARC) that won the elections. Although the CKRC managed to produce a draft constitution, the manner of appointment of CKRC Commissioners infused parochialism, ethnicity and divisive politics into the review process. In allowing political parties to be the main sponsors of members to the Commission, it was inevitable that such members would represent particular interests or preferences, which they then championed in the constitution-making process.

The National Constitutional Conference that had been set to begin before the elections was revived on April 28, 2003, at the Bomas of Kenya, Nairobi. This was against the backdrop of grumbles among constituent parties in NARC about President Kibaki's renegeing of the MoU. Although the content was not well understood by the public until the disagreement came to the fore, failure to resolve those disagreements caused permanent tension and suspicion between the two factions of the ruling coalition – NAK and LDP. These factional fights within NARC found expression in the constitution-making process, especially in the latter stages of the NCC. Bomas then became the fighting ground of the two opposing coalitions in NARC. One faction allied to the President was distrustful of the delegates' proposals who had been appointed by the KANU regime to safeguard its interests, and the government side was worried it would not have its say in the Conference.²¹⁸ These heightened suspicions made dialogue, compromise and consensus building, all key to good constitution making, almost difficult to achieve.²¹⁹ Besides, the same provision in which political parties sponsored members to the conference was adopted thereby introducing ethnic and political parties' interests to the process. One of the issues in the Njoya Case was that delegates to the conference were not fairly representative

²¹⁸ K. Njogu, 'Ahadi ni Deni' in Maupeu H. et al. (eds). *The Moi Succession: Elections 2002* op. cit., p.419

²¹⁹ G. Kibara, 'The State of Constitutionalism in Kenya 2003' in Tumasirwe, B. (ed), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003* (Kampala: Fountain Publishers, 2005) pp.70-96

of the country and that some parts of the country were over-represented while others were under-represented.

Nevertheless, the Bomas Draft Constitution was issued on March 15, 2004 without government participation. This document proposed fundamental changes to the current constitutional arena that included the reduction of presidential powers through devolution of power, the creation of a powerful premiership post, a bicameral legislature, a comprehensive Bill of Rights and a revamping of the judiciary. Not all the provisions were acceptable to the political elite, hence in 2005 parliamentarians had a series of meetings in Naivasha and Kilifi to sort out what they termed as contentious issues in the Bomas Draft. On 21 July 2005, Parliament endorsed the Kilifi recommendations and the Attorney- General was mandated to prepare a workable draft that would be presented to the people at a national referendum.²²⁰

The final document presented to Kenyans for their approval or rejection in the November 2005 still contained the essence of the Bomas Draft with a few changes such as less Premiership powers and the absence of the bicameral legislature. This did not go down well with Raila's Liberal Democratic Party (LDP). They already felt cheated by the unfulfilment of the MoU and they were now overlooked again by the reduction of the premiership's powers, a post they believed Raila was suitable for. This led to a split in the ruling NARC Coalition that saw LDP parliamentarians mobilize the country to reject the draft constitution on that basis. As a result members of government who had not supported the Draft were excluded in a Cabinet reshuffle and the reform process was at a stalemate.²²¹

²²⁰ Ibid p.422

²²¹ SID, *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* op. cit., p. 358

3.4.2 The Role of the Civil Society in the Reform Process

Civil society is defined as the realm of organized social life that is voluntary, self-generating, self-supporting and autonomous from the state.²²² In this instance, civil society refers to all non-governmental organizations such as welfare associations, religious groups, trade unions, and social advocacy groups. Kenya is reputed to have one of the most vibrant civil societies in Africa,²²³ perhaps due to their frequent engagement of the government on issues of national importance, especially socio-economic issues, and also because the state exerts minimal, if any, control on civil society.

In Kenya, specific sectors of civil society have been at the forefront in the agitation for constitutional reform. In 1985, the Church spoke out against queue voting and trademarks of Moi's personal rule which included corruption, administrative incompetence, injustice, disregard for the rule of law, nepotism and ethnic favouritism.²²⁴ Between 1988 and 1991, the Law Society of Kenya (LSK) and the Protestant Church umbrella group, the National Council of Churches (NCCK), assisted by committed individuals, spearheaded the push from single party to multiparty democracy in the country.²²⁵ The LSK emerged as an important pro-democracy actor, as its members represented reformist politicians who had been detained for agitating for the return of

²²² L. Diamond quoted in M. Nzomo, 'Civil Society in the Kenyan Political Transition: 1992-2002' in Oyugi et al (eds), *The Politics of Transition in Kenya: From KANU to NARC* op. cit., p.182

²²³ G. Mburu, 'Human Rights, Citizenship and Nationhood in Kenya: An Overview of Losses, Gains and Prospects', in Abdalla Bujra, ed, *Democratic Transition in Kenya: The Struggle from Liberal to Social Democracy* (Nairobi: ACEG, 2005) p.235

²²⁴ M. Chege, 'The Return of Multiparty Politics' in Joel Barkan (ed) *Beyond Capitalism vs Socialism in Kenya and Tanzania*. (London: Lynne Rienner Publishers, 1995) p. 57

²²⁵ Legal Resources Foundation, *Reforming Our Constitution* (Nairobi: Legal Resources Foundation, 1999) p.

pluralism. The NCKK clergy was also quite vocal in calling for governance reforms and expanded political space.²²⁶

There was also the establishment of the Forum for Restoration of Democracy (FORD), a pressure group that was a coalition of anti-government politicians, lawyers and activists, whose aim was to pressurise the regime to concede to multipartyism and constitutional reforms. This coupled with pressure from Western donors by freezing aid disbursements saw the ruling party agree to amend Section 2A of the Constitution in 1991 and Kenya was once more a multiparty state.²²⁷

Despite the return of multipartyism, the civil society was not able to push for the enactment of fundamental constitutional changes before the 1992 elections. This was due to distrust by political parties to whom power considerations were more important than the constitutional reform agenda. The political class' lack of commitment to the process was perhaps due to the reason that none of them wanted to restrict the legal powers they expected to enjoy themselves, once they ousted KANU from power.²²⁸

Notwithstanding, the civil society continued to deliberate over democratic development and consolidation in Kenya. In 1993 the LSK, the International Commission of Jurists (ICJ-Kenya Chapter), and the Kenya Human Rights Commission (KHRC), with the moral support of the Catholic Church and the NCKK, presented a model constitution which contained an adequate framework for a democratic multiparty system. The document, entitled 'Kenya Tuitakayo/ The Kenya We Want', was also endorsed by 28 civil society organisations and key opposition parties. Although it did not make a lasting

²²⁶ 1st July 1990 Sermon by the Rev. Timothy Njoya is notable as it called for political pluralism and was the first time a religious leader spoke against the current political regime openly.

²²⁷ M. Nzomo, 'Civil Society in the Kenyan Political Transition: 1992-2002' op. cit., p.192.

²²⁸ P. Ralph-Michael, 'Civil Society and the Election Year 1997 in Kenya' in M. Rutten et al, eds. *Out for the Count: The 1997 General Elections and Prospects for Democracy in Kenya*, op. cit., p. 33.

impression on the public, it laid the groundwork by highlighting the pertinent issues that dominated the reform agenda.

In 1996, the group Citizens for Coalition Change, 4Cs, assumed the mandate of instituting reforms as the KANU regime refused to cooperate and commit itself to the reform process, leading to the creation of the National Convention Preparatory Committee (NCPC). This brought together all political parties except KANU, religious groups and non-governmental organizations. It transformed itself into the NCEC and initiated civil disobedience measures to pressurize the government to concede to comprehensive reforms before the 1997 elections. However, disunity emerged within the NCEC on the modes of pressure to be applied. There were the reformists who wanted to maintain and consolidate the NCEC as an alternative centre of power and on the other hand those who wanted to give dialogue a chance.²²⁹ Opposition parties, threatened by the strength of the civil society, joined KANU in a minimum reform initiative, known as the IPPG reforms, trusting KANU would honour them and initiate comprehensive reforms after the elections. The NCEC, aware that the government was not committed wanted the elections done after the reforms. Despite this the opposition opted to negotiate for the minimum reforms to not only avoid the escalation of violence but to also regain control of the opposition movement.²³⁰

After the 1997 elections, failure by KANU to honour the IPPG reforms and to institute comprehensive reforms saw civil society maintain in pushing for reforms. Although divided by internal wrangles, the NCEC still mobilised support for change. Subsequent talks in Nairobi saw the establishment of two reform initiatives. One was the

²²⁹ W. Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* op. cit., p. 51

²³⁰ D. Peters, 'Civil Society and the Election Year 1997 in Kenya' op. cit., p. 45.

Ufungamano group headed by civil and religious leaders, while the other was parliamentary driven. The two groups eventually merged and came up with a draft constitution just before the 2002 elections. However nothing came of it before the elections as President Moi dissolved parliament two days before the start of the National Constitutional Conference that was to debate on the draft. With the failure of the 2005 Referendum on the new constitution which had its support, it seems civil society no longer has a definite agenda in the reform process, other than providing civic education.²³¹

In conflict times, CSOs contribute to maintaining or improving relationships by fostering action across conflict lines and ethnic divides through informal exchanges and joint projects. Just before the constitutional referendum, CSOs actively informed the population on contents of the constitution in place and the changes that had been proposed in the draft that was to be put in place. Besides, civil society has been on neutral ground and has helped in resolving ethnic conflicts in different parts of the country.

3.4.3 Ethnicity and the Constitutional Referendum in Kenya

Among Kibaki's campaign promises was to give Kenya a new constitution. The central issue surrounding constitutional change was the balance of power between the executive and the legislature. The post-independence constitution had put in place a strong presidential system in which the president appointed the vice president, cabinet ministers, judges and local administrators.²³² That system secured a centralized rule that was able to paper over the divisions between Kenya's 42 ethnic groups, but it also provided a fertile field for corruption and favoritism. N.A.R.C. proposed to end the culture of handing over excess power to one person; the President by creating an office of prime minister with

²³¹ Kituo cha Katiba, 'Constitutional review Process in Kenya: Report of the Fact Finding Mission of the Kituo Cha Katiba on the Progress of the Constitutional review Exercise in Kenya' also available at <http://www.kituoachakatiba.co.ug/kenyap.htm>

²³² J. Oloka-Onyango, *Constitutionalism in Africa: Creating Opportunities Facing Challenges* op. cit., p. 45

appointive powers which would be responsible to the country's unicameral National Assembly.

The plan to shift to a system distributing powers between the president and a prime minister was politically necessitated by the terms on which N.A.R.C. was formed. A member of Kenya's largest ethnic group, the Kikuyu, composing 22 percent of the population, Kibaki was dependent for his electoral victory on Odinga, the leader of the Luo, one of the three other major ethnic groups, each of which compose approximately 15 percent of the population. As the price of his cooperation, Odinga received assurances that when the new constitution was ratified, he would become prime minister.²³³

The vehicle for constitution-making was the Constitution of Kenya Review Commission (C.K.R.C.), which had 17 members chosen by the political parties and headed by legal scholar Professor Yash Pal Ghai. The C.K.R.C. was supposed to deliver a draft by the end of 2002, but its deliberations faltered. After a prolonged and tortuous process, the C.K.R.C. produced a document that created a strong prime minister's office after convening in March 2004 a consultative assembly of 640 delegates representing the various interests in Kenya's society. At that point, the government withdrew from the C.K.R.C. Kibaki had rethought his support for a strong prime minister and had become committed to one person holding the power.²³⁴

After the draft constitution was delivered to Attorney General Amos Wako on March 23, 2004, Kibaki's forces began to rewrite it to restore presidential power, with Wako taking the lead. The "Wako Draft," completed in July 2005, retained a prime

²³³ S. Wanjala, 'Human Rights Promotion and Protection in Kenya: An Overview' in Mchome Sifuna (ed.) *Taking Stock of Human Rights Situation in Africa* (Dar es Salaam: Faculty of Law, University of Dar es Salaam, 2002) p. 82

²³⁴ Kituo cha Katiba, 'Constitutional review Process in Kenya: Report of the Fact Finding Mission of the Kituo Cha Katiba on the Progress of the Constitutional review Exercise in Kenya' also available at <http://www.kituoachakatiba.co.ug/kenya.htm>

minister's office, but its holder was to be appointed and could be dismissed by the president, and would act under the president's direction. The draft also provided for the election of district officials, but allowed the president to suspend them.²³⁵ The response to the Wako Draft was immediate and vigorous. Civil society and religious groups urged the legislature not to send the document forward to a referendum, fearing the divisive conflicts that a campaign would precipitate. Odinga's forces announced their opposition to the draft, creating a split within Kibaki's cabinet. When the National Assembly approved the referendum nonetheless, seven cabinet members, including Odinga who was minister of roads, joined with K.A.N.U. in a campaign to defeat the constitution.

On 21st November 2005 there was a referendum which was marked by abusive rhetoric from both sides that was the orange side which was representing the "No" vote to the new draft constitution and the banana side which was representing the "Yes" vote. The referendum was surrounded by violent disruption of rallies and civil disorder leading to ten deaths, some of them perpetrated by security forces firing live ammunition into crowds. The whole referendum was seen to be drawn against ethnic lines because the constitution was broken down into what two people thought of the constitution and not the actual details indicated therein. The orange followers were seen to have been following Raila, and the banana voters were said to be following Kibaki and it was believed that people had taken such sides due to the people behind those symbols or rather followed the tribes (Luo and Kikuyu) behind those symbols.²³⁶

When Kibaki saw that the banana was going to loose, he promised to raise the salaries of local officials, distributed titles to government land and turned control of the

²³⁵ S. Holmquist and O. Ayuka, 'Kenya: Democracy, Decline, and Despair,' *Current History* (Vol. 100, No. 646, May, 2001)

²³⁶ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process* (Nairobi: Government Printer, 2006) p. 45

Amboseli National Park over to the Maasai ethnic group to gain more votes in a desperate attempt. one of those measures was sufficient to overcome opposition to the constitution that was centered on the institutional issue, but spread to provisions on land reform, religious courts and social issues, such as abortion and same-sex marriage, both of which were not endorsed in the draft but became flashpoints for religious conservatives nonetheless.

In the wake of defeat, Kibaki announced that he would continue to govern under the old constitution and dismissed his entire cabinet, promising to name a more "cohesive" team in December. The opposition called for cross-party talks to begin on a new draft constitution in the National Assembly, said that it was preparing for 2007 elections and hinted that it might mount a no-confidence vote against Kibaki. The thwarting of the constitutional review process signals an apparent unwillingness to allow an institutional framework that would devolve or share power, in particular with other ethnic groups in the country. This has had an immediate and adverse impact on the issue of the executive devolution of power and accountability, the rebuilding of independent state institutions, and the passage of a strong Bill of Rights.²³⁷

Kenya is divided into eight main administrative regions, known as provinces, which are in turn divided into 70 subunits called districts.²³⁸ Except for the fairly heterogeneous Nairobi Province, site of the national capital and the country's most populous urban area, the other provinces are dominated by particular ethnic groups and while not entirely homogenous, comprise people closely related in terms of language and customs. The 70 districts exhibit greater homogeneity in terms of ethnicity, population

²³⁷ S. Lamba, 'Towards New Constitution of Kenya: Essential Ideas of Justice, Principle and Process' *Mazingira Institute* 2005 p. 2

²³⁸ P. L. Agweli, *Constitution-Making in Kenya* (Nairobi: Transafrica Press, 2004) p. 22

characteristics and economic activities. Representation in the national parliament is based on constituencies, which are components of the districts.²³⁹ There are presently 210 parliamentary constituencies; these subunits tend to be much more ethnically homogeneous than either the districts or provinces. Table 4 provides summary information on the results of the constitutional referendum for Kenya nationally, provincially and along principal ethnic groupings.

As can be seen in table 4 below, there is considerable variation in the percentages of votes cast in favor of the new constitution. While 38% of the voters approved it nationwide, 93.28% voted "Yes" in the Central Province, but only 15.04% did so in Nyanza Province. The difference in the level of support for the new constitution is also evident across ethnic groups: 93.28% of the Kikuyus favored it, for example, compared with only 1.43% of the Luos. Large differences in the percentages of voters who turned out for the constitutional referendum likewise are apparent. Turnout nationally was nearly 60%, but it was only 27.26% in North Eastern Province. The highest voter turnout rate (71.86%) occurred in the Rift Valley Province. Voter turnout across the districts ranged from a low of 24.7% in Mandera, to a high of 84% in Migori. Among Kenya's main ethnic groups, turnout was highest for the Kikuyus (72.18%) and lowest for the Miji Kenda (40.48%).

²³⁹ Ibid., p. 23

Table 4: Constitutional Referendum Results, November 2005

Unit	Number of Constituencies	Percent voting YES	Referendum voter turnout
NATIONAL	210	38.0	59.34
PROVINCES			
1. Nairobi	8	43.35	42.33
2. Coast	21	20.65	41.00
3. Northeast	11	25.43	27.26
4. Eastern	36	47.33	60.20
5. Central	29	93.28	72.18
6. Rift Valley	49	22.92	71.86
7. Western	24	37.81	50.36
8. Nyanza	32	15.04	61.57
ETHNIC GROUPS		93.28	72.18
1. Kikuyu		83.38	61.83
2. Embu		90.79	72.45
3. Meru		37.81	50.34
4. Luhya		1.43	69.19
5. Luo		16.13	70.78
6. Kalenjin		19.87	57.57
7. Kamba		42.05	44.82
8. Kisii		19.09	40.48
9. Miji Kenda			

Source: Bard Anders and Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum of the Constitution CMI Working Papers WP 2006:13*

Overall, the results of the 2005 referendum suggest that regionalism and ethnicity may be important in explaining constitutional choice in Kenya. The wide variation observed in the percentages of votes cast for and against the proposed constitution points to large differences in the demand for institutional change across regions and ethnic groups.²⁴⁰ Nevertheless, there are a multitude of reasons why the referendum flopped. Since Islamic religious courts already exist in Kenya, demands were made that a legal basis for a number of religious judiciaries be provided in the constitution. Following an exclusion of this demand, Muslims voted against the referendum because they thought that

²⁴⁰ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process* op. cit., p. 45

their expectations and aspirations were not catered for. The constitution is supposed to be a confluence of interests in the whole society and it should not be seen to be agitating for interests of particular groups and marginalize others.²⁴¹ On the other hand, because Kibaki so vigorously promoted the new constitution and based his election campaign around it, many voters used the referendum merely as means to voice their approval or disapproval of the Kibaki government. In other words, many paid little attention to the actual text of the constitution and used the 'Yes' or 'No' vote to say 'Yes' or 'No' to the president. This became the sentiment on which the victorious Orange camp based their demands for snap-elections, claiming that the government had lost its mandate to rule as a result of the 'No' vote by the people.²⁴² The Referendum of 2005 was a manifestation of ethnicity in the review of the constitution. Many of the people did not see it as a thing that concerns Kenyan but the kikuyu ethnic group thus most people from other ethnic groups opposed it thinking that they were opposing the kikuyu domination.

The issue of land reform was also been prevalent, as disputes over land amongst Kenya's numerous ethnic groups are frequent. The draft constitution sought to deal with this and included measures against the ownership of land by foreigners (white immigrants and their descendants own numerous large tracts of land in Kenya). The constitution would have also permitted women to own land for the first time (only through inheritance) and sought to establish a 'land commission' which would manage and oversee the redistribution of land (the formation of the land commission was included primarily as a means of preventing the 'gifting' of land by government officials for favours). Politicians however,

²⁴¹ Interview with Lenaola Isaac held on 12 August 2007, Nairobi

²⁴² Interview with Wambua Paul Musili held on 25 July 2007, Nairobi

used this to brainwash and manipulate the populace by insisting that this was against the culture of the people of different ethnic groups.²⁴³

The main issues of contention throughout the drafting of the constitution were over how much power should be vested in the President. Many people believed Kibaki was attempting to garner dictatorial powers. In previous drafts, those who feared a concentration of power in the president added provisions for European-style power-sharing between the President and Prime Minister. However, the final draft of the constitution retained sweeping powers for the Head of State leading to a major flop of the referendum.²⁴⁴

Many voters used the referendum merely as means to voice their approval or disapproval of the Kibaki government categorizing them into those that preferred the then status quo and those that saw the referendum as a way of initiating political change. In other words, many paid little attention to the actual text of the constitution and used the “Yes” or “No” vote to say “Yes” or “No” to the president. This would become the sentiment on which the victorious Orange camp would base their demands for snap-elections, claiming the government had lost its mandate to rule as a result of the 'No' vote by the people.²⁴⁵

While explaining the results of the Referendum, Yash Pal Ghai - the former Constitution of Kenya Review Commission Chairman gives an account of the role of the media and various sectors of society including women and previously marginalized ethnic groups, in shaping the agenda, the process and the outcome of the constitutional review process up to the 2005 National Referendum. He argues that although civil society, with

²⁴³ Interview with Wanjiku Kabira held on 16 August 2007, Nairobi

²⁴⁴ Interview with Githu Muigai held on 11 August 2007, Nairobi

²⁴⁵ See B. Babafemi, *Raila Odinga: An Enigma in Kenyan Politics* (Nigeria: Yintab Books, 2006) p. 271

much popular support, was prominent in pushing for change, when the official process of review began the vested interests of government and even of those trusted with the review frustrated a quick outcome, and especially any outcome that meant curtailing the powers of government. Even high levels of popular involvement were unable to guarantee a new constitution against manipulation by government and other vested interests involved in review, including the law and the courts.²⁴⁶

²⁴⁶ Y. P. Ghai and J. Cottrell, 'Constitution making and democratization in Kenya; 2000-2005' *Democratization* Volume 14, Issue 1, February 2007 pp. 1 – 25

CHAPTER FOUR

A CRITICAL ANALYSIS OF THE ROLE OF ETHNICITY IN THE CONSTITUTION-MAKING PROCESS IN KENYA

4.0 Introduction

The major theory about the relationship between ethnicity and democracy is that ethnicity could potentially be de-stabilizing to democratization which propagates the sovereignty of the people not the government.²⁴⁷ The constitution has been identified as the main instrument of democratization because it distrusts power and ensures that the government does not have power to take away the sovereignty of the people. It is on this backdrop that this study sought to investigate the role of ethnicity in the constitutional reform process of Kenya between 1990-2005.

The first chapter reviewed literature on ethnicity, democracy and constitutional reform in Africa with the aim of mapping out the experience in the third world of these two processes. The concept of ethnicity was demystified by analyzing the different views which include primordialism, instrumentalism, constructivism and objectivism. A look at the constitutional reforms in Africa concluded that most African countries have reviewed their constitutions in one way or the other. They have come up with first generation constitutions which were attained at independence; second generation constitutions which were a repeal or amendment of the independence constitution and most countries put in place a one-party regime which nominally espoused one political ideology or the other. Third generation constitutions helped in crafting new and democratic constitutions in search of democratic and legitimate governance based on the free will of the peoples, and

²⁴⁷ S. Hameso, *Ethnicity and Nationalism in Africa* op. cit., p. 40

to foster democratic traditions. The specific case of Kenya which just like other African countries has undergone the above was reviewed.

The second chapter dedicated itself to the conceptual analysis of ethnicity, democracy and constitution making but focused majorly on the theoretical linkages between the variables. It was imperative to look at these concepts due to the elementary need for clarification because they are all disputed terms. It was established that democracy could be defined in terms of its institutions and procedures or outcomes. Besides, social, political and economic dimensions of democracy were presented. In addition, propositions and oppositions of democracy were examined with the aim of finding out whether democracy can provide tools for peacefully managing ethnic diversity before it gets destabilized. Moreover, the chapter found out that democracy in Africa cannot be likened to the one in western countries because its indices in the West such as regular elections and multi-partyism cannot be used as a fair judge of democracy in the third world.

The third chapter draws the historical trajectory of constitutional amendments in Kenya since independence. It establishes that since independence to 1997, the Constitution of Kenya was amended twenty eight times between. Other than eliminating regionalism and making the country a *de jure* one-party state, these amendments all led to the expansion of presidential powers leading to an all powerful executive in the country. Due to increasing autocratic rule, persistent calls for reforms to allow for multi-partyism and civil society independence as well as reduction in presidential powers began in the early 90s. Coupled with the intervention of the international community, the introduction of multi-partyism succeeded but efforts to reduce the powers of the president have been futile. However, many actors such as the civil society, the international community and even the government itself have been trying to forge an acceptable constitution for Kenya. The

chapter also brings out the factors affecting the current constitutional reform processes in the country which include politicians' interests, ethnic violence, civil society organizations and ethnic voting. Government initiatives towards constitutional change such as the IPPG, CKRC and NCC are also explored and their influence on the constitutional process is investigated.

In the quest not only to test the hypotheses of this study but also to justify the major assumptions put forth in the conceptual framework that guides the research, this chapter first ties the linkages between democracy, ethnicity and constitution-making in the Kenyan context. Then, it addresses the following themes that are prevalent in the study; ethnic exploitation, ethnic empowerment, problems of credible commitment and collective fears of the future.

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4.1 Democracy, Ethnicity and Constitution-Making in Kenya

The theoretical linkages between democracy, ethnicity and constitutional-making were investigated in chapter two.²⁴⁸ This section applies this investigation to the situation in Kenya.

Contrary to the main thesis of this study that ethnicity destabilizes democracy; ethnicity in Kenya, as opined by Agbango, has served as a basis to democracy in a number of times.²⁴⁹ In the mid-1920s a variety of regionally based associations, with a primarily ethnic focus, emerged among the Luo of western Kenya, the Pokot, Maasai, and the Kikuyu to advance social change against the European settler. The most popular is the Mau Mau resistance which was formed by members of the Kikuyu tribe, along with smaller numbers of Embu and Meru. They caused an uprising against the British colonial

²⁴⁸ Refer to 'figure 1: Theoretical Relationships between Ethnicity, Democracy and Constitutions' in chapter two

²⁴⁹ G. A. Agbango, *Issues and Trend in Contemporary African Politics: Stability, Development and Democratizations* op. cit., p. 163

administration that lasted from 1952 to 1960. Though it failed militarily, it may have hastened Kenyan independence.²⁵⁰

However, Mudimbe contends that Mau Mau is the idiom and symbol of Kenya's independence, and as such, the movement should not be viewed as merely the work of one ethnicity or region of Kenya, nor should independence be seen as the work exclusively of militants.²⁵¹

Negative ethnicity, Koigi wa Wamwere's name for the deep-seated tensions in Africa that the world has seen flare so terrifyingly, is destructive to democratic structures not only in Africa but in the world as a whole.²⁵² In Kenya, ethnic violence has influenced democracy in many ways. In 1992, violence pitted the Kalenjin against the Luo, Luhya, and Kikuyu communities claimed an estimated 1,500 lives and displaced at least 300,000 people. High-ranking government officials were involved in the formation, training, and arming of so-called Kalenjin warriors. These warriors, wielding traditional weapons (mostly bows and arrows) and occasionally guns, carried out coordinated attacks on Kikuyu, Luhya, and Luo communities in Rift Valley, Western, and Nyanza provinces. The government had two strategies for using "ethnic cleansing" for political gain. First, violent attacks on large numbers of Kikuyus in the Rift Valley prior to elections in 1991 and 1997 were intended to create a Kikuyu exodus from this area. By doing this, the Kikuyu (who support the Opposition) were displaced on Election Day and could not vote. Second, the ethnic cleansing after elections was intended to punish Kikuyus who did not vote for President Moi and his KANU party. The scale of violence was much more widespread

²⁵⁰ E. S. Atieno Odhiambo and John Lonsdale, (eds.), *Mau Mau and Nationhood: Arms, Authority, and Narration*, Athens, OH: Ohio University Press, 2003, 6

²⁵¹ V. Y. Mudimbe, *The Idea of Africa* Bloomington: Indiana University Press, 1994, 39

²⁵² K. Wamwere, *Negative Ethnicity: From Bias to Genocide* (UK: Harpercollins, 2003) p. 5

around the 1991 election, but there was a recurrence of violence before and after the 1997 election.²⁵³

Equitable representation which democracy propagates mitigates ethnic animosity. This is real in the Kenyan situation. As pointed out in chapter three, among the forty or so ethnic groups in Kenya, there is no group that is numerically large enough to exercise long-term domination of other groups. This has led to coalitions spearheaded by politicians from different ethnic groups which together can mathematically win their opponents. Given ethnicity has been a valiant actor in politics since the colonial times in Kenya, such a move signifies representation of the various ethnic groups in the government thus playing down on the possibilities of a conflict between them. For example in 2002, the major merger between NAK and LDP (NARC) brought a balance in the electoral mathematics of the country.²⁵⁴ The group comprised of Kibaki (Kikuyu), Raila (Luo), Charity Ngilu and Kalonzo Musyoka (Kamba), the late Kijana Wamalwa and Moody Awori (Luhya) and Kipruto arap Kirwa (Kalenjin). As KANU fronted Uhuru Kenyatta, a Kikuyu, as their presidential candidate, NARC selected Kibaki. The candidate had a tremendous win but this did not live to testify its positive impact on ethnic conflict because soon there were wrangles between the major factions of the party.

Just like the relationship between ethnicity and democracy is causal, so is the linkage between democracy and constitutionalism. As noted in chapter two, Issa Shivji argues that the issue of constitutionalism cannot be divorced from the wider phenomenon of democracy. Constitutional documents have neither been the outcome of a clash of principles nor are they seen as embodying a political commitment to a global societal

²⁵³ F. Jonyo, 'The Centrality of Ethnicity in Kenya's Political Transition' in W. Oyugi et al (eds), *The Politics of Transition in Kenya: From KANU to NARC* op. cit., p. 72

²⁵⁴ Ibid., p.159

vision. Their utility lies in serving the 'constitutional moment', which in the third generation constitutions is the transfer of power. They do not even have much of a 'constitutional function' like ordering the state apparatus, division and allocation of power and much less ideological legitimacy.²⁵⁵ Just like in Africa, the constitutional instrument in Kenya has very little to do with creating democratic space or in promoting notions of enhanced participation and inclusion on the ground. Instead of developing the idea of constitutional supremacy, the Kenyan constitution has paid homage to an executive supremacy.

At the end of the day, constitutionalism in Kenya will depend on the manner in which the issue of constitutional reform and implementation is concretely addressed. The method or process by which this is done is as important as the eventual outcome. In other words, the biggest challenge confronting those involved in the struggles for constitutional reform around the continent is how to strike a balance between ensuring that the path towards such reform is a participatory and inclusive one, and that it comprehensively addresses both the large and small issues of social, political and economic concern.

4.2 Cross-Examining the Emergent Debates in the Kenyan Constitutional Review Process and the Emotive Ethnic Issues in Kenya

Since the genesis of constitutional reform in Kenya, there have been major themes that have dominated the reform process. Chapter two identifies these emergent themes as including powerful executive, devolution, independence of government institutions such as the judiciary and legislature and the provisions to amend the constitution. On the other hand, ethnic conflict has recurred and in most cases been

²⁵⁵ L. Shivji, *Constitutional Development in East Africa for Year 2000* (Dar-es-Salaam: Kituo cha Katiba, 2003) p. 11

augmented at times when calls for constitutional reforms were at their peak. The major ethnic issues identified in chapter three include matters of resource distribution particularly land, exclusion of some ethnic communities from the policy processes of the country and instrumentalization of ethnicity for political gain. In the quest to find out the main role of ethnicity in the constitution-making process in Kenya, this section cross-examines these debates arising in Kenya's constitutional review process with the ethnic issues in the country.

The roots of ethnicity and attendant inequalities in Kenya lie deeply in the colonial situation.²⁵⁶ As evidenced in chapter three the colonial administration created Native Reserves for each of the main ethnic groups with a view to securing land for the settler economy. This had the consequence of creating the basis for ethnic consciousness and therefore ethnicization of the society. It created divisions based on ethnicity and territory. A clear link between ethnicity and territory emerged. Each ethnic group was administered separately without reference to others. This reinforced group identity. Ethnic self-identity concretized and became the basis for associational life. Social political groups evolved to operate within a space restricted by customary law and practice.

The analysis herein thus has much in common with Beard's seminal study of the economic forces that shaped the U.S. Constitution. He contended that the document crafted at Philadelphia took the form it did – and ultimately was ratified – because the interests of merchants, creditors and advocates of “sound” money prevailed over those of farmer-debtors and supporters of cheap paper money.²⁵⁷ Although Beard's conclusions have been disputed by historians, recent work has restored credibility to his economic interpretation,

²⁵⁶ SID, *Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives* op. cit., p. 359
²⁵⁷ A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Free Press, 1986) p. 86

but also suggests that the interests at play were more varied and more nuanced than originally thought.²⁵⁸ Consistent with the modern evidence, voting on the proposed Kenyan constitution is seen as being determined primarily by its anticipated effects on Kenyans' economic wellbeing. The regions and ethnic groups that benefited from a constitution that concentrated power in the presidency would therefore have tended to vote "Yes" in order to preserve their previous gains. On the other hand, those who had been left behind under the status quo would have tended either to abstain or to vote "No" because they expected to continue to be marginalized if the proposed constitution was ratified. This can be seen from the results of the 2005 referendum as shown in chapter three where 93.28 per cent of the Kikuyus voted Yes to the draft to maintain status quo since the current president is Kikuyu.²⁵⁹

In a pluralistic society ruled by a strong chief executive not obliged to share much power with the other branches of government, the groups that prosper are those on which the ruler relies for political support. The members of the supporting coalition are first in line for patronage positions and for government-financed economic development initiatives, such as roads, schools, water-distribution systems and other infrastructure. Cabinet posts in the Kenyan government are dominated by the president's own ethnic group, which serves as the linchpin of his power base.²⁶⁰ Economic wellbeing is thus linked closely to partisanship and ethnicity. This is also readily seen in the examination in chapter three where the Kibaki administration did away with equitable distribution of

²⁵⁸ R. McGuire, *To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution* (Oxford and New York: Oxford University Press, 2003) p. 11

²⁵⁹ See 'Table 5: The Results of the 2005 Referendum' in chapter three

²⁶⁰ S. Kimenyi, 'Ethnic Rent-Seeking, Stability and Institutional Reforms in Sub-Saharan Africa' In S. Borner & M. Paldam, (eds.), *The Political Dimension of Economic Growth* (New York: St. Martin Press, 1998) pp. 324–335: 325

Cabinet and other public positions after the government's attempt to campaign for the ratification of the proposed new constitution failed.²⁶¹

Politicians, acting as ethnic leaders, have no commitment to producing a new constitution and have short-term interests of settling political scores and advancing political ambitions.²⁶² They thus manipulate or exploit ethnicity as the ground on which they can gain their selfish ambitions. Negotiations on the way ahead to a new constitution have seen the political class take the lead with the civil society taking a back seat, which is not a positive development. Civil society is also being manipulated by politicians to address their personal ambitions. Non-governmental organizations have lost the public's trust due to their elitism, corruption and manipulation by politicians through funding. Civil society groups have to reinvent themselves as autonomous and transparent in order to regain the public's trust, and they also have to be seen to be fighting for the ordinary citizen or risk irrelevance.

Ethnicity is vulnerable to exploitation, however. Emphasizing differences and fabricating ethnic tensions nurses the grievances of groups on the margins of social and economic life. Glaeser for example, presents a model where political entrepreneurs foment hatred of other ethnic groups to build solidarity and organize mass action, including the use of deadly force, to advance their own agendas.²⁶³ Indeed, by posing a credible threat to the existing government's monopoly power over determination of the distribution of rents, domestic violence directed at other ethnic groups can be a strategic choice for capturing power. But ethnic diversity does not inevitably produce hostility and civil strife. Collier,

²⁶¹ See 'Table 4: Ethnic Composition of the Cabinet after the 2005 Referendum' in chapter three
²⁶² Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process* op.

cit., p. 45

²⁶³ E. Glaeser, 'The Political Economy of Hatred' *Quarterly Journal of Economics* 2005, Vol. 120 No. 1 pp. 45–86:61

for example, finds that very ethnically heterogeneous countries tend to have lower levels of conflict than those where one ethnic group dominates other minorities.²⁶⁴

As a matter of fact, ethnic Balkanization leads to discord and economic stagnation only when “excessive” in-group identification is combined with poor institutions of governance. In the context of Africa, good institutions – economic liberties and political rights – can overcome the negative effects of ethnic rivalry by enabling the sharing of political power and facilitating inter-group cooperation, hence muting tensions and promoting economic progress. The polarization of society is also magnified by such non-rational factors as political memories and myths and emotions. Political memories and myths can lead groups to form distorted images of others and see them as more hostile and aggressive than they really are.²⁶⁵

A clear example of such ethnic exploitation from the Kenyan context is drawn from the constitutional referendum of 2005. The opposing camps did not use the content of the draft to garner votes; instead they made it a contest between the factional leaders; Raila and Kibaki. Therefore, many voters used the referendum merely as means to voice their approval or disapproval of the Kibaki government categorizing them into those that preferred the then status quo and those that saw the referendum as a way of initiating political change. In other words, many paid little attention to the actual text of the constitution and used the “Yes” or “No” vote to say “Yes” or “No” to the president. This would become the sentiment on which the victorious Orange camp would base their

²⁶⁴ P. Collier, 'Economic Causes of Civil Conflict and their Implications for Policy' in World Bank, *The Economics of Civil War, Crime and Violence* Project 2000 also available at <http://www.worldbank.org/research/conflict/papers/civilconflict.pdf> accessed 24 August 2007

²⁶⁵ A. David and D. Rothchild, 'Containing Fear: The Origins and Management of Ethnic Conflict' *International Security*, Vol. 21, No. 2 (Fall 1996), pp. 41-75: 41: 55

demands for snap-elections, claiming the government had lost its mandate to rule as a result of the 'No' vote by the people.²⁶⁶

Problems of credible commitment arise whenever the balance of ethnic power shifts. As influence of one side declines, previously enforceable contracts become unenforceable. The checks and balances that safeguard the agreement today become insufficient tomorrow.²⁶⁷

The MOU entered into just before the 2002 general elections by the major partners in NARC found its way into the review process. Although the content was not well understood by the public until the disagreement came to the fore, failure to resolve those disagreements caused permanent tension and suspicion between the two factions of the ruling coalition – NAK and LDP. These factional fights within NARC found expression in the constitution-making process, especially in the latter stages of the NCC. The failure of the referendum was also attributed to the failure to honour the MoU, ethnic and political divisions, inadequate civic education and a contentious proposed new constitution.²⁶⁸ Current reform efforts include calls for minimum constitutional reforms reminiscent of the 1997 efforts to level the playing field for all political actors. This time it is the Orange Democratic Movement (ODM-K), composed of Raila's LDP and other opposition parties, that is calling for minimum changes, pitted against the President's allies who are for comprehensive constitutional reforms.

²⁶⁶ See Babafemi B., *Raila Odinga: An Enigma in Kenyan Politics* (Nigeria: Yintab Books, 2006) p. 271

²⁶⁷ A. David and D. Rothchild, 'Containing Fear: The Origins and Management of Ethnic Conflict' *International Security*, Vol. 21, No. 2 (Fall 1996), pp. 41-75: 41: 51

²⁶⁸ In 2006 President Kibaki appointed a Special Committee of Eminent Persons to chart the way forward out of the reform crisis. These are part of its recommendations. However, nothing came of the report which was rejected by pro-Raila Orange Democratic Movement (ODM) leaders who had led the 'No' campaign in the referendum.

The role of ethnicity in politics and constitution-making is almost given since it has been faced and continues to be confronted by some of the world's most stable democracies. In the United States, for example, the south traditionally votes Republican, and the north Democratic. In Germany, Bavaria has for long been in the grip of the Conservatives, ensuring that the CDU has ruled there for ages. In Britain, the same tensions resulted a few years into the creation of the Scottish assembly. The solution in the US and Germany was devolution of power through a federal arrangement. In Africa, the fear of the break of the post-Berlin conference states, leads us to view regional or tribal voter behaviour with hostility.²⁶⁹

On the other hand, the cries about the danger of breaking up countries through tribalism in Africa are overstated. The political elite use it to avoid dealing with the problems. In Kenya's case, the solution was there in both the Bomas and Wako drafts – devolution. The question was how much power to devolution, and to what levels. The referendum outcome showed that there had been important movements along the path that Kenyans started out on in 2002.²⁷⁰

Similarly, Switzerland is a stitch-up of various tribes who fiercely guard their identity today. He then asserted that African leaders, who ruin their countries with dictatorship under the pretext of guarding against the dangers of tribalism, are the same ones who hide their looted billions in Switzerland, which has prospered and is very stable – despite its tribes.²⁷¹

4.3 Towards the Effective Management of Kenya's Ethnic Conflicts

²⁶⁹ Interview with Otieno Aluoka held on 4 July 2007, Nairobi

²⁷⁰ Githu Muigai, Interview held on 11 August 2007, Nairobi

²⁷¹ Oliewo Michaels is the Vice Chairman, Party of Independent Candidates of Kenya, former Deputy Director of NCEC and a member of the 4Cs, Delegate No. 613 at Bomas. Interview held on 13 July 2007, Nairobi

Multi-ethnicity has become a socio-political phenomenon in most civil societies. In the present century, inter-ethnic cleavages, competition and conflict seem to have acquired a higher intensity. As a result, ethnic mobilization poses various challenges to many developing as well as developed countries.²⁷² South Asia is no exception to this phenomenon. It is an intrinsic component of the socio-political realities of multi-ethnic states in South Asia as in other parts of the world. Today, ethnicization of politics and politicization of ethnicity have become very common and have diffused mutual toleration, and have thus, sharpened ethnic consciousness among various communities. This section therefore looks for the possible solutions of ethnicity and ethnic conflicts.

Finding a solution to ethnic problem presents itself as a serious question. However, the attempts that can possibly lead toward solutions must be examined. As mentioned earlier, most of the violent conflicts today are caused by the divisions that exist in a pluralist society. Hence, if the conflicts are caused from such differences, the solutions must come from power sharing among the various ethnic or other sectarian groups. That is how in the recent years one finds an increasing significance of minorities and their rights and demands.²⁷³

Given the multi-ethnic, multi-religious societies all over the world today, individual and group differences are becoming sharper and deeper with the pace of development and competition. If some mutual arrangement can be made for power sharing or regional autonomy at the local level, conflicts will not get prolonged nor result in the wastage of human and other resources of the nation. For this, a few other conditions must exist. There must be mutual respect for other parties and their demands, as part of a confidence building

²⁷² C. Young, *The Politics of Cultural Pluralism* (Madison, Wisconsin and London: The University of Wisconsin Press, 1976) p. 79

²⁷³ D. Rothchild, *Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation* (Washington, D.C.: Brookings Institution Press, 1997) p. 127

measure. Unless each side views its opponent as honourable and having legitimate demands, relations cannot improve between various groups, which are characterised by widening fears and gaps.²⁷⁴

In power sharing initiatives, a certain share needs to be kept for the minority groups in cabinet, civil service, military, high party positions and such other important areas which will give some kind of satisfaction to individuals and groups. The power sharing arrangements are not permanent solutions, but very temporary and fragile. The use of power sharing arrangements between ethnic or sectarian groups has a limited appeal.²⁷⁵ Githu gave examples of India where the then Indian Prime Minister Rajiv Gandhi had negotiated peace accords with the All Assam Student Union, the Sikh leader Sant Longowal, the Mizo leader Laldenga and the Gorkha leader Subhash Ghisingh. In Belgium, the cabinet represents two ethnic groups on an equal basis. In Cambodia too, the government comprises two of the three main factions that had been engaged in a protracted civil war. Therefore, this arrangement would bring some improvement in the relations between various competing groups, as they would provide a certain amount of psychological security to these groups.²⁷⁶

The competing/conflicting parties do not like to get into power sharing arrangement while they have adequate support for their survival. The Tamil Tigers in Sri Lanka did not accept autonomy as a solution to their demands so long as they had control over vast resources.²⁷⁷ In Cambodia too, some Khmer Rouge groups refused to accept a place in the coalition government so long as they had control over pieces of land and trade. Even if the

²⁷⁴ L. Diamond and F. Marc, *Nationalism, Ethnic Conflict, and Democracy* (Baltimore: The Johns Hopkins University Press, 1994) p. 3

²⁷⁵ S. Hameso, *Ethnicity and nationalism in Africa* (New York: Nova Science Publishers, 1997) p. 40

²⁷⁶ Githu Muigai, Interview held on 11 August 2007, Nairobi

²⁷⁷ Interview with Wambua Paul Musili conducted by the researcher on 25 July 2007, Nairobi

parties agreed to this kind of an arrangement, it was not last too long. It would only give a temporary respite from the problem and not result in a long-term settlement.

Another way to bring out some amicable solution to these conflicts is through external intervention. The response of states involved in conflicts to external intervention varies from state to state. South Asian states have not been so appreciative of the whole idea of state intervention. Bangladesh, Burma, Bhutan, India or Pakistan have not allowed foreign organizations or countries to find a solution to their internal conflicts like those of the Chakma tribals, Bhutanese separatists of Nepalese origin, Kashmiris and Assamese in India, or Sindhi nationalists in Pakistan.²⁷⁸ Lake argues that external guarantees work only when the local parties to the conflict believe that the outside powers are committed to enforcing the social pact into the indefinite future.²⁷⁹ If there is absence of such a belief in the stamina of the external powers, intervention in any form will fail to mitigate the conflict.

There is a serious problem in third party intervention or any type of external intervention. The problem is that the preconditions for ethnic war are generally difficult or almost impossible for outsiders to understand and influence. And third parties cannot change ethnically divided societies and their grievances or symbolic disputes, or even their past history which has led them in to this situation.²⁸⁰ But what possibly could be done is to avert militarization of the nation and go into war.

²⁷⁸ T. Sisk, and A. Reynolds, *Elections and Conflict Management in Africa* (Washington, D.C.: United States Institute of Peace Press, 1998) p. 3

²⁷⁹ D. Lake, 'Ethnic Conflict and International Intervention' paper is posted at the Scholarship Repository, University of California also available at

<http://www.repositories.cdlib.org/cgi/viewcontent.cgi?article=1073&context=igcc>

²⁸⁰ W. Zartman, 'The Unfinished Agenda: Negotiating Internal Conflicts', in R. Licklider (ed) *Stopping the Killing: How Civil Wars End* (New York, NY: New York University Press, 1993) pp. 20-36:21

Division of states will also not be a viable solution to these conflicts. In the present century, many states have been created on the basis of the Wilsonian principle of “self-determination”. The key element in this approach has been division of territories and this has invoked ethnic principle for the equitable distribution of territories. Yet, changing the territories of states to give each community a state of its own can not solve most of the national and ethnic conflicts that remain today.²⁸¹ India was split in 1947 into India and Pakistan. In 1971 Pakistan was split into Pakistan and Bangladesh. Within all these nations again, there are many separatist tendencies and if countries are to be further divided, there can be no end to this phenomenon, as this is based on the principle of the satisfaction of human greed in the name of accommodating ethnic and minority aspirations.²⁸²

In fact, the most effective methods of protecting the minorities take two forms, federalism or devolution, and consociationalism. Consociationalism is best suited to European cultures. Federalism and devolution have been applied even in the non-European world with a great deal of success. The constitutional frameworks of some African countries accommodate the interests of the minority communities through the devolution of power. The Independence Constitution of Kenya had such provisions until it was amended to make the country a one political party system state. In the case of Kenya, devolution could be a solution to the severe ethnicization of politics.²⁸³

In addition, Yash Pal Ghai asserts that amending or replacing the old constitution is generally a part of the peace process. Enduring peace can only be achieved through negotiations on the re-design of the state and the allocation of power – thus inevitably highlighting the status of the constitution. Exactly when the constitution making stage of

²⁸¹ S. Hameso, *Ethnicity and nationalism in Africa* op.cit., p. 41

²⁸² Interview with Otieno Aluoka held on 4 July 2007, Nairobi

²⁸³ Oliewo Michaels, Interview held on 13 July 2007, Nairobi

the process is reached depends on the context. In some cases constitution amending or making is the last stage, after the conflict has been more or less resolved and other measures to consolidate peace has been put in place as in Namibia, Cambodia, East Timor and Afghanistan. In other cases, pre- occupation with a new constitutional settlement starts early, as in Sri Lanka, where the very genesis of the conflict lay in what was perceived by one party to be a faulty and unfair constitution. In the latter situation, the politics of the constitution play a critical role throughout the peace process. However, in both these scenarios, the sign of a successful peace process is a settlement on and adoption of a new constitutional dispensation. Although it may be possible to distinguish the specific constitution making stage of the process from other stages, the fact is that constitutional issues pervade all stages of the peace process. Some times peace talks can only start when there is a prior agreement that the constitution will be changed if necessary as in Papua New Guinea/Bougainville conflict and in Sri Lanka. Some times the obstacles implicit in the existing constitutional structure to peace negotiations like excluding some key parties, usually the 'rebels', or the failure of legitimacy of state institutions, need to be overcome before the negotiations can start or be successfully concluded. Even the broad understandings on the basis of which parties start negotiations or reach soon after during negotiations have implications for constitution, as indicating the orientation of change.²⁸⁴

Kirsti also insists that the design of a constitution and its constitution-making process can play an important role in the political and governance transition. For him, Constitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace

²⁸⁴ Y. Ghai, 'The Constitution Reform Processes: Comparative Perspectives' *Presidential Studies Quarterly* 2004, Vol. 34 No. 3 p. 1

agreement and partly a framework setting up the rules by which the new democracy will operate. An ideal constitution-making process can accomplish several things. For example, it can drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources—all key reasons for conflict. It must also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.²⁸⁵

In the Kenyan case, amending or replacing the old constitution will be a major step towards resolving the many ethnic conflicts in the country. As noted earlier, enduring peace can only be achieved through negotiations on the re-design of the state and the allocation of power – thus inevitably highlighting the status of the constitution. Besides, the constitution-making process can play an important role in the political and governance transition. However, the Committee of Eminent Persons argue that the first step towards adopting a new constitution for the country is to establish healing and reconciliation among the various ethnic communities through a lean national team that should spearhead this process.²⁸⁶ This process should not only address historical injustices but also the major divisions that emerged as a result of the review process.

²⁸⁵ S. Kirsti, 'Post-Conflict Peace-Building and Constitution-Making' *Chicago Journal of International Law* Winter 2006 Vol. 6 No. 2 p. 7

²⁸⁶ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process* op. cit., p. 127

CHAPTER FIVE

CONCLUSION

5.0 Introduction

Among the theories on the relationship between ethnicity and democratization examined in this study is the theory that ethnicity destabilizes the democratization process. Constitutionalism and democracy have been interpreted as both intimately related and intrinsically opposed. On the one hand constitutions are said to set out the rules of the democratic game and on the other they constrain the power of the demos and their representatives to rule themselves - including by reforming the very processes of democracy itself. The constitution-making process in Kenya has not only been unsuccessful but has also stalled at several points while bearing the characteristic of sporadic violence between different ethnic groups. Relying on these facts, this study sought to investigate the role of ethnicity in democratization by specifically evaluating the impact of ethnic cleavages to the constitution making process in Kenya.

5.1 Summary

In tackling the above-mentioned problem, the study utilized both primary and secondary sources of data. Primary sources included interviews with major stakeholders in the review process while secondary sources comprised of critical publications in constitution-making such as Mutunga's *Constitution Making from the Middle*, papers such as Coleman's *Concept of Ethnicity*, journals such as the *International and Comparative Law Quarterly* and *Journal of Conflict Management* and unpublished works including academic theses. Key literature reviewed revealed that ethnicity has had a negative effect on the democratisation process in Africa. Ethnocentrism permeates all circles of African

society and subsequently leads to uneven and inequitable distribution of resources in the countries affected.

The second chapter looked into the conceptual definitions of the major terminologies of the study which are; ethnicity, democracy and constitutionalism and their application in the African context. The study adopted the definition of ethnicity as the awareness on the part of a particular community of having a separate identity on the basis of common history, race, language, religion, culture and territory as well as the employment or mobilization of ethnic identity and difference to gain advantage in situations of competition, conflict or cooperation.²⁸⁷ Similarly the Western model of political democracy was not only considered to be extremely narrow and even alien to African cultures but also a cause of major divisions along tribal lines.²⁸⁸ On the other hand, the chapter noted that democracy without constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power, ethnic divisions, and even war.

This conceptual analysis gave way to an in-depth examination of the process of constitutional reform in Kenya. Although its main focus was on the period between 1990 to 2005, chapter three examines the history of ethnic variations in the country and the role ethnicity has played in politics since colonial times. It identifies the areas around which ethnic tensions have surrounded in the country including resource distribution such as land, exclusion of some ethnic communities from policy formulation and implementation and instrumentalization of ethnicity as a tool to garner political ambitions by the political elites. The chapter also looks at how the constitution of Kenya has attempted to manage ethnic

²⁸⁷ E. Osaghae, *Structural Adjustment and Ethnicity* (Uppsala: Nordic Africa Institute, 1995) p. 11
²⁸⁸ L. Diamond, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press, 1999) p.

tensions in the country. An analysis involving how the independence constitution, the Bomas and Wako Draft constitution address this issue is presented. Finally, other factors affecting the constitutional review process are investigated.

Chapter four did a critical analysis of the role of ethnicity in constitutional reforms in Kenya. It then cross-examined identified ethnic issues with emerging debates in the constitutional review process in Kenya. These included resource distribution with power devolvement, instrumentalization of ethnicity and executive presidential powers, exclusion of ethnic communities from policy formulation and implementation and the process by which constitutional review should be done. This chapter remarked that ethnicity has been used as a political tool in Kenya since the colonial times. In the post-independence period, this was exhibited by ethnic political appointments in all the regimes that have ruled the country. It was also evident in the voting patterns during presidential elections and the constitutional referendum that ethnicity is a central line of cleavage. The successful use of ethnic and regional coalitions in 2002 to drive KANU out of power justified the use of ethnicity as a tool for consolidating power and how leaders can marshal ethnic resources through manipulation.

5.2 Conclusions

Following the research components examined in the research, this section outlines the key conclusions of the study. The study examined a number of theories on the link between ethnicity and democratization. It established that ethnicity could destabilize or crystallize the democratization process depending on the case at hand. Reilly posits that in multi-ethnic society it is impossible for one group to dominate another or manipulate the apparatus of the state in an undemocratic manner because no single group has an adequate

majority to do so without challenge.²⁸⁹ On the contrary, John Stuart Mill when describing representative government in 1861 considered democracy “next to impossible in a society made up of different nationalities.”²⁹⁰ Similarly, democracy can be a panacea or a cause of ethnic conflicts in a multi-ethnic society. As a panacea, democracy eradicates the bad consequences of ethnic conflict by entrenching state principles that proscribe ethnic politics and by providing for power-sharing arrangements in the constitution in such a way that no particular ethnic group can feel permanently excluded from government.²⁹¹ However, democratization can also fuel nationalism in transition societies by encouraging ethnic self-consciousness which, in turn, threatens to make democracy obsolete by encouraging violence and conflict.²⁹² It appears, therefore, that the correlation between ethnicity and democracy is of a causal nature. That is to say that in some cases, ethnicity is the manifestation of democratic pluralism taken to its extreme in the negative sense, by leading to intolerance and exclusivity. Conversely, in other cases, ethnicity is the expression of social opposition to the lack of, or insufficient forms of, democracy.

The dissertation also remarked that constitutionalism and democracy have been interpreted as both intimately related and intrinsically opposed. While a constitution is an instrument to limit, control, and diffuse the power of governments, democracy, at least in its populist version, tends to concentrate potentially unlimited power in the hands of the current majority. However, it was determined that democracy without constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power, ethnic divisions, and even war. This means that without a consensual

²⁸⁹ B. Reilly, 'Democracy, Ethnic Fragmentation, and Internal Conflict' *International Security* Vol. 25 Issue 3, 2000 p. 170

²⁹⁰ J. S. Mill, *Considerations on Representative Government* (London: Longmans, Green & Co., 1890) p. 76

²⁹¹ B. Berman et al, *Ethnicity and Democracy in Africa* (Athens: Ohio University Press, 2004) p. 308

²⁹² E. Boulding, 'Ethnicity and New Constitutive Orders: An Approach to Peace in the Twenty-First Century' in U. Hisakazu and V. Takeo (Eds) *From Chaos to Order* (Tokyo: Yuskindo Publishers, 1990) pp. 56-61

constitution, a country cannot claim to be democratic. Despite the complementary relationship established between democracy and constitutionalism, the study did not assume that the links between ethnicity and democracy would apply to constitutionalism. That is why it sought to investigate the connection between ethnicity and constitution-making using the case study of Kenya. Nabweze's argument that national unity is the infrastructure for constitutionalism and a condition precedent for viable constitutionalism was taken into consideration.

The study examined a number of factors that affected the constitution-making process in Kenya. Historical aspects such as colonialism have affected the constitution-making of Kenya. The major factor is the introduction of the parliamentary system of government which has affected this process up to date. Although the constitution stipulates that the people of Kenya are responsible for making and enacting their own constitution, this has hardly happened since the parliament has strong power over the enactment of the constitution. This affects the constitution-making process because parliamentarians have different selfish interests about which they never seem to agree.

Besides, religion has emerged as a critical factor in the constitutional review process in Kenya since different religions would like to include provisions in the constitution that protect their religions. Different religions will vote for or against the constitution according to how much they are favoured by the constitution. For example during the referendum of 2005 the Muslim leaders asked fellow members to vote against the Wako draft bill because it did not include Kadhi courts and did not also specify minority groups which, they hoped, would include Islam as a minority religion in the country.

Inadequate civic education also affects the constitution-making in Kenya because some people do not know the content of the recommended constitution drafts thus they are manipulated by politicians who guard their own interests. For example most people thought that voting against the 2005 constitutional referendum was synonymous to voting for Raila Odinga while voting for it was voting for President Kibaki. For this reason people voted the way they did without knowing that the elections were supposed to be for the constitution amendments.

The hesitancy and stalemate in the constitution making process in Kenya stems from fear that if any thorough economic and political reforms are implemented most powerful politicians will lose credibility. Factional infighting, personality clashes, political differences and a scramble for money underlie the fear that surrounds the constitution of Kenya Review Process.

Turning to the major factor of study, the dissertation sought to investigate how ethnicity has influenced the constitution-making process in Kenya. First, it was established that ethnicity has been an integral part of Kenya's political landscape both during the colonial era and after independence. While there is nothing wrong with the idea that ethnicity is an important part of one's identity, ethnic chauvinism – manifested as tribalism – has emerged as a key issue in the country's politics. This was clearly identified through voting patterns and ethnic affiliations to political parties.

At independence in 1963, Kenya had two main political parties, the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU).²⁹³ KANU had membership of the numerically large Kikuyu and Luo ethnic groups while KADU's notable groups were the Kalenjin, Maasai, Turkana and Samburu (the so-called

²⁹³ F. Jonyo, and S. Owuoché, *Politics in Kenya: A Perspective* (Nairobi: Azinger Ltd, 2004) p. 7

KAMATUSA group). Subsequently, each of the main ethnic groups had at least its own political party and/or was allied to a party formed by another ethnic group. In 1992, the Kikuyu had the Democratic Party of Kenya (DP) led by Mwai Kibaki and Kenneth Matiba's FORD-Asili; the Luo had FORD-Kenya, while the Kalenjin were in KANU. The Luhya coalesced around KANU and FORD-Asili. In the 1997 general elections the Kikuyu again were the majority in DP, while the Luo were the majority in a new party—the National Development Party (NDP). The Luhya were in FORD-Kenya and the Kalenjin in KANU. In 2002, a great alliance (NARC) was formed for the sole reason of getting Moi out of power. This included Kibaki (Kikuyu), Raila (Luo), Charity Ngilu and Kalonzo Musyoka (Kamba), the late Kijana Wamalwa and Moody Awori (Luhya) and Kipruto arap Kirwa (Kalenjin). This shows that ethnicity is a major factor in any decision-making process even at the parliamentary level because members of parliament from the same ethnic group tend to be in the same political party and therefore exhort the same ideals. This is most applicable to the Kenyan situation where decisions on the Constitution are made by parliamentarians even after seeking the opinions of the people.

The dissertation also established that voting patterns are ethnically represented. Each ethnic region votes overwhelmingly for the leader who comes from that region. In both the 1992 and 1997 presidential elections, Kibaki got his best number of votes (35 and 90 percent) from Central province. In the same vein, the total number of votes that Ngilu garnered from the rest of the country in 1997 (28.5%) was less than the ones she got from the Kamba concentrated Eastern Province (37%).²⁹⁴ However, the major merger between NAK and LDP (NARC) in 2002 brought a balance in the electoral mathematics of the

²⁹⁴ See chapter four

country.²⁹⁵ The total population of Kikuyu, Luo, Kamba, Luhya and Kalenjin implied a definite victory for the candidate of the NARC party. Assuredly, Kibaki got 62 per cent of votes and his runners up, Uhuru Kenyatta, only managed a half of it (31 per cent).

These voting patterns can affect constitution-making when a constitution is subjected to a referendum as was the case in 2005. The study concluded that the results of the 2005 referendum suggest that ethnicity is important in explaining constitutional choice in Kenya. The wide variation observed in the percentages of votes cast for and against the proposed constitution points to large differences in the demand for institutional change across regions and ethnic groups. Although a number of reasons such as religion, cultural differences, resource distribution particularly land, devolution of power and economic crises were cited for the failure of the referendum, its results were a manifestation of ethnicity in the review of the constitution. Most people considered it to empower not the Kenyan but the kikuyu ethnic group. Therefore other ethnic groups opposed it thinking that they were opposing kikuyu domination.

The association between ethnic identity and political affiliation in Kenya has provided the underlying logic for politically motivated ethnic violence. Such violence has also affected the constitution-making process both negatively and positively. Since the 1991 constitutional reform initiatives were launched there has been a clear correlation between elections and violence. Ethnic violence was used to rally the populace for or against constitutional change. This was especially so in 1992 when President Moi was under pressure to transform Kenya into a pluralist state. A similar scenario repeated itself in 2005 before the constitutional referendum. Violent attacks on large numbers specific

²⁹⁵ F. Jonyo, 'The Centrality of Ethnicity in Kenya's Political Transition' in W. Oyugi et al (eds), *The Politics of Transition in Kenya: From KANU to NARC, 2003* (Nairobi: Heinrich Böll, 2003) p.159

ethnic groups usually intends to create an exodus from their area of residence so that they cannot vote for what is deemed dangerous to the existence of the perpetrating ethnic group. The role of ethnicity in constitution-making in Kenya as highlighted above was taken as not strange because it has been faced and continues to be confronted by some of the world's most stable democracies such as the USA, Germany and Switzerland.

Ethnic exploitation has been used to influence the constitution-making process in Kenya. Politicians who claim to be ethnic leaders have used identity, common memories and myths to propagate their selfish ambitions instead of leading their people towards a 'good constitution'. This was shown through the campaigns that took place just before the 2005 referendum that was meant to institute a new constitution. Main arguments for or against the draft constitution were not done as per the content wise rather they were appended on the success or failure of specific politicians.

Besides, it was also evident that the constitution-making process in Kenya was affected by ethnic economic empowerment because most of the ethnic fellows of the president in place preferred a status quo which would retain a powerful executive while those who felt alienated from the government wanted change. Therefore, many Kikuyus voted "Yes" while their opponents then – the Luo- voted "No".

The study also identified possible solutions to the ethnic conflicts in multi-ethnic societies. Given most of the violent conflicts today are caused by the divisions that exist in *a pluralist society*, it was established that their solutions must come from power sharing among the various ethnic or other sectarian groups. In power sharing initiatives, a certain share needs to be kept for the minority groups in cabinet, civil service, military, high party positions and such other important areas which will give some kind of satisfaction to individuals and groups.

In the 1960s and the 1970s, studies on political economy in Africa showed Kenya as a 'success story' owing to its relative political stability and high per capita incomes compared to other countries in the region. From the 1980s, Kenya's political system and the economy began to show signs of stress. Inequalities in income and even development *began to rapidly deepen. Accounting for these challenges was ethnicization of the economy and politics.* The ethnic elite consolidated political power by staffing governance institutions with elite from their own ethnic communities. Regions from which the governing elite came had better access to development resources than others. The study concluded that disparities that have evolved in the composition of governance institutions are the result of uncertainties in the political system. Further, a parliamentary system of government, combined with proportional representation, would address some of the challenges experienced in the management of ethnicity in the country.

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Notably, it was concluded that amending or replacing the old constitution is generally a part of the peace process. Enduring peace can only be achieved through negotiations on the re-design of the state and the allocation of power – thus inevitably highlighting the status of the constitution. Besides, the constitution-making process can play an important role in the political and governance transition. In other words, the reform of constitutions represent a crucial aspect of democracy-building, particularly relevant to post-conflict and post-authoritarian countries but also important to more established regimes in periods of transition. In the framework of political and institutional reforms, the design of constitutions can play a critical role in ensuring the advancement and the sustainability of democratic systems, by providing adequate mechanisms to manage conflicts within limits of peaceful coexistence and by promoting consensus around a set of core values. Constitutions are the core of the institutional structure/legal system of a

country and define the relationship among citizens, between citizens and the State, and between the State and the international legal system.

Given the scope of this study in terms of the time frame and main objective, the dissertation left out a critical element that would concretize its major findings. It was impossible to examine how ethnicity is dealt with in the current constitution. This includes how the arrangements in the current constitution seek to manage ethnicity. These arrangements would help investigate the extent to which the government has the capacity to manage ethnic relations, to explore the economic, social and political contexts in which various groups interact in order to achieve specific or general goals and the extent to which the constitution can be used to distinguish what is inherent and therefore not susceptible to change from provisional issues that may change through a constitutional amendment process. This identified element has been left for future research.

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APPENDICES

Unstructured Interview Schedules

Interview Schedule one

Interview conducted by the researcher with Messers Michael Oliewo and Otieno Aluoka on 4th July and 13th July 2007 respectively at Nairobi.

1. Why do African Governments have to review their constitutions?
2. Do multiple ethnicities affect constitution reform processes in Africa? If yes, how?
3. What positive points did the independence constitution of Kenya have?
4. How did the 1982 coup affect constitutional arrangements in Kenya?
5. What were the *major reasons for constitutional change in 1997?*
6. Were they the same in 2005?
7. Why did the KANU negotiations with IPPG make no impact to the search for a new constitution?
8. Why did the IPPG reforms flop?
9. How did ethnicity in the parliament affect its quest for constitutional amendments?
10. How do ethnic conflicts affect the constitution making process?
11. Did the people centered approach to constitutional reform bear any difference? If so, how?
12. Do you think that Kenyans were ethnically divided during the constitutional referendum of 2005?
13. What perpetuates these ethnic cleavages?
14. Do you think Kenya will ever have a 'good' constitution?
15. How can Kenya put in place a constitution that can address the multiple identities therein?

Interview Schedule two

Interview conducted by the researcher with Mr Paul Musili Wambua and Professor Githu Muigai on 25th July 2007 and 11th August 2007 respectively at Nairobi.

1. Why do African Governments have to review their constitutions?
2. Do multiple ethnicities affect constitution reform processes in Africa? If yes, how?
3. What positive points did the independence constitution of Kenya have?
4. How did the 1982 coup affect constitutional arrangements in Kenya?
5. What were the major reasons for constitutional change in 1997?
6. Were they the same in 2005?
7. Why did the KANU negotiations with IPPG make no impact to the search for a new constitution?
8. Why did the IPPG reforms flop?
9. How did ethnicity in the parliament affect its quest for constitutional amendments?
10. How do ethnic conflicts affect the constitution making process?
11. Did the people centered approach to constitutional reform bear any difference? If so, how?
12. Do you think that Kenyans were ethnically divided during the constitutional referendum of 2005?
13. What perpetuates these ethnic cleavages?
14. Do you think Kenya will ever have a 'good' constitution?
15. How can Kenya put in place a constitution that can address the multiple identities therein?
16. What was the constitutional problem facing the Review process?
17. What was the legal problem facing the Review process?
18. In your opinion, was the Judiciary a solution or part of the problem in compounding the Review Process?
19. What were the political challenges that confronted the Review Process?
20. In Your opinion, did ethnicity play a role in the Constitutional Review process stalemate?
21. What could you propose as the best way forward out of the current stalemate?
22. Do we really need a Constitutional review in view of the way it has drained national resources?

Interview Schedule 3

Interview conducted by the researcher with Honorable Mr. Justice Isaac Lenaola on 12th August 2007.

1. Why do African Governments have to review their constitutions?
2. Do multiple ethnicities affect constitution reform processes in Africa? If yes, how?
3. Did the independence constitution of Kenya exclude minority group rights?
4. How do minority groups suffer when the constitution is silent about them?
5. How did the 1982 coup affect constitutional arrangements in Kenya?
6. What were the major reasons for constitutional change in 1997?
7. Were they the same in 2005?
8. Why did the KANU negotiations with IPPG make no impact to the search for a new constitution?
9. Why did the IPPG reforms flop?
10. How did ethnicity in the parliament affect its quest for constitutional amendments?
11. When this happens, how do the minorities suffer?
12. How do ethnic conflicts affect the constitution making process?
13. Did the people centered approach to constitutional reform bear any difference in terms of including the minorities?
14. Do you think that Kenyans were ethnically divided during the constitutional referendum of 2005?
15. What perpetuates these ethnic cleavages?
16. How can Kenya put in place a constitution that can address the multiple identities therein?

Interview Schedule 4

Interview conducted by the researcher with Professor Wanjiku Kabira on 16th August 2007.

1. Why do African Governments have to review their constitutions?
2. How did the 1982 coup affect constitutional arrangements in Kenya?
3. What were the major reasons for constitutional change in 1997?
4. Were they the same in 2005?
5. Why did the IPPG reforms flop?
6. How has ethnicity among MPs affected the Constitutional reform movement?
7. What are the gender gaps in our current constitution?
8. How have women and women organizations contributed to the constitutional reform process in Kenya?
9. How did ethnicity expressed by culture affect the gender aspects in the draft constitution?
10. Did the people centered approach to constitutional reform bear any difference in terms of inclusion of women?
11. Do you think that Kenyans were ethnically divided during the constitutional referendum of 2005?
12. What perpetuates these ethnic cleavages?
13. How can Kenya put in place a constitution that can address the multiple identities therein?
14. In your opinion, was the Judiciary a solution or part of the problem in the Review process?
15. The 2005 referendum rejected a women friendly draft constitution, one that comprehensively addressed gender equality. Did that affect the position of women in Kenya today and how?
16. Kenyans have had to contend with several constitutional amendments since *Independence*. How can we ensure that a future constitution does not suffer a similar fate?
17. What could you propose as the best way forward out of the current stalemate?
18. What do you feel about the failure of the Constitutional amendment that sought to create 50 special seats for women?

Respondents

Otieno Aluoka, *Interview held on 4th July 2007, Nairobi*

Oliewo Michaels, *Interview held on 13th July 2007, Nairobi*

Wambua Musili, *Interview held on 25th July 2007, Nairobi*

Githu Muigai, *Interview held on 11th August 2007, Nairobi*

Lenaola Isaac, *Interview held on 12th August 2007, Nairobi*

Wanjiku Kabira, *Interview held on 16th August 2007, Nairobi*