

**UNIVERSITY OF NAIROBI**

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**POST CONFLICT CONSTITUTIONS AND SETTLEMENT OF CONFLICTS  
AN ANALYSIS OF PUBLIC PARTICIPATION PROCESS AND THE FEDERAL  
SYSTEM OF PROVISIONAL CONSTITUTION OF SOMALIA 2012.**

**BY**

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OF MASTER OF LAWS**

**2019**

**DECLARATION**

I Jaafar Mohammad Aman do declare that this is my original work and has not been submitted nor is it currently being examined for a degree in any other University

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## **DEDICATION**

I dedicate this work to my parents and my brother. To my late father Mohammad Aman who has been an inspiration to my academic journey even in his physical absence. His life model and advice remain to be a beacon of hope and admiration. To My mother; Rashida Khadar, who has continuously reminded me of my goals and sacrificed a lot to ensure I remained focused and dedicated in my endeavors. To my elder brother Mansour Adam, a fortress of hope and selfless heart.

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## ABSTRACT

Since the fall of Siad Barre Somalia has had a difficult time establishing and preserving a functional state. The challenge has been ongoing for more than two decades. The approval of the provisional constitution in 2012 provided another lifeline to the hope of nation building. There has been a considerable debate on the possible instrumental role of the constitutions in post conflict areas. While such argument has been concerned with the content for some time, and justifiably so, there have been an increased discussion on how important the process is also crucial in post conflict constitution making. Regrettably, the quest for peace has been the overwhelming guide in post conflict constitution making at the expense of public participation. Unfortunately, the current political and security situation in Somalia illustrates how important public participation is in post conflict constitution making. This thesis examines the role played by the provisional constitution to settle the conflict. The thesis investigates the effectiveness of the public participation process used during the Somalia constitution making process and also examine if the federal system adopted was enough to suppress and end the conflict in Somalia. The thesis argues that unlike previous models where constitution making was a highly an elite driven enterprise and content oriented, contemporary constitution making put emphasis on the process and content alike. The centrality of public participation is emphasized if the constitution is to have its intended effect in post conflict situations. The public participation encapsulates the sovereignty of the people and increases the ownership of the document which is central in conferring legitimacy necessary in ending such conflicts. Equally, the content of the constitution which is always contentious remains important, however, such an adventure requires ingeniousness in designing a proper model and when process and content are augmented peace is likely achievable. In the case of Somalia, the thesis argues that the public participation process was elitists and did not recognize the public input. The process was devoid of a democratic process to make a democratic document. Leaders were selected using clan formula and patronage. The effects of these omissions have made peace a distant reality. Equally, the federal framework deployed in the provisional constitution, has created a more division to the already divided country. The thesis recommends the usage of Constitutionalism in the making the new constitution under which the process and the content will respond to the democratic principles of public participation. The study also recommends the usage of Consociational model in the federal structure to maintain peace and stability and avoid the clan competition.

## **LIST OF ABBREVIATIONS**

<b>AMISOM</b>	:	African Union Mission in Somalia.
<b>A.N.D.M</b>	:	Amhara National Democratic Movement.
<b>B.F.C</b>	:	Boundaries Federal Commission.
<b>C.o.E</b>	:	Council of Experts.
<b>C.o.R</b>	:	Council of Representative.
<b>C.C</b>	:	Constitution Commission.
<b>E.P.D.R.F</b>	:	Ethiopian People Democratic Revolutionary Front.
<b>E.P.L.F</b>	:	Eritrean People Liberation Front.
<b>F.G.S</b>	:	Federal Government of Somalia.
<b>F.M.S</b>	:	Federal Member State.
<b>I.F.C.C</b>	:	Interim Federal Constitution Committee.
<b>I.G.A.D</b>	:	Intergovernmental Authority for Development.
<b>I.O.L.F</b>	:	Islamic Oromo Liberation Front.
<b>J.I.A</b>	:	Jubbaland Interim Administration.
<b>J.S.C</b>	:	Judicial Service Commission.
<b>N.C.A</b>	:	National Convention Assembly.
<b>O.N.L.F</b>	:	Oromo National Liberation Front.
<b>O.N.L.F</b>	:	Ogaden National Liberation Front.
<b>S.E.P.D.M</b>	:	Sothern Ethiopia People Democratic Movement.
<b>S.T.F.C</b>	:	Signatory Technical Facilitation Committee.
<b>UIC</b>	:	Union of Islamic Courts.
<b>T.G.E</b>	:	Transitional Government of Ethiopia.

<b>T.N. C</b>	:	Transitional National Charter.
<b>T.N.P</b>	:	Transitional National Parliament.
<b>T.F.G</b>	:	Transitional federal Government.
<b>T.F.C</b>	:	Transitional Federal Charter.
<b>T.F.P</b>	:	Transitional Federal Parliament.
<b>T.F.I</b>	:	Transitional Federal Institution.
<b>T.P.L.F</b>	:	Tigrayan People Liberation Front.
<b>T.S.C</b>	:	Technical Select Committee.
<b>UN</b>	:	United Nations
<b>UNPOS</b>	:	United Nations Political Office for Somalia.
<b>W.S.L.F</b>	:	Western Somalia Liberation Front.

## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.1 Background to the Study

Since the fall of Siad Barre's administration, Somalia has gone through multiple attempts to establish sound and democratic governance structures. Unfortunately, the attempts have fallen short of any positive outcome. The challenge has been enormous, considering the historical and structural form of the country which is highly polarized along clan lines and, recently, an increasing trend of religious intolerance.

Somalia got its independence in 1960. The birth of the nation came through a unification process joining the Italian administered south and the English administered north. Clan sentiments were present from the onset and, the mistrust between the two geographically distinct but ethnically uniform entities existed.<sup>1</sup> The economic disparities and inequality between the two regions were obvious. The Italian administered south enjoyed a myriad of opportunities which included inter alia: good arable land and relatively proper infrastructure. Like many African countries, Somalia's independence constitution intended to develop a nation state, in fact, among all African countries, Somalia had, by all standards what it takes for a nation state.<sup>2</sup>

For the first post-colonial years, the country enjoyed a relatively good democratic process. However, when democratic values were being entrenched at upper echelons, a lot more was being done to dislodge the newly found democracy albeit inadvertently in other levels. A web of clan

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<sup>1</sup>Maria Bongartz, *The Civil War in Somalia; Its Genesis and Dynamics* (Nordiska Afrika Institutet). The Scandinavian institute of African studies 1991 at 11.

<sup>2</sup> Abdisalam M. Issa-Salwe *The Collapse of The Somali State: The Impact of the Colonial Legacy* at 64.

competition, patronage, nepotism and corruption was taking shape in the nascent democracy.<sup>3</sup> A systemic development of what has been referred to “pervasive corruption” was taking root, total dismantling of the democratic experience gained momentum at state and sub state levels through clan competition and vested interest to the betterment of the elites. Subsequently, the notion of a state was immediately questionable.<sup>4</sup> The Somalia state or a proximate of it had proved to be a disillusion and failed to exist because of clan supremacy and leadership that never possessed a balance of vision.<sup>5</sup> The traditional socio-political patterns were incorporated in the governance structures of post-colonial Somalia. Any appointment in the government position was meant to be a representation of a clan in an act referred to as “clan balancing”.<sup>6</sup> By and large, the North- south rift played a pivotal role in degrading the democratic structures as well. The mistrust worked to ensure that the Southerners maintained an upper hand, not only politically, but administratively. By virtue of the capital being in the South it gave them a leeway to entrench nepotism and clanism to the fullest.<sup>7</sup>

In 1969, Somalia took a political trajectory common in most post-colonial Africa states; a *coup d'état*.<sup>8</sup> The post-colonial constitution was suspended and later on discarded and the democratic process came to an end.<sup>9</sup> The Siad Barre regime presented socialism as an alternative to clanism structures. But the euphoria and jubilation was short lived. The coup generals developed methods

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<sup>3</sup>JabrilAbdulle, ‘Somalia:Path to Recovery Building a Sustainable Peace’ (Center for research and Dialogue) <<http://www.somali-jna.org/downloads/Somalia%20-%20Path%20to%20Recovery%20-%20final.pdf>> accessed 2 June 2016. Publication date 2004.

<sup>4</sup>Ibid. 11.

<sup>5</sup>Michele Gonnelli (ed), ‘Somalia, Clan and State Politics’ (2013) 9 ITPCM international Commentary at 9.

<sup>6</sup>Bongartz (n 1) at 15.

<sup>7</sup>ibid at 14.

<sup>8</sup>Abdisalam M. Issa-Salwe, ibid (n2) at 70, see also, Ruth Gordon, ‘Growing Constitutions’ (1999) Journal of Constitutional Law Vol 1:3 528 at 574.

<sup>9</sup>Christiane E Philipp, *Somalia- A Very Special Case* (2005) 9 Max Planck Year book of United Nations Law 517 at 521.

and mechanism to concentrate power, censure the media and banned political parties and dissent. Despotism was coming full cycle. The promise to end the clanism became a mirage and, the melancholy did not die either. In fact, the regime had progressively developed clan structure to his dictatorship function.<sup>10</sup> Multiple state and non-state agencies were established in all levels in response to its declining popularity to control public opinion, suppress freedom of speech and civil liberties.<sup>11</sup> Mistrust among clans was used by the intelligence to expand the already existed clan cleavage and stifle the opposition agenda.<sup>12</sup> Family ties became paramount and remained the only safe retreat zones as the state became more oppressive using a plethora of instruments that went beyond state apparatus to include youth groups, women organizations, party agents and neighborhood watch groups.<sup>13</sup> Reinforcing clannism and failure to create a functioning nation state amplified just how socialism agenda proved wide contradictions.

The nationalist sentiments were equally prevalent. The regime had made irredentist claim against the neighboring countries about their Somali population. The claims culminated to a devastating war between Somalia and Ethiopia in 1977-78. Somalia lost and, the war left the government deeply unpopular, militarily humbled, economically insolvent and internationally isolated.<sup>14</sup> The North eastern part revolted in arms in the backdrop of the failed military operation.<sup>15</sup> Government response was so intense that it subjected the whole region to collective punishment with scorched earth policy, destruction of water catchment areas and civilian killings.<sup>16</sup> During this period, the

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<sup>10</sup>Abdulle (n 2); Bongartz (n 1) at 16.

<sup>11</sup>Abdulle (n 2).

<sup>12</sup>Bongartz (n 1) at 16.

<sup>13</sup>Abdulle (n 2).

<sup>14</sup>ibid.

<sup>15</sup>Bongartz (n 1) at 20.

<sup>16</sup>Abdulle (n 2).

government was on accelerated drift towards authoritarianism and turned to be the most oppressive and predatory regimes in Africa.<sup>17</sup>

By 1988 an all-out civil war was raging and, in 1991 Mogadishu had fallen in the hands of the rebels.<sup>18</sup> Although the regime had gone under, the fighting continued as a clan and inter-clan fighting continued to consume the country. Unbridled by political vengeance and clan dominance of 1960s and nourished by years of brutal oppression, the elitist attack came to surface supporting the “greed to grievance” hypothesis.<sup>19</sup>

For years, the country had not witnessed any constitutional order. The constitutional history of Somalia can only account for few intermittent years after independence. The independence constitution was mainly designed by the colonial masters and subjected to populous referendum in 1961 one year after independence. Checks and balance were well in place. There after the constitution was suspended in 1969 and later discarded in 1972.<sup>20</sup> In 1979 a new constitution was promulgated by referendum through a flawed process retaining the parliamentary system<sup>21</sup> that never worked.<sup>22</sup> After the fall of the regime, the international community and neighboring countries which were referred to as “frontline states” tried to establish order through constructive

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<sup>17</sup>Ken Menkhaus, ‘Somalia and The Horn of Africa’ (World Bank 2011) Case Study World Development Report 2011 at 2 <[http://web.worldbank.org/archive/website01306/web/pdf/wdr\\_2011\\_case\\_study\\_somalia\\_0.pdf](http://web.worldbank.org/archive/website01306/web/pdf/wdr_2011_case_study_somalia_0.pdf)> accessed 3 June 2016.

<sup>18</sup>‘A History of Mediation in Somalia Since 1988’ (Interpeace and Center for Research and Dialogue 2009) at 9 <[http://www.interpeace.org/wp-content/uploads/2009/05/2009\\_Som\\_Interpeace\\_A\\_History\\_Of\\_Mediation\\_In\\_Somalila\\_Since\\_1988\\_EN.pdf](http://www.interpeace.org/wp-content/uploads/2009/05/2009_Som_Interpeace_A_History_Of_Mediation_In_Somalila_Since_1988_EN.pdf)> accessed 4 June 2016.

<sup>19</sup>Menkhaus (n 15) at 3; Abdulle (n 2); Philipp (n 7) at 523.

<sup>20</sup>Abdisalam M. Issa-Salwe, *ibid* (n2) at 71.

<sup>21</sup>‘Somalia (1960-Present)’ <<http://uca.edu/politicalscience/dadm-project/sub-saharan-africa-region/somalia-1960-present/>> accessed 4 June 2016.

<sup>22</sup>Ruth Gordon, *ibid* (n8) at 571.

engagement with the Somalia's political leaders and clan elders. Security and economic interests of these countries were also part of the prolonged and complicated peace processes and outcome.<sup>23</sup> Numerous attempts were made with the Arta process in Djibouti in 2000 being the most successful mediation attempt since the fall of regime in Mogadishu.<sup>24</sup> A transitional National Government (TNG) with a transitional charter was put in place. The UN and a longtime ally Egypt supported the TNG<sup>25</sup> which was founded on a previously agreed formula of 4.5<sup>26</sup> where the major Somali clan will have equal representation and the minority clans will have 0.5 representations. The clan issue took a more central role being the most contested issue in the intractable conflict. The success of the TNG is highly contested with constant opposition from Ethiopia which went forth to established forum of Somali Restoration and Reconciliation Council which turned the TNG irrelevant.<sup>27</sup>

IGAD with the UN support and western countries established a new channel to foster state building process with negotiations held in Kenya from 2002-2004. The talks gave birth to a Transitional Federal Charter and Transitional Federal Parliament which Abdullahi Yussuf was chosen as president for Five years.<sup>28</sup> Although the talks had been dominated by the two opposing camps, other interest groups were also represented including the civil society and traditional elders. Like its predecessor the TFG was unable to foster a united nation. One of the main challenges was the

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<sup>23</sup>A History of Mediation in Somalia Since 1988 (n 18) at 14.

<sup>24</sup> Afyare Elmi and Abdullahi Barise 'The Somali Conflict: Root causes, obstacles, and peace-building strategies' (2006) African Security Review at 41.

<sup>25</sup> A History of Mediation in Somalia Since 1988 (n 18) at 14.

<sup>26</sup> The tribal composition of Somalia is made up of 4 major clans, *Hawiye, Darood, Dir, Rahanweyn (Digil and Mirifle)*. The 0.5 represent the minority clans which include *Bantu, Bajuni and Barawa*. The formula was established to ensure a complete representation of the clan composition of Somalia.

<sup>27</sup> Ken Menkhaus, 'Mediation Efforts in Somalia' (Center for Humanitarian Dialogue) at 37

<[http://www.hdcentre.org/uploads/tx\\_news/109MediationeffortsinSomalia.pdf](http://www.hdcentre.org/uploads/tx_news/109MediationeffortsinSomalia.pdf)> accessed 4 June 2016.

<sup>28</sup>A History of Mediation in Somalia Since 1988 (n 18) at 16.

threat from the Union of Islamic Courts (UIC) the Islamist had changed the conflict equation by introducing religion as a reference in a political discourse.<sup>29</sup> A second TFG was put in place to replace the failed one with a six-year mandate to prepare grounds for an all-inclusive government in 2012.

All the transitional charters faced legitimacy challenges in terms of their enactment process. The “frontline states” and other international parties had always expressed interest which affected the legitimacy of the document and hence their ability to bring the conflict to an end.<sup>30</sup>The main challenge has always been the inclusivity of the process and participation of the public in the constitutional discourse.<sup>31</sup>The 2004 document remain the reference document and the 4.5 formula was maintained in all the subsequent constitutions including the provisional one of the year 2012. The transitional periods have been ongoing, and the results have been very minimal in some regards and the sustainability of such a process to ensure the existence of a stable and perpetual government with the support of all and an end to the current conflict remains a question that many are asking.

## **1.2 Problem Statement**

The adoption of the 2012 provisional constitution of Somalia was a watershed event and memorable milestone in the achievement of peace in the post conflict period of the country. The

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<sup>29</sup>MemarDemeke, ‘Conflict Resolution Responses of Igad and AU to the Somalia Crises’ (2014) 2 International Journal of Political Science and Development 248 at 251; Adrews Atta-Asamoah, ‘Long Walk to Restoration: Lessons From Somalia’s Transition Process’ (Institute For Security Studies 2013) Situation Report, at 2 <[https://www.issafrica.org/uploads/SitRep2013\\_9July-Asamoah.pdf](https://www.issafrica.org/uploads/SitRep2013_9July-Asamoah.pdf)> accessed 5 June 2016.

<sup>30</sup>Afyare Abdi Elmi, ‘Revisiting the UN-Controlled Constitution-Making Process for Somalia’ <<http://www.e-ir.info/2012/09/02/revisiting-the-un-controlled-constitution-making-process-for-somalia/>> accessed 5 June 2016.

<sup>31</sup>ibid.

provisional constitution was structured to transform the political environment of the country from civil war to peace.

However, as much as this achievement was celebrated, the provisional constitution has not performed as expected in ending the conflict and it has also faced stiff opposition from different quarters of the public including the academicians, politicians, and the civil society groups. Despite the constitution being in force, issues relating to federalism, the status of women and religion in public life continue to elicit a lot of debate. In addition, the security situation has only slightly improved while fighting and killings of civilians is still rampant even on the streets of Mogadishu. The authority and legitimacy of the constitution is also in doubt prompting the question of adequacy of public participation framework used during constitution making and its approval in conferring legitimacy. The government authority is confined only to some parts of the capital and former warlords cum politicians are currently jostling for power and creating tensions while threatening the very basic fabric of the country challenging the efficiency of the federal system as enshrined in the constitution.

It is against this background that this research examines two main gaps; first, it examines the adequacy of the public participation framework used during the provisional constitution making process in conferring legitimacy and meeting peoples' expectation of ending the conflict. Second, the study examines the adequacy of the federal system of government created under the provisional constitution in ending the conflict. In a nutshell, this research examines the adequacy of the constitution making process and the federal system of government in meeting people's expectation of ending the conflict.

### **1.3 Research Objectives**

The objective of this study is to properly establish whether the current provisional constitution making process and the federal framework therein have managed to bring the conflict to an end.

The study will specifically:

- a. Analyze and asses the public participation framework under which the provisional constitution was developed and adopted and if it was adequate to conferred legitimacy to the constitution.
- b. Analyze and asses the adequacy of the federal framework in the provisional constitution.
- c. Asses how public participation and the federal framework have impacted on the conflict.
- d. Propose measures to be undertaken to improve public participation and the federal framework in the drafting the country's constitution.

### **1.4 Research Question**

1. How is the current conflict situation in Somalia related to the process of public participation and federal framework of the constitution?
2. To what extent have the constitution making process and the federal framework of the provisional constitution impacted on the conflict?
3. What are the necessary legal steps or reforms needed to improve public participation and the federal structure to ensure that the conflict is ended or substantially contained?

### **1.5 Research Hypothesis**

4. The study is based on the hypothesis that the public participation process used to make the constitution was not adequate to suppress the conflict. It is believed that the clan centric

politics that has placed the country in an abyss is still vibrant and the federal framework intended to displace it has failed to adequately address such issues and placing the country in a stable trajectory.

## **1.6 Justification of the Study**

Many have written on post conflict state building processes; the writings have been generally fragmented in specific areas without looking at the key driver of such areas: the constitution. Precisely the Somalia case has by far received very minimal writing regarding the provisional constitution as a document intended to bring the conflict to an end. It is believed that the finding of the study will help properly take stock of the current provisional constitution and how the public participation and the proposed federal framework can help end the conflict. It will further inform future process in drafting and adoption of the constitution of Somalia. The study will further help inform the region strategic move regarding its peace and stability as an important component for development which is central to all the frontline states.

## **1.7 Theoretical Framework**

The study will use two theories to explain its findings and recommendations:

### **Consociational Democracy**

The theory of consociationalism democracy stands for the government by elite cartel designed to turn a democracy with fragmented political culture into a stable democracy.<sup>32</sup> Consociationalism is mainly deployed in societies experiencing cultural, religious divergence and highly heterogeneous in nature due to their unique political culture. These natural differences either in

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<sup>32</sup>ArendLijphart, 'Consociational Democracy' (1969) World Politics 21; 2207 at 216.

race, religion, culture or even language are used as instruments of political mobilization. The actors in the consociationalism and actions are highly political than legal.<sup>33</sup> This is because the intended result is to displace conflict created by this natural yet violent susceptible differentials. There is an assumption that when properly deployed, consociationalism democracy works well in disabling conflict.

Consociationalism democracy is a moderation tool in the political set up, with its main objective being moderation by making each group feel secured mainly the minorities. Divided societies almost always have a high degree of insecurity. Dispensing such insecurity requires a level of institutional design. These designs are meant to ensure that the majority does not take it all. There basically four parameters that govern the consociationalism: grand coalition, which means all the political parties of all segments of the society jointly govern,<sup>34</sup> secondly, mutual veto, this is where there is a veto on issues pertaining exclusively to the interest of the minority. These is guarantee mechanism that its interest will not be subjected to a vote by the majority.<sup>35</sup> Thirdly, is proportionality, this is the standard in public offices and allocation of funds.<sup>36</sup> Fourth, segmented autonomy, where matters pertaining the segment and the decision making on issues pertaining the segment is mostly delegated to the segment.<sup>37</sup>

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<sup>33</sup> Arend Lijphart, 'Negotiation Democracy Versus Consensus Democracy: Parallel conclusions and recommendations' (2002) *European Journal of Political Research* 41: 107–113.

<sup>34</sup> Arend Lijphart, 'Consociation and Federalism: Conceptual and Empirical Links' *Canadian Journal of Political Science* Vol 12:3 499 at 500.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

In consociationalism theory power is normally allocated across competing interests in the society sometimes irrespective of political process.<sup>38</sup>The main reason why the political process is often given little attention is because the competing behavior of the members of sub cultures may create a cleavage making democracy highly unstable. However, a deliberate behavior of such an elite group can bring a stable position of a democracy by joining hands to what is referred to as the “union of oppositions”.<sup>39</sup>

The theory violates the principle of majority rules but, is well within the parameters of democracy. Successful consociationalism democracy will need four behavioral elements: the elite will accommodate each other’s divergent interest. Secondly, the ability of the elites to transcend the cleavages and join in common effort with other subcultures elites. Thirdly, their intention in maintaining the consociationalism system. Fourthly, the understanding of the peril of fragmentation by the competing elites.<sup>40</sup>The main drive in this arrangement is to avoid competition and create a coalition attitude using multiple mechanism including multiple balance of power.<sup>41</sup>

Law is meant to create and preserve social order and constitutions as supreme law are mainly among others, instruments intended to neutralize potential areas of conflict in a polity by creating, demarcating and organizing different centers and institutions of authority that would be potential fault lines, in summation they limit politics.<sup>42</sup>

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<sup>38</sup>Samuel Issacharoff, ‘Constitutionalizing Democracy in Fractured Societies’ (2004) 58 No 1 Journal of International Affairs 73 at 74 <<http://red.pucp.edu.pe/ridei/files/2011/08/62.pdf>> accessed 21 June 2016.

<sup>39</sup>Lijphart (n 32) at 212.

<sup>40</sup>ibid at 217.

<sup>41</sup>ibid.

<sup>42</sup> Miro Cerar, ‘The Relationship Between Law and Politics’ (2009) Annual Survey of International & Comparative Law: Vol. 15: 1: 3 20 at 21.

Factually, sovereignty lies with the people who should decide how to rule and govern themselves as an exercise of their sovereignty and as a fundamental principle of human rights which is essentially part of their inalienable rights cemented in natural law. Consociationalism is just one among many ways to ensure that not only their sovereignty is upheld but also their right and aspiration to live in perpetual peace is achieved. And this is the nexus between consociationalism as apolitical theory and law as body regulating relationship between different parties in a political set up. There is no better way to limit the behavior of the political class than through a constitutional design.

It is apparent that the constitution of Somalia adopted federalism as a system to diffuse and devolve power from the center to the periphery, however, the study holds that the use of consociationalism democracy would have been best suited to give effect to the intended results. Federalism is not a panacea for peace and in some instances, it can lead to emergence of new conflicts. And if the two are closely related how, then, would consociationalism be effective in impairing the conflict? As indicated, consociationalism operates under the four principles which can be used together with federalism. As much as federalism is still the preferred framework to govern Somalia, the way it has been provided for makes conflict displacement difficult. Federalism and consociationalism democracy work as counter majoritarian mechanism intended to limit the influence of the majority and give power to the minority.<sup>43</sup> That's why the two can complement each other. Nevertheless, the two are not always tied together, but they can function concurrently and the presence of one does not necessary infer the presence or absence of the other.<sup>44</sup> Although consociation need not

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<sup>43</sup> LJ Boule, 'Federation and Consociation - Conceptual Links and Current Constitutional Models' (1981) *Journal for Contemporary Roman-Dutch Law* 44:3 236 at 242.

<sup>44</sup> Arend Lijphart, 'Consociation and Federalism: Conceptual and Empirical Links' *Ibid* (n 34) at 512.

to be included in the constitution for it to perform its functional well, it is important to note that constitutions are responsible to create structures that will guide political life in the country and the inclusion of such in the constitution of a highly divided society provides a constitutional guarantee that are not easily abrogated.

Even though consociationalism is considered a strong devolution construct deployed in divided societies, it has been criticized in multiple ways. The opponents of the theory have elaborated numerous accounts why consociationalism is not only feasible, but it has also failed in some areas.<sup>45</sup> The opposition contends that, the power sharing is mostly temporary and not lasting, and only hold mainly during transitional period. It is further argued, that because the model relies mainly on some behavioral disposition of the elites, and it has amplified way too much the role of the elite play beyond their real bounds. The assumption that is being put forward is that, the elites would see the importance of compromise and respond positively and in good faith, an act that would also suggest the possibility of having spoilers who can make reaching a deal very distant.

Relying on the elite behavior also undermines democracy as it gives much attention to the elite's bargain than electoral outcomes. In addition, it goes along away to cement the differential identities by making them more salient. The ceding majority may not get full support from the masses and the extremists in their camp, it has the potential to appeal to the extremists to create parties in the segment which would turn the masses against the elites or create a far extreme ethnocentric parties

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<sup>45</sup> Donald L Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States' (2008) 49 William and Mary L Rev 1213 at 1219.

that will instigate for the group interest. Additionally, mutual veto can create immobilism and make decision making very burdensome.<sup>46</sup>

In light of this disqualifying factors, one would want to relook at the suitability of the model in addressing the governance gap in Somalian case. And the pitfall of identifying the model as the solution to the malfunctioning of the federal framework in the constitution which has failed to adequately dispense the conflict.

### **Constitutionalism**

The theory of Constitutionalism can be broadly understood as a theory of limited government by law.<sup>47</sup> Although it has developed in content over time, It is not entirely a novel idea especially in the western liberal world.<sup>48</sup> Despite that, it has continued to be fuzzy and lack a fixed and formal definition.<sup>49</sup> Some find it difficult to distinguish between constitution and constitutionalism and conflating the two, this confusion is surprising despite the fact that they are not mutually inclusive,

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<sup>46</sup> Ibid.

<sup>47</sup> Douglas Sturm, 'Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C.H. McIlwain' (1969) *Minnesota Law Review* Vol 54 215 at 217. See Also, Frank I. Michelman, Brennan and Democracy (Princeton University Press, Princeton, N.J. 1999) 5-6as captured in Rainer Grote and Tilman Roder (eds), 'Constitution-Making in Islamic Countries- A Theoretical Framework', *Constitution-making in Islamic countries between upheaval and continuity* (Oxford University Press 2010) at 24.

<sup>48</sup> M.T. Gibbons, ed *The Encyclopedia of Political Thought* John Wiley & Sons at 730-732 2014, See Also, Grewal, David Singh and Purdy, Jedediah, "The Original Theory of Constitutionalism" (2018). Faculty Scholarship Series. 5191 664 at 671 [https://digitalcommons.law.yale.edu/fss\\_papers/5191](https://digitalcommons.law.yale.edu/fss_papers/5191) accessed on 09 Oct 2019. See Also, David T. Butleritchie, 'The Confines of Modern Constitutionalism' (2004) *Pierce Law Review* Vol. 3, No. 1 at 1.

<sup>49</sup> M.T. Gibbons, ed *The Encyclopedia of Political Thought* John Wiley & Sons at 730-732 2014. See Also, Charles M Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 1 at 7.

neither are they synonymous.<sup>50</sup> There are numerous cases of constitutions without constitutionalism, just as they are cases of constitutionalism without constitutions.<sup>51</sup>

It is, however, imperative to differentiate between other doctrines or theories that are sometimes interchangeably used albeit inadvertently with constitutionalism: rule of law and democracy. I must prelude that although these theories are slightly different from each other they have multiple areas of convergence and are deeply related.

Like constitutionalism, the rule of law is also abstractly ambiguous. However, it does form part of the elements necessary to make constitutionalism what it is and a success.<sup>52</sup> The basic and fundamental element of the rule of law is that no man is above the law and persons in position of authority should only exercise their roles and powers without discretion but in accordance with the law which was properly established.<sup>53</sup> There are procedural and substantive elements establishing the rule of law. The form will always entail what the law as it exists and how it was made, while substantive part will be value loaded and captures issues of natural justice, democracy, equality and human right.<sup>54</sup>

Democracy on the hand, is in some instances thought to be synonymous with constitutionalism, however, in a very basic definition of democracy as the rule of the people for the people by the

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<sup>50</sup> Larry Catá Backer, 'From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems' (2009) *Pennsylvania State Law Review* Vol 113:3 671 at 675.

<sup>51</sup> Charles M Fombad, (n 49) *ibid*, at 7.

<sup>52</sup> Charles M Fombad, *ibid* (n 49) at 8.

<sup>53</sup> Jeremy Waldron, " The Concept and the Rule of Law" (2008) *Georgia Law Review* Vol 43:1 at 6. See also, F.T. Abioye, 'Constitution-Making, Legitimacy and Rule of Law: A Comparative Analysis' (2011) *Comparative and International Law Journal* 44 59 at 61. See Also, Charles M Fombad, *ibid* (n 49) at 8.

<sup>54</sup> Jeremy Waldron, *Ibid*.

people we find how different the two are.<sup>55</sup> And because it is almost difficult to undermine the centrality of democracy in any modern political set up, it is therefore, unforeseeable to have constitutionalism in undemocratic polity, but it is very well possible although in a very minimalistic definition to have democracy without constitutionalism, hence democracy is a fundamental element of constitutionalism.

The most intricate one is the difference or areas of interaction and separation between constitution and constitutionalism. Constitution is defined as “The rules and practices that determine the composition and functions of the organs of central and local government in a state and regulate the relationship between the individual and the state.”<sup>56</sup> Black law dictionary defines it as “... the organic and fundamental law of a nation...laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers...in any fundamental or important law or edict ...”<sup>57</sup> Whereas constitutionalism is in some cases defined as ‘as a set of prescriptions, a series of principles and values meant to shape and mold the constitutional arrangements of a polity in a way to comply with them’.<sup>58</sup>

This understanding provides that; constitutions reflect state of political consensus in form and substance while constitutionalism represents the fundamental principles guiding the authorship and content, which makes constitutionalism very effective during constitution making and

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<sup>56</sup> Elizabetha Martin ed, *Oxford Dictionary of Law*. Oxford University Press Fifth Edition 2002. At 108.

<sup>57</sup> Black law Dictionary.

<sup>58</sup> Carlo Fusaro, ‘Constitutionalism in Africa and Constitutional Trends: Brief Notes from a European Perspective’ in Veronica Federico and Carlo Fusaro (ed), *Constitutionalism and Democratic Transitions Lessons from South Africa*, Firenze University Press Italy (2006) at 15.

implementation.<sup>59</sup> Constitutions lacking these fundamental principles will with no doubt fail the constitutionalism test. The paradox of having constitution with no constitutionalism fades in light of this distinction. It is critical to note that the major function of a constitution is to avoid excesses emanating from the ruler and from the populous, excesses from the government nurtures tyranny, while from the populous leads to anarchy.<sup>60</sup> As much as this is the main objective of a constitutions is not always achievable, and often fails to contain these excesses especially of the ruler. This is mainly not due to the absence of a constitution but because the constitution lacked the principles of constitutionalism that were meant to ensure that the polity is governed by law.<sup>61</sup>

Constitutions are not uniform, as an expression of political settlement largely reflects the political, social and economic ideology and values of a community they have varied characteristics.<sup>62</sup> For example some which relate to socialism will contain characteristics different from what democratic ones would have. Such constitutions are highly descriptive and concentrate on the citizen's duties other than rights and can easily be abrogated by the political authority, an act which makes them deficient in constitutionalism.<sup>63</sup> Contrary to that, democratic or liberal constitutions would be prescriptive and normative reflecting or giving effect to constitutionalism.

Liberal legal and political theory that promotes constitutionalism ascended to prominence during the enlightenment period.<sup>64</sup> This theory had political and philosophical underpinnings connected

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<sup>59</sup> Ibid at 2. See Also, Charles M Fombad, *ibid* (n 49) at 6.

<sup>60</sup> Charles M Fombad, *ibid* n (49) at 6.

<sup>61</sup> *Ibid*.

<sup>62</sup> See Also, *The Foundations of Constitutionalism*, (1975) *Loyola of Los Angeles Law Review* Vol 8 507 at 512, See also, F.T. Abioye, (n53) *ibid* 61.

<sup>63</sup> Louis Henkin, 'Elements of Constitutionalism' (1998) *International Commissions of Jurists Review* (1998) *Review* No 60 11 at 11.

<sup>64</sup> David T. Butleritchie, *ibid* (n48) at 6.

with the social structure of the time.<sup>65</sup> Which means the content of constitutionalism, was equally a reflection of certain historical circumstances, and by that, it is always subjected to changes like any other societal demands albeit incrementally. Therefore, the content of what amounts to constitutionalism today differs from what it was in the 17<sup>th</sup> century.<sup>66</sup> Which makes it important to know what exactly amounts to constitutionalism.

And because constitutions can be without constitutionalism, scholars have enumerated normative prescriptive characteristics to be found in a constitution that would reflect constitutionalism. This is because constitutionalism as a guiding principle is about constitutions and constitution making.<sup>67</sup> These elements include: the sovereignty of the people and derives its authority from the will of the people. It prescribes a representative government responsible and accountable to the people the governmental authority is to be exercised only in accordance with law established pursuant to constitutional processes and consistent with constitutional prescriptions and limitations. Government is for the people but is limited by a bill of individual right. The government is fractured by some separation of powers or other checks and balance. The system provides for constitutional review by a court or other independent institutions with authority to monitor compliance with constitutional prescriptions and to provide remedies against their violation Constitution cannot be suspended, circumvented or disregarded by political organs of government, and that it can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in a constitutional mode...".<sup>68</sup> These

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<sup>65</sup> Carlo Fusaro, *ibid* (n58) at 18.

<sup>66</sup> Harvey Wheeler, 'The Foundations of Constitutionalism'(1975) *Loyola Law Review* 507 at 507 (1975) Sturm, Douglas, *ibid* (n 47) at 217.

<sup>67</sup> Carlo Fusaro, *ibid* (n 58) at 15.

<sup>68</sup> Louis Henkin, *ibid* n 46 at 12. See Also, Carlo Fusaro *ibid* (n 58) at 21. Charles M Fombad, *ibid*, (n 49) at 6, See Also, Harvey W heeler, (n 66) at 513. See Also, David T. Butleritchie *ibid* (n 48) at 6. Carlo Fusaro, *ibid*,

elements are not in any way exclusive and final, but they largely represent most and foundational ones. Collectively they are of impotence and hardly would it be possible for one to be present in exclusion of the rest. However, two of these would particularly relate closely with the objectives of this study: the people are sovereign, and the derivative rights that emanate from it and judicial review.

Constitutionalism postulates the existence of two set of legal discourse, the primary and fundamental law and the secondary laws derived from it. The hierarchy between the two is of fundamental importance in creating legitimacy. It follows that, if the people are sovereign then the laws should reflect their aspiration, more importantly the fundamental law and they should actively participate in its making. Therefore, the process under which these laws are enacted or promulgated and translated into an enforceable legal instrument is central in upholding the constitutionalism's pillar of populous sovereignty.<sup>69</sup> As indicated in this study, constitutionalism is highly and directly related constitutions and constitution making. Lack of populous participation in making of any constitution will fatally affect its legitimacy. Actually, the main issue about what exactly constitutionalism really addresses is not "whether but how "the people" were understood to participate in government...rule themselves".<sup>70</sup>

The spirit of constitutionalism would prescribe public participation as a reflection of people's sovereignty and an important element of the process of constitution making. The sovereignty of the people also prescribes substantive provisions as well; where their fundamental rights will be

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<sup>69</sup> Carlo Fusaro, *ibid*, David T. Butleritchie *ibid* (n48) at 8.

<sup>70</sup> David Singh and Purdy, *Jedediah*, *ibid* (n 48) at 669.

up held and models to curb any attempt to water them down by the legislation or acts of the executive.<sup>71</sup> Until recently, constitutionalism had assumed that the power of the parliament as a representative of the populous should be and continue to supreme.<sup>72</sup> This was so until it there came the invention of judiciary review to “impeach” or declare administrative acts of government or acts of parliament unconstitutional and to firm up the sovereignty of the people.<sup>73</sup>

Judiciary review has a tremendous effect in cementing the principles of rule of law as an element of constitutionalism and also, broadly fortifying constitutionalism by declaring laws or actions of the government unconstitutional, basically denying the majority the prerogative of some issues considered fundamental.<sup>74</sup>

The theory of constitutionalism offers the solution within a legal framework. Here, besides its foundational principle of popular sovereignty, the judicial review process becomes extremely important in limiting the range of decision the political elite can undertake whether during constitution making or after.<sup>75</sup> Public participation is fundamentally a reflection of people’s sovereignty and the absence of people in the constitution making process cannot be underrated. It is meant to ensure voices of the people irrespective of their social, economic or political standing and power is herd and represented in what is contemporary known as a social inclusion and

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<sup>71</sup> David T. Butleritchie, *ibid* (n 48) at 14.

<sup>72</sup> Harvey W heeler (66) at 547.

<sup>73</sup> *ibid* at 550.

<sup>74</sup> Carlo Fusaro *ibid* (n 58) at 27.

<sup>75</sup> Issacharoff (n 38) at 73.

participation.<sup>76</sup> It is basically an attempt to ensure the victor or the more organized does not devour the process to his interest in breach of the principles of constitutionalism and the rule of law.<sup>77</sup>

The constitution making process of the transitional constitution of Somalia was carried out in an environment where there were still a lot of mistrust and fighting. It was necessary to ensure trust is built and that comes when all parties to talk with each other. It was paramount that what important was for the public to participate in the process. It could have been easily achieved by deploying the principle of constitutionalism and the public would have been given an opportunity to actively participate in the constitution making process in exercise of their sovereignty.

In addition. The judiciary plays a significant role in building trust and enforcing the sovereignty of the people in upholding their right to participate. And in such an environment judicial review process would have been of great importance. This process is very crucial in ensuring that elite interest does not override the interest of the population and the rest of the population feels safeguarded by the fundamental law.

Public participation as an integral part of upholding the sovereignty of the people goes a great deal in creating the very much needed legitimacy in the post conflict environment like Somalia. Where absence of legitimacy is almost the reason why such conflicts range unfettered. These two represents a fundamental aspect of constitutionalism in constitution making. Absence of such would make it very difficult for people to hope that other elements of constitutionalism would ever

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<sup>76</sup> Carlo Fusaro *ibid* (n 58) at 24-25.

<sup>77</sup>*ibid*.

be developed. It is well noted, these elements by and large protect the interest of many and hardly do society with this entrenched values slide into conflict or fail to resolve their political differences.

The theory has been deeply entrenched in the global legal framework and it has been widely accepted. But that doesn't mean it has gone without dispute. Constitutionalism assumes that individual right will always trump over collective gain, and the aim of any government is to facilitate the well being of the individual. This premise, however, is not universal. Basing on its historical context and build on certain philosophical underpinnings and development, its difficult to assume the whole world would develop on those same lines. It is also clear, that countries have multiple social and historical limitation which by and large differs distinctly from the western approach. This disparity would often guide the creation of constitutions. The fundamental question is that, if individual good is meant to be achieved, does it always need to come through western political and legal framework, the answer is definitely no.

## **1.8 Literature Review**

There has been relatively more literature in academics on post conflict constitution making process over the recent past increasingly touching on the process, giving more emphasis on modes of participation and minimizing further polarization. Yet, there has been relatively lower attention on the potential ability of transitional or interim constitutions as instrument of conflict settlement.<sup>78</sup> However, the available literature, despite its scarcity, has attempted to clearly analyze the role of transitional or interim constitutions in a wider conflict settlement process.

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<sup>78</sup>Ozon O. Varol, 'Temporary Constitutions' (2014) 102 California Law Review 40 at 420.

### **Transitional/ Provisional/ *Interim* constitutions**

Transitional constitutions phenomena are not an oddity or an invention of recent times as its widely assumed, in fact the world had witnessed many such arrangements especially during decolonization period and in United Nations mandated territories<sup>79</sup>. Nonetheless, post conflict nation building has proven to be an uphill task in many jurisdictions due to intricacy and emotions surrounding the process and the dissatisfaction of the final outfit of such constitutions by the competing parties. The main challenges facing post conflict constitution making is that the parties associated with the process are the same people who were until recently been engaging in civil wars and its expected of them to formulate a document that will not only settle the conflict but that will imbue the nature of the state, identity and governance institutions. In addition, trust and legitimacy have, jointly, an intrinsic bearing among players in the post conflict context. While is imperative to ensure that there are no more hostilities or active armed engagements during the period, it is equally necessary to appreciate that post conflict constitutions as a new social contract between citizens and state institution need to be highly futuristic in terms of elaborating the rule of engagement and promoting sustainable peace. This outcome, however, postulates that the merging of peace-making process and constitutional state making goal is highly integrative. At this juncture, therefore, it is worth interrogating the ability of post conflict interim constitution in settlement of conflict and more in particular Somalia's provisional constitution.

If the term post conflict provisional constitution is broken in to its constitutive elements, it will be clear that the term attracts some range of similarities with other forms of agreement during the conflict period. In addition, the connotation attached to the document as being provisional might

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<sup>79</sup>Ibid at 413.

give a false impression on the document to be less binding and deficient in legitimacy compared to permanent constitution which, although amendable is always considered to be enduring.

To start with, one might generally fail to appreciate the intricate difference between a peace agreement and a provisional constitutional settlement in a fluid transitional political arrangement. Different conflict case studies have projected different approaches in both sequence and content of constitutions. A transitional constitution may be part of the negotiated peace agreement as the case of South Africa, or a peace Agreement containing a constitution as the case of Bosnia or a comprehensive agreement giving birth to a constitution like the South Sudan case.<sup>80</sup> It follows, therefore, that a peace agreement as captured by Bell and Fulscher is "...a formal document that is publicly produced after discussion with all (or some) of the conflict's protagonists".<sup>81</sup>

On the contrary, provision constitution is defined as "...a constituent instrument that asserts its legal supremacy for a limited period of time pending the enactment of a contemplated final constitution".<sup>82</sup> While the definition seems to put the difference between peace agreements and provisional constitutions to an end, it raises other issues in regards to how distinct provisional constitutions are in relation to permanent constitutions and why the distinction is important. It is clear rather from the definition above that Provisional constitutions will maintain fundamental

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<sup>80</sup>Kirsti Samuels, 'Post Conflict Peace Building and Constitution Making' (2006) 6(2) Chicago Journal of International Law 663 at 664.

<sup>81</sup>Christine Bell and Kimana Zulueta-Fulscher; *Sequencing Peace Agreements and Constitutions in the Political Settlement Process*, (Policy Paper No 13 International Institute for Democratic and Electoral Assistance) 2016 at 18. See also, Kimana Zuleta Fulscher, *interim Constitutions Peace Building and Democracy Building Tools* (Policy Paper Institute for Democratic and Electoral Assistance 2015) at 9.

<sup>82</sup>ibid at 19.

characteristic of a permanent constitution, and this is regarding how power is shared in a political set up and being an ultimate legal reference point albeit temporarily.

It however differs from a permanent constitution in terms of time frame of its applicability. This is because interim constitutions mainly intend to fill a gap in a political scene where there are no institutions or legitimate ones and create time for sober engagement and negotiations.<sup>83</sup> While the provisional constitutions will have a sunset clause and contemplate their life span, a permanent constitution will only consider methods of amendments and how it can be repealed. With these in mind, it becomes difficult to assume that permanent constitutions are permanent in the strict sense of the word, and what it basically entails is that; it is enacted without expecting the enactment of a successive document.<sup>84</sup> It is a point of no contention however that, irrespective of its interim nature, the provisional constitution has the same legal force as a permanent one and more often forms part of the final or permanent constitution.

### **Transitional Constitutions and Conflict Transformation**

Recent experiments have clearly shown that developing sound institutions is key to sustainability of peace in any post conflict set up. It thereby becomes paramount that, without clearly addressing ways of transforming political and governance environment any conflict settlement will hardly prevail as noted by Samuels. In his observation he noted that "...conflict cessation without modification of the political environment, even where state-building is undertaken through technical electoral assistance and institution- or capacity-building, is unlikely to succeed. On

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<sup>83</sup>Celia Davies, *Interim Constitution in Post-conflict setting* (Kimana Zueltra Fuelscher, Asanga Welikala, Sumit Bisarya, Christine Bell eds, Discussion Report International Institute for Democracy and Electoral discussion report December 2014) at 5 , Kimana Zuleta Fulscher (n 81) at 6.

<sup>84</sup>Kimana Zulueta-Fülscher (n 81) at 8.

average, more than 50 percent of states emerging from conflict return to conflict most countries have shown tendency of spilling back to violence after cessation of hostilities or have resulted in weak democracies...".<sup>85</sup> Traditionally, constitutions have played a central role in addressing these deficiencies mainly in post conflict situations. As the case often is, Horowitz has clearly mentioned that hardly will any constitution come to be without being presided by conflict circumstances.<sup>86</sup>This is an indication that, constitutions have a functional role in diffusing and crippling violence in post conflict set up. What this suggests also, is; preferring a transitional or permanent constitution is a matter of procedure.

Tietel presents that; historically, constitutions or constitution making periods have numerously presented an opportunity for a people to collectively embrace a common agenda and move towards civil engagement. Considering an idealist approach, constitutions have, at least during transitional periods been considered as "agents of change", this is however contrary to realists who consider it to be "...more than a reflection of the balance of power...", this view cements the realist appreciation of a negotiated transition as a political event and a constitution as an extension of politics.<sup>87</sup> The latter view does not in Tietel analysis provide any distinctive value to the constitution in transitional times. Oppositely, the idealists have in Tietel observation an elaborate and compelling explanation though not sufficient on the role of constitution in transitional

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<sup>85</sup> Samuels (n 80) *ibid*.

<sup>86</sup>Donald L. Horowitz, 'constitution Making: A Process filled with Constraints' (2006) 12 (1), *Review of Constitutional Studies*, 11 at 10. See also, Yash Ghai and Guido Galli, *Constitution Building Process and Democratization. Lesson learnt* (International Institute for Democracy and Electoral Assistance 2006) at 5.

<sup>87</sup>Ruti Tietel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (2009) 106 *Yale law Journal* at 2053. See also, Samuels (n 80) at 667.

periods.<sup>88</sup> In their approach he explains; constitutions have a foundational role in providing a "constitutional moment" from the old regime to a new political order.<sup>89</sup>

More importantly, in his analysis Tietel has shown how transitional constitutions have been highly instrumental in brokering a political shift from an authoritarian rule towards democracy, and has shown the propensity and ability to mediate between antinomies of "...backward versus forward, retroactive versus prospective, continuity versus discontinuity, individual versus collective law versus politics..." these purposes with its attached importance, are however, not the end stage or the presumed constitutional moment, rather an agents in the transformation process.<sup>90</sup> This kind of brokerage might happen as a result of long and painstaking political negotiations or as a result of rapturous war. It follows therefore that transitional constitutions are not only designed to stifle and limit active conflict but also in constructing the transition as Tietel explains.<sup>91</sup> With this functionality, it is never sufficient as Samuels contends to have a constitution as a final document but rather an inclusive process through which the constitution especially the transitional one is made. This process helps to promote inclusivity in fragile transitions.<sup>92</sup> The position explained by Tietel is mainly based on the assumption that law, and this case the constitution is instrumental in or can be an instrument of positive social change. This view is very contentious in understanding the role of law in politics. The Tietel analysis does not however, indicate instances where law becomes an obstacle to political process and the consequences of that especially during transition

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<sup>88</sup>Ibid at 2059.

<sup>89</sup>Ibid at 2055.

<sup>90</sup>ibid 2079.

<sup>91</sup>Ibid.

<sup>92</sup> Samuels, (n 80) at 667.

However, this proposition is true given the foundational role played by constitution during the constitution making instances.

### **Public Participation and Conflict Transformation**

As much as transitional constitutions have the ability to transform conflicts it is never sufficient to formulate a constitution that resembles a contract or a covenant and expect to create a working consensus on the practices of governance as observed by Hart.<sup>93</sup> Contemporary conflicts as Hart elaborates "... are within nations as much as between nations, concerns identity as much as territoriality are participatory rather than declaratory..."<sup>94</sup> such challenges and conflicts will definitely demand a different and a modern approach and the crisis at hand will require more than mere "...structuring and legitimating of institutions of limited powers..." as the main objective and method.

This modern approach will rather be an approach that is highly responsive to identity and inclusiveness of a nation and increasingly participatory.<sup>95</sup> In criticizing the old approach, Weiner and Della Sala have suggested that the "old" constitutionalism referring to the old approach in making constitutions, has limited ability to address the conflict challenges of the twenty first century, as a result, they suggested adoption of what is referred to as "new constitutionalism" approach which departs significantly from the old constitutionalism.<sup>96</sup>The new constitutionalism

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<sup>93</sup>Vivien Hart, 'Constitution-Making and the Transformation of Conflict' (2001) 26 (2) *Peace and Change* 153 at 154

<sup>94</sup>Ibid at 156.

<sup>95</sup>Ibid.

<sup>96</sup>Antje Weinner and Vincent Della Sala, 'Constitution-Making and Citizen Practice-Bridging the Democracy Gap in the EU' (1997) 35 No 4, at 549, Hart (n 93) at 156.

considers constitution making as a " working consensus" and not an event of "documenting outcomes or codification of a settlement".<sup>97</sup>

This statement eradicates the process where only elites used to determine the process and content of constitution. This approach places individuals in the middle of political engagement other than on the fridge. With this approach, Hart points that such engagements elevate the process to a higher level of negotiation, continuous conversation in governance and conflict transformation. However, the old constitutionalism has not and should not be completely displaced with the new one, this is because it also concentrates on equally important parts of constitution making and nation building mainly; exercise of power in a polity and creation of institutions even when these elements remain to be increasingly essential.

However, Hart suggests that conventional constitutionalism be augmented and the role of creation of institutions will be required in addition to "politics of cultural recognition". These two approaches create a converging point between the two axes of finality and debate inherent in two constitutional approaches.<sup>98</sup> This approach is very essential in communities facing acute divisions, either racial, religious or even ethnical. Recognition of communities has become paramount in managing political challenges. In the Somalian case, the conflict was mainly instigated by lack of social recognition expressed in terms of marginalization, and any reconstructing process intended should recognize communities in a fundamental manner.

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<sup>97</sup>Hart, (n 93) at 160.

<sup>98</sup>Hart (n 93) at 160, see also Weiner and Della Sala (n 96) at 550.

This is consistent with what Weinner and DelaSalle among others have argued and established that "...consent of the people is necessary for a liberal democratic order to be considered legitimate...".<sup>99</sup> Conflict is essentially a violent rejection of existing political arrangements or its ineffectiveness in addressing the challenge faced by a people. Hart emphasizes that "...these people must be heard in the process of constitution making...citizens have reactively rejected constitutions emanating from elite or intergovernmental organizations...".<sup>100</sup>The propositions presented here creates an impression that conflict is mainly as a result of exclusion not capturing other causes that might influence conflict like external interference. In addition, they present cultural recognition as a solution to this challenge.

Cane on his end suggests that there are currently three models articulated to properly frame public participation: popular, contributory and contestatory.<sup>101</sup> The first one is normally deployed in elections and referendums when ratifying and or amending constitutions while the other two are often used to approve subsidiary laws and guide policy direction, the popular part is of concern to this study.<sup>102</sup> According to Wengert, public participation represents the relenting spirit of minimizing state control and expanding the realm of the people, it is a continuous effort to explain the relationship between the government and the governed.<sup>103</sup>

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<sup>99</sup>Weinner and Dela Salle (n 96) at 551, Yash Ghai, (n 86) at 14, Hart (n 93) at 160. Abrak Saati, Participatory Constitution-Making as a Transnational Legal Norm: Why Does It "Stick" in Some Contexts and Not in Others?' (2017) UC Irvine Journal of International, Transnational, and Comparative Law Vol. 2:113 at 114, See Also, Norman Wenger, 'Citizen Participation: Practice in Search of a Theory y' (1976) Natural Resource Journal Vo 16 23 at 33. See Also, Angela M. Banks, 'Expanding Participation in Constitution Making: Challenges and Opportunities' 49:4 William and Mary Law Review 1043 at 1049, See also, Zachary Elkins et al 'The Citizen As Founder: Public Participation in Constitutional Approval' (2011) Temple Law Review vol 18 101 at 112.

<sup>100</sup> Hart, (n 93) at 156.

<sup>101</sup> Peter Cane, 'Participation and Constitutionalism' (2010) Federal Law Review Vol 38 319 at 829.

<sup>102</sup> Ibid.

<sup>103</sup> Norman Wengert, (n99) ibid at 33.

Importantly, there is always trust issues in post conflict settings, and when the public effectively participates and potentially marginalized groups feel or deem to be controlling or having a stake in influencing the political outcomes it, by great length, addressed the trust deficiency issue.<sup>104</sup>

The public participation notion has since become an international norm more so in post conflict constitution making.<sup>105</sup>

Bank weighs in and mentions that contemporary wisdom is highly suggestive that process is crucial as the content for purposes of legitimacy.<sup>106</sup> Besides legitimacy, Bank also suggests that, public participation also brings other positive outcomes like it embodies the ideals of democratic inclusion in plural society by encouraging the public to engage, it also advances social justice but providing avenues where citizens will air their issues and be considered, it also presents that as a result of this inclusivity and listening it help understand public plight and create enabling environment to produce high quality solutions.<sup>107</sup>

This citizen centric approach has been fundamental in passing the legitimacy test and the concept of public participation has lately been central in granting legitimacy to constitutions. In such a participatory environment it is believed that people become more committed to the constitution irrespective of the degree and significance of their participation in the process. What he is suggesting is that; public participation touches strongly on the sovereignty of the people which magnifies representation and self-determination. The fact that constitutions could previously be

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Angela M. Banks, (n99) ibid at 1048.

<sup>107</sup> Kathryn S. Quick and John M. Bryson 'Theories of public participation' in Jacob Torbing and Chris Ansell (ed) Handbook in Theories of Governance, 2012 Edward Elgar Press at 3.

negotiated, written and even endorsed by lawyers and politicians made the enterprise very undemocratic, and elitist negating the democratic principles. It is important that public participation shouldn't be seen as a condition for constitution making but part of it. It is not an event that happens once, but it works through the entire constitution making process to the end.

How, then, does public participation in relation to constitution making relate to or contribute in transforming a conflict? As illustrated by Hart, contemporary conflict is mainly intra state, unlike previous conflicts and this is mainly fueled by lack of recognition of the constitutive parts of the society. To put this into context, Wenner and Della Sala have illustrated the presence of two elements in a contemporary nation state structure: individual and polity/ community, these two must interact in what is referred to as 'citizen practice'.<sup>108</sup> But the citizen part or the public is not always uniform, homogenous, they represent different and sometimes conflicting social and economic interest as Tully displays.<sup>109</sup>

The public participation part tends to give recognition to these groups and allow them to exercise their democratic rights or what is known as "civil dialogue".<sup>110</sup> It is crucial to deconstruct the 'public', 'citizens' and people in so far as participation in constitution making is concerned. Tully has indicated that the concept of 'Citizen' tends to presuppose uniformity of the whole in real sense they are not homogenous. And each group which could also be internally fragmented strive for recognition. Ghai on his end contends the idea of grouping a wide segment of the populous as one. He explicitly mentions that there is nothing like the "people" rather, there are" religious groups,

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<sup>108</sup> Wenner and Della Sala, *ibid* (n96) at 602.

<sup>109</sup> James Tully, *Strange Multiplicity: Constitutionalism in the age of Diversity*, University of Cambridge Press (1995) at 9.

<sup>110</sup> Hart, (n93) *ibid*, at 166.

ethnic groups, the disabled, women, youth, forest people...lawyers, doctors...all pursuing their own agenda".<sup>111</sup>

This tension for lack of recognition is given life by the process of participation by placing racial, cultural equality at the center of the process. The overriding assumption is that; when the public has participated in writing and endorsing a constitution irrespective of their inclination whether racial or otherwise, the constitution would then command acceptance and legitimacy, which is paramount in evading conflicts, this is because conflicts are almost always a statement rejecting the prevailing political condition and eroded legitimacy. This position creates a causation relationship between public participation and legitimacy and between presence or absence of legitimacy and conflict.<sup>112</sup> Public participation is not the only measure to be met in constitution making for purposes of establishing peace and it cannot solely do that, but without it, peace would be difficult to achieve either, as Ghai puts it Public participation will be better understood in a context of factors contributing to legitimacy.<sup>113</sup> Irrespective of its importance, there are no specific approach to this participation and at what level should the public be involved. The new constitutionalism has transformed this process to consider public participation as a continuous process that involves the initial stages of constitution making to implementation.<sup>114</sup> But exactly to public participation? Or what is the irreducible minimum capable of granting the expected legitimacy to displace violence? Wedner, points out among almost seven models of public participation that varies in

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<sup>111</sup>Ghai, (n 86) at 15.

<sup>112</sup> Zachary Elkins et al, (99) *ibid* at 119. See Also, Jennifer Widner, 'Constitution Writing and Conflict Resolution' Research Paper No. 2005/51 at. Wedner has demonstrated extensively and empirically the evidence suggesting the relationship between participation in constitution making and conflict reduction in different parts, also,

<sup>113</sup> Ghai, *ibid* (86).

<sup>114</sup> Jennifer Widner, (n 112) *ibid*, at 2.

scope and style, that violence reduced substantially in areas where deliberative body was elected and people agreed on negotiated rules before the constitution making process.<sup>115</sup>

The conflict in Somalia is a representation of how marginalization can spark violence, so much that it consumes the country for more than two decades. The attempt to reconstruct the political structure should not be done in an elitist manner but rather encompass the cultural recognition element, in Somalia it should be an issue of clan recognition. The adoption public participation could along away to dissuade waring factions from continuing in the violent path and engage in a civil dialogue to address their concerns. The legitimacy needed to ensure that people follow the command emanating or reflecting the constitutional functions can only be achieved when people feel to have been part of the process. And safeguarding the gains they still need to be part of the process.

Conversely, participation per se does not confer legitimacy or guarantee implementation of the document as critic would suggest. In fact Devra Moehler in his analysis of the relationship between public participation and legitimacy, he has indicated that little relationship exists between public participation and legitimacy in reference to Ugandan constitution.<sup>116</sup> Furthermore, Ghai has indicated that there are variable instances where constitution making process involved high level of public participation but the document had very limited impact on the political system as many of the provisions were constantly ignored and the spirit undermined.<sup>117</sup> Moreover, public debate as Elster called it might in some instances lead the elite to develop hard position and makes

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<sup>115</sup> Ibid, at 9. See Winder above for extensive analysis of the report.

<sup>116</sup>Ghai, (n 86) at 242.

<sup>117</sup>Ghai, (n 86) at 14.

negotiations difficult and in some cases creating stubbornness, overbidding and grandstanding. Conversely, close door discussions could be of high quality and framers can easily accept an opposing position if convincing facts are present.<sup>118</sup>

Admittedly, with this variation and, in addition to the fact that there are no quantifiable standards and widely accepted forms of public participation, the concept remains undoubtedly important but unfortunately fluid. It is appreciated that more often there are issues so complex which may require comparative understanding that the public might find it excessively difficult to comprehend.

## **Federalism**

The process of constitution making has always been important, however, the content of the same has equally brewed so much debate. Different circumstances have made certain constitutional design choices preferable and conflict is one of them. Because of conflict, many countries will develop modalities of addressing fears and diminished level of trust to restore the country's prosperity. Federalism appears to be one of the mechanisms.

According to Elzar, federalism is a form of political organization which appreciates political power and work towards achieving political justice through provisioning of proper political

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<sup>118</sup> Jon Elster, 'Forces and Mechanism in The Constitution Making Process'(1995) 35 Duke Law Journal 365 at 388. Devra Moehler and Eleanor Marchant, 'A multi-Dimensional Model of Participatory Constitution Making Process and Legitimacy University of Pennsylvania, at 10. Tom Ginsburg, Justin Blount, Zachary Elkins, 'The Citizen as Founder, Public Participation in Constitutional Approval' (2008) 81 Temple Law Review 361 at 371. For insightful recognition of the limitation of public participation -ONLY- as an instrument to democratize communities and improve the peace environment and prospect and also how public participation can work in some instances and fail in others as the case in Zimbabwe See, Abrak Saati, *The Participation Myth Outcomes of participatory constitution building processes on democracy* (2015) Umea University Press Umea at 270. The book provide

environment.<sup>119</sup> Federalism, he suggests, intends to find political justice which is paramount to have political peace and shape political behavior and guide people towards the two.<sup>120</sup> To him, the main aim of federalism is to establish justice which is paramount in establishing peace, especially in nations where there is lack of homogeneity. Basically, federalism must be understood as a framework and away of responding positively to challenges associated with diversity.<sup>121</sup> Elazar would put it as a "... linkage of individuals, groups and polities in lasting but limited unions in such a way as to provide for energetic pursuit of common ends while maintaining the respective integrity of all parties...".<sup>122</sup> It disperses power from central part to all other composing entity of a polity. This analysis is only suitable in cases where polities have emerged because of covenants not as subjects of a conquest. In the case of Africa, the Nation state did not come into being out of voluntary formation but only emerged from the commissions of the colonialist.<sup>123</sup> However, of importance here, is to appreciate that, federalism as an agent of separation of power, and that it assists in stabilizing political entity, distributing government good and increasing efficiency by decentralizing power and empowering the constituting entities.<sup>124</sup>

It differs greatly from unitary form of government while shares much with other forms of devolution: confederacy and federacies. There are different types and models under it, but the most common one is known to be "... a national union whose constitution is the supreme law of the

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<sup>119</sup> Daniel J. Elzar, *Exploring Federalism*, University of Alabama Press at 1.

<sup>120</sup> Ibid, at 2.

<sup>121</sup> Tsegaye Regassa, 'Learning to live with Conflict, Federalism as a Tool of Conflict Management in Ethiopia an Overview' (2010) 4 Mizan Law Review 52 at 62, Donald L. Horowitz, 'The Many uses of Federalism' (2007) Duke law Review Vol 55 953 at 957.

<sup>122</sup> Daniel J Elazar, 'Federalism and The Way to Peace, institute of Intergovernmental relation, Queen's University Kingstone Reflection Paper No 13 at 21.

<sup>123</sup> Eghosa Osaghae: *Federalism and the Management of Diversity in Africa*, (2004) Identity, Culture and Politics Vol 5:1 and 2 162 at 166.

<sup>124</sup> Peter C. Ordeshook, 'Constitutional Stability' (1991) Social science working paper 779 at 27.

land but in which authority and power are divided and shared by a general and constituent governments”.<sup>125</sup>

There are primary and fundamental elements of federalism that are worth of being explained. Lijphart has enumerated these two elements: the primary element is that the activities of the government is divided between regional and central government in such a manner that enables each parts of the government to make final determination on some issues.<sup>126</sup> In addition to this, the federal element is in a written constitution, the parliament is bicameral, there is equal or disproportionately strong representation of the smaller units, decentralized government and the right of units to be involved in changing of the federal constitutions and retain the right to unilaterally amend theirs.<sup>127</sup>

Lijphart on his part has made considerable distinction between consociationalism and federalism, the comparison is important because as they both serve the same purpose and contain some common elements including that they both seems to provide accommodation to different segments of a plural society without interfering with territorial integrity,<sup>128</sup> some might find them equally the same. However, despite these similarities, the most glaring of difference of all is: federalism is territorial while consociationalism is not.<sup>129</sup> Despite the differences, they can and often overlap.

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<sup>125</sup> Daniel J. Elazar *Federalism: An Overview*, in *Federalism: Theory and Application* (Ed) Bertus de Villiers 1995 HSRC Publishers Pretoria at 6.

<sup>126</sup> Arendt Lijphart, ‘Consociation and Federation: Conceptual and Empirical Links’ (n 34) *ibid* at 502.

<sup>127</sup> Robert H. Dorff, ‘Federalism in Eastern Europe: Part of the Solution or Part of the Problem?’ (1994) *The Journal of Federalism* Vol 24 99 at 100, See Also, Arendt Lijphart, *Consociation and Federation: Conceptual and Empirical Links*, (n34) *ibid*.

<sup>128</sup> Arendt Lijphart, *ibid* at 499.

<sup>129</sup> *Ibid*, See Also, Daniel J. Elazar, exploring federalism, (119) *ibid* at 20, Elazar has extensively discussed the differences between the federalism and consociation while acknowledging the anti-majoritarian tendency of the two. See also, Boule, L, ‘Federation and consociation conceptual links and current constitutional models’ *ibid* at 238.

Consociation can be achieved within the federal institution and vice versa.<sup>130</sup> There is, however, a question that does seem not to be responded to by Lijphart; if consociation would perfectly work within the confines of federalism or if consociation would work like federalism, why, then, would one resist the idea of merging the two and avoid having the two concurrently? Lijphart however, believes that federalism would perfectly work as a means of achieving consociation.<sup>131</sup> This would basically mean modifying consociation or federalism and they cannot reflect the concepts in their original format. Lijphart seems not to have considered the short-term effect of consociation as a tactic of unity. This is because consociation, would, in most instances deal with groups and serve a political agenda specific to a period and might change with the variation of demographic shift.

### **Federalism and transformation of conflict**

The invention of federalism was entirely destined to manage and curtail the human disposition of weakness towards power. The framers of American constitution had to come up with both vertical and horizontal structures of power division to create a balance.<sup>132</sup> The balance that they thought would only be effective through institutional design rather than through human choice. This, to a certain limit, has always been the reason why federal structure is captured in a constituting document like a constitution. But that would address the challenge thought to be associated with scale. Currently, the main challenge especially in Africa is accommodating diverse communities with diverse interest.<sup>133</sup> Considering what Horowitz has suggested, federalism can have effect in multi ethnic structure in different ways beyond the territorial factor and can be structured in away

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<sup>130</sup> Ulrich Schneckener, 'Making Power-Sharing work Lessons from Successes and Failures in Ethnic Conflict Regulation' (2000) Institut für Interkulturelle und Internationale Studien Universität Bremen at 6.

<sup>131</sup> Lijphart, 'Consociation and Federation: Conceptual and Empirical Link' (34) *ibid* at 515.

<sup>132</sup> James Madison, *The Federalist*, (1788) No 51.

<sup>133</sup> Eghosa Osaghae: 'Federalism and the Management of Diversity in Africa' (n123) *ibid* at 168.

that will disperse power and minimize possibility of a conflict.<sup>134</sup> This kind of remedy prescription by Horowitz cannot be patched or easily transplanted without critically analyzing specific need of each country. However, they almost always premised on two fundamental reasons behind any federal structure: maintaining political integration and countering majoritarian tyranny.<sup>135</sup> What it seems to be changing to differentiate between structure and process especially in the failed examples. While there could be a well fir federalism structure the process could fail to raise to the occasion and mainly by the actors.<sup>136</sup> It is of little surprise then, when most federal states as per Bermeo indicates that armed rebellion are three times more common among groups living in unitary than in federal states and most stable multinational democracies are federal including India, Switzerland Canada and Belgium.<sup>137</sup> These success stories do not rely on one specific approach rather they tend to consider federalism as a set of mechanism designed to respond to specific governance deficiency and multiple approach are used to reinforce the effectiveness of the federalism.<sup>138</sup> Important to note is that, there are several cases of failed federalism, which by accounts of some federalism proponents like Elzar have suggested several reasons why such experiences have failed and much so in Africa.<sup>139</sup>

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<sup>134</sup> Donald L. Horowitz, many Uses of Federalism, n (122) *ibid*, 958-962. Horowitz has enumerated almost seven structures of federalism responding to diverse challenges faced by plural societies and how some constitutional design of federalism can respond to such, See Also, Andrea Iff , 'Peace-Promoting Federalism: Making Sense of India and Nigeria Publius' (2013) Vol 43:2 227 at 227.

<sup>135</sup> Ahmed T el-Gaili, 'Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan' (2004) 45 *Harvard International Law Journal* 503 at 516.

<sup>136</sup> <sup>136</sup> Robert H. Dorff, 'Federalism in Eastern Europe: Part of the Solution or Part of the Problem?' (n127) *ibid*. at 104 and the writer suggest the disjunction between the two have led to the usage of federalism to suppress minorities and worse when federalism is reversed.

<sup>137</sup> Pipa Norris, *Driving Democracy*, (New York, Cambridge University Press, 2008) at 73.

<sup>138</sup> Andrea Iff, (n134) *ibid* 241.

<sup>139</sup> In his expansive account on Federalism he has mentioned almost seven reason 1)Imposition from outside without local involvement( Cameroon, Ghana and Uganda,2) Ascendancy of a string man mostly in post-colonial Africa( Ghana, Libya)and competing interest (The East African Community)3, Intense ethnic fighting beyond the ability of the federal system to positive impair due to the fighting falling precisely in the middle of the political cleavage( central African federation and Zimbabwe) 4, lack of human resources; the spirited men to serve, 5) Federal inclined political culture, 6, Lack of sufficient common interests, 7) Unbalanced federal arrangements also rarely succeed

The Somalian politics has always been a fight between the center and periphery, including the current contestation between Somaliland and the rest of Somalia. Somaliland is claiming independence from the rest of Somali due to inequality that existed way immediately after independence and remain as such for the longest the union had stayed. In addition, the rest of Somalia which for the longest time before the civil war was replete with cases of seclusion, nepotism and marginalization.

The federal system is, therefore, intended to fill this human disposition to control and deprave the rest of the population any political goods due to their clan affiliation or origination. The multiple clan centric politics has dissected the politics and made many participants lose the sense of national vision. But just like all other federal cases, the failure and success are highly dependent on several factors, most of which is attributed to the actors.

That withstanding, federalism is not a panacea to all political problems neither is it intended to create a state of perpetual peace. In fact, it can be effective in solving old problems but also generate new ones. It follows therefore, federalism as a form of decentralized system, tend to minimize the occurrence of conflict rather than eliminate it. Somalia unlike other multi ethnic countries, is a highly homogenous at the high level but highly differentiated at the clan levels. These real or assumed differences have been politically instigated and mobilized against each other creating the same political challenges faced by other multi ethnic countries. Federalism as a system, together with other constitutional designs, is capable to transform the conflict.

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See Daniel J. Elazar, exploring federalism, (n119)ibid at 245, See Also Eghosa Osaghae: Federalism and the Management of Diversity in Africa, (n123) ibid, at 166, See Also, Andrea Iff , ibid at 234.

There are several challenges facing federalism as a system of government that make many shy away, but the main issue lies in assuming that federalism is very unstable due to intergovernmental competition.<sup>140</sup> In Africa, the fear was mainly seen that federalism is a recipe for disintegration and fragmentation of the political unit.<sup>141</sup> The benefit of Federalism or decentralized system of government has come under criticism from some quarters. Critics argue that federal structures may encourage breakup of nation states. Extreme disparities in demography and wealth of federal units may exert pressure and contribute to stress and calls for more autonomy among the units which will eventually propel or fuel instability.<sup>142</sup> This is mainly because more often, federal boundaries are drawn along ethnic lines which might encourage local politicians to play the ethnic card for purposes of popularity generating high intra- ethnic cleavages.<sup>143</sup>

From the above literature, studies have been carried out in relation to nation building, the role of constitutions in conflict management but, very little has been written about the process of the and the federal system provisional constitution of Somali and how it has impacted in the ongoing conflict. That is the gap that this study intends to fill and analyze whether the current constitution and the process followed, and the state structures enshrined in the transitional constitution can end the conflict and eliminate or highly reduce the prospects of conflict.

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<sup>140</sup> Jenna Bednar, *Federalisms: Unstable by Design* (1997) at 4.

<sup>141</sup> Alemante G Selassie, 'Ethnic Identity and Constitutional Design for Africa' (1992) *Stanford Journal of International Law* 29:1 at 9, See Also, Richard Simeon, 'Constitutional Design and Change in Federal Systems: Issues and Questions' (2009) *The Journal of Federalism* Vol 39: 2 241 at 244.

<sup>142</sup> Pipa Norris, *Driving Democracy*, (n137) *ibid*, at 73.

<sup>143</sup> *Ibid*, at 73.

## **1.9 Scope and Limitation of the Study**

Geographically, the study will focus on Somalia. The study will also only focus on the provisional constitution of Somalia of 2012 in as far as its making process and federal structure is concerned. There will be examination of case study of Ethiopia, but the main objective will remain to study the process and the federal content of Somalia's provisional constitution.

Time limitation will limit the process to desk-based research and, there will be no interviews, questionnaires and focus groups. Due to the current situation in Somalia and financial limitations it would be extremely difficult to conduct field study.

## **1.10 Research Methodology**

This study adopts a purely qualitative methodology premised on a combination of both descriptive and analytical research designs. The descriptive methods will clearly describe the issue under study: the transitional constitution making process and the federal structure as contained in the interim constitution. At this point the aim will be to provide accurate representation of what the process was like with clear interest on the public participation part of the process and also, provide accurate representation of the federal structure of government.

The descriptive method deployed here remains to be the best method used in studies of this kind, this is because the aim is first to know how public participation was conducted without any interference to the variables to give a picture of what the situation is or was and lastly draw a correlation between.

The case study here will be Somalia and the data required in this approach will be mainly the available material detailing what and how the public participation process was undertaken and how

is the federal system captured in the interim constitution to identify the challenge and gap in line with the research questions, the research will then deploy analytical methods to further test the hypothesis and analyze the issues described in an attempt to reach a conclusion of the stipulated research questions and develop solutions to the challenges presented.

The methodology to be applied in this study will comprise of both primary and secondary sources of data. Primary sources include an analysis of the provisional Constitution 2012. Secondary sources of data shall include books, journal, articles, reports, publications, and internet searches. The data obtained through primary and secondary methods shall be described and then analyzed through the descriptive and analytical research designs.

### **1.11 Chapter Outline**

This study is divided into the following chapters

#### *Chapter one: Introduction to the study*

This chapter provides an overview of the study comprising the background to the study, problem statement, research questions and objectives, hypotheses, justification, theoretical framework, literature review and research methodology.

#### *Chapter two: Constitutions and Conflict Settlement*

This chapter will analyse the instrumental role of constitutions in conflict settlement and its ability to transform and develop mechanism of settlement of political differences from civil confrontation to civil discussion and dialogue.

#### *Chapter three: Public Participation and The Federal System in The Provisional Constitution of Somalia 2012.*

This chapter will provide a historical background of the Somalia's constitution and what is meant to achieve. The analysis in this chapter will rely on theoretical framework discussed in chapter one to capture the processes of public participation and federal system of the constitution and identify its ability as an instrument of conflict settlement.

*Chapter four: Public Participation in The Post Conflict Constitution Making and The Federal System: The Case of Ethiopia*

This chapter will consider the model of public participation in the making of a post conflict constitution for conflict settlement in Ethiopia. This case study will provide a case of what can be anticipated when the public participation is not very inclusive also, the ineffective of federal structure where it is not properly modeled to respond to ethnic and issues

*Chapter five: Summary Finding, Recommendations and Conclusion.*

This will be a concluding chapter where the summary of the study will be laid and how they relate or sync and reflect with the hypothesis previously stated in chapter one. Based on that there will be reasonable recommendations for improvement and enhancement in the conclusion.

## CHAPTER TWO

### POST CONFLICT CONSTITUTIONS AND SETTLEMENT OF CONFLICT

#### 2.1 Introduction

Most countries in the southern part of the globe were subjects of colonial hegemony for the better part of the nineteenth and twentieth century.<sup>144</sup> The end of colonial rule mainly in Africa was a culmination of long negotiations between the elites and the colonialists.<sup>145</sup> The settlement created a dichotomy of offering; the nationalist's elites got their demands of independence in one part, and the colonialists attained the inculcation of western model of economy and government in their colonies' respective independent constitutions.<sup>146</sup> With the exit of the colonialist, the legal and constitutional legacy left behind was, by and large a reflection of European legal enterprise which resonated widely with the European historical context.<sup>147</sup>

At independence, the ruling elites were faced with myriad of challenges which unfortunately they responded with equal or more brutal methods than previously employed by colonialists.<sup>148</sup> The elites, whom with nearly zero public participation had approved a constitution of a new polity, and thereafter undertook an expedited journey to amend the constitution with an accelerated impetus to improve their position of power and authority devoid of any democratic semblance.<sup>149</sup> Consequently, most constitutions lacked its utility and failed to address citizens' expectations and

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<sup>144</sup> Stephen Ocheni and Basil C. Nwankwo, 'Analysis of Colonialism and Its Impact in Africa' (2012) *Cross-Cultural Communication Canadian Academy of Oriental and Occidental Culture* 8(3), 46 at 46.

<sup>145</sup> Edmond J. Keller, *Decolonization, Independence and the failure of Politics* at 157.

<sup>146</sup> Ruth Gordon, (n8) *ibid*, at 539.

<sup>147</sup> *Ibid*.

<sup>148</sup> Edmond J. Keller, *ibid*, at 166.

<sup>149</sup> Ruth Gordon, (n8) *Ibid*, at 538.

accelerated institutional decay.<sup>150</sup> These events ultimately precipitated into calls for change through either armed struggle or political movements.

In most parts of Africa, the call and demand for a new constitution was indeed an attempt to reconstruct a state in hitherto divided nation and address inequalities and fractured governance and democratic systems that ought to have accommodated the population. With the fall of the soviet empire and the emerging wave of democratization in the last decade of the Twentieth Century, constitutions have been widely used as agents for reengineering states and an instrument for restoring peace and enhancing development.

This Chapter analyses the instrumental role of post conflict constitutions in conflict settlement and its ability to transform and develop mechanisms of settlement of political differences. Somalia and other countries in the Horn of Africa have in the recent past experienced civil strife and constitutional instability. This lack of constitutional instability is attributed to, among others, ethnic seclusion, religious domination, and lack political representation.<sup>151</sup> Protracted political differences have often led to violent conflicts and wars. In the long run, and more often these issues have prompted the enactment of new constitutions, which have been increasingly been expected to be a good stabilizing tool in a political crisis.<sup>152</sup>

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<sup>150</sup> Ibid at 544.

<sup>151</sup> Valeria Piergigli 'The Constitutional Transitions in the Horn of Africa: Problematic Balancing among Traditional, Religious, and Liberal Values, ( 2003) North East African Studies, Vol 10, No. 3, 249 at 250.

<sup>152</sup> Hart (n 93) at 158. Ghai and Ghalli, (n 86) at 7.

## 2.2 Post Conflict Constitution

The late Twentieth century witnessed an upsurge in constitution making in most part of the world particularly in the southern hemisphere of the globe.<sup>153</sup> This trend was by and large influenced by the decline of the Soviet Union's influence in the global arena and equally an increased wave of democratization.<sup>154</sup> The increasing demand from marginalized communities for more representation also exerted more pressure for state restructure and new constitutional dispensation as a condition for putting down arms.<sup>155</sup> Traditionally, constitutions were documents used to cement, formalize and codify a consensus in a polity and establish a political community.<sup>156</sup> They equally establish the framework for sharing and exercise of power.<sup>157</sup> The traditional constitution has been forward looking in achieving a common need and aspiration of peace by deflating an abstract cause of anarchy and instability bypassing the current threat of a conflict.<sup>158</sup> The main aim, among others was to tame the human behavior of selfishness and abuse of power.<sup>159</sup> It was engineered and structured more appropriately to deflect future tensions in the polity between the government and the populous.<sup>160</sup>

However, a conflict context presents a different set of challenges in the political and legal set up of a country. Conventional constitutions are inherently incapable of fully capturing and responding to such political revolts. This is because, constitutions establish a basic and foundational political

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<sup>153</sup> Hart, (n 93) at 153.

<sup>154</sup> Samuel P. Huntington, *Democracy's Third Wave* (1991) *Journal of Democracy* Vol 2 12 at 12.

<sup>155</sup> Hallie Ludsin, 'Peacemaking and Constitution-drafting: A Dysfunctional Marriage' (2011) *University of Pennsylvania Journal of International Law*, Vol. 33 at 242.

<sup>156</sup> Hart (n 93) at 155.

<sup>157</sup> Ghai and Ghalli (n 86) at 7.

<sup>158</sup> Ruti Tutel, (n87) at 2054, See also Ludsin, (n55) at 247.

<sup>159</sup> Martin H. Redish and Matthew Hein, 'premodern Constitutionalism' (2016) 57 *William and Mary Law Review* Vol 57 1825 at 1830.

<sup>160</sup> Ludsin at (n155 ) 241.

arrangement and, eruption of conflict is an indication of its ineffectiveness and proposes to disrupt and reconstruct a new political foundation.<sup>161</sup> And it is in such politically volatile circumstances constitutions are made.<sup>162</sup> During such periods of political violence, the political and legal landscape of a country responds to the challenges faced by formulating a constitutional moment where fears and expectation of the parties are addressed but never anchored in ordinary legislation but in “higher” law making process which more often is undertaken by the “people” to transform the conflict and establish a new political foundation.<sup>163</sup> This process gives birth to a post conflict constitution which is intended to transform the conflict and the conflict environment.

The new constitution is considered as a device to reconstruct a new future for the country and plays a central role in appreciating the relationship between politics and constitution as a legal text.<sup>164</sup> The functionality of post conflict constitutions emanates from the view that peace is best achieved through a detailed process of peace building. And to achieve peace building objective, state building process must be undertaken which comprises of an intentional approach to build and strengthen institutions of governance adjudication and conflict resolution frameworks. In addressing such issues comes the role of Post-conflict constitutions which have the ability to undertake such objectives perfectly.<sup>165</sup>

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<sup>161</sup> Tietel, *ibid* (n 87) at 2055, see also, Horowitz, (n 86) at 8, See also, kim lane Scheppele, ‘A constitution between past and future’ (2008) *William and Mary Law Review* Vol 49 11 1377 at 1377, See also Samuels, (n80) at 667, See Also, Ulrich K. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization’ (2006/7) *New York Law school Law Review* Vol 51 468 at 469.

<sup>162</sup> Ludsin (n155) at 242, See also, Elster, (n118) at 371, See also, William W. Van Alstyne, ‘Quintessential elements of meaningful constitutions in post-conflict states’ (2008) *William and Mary Law Review*, Vol 49:1497 at 1499. See also, Scheppele (n 161) at 1378, See Also, Preuss, (n 161) *ibid*.

<sup>163</sup> Hart, (n93) at 158.

<sup>164</sup> Christine Bell, ‘Introduction: Bargaining on Constitutions – Political settlements and constitutional state-building’ (2017) *Global Constitutionalism* (2017) 6:1 13 at 21.

<sup>165</sup> Ludsin (n155) at 243, Bell, (n164) *ibid* at 18.

Nevertheless, during conflict periods, political landscape becomes excessively volatile and requires some time to cool the temperatures. And with the legitimacy of the incumbent authority in question, post conflict constitutions have taken up the peacemaking role and broker political settlements.<sup>166</sup> This kind of constitutional development is however contextualized as part of political transition, and by that it requires good sequencing in mitigating constrains and limitations. In transitional periods, constitutions are never developed wholesomely but incrementally and through “fits and starts”<sup>167</sup>. This is because conventional constitutions are considered “... monolithic, enduring ...forward looking and prospective”, qualities that will not sufficiently address the challenges of transition and as such given that the transitional constitution phenomena are “ambivalent” in its directions and propels principle of constitutional justice which by and large is retrospective in nature in addressing previous injustices.<sup>168</sup> Therefore, many constitutions during such periods are done under interim measures to avoid making decisions under constrains.<sup>169</sup>

### **2.2.1 Interim Constitutions**

The idea of constitutions addressing political complexities is never new.<sup>170</sup> The modern conflict has been interstate than between states and, issues of identity, redistribution of resources, electoral process and legitimate exercise of power have proven to be in the center of most conflicts.<sup>171</sup> The global practice has been that; during or immediately after cessation of hostilities an interim constitution is developed to address specific issues; bring the parties on the table, stop proliferation

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<sup>166</sup> Ludsin (n155) at 242. See also, Bell, (n164), *ibid* at 19.

<sup>167</sup> Tietel, (n 87) at 2057.

<sup>168</sup> *Ibid*, See also, Ludisn (n7) at 246 See Also, Horowitz, (n86) at 8, Elster (n118) at 373.

<sup>169</sup> Ludsin,(n155) *ibid*, See also, Elster, (n118) at 365.

<sup>170</sup> Bell (n164), *ibid* at 20.

<sup>171</sup> Hart, (n93) at 153. See also, Yash Ghai and Guido Ghalli (n86) at 8.

of conflict, bestow legitimacy, build the eroded trust and maintain some stability among others.<sup>172</sup> Admittedly, constitutions codify set of agreements and national values and establish institution of governance.<sup>173</sup> But well before that, parties must always engage in a prolonged negotiation and nearly all instances of constitution writing are covered with many uncertainties, indecisiveness and inadequacy about the future, which any attempt to have a permanent constitution immediately after a conflict is highly erroneous.<sup>174</sup>

Interim constitutions are defined as constitutions that “limit its own terms and lapses at its expiration date unless reenacted through regular constitutional amendments procedures”.<sup>175</sup> It is also defined as “a constituent instrument that asserts its legal supremacy for a certain period pending the enactment of a contemplated final constitution”.<sup>176</sup> The interim constitution could take a different form depending on the political context, some constitutions form part of a peace agreement while some are separately developed.<sup>177</sup>

Despite having some common functions, there exist differences between peace agreements and interim constitutions. Peace agreements are more exclusionary than interim constitutions both in terms of process and substance and they highly focus on narrower interests to placate parties to the conflict and are highly interested in stopping the violence.<sup>178</sup> But importantly, the peace agreements

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<sup>172</sup> Teitel, (n45) at 2057. See also, Celia Davies, (n 41) at 10. See also, Jennifer Widner, (n112) *ibid*, at 1534. See also, Charmaine Rodrigues ‘Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-Cooker of Transitions in Conflict-Affected States?’ (2017) *Global Constitutionalism* 6:1 13 at 23, See also, Kirsti Samuel, (n38) at 664.

<sup>173</sup> Ludsin, (n155) at 247.

<sup>174</sup> Kim Lamae Scheppele, (n 161) at 1405.

<sup>175</sup> Varol, ( n78) at 415.

<sup>176</sup> Kimana Zulueta-Fülscher, *Interim Constitutions Peacekeeping and Democracy-Building Tools*, (n81) at 9.

<sup>177</sup> *Ibid* at 8. Ludsin, (n155) at 247.

<sup>178</sup> Kimana zulueta – Fulscher, (n81) *ibid*, Ludsin, *ibid*.

do not enjoy the legal and legitimacy of interim constitutions, and in addition, the opacity of the legal status of a peace agreement emanates from a range of issues other than the content of the agreement itself.<sup>179</sup> Hence, a peace agreement could have far reaching legal implications if parties to it agree to make it so. It is more common to have interplay between a peace agreement and an interim constitution by the virtue that these processes tend to be driven within the same time span. However, they are both designed to achieve solutions to political disputes and in some instances a peace agreement would be an integral part of an interim constitution.

They are numerous benefits in using interim constitutions in times of political turmoil. First, it helps in providing the basic framework to address political paradoxes that are hardly addressed by ways of ordinary politics and make parties negate violence as an instrument of politics.<sup>180</sup> Secondly, the process of making permanent constitutions during conflict times give birth to inherent tensions and constrains to the participants and this is due to multiple limitations and constrains in a conflict environment. Some of constrains that would inevitably come to play include; sequencing tension, time frame tension, long term and short-term tension, and, tension within the participants. Interim constitutions minimizes such tensions and constrains.<sup>181</sup> Thirdly, interim constitutions handle the political challenges experienced in a polity in an “incremental and experimentation manner” which have positive impact on both the quality and quantity of information to be incorporated in the final document based on real experiences.<sup>182</sup> Fourthly,

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<sup>179</sup> Christine Bell, ‘Peace Agreements: Their Nature and Legal Status’ (2006) *The American Journal of International Law* Vol 100 373 at 378.

<sup>180</sup> Arthur J. Jacobson, ‘Transitional constitutions’ (1992) *Cordozo Law Review* 14 947 at 954, See Also Ben Nwabueze (2003) *Constitutional Democracy in Kenya and Africa vol 2: Constitutionalism, Authoritarianism, and Statism*, Spectrum Books Limited, Abuja, at 119.

<sup>181</sup> Ludsin (n 155) at 251, Jon Elster, (n118) at 373

<sup>182</sup> Varol, (n78) at 412.

interim constitutions tackles the “cognitive biases” problem where the drafters in the aftermath of a political crisis lean towards achieving quick wins and immediate political interests, interim constitution gives parties ample time to digest issues and put long term interests into perspective.<sup>183</sup> Fifth, temporary constitutions help keep the constitution free from the influence of the drafters on the future generations and avoid a trap where drafters often capture issues in the constitutions with finality denying future generations the easy way of amending the constitution a phenomenon referred to as “dead hand”.<sup>184</sup> Conversely, there are numerous drawbacks that can arise from the interim constitution. First, the participating parties could be complacent to reach a conclusion on the final constitution and prolong the transitional period.<sup>185</sup> Secondly, interim constitution may allow short sighted parties to delay the transitional period for the benefit that they already enjoy. They work to kill the need to have substantial change and the process suffers natural fatigue and lack of attention.<sup>186</sup>

Given the conflict situation, drafting and promulgation of interim constitutions is equally an uphill task filled with multiple challenges. Among the challenges faced is the multiple tensions it creates and conflict of divergent interest of the contending parties. Parties to the conflict strive to strike gains and might develop immediate interests obscuring the long-term objections of a constitution. The interim constitutions will have certain characteristics besides the time limit. It would often limit itself in terms of substantive issues and addresses them in minimum forms and elaborate on the election timelines and the interim period as well as the mechanism of writing and enacting a

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<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Charmaine Rodrigues, ‘Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-Cooker of Transitions in Conflict-Affected States?’ (2016) University of Edinburgh School of Law Research Paper 23 20 at 34 to 43.

<sup>186</sup> Varol, (n78) at 416.

permanent constitution.<sup>187</sup> All These steps are done with an aim of cooling temperatures and restoring peace in an environment with little or diminished trust among the contending parties.<sup>188</sup>

### **2.3 Interim Constitution and Settlement of Conflicts**

Interim constitutions come to being during a period of highly political flux and form part of the transition, and as such, the process towards their enactment creates political tension. In addition, the parties will more likely be pulling in the opposite directions; the incumbents being in favour of the status quo or elements of it and the opposition interested in establishing change. These unique situations make the interim constitution both back ward and forward looking.<sup>189</sup> The idea on constitutions taking part in addressing political challenges is not new, and recently, there has been a countervailing rise of appeal on the functionality of constitutions to be at the center position to midwife political settlements and resolve conflicts.<sup>190</sup> They, in fact, represent a converging point of two different processes of: peace agreement and constitutional making. The fusion of these two processes which were until recently considered to be serving short and long-term interests respectively, have created a more conducive environment for peace making and constitution making simultaneously.<sup>191</sup>

The functionality of an interim constitution as a peace-making tool is achieved through variant of means. It will be inaccurate to suggest a uniform method or a necessity of using all or specific combination across all conflict areas. However, the utility of majority; or combination of some

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<sup>187</sup> Nwabueze (n30) at 12.

<sup>188</sup> Widner, (n 112 ) at 22.

<sup>189</sup> Teitel, (n 145) at 2052.

<sup>190</sup> Bell (n 164) at 19.

<sup>191</sup> Ludsin (n 155) at 247.

mechanisms have proved effective. There are mainly two approaches in looking at the document in assessing its conflict resolution function. First; is the procedural part which include the drafting, consultations, deliberations, adoption and promulgation process. Second, is the content or substance of the document which focuses on diffusing the tension through creation of sound institutions and governing structures that assist in creating inclusivity and hence maintaining peace.

In dissecting the procedural part, interim constitution acknowledges the relationship of the rigidity of a legal text and the elasticity of elite bargain in settling conflicts. To this end, the interim constitutions applies "new" constitutionalism.<sup>192</sup> This is in addition to its application of "old" constitutionalism of creating power maps and developing institutions and limiting the government and protecting fundamental rights in what is referred to as "institutional architecture" to pass the legitimacy test of a liberal democratic constitution.<sup>193</sup> The "new" constitutionalism which incorporates what has been referred to as "cultural reignition" and brings all segments of society together to form participatory constitutionalism.<sup>194</sup> The two approaches are not mutually exclusive, rather the new model is an expansion of the old. The two approaches; institutional architecture and cultural recognition when augmented create two qualities to address conflicts. The former appreciates the power map of the polity which refers to the content of the document and the latter insists on public participation which refers to the procedure of the constitution making.<sup>195</sup>

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<sup>192</sup> New constitutionalism is variation of "old" constitutionalism in as much as the new Constitutionalism takes to account and sensitive the demos or citizens are actively engaged in the political decision making especially constitution making and their political role is recognized, and as a result their wishes would be reflected in the constitution and how they will relate to each other as citizens or political community. See Antje Weiner et al *ibid* at 597-601.

<sup>193</sup> Weiner and della Sala (n52) at 598.

<sup>194</sup> Varol, (n78) at 156.

<sup>195</sup> Varol (n 78) at 158.

Cultural recognition plays a key role in establishing a wider social consensus in settling political disputes.<sup>196</sup> In societies where diversity based on ethnicity, religion or culture are used to propel or become instruments of political mobilization and political positions are refracted or conflated to mean conflict among the different groups, processes and recognition of citizen composition plays a great deal in settling conflicts.<sup>197</sup> It is in such circumstances that interim constitutions put emphasis on a democratic procedure that include participation, transparency and accountability to increase chances of peace.<sup>198</sup> Importantly, to settle conflicts interim constitution employ its feature of not being finale in codification of political agreements but create a ground for continuous civil engagement and a making it a process and not an event, which is essential in the provisioning of means to end a conflict.<sup>199</sup>

This continuous discussion and lack of finality in the document open grounds for negotiations among the society and key groups actors. It allows political players representing different interest groups come together for round table discussions, conferences and media debates and the public is actively involved.<sup>200</sup> Often, this process minimizes a possibility of the negotiations being dominated by elites only without incorporating wider “ideological spectrum” a scenario often creates a situation of “division of spoils” and create “long term power divisions, restrict power agenda and limit government accountability”.<sup>201</sup> By making the interim constitution a process

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<sup>196</sup> Rhodri C. Williams ‘Constitutional Assistance and the Rule of Law in Post-Conflict Transitions: An Overview of key trends and actors’ Maria Nystedt, (ed) Folke Bernadotte Academy (2013) at 31. Ludsin (n155) at 247.

<sup>197</sup> Sujit Chaudhry, Bridging comparative politics and comparative constitutional law: Constitutional design in Divided society, from Sijiui Chaudhry Constitutional design for divided societies: integration or accommodation oxford university Press (2008) 1 at 5, Samuels, (n80) 667.

<sup>198</sup> Samuels (n80) *ibid*.

<sup>199</sup> Tietel (n 87) at 2062, Varol, (n78) at 167.

<sup>200</sup> Jamal Benomar (2003) Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries, United Nations Development Programme, at 3.

<sup>201</sup> Samuels, (n80) 670.

rather than an event, elites are exposed to multiple options and ways to advance their interest and accommodate differences in a less competitive manner and reduce cleavages and group competition.<sup>202</sup> The process greatly influences the sense of inclusion, national unity, ideology, trust and importantly; help show and reflect the sovereign nature and the will of the people, as well as their valuable contribution.<sup>203</sup> This feeling creates a sense of local ownership and improve the legitimacy of the document.<sup>204</sup>

Through the public participation process the convergence of all stakeholders greatly addresses sources of conflicts among communities and candidly conversing and improving the feeling among the parties that the document is just and has a high level of success.<sup>205</sup> Public participation during interim constitution making process represent the very need for recognition of all societal segments and their interests and deviates from traditional viewpoint of constitutions being a reflection of power consolidation of a victorious dominant class or ethnic group.<sup>206</sup> This approach has assisted in dampening all form of animosity and legitimize state authority and reduces the tension and increases the feeling of inclusivity in the process which greatly diminishes probability of any conflict.<sup>207</sup>

Public participation in constitution making, especially in a conflict set up is understood to confer legitimacy and acceptability.<sup>208</sup> It is crucial however that for wider participation the word “people”

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<sup>202</sup> Lijpart (n27) 216.

<sup>203</sup> Williams (n 196) at 12.

<sup>204</sup> Ibid at 12.

<sup>205</sup> Widner, (n112 ) at 5.

<sup>206</sup> Gahi (n40) at 13.

<sup>207</sup> Issacharof (n38) 74, Samuels, (n80) 666.

<sup>208</sup> Ghai and Gutrel, (n86) 10, See Also, Jennifer Widner. ‘Constitution Writing in Post-conflict Settings: An

is normally disaggregated to include the “religious groups, ethnic groups, the disabled, women, youth, forest people, pastoralists, sometimes ‘indigenous peoples’, farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, and practicing, failed or aspiring politicians”.<sup>209</sup> These diverse groups of people compose of individual who need to have active citizen engagement with the institution.

Public participation is not by any means an end on its own, rather a forum for negotiation and a process intended to diffuse the feeling of being marginalized which is mainly the reason behind conflicts and by addressing it, the conflict is highly restricted. The contents of the constitution are by all purposes been the key items of discussion and a source of political drift, contestation and violence. Therefore, the parties are often concerned on how and to what extent have the concerns, fears and the structural dysfunction of the previous constitution is being addressed.

By and large constitutions are “power maps” and most conflicts will emanate because of a section of the population feel marginalized or being sidelined in participation in the management of the country and resources. To address this deficiency, the content of a constitution becomes important. Interim constitutions as an instrument of conflict settlement addresses these challenges through institutional architecture or design. Among the ways deployed to deflate or settle conflict in a divided society are; consociational democracy, constitutionalism and federalism.

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Over view’ (2008) 9 William and Mary Law Review Vol 49 1513 at 1515 See Also, Sujit Chaudhry, Bridging comparative politics and comparative constitutional law: Constitutional design in Divided society, from Sijiui Chaudhry Constitutional design for divided societies: integration or accommodation oxford university Press (2008) ibid at 6.

<sup>209</sup> Ibid at 15.

This study will entertain the discussion of these three tension deflating mechanisms to establish how the contents of an interim constitution can be used to stop and or avert a conflict. Typologies developed in discussing democratic system have been based on three important structural components; electoral system (proportional representational Vs majority rules) political system (Centralized Vs Decentralized) and the structure of society (Homogenous Vs Heterogeneous).<sup>210</sup> There exists a very strong relationship between political culture and social structure on one hand and political stability on the other hand. Countries which enjoy a high degree of homogeneity and differentiated role structure tend to be more stable, while there are countries with high degree of heterogeneity, fragmented political culture tend to be immobile and highly unstable, the third system are heterogeneous but stable.<sup>211</sup> These challenges are even made worse in the absence of “cross cutting interests” or “overlapping membership” which always tends to create moderation in a polity. To understand the stability of the third system irrespective of being heterogenous and fragmented Lijphart, introduces a third variable “the behavior of the elite” in explaining the stability in those countries.<sup>212</sup>

Consociationalism works towards eliding the challenge of the majority rule in a divided society by including every group in the government<sup>213</sup>. Interim constitution in divided societies works to build this kind of cooperation among the elites. Because it works as a system of guarantee for parties involved in the negotiations. There are basically four important features of consociational democracy; First, the government is formed through a grand coalition of all significant segments

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<sup>210</sup> Renske Doorenspleet and Huib Pellikaan, ‘Which Type of Democracy Performs Best?’ (2013) University of Warwick, published in *Acta Politica International Journal of Political Science* (2013) 48 3 at 237 at 242.

<sup>211</sup> Lijphart, ‘Consociational Democracy’ (n 32) *ibid*, at 209.

<sup>212</sup> *Ibid*, 211.

<sup>213</sup> Donald L. Horowitz, Donald L. Horowitz, “The Many Uses of Federalism (2007) *Duke Law Review*,” Vol 55 956, at 1214.

of the society; Second, segments of society have equal veto for some issues and may vote separately on issues that matters entirely to them, Third, all positions in the government are allocated proportionately including allocation of resources. Proportionality is the principle for allocating political representation including public funds, and civil service positions; Fourth, there exist a degree of autonomy in management of segments' "private" issues.<sup>214</sup> In this structure of accommodation, the dichotomy of government and opposition is repealed by the fusion system model where the opposition exists within the framework of government. The system encourages compromise, tolerance and accommodation and there is no winner takes it all situations.

Generally, a political system which is defined by sharp political cleavages and fragmented interests will hardly be stable. <sup>215</sup>This instability cuts across the social strata from the masses to the elites. But outside these cleavages which could, and often does exacerbate political tension and instability, the elites could have a deliberate engagement to counter the effect of the existing social and political fragmentation. More often than not, this counter fragmentation process happens in a post electoral stage through power sharing arrangements and cabinet slots in the government. Nevertheless, this process can be further stretched to be incorporated in the electoral system or in a constitution interim or otherwise to curb any foreseeable instability or potential of another civil strife. <sup>216</sup>

Although the system seems to go against the democratic norm of majority rules, it's quit politically stabilizing especially when stakes are high. In Lebanon for example, the civil war had consumed

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<sup>214</sup> Issacharoff, (n38) at 74.

<sup>215</sup> Lijphart, Consociational Democracy (n 32) *ibid*, at 209.

<sup>216</sup> *Ibid*, at 214.

the country for more than a decade and when an accord was reached the divided country opted for a consociational government where top executive positions were shared among the rival parties; in this case religious groups.<sup>217</sup> Likewise, to avoid the recurrence of civil war in Colombia, the two parties agreed to have the presidency rotational every four years.<sup>218</sup> Essentially, there exist variety of methods within which the consociational democracy works, but the main characteristic is that it creates the stability of the system. Examples ranging from heterogenic states of continental Europe to Africa all strive to create a stable system where elites can compromise within the system without falling apart. Religion and ethnicity are the main challenge of the modern political institutions and seclusion based on these are also the major sources of crises.

With its promising abilities, consociationalism has not gone uncontested. Majorly, it has been vouched to be able to displace conflict in divided societies which it has in some cases failed to present the expected results and succeeded in some.<sup>219</sup> These mixed cases of success and failure have made some to question just how viable is consociation? The major flaw in the system as some would put it is that it reinforces the same divisions and cleavages it intends to manage and make governing an uphill task.<sup>220</sup>

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<sup>217</sup> Ibid, at 213.

<sup>218</sup> Horowitz, "The Many Uses of Federalism" (n 62) at 1237.

<sup>219</sup> Samir Makdisi and Marcus Marktanner, 'Trapped By Consociationalism: The Case of Lebanon' (2009) Topics in Middle Eastern and North African Economies, electronic journal, 11, Middle East Economic Association and Loyola University Chicago, Vol 9 1 1 at 12. See Ulrich Schneckener has provided comprehensive analysis of several cases where consociation has succeeded and failed and some factors that led to each outcome. cases of both failed and success See Ulrich Schneckener, Making Power-Sharing Work Lessons from Successes and Failures in Ethnic Conflict Regulation (2009) Institut für Interkulturelle und Internationale Studien

<sup>220</sup> Samir Makdisi et al ibid at 3, See also, John McGarry and Brendan O'Leary, Consociational Theory, Northern Ireland's Conflict, and its Agreement 2. What Critics of Consociation Can Learn from Northern Ireland' (2006) Government and Opposition, Vol 41 2 249 at 251.

It also, fails to recognize how powerful external parties could be or how much influential the neighbors could be.<sup>221</sup> The workings of consociation has also failed to imagine scenarios beyond the nation state formation as a unit of politics and hence it has been seen to very weak in the promotion of self-determination.<sup>222</sup> The other important part is that, when working exclusively as political vehicle, it comes out that consociation is highly concerned with politics of the day than foundational institutional design like electoral design.<sup>223</sup> It is no doubt that consociation can, as it has shown, bring peace in divided society, but the fact that it relies on behavior of the elites to counterweight the bias tendencies of their base is, in itself a variable of failure.<sup>224</sup> There are conceptual, normative and prescriptive challenges engulfing consociationalism which might make it practically incoherent.<sup>225</sup>

While consociational democracy is a highly political adventure full of compromises and negotiations, countries especially those emerging from conflict and are highly fragmented, tend to ring fence their hard-earned democracies with a more solid governance framework. Fragmented societies live with limited trust levels, to address the mistrust post conflict institutions must be highly fortified to ensure that the country doesn't slip back to violence due to the imposition of the majority. This is because geopolitical dynamics might change, and constitutionalism has been widely seen as the best avenue to accommodate such fears. Although it fails to attract a common

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<sup>221</sup> John McGarry and Brendan O'Leary, *ibid*, See also, how Arab- Israel conflict affected the application and functionality of consociation in Lebanon in Samir Makdisi and Marcus Marktanner, *ibid* at 13, See Also, Henry Jarrett, *The Limits of Consociational Power Sharing*, in M. Jakala et al. (eds.), *Consociationalism and Power-Sharing in Europe*, International Political Theory, Palgrave Macmillan Switzerland (2018) at 36.

<sup>222</sup> John McGarry and Brendan O'Leary, *ibid*.

<sup>223</sup> *Ibid* at 153.

<sup>224</sup> Ulrich Schneckener, *ibid* at 25, John McGarry and Brendan O'Leary *ibid*, See Aslo, Samir Makdisi and Marcus Marktanner, *ibid* at 13.

<sup>225</sup> Renske Doorenspleet and Ammar Maleki 'Understanding Patterns of Democracy: Reconsidering Societal Divisions and Bringing Societal Culture Back' In M. Jakala et al. (eds.), *Consociationalism and Power-Sharing in Europe*, International Political Theory, Palgrave Macmillan Switzerland (2018) at 14-21.

definition as a result of being highly influenced by its specific experiences, it remains to be a “framework for mediation or contain unavoidable conflicts in the political, economic and social fabric of every human society.”<sup>226</sup> Constitutions will always memorialize the hierarchy of power and authority but, constitutionalism will provide a yard stick by which such hierarchy and authority can be “judged, legitimated and modified”.<sup>227</sup> It focuses mainly on the legality of actions undertaken by the government; the actions must be in conformity with the law to avoid arbitrary actions and protect fundamental rights. These two are briefly understood as the process aspect and the substantive aspect.<sup>228</sup> The constitution, whether written or not has developed a fundamental role of setting out the distinctive institutions and their respective authority, by so doing it is deliberately limiting both vertically and horizontally the powers of each organ in a political entity and the public and by that; protecting the right of the people. Besides limiting the authority, the constitution also stipulates the hierarchy of rules or laws to curb the legislators’ affinity to enact laws that would infringe on the rights of the people or succumb to immediate interest at hand. While constitutionalism will limit the actions of the government, democracy on the hand may prove a challenge in creating a tension between the will of the people and the rule of law. Relying overly on the sovereignty of the people may lead to dismantling constitutionalism.<sup>229</sup>

Many attempts have been made to address the tension between democracy as the will of the people and constitutionalism as the rule of law especially when it has been widely accepted and approved

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<sup>226</sup> Abdullahi Ahmed An Naim, ‘Religion, The State and Constitutionalism in Islamic and comparative perspective’ (2009) *Drake Law Review*, Vol 57, 829 at 832.

<sup>227</sup> Larry Cata Backer, ‘Theocratic Constitutionalism An introduction to a New Global Legal ordering’ (2009) *Indiana Journal of Global Legal Studies*, Vol 16 (1) 85 at 96.

<sup>228</sup> Friedrich A. Hayek, *The Constitution of Liberty*, (China Social Sciences Publishing House 1960) at 182, See also, An Naim, (68) at 831, See also, Backer, (n 69) at 87-100.

<sup>229</sup> Yash Ghai, “Constitutionalism and the Challenge of Ethnic Diversity,” (2008) *World Justice Forum*, at 3-5.

to be at the pivotal position in protecting human rights and obedience to the laid down laws<sup>230</sup>. Such tensions and mechanisms to properly address them within the framework have depicted how transformative the concept of constitutionalism and the rule of law have been. By extending the understanding of constitutionalism from a minimalist approach of limited power and one that significantly appreciates processes to, a more elaborate and expanded approach and function that encompasses certain principles and procedures that fortify the supremacy of the law which include; independence of the judiciary and presumption of innocence, open trial and access to representation and whether the said law has attained the status of being a legitimate rule to be followed and judicial review among others.<sup>231</sup> Constitutionalism has been able to address the many sources of conflict.

Nevertheless, it is imperative to understand that the concept of constitutionalism was initially construed and formulated in a more homogenous society; England, at least during the modern period.<sup>232</sup> Its development thereafter and mainly in Europe was equally within a more homogenous context and importantly was anchored on the notion of “nation state”.<sup>233</sup> Within that context, the tension that exists in a plural society including ethnically divided ones could not be addressed. Diversity has its own complex and intricate challenges. It has been argued by critics that; based on its origin and a being a foundation of a liberal state, constitutionalism assumes homogeneity or creates one. Traditions, cultures and customs of a people are delineated. Interactions between the

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<sup>230</sup> Ibid.

<sup>231</sup> Ibid, at 4.

<sup>232</sup> Douglas Sturm, ‘Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C.H. McIlwain’ (1969) *Minnesota Law Review* 215 at 225 See Also, ‘Grewal, David Singh and Purdy’, *Jedediah*, *ibid* (n48) 673.

<sup>233</sup> David T. Butler-Itchie, *The Confines of Modern Constitutionalism*, *ibid* (n48) at 1.

people and the state is based on the concept of citizenship with no reference to cultural background, Parekh candidly elaborates this phenomenon and explains:

“...People relate to the state through the concept of citizenship, based rigidly on equal rights and obligations of all persons, premised on loyalty to the state, and acknowledging no distinctions of culture or tradition. Citizens have rights but these are rights of individuals, based on an abstract and uniform view of the human person. The state operates through the medium of the law, but it is the law created by the state, rather than pre-existing bodies of customs or local law. The state favours the uniformity of structures and seeks to achieve the homogenization of culture and ideology, propagating them as universal values. The domain of the state is the public space, with an ever-shrinking area of private space, which alone allows some expression of cultural diversity”<sup>234</sup>

Given what has been elaborated above, constitutionalism has a mechanism of addressing such challenges of diversity. Among the mechanism deployed is by providing electoral incentives to make communities work together through the right of citizen.<sup>235</sup>

The incorporation of constitutionalism in interim post conflict constitution offers more assurance to the minorities and the competing parties that the rule of law other than the wishes of men or majority only will prevail. The sense that neither the executive nor the parliament can override the right of the people and the judiciary has the powers of judicial review invokes a feeling of confidence. A constitution that embodies the rule of law principles helps in restoring civic trust. This is an important aspect in restoring confidence in basic norms that could have been subverted by the effects of conflict and human rights violations in a country.<sup>236</sup> Constitutions establish institutions that have powers to mediate and solve problems. These include courts, office of the ombudsman, tribunals, local committees among others. In addition, constitutions that guarantee

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<sup>234</sup> Ibid, at 5.

<sup>235</sup> Ibid at 12.

<sup>236</sup> Williams (n 196 ) at 17.

representation and decision-making power to all parties are significant in solving protracted political conflicts as people get a sense of assurance that their interests are legally protected. The effective interaction of all these institutions gives rise and effect to constitutionalism and the rule of law. By reconstructing a new political identity within the post conflict context and using the interim constitution as an agent of this transformation and institutional interaction, constitutionalism together with other instruments play a pivotal role in ensuring that peace and stability is maintained.

However, constitutionalism has not gone unchallenged. Conceptually, constitutionalism has been subject to a lot of debate on what exactly it means.<sup>237</sup> The ambiguity of a clear definition of the meaning and what is the minimum quantum of value quantity that would fit the definition.<sup>238</sup> This is because the concept has been evolving over time until its current structure.<sup>239</sup> Additionally, the content of constitutionalism has also been evolving in time, begging the question of what exactly informs the incremental trend in its content?<sup>240</sup> What, however, needs to be appreciated, is that constitutionalism developed in historical context, some of its are as a result of specific historical experiences. The liberal world order, also, had found foot in Africa through colonization and this process has left behind a legal legacy reflecting directly the European enterprise.<sup>241</sup>

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<sup>237</sup> Harvey Wheeler, 'The Foundations of Constitutionalism' (n66) *ibid* at 507. See Also, David T. Butler-ritch, *ibid* (n48) at 1.

<sup>238</sup> Ancient constitutionalism dealt with embracing the state, until when its meaning was extended to mean limited government, see, Harvey Wheeler *ibid* at 509.

<sup>239</sup> Douglas Sturm, *ibid* 217, See Also, *ibid* 217.

<sup>240</sup> The normative and prescriptive elements of constitutionalism has been growing in content and meaning.

Example: That people are all equal, has been, since inception in the preamble of the American constitution, while slavery was being practiced unchallenged for considerable time, additionally the concept of equality and citizenship has been evolving and its been only recently that Blacks and women in America have been granted universal suffrage and political and civil rights.

<sup>241</sup> Justin Ngambu Wanki and Carol C. Ngang, 'Unsettling Colonial Paradigms: Right to Development Governance as Framework Model for African Constitutionalism' (2019) *African Studies Quarterly* Vol 18 2 67 at 68.

In addition to constitutionalism the structure of state can be highly beneficial in recognizing communities and; without doubt such steps would highly minimize the occurrence of violence. Considering that state structure plays an integral role in state building during post conflict constitution making and, helps significantly in averting much of the tension associated with power concentration and marginalization, many states have considered different methods to reduce much power concentration at the center and bringing much diverse communities together. In seeking to mitigate conflicts and promote democracy in divided societies. Constitutional law experts have proposed several institutional designs and solutions. These measures include the introduction of various degrees of self governance including: Autonomy, federalism decentralization, devolution integrative arrangements of electoral rules, power sharing mechanisms.<sup>242</sup>

Originally when federal structure was innovated in the United States, its objective was mainly to bring small entity into the fold to form a big polity.<sup>243</sup> This approach was mainly with an intention of territorial expansion, and it settled well with the quest for scale but, when dealing with ethnic conflict or divided society this approach requires modification.<sup>244</sup> The objective of designing a federal structure in a divided society is definitely not for the purposes of enlarging its territory but, for the sheer objective of reducing bifurcation and increase fluidity in the political arena of the polity.<sup>245</sup> Like many concepts in political field, it suffers from lack of uniformity in its definition, and it's nearly impossible to have a unified one. Nevertheless, its definition is almost always based on functionality other than an abstract approach. In this context federalism has been defined as “a

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<sup>242</sup> Hanna Lerner “Permissive Constitutions, Democracy, and Religious Freedom in India, Indonesia, Israel, and Turkey, *World Politics*, (2013) Vol 65, No 4, 609 at 9.

<sup>243</sup> Horowitz, ‘The Many Uses of Federalism (n 62) at 956.

<sup>244</sup> *Ibid* at 957.

<sup>245</sup> Donald L. Horowitz, ‘Democracy in Divided Society’ (1993) *Journal of Democracy* Vol 4 (4) at 36.

constitutionally entrenched structure in which the entire territory of a given state is divided into separate political units, all of which enjoy certain exclusive executive, legislative and judicial powers independent of the central government...”.<sup>246</sup> Federalism has two dimensions; one is the institutional or structural one where a constitution creates two separate level of governments. Second, is the “set of ideas which underpin such institutions” or procedural part which creates a balance between the two institutions.<sup>247</sup> The key feature of federalism is the autonomy of the unit in a constitutionally defined manner and the separation of power between the central government and the constituting units.<sup>248</sup> Perhaps it should be elaborated that federal designs does not operate in exclusivity of other mechanism advanced for purposes of creating a more inclusive governance system. Also, neither does it offer a panacea of solution to the divided societies. Belgium for example went through a series crisis since 1990 into 2008 and went through multiple constitutional amendments even though it had both the consociational and federal structure. <sup>249</sup>

In a divided society operating under proper constitutional democracy, the interest of the various groups and identities are equally protected under the law. Competing interests among different groups such as clans, tribes and religious groups if not well protected under the law, have often led to chaos. And in countries that have managed to overcome this or have attempted to overcome these challenges federal design of the state has played a central role.<sup>250</sup> The form and the extent of the federal design will often take a different shape based on a number of issues, it should be noted

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<sup>246</sup> Stefan Wolff, Dr Annemarie Peen Rodt (ed) *Approaches to Conflict Resolution in Divided Societies: The Many Uses of Territorial Self-Governance*, (Exeter Centre for Ethno-Political Studies, University of Exeter 2010) at 10.

<sup>247</sup> Obydenkova Anastassia, ‘Institutional Tools of Conflict Management - Asymmetrical Federalism in Ethnic Territorial Conflicts: Quantitative Analysis of Russian Regions’ (2005), *Peace, conflict and development: An interdisciplinary Journal*, Vol. 7, 251 at 262.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*, at 13.

<sup>250</sup> Eghosa E. Osaghae, (n123) at 164.

that the whole transitional arrangement is meant to create a favourable environment for discussion and secession of violence. That being the case, the federal structure during the transitional period or within the transitional constitution is merely an attempt to address far deeper issues of representation, inclusivity and cultural or ethnic autonomy among others. These issues will give rise to the format or and the structure of federalism favourable to the specific context.<sup>251</sup> Through different models, federalism has been able to mitigate if not completely vitiate the feelings associated with political shortcomings in a divided society.<sup>252</sup> Federalism can help a national minority group exercise power in their majority regional level in ways that would have been impossible in a unified centralized system. It can also serve as a method to quarantine conflict and minimize its spread across the country.<sup>253</sup> Nigeria is a case study where during the first republic the federal states were quite large and any religious issue between Muslims and Christians would easily escalate to the national front. By changing the boundaries and creation of additional states such issues have been reduced to sub national level and dealt with within the state and free the entire country from such altercations.<sup>254</sup> In cases of discontent and the plight of special needs, federalism has deployed its asymmetric mechanism to address such shortcomings; the Russian federation and the Quebec part of Canada are examples of this approach.<sup>255</sup> While ethnic divisions may dominate alliances and allegiance in a society, federalism has the ability to create units which may create incentives that will push political actors to look at issue from a competition point of view among political units rather than from an ethnic vintage.

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<sup>251</sup> For more elaborate explanation on the types and structures of how federalism can be used in different political contexts see Donald L Horowitz, 'The Many Uses of Federalism' (n62) at 958.

<sup>252</sup> Soeren Keil, "Federalism as a tool of conflict-resolution: The case of Bosnia and Herzegovina" (2012/1) *L'Europe en Formation*, No 363,205 at 208. See also, Horowitz, (n 62) at 957.

<sup>253</sup> Horowitz, *ibid* at 959.

<sup>254</sup> Horowitz, *ibid*, at 958.

<sup>255</sup> *Ibid*, See also, Obydenkova Anastassia, (n83), at 263.

Federalism might create a unit which is a composite of different ethnic groups deflate the ethnic tension. This is evident when two units are in competition and one is poor and the other is rich, it's likely that in as much as there exist different ethnicity in both units, the struggle will evolve to be between the rich and the power in terms of resource allocation and by pass the ethnic affiliation among the individual units. This is because the federal structure can create a far wider cross cutting cleavage that by pass the ethnic division line.<sup>256</sup> In some instances it becomes difficult to ameliorate ethnic conflicts, federalism has had the ability to reconstruct an entity and reduce the conflict from inter group to intra group with less national effect just like the quarantine effect explained earlier.<sup>257</sup> This is because groups that have political relevance are normally malleable and they respond to territorial context more easily, the smaller the territory, the lesser the political identity crops up.<sup>258</sup> When an electoral system in a free fair election is seen to favour a group or an ethnic group over the others, violence will definitely appear imminent for purposes of addressing the structural challenges in the system that seems perpetual. Federalism has in some countries, and in this case again Nigeria drastically altered the electoral system to make it more inclusive and apportion political clouts proportionately.<sup>259</sup>

There, cases where federalism has failed to reduce conflict but made them even more.<sup>260</sup> The other challenge with federalism is that it might prompt secession and fragmentation of the polity. This was a genuine concern in African countries which saw in themselves multiple ethnicity that

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<sup>256</sup> Ibid.

<sup>257</sup> Horowitz, *ibid* at 959

<sup>258</sup> Ibid, at 961.

<sup>259</sup> Ibid.

<sup>260</sup> A.K Adegehe 'Federalism, Federations and Ethnic Conflict: Concepts and Theories, at 46.

<https://openaccess.leidenuniv.nl/bitstream/handle/1887/13839/chapter+two.pdf;jsessionid=843A9DCF64EE2933A670513CA4737A64?sequence=13> accessed on 7<sup>th</sup> Nov 2019.

would be difficult to hold together. Some of the critics of federalism consider the structure to be capable of ideology resentment. The quest for federalism has also been related to democratization, however, federalism has not directly resulted in creation of democracies, in fact they could be autocratic federations.

Generally, constitutions that permit states and communities to pursue their own policies tend to reduce tensions that would arise if the national government had to decide everything. Federal constitutions create mechanisms that permit citizens to decide many things at the state and local levels of government and avoid battling over single national policies to be applied uniformly throughout the land. This is crucial especially in a country that has experienced wars or political conflicts.

The significance of these systems forms the overarching argument in this thesis, and it is addressed in chapter 3. Interim constitutions have and can still achieve a great deal of stability in a fragmented society. By taking an inclusive process that brings people on board and employing mechanisms of consociational democracy, constitutionalism and federalism many conflicts would hardly arise or proliferate. These mechanisms have achieved a great deal of stability in an otherwise fragile political settings and Somalia is not an exception. The following chapter will extensively delve into analyzing at how constitution making process and the federal framework as captured in the interim constitution have influenced the trend of conflict in the country.

## CHAPTER THREE

### PUBLIC PARTICIPATION PROCESS AND THE FEDERAL SYSTEM OF THE TRANSITIONAL CONSTITUTION OF SOMALIA 2012

#### 3.1 Introduction

Since the fall of Siyad Barre, Somalia has failed to have a peaceful environment for governance and development. Many attempts have been made with the intervention of regional and international countries and bodies to establish a working government but with limited or no success. In 2012 with the technical and financial support of the UNDP and other international partners, the country finally got an interim constitution.<sup>261</sup> The constitution making process was undertaken by a group of selected men and women and was done mainly outside the country for security and logistic purposes. The general Somali public did not publicly participate in the process neither did they publicly endorse the document through a public plebiscite. The document was transitional and for a limited period of four years. However, the period has taken longer than initially planned. Procedurally, the process as it was commissioned, carried an inherent and a procedural risk to the legitimacy associated with such documents and its ability to transform violence. Substantively, the federal framework challenged the unitary form of government prevalent before the war and construed to placate the tension that often exist between the center and the periphery.<sup>262</sup>

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<sup>261</sup> UNDP Guidance Note on Constitution-making Support at 15. See Also, Afyare Elmi. Revisiting the UN Controlled Constitution Making Process for Somalia <https://www.e-ir.info/2012/09/02/revisiting-the-un-controlled-constitution-making-process-for-somalia/>.

<sup>262</sup> Mohamed A. Mohamoud, Federalism for Somalia: Internal and External Challenges in the Post- Transitional Period, at 5.

Despite the endorsement of the interim constitution, there exists political and security challenges. Although the scale of violence both within the capital and outside has subsided, it remains a challenge to both the government and the public. Government institutions have not established a visible footprint in the public life and has only slightly tried to establish its authority within the capital.<sup>263</sup>

This chapter analyses the relationship between process, content and expected outcome of the Somalia Interim Constitution of 2012. It proceeds to analyze the process under which the interim constitution was drafted and promulgated and establish if it met the legitimacy threshold that would have an impact on the trend of violence. In addition, the chapter will deeply analyze the federal framework encapsulated in the constitution and together establish to what extent has it contributed to the cessation of violence in Somalia.

## **3.2 History of Somalia's Constitutional Process**

### **3.2.1 1961-1991**

At independence, the governance and constitutional path of Somalia looked bright and promising. The independence constitution had all the hallmarks of a democratic constitution with a parliamentary system of government that had acceptable checks and balances and protection of fundamental human rights.<sup>264</sup> Two successive regimes governed the country under the independence constitution until the events of 1969 that dramatically changed the country's

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<sup>263</sup> Matt Bryden & Tres Thomas, Erica Marsh(ed), *Somalia's Troubled Transition: Vision 2016 revisited report*. At 7.

<sup>264</sup> Afyare Abdi Elmi and Abdullahi Barise, 'The Somali Conflict: Root causes, obstacles, and peace-building strategies' (2006) *African Security Review* 15 1 32 at 34; Christiane E Philipp, *Somalia- A Very Special Case* (2005) 9 Max Planck Year book of United Nations Law 517 at 521.

political trajectory.<sup>265</sup> The independence constitution was first drafted by a technical committee comprising of 23 members. A constitution that consisted of 143 articles was presented to the colonial administration by the technical committee. Thereafter, a political committee comprising of 50 members debated the constitution article by article and created a draft of 100 articles and made changes as needed.

More deliberations by a constituent assembly comprising of a 90-member parliament and 20 other individuals representing different interest groups were conducted resulting to some further changes. The Somali people then ratified the constitution in 1961 through a referendum. The process was largely seen as transparent and participatory giving the document legitimacy it requires.

With the advent of the coup, the independence constitution was suspended, and Somalia's deep political and constitutional challenges was blown out.<sup>266</sup> The military rule introduced a new constitution in 1979 through a public referendum, a process which many described as flawed. The 1979 constitution cemented and coronated Barre's rule by abolishing the opposition and introducing a presidential system with wide and sweeping powers. In 1984, the constitution was amended to extend the presidential term limits from previously six-years to seven years renewable and change the presidential election process from two thirds of the members of parliament to a direct popular vote. The new amendments gave the president an opportunity to leverage on the

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<sup>265</sup> Philip, (n1) Ibid; M. J. Fox, *The Roots of Somali Political Culture*, First Forum Press Boulder USA 2015 at 10; Jabril Abdulle, 'Somalia: Path to Recovery Building a Sustainable Peace' (Center for research and Dialogue) <<http://www.somali-jna.org/downloads/Somalia%20-%20Path%20to%20Recovery%20-%20final.pdf>> accessed 20 August 2018. Publication date 2004 at 11.

<sup>266</sup> This is because the independence constitution was suspended by the military.

state apparatus and use of fear and intimidation to cement his rule. With him as the sole candidate, the elections were not more than self-endorsement. The “victory” was landslide with 99.9% of the votes being for president. During the period of intense fighting in the country and the emergence of popular arm revolt in 1990, the regime proposed some constitutional changes. The changes included inter alia the formation of a prime minister position, but the opposition declined and considered the changes as cosmetic and too late.<sup>267</sup> Up until the fall of Mogadishu in 1991, the country had undergone unsurmountable amount of destruction and killing. The constitutional journey had been manipulated and distorted and the country was left with little history of institutions and order. The fall of Siyad Barre also poised another challenge for the armed group who lacked a unified vision of the country and had only one agenda: toppling the government. Without a unifying figure, fighting erupted among the armed groups which further jeopardized the already difficult situation in the country.

### **3.2.2 The Arta Process 2000**

With fighting among the armed clan and sub clan groups continue to cripple the country further, it was evident that the country was in a disarray. Many attempts were presented to bring the parties to the table but with limited successes. The first substantive moves on constitution making in Somalia after the oust of Major Barre and the civil unrest was around August 2000 when Arta Declaration was made in Arta, Djibouti.<sup>268</sup> For a whole decade since the fall of Siyad Barre, Somalia failed to establish any form of governance.

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<sup>267</sup> Maria Bongartz, *The Civil War in Somalia; Its Genesis and Dynamics* (Nordiska Afrika Institutet). The Scandinavian institute of African studies 1991 at 27.

<sup>268</sup> This was in the context of the Somali National Peace Conference.

The inter clan fighting became more predatory and militias controlled most parts with no single party claiming full authority or control.<sup>269</sup> The Arta peace process brought on board almost 5,000 from all walks of the Somali society. Delegates came from: traditional leaders, businessmen, women, professionals and warlords. The peace talks culminated in the formation of Transitional National Government (TNG) led by Abdiqassim Salad Hassan as the president under National Transitional Charter(TNC). The charter established the 4.5 formula for power sharing among the 4 major Somali Clans and 0.5 for the minority clans and communities.<sup>270</sup> The Charter was a peace agreement that established transitional government structures of Transitional National Government (TNG) and the Transitional National Parliament (TNP) for a period of three years.<sup>271</sup> The TNG failed to marshal the support of the local and some regional and international actors and by the year 2002 the whole arrangement became obsolete with no authority.<sup>272</sup>

### **3.2.3 Eldoret/ Mbagathi Process 2002**

When the TNG became increasingly irrelevant and dysfunctional, Inter Governmental Authority on Development (IGAD) with assistance from other international partners started a new front to establish law and order in Somalia.<sup>273</sup> The peace process went on for two years and considered to be the longest in the history of Somalia mediation. The peace process culminated in the formation of a Transitional Federal Charter(TFG) and a Transitional Federal Parliament(TFP) for five

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<sup>269</sup> Terrence Lyons, Ahmad I. Samatar, *Somali state collapse, Multilateral Intervention, and Strategies for Political reconstruction*, Brookings Occasional papers, The Brookings Institution Washington 1995 at 21; International Crisis Group, *Negotiating a Blue Print for Peace in Somalia*, Africa Report No 59 6<sup>th</sup> March 2003. Nairobi, at 5.

<sup>270</sup> Ken Menkhaus, Hassan Sheikh, Ali Joqombe, Dr Pat Johnson (ed) Dr. Pat Johnson 'A History of Mediation In Somalia since 1988' interpeace and Center for research and Dialogue at 15; Mark Bradbury and Sally Healy 'Endless war a brief history of the Somali conflict' Accord issue 21 at 13.

<sup>271</sup> Christine Bell, 'Introduction: Bargaining on constitutions – Political settlements and constitutional state-building' (n164), at 30.

<sup>272</sup> Umberto Tavalato 'Somalia, Djibouti to Mbagathi making or breaking peace' Nairobi 2004. unpublished

<sup>273</sup> Loynes et al, (n5) at 16.

years.<sup>274</sup> The negotiations provided for the federal system of government in clear departure from the Arta Transitional Charter.<sup>275</sup> The transitional authority like its predecessor failed to win the support of the clan demarcated politics of Somalia and failed to accommodate all parties but rather chose to divide power within a narrow clan coalition and the TFG failed to achieve any of the tasks under the TFC.<sup>276</sup>

The TFC was adopted as an interim constitution until when the federal constitution is in place.<sup>277</sup> Following the Mbagathi Process, Transitional Federal Parliament and Transitional Federal Government (TFG) together known as Transitional Federal Institutions (TFIs) replaced the Transitional National Parliament and Transitional National Government in August 2004. Somalia was henceforth declared a federal republic. TFC had provisions that would eventually form part of the interim constitution of 2012.<sup>278</sup>

The Charter provided for a number of commissions to be set up among them was the creation of an Independent Federal Constitutional Committee (IFCC) that would be ratified by parliament. Members of the IFCC were to be proposed by the Council of Ministers and approved by the parliament to undertake the task of writing the country's constitution.

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<sup>274</sup> Ibid. See also, The Transitional Federal Charter of The Somali Republic, February 2004 Nairobi at 17. <http://www.ilo.org/dyn/travail/docs/2177/Transitional%20Federal%20charter-feb%202004-English.pdf> . Accessed on 3rd April 2018.

<sup>275</sup> Lyons et al (n5) at 16.

<sup>276</sup> Ibid at 17, see also, ICG Report (n5) at 1, Brabury et al (n 6) at 14.

<sup>277</sup> Transitional Charter (n10) at 37.

<sup>278</sup> Kirsti Samuels "An opportunity for peacebuilding dialogue? Somalia's constitution-making process." Accord, Issue 21.

### **3.2.4 2006-2012**

Following negotiation and discussions among ministers and members of parliament, a list of 15 members was produced based on the 4.5 formula to constitute the IFCC.<sup>279</sup> Subsequently, the Transitional Parliament formally established the IFCC by passing the Somalia Constitutional Commission Act in 2006. This Act gave the commission powers and authority to begin the constitution making process. However, the security situation in Mogadishu got worse with the advent of Union of Islamic Courts (UIC) and the process failed to proceed as planned. By 2009 and with escalating security situation, the TFG proved ineffective and a new government was put in place, as a result the IFCC membership was expanded to accommodate the incoming factions.<sup>280</sup> The final draft of the transitional constitution of 2012 was signed by the parties together with the protocols in June 2012 the constitution was approved by the National Constituent Assembly on 1<sup>st</sup> August 2012. The process under which the transitional constitution was made and approved has been a contentious issue within the Somali and constitutional experts alike as far as legitimacy of the document is concerned and hence its ability to meet the public expectation to contain and settle the ensuing conflict.<sup>281</sup>

### **3.3 The Transitional Constitution 2012 Making Process and the Legitimacy Question**

For the longest period since the fall of Siyad Barre and subsequent attempts to establish proper governing institutions in Somalia, the 2012 constitution was a major attempt yet in establishing

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<sup>279</sup> Kirsti Samuels “An opportunity for peacebuilding dialogue? Somalia’s constitution-making process.” Accord, Issue 21.

<sup>280</sup> Somalia’s Parliament should produce a constitution for and by the people, Heritage Institute for Policy Studies Report, Feb 2017 at 3.

<sup>281</sup> For legitimacy claim and protest from Somali Mps, almost 185 Mps had protested to the UN on the process of constitution making See a comprehensive report by Abdihakim Ainte, Somalia Legitimacy of the Provisional Constitution in Alexander Ramsbotham and Achim Wennmann (Ed) Legitimacy and Peace Processes From Coercion to Consent, Accord issue 25 at 60-64.

order in a fractured country. The endorsement of the 2012 constitution happened in a time where most of the country was craving for order and stability. It is essential to dissect how the contents of the constitution was structured with an intention to instrumentalize it to reduce the fighting, but before we delve into that, the constitution making process under which the legitimacy of the document has been questioned is worth a thorough investigation. The relationship between legitimacy and process is paramount as it would be only possible for a document to gain acceptability if it gains legitimacy.

The federal charter that was approved during the Mbagathi peace process contemplated the creation of independent bodies which included among others; the Independent Federal Constitution Commission (IFCC). In June 2006 through the Somali Constitution Commission Act the Parliament of Somalia brought IFCC into existence.<sup>282</sup> The IFCC was mandated to draft the federal constitution. The IFCC membership was based on the clan formulae of 4.5 developed during the Arta process where the big four clans will take equal share of positions while the minority will take one half.<sup>283</sup> The manner under which the IFCC members were selected has been a subject of great contention among the stakeholders and beyond. The fighting in Mogadishu and the fragile position of the TFG brought the process to a halt up to 2009 when a new government was in place and the membership of the IFCC expanded to accommodate the new political

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<sup>282</sup> Samuels (n 16) at 87.

<sup>283</sup> Afyare Abdi Elmi, 'The limits of the UN Controlled Constitution Making Process in Somalia' Horn of Africa Journal (2013) Vol 31; Elmi, 'Revisiting the UN-Controlled Constitution-Making Process for Somalia' Sep 2012 <http://www.e-ir.info/2012/09/02/revisiting-the-un-controlled-constitution-making-process-for-somalia/> accessed on 10th April 2018. See also, Kristi Samuels 'Constitution-building during the war on Terror: The Challenge of Somalia' (2008) International law and Politics Vol 40 at 598.

reality.<sup>284</sup> The IFCC membership did not have the necessary expertise to draft the constitution neither did the selection of the experts suggests compliance to the agreed democratic standards.

Nevertheless, it presented the first draft in 2010 to the public for discussion. During public interrogation of the document, the public opinion was divided along many issues which included inter alia: federalism, the role of Islam in the public space, citizenship and the structure of government. To fill the competency gap and to “avoid politicization” of the process as it had already been emerging, a Committee of Experts (C o E) was appointed in 2011 to make the process free from political interference.<sup>285</sup> Together with IFCC, the C.o.E undertook the challenge of revising the 2010 draft constitution. Unlike the first draft, the second draft was not publicly debated but instead the joint committee presented a revised edition of the constitution in April 2012 to a seven-member signatory committee despite that no public input was considered in the revised version.<sup>286</sup>

The signatories which comprises of the TFG President, The Prime Minister, the former TFG Speaker, the President of Puntland, the President of Galmudug, Ahlu Sunnah group representative and the special representative of the Secretary General of the UN. The seven-member team met in Addis Ababa and agreed on the contentious issues in the draft and appointed a review committee, members of which did not come from either the IFCC and the C.o.E to review the second draft of the constitution. In June 2012 the seven-member signatory group finally endorsed the draft

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<sup>284</sup> Samuels (n 16) *ibid*.

<sup>285</sup> *Ibid*.

<sup>286</sup> Elmi (n 18) at 6.

constitution in Nairobi together with 4 protocols one among them establishing a National Convention Assembly (NCA).<sup>287</sup>

The signed protocols also created inter alia the Signatories Technical Facilitation Committee (STFC) to steward the endorsement of the constitution through the National Convention Assembly by undertaking ‘...necessary amendments, revisions, and drafting of transitional schedules of the provisional constitution...’.<sup>288</sup> Technically, the STFC replaced the IFCC and the C.o.E, the role of IFCC was relegated to undertake civic education after the signing of the provisional constitution which was expected to last for only few days.<sup>289</sup> The STFC facilitated the endorsement of the provisional constitution through the National Convention Assembly (NCA) which was appointed through the 4.5 clan loaded system and created a 825 member assembly. With very few amendments to the signed document which was done exclusively by the STFC, the provisional constitution was finally endorsed by the NCA on August 1<sup>st</sup> 2012 winning by 96%.<sup>290</sup> The selection of the parliamentarians was done pursuant to Technical Selection Committee (TSC) protocol which had an elaborate methodology of how the member selection process was to be conducted.<sup>291</sup> The endorsement of the provisional constitution was as many would suggest, a mere process that wouldn’t impact on the continuity or otherwise of the document. This is because the NCA protocol when contemplating a NO vote, clearly stipulated that the provisional constitution will still ‘...take

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<sup>287</sup> Afyare Abdi Elmi and Abdullahi Barise, ‘The Somali Conflict: Root causes, obstacles, and peace-building strategie’ African Security Review, Institute for Security Studies 15.1 at 7

<sup>288</sup> Protocol Establishing the Signatories Technical Facilitation Committee, Art at 1.

[http://www.constitutionnet.org/sites/default/files/technical\\_facilitation\\_committee\\_june\\_22\\_eng1.pdf](http://www.constitutionnet.org/sites/default/files/technical_facilitation_committee_june_22_eng1.pdf) Accessed on 18th April 2018.

<sup>289</sup> National Constituent Assembly Protocol June 22, 2012 Art 2(3) and (4).

<sup>290</sup> Elmi, (n 18) at 12.

<sup>291</sup> Protocol Establishing the Technical Selection Committee, June 22, 2012.

effect until a new constitution is adopted...'.<sup>292</sup> Therefore, the No vote wouldn't have much of an effect.

The manner in which the provisional constitution was made and subsequent endorsement of the same by the National Convention Assembly pose a legitimacy challenge. The major contending issue was highly based on the way the draft was pushed through without any meaningful public participation and only a group of seven unelected people took the decision on behalf of the Somali people to endorse the document. In addition, the seven-member team are accused of indulging with external political agenda of Kenya and Ethiopia at the expense of Somalia.<sup>293</sup> Majority of the civil society groups and religious organizations including Islamists were excluded from participation and only a representation of forces considered less controversial were admitted at the discretion of the international and regional powers.<sup>294</sup>

The pivotal role of public participation in contemporary constitution making can never be emphasized further. Unlike previous constitutions where power plays and relations were central, contemporary constitutions give much interest in social recognition, addressing issues of national unity, developing and entrenching national values through participatory process.<sup>295</sup> And because the interim constitution intended to establish a democratic institution it followed logically, that the process be democratic as well and follows the formal conception of the rule of law which entails among other things that the law as it exists was formulated by authorized persons and in an

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<sup>292</sup> Ibid, (n 23) Art 7 (5).

<sup>293</sup> Elmi, The Limits of UN controlled Constitution making process in Somali, *ibid* at 4.

<sup>294</sup> Elmi, n 18 at 9.

<sup>295</sup> Yash Ghai, The role of Constituent Assembly, IDEA at 4.

authorized manner.<sup>296</sup> It is quite agreeable that there is no single or specific form and shape public participation should take.<sup>297</sup> Many countries based on specific context and circumstances have undertaken different approaches. Making of a constitution is a function and events as Widner puts it include, negotiating the ground rules, developing of an interim document, preparation of initial text, deliberation and adoption of the draft text and lastly ratification and there are multiple ways to sequence these events.<sup>298</sup>

Generally, public participation would mean a situation whereby the mass public has more opportunities to both oversee and engage in the process.<sup>299</sup> The developing literature has given public participation the status of a right and a manifestation of the principle of self-determination.<sup>300</sup> In addition, it has become among the most important criterion of a legitimate process.<sup>301</sup> Contemporary democratization scholars tie the legitimacy of government actions on the participation of those affected by the decision in the decision-making process.<sup>302</sup> Difference need not be made to distinguish temporary arrangements and those perceived permanent. An interim constitution has, during its effective period the same effect and legal standing as a

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<sup>296</sup> Ft Abioye, 'Constitution making, legitimacy and rule of law; a comparative analysis' (2011) *Comparative and International Law Journal of Southern Africa* XLIV 59 at 64; Vivien Hart, 'Constitution-Making and the Transformation of Conflict' *ibid* (n 93)158.

<sup>297</sup> Hart, (n 93) at 63. 11; Devra Moehler and Eleanor Marchant, 'A multi-Dimensional Model of Participatory Constitution Making Process and Legitimacy'(n118) *ibid*, at 3.

<sup>298</sup> Jennifer Widner (n208) *ibid*, at 1522; Jill Cottrell and Yash Ghai, 'Constitution Making and Democratization in Kenya (2000–2005)' (February 2007) *Democratization Journal*, Vol.14, No.1, 1 at 19.

<sup>299</sup> Zachary Elkins, Tom Ginsburg, Justin Blount 'The citizen as founder: Public participation in Constitutional approval' (2008) *Temple law Review* Vol 81, 101 at 103.

<sup>300</sup> See, Peter Cane, Participation and constitutionalism, (n101) *ibid*. See Also, Abrak Saati 'Participatory Constitution making as a legal norm' n (99) at 121, See also, Vivien Hart, Constitution Making and the Right to Take Part in a Public Affair, in Laurel E. Miller & Louis Aucoin (eds) *Framing the State in Times of Transition: Case Studies in Constitution making* (2010) at 20.

<sup>301</sup> Devra et al (n 118) at 5.

<sup>302</sup> Angela M. Banks, 'Expanding Participation in Constitution Making: Challenges and Opportunities' (n99) *ibid* at 1047, See also, Kirsti Samuels, Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies, 2006 *INTL IDEA* 29, See also, Guido Galli, Constitution Building Processes and Democratization, 2006 *INTL IDEA* 10.

permanent constitution. Factually, transitional constitutions almost always form part of the permanent constitution or it is heavily relied upon. The process upon which it is made should also be as democratic as making a permanent constitution. In fact, because the interim arrangement has an immediate task to curb the proliferation of violence, it ought to be more democratic to effectively marshal public support and bridge the trust gap because of undemocratic rule preceding the conflict.<sup>303</sup>

The Somalia's transitional constitution used a mixed system of constitution making. The system relied heavily on the IFCC and later, the assistance of the C.o.E to write and present the constitution to the public. The process was done in two stages. During the first stage the draft document was publicly shared through different platforms including online for public engagement. The second draft was only shared after it had already been signed off. The interim constitutions relied on federal charter of 2004 which contemplated the formation of IFCC to draft a "federal constitution" for Somalia.<sup>304</sup> The selection of the IFCC member did not consider the competency of the member or done through a democratic process rather but it was as always, a clear balance of the clan proportion which cemented the opportunity spirit and nature other than undertaking a responsibility to produce an all-inclusive document.

The initial membership and subsequent expansion were purely based on clan accommodation and political expediency between the council of ministers who were mandated to appoint the members and the parliament which was supposed to approve the selection.<sup>305</sup> The IFCC work was not

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<sup>303</sup> Yash Ghai, The Constitution reform process: Comparative perspective. Paper presented on "Toward Inclusive and Participatory Constitution Making" 3-5 August 2004, Kathmandu (Nagarkot) at 4.

<sup>304</sup> Kristi (n 16) at 86; Elmi, (n 18) at 4.

<sup>305</sup> Kristi, *ibid*.

entirely easy given that most for the members had no expertise or competent enough to handle the process with many moving pieces.<sup>306</sup> With new realities on the ground, the IFCC membership was expanded, and in 2011 C.o.E was created to assist the IFCC in performing its mandate. The IFCC had a clear mandate from the beginning: to create a “federal constitution”. This restriction to make a federal constitution looked like the outcome of the process was already premeditated, which was by and large a clear manipulation of the process and a boardroom negotiation far from the free will of the people.

The first draft was shared with the public for their input, the response was highly negative and, touched mainly on the unresolved and contentious issues of federalism, the role of Islam in public life, citizenship and the structure of government among others.<sup>307</sup> With the negative response brewing, the IFCC with the technical support of the C.o.E went to revise the draft. The second draft was never presented to the public for discussion during the draft stage. It was presented to the signatory of the UNPOS and the role of the IFCC and C.o.E was relegated.

The process proceeded without further public engagement and the document was later presented to a seven-member group for signing and creating institutions to officially endorse the constitution. Apparently, and in accordance with released statements by the signatories all contentious issues were solved during a short meeting in Addis Ababa. There were no proper deliberations on all contentious issues and the public was not by all standard involved in the deliberation of the second

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<sup>306</sup> Elmi has mentioned with the exception of Dr Jama, the rest of the members were selected based on the 4.5 system representing the major clans and the minority ones, competency was not a priority, more reason why a nother committee of exerts was selected to assist on the technical part of the process See Elmi, *ibid* at 4.

<sup>307</sup> Elmi, (n18) *ibid*.

draft contrary to the expectation and the mandate given to the IFCC.<sup>308</sup> All signatories to the document represented specific interest of certain groups with no wider representation.

Factually, the document was endorsed with few changes done by a body established under the protocols and a vote in the National Constituent Assembly could affect anything irrespective of how the members could vote. The NCA was expected to represent public interest and perspective but given their mandate they could not do much including an important function as amending the document as one would expect of such an institution. This process cannot be assumed to be democratic or a reflection or representation of public will, but a process crafted to subvert the will of the people for political purposes galvanized in promoting security and stability.

### **3.4 Analysis of the Process**

Public participation forms part of the constitution making process which entails more than a referendum, but the public as citizens of a political entity need to be part of the whole process for the document to gain the necessary legitimacy it requires to impart violence.<sup>309</sup>

All the requisite stages in participatory and democratic constitution making were mostly limited to political clan balance and foreign intervention. No substantive deliberations of the draft were

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<sup>308</sup> See an elaborate calendar of events to be done within the mandate of IFCC is mentioned by Kristi in, Kirsti Samuels "An opportunity for peacebuilding dialogue? Somalia's constitution-making process." Accord, Issue 21 at 87.

<sup>309</sup> Weinner Antje and Vincent Della Sala, 'Constitution-Making and Citizen Practice-Bridging the Democracy Gap in the EU' (1997) 35 No 4, See Also, Jennifer Widner, (n 208) *ibid*, at 1522, See Also, Balkin, Jack M., "Respect Worthy: Frank Michelman and the Legitimate Constitution " (2004) *Tulsa Law Review* Vol 39 485 at 494. Scholarship Series. 241.

undertaken and the adoption process by the NCA was highly cosmetic to say the least.<sup>310</sup> It is excessively difficult to suggest that the clan-based selection method of 4.5 done by the Technical Selection Committee was on its own a proper representation of the public, this is because at the sub clan level the decision is never made on merit rather on privileges and often privilege is given to the biggest household and the most influential of the sub clan members. The politics at the sub clan level is as furious as it is at the clan level. The work of STFC was designed purposely to replace IFCC and the C.o.E by effecting the necessary amendments, revisions, and drafting of transitional schedules.<sup>311</sup>

How would such a document with such elite oriented process claim to have gained the legitimacy of the public and how would it then be able to end the conflict. Lack of wider public participation almost always affect the legitimacy of a constitution and, public participation is not entirely the only yard stick of legitimacy but lack of it could be a source of wider polarization and curtail the healing process.<sup>312</sup> The initial failure of the Somali state was a result of the regime lacking in legitimacy, also, the eruption was the civil war was, by many account an indication of the absence of any unifying power and legitimacy, therefore, the provisional constitution needed to gain the legitimacy and help end the war. The South African process allowed greater public participation and as result the country evaded a potentially explosive civil war.<sup>313</sup> Unfortunately, failure to appreciate the centrality of public participation the war is still raging.

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<sup>310</sup> NCA was never allowed to make changes to the provisional constitution despite being the “representative” of the people.

<sup>311</sup> See Signatory Technical Facilitation Committee protocol Art 1 (a-g)

<sup>312</sup> Jon Elster, 'Forces and Mechanism in The Constitution Making Process' n(118) *ibid*, at 388.

<sup>313</sup> Veronica Federico, Democratic transitions and constitution-making processes: The role of constitutionalism as mechanism of building consensus. The South African case in Veronica Federico Carlo Fusaro (ed) *Constitutionalism and Democratic Transitions: Lessons from South Africa* Firenze University Press 2006 47 at 51.

### **3.5 The Federal Framework in the Somalia Provisional Constitution**

Federalism question has and continues to be one of the most contentious issues during every stage of Somalia constitution making process with as many opponents as proponents.<sup>314</sup> This is because of the country's clan composition and competition. The 2004 transitional charter which the provisional constitution was based on, explicitly captured that the IFCC will work to make a "federal provisional constitution". And, Article 1 of the Provisional Constitution states that Somalia is a 'federal, sovereign, and democratic Republic'.

Under the provisional constitution the structure of the federal government is composed of two levels of government: The Federal Government Level; and The Federal Member States Level. The latter comprises of the Federal Member State government, and the local governments.<sup>315</sup> The constitution is not clear on the number of federal units in the country, it has, however, delegated the issues to the Boundaries and Federation Commission (BFC) which was established in 2015 three years after ratification of the constitution and way after the formation of some of the federal units.

The constitution contemplated two ways that might lead to the formation of FMS: by the House of the People based on the recommendation of the BFC or; by voluntary merging of two or more of the pre-1991 administrative regions.<sup>316</sup> It is worth noting that Puntland and Somaliland are the only existing FMS prior to the formation of the BFC, although Somaliland had since the fall of the

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<sup>314</sup> Most of the Darod clan which inhabit a big part of Puntland and also clans residing in Jubba land prefer Federalism while other clans Like Hawiye and the residents of Mogadishu are proposing a strong unitary state, See also testimony by EJ Hojendoorn by International Crisis Group at <https://www.crisisgroup.org/africa/horn-africa/somalia/security-and-governance-somalia>.

<sup>315</sup> Art 48.

<sup>316</sup> Art 49 (5)(6).

regime in 1991 claimed independence and secession of the Somali union. It has however, failed to rally support of international community for recognition.<sup>317</sup>

In the southern part, three regions of lower Jubba, middle Jubba and Gedo had, under very acrimonious circumstances and with the support of Kenya, to the objection of the FG in Mogadishu formed a unified federal state. This move culminated into a fight and a middle ground was achieved by declaring Jubba region to be an Interim Jubba Administration.<sup>318</sup> Subsequently, other administration areas were formed as interim administrations, these include; Southwest Somalia (Bay, Bakool and Lower Shebelle), Central Somalia ( Galmadug and Mudug jointly to be named Galmadug) and Hirran and Middle Shebelle administration with addition of Puntland and Somaliland it makes a total of FMS to be six. Mogadishu has a separate status as a national capital. The provisional constitution provides that the number and the boundaries of the districts in a FMS are to be determined by a law enacted by the parliament of the FMS and must be approved by the House of the People of the Federal Parliament and the number and boundaries of FMS shall be determined by Parliament.<sup>319</sup> The FMS shall be structured in a way that will respond to their respective challenges and local needs. Currently most of the FMS have followed the same structure of the FG in having a president, a prime minister and parliament. This is mainly so because of the clan balance needed within an FMS which normally have more than one clan competing for positions and recognition.

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<sup>317</sup> Demi Jacques Dayna Jones et al (ed) *A Shadow on Tomorrow's Dreams: Somaliland's Struggle for Statehood, Unrepresented Nations and Peoples Workshop* Lewis & Clark Law School, 2016 at 22.

<sup>318</sup> *Federal Somalia: Not If but How*. Heritage Institute for Policy Studies, Policy Brief, 02 2015 at 1.

<sup>319</sup> Article 49(4).

With a history of mistrust among clans and its respective leadership, it is more likely that leaders might work within myopic interests and advertently or inadvertently further destabilize the country. It is on this premise that the constitution developed principles to foster unity. The constitution stipulates a number of principles governing federalism as captured in Article 50. These principles are expected to help steer the country towards stability. Article 50 provides:

“The various levels of government, in all interactions between themselves and in the exercise of their legislative functions and other powers, shall observe the principles of federalism, which are:

- a. Every level of government shall enjoy the confidence and support of the people;
- b. Power is given to the level of government where it is likely to be most effectively exercised;
- c. The existence and sustainability of a relationship of mutual cooperation and support between the governments of the Federal Member States, and between the governments of the Federal Member States and the Federal Government, in the spirit of national unity;
- d. Every part of the Federal Republic of Somalia shall enjoy similar levels of services and a similar level of support from government;
- e. Fair distribution of resources;
- f. The responsibility for the raising of revenue shall be given to the level of government where it is likely to be most effective exercised;
- g. The resolution of disputes through dialogue and reconciliation.<sup>320</sup>

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<sup>320</sup> Art 50.

Every government is expected to strive for a cooperative relationship with other governments, to respect and protect the limits of its powers and the powers of other governments and, have effective brotherly relationships with other levels of government in order to promote the unity of the citizenry”.<sup>321</sup>

The executive heads of the Federal Government and the Federal Member State governments are also expected to convene regular conferences to ensure the existence and development of cooperative federal relations. In such meetings, they are to discuss and agree on strengthening national unity; security and peace of the country; national socio-economic development, and common market policies of the country; promotion of the wealth of the people and information sharing.<sup>322</sup>

Laws passed by the Federal Parliament are to regulate the establishment of institutions and guidelines that facilitate interaction between the various levels of government; and the establishment of guidelines that facilitate the resolution of disputes between the various levels of government without resorting to court. And because federalism is about sharing of power and resources, the constitution mentions functions that will be devolved but generally suggested that most will be negotiated between the FG and FMS when formed with exception of key functions which include; Foreign Affairs, National Defense, Citizenship and Immigration, Monetary Policy. These functions shall remain within the authority of the FG.<sup>323</sup> The constitution however, mentions that the FG together with FMS shall conduct regular high-level meetings to discuss issues

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<sup>321</sup> Art 51.

<sup>322</sup> Ibid.

<sup>323</sup> Art 54.

that affect their territories which include; Water sources, agriculture, animal husbandry, pasture and forestry, the prevention of erosion and the protection of the environment, health, education, relations and dialogue amongst traditional leaders, and the protection and development of traditional law, Relations amongst religious scholars and Youth. <sup>324</sup>

In addition, the constitution mentions the FMSs could also, get into a cooperative agreement amongst themselves and or between themselves and the FG. This cooperation agreement could be in areas of mutual interest but should not contravene the national constitution or the constitution of the respective FMS.<sup>325</sup> The FG is expected to consult the FMS during international negotiations on issues that might affect the specific FMS in matters of foreign Aid, trade, treaties or “other major issues related to international agreement”. During negotiations of a specific issue affecting a specific FMS, federal government representatives in attendance shall be supplemented by representatives from FMS. However, the FG shall regard itself as the guardian of the interest of the FMS. <sup>326</sup>

The Federal Parliament consist the House of the People and the Upper House. The Upper House membership have the responsibility of representing the interest of the FMS they represent and to “safeguard the federal system”.<sup>327</sup> The election of the members of the Upper House shall be through a secret ballot by the people of the FMS. The maximum number of the Upper House shall not be more than 54 based on the 18 administrative regions that existed before 1991 this accounts to 3 members per administrative region irrespective of the population or tribal power of a region

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<sup>324</sup> Art 52 (1).

<sup>325</sup> Art 52 (2).

<sup>326</sup> Art 53 (1,2,3).

<sup>327</sup> Art 61(3).

enforcing the spirit of equitable, and, the 3 members must represent all communities in the member state.<sup>328</sup> The Upper House shall have the role stipulated in article 71.

The court system is relatively devolved. The constitution has created a Constitutional Court, a Federal level courts and Federal Member State level courts. The highest court at the federal member state shall be the Federal Member State High Court, while the highest court in the federal government will be the Federal High Court. The constitutional court shall have the original and exclusive jurisdiction on matters pertaining to the constitution mainly interpretation at all levels.

<sup>329</sup> The constitution elaborated the powers of the Constitutional courts but relegated the powers and interaction of the other level of courts to the legislation to be enacted by parliament.

The manner with which the provisional constitution was made was a culmination of factors which together affected how the process was undertaken and by and large affected its content too. These limitations and circumstances can be summarized as follows: the clan system that has been woven in the warp and woof of the society and further fortified by the conflict, the volatile and unstable conflict and civil war environment, lastly the foreign intervention in the constitution making process and state design.

### **The Clan Factor: The Colonial Legacy of Identity Politics**

Ethnic identities are not a mere construction of colonialism, circumstances, events or figments of imagination but, are evidently real.<sup>330</sup> Way before the advent of colonialists, it was a common

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<sup>328</sup> Art 72 (a,b,c).

<sup>329</sup> Art 108 a,b,c; Art 109 c.

<sup>330</sup> Crawford Young, 'Nationalism Ethnicity and Class' (1986) *Cahiers tudes africaines* 103 XXVI-3 421 at 442; M. Mamdani, 'New Frontiers of Social Policy' Arusha Conference December 12-15, 2005 at 6.

observation that most African societies had within their locals spheres political organizations which had fused territoriality with ethnic identities. With the advent of colonialists, these societal and political establishments were dismantled, restructured and reorganized to formulate a new structures and identities with politics being a dominant feature. Until then, ethnicity as social identity of people united in consciousness of their shared and common descent was never a challenge to the Africans or their political organizations.<sup>331</sup>

But, with limited resources and large territory to manage, the colonial administrators had to fetch for ways to establish authority and rule without bleeding much resources or creating much resentment; in the process, they reinvented organizations and administrators manipulating the traditional institutions.<sup>332</sup> They gave power and recognition to some chiefs a move which altered power structures within the native power maps. In addition, the introduction of uneven and peripheral market economy or commercialization of pre-colonial economy adversely disrupted the economic structure that prevailed.<sup>333</sup> These resulted in elevating other regions over the other or those who had proximity to the colonialists.

The enduring effect of these moves created a differential effect between the communities and generated a perceived dissimilarity and created competition for colonial favors. In the same wave, the African nationalist emerged as a product of colonial education system and tutelage, therefore,

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<sup>331</sup>Christoph Antweiler 'Ethnicity from an anthropological perspective' in Michaela Pelican, Albert Manke et al (ed) *Ethnicity as a Political Resource. Conceptualizations across Disciplines, Regions, and Periods* (2015) University of Cologne, AT 27. Claude Ake, 'WHAT IS THE PROBLEM OF ETHNICITY IN AFRICA?' Michigan State University Libraries

<sup>332</sup> Ake, *ibid* at 2

<sup>333</sup> Young, *ibid* at 445; Abdi Ismail Samatar, 'Debating Somali Identity in a British Tribunal: The Case of the BBC Somali Service' *Bildhaan* Vol. 10 36 at 40; Ile-Ife, Nigeria, 'Beyond Intractability: Ethnic Identity and Political Conflicts in Africa' (2016) *International Journal of Humanities and Social Science* Vol. 6, No. 6 242 at 242.

it surprises less, with this context at glance to understand how the colonial world view remained to many nationalists however inadvertently the preferred frame of analysis. The colonial experiences created one devastating phenomena; the transformation of social identity to a political one. Consequently, the process of decolonization brought this disruption to full glare when the unity of the nationalist came to the brink as they scrambled to dominate the political space about to be created.<sup>334</sup>

With rudimentary class structure the nationalist unlike the colonialist back home,<sup>335</sup> could not rely on the small class of urbanized natives to mobilize for the new political structure and organization. The nationalists had to find a base to mobilize and they could not find none other than ethnic base. Most nationalists associated with were tempted to use their ethnic base to consolidate power.<sup>336</sup>

The colonial government was only democratic to an extent that it protects the interest of the colonial class and not the natives, so, negotiating and leaving behind a democratic post-colonial constitution and expecting the disposition of the newly empowered nationalist to govern democratically with a progressive liberal constitution was, to say the least expecting too much. Therefore, the negotiated post-colonial states were crafted to be liberal democracies, but the leadership that inherited the colonial legacies drifted to create a monolithic political space.<sup>337</sup> To

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<sup>334</sup> Claude Ake, *What is the Problem of Ethnicity in Africa*, ibid at 3.

<sup>335</sup> The political experiences of the colonialist had been highly informed by the class competition as the differential element and a major theme in their home countries' political struggles. The same could hardly be replicated due to how, the colonialist structured the colony's political landscape. The colonialists established the ethnicity as the differential element and considered natives as many as they were to be distinct and different. The laws governing the natives were mainly customary and the rest were governed through civil laws and to some extent the Muslims could have the Mohammedan laws applicable to them when and how the colonialist would deem appropriate. It is worth appreciating that even the way the liberation movements were structured including the concept of parties, nationalists' movements, the labour unions, professional bodies and the "formal" non-combative political struggle were a reflective of colonial master's experiences and their influences.

<sup>336</sup> Young, ibid 447.

<sup>337</sup> Ibid.

remain in power the nationalist used the same methods as their masters and “Ethnicity became politicized and politics ethnicized” and formed politics of exclusivity.<sup>338</sup> Politics was seen through a dichotomy of those inside versus those outside government; them versus us nexus.

Across Africa, it emerged that post-colonial political leaderships were based highly on the charismatic traits of the person or his brutal survival tactics with the support of his ethnic group. To stage an effective opposition, most opposition figures had to find sufficient support from their ethnic blocks too. The system developed ethnic blocks that belong and associate with state power and the others in the opposition trenches. It follows that, ethnic groups provided the most formidable yet countervailing force to state power and most ethnic conflict was, as is today a mere expression of frustration of exclusion and marginalization.<sup>339</sup> These dissections and division along ethnic identities and race happened to most African countries that lived the colonial experience, and which had within their borders a significant number of immigrants and indigenous population with diverse cultural background. But, Somalia had no such composition.

Like most Africa countries, Somalia was a colonial construct. The colonialist handled them with some variation due to its social peculiarity. Principally, the colonialists deliberately divided and shared Somalis inhabited territories among the three prevailing powers. The British took the Northern part, currently Somaliland and the Northern Frontier region of the then British protectorate of Kenya, the Italians took the Southern part, the French took part of what is currently

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<sup>338</sup> Ibid at 4; Abdi Ismail Samatar, ‘Debating Somali Identity in a British Tribunal: The Case of the BBC Somali Service’ *Bildhaan* Vol. 10 36 at 40.  
<https://digitalcommons.maclester.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1105&context=bildhaan> accessed on 29<sup>th</sup> Feb 2019.

<sup>339</sup> Ake *ibid* at

Djibouti and because Ethiopia, which had branded itself a Christian island among hostile Muslim neighbors got a portion too, the Ogaden region.<sup>340</sup> In addition, most of those territories were latter retained as independent states except for the Ogaden and the Northern Frontier region which remained within the current territories of Ethiopia and Kenya respectively.<sup>341</sup> Further, the Italian Somalia and the British Somalia were subsequently merged to create one unified Somalia. The union was fragile and the resentment between the two regions never ceased but exacerbated by the coming of Siad Barre to power.

With most of the country enjoying homogeneity in language, religion, economic and social mores, it was difficult for the colonialists to perpetuate differences anchored on either race, religion or language, but that did not leave them with no options. Socially, the Somali people are genealogically divided into five major groups: Hawiye, Darod, Dirr, Rahawey and Issaq. All these four share the same origin, collective history and tradition save for some variation based on economic activity and regional peculiarities.

The genealogy identity was always for identification purposes and such classification had never been considered to mean that they are in any way distinct ethnic groups or tribes. Somalis share most, if not all of what has traditionally been regarded divisive and had pitted communities against each other in other African countries. But to proceed with the colonial formula of divisiveness, the

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<sup>340</sup> Terrence Lyons and Ahmad Samatar, *Sate Collapse, Multilateral Intervention and Strategies for political reconstruction*, the Brookings Institution DC 1995. At 11.

<sup>341</sup> Afyare Abdi Elmi and Abdullahi Barise, 'The Somali Conflict: Root causes, obstacles, and peace-building strategie' *African Security Review*, Institute for Security Studies 15.1 at 23.

colonial masters had to invent a strand that will project the differences in the society, and they found one in the cultural tradition of genealogy.<sup>342</sup>

With genealogy as the differentiating point between a hitherto similar and united people, the colonialists could keep the wheels of division into motion. The traditional clan identity and institutions were highly functionalized by the colonialist to advance their agenda of subjugation and division. The colonialist exploited the genealogical identity and differences and politicized it to form a new political identity out of it in the same fashion they exploited ethnicity in other African countries. Unfortunately, the post-colonial experience continued to reproduce the colonial legacy more so, as it proved to be effective in consolidating power and influence.

The clan identity was largely used to consolidate power and dash out favours and privileges as other clans wallow in desperate need of state inclusion and services. There are no noticeable differences between Somalia and most of African countries which suffered traditional cultural and moral erosion during the colonial period. The differences were subconsciously and subliminally instilled to the extent that Somalis from French or Italian administered territories felt and perceived themselves different from the rest.

The mere fact that different colonial power exercised their authority in different parts of the previously known Somali inhabited areas, gave birth to perceived differences between the Somali nation. The deepest of these resentments were exacerbated by the post-colonial government that was seen to be favouring the Italian colonized “southerners” over the British colonized

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<sup>342</sup> Young *ibid* at 442; Abdi Ismail Samatar, *ibid* at 41.

“northerners” the dichotomy of south and north and the genealogy differences have remained to be the most troublesome effect of colonialism in Somalia. Politically, the effect of these differences could be seen and for example between 1964 to 1969 political parties shot from 21 to 64 most of which were representative of clans or sub clans identities.<sup>343</sup>

The military coup of 1969 raised a nationalist hymn under the band of scientific socialism to deconstruct the already steady and firm established politicized clan identity.<sup>344</sup> To no surprise, the scientific socialism was just another façade of underlying weak governance structure. The Barre regime built its brutal and repressive rule by manipulating clan cleavages and relying heavily on his clan and sub clan members for sycophantic flatteries and vicious suppression of his adversaries mainly from competing clans and sub clans to cement his leadership.<sup>345</sup>

As political suppression took ground, the national political identity became even more nuanced and less formal, whether in government or opposition during. The civil opposition groups that transitioned to organized armed groups were largely clan based.<sup>346</sup> By the time Barre took flight, the fighting had escalated to further tipping clans against each other for control and domination. The political path after the fall of Barre was painstakingly depressing. The Northern part (British Somaliland) dominated by the Issaq clan declared independence and seceded from the rest of Somalia. The initial peace initiatives and the failed to resolve and unwind the colonial and post-

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<sup>343</sup> Yasin Ismail, Somalia's clan politics, <https://worldpolicy.org/2018/03/13/somalia-clan-politics/> accessed on 5th Feb 2019.

<sup>344</sup> Abdisalam M. Issa-Salwe, *The Collapse of The Somali State: The Impact of the Colonial Legacy* (no publication details) at 72. See Also, Abdullahi Mohammed Odowa, What Can Current Leaders in Somalia Learn from Their Past History? In *Somalia clan and State and Politics*, *ibid* at 22.

<sup>345</sup> Terrence Lyons and Ahmad Samatar, *Sate Collapse, Multilateral Intervention and Strategies for political reconstruction*, the Brookings Institution DC 1995. At 19.

<sup>346</sup> *Ibid*.

colonial artificial differences between the people. Equally, the constitution making process and content remained shackled with the clan dynamics.

### **The Civil War Effect**

The fight that ensued after the fall of the Bare regime was devastating and traumatizing. Narrations of atrocities committed against clans that once associated with Barre depicted the level at which clan and sub clan competition had escalated. Refutably, the clan identity was not a creation of the colonialists *per se*, the colonialist developed it into a functional unit of politics and utilized the identity differences to introduce patronage, give favours and ultimately subvert it to influence political preferences. The outbreak of the civil war represented the last episode in the long series of failures which brought the clan division into sharp conflict with the modern nation state structure.

The state craft of Somalia during independence seemed less viable with kind of values and leadership it had to sail it to the safe bank. The clan patronage and nepotism were so rampant within the state institution and functions.<sup>347</sup> The crumbling of the state deprived state institutions the monopoly of violence, left the population vulnerable and with no source of security other than the clan institution. The fall of Barre was not the beginning of the civil war, rather an escalation and a beginning of a more daunting epoch of tragedy and disaster.

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<sup>347</sup> Abdirashid A. Ismail, 'Maandeeq: The Dilemma of the Post-Colonial State in Somalia' (2016) Nordic Journal of African Studies University of Helsinki, Finland Vol 25(1) at 9.

The war situation proved challenging during the constitution making process. The security situation presented a logistical nightmare. Hardly does a war environment present the favourable conditions for any negotiations let alone a more tough exercise like constitution making. More so when the parties involved are not subject of a single authority. The war environment largely affected the formation and participation of a larger group of participants in the constitution making process. The security challenge affected how the governance institution under the transitional charter would be formed at least in the interim. Despite such limitations, it was evident that there seemed to be an overriding interest to have a constitutional framework at any cost.<sup>348</sup>

It would be strange to assume the process would be immune from decades of devastating civil war and the trust level, and scepticism among the political cadre to be equally intact. The conflict situation had a great psychological and political impact. The competition and challenges had mutated significantly that would require a different dimension to address new challenges that had emerged. The war had mutated to bring the Jihadist dimension, a phenomenon that had very small existence when the war broke out in the early nineties. Now, the country was facing the most sophisticated group of fighters yet from different countries whose agenda is to establish an Islamic state with presence beyond the national borders of Somalia.

Democratic constitution making process dictates public participation in form and manner that would confer considerable legitimacy to the document as a negotiated. The participating group needed to reflect all segments of the society and not only the political class. But, it was apparent

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<sup>348</sup> Abubakr Arman, A Constitution of Ambiguity and Deferment. <https://foreignpolicyblogs.com/2012/08/07/a-constitution-of-ambiguity-and-deferment/> accessed on the 5<sup>th</sup> March 2019.

that there were no organized civil societies that resembles any that exists in a democracy. Neither did the participating political class had a legitimacy beyond their clan or sub clan domain. In addition to the fact that social organization during the colonial period made it difficult to form a sound and strong civil society, the War had dismantled whatever that was at the formative age to see its maturity. Years of Barre predatory regime and subsequent war had made very little to produce civic leaders who could bare the leadership responsibilities to participate in the state Somali state craft.

### **Foreign Intervention**

Within the internal constrains discussed above, there were also, externalities that had a profound effect on the process and content. The constitution making process was not happening within the local context of Somalia alone, regional and international players had an open and hidden hands in both the process and the content. Historically, Somalia considered itself a nation that stretches beyond colonial boundaries. But, it was during the Barre regime that it had undertaken hostile military steps of irredentism to consolidate the Somali nation. A move that directly challenged the colonial boundaries and territorial integrity of the region and brought about escalating tensions between its neighbors: Kenya and Ethiopia. Kenya had to subdue an internal rebellion of the Somalis in the Northern Frontier Province in the mid-sixties. Ethiopia had to go to a full-blown war with the Barre regime 1978 to stifle his irredentist adventure.

Such temptations did not stop with the exit of Barre regime. In recent times, the Al Shabab group had threatened to override and disregard the colonial boundaries with its neighbours during their formative years, portraying just how deep the animosities run. The international community was

equally concerned with the security challenge the Somali conundrum presents to the global peace and security. Dislodging an interim government that had the support of the regional and international community and UIC assuming power in the capital Mogadishu quickly prompted the adjacent countries to intervene especially Ethiopia and Kenya to curb the activities and effects of the global jihadist movement in Somalia by ways of military incursions and creation of buffer zones.

The tension between Ethiopia and Somali are historical and political. Therefore, having a lawless Somalia presented a national security threat to Ethiopia which also had just emerged from a protracted civil war. From the onset, the intervention of Ethiopia seemed to be in preservation of its national security, but Ethiopia was also worried of strong united Somalia. On the same note, Kenya which also boasts a substantial population of Somalis deemed it necessary to have a degree of influence for purposes of its own security and stability through mild and tactful means.

The intervention and the influence exerted by these two countries had caused serious legitimacy issues. The overriding feeling is that these two countries are not helping but intentionally influencing the trajectory of the constitution making and the content thereto. Most Somali nationalists believed the historical enemies of Somalia now have an upper hand in the sovereign affairs of Somalia.<sup>349</sup> The governments of Ethiopia and Kenya had vested interests in the type and the nature of government to be set up in Mogadishu just as they had interest in seeing no threat

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<sup>349</sup> Afyare Elmi has expansively illustrated how the two countries and the UN largely influenced both the process and content of the provisional constitution of Somali 2012 depriving the document of its much-needed legitimacy at the critical constitutional moment. For more see; Afyare Elmi, 'Revisiting the Un Controlled making process in Somali, (2013) Horn of Africa Vol XXXI.

should emanate from there too.<sup>350</sup> This feeling affected the process and the content of the constitution in different ways. The constitution making process was mostly handled in Kenya and pushed by both countries. The roles were divided between Addis Ababa and Nairobi, and of course the international community.<sup>351</sup>

In many respects therefore, some challenging issues were swept under the carpet to serve multiple interests.<sup>352</sup> There were some problems that had become fundamentally difficult like, clan balancing and inclusion, the role of religion and women in the public life. It is quite difficult to access if the process was an imposition or a compromise, but either way, the result was the same. It is evident from the: where, when and how the constitution was drafted, debated and approved that the international community and regional countries had vested interests in the process and content of the constitution.

Besides the Arta process in Djibouti, almost all peace conferences and constitutional conventions were conducted in Kenya mostly under the auspices of the UN and international partners. The selection of the constitutional convention, the process of negotiations, drafting, discussion, the signing of the document in Kenya after being amended in Ethiopia and eventually endorsement by the NCA, the endorsement that couldn't make any meaningful amendments without the approval of another body was a clear indication of how far the external influence played a big role.

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<sup>350</sup> Abdullahi Mohammed Odowa, *ibid* at 16.

<sup>351</sup> Elmi, *ibid*.

<sup>352</sup> Armani, *ibid*.

Regional bodies were instrumental in pushing for a federal government in place. Although federalism framework idea works better in fragmented society and sounded noble and innocent, there were other interests at play between Ethiopia and Kenya. The process was all but an expression of sovereignty of the people of Somalia. The federal structure was left ambiguous in terms of the number, powers and authority. Neither did the constitution gave a framework on how enabling legislation would support the operationalization of the federal structure. The constitution was by all means a big variance a departure from what had been in existence. While it espoused and professed democratic governance to provide for peace the prevailing superstructure of weak governance couldn't have assisted in the transition. This constitution making process through its many processes was neither inclusive nor conclusive.

### **3.6 The Nexus Between Public Participation, the Federal System and the Conflict**

The constitution was meant to stop the fighting and convert civil war into a political dialogue. The process of public participation represents a very important part of the democratic constitution making process.<sup>353</sup> The question is; how the failure to have public participation made peace a challenge? From the beginning, the composition of the participants in the constitution making did not represent the Somali population.<sup>354</sup> At the time the constitution was being approved, the major dissenting military force was the Al Shabab, while majority of the clan have representative in the government, the group was never enticed to join the political process. Irrespective of their political

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<sup>353</sup> Public participation is said be more participatory when mass public participate in the whole process as captured by Jennifer Widner, the final and the most conspicuous being the referendum where it is seen to have gained public support and meet the democratic criteria of the public being sovereign, See, Zachary Elkins and Justin Blount, 'The Citizen as Founder: Public Participation in Constitutional Approval' n (99) *ibid* at 103-105, see also, Jennifer Widner, 'Constitution Writing in Post-Conflict Settings: An Overview' (n208)

<sup>354</sup> Abdihakim Ainte, *ibid* at 60.

ideology, they need to be included in the political process.<sup>355</sup> The process should have incorporated their presence and listen to their core issues part of which to a larger extent was already included in the constitution.<sup>356</sup> Empirical evidence have shown the danger of exclusionary behavior in constitution making.<sup>357</sup> The raging conflict in Somalia had largely been caused by lack of proper representation, equitable distribution of resources and nepotism.<sup>358</sup> And big portion of the foot soldiers in al Shabab represent the majority of those feeling marginalized.<sup>359</sup> The federal government has for the longest maintained a security approach with all the armed groups fighting with very little political path, this has made the peace less viable.<sup>360</sup> Constitution making is a political enterprise too, and it is difficult to imagine how a polity discussing a foundational document would afford to exclude some segment of the population.<sup>361</sup> The fact that constitution making is also a political venture, there are always vested interests to exclude and dominate by not giving sufficient incentive to others which are the recipe of violence, and that is what transpired.<sup>362</sup> The fight in the 21<sup>st</sup> century as it has been captured herein, is mostly intra state and this is mainly due to lack of recognition and accommodation, the failure to give citizens an opportunity to participate in the making of the foundational document always leads to violence.

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<sup>355</sup> Many policy experts have realized that military actions or military interventions do not provide for peace, the US has started negotiations with the its archaic nemesis Taliban, an indication that every group need to be given a chance to express their political positions, See, <https://www.washingtonpost.com/news/monkey-cage/wp/2019/02/08/the-u-s-is-now-negotiating-with-the-taliban-would-that-work-with-al-shabab/>.

<sup>356</sup> The provisional constitution recognizes Sharia a source of legislations in Somalia, which have been the main demand of Al Shabab.

<sup>357</sup> Jamal Benomar, *Constitution-Making, Peace Building & National Reconciliation: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries*, (2003) United Nations Development Program at 7.

<sup>358</sup> Abdisalam M. Issa-Salwe, *ibid* at 76.

<sup>359</sup> Akinola Olojo, *How viable is dialogue with al-Shabaab and Boko Haram?* Institute for Security Studies Policy Brief 2019 at 5.

<sup>360</sup> Michael Keating and Sagal Abshir 'The Politics of Security in Somalia' (2018)Center on International Cooperation at 1.

<sup>361</sup> Richard Simeon, (n141) *ibid*, at 245. John Elster, 'Forces and mechanism in The Constitution Making Process' (n118) *ibid* at 365.

<sup>362</sup> Richard Simeon, *ibid* at 252.

The clan-based politics exacerbated the feeling of exclusion, and marginalization.<sup>363</sup> Like most conflicts in the 21<sup>st</sup> century, it was more intra state than between states, necessitated by poor governance structures and myopic leadership. Federalism, as a form of decentralized system help minimize occurrence of conflicts through a myriad of methods and structures that include: recognition, representation and providing autonomy in governing institution.<sup>364</sup> And depending on how it has been crafted, it has been instrumental to address such challenges, more specific in divided and or post conflict societies.

Since inception of the federalism idea in Somalia's political discourse, most politicians and civil leaders had had a skeptical view about it and considered it to an imposition or an agenda by the neighboring countries to have a weak Somali state. Strangely, they failed to appreciate how it could vitiate the ongoing conflict and brace stability. In addition, federalism is expected to address issues of heterogeneity and conflicts associated or emanating from it in a society, many still believe the clan cleavages in Somalia and the prejudice occasionally accompanying it are, according to them, never sufficient to consider Somalia a highly fragmented, heterogeneous or a composite of mutually exclusive ethnic groups that requires federalism to solve the conundrum. This kind of outlook among others have created a pool of opposition to the federal framework.

Despite the opposition, the federal system was enshrined in the 2012 interim constitution of Somalia. The federal system as is, is expected to influence the country move towards stability through two main avenues. First, the system to accommodate and restructure boundaries of the

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<sup>363</sup> Michele Gonnelli, Between local governance and federalism, international actors and pirates in Clan and State Politics in Somalia, Michele Gonnelli (ed) ITPCM International Commentary December 2013 at 8.

<sup>364</sup> Soeren Keil, 'Federalism as a tool of conflict Resolution: The case of Bosnia and Herzegovina, (2012) L'Europe en formation No 363, 205 at 210.

already existing regional government of Somaliland and Puntland, as well as the distinct regional entities of Somalia in the pre-1991 administrative regions to engineer a new geopolitical reality to curb clan patronage and influence the inter and intra clan politics. Second, the implementation of shared rule (in central government) and self-rule (in regional government) that would give the citizens at all levels a sense of belonging autonomy and control. The clan-based conflicts in Somalia can best be addressed through a system that disrupts clan entitlement and allocate some level of autonomy to an administrative unit, something that a unitary state will not likely do.

Unfortunately, by and large, these and many other aspirations are nothing more than constitutional texts. The FG has failed to address the structural adjustment needed to enable federalism take root and alter the trend of violence or stifle its proliferation. The necessary legislative instruments have always proved to come too late.<sup>365</sup> The creation of the FMS took longer than previously anticipated which provided grounds for regions to create FMS without proper structural mechanism in place or consulting the FG like the case for Jubbaland Interim Administration (JIA).

The lack of geographic architecture and dismembering of clan concentration set up that has been in existence for much too long has brought about challenges between clan members present in one FMS and between different FMS entities. The creation of FMS without a proper formula has made room for clan as a primary tool for power play and, it has more often shifted the task from constitutional implementation to power competition between the FG and more terribly between clans within individual FMS.<sup>366</sup> Fighting and competition between clans and sub clans in

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<sup>365</sup> Some legislation can be sighted on this regard; The act on boundaries commission, distribution of revenue framework and constitution review commission act.

<sup>366</sup> Dominik Balthasar, Somalia's federal agenda: From fragility to fragmentation, European Union Institute for Security Studies, 2015 Report No 17, at 2-3.

Hirshabelle about land and representation in the local assembly is a clear indication of that.<sup>367</sup> Also, the fighting between the Galmudug administration and the Ahlu Sunna wal Jama'ah militia is also another case for increasing appetite for control and dominance.<sup>368</sup> Although the two protagonists have reconciled through a power sharing formula it is evident that the situation at the respective FMS and constituting districts and clans remains to be highly fluid and volatile. And because conflict can never be managed at the national level or federal level only, the local communities must feel incorporated.

The continuous fight between sub clans for more representations and recognitions is an eminent threat to federalism system or functionality of the FMS. Equally the boundary dispute between Galmudug and Puntland and between Puntland and Somaliland is also another indication of how the absence of a deliberate intervention to deflate clan competition through geographical modification can only lead to acknowledging people to be part of clan arithmetic and instigate violence. The provisional constitution ought to have brought about positive disruption of the old system and entrench a new identity but unfortunately that has not happened yet.

In a federalism system political power is decentralized and guaranteed in a constitutional text as a primary legal reference. The constitution ought to clearly elaborate explicitly and especially in a fractured and clan-based country like Somalia the number of federal units, functions and powers bestowed upon the federal units, revenue allocation and the type of relationship that would exist between the FMS and the FG. Surprisingly, the interim constitution is silent on much of the issues.

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<sup>367</sup> Abass Sheikh Kassim, Conflict Assessment Report Hirshabelle State of Somalia, 2017 at 6-7.

<sup>368</sup> Ibid.

And, unfortunately, the constitution left some of such issues and, in a clan laden environment to statutes to be legislated in a parliament that is selected through a clan formula.

It is apparent that mistrust, social and political polarization and tribal, clan and sub clan competition that have continuously manifested itself in political spectrum cannot be diminished or minimized but will be exacerbated amidst this blurriness in function and power allocation and create a strained relation between the center and the periphery. The raucous relationship that is and has been on the rise could make the contemplated peaceful co-existence between the federal entities and the central government a pipe dream.<sup>369</sup>The constitution is faulted for leaving key sections incomplete, especially sections on the division of powers and resources allocation between the Federal Government and sub-state units and only mentioned what will be beyond the scope of the FMS like the Foreign Affairs, National Defense, Citizenship, Immigration and Monetary Policy and avoided in elaborating what exactly lie within the FMSs mandate.

It has however, captured that the two levels will have discussions in areas of water resources, agriculture, animal husbandry, pasture and forestry, the prevention of erosion and the protection of the environment, health, education, relations and dialogue amongst traditional leaders, and the protection and development of traditional law, Relations amongst religious scholars and youth.<sup>370</sup> What the constitution contemplated to achieve or mean with the word “discussion” has remained a puzzle. It does not plainly allocate powers to the FMS which leaves the FMS to assume virtually every mandate and responsibility and operate as independent states. This has led to multiple

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<sup>369</sup> Survey of Public Opinion on Somalia’s Provisional Constitution, heritage institute, Policy Brief, 07 2017 at 3.

<sup>370</sup> Art 52.

fissures in the past and has been made even worse by the current stalemate between the FMS and the FG. The FG has numerous times accused the FMS to have expanded their interpretation of the powers allocated to them in the constitution and going further to engaging international actors and institution in areas of security and monetary policies which the FG considers to be against the latter of the constitution.<sup>371</sup>

Equally, the FMSs have continuously accused the FG to be undermining the autonomy of the FMSs by interfering with their internal issues and influencing political arrangements, election outcomes and incite clan sentiments in their respective states. This has now translated into a vicious tension between the FG and the five FMS, mainly JIA, Galmudug, Hirshabelle, South west and Puntland which have now suspended all corporations with the FG.<sup>372</sup> This acrimonious position galvanized by issues of clan domination and incitement has placed the federal structure at a dangerous path and its slowly brewing old malaise of mistrust between the center and the periphery and, entice the imagination of the FG being interested with power concentration, a problem that instigated the two civil war and the reason behind adoption of federalism.

Resources, just like power, is almost always part of the federal decentralization process. Resource allocation is hardly contemplated without appreciating how revenue would be collected and allocated between states in a federal system. And because of the long civil war, and existence of economic activities outside the supervision of the state the economic conditions might not be lucrative enough to help collect revenue and share it between the FG and the FMS. With these

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<sup>371</sup> Options to End Somalia's Current Political Stalemate, Heritage Institute for Policy Studies, Policy Brief 17 Oct 2018 at 1.

<sup>372</sup> Ibid at 2.

limitations, the constitution failed short of elaborating how revenue or even resources were to be shared between the FG and the FMS.

Conversely, it is not well crafted how strategic installation like the Port of Bosaso and Kismayo both of which lie within different FMS could have their respective revenues properly accounted for and shared nationally.<sup>373</sup> The FG is only currently collecting taxes within Mogadishu while the federal states and some militias collect and administer taxes collected in their respective regions which makes redistribution of resources problematic.<sup>374</sup> Appreciating the centrality of resource allocation and redistribution, the framers -who apparently did not include the locals -should have clearly developed a governing principles and framework addressing such issues. The probability of clan competition and conflict based on limited resources remain strife and inevitable as the case in Galmudug and Hirshabelle.<sup>375</sup> Equally, underdeveloped regions which were ravaged by decades of war would feel highly disadvantageous and might incite conflict. Equitable resource allocation remains a very important element to avert, mitigate and deflate conflicts. Lack of comprehensive approach in the interim constitution has made peace a stretch far away from enabling a peaceful environment.

The Upper House is designed to protect the interest of the FMS. But, looking into the constitution, it is not very clear how that is supposed to be achieved. The powers allocated to the Upper House hardly captures the mechanism on how the House will protect the interest of the FMS. Most of the functions are identical to the Lower House, which creates an impression of a lacuna in addressing

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<sup>373</sup> Mobilizing Domestic Revenue to Rebuild Somalia Somalia economic update, World Bank Report, 2<sup>nd</sup> Edition July 2017 at 17.

<sup>374</sup> Ibid.

<sup>375</sup> Sheikh (n56) at 10—12.

the functionality of the federalism. It is expected that when strain relationship between the FMS and the FG is involved the Upper House should handle the issue under their mandate which is not very well cut off to protect the FMS.

The judiciary has skeleton provisions and very limited information. The establishment of the Judicial Service Commission (JSC) does not clearly address issues of employment of judicial officers at the state level, in addition the representation in the JSC is not clear if FMS will have a representation or shall be consulted. The constitution only mentions the powers bestowed upon the Constitutional Court while there is no mentioning of powers given to other levels like the High Court and subordinate courts. While the dispensation of justice is still weak and lacks authority, in areas with al Shabab presence people still prefer to adjudicate to their courts or community and customary institution to settle disputes.<sup>376</sup> The fractured judicial system creates a perfect brewing ground for discontent and conflict due to arbitrary application of the laws and lack of standard procedures in addressing disputes.

To analyze the functionality of the federalism system it emerges that it faces a cute shortage of enabling mechanism and vision from both the constitutional purview and the supporting legislation. It is important to appreciate that the main sources of the conflict revolved around issues of representation, equitable share of resources, clan patronage and lack of rule of law among others. The federal framework was supposed to bridge the gap and provide space for development and fulfilling the expectation of people by providing a mechanism for lasting peace through the new

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<sup>376</sup> Abdi Noor Mohamed, Building Federalism through Local Government Dialogue, Assessment Mission to Middle Shabelle 28 July – 15 September 2015 at 8.

constitutional dispensation. This was premised that most clans in Somalia have their designated geographical area, and creation of the FMS and the local authorities will consider the composition of clans in its administration and district levels, ensuring that power is well devolved and, as many clans as possible should feel to be participating in running the affairs of the country. And as a result, this will minimize the price people associate with the power at and reduce the attraction of the power trapping at the center.<sup>377</sup>

Unfortunately, it is within this same framework that clans still compete for more power based on their numbers, power and influence at the periphery, which endanger the very reason of the existence of federalism or federal states. Clan and inter clan fighting have not seceded neither has trust level achieved considerable increase within and around most of the FMS. The merging of two or three former administrative regions without proper clan architecture and reformulation bring along a group of clans which increases the emergence of conflict due to the still existing clan political control. In addition, the absence of governance structures and memory that appreciates the rule of law and the diversity of the people, it is hardly expected that the weaker clans or sub clans in any FMS will be awarded proper protection or representation they deserve.

There have been many clans and inter clan fighting and domination attempt in many regions due to weak structures that fail to give adequate assurance to small clans. The boundaries commission which was supposed to work and formulate a methodology to minimize clan concentration and realign the boundaries in way that will minimize clan dominance has made such aspiration appear

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<sup>377</sup> Norris Pipa, *Driving Democracy*, (New York, Cambridge University Press 2008) Chapter Seven 'Federalism and decentralization' at 3-5.

only in distant future. In addition, the governance structure in the current arrangement is oblivious of merging and extremely pernicious challenge of the Islamists. This came out clearly when Ahlusunna wal Jam'ah an armed group in Glamudug region comprising different clans in its ranks forced their recognition as a separate power. The group boasts its multi ethnic/ clan composition and places itself as the best alternative to the clan-based politics.

With its transcendental identity it introduces a more disturbing challenge of religion as a component of politics. This qualification resembles that of Al Shabab with variation in the use of violence against civilians and civilian installations. The seclusion of Islamist, or admission of some who appeared to be moderates amongst the drafters during constitutional discourse might have given Al Shabab more leverage to push for their agenda and entice the moderate among the Somalia population to join their cause. Currently, the threat presented by Al Shabab is real and solutions must be more compelling and beyond guns and bullets. Winning hearts and minds of young men could be well crafted by engaging in dialogue and ensuring the structures enshrined in the constitution are able to offer a promising alternative the endless fighting.

The constitution falls short of addressing the real needed details to face the challenges faced by the Somali people. The central challenge would be if the law can, and has, the ability to vitiate and impair violence, even in instances where violence has been deep and long. The constitution, beyond capturing agreed values and principles of a political negotiations, it also introduces values and that influence the conduct of politicians and the public in general.<sup>378</sup> The respond here is to appreciate the instrumental effect and role of law in guiding the political discourse and setting up

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<sup>378</sup> Richard Simeon, *ibid* at 242

the rule of engagement. The good example would be the Good Friday Agreement which received the consent of the people and enshrined as constitutional document that made peace achievable in Ireland after years of war between the contending factions.<sup>379</sup>

The federal framework as currently structured does not enable the population to meet their expectation of peace and security. The boundaries created does not disrupt the clan concentration and composition neither does it create territories that will increase issue-based politics away from clan and intra clan patronage. The FG lacks the ability to formulate a more robust national dialogue that will address the trust deficiency and empower the FMS. Equally, the FMS have not appreciated that federalism means more inclusion than exclusion and it could benefit all stakeholders.

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<sup>379</sup> For extensive analysis of the Good Friday Agreement see, Bertie Ahern, 'The Good Friday Agreement: An Overview' (1998) Fordham International Law Journal Vol 22: 4:5

## CHAPTER FOUR

### PUBLIC PARTICIPATION IN POST CONFLICT CONSTITUTION MAKING AND THE FEDERAL SYSTEM: THE CASE OF ETHIOPIA

#### 4.1 Introduction

Ethiopia promulgated a new constitution in 1994 and took effect in 1995<sup>380</sup> after a five-year transitional period that transitioned the country after along civil war that eventually brought down the *Dergu* regime which ruled the country since the fall of the fall of Haile Selassie in 1974.<sup>381</sup> The modern Ethiopia has been in formation for a long period and almost attained its current geographical boundaries in the late 19<sup>th</sup> century.<sup>382</sup> For the longest, the Amhara and Tigrey ethnic groups respectively from the North Central and the North had, and although not concurrently, dominated the political scene and created a unitary centralized state through all methods of political subjugation and economic exploitation.<sup>383</sup>

The demographic Ethiopia as it is known today is a composite of nearly 84 ethnic groups and languages.<sup>384</sup> The imperial force of the north central elite ethnic group dominated over all these

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<sup>380</sup> Tsegaye Regassa, 'The making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice' (2010) *Afrika focus* Volume 23 No 1 85 at 87.

<sup>381</sup> Harold G. Marcus, *A History of Ethiopia* (2004) Berkeley: University of California Press, at 67. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.374.313&rep=rep1&type=pdf> accessed on 31<sup>st</sup> Oct 2018; AK Adeghe 'Ethiopia's Ethnic Federalism, History and ideology' (2009) 54 at 56. Available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13839/chapter%20three.pdf?sequence=12> accessed on 22<sup>nd</sup> Nov 2018.

<sup>382</sup> Hashim Tewfik, 'Federalism in Ethiopia' (2010) *Institute of Federalism Addis Ababa University* at 2; AK Adeghe, *ibid* at 55; See also, Addis Hiwet 'Analysing The Ethiopian Revolution' (1984) *Review of African Political Economy*, No. 30 *Conflict in the Horn of Africa* 32 at 36.

<sup>383</sup> Siraw Megibaru Temesgen, 'Weaknesses of Ethnic Federalism in Ethiopia' (2015) *International Journal of Humanities and Social Science Invention* Vol 4 issue 11 49 at 50; ; Christophe Van der Beken, 'Federalism and the Accommodation of Ethnic Diversity: The Case of Ethiopia' at 2; Christophe Van der Beken, *Ethiopia: From a Centralised monarchy to a Federal Republic* (2007) *Afrika Focus*, Vol. 20 Nr 1-2 13 at 14; See generally on centralization policies of the emperor in Assefa Fisha, 'The Process of Centralization (1930-1991)' available at Accessed through <http://www.abysinnialaw.com/study-on-line/item/1089-process-of-centralization> on 8th Nov 2018.

<sup>384</sup> Alem Habtu, *Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects* (2003) *International Conference on African Development Archives Paper* 57 at 7; Jon Abbink, 'Ethnic-based federalism and

nations mainly by military conquest cemented by imposition of their culture, language and religion and effective suppression of the rest. The ruling elite purposefully initiated and executed with unprecedented vigour a process to conquer territories and dispose land owned by the other nations in their native regions and allocating them to their preferred settlers and associates ranging from administrators, Judges and priest most of whom came along with the conquering forces.<sup>385</sup> The discontent of the imperial rule came to its climax in 1974 when the imperial monarch was overthrown by the military commonly known as Dergue the Amharic word for a committee.<sup>386</sup> The latter established another era of terror disguised in reforms and development under socialism. The *Dergu* regime failed through its application of Marxism-Leninist dialectic to address the “national question” of nationalities and ethnic representation and rather assumed dictatorial and punitive measures like its predecessors to establish a unitary centralized regime.<sup>387</sup>

By 1991, the regime had lost its velocity and its socialism model had terribly failed to address array of issues including the Ethiopian national question.<sup>388</sup> The incoming regime represented a new venture in another cycle of social engineering of the Ethiopian nation and restructuring of the state. By all measures, the acknowledgement and adoption of ethnic federalism was a bold move

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ethnicity in Ethiopia: Reassessing the experiment after 20 years’ (Nov 2011) *Journal of Eastern African Studies* Vol. 5, No. 4 596 at 597. Alemante G. Selassie, ‘Ethnic Federalism: Its Promise and Pitfalls for Africa ( 2003) *The Yale Journal of International Law* vol. 28: 51 at 68. Daniel Abebe, ‘Ethnic Federalism in Ethiopia: A Means to an End’ (2017) University of Chicago Unpublished. At 2. Ethiopia’s population is approximately 99.8 Million. With individual languages are counted to be 90, of these 88 are living 2 extinct 85 are indigenous and 3 non indigenous, 43 are institutional, 13 are developing 16 are vigorous 11 are in trouble and 5 are dying available at <https://www.ethnologue.com/country/ET> accessed on 6th Dec 2018.

<sup>385</sup> Alem Habtu, *ibid* at 10. Temesgen, *ibid*; Tewfik, *ibid* at 3; Milkessa Midega ‘Ethiopian Federalism and the Ethnic Politics of Divided Cities: Consociationalism without Competitive Multiparty Politics in Dire Dawa’ (2007) *Ethnopolitics*, 16:3 279 at 280.

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

<sup>387</sup> Assefa Fisha, *ibid* (n4) at 10; Bekalu Atnafu Taye, *Ethnic federalism and conflict in Ethiopia* at 48. <https://www.ajol.info/index.php/ajcr/article/download/167170/156607> Accessed on

<sup>388</sup> Harold G. Marcus, *A History of Ethiopia*, *ibid* at 216.

and a clear departure from the nation state building approach undertaken by post-colonial African states where ethnic expression were denied public expression and acceptance.<sup>389</sup> The third engineering phase had given the ethnic groups autonomy and the probability of secession, but the party remained vanguard and controlled most of the activities with the minorities Tigray ethnic group being in command and suppressing other ethnic groups.

The constitutional journey has been tedious and challenging in so far as addressing the competing interests of peoples and nationalities in Ethiopia under variant forms of political leadership and structures. This chapter evaluates the Ethiopia's post conflict constitution making process and its ethnic federalism model in an attempt to understand its ability to address the ethnic and nationalities diversity of the people and if its ability to cap the violence associated with such diversity.

#### **4.2 The Constitutional History of Ethiopia**

During the first half of the 20<sup>th</sup> century, the Ethiopian imperial embarked on a modernizing adventure. At the center of this modernizing foray, was a written constitution. In general, Ethiopia has seen four permanent constitutions excluding the revised one on the eve of 1974 revolution, and the 1991 Transitional charter, the: 1931, 1955, 1987, 1991(Transitional) and 1995.<sup>390</sup> Until 1931, the political system was monarchical and feudal with no proper legal formalism. The nobility stationed at different provisional centers used to govern in the emperor's name with some limited

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<sup>389</sup> Habtu, *ibid* (n5) at 4; Alemante G. Selassie *ibid* (n50 at 53; Hiwet, *ibid* (n3) at 35; Adeghe, (n2) at 56.

<sup>390</sup> Abebe, n5, Regassa, *ibid* (n1) at 98.

autonomy. The political structure was centralized but due to geographical vastness and poor infrastructure, the emperor ruled through regional lords or “kings” in their own rights.<sup>391</sup>

#### **4.2.1 The 1931 Constitution**

The 1931 constitution ushered in a new epoch in Ethiopia’s governance structure by paying homage and cementing the conventional imperial powers. The constitution was a statement of authority and abolition of the dual system of autonomous “kings” in the periphery while cementing a strong central monarchy. The imperial system deliberately but carefully neutralized competitors to the throne through effectively centralizing the state and legitimizing absolutism by absorbing most of the regional “kings” into emperor’s court as advisors.<sup>392</sup>

Compared to ordinary constitutions, the 1931 constitution had very limited functionality. The constitution was merely a centralizing instrument and zest to look modern as far as governance is concerned.<sup>393</sup> Modelled around the Japanese Meiji constitution, with most clauses resembling the Japanese imperial constitution of 1887, it hardly served any one beyond the emperor and his cronies. The constitution established the two-chamber parliament; the Senate and Deputies. While the emperor appointed the senate from his pool of loyal elites and nobilities, the nobles appointed the Deputies, interestingly, both houses were only granted “deliberative” powers.<sup>394</sup> The

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<sup>391</sup> Tsegaye Regassa, *Ethnic Federalism and The Right to Self-Determination As A Constitutional Legal Solution to the Problem of Multi-Ethnic Societies: The Case of Ethiopia* as in; Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, (Netherlands, Wolf Legal Publishers, 2005/06) at 19-21.

<sup>392</sup> Assefa Fiseha, *ibid*.

<sup>393</sup> Tsegaye Regassa, *ibid*; Harold G. Marcus, (n2) at 135.

<sup>394</sup> Constitution of Ethiopia 1931 Art 30.

constitution had very limited aspect of a liberal democratic semblance. By and large, the emperor consolidated more powers. The constitution was cynical and considered a mere grant to the people.

#### **4.2.2 1955 Constitution**

The 1955 constitution came along to further consolidate more powers and exert more authority. The constitution was a mere revision of the 1931 and an attempt to bridge a gap between a more progressive Eritrean Constitution. A country which was, until 1949 an Italian colony with a constitution entrenched in a liberal western edifice, something that the 1931 was lacking. The emperor consolidated more powers and remained to be the sovereign while the people his subjects.<sup>395</sup> Chapter one of the constitution was basically elaborative of his lineage and the privileges of the emperor's family and their successors.<sup>396</sup> The second chapters covered the powers bestowed upon him including legislative, judicial and all relevant appointments. He was supreme and absolute.<sup>397</sup> The rights of the subjects were always restricted with expression such "in accordance to the law" "within the limits of the law".<sup>398</sup>

The parliament comprised of two chambers, one of which is appointed by the emperor and to be elected after a period of two years from the day the constitution comes to effect. Part of the conditions stipulated for eligibility was one must own a property in his district, which gives privilege to the nobles and the elites.<sup>399</sup> The constitution was a grant to the subjects by the emperor and had limited checks and balances and with less ability to uphold the rule of law. This

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<sup>395</sup> AK Adeghe, *ibid* (n2) at 56.

<sup>396</sup> Constitution of Ethiopia 1955 Chapter 1 Art 1-20.

<sup>397</sup> *Ibid*, Art 26-36.

<sup>398</sup> *Ibid* (n16) Art 45.

<sup>399</sup> *Ibid* Art 96.

constitution served the emperor with very limited incentive to expand the democratic space or any meaningful adjustment, keeping in mind that most African countries were still colonies and Europe was undergoing major political restructuring within its borders as a result of the World Wars.

### **4.2.3 1987 Constitution**

When most neighboring countries in the sixties were undergoing emancipation from the colonialists and establishing self-rule, the emperor leadership was similarly presented with unsurmountable challenges due to its lack of political nerve and imagination to adapt and evolve, and rather opted to continue with its archaic monarchical way. The newly western educated youth represented an antithesis to the emperor and were perturbed by how rudimentary and inefficient the system was at the time when the neighboring countries were advancing.<sup>400</sup> The belated changes could not hold back the formidable wave of rapturous events in the country. By 1974, the *Dergue* a committee in Amharic had taken power and rendered the monarchy obsolete. The euphoria of liberation was jubilating, ecstatic but remained highly fleeting. The 1955 constitution was not only suspended, but the Dergue lacked a common road map or a coherent plan to address the adverse challenges of the country including demands of the unions, the student movements and the general masses in a formal and uniform legal structure.<sup>401</sup> Instead, it embraced socialism as a mode of economic organization in a country with majority of the population being agrarian and rural with very limited political or economic organization.<sup>402</sup> The military remained directly in charge with

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<sup>400</sup> Assefa Fisha, 'The process of centralization 1930-1991' at <http://www.abysinnialaw.com/study-on-line/item/1089-process-of-centralization> on 8th Nov 2018.

<sup>401</sup> Addis Hiwet, 'Analysing the Ethiopian Revolution' (1984) *Review of African Political Economy* No. 30 Conflict in the Horn of Africa 32 at 36.

<sup>402</sup> Adeghe (n 1) *ibid* at 64.

unfettered powers and authority, by all measures, this was a recipe for dictatorship which eventually ensued the country due to the organizational vacuum.

This prelude is important as far as constitution and constitutional order is concerned. As time elapsed, the military was gradually but systematically dismembering the constitutional offices and institutions and never replaced them in any way. Practically, the Dergue ruled with no constitution but decrees.<sup>403</sup> The draft constitution of 1974 never materialized and the Dergue purposefully undermined the process to their benefit. The 1987 constitution came as a cementing factor to the hitherto well entrenched dictatorship covered in public emancipation and socialism. Departing from the monarchical constitutional grant, the 1987 was subjected to plebiscite. The constitution established a new name for the country; People Democratic Republic of Ethiopia (PDRE) and re arranged how labour and means of production are organized.

The constitution contained 119 articles, 4 Parts and 17 Chapters. The state maintained its unitary form albeit regions were granted some autonomy.<sup>404</sup> It established a National Shengo which worked like a parliament with vast powers including emending the constitution, electing the president and the deputy president, the prime minister, deputy prime minister the supreme court judge the public prosecutor, the auditor general and establish administrative units.<sup>405</sup> The president had massive responsibilities ranging from being the head of state, the Secretary General of the Communist party, the executive president of the republic, the president of the Council of State, the chairman of the National Shengo, and the Commander in Chief of the armed forces.<sup>406</sup> The

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<sup>403</sup> *ibid* (n 16).

<sup>404</sup> 1987 Constitution Art 59.

<sup>405</sup> *Ibid* Art 63.

<sup>406</sup> *Ibid* Art 84- 87.

separation of power concept was not well addressed as the president could trigger legislation and assent them as well.<sup>407</sup>

The constitution abolished the class privileges and set all citizens on equal footing, and positively eradicated the pseudo feudal state that existed during the emperor's time. Importantly, there was and for the first time a clear separation between state and the church and the state was no longer the custodian of the orthodox church. The document was more like a revolutionary manifesto characterized by socialist ideals in its substantive values, principles and provisions, and it was in theory made by the people of Ethiopia themselves, as opposed to the first two which were "imposed" by emperor colonialists. By all standards, the constitution was an imbroglio, it provided for a fractured leadership with less or no legitimacy and lacked developmental compass to save the country for the precipice. In the middle of these, the rebel groups were getting momentum and no amount of such cosmetic changes would have stifled their advancement amid unraveling support in the west.<sup>408</sup>

#### **4.2.4 1995 Constitution**

Just like socialism wave had engulfing the post-colonial Africa in the 70's, Ethiopia was no exception. The 90's was equally the epoch of liberal democracy tide and, Ethiopia was in the middle of it too.<sup>409</sup> After nearly seventeen years in power, the Mengistu regime was eventually dislodged in 1991 by a coalition of revolutionary forces from multiple ethnic groups: Tigrayan

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<sup>407</sup> Ibid Art 86(5a).

<sup>408</sup> Harold G. Marcus, *A History of Ethiopia*, ibid at 210.

<sup>409</sup> Marina Ottawi, 'The Ethiopian Transition: Democratization or New Authoritarianism?' (1995) *Northeast African Studies New Series* Vol. 2 No. 3 67 at 67.

People Liberation Front (TPLF), Oromo Liberation Front (OLF), Afar Liberation Front (ALF), Eritrean People Liberation Front (EPLF), Islamic Oromo Liberation Front (IOLF), Western Somali Liberation Front (WSLF), Ogden National Liberation Front (ONLF). Just before the march towards Addis Ababa and for purposes of uniting and gaining legitimacy and support, the TPLF joined hands with other ethnic rebel groups and formed an umbrella of ethnic parties which included: TPLF, Amhara National Democratic Movement (ANDM), the Oromo People's Democratic Organization (OPDO), and the Southern Ethiopian People's Democratic Movement (SEPDM) together they are known as Ethiopian People's Democratic Revolutionary Front ("EPDRF").<sup>410</sup>

The fall of Mengistu was a watershed event and presented the rebels with a constitutional moment. And, considering their composition, the coalition was perfectly placed to set in motion a constructive turbine to socially engineer the country, a process that unfortunately failed in two previous attempts. The TPLF which was the dominant party, had an overriding assertion of self-determination way before the fall of the regime and struggled to establish an ethnic based republic of the Tigreyan people an idea shared with almost other rebel groups.<sup>411</sup>

The pseudo feudal system under the emperor and its ramification in creating social classes while subjugating the rest of the population gave birth to calls for emancipation of other ethnic groups.

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<sup>410</sup> Ibid at 68; Mohammed Ademo, The Many Layers of the Ethiopia Crisis, Africa Centre for strategic studies <https://africacenter.org/spotlight/many-layers-ethiopia-crisis> accessed on 12th Nov 2018; Bekalu Atnafu Taye, Ethnic federalism and conflict in Ethiopia at 48, <https://www.ajol.info/index.php/ajcr/article/download/167170/156607>. Accessed on 6th June 2018.

<sup>411</sup> Jon Abbink, (nxxx) at 599; Christophe Van der Beken, (n 4) at 7; Bekalu Atnafu Taye, 'Ethnic federalism and conflict in Ethiopia' at 6 <http://accord.org.za/ajcr-issues/ethnic-federalism-conflict-ethiopia/> accessed on 10<sup>th</sup> Nov 2018.

This interminable aversion brought to fore the highly popularized Leninist coined phrase of “the national question” that was academically problematized and publicly disseminated just before the emperor was dislodged and all through the entire rule of the military junta and, had generated a heated discourse as the most persistent question within the Ethiopian intelligentsia. Being a composite of tribe and ethnic groups informed by the Marxist-Leninist approach, Ethiopia’s social engineering had remained an intricate conundrum even during the Dergue regime. The coalition approved a Transitional Charter that upheld multiple freedom and rights including the right of self-determination and a process to establish a new constitutional order.<sup>412</sup>

From the outset, the 1995 constitution was a cessation from past experiences, its endorsement and content had no replication in the modern Ethiopian history.<sup>413</sup> It completely, at least in paper, overhauled the structure and the mode of governance.<sup>414</sup> The boldest article at the center of the new constitutional dispensation was the right of self-determination and the right to secede which was firmly entrenched in the constitution.<sup>415</sup> The constitution had Eleven Chapters and One Hundred and Six Articles. It acknowledged the diverse ethnic and nations composition of the country. Right from the preamble it states “We the Nations, Nationalities and Peoples of Ethiopia” a problem that has been part of the Ethiopian evolution politics.<sup>416</sup> The constitution established a federal state away from the unitary one that has been in existence since the 19<sup>th</sup> century.<sup>417</sup> The

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<sup>412</sup> Alem Habtu, (n6) at 13. The Transitional Period Charter of Ethiopia.

<sup>413</sup> Jan Erk, ‘Nations, Nationalities, and Peoples’: The Ethnopolitics of Ethnofederalism in Ethiopia, *Ethnopolitics* (2017) Vol 16:3 219 at 220.

<sup>414</sup> J. Abbink, ‘Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism’ (2006) *Journal of Contemporary African Studies* vol 24:3 398 at 394.

<sup>415</sup> Constitution of The Federal Democratic Republic of Ethiopia, Art 39.

<sup>416</sup> The Preamble of the Constitution of The Federal Democratic Republic of Ethiopia of 1995.

<sup>417</sup> Ethiopia has always had a unitary centralized government from the emperor period up until the collapse of the Dergue system. See, the 1935, 1955, 1987 constitutions.

constitution vested the sovereignty on the peoples, nations and nationalities, it established basic and fundamental human rights. The country was transformed from a unitary state to a federal one with nine ethnic states and two administrative cities. The constitution enshrined the separation of powers principle and separated state and religion.<sup>418</sup>

#### **4.2.5 The 1995 Constitution Making Process**

With the fall of the regime in Addis Ababa, the making or remaking of a new constitutional order became excessively salient. Contextually, years preceding 1990 had seen considerable weakening of the Eastern bloc's influence, a regression that culminated in the fall of the Soviet power bringing the protracted Cold War to an end. The events of 1989 represented moments of great significance. The triumph of Western liberal democracy against the Eastern socialism model on the global stage did not only precipitated the demise of Eastern socialism model that had pervaded most post-independence African states but, left most of these states with no patron and inspiration from ideological center.<sup>419</sup> In Ethiopia, and in the midst of these global seismic changes, the sounds of guns and bullets were still reverberating while simultaneously, ushering in a period of rapture and deconstruction. Reflecting the global trend, the scale was gradually but firmly drifting in favour of the western supported rebels against the Socialist regime. The armed coalition sweeping the Ethiopian highlands, valleys and plains captured the capital in May of 1991. More than any other time, the coalition needed to remain coherent and unified to avoid the country disintegrating in to an abyss of violence and replicate the Somalian experience.

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<sup>418</sup> Constitution of The Federal Democratic Republic of Ethiopia, See Also, Art 11 Art 50.

<sup>419</sup> Valeria Piergigli, *The Constitutional Transitions in the Horn of Africa: Problematic Balancing among Traditional, Religious, and Liberal Values* (n151) *ibid*, at 250. Vick Lukwago Ssali, 'Ethnic Federalism in a Comparative Perspective: Implications for Uganda' at 101.

At the inception, the political environment looked promising with feelings of inclusivity and respect of pluralism in a highly diverse political construct of Ethiopia. In July 1991 and under the leadership of the EPDRF, Twenty Seven political groups some created overnight, convened in Addis Ababa and participated in a conference to develop a governing arrangement.<sup>420</sup> The conference culminated in one key decision: enacting of a Transitional Period Charter and Transitional Government with 87 Council of Representatives (COR) representing all present political groups present and Council of Ministers.<sup>421</sup> The legal framework for the constitution making process was largely pegged on this document. The Transitional Period was to last for only two years subject to only one extension and for a maximum period of six months only.<sup>422</sup>

Within this time frame, a new constitution would be made, elections for regional and local assemblies to be conducted within six months and the elections for the Constituent Assembly undertaken and subsequently ratify the constitution, thereafter election for the national Assembly be held.<sup>423</sup> It is worth mentioning, however, that in the conference, EPDRF had substantial representation with 32 representatives out of the total 87 and within the EPDRF the TFLP was the most dominant despite its small ethnic base population of the Tegreyans.<sup>424</sup> The Oromo Liberation Front (OLF) which represented the biggest population and second most largest party had only 12 representatives and the remaining slots were shared among the other political groups.<sup>425</sup> There was

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<sup>420</sup> Habtu, (n 6) at 14; *ibid* (n23) at 70.

<sup>421</sup> Transitional Period Charter of Ethiopia, Article 6-7.

<sup>422</sup> *Ibid*, Article 12.

<sup>423</sup> Transitional Period Charter of Ethiopia, Article 10- 12. *Gazeta 1991*Ottaway, (n 23) at 71. Habtu, *ibid* at 14; Fisha, *ibid* (n16). John M. Cohen, *Transition toward Democracy and Governance in Post Mengistu Ethiopia*' (1994) Harvard Institute for International Development Harvard University, Development Discussion Paper No. 493 at 3; National Democratic Institute for International Affairs and the African-American Institute and the African-American Institute, *An Evaluation of the June 21, 1992 Elections in Ethiopia* (Washington, D.C 1992), at 16.

<sup>424</sup> Regessa, (n8) at 87; Ottaway, (n 23) at 72.

<sup>425</sup> Ottaway (n 23) at 71; Hebtu, at 15.

no understandable logic or a comprehensible matrix explaining how the allocation was based on, it is always left to be assumed that military abilities and power could have been the overriding criteria.<sup>426</sup> It was not an oddity that as a result of this imbalances Males Zenawi, the leader of TFLP a powerful party within the EPDRF was elected as the leader of the Transitional Government of Ethiopia (TGF).<sup>427</sup>

Under the Transitional Charter, the Council of Representatives CoR, was to establish a Constitution drafting Commission. With Proclamation No 24/1992 a Constitution Commission (CC) was established with a 29-member General Assembly, the Executive Committee and various expert committees.<sup>428</sup> The Members of the Commission were chosen and approved by the CoR from diverse background all enjoying equal vote. The commission was made of Seven members from the CoR, Seven members from different political organizations, three members from trade unions, Three members from the Chamber of Commerce, two members from the Ethiopian Lawyers Association, two members from the Ethiopian Teachers' Association, Two members from the Ethiopian Health Professionals' Association; and Three women representatives.<sup>429</sup> The Chairman, the deputy and the secretary of the CC were both appointed by the CoR.<sup>430</sup> The commission was organized based on different thematic areas on 1) Human Rights, 2) Government Structure and Division of Powers, and 3) Special Issues (including official languages and citizenship).<sup>431</sup>

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<sup>426</sup> Hebtu, *ibid.*

<sup>427</sup> Cohen (n 30) at 3.

<sup>428</sup> Regassa, (n1) at 102.

<sup>429</sup> *Ibid*; Cohen *ibid* at 6.

<sup>430</sup> Regassa, *ibid.*

<sup>431</sup> Heodore M. Vestal, 'An Analysis of the New Constitution of Ethiopia and the Process of Its Adoption' (1996) *Northeast African Studies New Series* Vol. 3 No.2 21 at 23.

Within six months, the CC presented a booklet "About Basic Concepts of Constitutions: Presented for Public" the booklet apparently contained all the ideas relevant and viable to be included in the constitution. The booklet was meant to be a guide to foster public discussion and engagements. Recommendation were solicited from the public albeit in a controlled fashion.<sup>432</sup> Discussions were held around the country, with limited participation and special discussion forums were equally held with different stakeholders including journalists, religious organization, professionals and academicians, political parties and civil society groups.<sup>433</sup> Until when it was presented to the CoR through the president, the content of the constitution was never known to the general public except for the periodic newsletter produced by the CC.<sup>434</sup> On 8<sup>th</sup> April 1994, the CoR deliberated on the draft and approved the draft constitution with exception of two section on: land ownership and self-determination which the document presented two alternatives.<sup>435</sup> The document was now presented to the public by the commission for discussion before it is ratified.<sup>436</sup> The discussions were held in kebeles and school premises were used for discussion, however the turnout for such discourses were low.

This development opened the door for the election of the Constituent Assembly. The EPRDF had learnt from the regional elections of 1992 how to undertake an election in a country with little memory of democratic practices due to years of imperialism and dictatorship. The participation had given EPDRF an upper hand and a substantial mileage in mobilization and organization through manipulation, violence detention and fraud leading almost all political parties boycotting

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<sup>432</sup> Ibid at 24.

<sup>433</sup> Cohen, (n30) at 7.

<sup>434</sup> Cohen, (n 34) at 7.

<sup>435</sup> Regassa, ibid (n1) at 103.

<sup>436</sup> Transitional charter article 7.

the 21<sup>st</sup> June 1992 regional and local elections.<sup>437</sup> As a result, the EPRDF and its surrogates won 96.6 % of the local and regional seats.<sup>438</sup> The elections were dubbed legitimate and bona fide by a range of international organizations and media outlets, but, in reality, it was a major setback and a disjunction in the path to democratization.<sup>439</sup>

In 1994, a 547 Constituency Assembly was elected, again, amid boycott from all major opposition parties with exception of feeble independent candidates. EPDRF won 484 seats a substantial presence to set and pass legislative agendas in the house. Concisely, the elections were about everything but a contest between ideas or parties, the competitiveness level had diminished and the populous, especially in the southern part, were left with no or weak choices. EPDRF was again establishing itself as a monopoly and consolidating its grip of the country, a phenomenon witnessed during the *Dergue* regime. This grip eventually evolved into authoritarianism through gradual manipulation of functioning institutions and subverting the democratic processes.<sup>440</sup>

By this time, EPDRF had not only become a dominant player but a de facto player with all parties sidelined and or eliminated. The EPDRF's dominated Constituency Assemble ratified the Constitution on the 8<sup>th</sup> Dec 1994 with very little oppositions all from the independent assembly members.<sup>441</sup> To elect new national and regional assemblies, elections were to be conducted within six months after the adoption of the constitution to bring the transition to an end. Enjoying the four

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<sup>437</sup> Vestel (n..) ibid at 25; Cohen ibid at 19; NDI (...) at 18. Ottaway ibid at 72.

<sup>438</sup> NDI ibid at 19; Terrence Lyons, 'Closing the Transition: The May 1995 Elections in Ethiopia' (1996) *The Journal of Modern African Studies* Vol. 34 No. 1 121 at 127.

<sup>439</sup> Ottaway, ibid at 72; Lyons, ibid at 126.

<sup>440</sup> Ottaway, ibid at 73.

<sup>441</sup> Terrence Lyons, 'Closing the Transition: The May 1995 Elections in Ethiopia' (1996). *The Journal of Modern African Studies* Vol. 34 No 1 121 at 130.

years of organization and resilience in the absence of any meaningful opposition, EPDRF was again and by no means expecting a serious or equal opposition race. In fact, it was a favourable treat. The 1995 elections were, by any assessment, EPDRF's last and final push to cement its grip on power for the next five years not as a party in transition but as a ruling party in post transition Ethiopia. Of course, these happened at a time when EPDRF had properly positioned itself for a major victory. Limited contenders participated, and among those, many belonged to, or were EPDRF's surrogates or associates. The election process was reduced to be a public relation exercise.

At inception, the constitution making process was cheered and vaunted for by all political parties as it came about as a culmination of a large consensus between the stakeholders at the conference immediately after the fall of the Dergue regime. However, the EPDRF's covert behavior did not only result in opposition withdrawing from the process but stultified any meaningful opposition to the political road map. The process was eventually reduced to be EPDRF's affair supported by its base of ethnic Tigreyan population despite the increasing discontent among other players.<sup>442</sup> This discontent, immensely affected the level of participation. A person need not to stretch much to notice that almost all political parties that mushroomed after the fall of Dergue or even those that existed during the Dergue period were ethnically based.<sup>443</sup> And, juxtaposing the historical injustices committed against most of the ethnic groups with the EPDRF behavior, it became apparent why majority of regional and local population failed to see their aspirations being

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<sup>442</sup> Regassa, *ibid* at 107. Ugo Mattei, 'The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions' 1995 <http://www.jus.unitn.it/cardoza/Review/constitutional/Mattei2.html> accessed on 22<sup>nd</sup> Nov 2018. At 6; Ak Adeghe, *ibid* (n12) at 57.

<sup>443</sup> Habtu, Alem, 'Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects' *ibid* at 14, See also, Marina Ottaway, 'The Ethiopian Transition: Democratization or New Authoritarianism?' (1995) Michigan State University Northeast African Studies, New Series Vol 2: 3 67 at 71.

represented by any other political parties other than theirs. The aggregate effect of these maneuvers by the EPDRF and subsequent withdrawals created an unfavorable ground to allowing a countervailing force to emerge or challenge the incumbent or even entertaining a slim probability of winning. These factors collectively affected the original legitimacy of the document.<sup>444</sup>

Constitution making process is preeminently a political venture.<sup>445</sup> It is hardly possible that any outcome will quench the needs and expectations of all parties. Nevertheless, the legitimacy of the process needs to be beyond reproach. That having been said, the question of legitimacy mustn't be about presence or absence, but an issue of degree. In a democracy, legitimacy is created by the people through participation, unlike other autocratic regimes where legitimacy is absent or is only consumed.<sup>446</sup> Lack of legitimacy affects the degree of which people associate commands that are derived from it and fail to see the legal or moral obligation to live up to its commands.<sup>447</sup>

To vitiate conflict, legitimacy issues gain primacy. And this is not because it is the ultimate goal, but its absence possesses more potent challenges that, by any measure, are far too big to be ignored. The process and circumstances under which the constitution was crafted, debated and endorsed, was, to many, an abortion of a national vision of development and inclusivity conceived at the fall of the Dergue regime. Most opposition parties felt that the constitution moment was mutilated, lost and the expectation that people had was dampened by velocity of EPRDF tactics. Since the 1995

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<sup>444</sup> Ottaway, *ibid* at 78. Regassa, at 109.

<sup>445</sup> Daniel J. Elazar, *Constitution-Making: The Pre-eminently Political Act*, <http://www.jcpa.org/dje/articles3/constisramer.htm> accessed on 22nd Nov 2018.

<sup>446</sup> R. W. Smith, *The Concept of Legitimacy*, (1970) *A Journal of Social and Political Theory* No. 35 17 at 24.

<sup>447</sup> *Ibid* at 18.

elections, the country has been politically polarized and culturally dismembered.<sup>448</sup> In addition, the praxis between the constitutional texts and its practice, has, for all intent and purposes been on the rise, denying the constitution a much-needed derivative legitimacy to supplement the original legitimacy deficiency.<sup>449</sup>

It is unquestionable that the constitution making process remains a contentious issue, however, the constitution might gain some derivative legitimacy in the long run. Nevertheless, the content of the constitution proposes a completely new system of federalism which had never been previously implemented or used in the country. As much as this architecture was arguably an attempt to placate the violence that had ensued the country for decades, it has equally generated an unsurmountable heap of controversy and debate which is worth interrogating.<sup>450</sup>

### **4.3 The Federal Structure in the Ethiopia's 1995 Constitution**

Federalism as conceptualized in chapter two of this study is a devise for organizing two or more levels of government that assume different sets of responsibilities and manage the affairs of a country.<sup>451</sup> The Ethiopian Constitution expressly provides for a federal form of government. This was arrived at, majorly because of the need to put into consideration the ethnic composition of the country and historic injustices.<sup>452</sup> There was need and desire to find an appropriate means to

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<sup>448</sup> J. Abbink, Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism' *ibid* at 399.

<sup>449</sup> Tsegaye Regassa, 'The making and legitimacy of the Ethiopian Constitution (n380) *ibid* at 88.

<sup>450</sup> Ethiopia had seen unrelenting episodes of internal strife and external war, 1997 it waged a full-fledged war with Somalia, but before that there have been Eritrean demand for secession that started even before the fall of the emperor. By 1977 there were multiple ethnic groups fighting including the Oromos, Somalis in Ogaden region and Eritreans, See Harold G. Marcus, *A History of Ethiopia*.

<sup>451</sup> Muhammad Habib "The Ethiopian Federal System: The formative stage, (2010), Friedrich-Ebert-Stiftung, Addis Ababa, available at <http://library.fes.de/pdf-files/bueros/aethiopen/07945.pdf> (last accessed 12/11/2017).

<sup>452</sup> Bekalu Atnafu Taye, 'Ethnic federalism and conflict in Ethiopia' *ibid* at 46.

manage the complex ethnic and linguistic diversity of Ethiopia and reduce conflicts that had permeated the society for long. Ethnic antagonism was not, by any chance the only contributing factor for the conflict. It is, with no doubt high ranking, which informed the adoption of federalism.<sup>453</sup>The Ethiopian experience is not entirely about federalism, but ethnic federalism. This was in clear contrast from the normative federal experiences especially in post-colonial Africa where ethnic identities have largely been suppressed under the pretext of preserving national unity.<sup>454</sup>

Following the expansionist policy of King Tewodro and later by Menelik, many ethnic groups found themselves within the current Ethiopia's political geography. It was a coercive and abusive union with many agitating for separation. With the fall of the Dergue regime, the political class decided to put to an end the prevailing centralization model of governance and seek an appropriate structure that will correspond to the country's diversity while proceeding under a common vision of democracy that assures every nations, nationalities and people of equal rights and freedom including the right to self-determination.

The 1995 constitution established two independent city states of Addis Ababa and Dire Dawa and nine Ethnic federal states using "settlement patters, language, identity, and consent of the people concerned" as basis for the political geographical organization.<sup>455</sup>These are namely, 1) The State

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<sup>453</sup> Adegehe, A.K, "Federalism and ethnic conflict in Ethiopia : a comparative study of the Somali and Benishangul-Gumuz regions," 2009, Doctoral Thesis, Leiden University, p 4, available <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13839/chapter%20one.pdf?sequence=14> last accessed 8/9/2018); Milkessa Midega, Ethiopian Federalism and the Ethnic Politics of Divided Cities Consociationalism without Competitive Multiparty Politics in Dire Dawa (2017) *Ethnopolitics*, 16:3, 279 at 283.

<sup>454</sup> JAN ERK, ' Nations, Nationalities, and Peoples: The Ethnopolitics of Ethnofederalism in Ethiopia' (2017) *Ethnopolitics* Vol. 16 No. 3 219 at 231. <http://dx.doi.org/10.1080/17449057.2016.1254409> accessed 22<sup>nd</sup> Nov 2017.

<sup>455</sup> The Federal Constitution of Ethiopia 1995, Art 46.

of Tigray 2) The State of Afar 3) The State of Amhara 4) The State of Oromia 5) The State of Somalia 6) The State of Benshangul/Gumuz 7) The State of the Southern Nations, Nationalities and Peoples 8) The State of the Gambela Peoples 9) The State of the Harari People.<sup>456</sup> The federal system is incongruent and asymmetrical in sub units formation and resource allocation. The federal government is based on a parliamentary system of government with a bicameral parliament.<sup>457</sup> The constitution contemplates two levels of government the Federal level and the State level, each having the executive, legislative and judicial arms of government.<sup>458</sup> The Federal government's parliament has two chambers: The House of Peoples' Representatives, elected by people from each electoral district for a term of five years on the basis of universal suffrage. The number of the representatives including special seats shall not exceed 550 members.<sup>459</sup> The House shall be responsible for all federal legislative issues.<sup>460</sup> On the other hand, The House of Federation is composed of one representative of Nations, Nationalities and People elected by State Council or through popular election in the respective state.<sup>461</sup> The States were given wide range of powers to administer their issues and the constitution stipulates that any function not expressly given to the Federal government or being shared concurrently with the state, resides with the State.<sup>462</sup> Taxation and management of natural resources are shared between the Federal government and the independent states.

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<sup>456</sup> Ibid Art 47.

<sup>457</sup> Art 45; Art 53.

<sup>458</sup> Art 50 (2).

<sup>459</sup> Art 51 (1,2,3).

<sup>460</sup> Art 55, for an elaborate power bestowed upon The House of peoples' Representative, see Article 55 of the constitution.

<sup>461</sup> Art 61. Elaborate power and functions allocated to the House is stipulated in provision 62 of the Constitution which by and large are different from the one given under Art 55.

<sup>462</sup> Art 52.

The ethnic federalism in Ethiopia was a pioneering venture in African political experience. To explicitly consider ethnicity as a foundation of its federalism, Ethiopia was taking a bold move aimed at reducing the reoccurrence of violence that had been prevalent for decades preceding the 1991 revolution. Moreover, to the revolutionaries, it was a more reasonable way to address the divergent opinion of multiple group of rebels some of whom were considering seceding, a move that was detrimental and challenging to the existence of the very country.<sup>463</sup> The constitution deliberately bestowed sovereignty to the collective composition of the inhabitant of Ethiopia's polity and acknowledges them as "nations, nationalities and people" and grant each of them the right to self-determination and cessation.<sup>464</sup>

Except for the Ethiopian- Eritrean war, Ethiopia had never seen a full scale civil war like the one witnessed prior to the 1991 revolution.<sup>465</sup> The current federal dispensation has, to some extent failed to discourage conflict. For more than twenty years the country has managed to hold together. The ethnic federalism has increased the sense of belonging in many states and enabled the hitherto subjugated ethnic communities to feel and exercise power at the local level however superficial some would construe such enjoyment. Ethnicity per se has never been a primordial source of conflict but, its use as a mobilizing agent for political expediency has had in many areas a denting effect.<sup>466</sup>

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<sup>463</sup> J. Abbink, 'Ethnic-based federalism and ethnicity in Ethiopia: Reassessing the experiment after 20 years' (2011) *Journal of Eastern African Studies* Vol. 5, No. 4 596 at 599.

<sup>464</sup> Art 39.

<sup>465</sup> J. Abbink, 'Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism' (2006) *Journal of Contemporary African Studies*, 24:3 389-413 at 390.

<sup>466</sup> Bekalu Atnafu Taye, (n 25) 44.

This experiment has not been short of some pitfalls or blaring unintended consequences. Most of the formed ethnic states have developed a feeling of exclusivity of the region to the specific ethnic group expanding the cleavage intended to be closed by this kind of arrangement. Being a rural and subsistent agrarian economy, land and grazing areas remain to be dear to many. It's no accident, therefore, to find violence over limited land and grazing resources.<sup>467</sup> In addition, identity politics has taken center stage, the new dispensation intended to minimize the feeling of subjugation and domination. However, its practically difficult to have a whole region composing of only one ethnic group. This has left minority ethnic communities residing in such states to be under constant fear of elimination or being in different state.

The EPDRF's behavior has evolved to be more of vanguard party than an ordinary political establishment in a democracy.<sup>468</sup> It has, and unfortunately in many attempts, failed to ensure full implementation of the constitution in latter and spirit.<sup>469</sup> Political space has been squeezed to only reflect the policies of the ruling party. Opposition parties have gradually been suffocated and many of their leaders imprisoned for seeking further political space. The party has continued to develop policies that are not only inconsistent with the constitution but blaringly advancing the Tigrean click interest within the coalition further fermenting feelings of resentment from other ethnic groups and the wider political class.<sup>470</sup> At the national level armed resistance is still rife, the OLF and ONLF have resisted the temptations to be indulged in a government they consider to be illegitimate and lacks the political goodwill to create meaningful democratic leadership.

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<sup>467</sup> Ibid at 52.

<sup>468</sup> Marina Ottaway 'The Ethiopian Transition: Democratization or New Authoritarianism' ibid at 73.

<sup>469</sup> Tsegaye Regassa, at 87.

<sup>470</sup> Bekalu Atnafu Taye, ibid at 47.

#### **4.4 Lessons and Inferences for Somalia from the Ethiopian Experience**

Although there exists stark differences in the origin of state formation and group identity structure, the causes of war in both Somalia and Ethiopia appear to be almost identical: centralization and domination of the state by individuals mainly from the same social group and or identity. These challenges were mere effects of years of constitutional dismembering and mutilation by the ruling governments and of course, with support from their clansmen/ethnic groups and cronies from other clans/ groups for purposes of inferring some form of legitimacy. Constitution making, is with no doubt, an important milestone but, transformative governance and peace require more than just a cosmetic process and superficial content of some legal instruments.

The non-inclusive process in both countries dampened the much-needed legitimacy of the constitution as peace making document. In both countries the path towards a more inclusive and democratic government has been daunted by many challenges and the process was marred by controversies and displeasure across the political divide. The Ethiopian experience lacked broad consultative approach required to confer a substantial level of legitimacy. The dominant nature of TPLF in the EPDRF made it excessively difficult for other competing parties to participate effectively. It is hard now, just like it was then, to imagine the process to be anything other than an interparty affair disguised in a national outfit.

As much as ethnicity had gained prominence in the student's movements of 1970's influenced largely by the Leninist ideology, TPLF had propelled it to another level and ensuring its implementation in the new dispensation. The file and rank of TPLF had almost entirely believed

ethnicity to be an organizing principle in the Ethiopian polity.<sup>471</sup> Despite the federal structure being closer to what most communities- especially the Oromos- had wished for, the process was far from what they expected. Some, especially politicians hopefully imagined that these omissions could only exist during the constitution making process, and many expected changes thereafter, but the implementation phase was never rosy either.

The EPDRF government poised to be increasingly reluctant in building and preserving a constitutional order and enshrine a strong democratic foundation for the country. It developed a penchant of negative disposition towards free elections and principles of democratic governance which largely affected the re-engineering of the Ethiopian state.<sup>472</sup> Critically, the ethnic federalism was initially happily received by many ethnic groups. Unfortunately, it has had undesired effects.<sup>473</sup> For nearly three decades since it was put into practice, it was peoples' expectation that ethnic conflict would be less frequent. To the contrary, conflict still rages.

Coinciding geographical boundaries with ethnic identities as administrative units have just like some expected, amplified ethnic identity above any other identity in the polity. Unfavorably, and for political expediency, the political class have and with little remorse politicized the ethnic

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<sup>471</sup> Beside the previous inclination towards regional autonomy and right towards self-determination, these positions was again cemented by democratic typologies presented by S. P Huntington in his presentation to constitutional making discussion expert deliberations in Addis Ababa in 1993 which he succinctly appreciated the ethnicity as one of the organizing component in a polity he states "...ethnicity is likely to be central to Ethiopian political parties, elections, and politics in general. Attempts to suppress ethnic identifications or to prevent ethnic political appeals are not likely to be successful..." See Samuel P. Huntington 'Political Development in Ethiopia a peasant Based Dominant Part Democracy Report to USAID/ Ethiopia on consultations with a constitutional commission 28 March -1 April 1993 at 14.

<sup>472</sup> This came to light largely after the 2005 elections, where the opposition almost gained a good control of the legislative positions at the local and national assemblies to the disbelief of the ruling party. The government responded with fierce force and arrested many opposition members and as a result most people lost their lives.

<sup>473</sup> J. Abbink, at 402.

identity. Consequently, the model which territorializes ethnic groups that widens the already existing cleavages has not been able to abate conflicts but made them mutate and proliferate to national level while some still persist at the sub national level. Though there was no proper public participation, the behavior of the regime thereafter, failed to project itself in a democratic fashion and had to carry the biggest brunt on how the events and circumstances have evolved.

The effects of these actions have been far and wide. For many years now, Ethiopia has remained volatile, vulnerable and more fractured than ever.<sup>474</sup> The many superficial attempts to restructure the country through developmental model has had little effect if any in the political space.

Somalia need not to go the Ethiopian way. Disappointingly, it seems to be reading from the same script only with different players. The constitution making process experience was dominated by elites from the major clans and their associates excluding majority of the public including the Islamists; who at the time, represented the most single threat to the nation state of Somalia than the clan militias did. Moreover, those who participated were selected through a process that was devoid of democratic norms and was largely influenced by clan and sub clan competition.

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<sup>474</sup> Since the death of the strong prime minister Meles Zenawi, the country has been on steep drive. Additionally, the resignation of the prime minister Haillemariam on the backdrop of wide public demonstrations against government expansion of Addis boundaries and re settlement of the Oromo ethnic group far outside the outskirts of Addis Ababa took the country towards the precipice. These events pushed for the election of Abiy Ahmed -the first ever to be given to an Oromo- to the premiership position opening doors of political reforms. However, the ethnic tension is now higher than it has ever been with ethnic conflict exacerbating across many border intersections and between ethnic groups and, the hitherto powerful EPRDF party is increasingly becoming fratricidal. For more see Mahmoud Mamdani's Article <https://www.nytimes.com/2019/01/03/opinion/ethiopia-abiy-ahmed-reforms-ethnic-conflict-ethnic-federalism.html> accessed on 14<sup>th</sup> January 2019; See also, Alemayehu Weldemariam, ' Ethiopia's federation needs reviving, not reconfiguring' at <https://www.ethiopia-insight.com/2019/01/10/ethiopias-federation-needs-reviving-not-reconfiguring/> accessed on 14<sup>th</sup> January 2019.

Conversely, successive Somali governments have been accused of not honoring the constitution and manipulating the constitutional structure to stifle its full implementation.<sup>475</sup> These attempts either covertly or overtly undertaken have, and in numerous occasions, made it difficult for warring factions to trust the government.<sup>476</sup> Consequently, mistrust has remained high and peace a distant wish. Additionally, ethnic and clan identities in two countries have remained prevalent and nuanced if not increased, suppressing other forms of identities like citizenship, religion and class. The Federal structure in Somalia is not entirely clan based but creates a structure that encourages clan competition. And, the experience has not been encouraging either. The Federal Government has been engaging covertly to undermine the federal structure under the pretext of promoting security and advancing unity.<sup>477</sup> It is with no doubt that, Somalia lacks a strong central government and vanguard party like Ethiopia, but, by undermining the autonomy of the Member States would potentially derail state building process. On their part, the Member States have, both in the past and, also recently tried to flex their muscles to prove their autonomy.

The competition between the Federal Government has been escalating variably. The federal government with the help of AMISOM and the Ethiopian forces have in some instances worked to influence the course of political events in some Member States. Geographically, most clans have their designated area of concentration, creating a minority in each state of which each has some historical feuds or competing interests. Coupled with the elite behavior at the center and at the grassroots, it seems the federal structure alone remains to be less effective to discourage conflict.

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<sup>475</sup> Survey of Public Opinion on Somalia's Provisional Constitution policy Brief 14 July 2017, Heritage Institute for Policy Studies at 3. The survey indicates that 53.3 thought that the constitution was not being implemented.

<sup>476</sup> Options to End Somalia's Current Political Stalemate Policy brief 17 October 2018 Heritage Institute for Policy Studies. The brief indicated how the fighting between the FGS and the FMS have escalated to a level never seen before and it has eroded so much of trust between the Federal member states and the Federal Government

<sup>477</sup> Ibid, the attempt by the FG to undermine the elections in Jubbaland and Galmudug to mention a few.

Over and above these challenges, there is the Al Shabab question. The Islamic insurgents continue to pose a serious challenge yet.<sup>478</sup> Admittedly, the group was never incorporated in the political process, partly because of their opposition to such processes and, partly because the political class preferred their exclusion based on their violent nature. Unfortunately, the current unfolding events does not work well to dissuade people from joining or at least being sympathetic to such groups. The current political structure has failed to entice the group to abandon their path of violence and engage in civil political discourse. Of course, not all the Islamist would accept the democratic path as that would be an oxymoron to their global Islamic caliphate, but it would have diluted some members and discourage some from joining. With clashes instigated broadly by the weak rule of law and clan patronage, some of the weaker clans and the youth find refuge within the Islamists who purport to be neutral in administering and dispensing justice.

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<sup>478</sup> The level of violence associated with al Shabab remains considerably high but has, in recent times relatively gone down both in scale and magnitude. Although not to the level that would suggest the country is safer from such threats. Previously, the group had huge unfettered territory under its control and an army which enabled it to enjoy both the man power and opportunity to access finance through illicit business and tax collection, though still happening but not on the large scale. The group has continued to wage sophisticated attacks using mainly suicide bombs and Improvised Explosives Devices (IEDs) in November 2018, the group detonated three (3) suicide bombs in Mogadishu alone killing more than 50 civilians and security personnel's. For more see, United nations, Security Council Report, Report of the Secretary-General on Somalia at [https://www.ecoi.net/en/file/local/1432669/1226\\_1526474152\\_n1812071.pdf](https://www.ecoi.net/en/file/local/1432669/1226_1526474152_n1812071.pdf) [https://unsom.unmissions.org/sites/default/files/human\\_rights\\_and\\_protection\\_in\\_somalia\\_-\\_monthly\\_brief\\_july\\_2018.pdf](https://unsom.unmissions.org/sites/default/files/human_rights_and_protection_in_somalia_-_monthly_brief_july_2018.pdf) , accessed on 12th January 2019 See Also <https://www.acaps.org/country/somalia/crisis-analysis#container-5676-databcard-48989> accessed on 12<sup>th</sup> January 2018.

## CHAPTER FIVE

### THE CONCLUSION

#### 5.1 Introduction

The Somali interim constitution has been in existence since 2012, the process under which the constitution was made, debated and eventually endorsed was highly controversial and the proposed federal structure of government continues to elicit unsurmountable amount of debate in different circles.<sup>479</sup> Through the six years implementation period a lot has changed. The study has tried to succinctly explain: First, how the constitution making process was carried out, debated and endorsed. Second, the impact of the process as undertaken on the legitimacy of the document and eventually the ability of the document to settle or impair the ensuing conflict. Thirdly, understanding the federal structure in the interim constitution and, fourthly, the effectiveness of the federal structure on the settlement of conflict. That being the case, it remains paramount to establish whether the questions forming the basis of this study expedition have been answered.

Constitutions have been about power map of a country. As a foundational document, it enjoys extensive ability to establish new rules of the game and formula of engagement.<sup>480</sup> The constitution making moment is as foundational as the document itself. In conflict dominated areas, the constitution has been used to restructure the state and assist in settling conflicts which are mostly instigated by feelings of exclusion and injustices. But, not all constitutions or any constitution making process will inherently have a positive affect and influence the trajectory of events it

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<sup>479</sup> Many academics, clan elders and politicians have made numerous commnets at the federal system of government in many forums, see a research paper by Afyare Abdi Elmi, Decentralization Options for Somalia (2016) The Heritage Institute for Policy Studies, see also, Abdi Noor Mohamed, Building Federalism through Local Government Dialogue Assessment Mission to Middle Shabelle 28 July – 15 September 2015 Berghof Foundation.

<sup>480</sup> Hart, *ibid* 249.

intends to address. Failure to appreciate inclusivity in the process and to properly establish the correct and appropriate structure of state have more often been a source of conflict in many parts. Traditional constitution making has been replaced by more progressive and modern constitution making process. Constitution making has shifted from being a contract to a process and a site of engagement building on democratic participatory style where interests are traded to achieve shared benefits and stability. Unfortunately, the Somali constitution making process adopted a minimalist approach in deploying democratic tools in the state craft. An approach that has so far yielded little desirable outcomes. The constitutional moment was not used to its full potential and there was a replication of old style of managing crises.

Somalia has been facing increased military activities since the fall of Siyad Barre, the trajectory and actors in the militancy have been shifting with time. Currently, the clan war lords share the violence geography with Al Shabab, although Al Shabab remains to be the most countervailing force against establishment of a functioning state. Beyond the violent strategy that it professes, it remains to be a group with political ambitions more than any other thing. The group seeks authority and control of territories and state functions to influence the society based on ideological references. The failure to lure some or a substantial number of the Al Shabab remains to be a challenge to be tackled by any future government. It is understood that, military attacks might weaken and dismantle a centralized attack from Al Shabab, but hardly would it end the ideology behind it. Because the group's ambitions are political, and the political process ought to have brought them within the fold and convince them to participate, which never happened.

Most areas in the country still face acute security challenges and weak governance structures. As a result of ambiguous structure and near lack of spirit to implement the constitution, the democratic culture is far from gaining ground or penetrating the political discourse as expected. The clan cleavages have not diminished despite the long transitory period in fact, it has mutated and, in some cases, become more prevalent. The inter clan fighting have not subsided to the desirable levels and security situation remains volatile and fragile. In the absence of the AMISOM army and frequent military intervention, the possibility of the state to survive attacks from its adversaries remain negligible. It is apparent that, the current political structure as captured in the transitional constitution oddly falls short and suffers the much-needed ability to vitiate conflict.

## **5.2 Conclusion and Recommendations**

This study has raised issues regarding the process and the content of the 2012 post conflict constitution making in Somali and the surrounding challenges under which they were undertaken. The enduring lesson has been the difficult task of using a document whose legitimacy is contested, to transform an armed conflict to a civil democratic engagement. There always exist a tension between politics and law and many assume that the two would exist in mutually exclusive enclaves. But that imagination has proven farfetched. Constitutions are as political as they are legal. They are also instrumental as they are articulately procedural. They represent power maps for the people it intends to govern and work as a stabilizing agent in conflict areas. While legitimacy is always the cornerstone of any constitution, it is, however, instrumental and much needed in a conflict setting. The legitimacy is based on two fundamental tests; the process and the content. The two would certainly often go hand in hand and the process is as important as the content.

Considering the process part, the study has shown that the process under which the constitution was drafted, debated and approved did not confer the legitimacy needed to end the violence. Thus, the 2012 transitional constitution has failed to settle the conflict in Somalia as expected due to its undemocratic process. The process did not enjoy the democratic spirit of inclusivity and public participation. Beside the tribal chiefs and leaders and the prominent political organizations and some civil groups, the process had very little input from the general public. Some would suggest the impossibility of such an exercise and the difficulties it would present especially considering the security challenges. But, most groups which had considerable influence were left out of the constitutional discourse and process.

The ability of the constitution as an instrument intended to bring the conflict to an end has been, to say the least minimal, and it has in some instances fueled conflict in some regions. The underlying factor has been that the constitution has not been able to gain the intended legitimacy required to attract armed groups to join the democratic process. Most of whom believe, since the constitution was mainly driven by the forces outside Somalia, then it is only logical to suggest that the constitution was an imposition from the foreign governments and not representation of the will of Somalis.

Many groups felt left outside the process as elites from clan dominated IFCC were selected, and the lack of public participation on the final draft had left many people out. Even those who participated in the drafting process, and the subsequent discussions and adoption process that

followed did not partake as most of their peers do in such circumstances.<sup>481</sup> There was too much of political brokerage than actual political negotiations with a spirit for long term peace settlement. The foreign intervention remained to have been in control of the drafting, debating and endorsement. The IFCC and C.o.E could not present the second draft to the public, neither did they review the last draft before the signing. The intervention of the regional states and international organizations presiding over the amendments and eventually the signing process in Kenya without the experts' or the general public's input, a procedure that killed the dream of a stable Somalia. With the absence of all political actors, armed or civil, the legitimacy of the constitution remains challenged and its authority questionable. The political landscape remains volatile and fragile eight years since the adoption of the constitution. So far, the security situation is not safe enough. Most part of Somalia is still suffering from a cute militancy activity and the government control remain to be way small in geography and weak in control.

The deficiency in a democratic process has its origin in a layered and multifaceted way. But, the immediate problem was the politicization of social identity that made Somalis to primarily identify themselves as members of their respective clans rather than members of a collective entity called Somalia. This issue vividly appeared in the constitution making process. It was unfortunately transformed into a process that ensured clan and sub clan identities are further entrenched and protected.

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<sup>481</sup> There have been numerous constitution making process in the continent in the last part of the last century, Uganda, Kenya, South Africa have all made new constitution and the process varied in terms participation. South Africa stands out in its process and have gained prominence. The actions and behaviour of the participants in these three cases differ greatly with the event that took place in Somalia see, Devra C. Moehler, Participation and support for the constitution in Uganda (2006) *Journal of Modern African Studies* 44: 2 275, see also, Veronica Federico, Democratic Transitions and Constitution-making Processes. The Role of Constitutionalism as Mechanism of Building Consensus. The South African case in Veronica Federico and Carlo Fusaro (ed) *Constitutionalism and Democratic Transitions: Lessons from South Africa*.

The study has shown that the constitution making process was an elite arrangement that had no clear and legitimate support from their base and the general population was not properly included in the process. Moreover, the parliament, although selected in clan method did not exercise their mandate as expected. The fact that the clan dynamics were used, and clans I identities were politicized during the constitution making process symbolized how the take off towards a more democratic state has failed, and how far it would be for the document intended to settle the conflict to achieve its vision.

Additionally, the constitution developed a federal structure of government in an attempt to address the causes of the protracted civil war and establishing a state that will ensure that state avoids the recurrence of war. Irrespective of having such a structure it appears to be less effective if not a source of conflict. The federal system has not managed to effectively bring in unity in diversity and encourage civil debates and engagements. The Federal system has been and continue to be a subject of heated discussions. There were varying and conflicting proposals on the state craft. This is partly because of the long and deeply rooted mistrust among the parties based on the historical incidents.

The settlement for the federal structure was more like a recommendation from the international community than a recommendation from the IFCC's deliberations. From inception, the Mbagathi peace conference had suggested for the drafting of a "federal Constitution". It is quite normal for political scenes to be dominated by foreign entities especially in conflict areas to find assistance from the international community and partners for political and legal reconstruction, but in this context the level of involvement was questionable. The federal structure is very ambiguous in

several aspects creating rooms for unnecessary competition and fighting. The federal boundaries were not clearly demarcated and, given the already precarious situation of Somaliland which has been forging for cession, the matter became more challenging. Empirically, lack of boundary delineation can be a source of unending conflict and instability, especially in post conflict areas. The number of the FMS were not clearly mentioned neither is the proposed merger of two or more FMS is clear. Also, the constitution did not, in a well-defined manner allocate powers to the FMS. These gaps have been a source of confrontation between the FG and FMS in many instances. The accumulating effecting has precipitated a legitimacy crisis in the constitutional arrangement and its intended utility.

The intended effect of the document to settle the conflict has not been achieved as expected. The populous expectation of peace and stability has been greatly dampened. The legitimacy of the document is as questionable today as it was during its approval. The attacks in Mogadishu are still rampant. Members of the public are still in fear and government officials have been subjects of assassinations in and outside Mogadishu. Some regions are under the control of the militias and militant groups of Al Shabab.

The government authority has not been felt. This could be as a result of some other factors as well, but, the fact that the population does not present itself to the constitution and its authority as vested in different offices is almost the main reason. The content of the constitution has created more distance between the federal Member States and the Federal Government than initially intended. The federal structure was intended to accommodate the diversity of the people, but it has

exacerbated the differences between them. The constitution as is, has also been suffering from lack of proper implementation.

The Ethiopian experience provided a great vintage on how a process gone wrong from the beginning would most certainly fail to provide the intended results. For closer to three decades, the Ethiopian constitution has failed to unite the country and appreciate the diversity, mainly because the constitution making process was never democratic and the content did not respond appropriately to the challenges affecting the society. The result has been an increasing tension between the many tribes and a weak governance structure that almost always threaten to bring the country to a brink. In addition, inter-tribal clashes continue to rage irrespective of having ethnic federalism.

The Somalia's constitutional journey has just seen the first leg. The current constitution had missed a golden opportunity to get things the right way. However, the country has seen some positive steps, and more is required.

### **5.3 Recommendations**

First, the Constitution review commission act should also contain elaborate public participation provisions so to ensure that the population take part in all the critical steps of a democratic constitution making process. Effectively starting from agenda setting all the way to ratification. The perceived feeling of being part of the decision-making process displaces a lot of sentiments that often elicit conflicts.

Second, there should be a separate constitutional convention which should not include the current members of parliament. This is to avoid preexisting interests to cloud the decision making process. It should be an inclusive body that incorporates all segments of the society including: politician selected by the people for the function, professional organization, civil society organization, religious leaders, women groups and youth groups and people with disabilities.

Thirdly, As a foundational document, the constitution making process should be guided by the principles of constitutionalism which would ensure, representation, equality, separation of power and independence of the judiciary and the power of judicial review to protect the rights of the minorities. There could be a pre constitution agreement that would limit the actions of the constitutional conventions. This is because, the clan composition in Somalia is not symmetrical, there exist clans with considerable demographic strength and influence, while others have less or insignificant presence in both social and political spheres, the latter ones are generally referred to as 0.5. Equally, the big clans are not of the same weight. The probability of two or more joining together due to lineage and genealogical proximity to dominate the political scene is real. The result would be the winner take it all. That would be potentially perilous. Even when some guarantees are entrenched in the constitution, the possibility to amend or distort could emerge. Constitutionalism works outside the political spectrum to stifle such maneuvers and ensures not only the minority rights prevail but also in safeguarding the interest of all parties.

Fourth, empowering the Judiciary: Somalia's judiciary is far from attaining a desirable standard of independence given its formative stages and the effect of the protracted civil war. That notwithstanding, and for the minority groups to at least feel assuaged the courts must -like in other

fractured societies or post conflict societies -work to diffuse the fears of the minorities and emerge as defenders of democracy and the rule of law.<sup>482</sup> The independence of the Judiciary will also help protect the right of people to participate and avoid politicians to undermine the principles of constitutionalism or make fundamental change in the constitution without the approval of the people.

Fifth, there given the clan centric politics of Somalia there should be a multifaced approach that combines consociational democracy within the federal structure. A centralized system has proved catastrophic in the past, and the federal system has not been properly tested. On face value, there seem to be overlaps between consociation model and federalism. However, they do not overlap neither are they broadly apart, but closely related. Federalism could be a device to implement consociation and vice versa.<sup>483</sup> The key feature of consociationalism is that it goes against the majority rule and bring on board a deliberate joint elite behavior to establish a stable country.<sup>484</sup>

Sixth, the federal structure provision need to be improved and clarified to avoid falling into a clan federalism trap. The current ambiguity in the federal structure would most likely fail to be a pacifier. Further, the preposition suggesting that federalism and democracy are inseparable is factually misplaced. In fact, federalism could be anything but democratic. This has been

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<sup>482</sup> For detailed analysis on how courts play a pivotal role in assuaging fears of the minority through constitutionalism, it is may be appropriate to look at how the constitutional court behaved in Post Dayton peace plan and how the court handled the fears of the minorities through a functional interpretation of the constitution. Equally, the central role which the constitutional courts in the Transitional period in South Africa played to avert a potential impasse and maybe, a civil war in post-apartheid period. It is no doubt the courts have a very important role and not limited in upholding the letter of the constitution but to avoid many pitfalls which the constitution due to delicate situation might have failed to include, See Samuel Issacharoff (n38)

<sup>483</sup> Ibid, at 500.

<sup>484</sup> Arendt Lijphart, 'Consociational Democracy' (n32) ibid, at 213

experienced in places like in the former Soviet Union.<sup>485</sup> The boundaries must be established and made to avoid converging of clans and territory or geographical boundaries like Ethiopia. This must also go a long way in influencing how voting blocks are crafted and delineated to improve cross clan cooperation.

Seventh; to avoid misuse of power and unchecked authority, the constitution and the government must enhance free speech and political rights as part of their constitutional and natural rights. The growth of civil societies in all segments of the society by engaging different segments of the society as the peace and governance building blocks. The segments should include; trade unions, workers' union, religious leaders and forums, professional bodies, and the youth. Political organization and party structures need to be incentivized to modify and bypass the clan identification and encourage cooperation between multiple clans.

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<sup>485</sup> Arendt Lijphart, 'Consociation and Federation, conceptual and empirical links' (n 34) *ibid*, at 5.

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