
Constitutional Mechanisms for the Management and Settlement of Identity Conflicts

The Cases of Sudan, Kenya and Somalia

by

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PhD Thesis

submitted to the Department of History and Political Science

In conformity with the requirements for
the degree of Doctor of Philosophy

Luiss University of Rome

Rome, Italy

October 2011

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DECLARATION

I, Steve Odero Ouma, declare that this work is original. It has never been presented to any other University or institution. In the instances where the works of other writers have been used, references have been duly given. In this respect, I declare this work to be authentically mine. I hereby present this thesis in partial fulfilment of the requirements for the award of the degree Doctor of Philosophy.

Signed.....

Date.....

ACKNOWLEDGEMENT

Firstly like to thank God for according me the opportunity to have been part of the candidates in the PhD programme in Political Theory at Luiss's Centre for Ethics and Global Politics. It is because of this fact that I have been able to complete my PhD Thesis in a field that I have always cherished. Secondly my gratitude goes out to the Institute of Diplomacy and International Studies, University of Nairobi, International Crisis Group Nairobi Office for being my home for the final months of the programme and in addition for providing me with a conducive academic environment. Immense appreciation to the dexterous capabilities of my supervisor, Dr. Aakash Singh who is responsible for the intellectual drive that has motivated me and facilitated completion of this work. For guiding and instilling in me the drive to persist even in the face of adversity, I am indebted to Dr. Daniele Santoro. Last but not least I am grateful to my family for granting me the support to complete this piece.

LIST OF ABBREVIATIONS

MDG	Millennium Development Goals
NEPAD	New Partnership for Africa's Development
COMECON	Council for Mutual Economic Assistance
SAPs	Structural Adjustment Programs
IMF	International Monetary Fund
NGOs	Non-Governmental Organisations
UNCTAD	United Nations Center for Trade and Development
SPLA	Sudan's Peoples Liberation Army
SPLM	Sudan's Peoples Liberation Movement
NPC	National Petroleum Commission
CPA	Comprehensive Peace Agreement
UN	United Nations
SANU	Sudan African National Union
SF	Southern Front
NUP	National Union Party
PDP	Peoples Democratic Party
ICF	Islamic Charter Front
SPRSA	Southern Provinces Regional Self-Government Act

HEC	High Executive Council
NCP	National Congress Party
GOSS	Government of Southern Sudan
FFAMC	Fiscal and Financial Allocation and Monitoring Commission
NRF	National Revenue Fund
SSRDF	Southern Sudan Reconstruction and Development Fund
PNU	Party of National Unity
ODM	Orange Democratic Movement
ICC	International Criminal Court
PEV	Post Election Violence
NARC	National Rainbow Coalition
KANU	Kenya African National Union
KADU	Kenya African Democratic Union
ODM-K	Orange Democratic Movement Kenya
ECK	Electoral Commission of Kenya
MP	Member of Parliament
IPPG	Inter-Parties Parliamentary Group
AU	African Union
UN	United Nations
PC	Provincial Commissioner

DC	District Commissioner
GPT	Graduated Personal Tax
LGA	Local Government Act
FFC	Financial and Fiscal Commission
DP	Democratic Alliance Party
ANC	African National Congress
AIDS	Acquired Immune Deficiency Syndrome
KHBS	Kenya Household Budget Survey
RCE	Regional County Executive
USC	United Somali Congress
SNM	Somali National Movement
SPF	Somali Patriotic Front
SYL	Somali Youth League
SRC	Supreme Revolutionary Council
WSLF	Western Somali Liberation Front
SRSP	Somali Revolutionary Socialist Party
MOD	Marehan Ogaden Dulbahante Clans
ICU	Islamic Union Courts
ASWJ	Ahlu Sunnah Wal Jama'a

AMISOM

African Union Mission in Somalia

IGAD

Intergovernmental Authority on Development

CHAPTER ONE

THE MANAGEMENT AND SETTLEMENT OF IDENTITY CONFLICTS

1. CHAPTER ONE: THE MANAGEMENT AND SETTLEMENT OF IDENTITY CONFLICTS

1.1 Introduction

From Chiapas to Chechnya, from India to Indonesia and from Algeria and Angola to Afghanistan, the world has and continues to witness the "cult of origins" where difference has often meant destruction, destitution, despair and death.¹ This can most graphically be illustrated by the Rwandan genocide of 1994 where almost one million Tutsis and moderate Hutus were killed. The power of ethnicity and ethnic or identity politics has been eloquently put forth by the truism best captured by Richard Davies as follows:

"As with other forms of identity, ethnicity provides a sense of belonging and a way of knowing 'who we are'. This enables identification with other individuals of a similar background, something which it can be argued is essential to the security of the individuals. This sense of community may be of increasing importance in an age of bureaucratisation and impersonal mass societies, and a world of political alienation and isolation".²

The relevance of ethnic or identity politics is amplified by the fact that the world is divided into approximately 5000 distinct ethnic groups and only 9.1 percent of independent states are ethnically homogenous.³ The situation seems particularly profound in Africa, than in most other parts of the world

¹ Jill Krause and Neil Renwick, *Identities in International Relations* (Basingstoke, MacMillan, 1996), xiii.

² Richard Davis, *The Myth of Black Ethnicity: Monophylety, Diversity and the Dilemma of Identity*, (Denton, Ablex Publishing, 1997), p.87.

³ Davis, *The Myth of Black Ethnicity*, p.88; Agyemang Attah-Poku, *The Socio-Cultural Adjustment Question: The Role of Ghanaian Immigrant Ethnic Associations in America*, (SUNY at Old Westbury and Albany, 1996) p.181.

more so with the continent's legacy of arbitrarily drawn boundaries which has given rise to situations such as that in the Democratic Republic of the Congo (DRC) where over 250 ethnic groups exist.⁴ It follows that the challenge for politicians, policy-makers and intellectuals is how to transform the politics of identity along more benign routes from violence and exclusion to peaceful co-operation and accommodation. This thesis aims to provide insight into this transformation process by firstly examining what could be done within states and second, how the international community can assist in constructively intervening in the search for sustainable peace.

1.2 Clarification of Concepts

A lack of conceptual clarity in a discussion such as the one at hand can lead to ambiguity and, hence obfuscation, to one's analysis. The first concept that deserves clarification is ethnicity. According to Davis,

"Ethnicity is the condition of belonging to an ethnic group, the sense of ethnic identity felt by members of an ethnic community. ... The term derives from the Greek word "ethnos" meaning a group of people characterised by common descent and therefore a basic human category in itself as opposed to a sub-group of a larger unit".⁵

This definition is supported by other authors such as Morris Hale who argues that ethnicity encompasses some combination of race, religion, culture and group identity⁶; and Schrire who proposes that the essential component of

⁴ Attah-Poku, *The Socio-Cultural Adjustment Question*, p.184.

⁵ Davis, *The Myth of Black Ethnicity*, p.80-81.

⁶ Morris-Hale Walter, *Conflict and Harmony in Multi-Ethnic Societies: An International Perspective*. (New York: Peter Lang, 1997), p.xv.

ethnicity is assumed common descent.⁷ This definition of ethnicity largely coincides with the concept of an ethnic group. Thus Thomson describes an ethnic group as;

"a community of people who have the conviction that they have a common identity and common fate based on the issues of origin, kinship ties, traditions, cultural uniqueness, a shared history and possibly a shared language".⁸

Also significant, Poku notes that ethnic group *"pertains to organised activity by persons linked by a consciousness of a special identity, who jointly seek to maximise their corporate, political, economic and social interests"*.⁹ Importantly, both Rothchild and Poku note that ethnicity is subjective rather than objective - it is a perceived sense of common origins and interests.¹⁰ This is an important point to muster before embarking on any efforts aimed at defusing virulent ethnic conflicts. The concept that underlies conflict management and settlement is that ethnic conflicts are anchored on perceptions sometimes justified and in other instances unfounded. From the foregoing, a belief in the change of perception is key to conflict resolution efforts. Secondly, and a concomitant of the previous point, is that identities are never static, rather, they are dynamic and therefore malleable. According to Krause and Renwick *"... identities are constructed and can therefore be*

⁷ Schrire Robert "The Nature of Ethnic Identity" in Schrire Robert and HW Van der Merwe (Eds.) *Race and Ethnicity: South African and International Perspectives*, (Cape Town: Juta and Company, 1980), p.6.

⁸ Alex Thomson, *An Introduction to African Politics*, (London, New York: Routledge, 2000), p.58.

⁹ Attah-Poku, *The Socio-Cultural Adjustment Question*, p.180.

¹⁰ Donald Rothchild *Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation*, (Washington: Brookings Institution Press, 1997), p.4; Attah-Poku, *The Socio-Cultural Adjustment Question*, p.180.

deconstructed and reconstructed anew".¹¹ Ethnicity, like other identities, is similarly malleable. In fact ethnicity is " ... *transformed over time by processes of immigration, social reproduction and change, nation-building and national integration*".¹² This is an important point for the conflict resolution practitioner since the transformation of ethnic identities could open up new avenues of peace in 'intractable' conflicts. At the same time however, it could complicate delicate peace negotiations as the demands and/or needs of belligerents change.

Another issue that presents a challenge to the management and settlement of ethnic conflicts is the fact that the causes of ethnic conflagrations are diverse and multiple ranging from cultural differences to minority politics, religion to territorial disputes. Often conflicts arise where ethnic identities coalesce with class or other identities; where, for instance, an ethnic group feels that they are not receiving the benefit of economic production. A good example of this is the case of the Ogoni people in the oil-rich Delta state of Nigeria. Supporting this view, Davies argues that where inequalities "*... result from ethnic discrimination and also affect material interest, ethnicity provides a cohesive basis for mobilisation because of the power of its subjective attachments*".¹³ Further lending credence to such a view, Rupesinghe and Anderlini clearly illustrate the varied and multiplicity of variables fuelling the 1994 genocide:

"... in Rwanda, one of the world's poorest nations, a rapidly increasing population coupled with decreasing agricultural productivity, few opportunities and uneven government support for rural areas

¹¹ Jill Krause and Neil Renwick, *Identities in International Relations*, p.xii.

¹² Davis, *The Myth of Black Ethnicity*, p.81.

¹³ Davis, *The Myth of Black Ethnicity*, p.81.

exacerbated social tensions. This, combined with a drop in tea and coffee prices in the late 1980s and structural adjustment policies implemented in 1990, led to even harsher living conditions and eroded the government's legitimacy in the eyes of the people. These factors in themselves did not create sufficient conditions for the outbreak of civil war or the genocide of 1994. Within the wider context, however, they were instrumental in the build-up of tension and grievance in a country with a history of social and ethnic divisions and recurrent communal violence".¹⁴

Other scholars also note the uniqueness of other variables exacerbating ethnic conflicts on the African continent:

"... throughout the continent states preside over divided societies containing widely divergent ethnic groups. This has made it particularly difficult for post-colonial states to generate a moral basis for government which endows rulers with legitimacy or authority, rather than with the mere control of the state machinery ... The weakness of the African state institutions and the fragile nature of its public acceptance provides a unique socio-political environment which encourages informal networks of personal relationships between powerful and well-placed individuals (patrons) and the rest of their ethnic communities".¹⁵

The scope and the intensity of the variables driving ethnic conflicts often lends greater complexity to the issues of identity at hand thereby contributing to some conflicts being labelled as intractable. For the conflict resolution practitioner, this implies that such conflicts must be approached in a holistic fashion in order to understand the interplay between the factors resulting in virulent ethnic nationalism.

¹⁴ Kumar Rupesinghe and Sanam Naraghi Anderlini, *Civil Wars Civil Peace: An Introduction to Conflict Resolution*, (London, Pluto Press, 1998), p.14.

¹⁵ Attah-Poku, *The Socio-Cultural Adjustment Question*, p.184, 186.

1.3 Understanding Ethnic Conflicts in Africa

Many constructivist and instrumentalist scholars have demonstrated that ethnicity assumes an important aspect in African conflicts but does not per se explain their emergence. Understanding the major causes of the conflicts that have plagued Africa requires a time-space collocation. This implies locating the conflict region in a multidimensional space, both geographically and historically. The case of Sudan provides an fitting case study, not only for the understanding of the characteristics of post-independent African states and therefore of the political behaviour that has triggered conflict but also the common changing features of conflict in Africa. The use of the term Africa does not want to minimize the complexity and uniqueness of the different states and ethnicities of the continent, but only attempts to trace a common thread, which is useful to have a more in-depth comprehension of the conflicts in Africa, and especially of the so-called ethnic conflicts. The causes for conflict in Africa are numerous. However, the historical period and events (such as colonialism, neo-colonialism, the Cold War, and the collapse of the Soviet Union) explain some of the policies and choices that African countries made.

Conflicts in Africa can generally be classified as Stefano Bellucci, Professor of Comparative African Systems at the University of Pavia, Italy says into two main categories: the postcolonial and the neoliberal conflicts. The *postcolonial era conflicts* can be located in a time framework which goes from the independence of most African states (the sixties) to the collapse of the Soviet Union (1991). The root causes of conflict in this category generate from socio-

political, cultural and economic conflicts, from the failure of state-building and consequently of nation building, and from militarism and militarization.

The neoliberal epoch conflicts belongs to those of the ongoing global era. This era is characterized by political and economic changes, the crisis of the state and the end of the Cold War. It is noteworthy that both types of conflict have an economic dimension to their existence, in particular the misallocation of resources and power. Stefano Bellucci points out that “the causes of civil conflicts come from social, cultural and political factors, which hide economic aspects: between those who are in power and those who experience its consequences; economic aspects, which result in growing poverty and economic inequality, and which finding armed conflict the only solution.”¹⁶ Biafran scholar and PhD in Political Science, Emmy Godwin Irobi, argues, “economic factors have been identified as one of the major causes of conflict in Africa. Theorists believe that competition for scarce resources is the common factor in almost all ethnic conflicts in Africa. In multi-ethnic societies like Nigeria and South Africa, ethnic communities violently compete for property, rights, jobs, education, language, social amenities and good health care facilities.”¹⁷ In a similar way, Ernest Harsch wrote in *African Renewal*:

“Inequality does matter for achievement of the MDGs,” noted Mr. Arjan de Haan, a social development adviser with the UK’s Department for International Development, in an article in NEPAD Dialogue, a publication of the New Partnership for Africa’s Development (NEPAD),

¹⁶ Bellucci Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.56 (Rome: Carrocci Editore, 2006).

¹⁷ Irobi, Emmy Godwin, *Ethnic Conflict Management in Africa: A Comparative Study of Nigeria and South Africa*, *Research Paper*, May, 2005, at [Beyond Intractability.org](http://www.beyondintractability.org) of the University of Colorado, at: http://www.beyondintractability.org/case_studies/nigeria_south-africa.jsp?nid=6720

a continental plan adopted by African leaders in 2001. "Inequality — particularly in assets and gender — can even reduce rates of growth, hence indirectly limiting poverty reduction." "Ignoring inequality in the pursuit of development is perilous," states UN Under-Secretary-General for Economic and Social Affairs José Antonio Ocampo. "Focusing exclusively on economic growth and income generation as a development strategy is ineffective, as it leads to the accumulation of wealth by a few and deepens the poverty of the many." Besides impeding poverty reduction and achievement of the MDGs, Mr. Ocampo adds, failure to address inequalities means that "communities, countries and regions remain vulnerable to social, political and economic upheaval." The World Bank, which for years emphasized market liberalization as the best route to economic growth and poverty reduction, now also recognizes the role that inequalities play in hindering those goals. "Equity considerations need to be brought squarely into the centre of both diagnosis and policy," says the Bank in the 2006 edition of its annual World Development Report, which this year focuses on the theme "Equity and Development."¹⁸

1.3.1 The Postcolonial Period: Postcolonial African States and the Emergence of Conflict

In order to understand postcolonial African conflicts, it is essential to appreciate the main characteristics of post-independent African states. These features have been influenced by pre-independence historical events, such as colonialism, and by the global trends, changes and events, which took place after World War II. These characteristics are the main cause for uneven economic distribution, political and social unrest which led to the majority of African conflicts. Independence instilled in African societies immense optimism for the future. Due to the numerous structural problems inherited from the past, the new African governments were unable to meet the growing requests

¹⁸ Harsch, Ernest, Combating Inequality in Africa, *Africa Renewal*, Vol.20 #2 (July 2006), page 16. From: <http://www.un.org/ecosocdev/geninfo/afrec/vol20no2/202-combating-inequality.html>

of their people. The failure of the new states to fulfil their obligations towards their citizens led to disillusionment. The new states failed because “in the absence of a state with efficient institutions, it was difficult for the new African governments to counterbalance the economic and social disequilibrium inherited from colonialism.”¹⁹ Unmet expectations, rising poverty, economic underdevelopment, political unrest, together with increased militarization and the exploitation of ethnicity as the appealing tool for the mobilization of the masses led to conflict. Conflict was the result of the intertwining of internal and external factors.²⁰ Aside from, the structural problems inherited from colonialism, ethnicity and religion played a major role in shaping conflict in Africa, because “ideology was used by many African leaders as a means to achieve power, and power granted the control of the economy.”²¹

1.3.1.1 Postcolonial African States and the Legacy of Colonialism

The impact of colonialism on the African continent is certainly relevant in characterizing postcolonial states and conflicts. In talking about ethnic conflict, Emmy Godwin Irobi affirms that “it is important to note that most of these ethnic conflicts were caused by colonialism, which compounded inter-ethnic relations by capitalizing on the isolation of ethnic groups. The divide-and-conquer method was used to pit ethnicities against each other, thus keeping the people from rising up against the colonizers. Distribution of economic

¹⁹ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.57-8 (Rome: Carrocci Editore, 2006)

²⁰ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.41 (Rome: Carrocci Editore, 2006)

²¹ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.63-64 (Rome: Carrocci Editore, 2006)

resources was often skewed to favour a particular ethnic group, pushing marginalized groups to use their ethnicity to mobilize for equality.”²² Bellucci agrees that colonialism has had a tremendous impact on postcolonial states, because it transferred to these states its patterns of violent and exploitative administration.²³ The causes of ethnic conflicts in Africa are more often than not historical and traceable to the European penetration in Africa and in colonial slave trade which introduced models of violent exploitation and domination in African societies that since then have taken root in the continent. All through the decolonization period, the new states have grappled with scarce institutional and human resources. The underdevelopment caused by colonialism and neo-colonialism is at the base of social and political conflict in Africa between the poorer masses and the rich elites. These imbalances have generated the social discontent that has subsequently fuelled civil wars.²⁴ Colonialism has shaped the postcolonial state in five main ways:

- a) It left it with a fragile economy;
- b) it left it with weak political institutions;
- c) it legitimized patterns of violent coercive and exploitation;

²² Irobi, Emmy Godwin, *Ethnic Conflict Management in Africa: A Comparative Study of Nigeria and South Africa*, *Research Paper*, May, 2005, at Beyond Intractability.org of the University of Colorado, at: http://www.beyondintractability.org/case_studies/nigeria_south-africa.jsp?nid=6720

²³ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.56 (Rome: Carrocci Editore, 2006)

²⁴ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.56 (Rome: Carrocci Editore, 2006)

- d) it disrupted the African geopolitical scenario by introducing artificial borders; it has created or consolidated ethnically homogeneous elites, despite multicultural heterogeneousness of societies;
- e) it has set in motion mechanisms of identity awareness, such as Pan-Africanism and pan-Arabism, in response to a Western imperialist domination based on racial and cultural superiority.

On the first point, postcolonial states in Africa have been left with very fragile economic economies which in turn has caused their economies to be dependent on the import of refined goods and on foreign capitals. This is important because this dependence has hindered the process of economic growth and development. De facto, these colonies, when created, were not meant to be independent. The only *raison d'être* for the colonies had been their economic exploitation to the advantage of the imperial power. They produced and exported raw materials, which were then sent off to the colonial power to be manufactured. Because of the lack of refined goods, the colonies had to import them and in so doing benefiting the colonial power exporter. The construction of scanty infrastructure, such as railroads and roads, was intended to easily access and exploit the resources of the colony to the advantage of the colonial power and not for the development of the colony. Areas with few or no resources were largely neglected and marginalized, causing regional underdevelopment and great disparities within a same country. As a consequence, when independence came, the economies of the former colonies in this case the new African states were dependent on the import of refined goods and on the only form of income that they had: the export of raw

materials at a paltry cost. Economic backwardness caused these states to be dependent also on foreign capitals, which were the only form of investment and the only possible solution for achieving economic growth and modernization.

Secondly, most of the former colonies have retained a Western system of political organization, which is alien and is not adaptable to the postcolonial reality. These political institutions are by and large inadequate to face the multiethnic reality of African states. Wallace-Bruce has stated that “the new Republic could not disguise the stark bi-reality. It had ‘two different judicial systems, different currencies, different organization and conditions for service for the army, the police, and civil servants...The governmental institutions, both at the central and local level, were differently organized’...”²⁵ For this reason, in the absence of a previous process of common political and social organization, postcolonial governments have been alienated from the beginning from the overall majority of the population, consequently hindering the process of state building and of nation building. In most African colonies a large bureaucratic apparatus has come to develop, which had previously been unknown to them. Posts within the bureaucratic machine are the only and the best alternative to more customary forms of employment (farming, herding, trade, etc.). Thus, they are highly competitive. This has fuelled corruption and political patronage. Corruption in turn has hampered efficiency, and the large expenditures for the maintenance of such a huge apparatus has even weakened the economy

²⁵ Roland Oliver and Anthony Atmore, “Africa Since 1800”.p.97 5th Edition. Cambridge: University Press, 2005 Ref. Op. Vii Wallace-Bruce, The Statehood of Somalia and the United Nations.

more. Further, colonialism brought with it an administrative apparatus which offset the traditional organization of local communities. When most colonies became independent during the mid-1960s, they took on and maintained a system, which could not have deeply taken root in less than a few decades. In addition, these fragile systems had to co-exist with the more traditional societal organizations, the communities or “tribes”. One type of organization had now to manage and rule what was once a large variety of different systems of organization with differing interests. In Somalia, for instance, immediately after independence, around 60 political parties were created, each of which reflected the interests of various Somali groups. In the absence of a strong sense of ‘stateness’, politics came to represent not a point of cohesion among groups, but a tool for individual interest groups, represented by the various ethnic communities. Local elites on their part did nothing to better the situation and move towards cohesion by granting favours and benefits to their kinsmen and allies, who usually belonged to the same ethnic group. In this respect, they appealed to common origins and ancestry to politically mobilize ethnicities in their favour.

The fragility of the postcolonial economies and the specific historical momentum led to see the state as the only provider of power, status and wealth. Therefore, conflict over resources became a competition for power, which assumed ethnic overtones due to the mobilization of ethnicities by political elites. A failure of sustained state and nation-building efforts led to the proliferation of numerous dictatorships and failed democracies in post-independent Africa. In the post colony, democracy was bent out of shape to suit the interests of the military, the bureaucracy, feudal and other powerful

interest groups. It was either basic, guided or otherwise appropriately prefixed to deny its central function of articulating the will of the people not to mention key processes such as accountability. Among other things, this also meant that a genuine system of political accommodation could not be put into place.”²⁶

Thirdly, colonialism legitimized patterns of coercion, violence and exploitation. These vices were retained by the African postcolonial elites then in power following the customary form of enforcement they had attained during colonialism. Given the failure of state and nation-building, postcolonial governments were unable to gain the consensus of their whole population. Thus, these methods were seen as necessary to maintain order in the post colony. In the absence of strong and effective state institutions, which could provide efficient enforcement mechanisms, the elites in power maintained their power through terror and violence. In this sense, colonialism reinforced and legitimized forms, which were typical of the feudal system.

Fourth, the colonial empires disrupted the geopolitics of the African continent by introducing artificial borders. The Berlin Conference of 1884-5 partitioned Africa in what some scholars have referred to as “spheres of influence” among the colonial powers. African states had been artificially created by drawing borders, which did not take into account the ethnic component and plurality on the territory. The colonisers did not take into consideration the local people’s subsistence activities (be it farming or herding or nomadic) and the geological conformation of the ground, either. In addition, colonial administrations had

²⁶ Rashid, Abbas and Shaheed, Farida, Pakistan : Ethno-Politics and Contending Elites, Discussion Paper No. 45, June 1993 Prepared for the United Nations Research Institute for Social Development From: www.unrisd.org

made little or no effort to create a sense of unity and in fact worked against it. Thus, when independent, the newly formed governments had to struggle to create a sense of national unity in a heterogeneous society. The ethnography on the continent was completely subverted in that different ethnic groups had now to coexist within the same territory with other ethnic groups, with which there had previously been little or no interaction. Given the fragility of the economy, the competition for access over resources, and the failure of state-building, nation-building, too, failed.

A fifth important feature is that the colonial administrations created or consolidated power to ethnically homogeneous elites sowing the deadly seed of negative class politics. Colonial powers had sought the help of a small part of the population to administer the country. They either created new elites or re-confirmed the power of pre-existing elites. The negotiation with these elites served the purpose of maintaining order in the colony, and consisted of educating them in Western-like education, granting them posts in the new administrations, benefits, and impunity. When independence was not the result of insurrection and war, independence was negotiated between the colonial administration and the elites. Therefore, independence re-confirmed these elites as the new ruling actors in postcolonial countries. This had two effects: it led to a lack of legitimacy by the whole population and created competition for access over resources. The fact that the elites represented specific interest groups and neglected others caused the new states to lack legitimacy by the whole society from the beginning. Second, because the state was the main provider of wealth, local elites came to exploit ethnicity as the main engine for political mobilization and therefore for access over resources.

Governing elites came to be associated with the ethnic group to which they belonged, and marginalization came to be seen not as the failure to evenly distribute resources, but as the domination of ethnically homogeneous elite over a heterogeneous society.

Sixth, another effect of colonialism, which is usually underestimated, is that it set in motion complex mechanisms of social and identity awareness (existing beyond geographical borders), such as pan-Africanism and pan-Arabism, in response to Western imperialism. At first, in the decolonization process, these movements served as ideological glue against the ideas of African cultural and racial inferiority that Western colonial powers had tried to instil. Later on, though, post-independence economic underdevelopment and disparities in income distribution were distorted through the prism of ethnicity, making these movements ethnic coalitions for political and economic claims. Because these two movements coexisted within the same territorial borders in certain large regions of Africa such as Sudan, clashes became inevitable, as each of them gained more strength from the idea of superiority, especially in the light of a larger context, such as the Middle East.

It ought to be mentioned that pan-Africanism and pan-Arabism played an important role in the process of integration in the immediate post independence period because they positively strengthened cultural and ethnic identities. The concept of pan-Africanism was embraced by the African Union, which was created in 1963 and was able to philosophically link African leaders. Despite its failures, the African Union gave and continues to give African leaders the chance to mingle and to spread their ideas throughout the

continent. It has not only created self-awareness among African elites but also expounded and drawn more attention to pertinent issues such as ethnic conflict. However the downside of these movements is that they have since become the “legitimate” causes for war thereby sidelining the real causes such as economic marginalization and failed nation and state-building. At the domestic level, ‘Africanness’ has created polarization, where marginalization has taken the form of ethnic discrimination.

Exemplifying this point, Alex de Waal provides an explanation of how significant Africanism and Arabism are in the Sudanese context. He argues that the incorporation of Darfur not only in Sudanese processes but also in wider African and Middle-Eastern processes, has caused Darfur’s ethnic identities to be “radically and traumatically simplified, creating a polarized ‘Arab versus African’ dichotomy that is historically bogus but disturbingly powerful. The ideological construction of these polarized identities has gone hand-in-hand with the militarization of Darfur, first through the spread of small arms, then through the organization of militia and finally through full-scale war. The combination of fear and violence is a particularly potent combination for forging simplified and polarized identities, and such labels are likely to persist as long as the war continues. The U.S. government's determination that the atrocities in Darfur amount to ‘genocide’ and the popular use of the terms ‘Arab’ and ‘African’ by journalists, aid agencies and diplomats, have further entrenched this polarization, to the degree that community leaders for whom the term ‘African’ would have been alien even a decade ago, now readily identify themselves as such when dealing with international interlocutors.”²⁷At

²⁷ De Waal Alex, Who Are The Darfurians, *Justice Africa*.

the same time, pan-Arabism appears to have created the idea of superiority amongst the Arabs. The fact that pan-Arabism has at times mixed with pan-Islamism at the level of ideas seems to have given pan-Arabists an even more legitimate belief of their superiority. The idea of descent from the Prophet Muhammad and centuries of cultural and economic splendour that has given a unitary aspect to the Arab world has just served to entrenched this idea of superiority. In similar vein, pan-Africanism has strengthened the feeling of African awareness in most rebel groups, who have for long felt themselves oppressed and discriminated by their own governments in the same way as colonialism had done. When the reality of bad governance and regional marginalization has come into contact with the ideas of pan-Africanism and pan-Arabism, this potent concoction has created immeasurable hatred, resentment and finally conflict.

Also, pan-Africanism and pan-Arabism have become important tools for leaders, intellectuals and elites, who have been able to appeal to a renowned consciousness of their origins and used these ideas as a point of strength in civil wars to gain consensus. In this sense, what was created as a movement of protest against the imperialist era of the West has was used and continues to be used as a double-edged knife manifesting in the revolt against other of ethnic groups within the same countries. The appeal to and exploitation of ethnicity as well as the appeal to religion, have become dreadful weapons where national unity has been non-existent or the basement on which states are created are fragile as is mostly the case.

1.3.1.2 Postcolonial African States and the Impact of the Cold War Period

Post-colonial African states inherited from colonialism elitist, coercive governments, large bureaucratic apparatuses, fragile political and economic institutions all of which have led to failed prospects of nation-building. The cold war period contributed in many ways to the shaping of postcolonial African states. For example, global trends and theories emphasized the role of the state as central in development and modernization. Secondly, military confrontation between the two superpowers resulted in militarization of allied states and rebel movements. On the first point, global trends and theories throughout the sixties strongly emphasized the role of the state as central in development and modernization. The major challenge for neo-independent African states was modernization. In order to achieve this objective, highly centralized states were seen as the only feasible solution. In fact, centralization served the purpose of hiding the problem of national disunity and of fragile political institutions. Thus, African countries in the sixties and seventies were highly centralized both economically and politically. Centralization did not solve the existing problems, but led to an enormous concentration of power and wealth in the hands of an elite, which was consequently perceived as the domination by a specific ethnic group.

This centralization of power led to the neglect of issues of nation-building in a multiethnic society by the new governments. Centralization of political and economic power during the Cold War period was not uncommon to the rest of the world. Global trends had, in fact, emphasized the central role of the state

not only in the political but also in the arena of economics. In the first place, the Keynesian theories had become very popular in most Western countries.²⁸ The main idea that spread after the Great Depression was that unemployment had finally led to the rise of fascism all over Europe.²⁹ In looking at the Great Depression of the 1930s, Keynes had speculated that the free oscillation of markets could not adjust on its own to full employment. He considered the economic downturn as attributable to a lack of demand and had proposed that governments stimulate the same through fiscal policies aimed at either cutting taxes or increase in government expenditures. Throughout much of Europe, the nationalization of the economy had yielded admirable results, especially when considering the economic miracles of Germany and Italy during the early sixties.³⁰ Europe being the mother of a social welfare system, in which the state was the main provider for health and education services and having d itself been very successful, some postcolonial states borrowed leave from their domestic measures adopting state-centred economic structures.

On the second point, the emergence of the Soviet Union as a political, military and economic superpower was central in the determination of global political and economic trends. The perceived success of the 5-year plans, the emphasis on heavy industry, the collectivization of land, and the creation of the Council for Mutual Economic Assistance (COMECON) contributed to raise the Soviet Union to the rank of an economic superpower. Ideologically and politically speaking, the Soviet Union was the only alternative to Western capitalist

²⁸ Heywood, Andrew, *Political Ideologies: An Introduction*, MacMillan Press Ltd, London, 1998.

²⁹ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.21(Rome: Carrocci Editore, 2006).

³⁰ Heywood as note 28 above.

democracy which recalled ideas of a colonial exploitative past. Not by chance, Karl Marx had seen imperialist colonialism as an inherent feature of capitalism - which required a continuous consumption and consequently a continuous market expansion - and also of the concept of "surplus value," which could only result from the exploitation of the labour force. Furthermore, the military confrontation between the United States and the Soviet Union led to the militarization of geo-strategically important states and rebel movements. De facto, the two superpowers were not formally at war with each other, but their confrontation resulted in the militarization and financing of allied states including former colonies in Africa and therefore in the emergence of proxy wars. These two superpowers not only financed states, but also rebel groups that aimed at overthrowing regimes, which could support the opposite bloc. There are plenty of examples in Africa of these instances for example the Soviet support and armament of the Somali regime of Siad Barre, of the Marxist liberation movements in Guinea-Bissau and in Mozambique; or the United States support to Hissené Habré of Chad, Congo-RD, Congo-Brazzaville, etc.³¹ Militarization characterized African societies and gave conflicts an incredible power of destruction.

1.3.2 Ideologies of the Cold War Period

Thus, African states were guided in their choices by global trends, which saw the state as the central apparatus. The tendency of most African states towards socialism was strengthened ideologically by three theories, which either saw

³¹ Julius O. Ihonvbere, "Are Things Falling Apart? The Military and the Crisis of Democratization in Nigeria," *Journal of Modern African Studies* 34 (June 1996): 193-225.

the former colonial powers as hegemonic or criticized the exploitative inclination of capitalism. These are neo-colonialism, the dependency and the structuralist theories. Neo-colonialism emerged in response to the economic dependence of postcolonial states on the former colonial powers as they were the only available source of investment for economic growth and modernization. Neo-colonialism emphasized and criticized the central role that the former colonial rulers retained in the economic growth of former colonies as a new form of imperialism. In Bellucci's words, neo-colonialism "indicates new forms of hegemony of the more advanced former colonial powers on the ex colonies. The former colonial powers tended to substitute the old direct rule with a relation of economic, technological and political dependency."³² Secondly, the dependency theory is the that which neo-colonialism finds its economic basis. It can be summarized in the words of Brazilian scholar, Theotonio Dos Santos: "By dependence we mean a situation in which the economy of certain countries is conditioned by the development and expansion of another economy to which the former is subjected."³³

The relation of interdependence between two or more economies and between these and world trade, assumes the form of dependence when some countries (the dominant ones) can expand and can be self-sustaining, while other countries (the dependent ones) can do this only as a reflection of that expansion, which can have either a positive or a negative effect on their immediate development."³⁴ Most scholars of this school of thought saw

³² Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.57 (Rome: Carrocci Editore, 2006).

³³ Id.

³⁴ Quoted in: Gilpin, Robert, *The Political Economy of International Relations*, p.282 (Princeton, NJ: Princeton University Press, 1987).

dependence as the main cause for underdevelopment in Africa. “Although different dependency theories lean in one direction or another – toward Marxism or nationalism- they all share several assumptions and explanations regarding the causes of and the solution to the problems of less developed countries. This position is captured by Andre Gunder Frank’s statement that ‘it is capitalism, both world and national, which produced underdevelopment in the past and which still generates underdevelopment in the present.’³⁵ As Thomas Weisskopf has opined, ‘the most fundamental causal proportion associated with the dependency literature is that dependence causes underdevelopment’”.³⁶ However, Gilpin argues that “the less developed countries have a high degree of dependence and continue to be vulnerable precisely because they are underdeveloped rather than vice versa. (...) Their foremost problem is not external dependence but internal inefficiency.”³⁷

The third theory is structuralism. In view of the foregoing, a liberalist capitalist world economy tends to preserve or actually increase inequalities between developed and less developed economies. Whereas trade was indeed an engine of growth in the nineteenth century, structuralists argue that it cannot continue to perform this role because of the combined effects of free trade and the economic, sociological, and demographic conditions prevalent among less developed economies in the twentieth century.³⁸ These conditions include the combination of overpopulation and subsistence agriculture, rising expectations

³⁵ Same as note 32 above.

³⁶ Quoted in: Gilpin, Robert, *The Political Economy of International Relations*, p.282 (Princeton, NJ: Princeton University Press, 1987).

³⁷ Gilpin, Robert, *The Political Economy of International Relations*, p.304 (Princeton, NJ: Princeton University Press, 1987).

³⁸ Ragnar Nurkse, “Towards the Law of Economics and Development”, *European Journal of Law and Economics* 28 (2009) p. 19-37.

causing a low propensity to save, excessive dependence on unstable commodity exports and political domination by feudal elites. These structures trap less developed countries in a self-perpetuating state of underdevelopment equilibrium from which they cannot escape without outside assistance.³⁹ The structuralist argument is that the world economy is composed of a core or centre of highly industrialized countries and a large underdeveloped periphery.⁴⁰ In the non-industrial periphery, however, technical progress is introduced from outside and is restricted primarily to the production of commodities and raw materials that are exported to the core.⁴¹

Although the dependency and the structuralist theories differ on the causes of underdevelopment, what they both point out is that less developed countries' economies are dependent on the economies of more industrialized countries. Indeed, the lack of internal capital for investment has been one of the main structural problems in the continent. Externalities (typically in the form of neo-colonialism) that often resulted from alliances that the same African governments wanted, impeded the actuation of progressive policies, because the ex-colonial powers and the superpowers (USA and USSR) strongly encouraged militarism, that is; disproportionate military expenditures, which has took resources away from important development sectors, such as education and infrastructures."⁴²

³⁹ Gunnar Myrdal, *The Political Element in the Development of Economic Theory* Transaction Publishers 1990

⁴⁰ Raul Prebisch, *The Economic Development of Latin America and its Principal Problems*, 1950, New York United Nations Publications,.

⁴¹ Gilpin, Robert, *The Political Economy of International Relations*, p.274-276 (Princeton, NJ: Princeton University Press, 1987).

⁴² Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.19 (Rome: Carrocci Editore, 2006)

1.3.3 The Neoliberal Period

As illustrated above, the Cold War period was characterized by a large concentration of power in the hands of the state; in fact, the state was seen as the only actor capable of achieving economic growth and development. African states were thus highly centralized but because centralization could not solve Africa's structural problems, this did not lead to economic growth and development. Indeed, Africa's budget deficit increased and economic underdevelopment led to a competition over resources, which came to be seen as a competition among ethnic groups. The eighties and nineties marked a period of transition between the postcolonial and the neoliberal period and signalled the crisis of the state. At both the international and domestic level, the state lost its importance as central actor in the development process. These two decades were marked by an era of free market and liberalization.

The Reagan-Thatcher ideologies⁴³, the Washington Consensus⁴⁴ and the concept of conditionality promoted economic liberalism and democratization. Especially during the Nineties, with the collapse of the Soviet Union, we assisted to the triumph of democracy. Conditionality came thus to be associated with good governance, in order to promote the respect of human rights and of international law. Anyhow, "conditionality and the economic neoliberal reforms," argues Stefano Bellucci, "had curbed the budget deficit from one side, but had worsened even more the economic situation and the living conditions of the populations. Because of the liberalization of trade and of the money market, both inflation and unemployment increased; whereas,

⁴³ Same as note 32 above.

⁴⁴ Id.

the decreased state intervention caused a diminishing financing of educational and health infrastructures.”⁴⁵ The crisis of the state corresponded also to an increase in “illegality, criminality, and informal economic exchanges”.⁴⁶ The collapse of the Soviet Union is an important factor which must be necessarily mentioned. It is relevant in two respects. First, with the end of the balance of power between the two superpowers, and therefore of their military intervention in Africa, African states started to interfere more and more in neighbouring countries’ domestic affairs. Second, Stefano Bellucci argues that “the end of ideological confrontation at a global level exacerbated the political crisis of the post-colonial nation-state.”⁴⁷ De facto, the ideological dimension ceased to be the consolidating factor of African politics, and the post-colonial period came to an end. Crisis of Postcolonial States and Democratization The Eighties and Nineties saw two important events, which signalled the end of the postcolonial era: the end of the Cold War and a renewed spread of free market ideologies, in the guise of conditionality and structural adjustment programs (SAPs).

The end of the Cold War and the policies of conditionality and structural adjustment, induced by the IMF and the World Bank, led to two fundamental phenomena in the development of African states and conflicts: the crisis of the postcolonial state and the democratization process. The end of the Cold War also ended the financial, military, and ideological support of the two

⁴⁵ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.30 (Rome: Carrocci Editore, 2006)

⁴⁶ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.30 (Rome: Carrocci Editore, 2006)

⁴⁷ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.19 Carrocci Editore (2006, Rome)

superpowers to strategically important African states and rebel movements. This had two consequences: a political and an economic one. Politically, the ideological struggle between communism/socialism and democracy/capitalism came to an end. These ideologies had in a way constituted the glue on which many postcolonial states held. Indeed, the balance of power between the two superpowers had prevented the intervention of states in neighbouring countries' internal conflicts. Consequently, the lack of this glue made postcolonial African states more vulnerable to the interference by other states and by internal interest groups. Economically, the end of the financial and military support by the two superpowers not only exasperated even more the already bad economic conditions of African societies, but also meant that African states were more dependent on international lenders and donors. After the oil crisis of the Seventies, and despite a worldwide economic recovery, African budget deficits and consequent economic underdevelopment deteriorated even more. Because of this, even their dependence on international aid increased. The policies of conditionality and structural adjustment, which were started in the Eighties, found their ideological foundations in the Reagan-Thatcher programs of liberalization and privatization. Conditionality is an economic program, according to which an international financial institution lends money to a developing country on the condition that the last engages in structural adjustment programs.

Structural adjustment programs (SAPs) are those programs, which profess the correction of macroeconomic imbalances and that allow for the market, and not for the state, to allocate goods available for purchase. With the collapse of the Soviet Union and thus the end of its ideological confrontation, the

community of Western lenders and donors “intensified their campaign for multi-partyism in Africa where the balance of the Soviet Union was no longer available to African governments in their quarrels with the West.”⁴⁸ SAPs, the end of the ideological, military and financial support of the Soviet Union contributed to weaken the foundations of authoritarian, one-party and dictatorial regimes in Africa. The loss of funds to fuel the machine of patrimonialism, patronage and corruption, which kept these regimes alive, was no longer available, and led to their crisis.

Pressure by the international community, i.e. Western financing communities, contributed to the process of disintegration of postcolonial states and fuelled a movement of protest for change in Africa. During 1990 and 1994, these movements of protest led to an unprecedented wave of democratization. The key event was the peaceful overthrowing of the Kérékou regime by the civil society and NGOs in Benin. Ould-Mey, Mohamedan, “Structural adjustment programs and democratization in Africa: The Case of Mauritania” in *Multiparty Democracy and Political : Constraints of Democratization*, p.44 Edited by John Mukum Mbaku and Julius O. Ihonvbere, (Aldershot, UK: Ashgate, 1998) 30 The event was followed by the fall of dictatorships in Congo-Brazzaville, Niger and Mali and by the end of the apartheid system in South Africa. In other countries, such as Mozambique, Guinea-Bissau and Mali, the international community was able to put pressure on the same governments to enact democratic reform. According to Julius Ihonvbere, the struggle for democracy had positive

⁴⁸ Ould-Mey, Mohamedan, “Structural adjustment programs and democratization in Africa: The Case of Mauritania” in *Multiparty Democracy and Political : Constraints of Democratization*, p.44 Edited by John Mukum Mbaku & Julius O. Ihonvbere, (Aldershot, UK: Ashgate, 1998)

consequences on African states. It “encouraged challenges to authoritarian and military as well as repressive one-party regimes; (...) it has encouraged the rise of new political parties and movements on the political landscape; (...) ethnic, religious, community and human rights as well as environmental organizations in Africa have become part of the struggles for democracy.”⁴⁹ In a few words, the democratization process, which has had a role in the crisis of the postcolonial state, has encouraged multipartyism and the creation of a civil society in Africa.

The collapse of the Soviet Union, democratization, and the economic programs of the IMF and the World Bank translated, both domestically and internationally, in a total distrust of the state in the promotion of economic development. This, in turn, led African societies to “withdraw into ethnic and community institutions (...); to refuse to pay taxes, support government projects, and vote in elections; (...) and has also led them to withdraw into the so-called informal or underground or parallel economy.”⁵⁰ Notwithstanding the advantages that the democratization process and the crisis of the state had for African societies, many scholars argue that the impact of the neoliberal era and its processes (such as SAPs) had a fundamental impact in the insurgence of conflict. Indeed, after a first wave of optimism, conflicts, especially the ethnic, tribal and religious ones, multiplied all over the continent. This does not mean

⁴⁹ Ihonvbere, Julius O., “Where is the third wave? A critical evaluation of Africa’s non-transition to democracy” ” in *Multiparty Democracy and Political : Constraints of Democratization*, p.13 Edited by John Mukum Mbaku & Julius O. Ihonvbere, (Aldershot, UK: Ashgate, 1998)

⁵⁰ Ihonvbere, Julius O., “Where is the third wave? A critical evaluation of Africa’s non-transition to democracy” ” in *Multiparty Democracy and Political : Constraints of Democratization*, p.11 Edited by John Mukum Mbaku and Julius O. Ihonvbere, (Aldershot, UK: Ashgate, 1998)

that ethnicity, tribalism and religion have become the primary factors for conflict. However, the absence of the ideological confrontation of the Cold War and the loss of trust in the state have led local leaders to exploit even more the ethnic, tribal and religious components in the mobilization and political adherence of local communities. As has been said, the economic factor plays an important role in African conflicts. This was true for the postcolonial period, and even more in the neoliberal one. Although proponents and critics of the impact of globalization on Africa have differing views, they both agree that globalization on Africa with its free trade, market liberalization and free flow of investment, has put Africa to a disadvantage in the global market because of its “inadequate capacity to manage the process, which makes it more vulnerable to inherent potential forces of political and economic destabilization.”⁵¹ In a paper produced by UNCTAD, the focus of the failure of Africa to enter globalization is on African states themselves.

Accordingly, SAPs have resulted in better macroeconomic policies, with consequent higher levels of growth on the African continent. Anyhow, these policies are “clearly inadequate to effectively address the challenge of poverty reduction, which is embedded in the grossly uneven distribution of the benefits of economic growth between Africa’s sub-regions, economic sectors, and segments of the population.”⁵² Proponents of SAPs and of globalization point out that globalization undoubtedly yields benefits, but that in Africa, structural

⁵¹ “Globalization, regionalism and Africa’s development agenda” Paper prepared for UNCTAD X, February 12-19, 2000, Bangkok, Thailand. From: www.unctad-10.org/pdfs/ux_id_ecapaper.en.pdf

⁵² “Globalization, regionalism and Africa’s development agenda” Paper prepared for UNCTAD X, February 12-19, 2000, Bangkok, Thailand. From: www.unctad-10.org/pdfs/ux_id_ecapaper.en.pdf

inefficiencies are the main cause for its unsuccessful results. African states' main problems are those same problems that affected postcolonial states, that is, their dependence "on the production and on the export of a few primary commodities whose share of world trade is declining (...). Since the majority of people are employed in the commodity producing sectors, poverty is perpetuated by the secular decline in the demand for these commodities."⁵³ Another major problem emphasized by UNCTAD is the lack of sufficient investment finance, which has contributed to the deterioration of infrastructure that has in turn led to higher costs of transport. This has made these goods, for which the world demand had already declined, even less competitive. Finally, an important shortcoming is the lack of domestic investment in human and physical capital, both of which are "prerequisites for competitiveness and sustained growth and development."⁵⁴

Scholars, who are more critical of globalization, have argued that SAPs and globalization have not been beneficial at all for Africa; and on the contrary, they have triggered conflict. Indeed, the rise in poverty has increased the divide between rich and poor and also the share in the informal and illegal economy. In the words of Stefano Bellucci, "the liberalization of trade and of the money market has increased inflation and unemployment; in turn, the reduction of state intervention in the economy has reduced the investment in the education and health sectors. Thus, 'the retreat of the state' has corresponded to a

⁵³ "Globalization, regionalism and Africa's development agenda" Paper prepared for UNCTAD X, February 12-19, 2000, Bangkok, Thailand. From: www.unctad-10.org/pdfs/ux_id_ecapaper.en.pdf

⁵⁴ "Globalization, regionalism and Africa's development agenda" Paper prepared for UNCTAD X, February 12-19, 2000, Bangkok, Thailand. From: www.unctad-10.org/pdfs/ux_id_ecapaper.en.pdf

worsening of the living conditions of the masses and an intensification of the illegality, criminality and informality of economic exchanges. Social degradation has allowed the formation of new forms of violence, or 'social chaos', which characterize African conflicts in the global era."⁵⁵ Stefano Bellucci also affirms that democratization has not translated into democracy, in which minority rights are at the basis. Democratization has only led to multi-party competition in the elections and for access over resources, but has not yielded benefits to the whole population. "In Africa, the so-called neoliberal democratization has seemed to serve only the new system and the new dominant elite, rather than the whole population."⁵⁶ For those scholars, who criticize globalization and SAPs, such as Veronika Bennholdt-Thomsen, Maria Mies and Silvia Federici, the proliferation of war in Africa, as well as in Latin America and Asia, has been caused by the destruction of subsistence economies and especially of subsistence agriculture by globalization. For these scholars, globalization follows the same patterns of 19th-century colonialism, without necessarily conquering the territory. "SAPs, trade liberalization, privatization and intellectual property rights (...) are responsible for an immense transfer of wealth from the Third World to the metropolis, and (for) the expropriation of Third World assets and resources by multinational corporations, (...)" which have led to a "context of generalized economic bankruptcy, (in which) violent rivalries have exploded everywhere among different factions of the African ruling class, who, unable to enrich themselves through the exploitation of labour, are now fighting for access to state power, (which is) the key to the

⁵⁵ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.30 (Rome: Carrocci Editore, 2006).

⁵⁶ Bellucci, Stefano, *Storia Delle Guerre Africane: Dalla Fine del Colonialismo al Neoliberalismo Globale*, p.32-3 (Rome: Carrocci Editore, 2006).

appropriation and sale on the international market of either the national assets and resources or the assets possessed by rival or weaker groups.”⁵⁷ In the essence, scholars have pointed out to a flurry of causes for the emergence of conflict in Africa in the neoliberal period. However, structural and economic factors remain the crucial ones. The crisis of the state and the following wave of democratization have substituted the old elites and introduced multipartyism in Africa, but economic and social underdevelopment has not decreased. Conflict over resources and power is still the key cause in the understanding of African conflicts, in both the postcolonial and the neoliberal periods. The end of the balance of power between the Soviet Union and the US has, however, unchained forces of identity creation and association, which were once subordinated to the ideologies of the Cold War. Sudan perfectly fits in the framework of African conflicts in both the postcolonial and the neoliberal periods. Sudan has inherited structural inefficiencies from its historical past that are still the main causes for conflict in the ongoing Darfur crisis.

1.3.4 The Management of Identity Conflicts

External intervention in the management of ethnic conflicts is a valuable and necessary component of ethnic conflict resolution and can prevent disastrous consequences commonly associated with such conflict. However, external intervention on its own is often an insufficient means of conflict management and can do more harm than good. External intervention can be paternalistic

⁵⁷ Federici, Silvia, War, Globalization and Reproduction, *Turkish Journal of International Affairs*, Vol. 1 No. 4, Winter 2002 From: <http://www.alternativesjournal.net/volume1/number4/federici.htm>

and undemocratic and may fail because of a lack of understanding of the internal situation which has led to the conflict.⁵⁸ Ethnic conflict is largely an intra-state phenomenon and therefore is at best internally managed. Some methods of internal conflict management are discussed below.

1.3.4.1 Secession

Secession is the most extreme method of conflict management and for this reason is often either not considered as an option for conflict management, or is considered a last resort. Nonetheless, some ethnic conflicts have been managed with varying degrees of success by allowing one of the ethnic groups involved to secede. Examples include the independence won by Lithuanians, Eritreans and Ukrainians⁵⁹. Secession may be considered a solution when the costs of secessionist civil war outweigh the benefits of maintaining the current state boundaries and when the separation of the multi-ethnic state will result in the creation of two homogenous regions, which are likely to be more governable than the original region.⁶⁰ Secession also appears as an attractive option when it allows a group to escape oppression through receiving self-government.⁶¹ While secession can be considered a viable option in the management of some ethnic conflicts, there are also some disadvantages related to it. Firstly, it is not always easy to determine exactly which group(s)

⁵⁸ John McGarry and Brendan O’Leary, “The Political Regulation of National and Ethnic Conflict”, *Parliamentary Affairs* 47 (3) 1994: 94-115.

⁵⁹ Ted Gurr “Transforming Ethno-Political Conflicts: Exit, Autonomy or Access” in Kumar Rupesinghe (Ed.), *Conflict Transformation*, (New York: St. Martins Press, 1995), p.6.

⁶⁰ Ted Gurr, *Transforming Ethno-Political Conflicts*, p.6.

⁶¹ McGarry and O’Leary, *The Political Regulation of National and Ethnic Conflict*, p.98.

and which territory should form the new state.⁶² The seceding region is likely to contain its own minorities which means that secession could lead to new ethnic conflicts if these minorities do not support the secession of the region.⁶³ Secondly, secession often produces violence or occurs in a violent fashion, and may even exacerbate the original situation.⁶⁴ Secession may transform the intra-state conflict into a conflict between two independent neighbouring states. A third problem is that secession may lead to the establishment of a state which is not economically viable, or may diminish or eliminate the economic viability of the existing state.⁶⁵ Another problematic with secession is that certain international law principles can be appealed to both by the secessionists, and those wishing for the state to remain united thereby creating more friction than accord. These principles are that of self-determination and statehood, and the sovereignty of states respectively.⁶⁶

1.3.4.2 Nation-Building

National identity or nationhood can be defined as a collective sense of belonging and can result from a number of factors.⁶⁷ Nation-building involves reducing disparities between groups and promoting the idea of a common

⁶² McGarry and O'Leary, *The Political Regulation of National and Ethnic Conflict*, p.99.

⁶³ Abdullahi Ahmed An-Naim, "The National Question Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination", in Issa Shivji (Ed.) *State and Constitutionalism: An African Debate on Democracy*, (Harare: South African Political Economy Series Trust, 1991.)

⁶⁴ McGarry and O'Leary, *The Political Regulation of Ethnic Conflict*, p.100.

⁶⁵ Abdullahi Ahmed An-Naim, "The National Question Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination", p.109.

⁶⁶ Oliver Richmond, "Mediating Ethnic Conflict: a task for Sisyphus?" *Global Society* 13(2) 1999:181-205.

⁶⁷ William Hazelton, "Ending Violent Ethnic Conflicts: Separating or Sharing as Options for Negotiation", *Nationalism and Ethnic Politics*, 4(3) 1998:102-119.

shared nationhood.⁶⁸ Some theorists have opined that if nation-building can promote an identity based on a common territory, or common history rather than one based on ethnicity, it can be considered an effective ethnic conflict management strategy.

1.3.4.3 Power Sharing

Power sharing practices have in such instances offered an alternative to the simple majoritarian practices of democratic governance. Two broad approaches to construction of democratic governance namely the consociational or group building block approach that relies on accommodation by ethnic group leaders at the centre and a high degree of autonomy and the integrative approach which seeks to create incentives for moderation by political leaders on divisive ethnic themes and to enhance minority influence in majority decision making have been adopted. Consociational approaches rely on elite accommodation and guarantees to groups to protect their interests such as a mutual or minority veto whereas the integrative approach relies on incentives for intergroup cooperation such as electoral systems that encourage the formation of pre-election pacts among candidates or political parties along ethnic lines.

The consociational and integrative approaches can be fruitfully viewed as conceptual poles in a spectrum of specific conflict regulating institutions and practices that promote power sharing. Which approach and which practices are best in any given conflict situation is dependent on the patterns and dynamics

⁶⁸ Donald Horowitz, *Ethnic Groups in Conflict*, (Berkeley: University of California Press, 1985), p.599.

of the particular conflict. Indeed a given political system may fruitfully incorporate aspects of both approaches simultaneously. It is useful to consider the practices in terms of three sets of variables that apply to both approaches: territorial division of power, decision rules and public policies for example on language, education and resource distribution that define relations between the state and the ethnic groups. Five consociational conflict regulation practices are as follows:

- *Granting of territorial autonomy and creation of confederal arrangements;*
- *Creation of polycommunal or ethnic federations;*
- *Adoption of group proportional representation in administrative appointments including consensus decision rules in the executive.*
- *Adopting a highly proportional electoral system in a parliamentary framework. Acknowledging group rights or corporate non territorial federalism.*

Five integrative conflict regulating practices are as follows:

- *Creating a mixed or non ethnic federal structure;*
- *Establishing an inclusive centralised unitary state;*
- *Adopting majoritarian but ethnically neutral or non-ethnic executive, legislative and administrative decision making bodies;*
- *Adopting a semi-majoritarian or semi-proportional electoral system that encourages the formation of pre-election coalitions (vote pooling) across ethnic divides.*
- *Devising ethnicity-blind public policies.*

Power sharing practices when they are adopted by parties in conflicts often evolve in direct response to a history of violent conflict. Pragmatic perceptions toward other groups can emerge from the belief that the failure to accommodate will precipitate wider strife. However, political leaders and publics must be motivated to avoid worsening or more violent conflict if power sharing is to be successfully adopted. Unfortunately such motivation does not always exist; high levels of violence do not inevitably mean that political

leaders will be more moderate and adopt power sharing. Transitional moments both in terms of changes in structure or peace processes in which parties adopt agreements or mutual security pacts that seek to limit the ability of groups to inflict mutual harm. The degree of unity and organisational coherence of the parties and the ability of political leaders to persuade their constituents to act peacefully are the most important variables in creating improved relations among ethnic groups. Conciliatory attitudes must both be broad including hard-liners and deep including key publics as well as leaders.

International intervention in ethnic conflicts focuses both on the process by which groups rearrange their relations through violence or dialogue and on the terms and structures of the outcomes that are reached. Despite the inherent problem of partition, the international community should not assume that the borders of an existing state are sacrosanct. The principal decision the international community must face in any given violent ethnic conflict is whether separation or power sharing is the more achievable sustainable and just outcome. This is of special relevance when the parties themselves cannot reach an agreement on this fundamental question. The international community often places too much emphasis on democratic elections without considering their potentially adverse impact in situations of severe ethnic conflict especially when such elections are held with simple majority rule electoral systems and without prior mutual security pacts. It is true that elections are critical moments in peace processes; they are turning points at which relations can polarise or new national unity can be forged through the creation of legitimate government. But much depends on both the electoral system chosen and the administration and monitoring of the election event. In

this way elections provide important opportunities for intervention to help ameliorate ethnic conflicts because they are especially amenable to monitoring and an ongoing international presence.

1.3.4.4 Federalism

Federalism can be considered a method of power sharing as it allows for power to be distributed among different groups. Federalism involves the devolution of power by the centre to regional units and a formal distinction between the powers of the central government and the powers of the federal units.⁶⁹ A federal arrangement can increase the confidence of the conflicting ethnic groups and allow them to feel less threatened by other ethnic groups.⁷⁰ It can also appease demands for secession. There are however, several problems with federalism. Firstly, federalism usually refers to the devolution of powers to a specific geographical region and is thus only a solution where the conflicting ethnic groups are territorially based.⁷¹ There are some forms of non-territorial partitions, such as the cultural councils of Belgium,⁷² but generally federalism is taken to involve devolution to a particular geographical area. Another problem with federalism is that there are definite costs to federalism and these costs may be seen as outweighing the benefits of federalism. The costs include the duplication of function, the expense of having state capitals and other

⁶⁹ John Coakley, "Introduction: The Territorial Management of Ethnic Conflict", In *The Territorial Management of Ethnic Conflict*, (Great Britain, Frank Cass, 1993), p.15.

⁷⁰ David Lake and Donald Rothchild, "Containing the Fear: The Origins and Management of Ethnic Conflict", *International Security*, 21(2): 1996, 41-75.

⁷¹ David Welsh, "Domestic Politics and Ethnic Conflict", *Survival*, 35(1): 1993, 63-80.

⁷² Francis Cohen, "Proportional Versus Majoritarian Ethnic Conflict Management in Democracies", *Comparative Political Studies*, 30(5): 1997, 607-630.

expenses related to the running of separate federal administrations.⁷³ Nigeria serves as an example of an African state that has experimented extensively with federalism. At independence in 1960 Nigeria adopted a federal character. The three Regions established under British rule were maintained.⁷⁴ Over the years a number of other Regions were established, many of them in response to the demands of ethnic groups. By 1996, Nigeria had 36 different federal regions.⁷⁵ Some thinkers express strong support for the use of federalism in the resolution of ethnic conflict in Nigeria. Diamond describes the federal system as a 'crucial resource' for Nigeria and argues that decentralised power and local autonomy are essential in Nigeria.⁷⁶ Akinrinade agrees, stating that the Nigerian experience illustrates the need for 'the development and practice of true federalism'.⁷⁷ He sees the devolution of real power and responsibilities to federal units as vital and criticises the Nigerian federal system for having a central government with too much power. Rothchild sees federalism as a possible way to make politics in Nigeria less threatening and to encourage co-operation between groups, but notes that federalism as a solution to ethnic conflict is undermined if ethnically exclusivist regional governments refuse to allocate resources equitably and act repressively.⁷⁸ He notes that when

⁷³ Donald Horowitz, *Ethnic Groups in Conflict*, (Berkeley: University of California Press, 1985), p.621-622.

⁷⁴ Richard Syngé, "Nigeria: Recent History", in *Africa South of the Sahara* (London: Europa Publications, 2000), p.819.

⁷⁵ Osaghae Eghosa, *Nigeria Since Independence: Crippled Giant*, (Bloomington and Indianapolis: Indiana University Press, 1998), p.294.

⁷⁶ Larry Diamond, *Class Ethnicity and Democracy in Nigeria: The Failure of the First Republic*, (London: MacMillan Press, 1988), p.324-325.

⁷⁷ Akinrinade Sola, "Ethnic and Religious Conflict in Nigeria: What lessons for South Africa?" Lecture given at the University of Pretoria on 12 May 2000, organised by The South African Institute of International Affairs, Pretoria Branch.

⁷⁸ Donald Rothchild *Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation*, p.56.

carefully crafted, federalism and other systems of decentralising authority, can place necessary limitations on central authority and promote confidence among regional leaders. However, federalism can increase conflict and worsen inter-ethnic relations if it is not introduced carefully.⁷⁹ Osaghae does not believe that federalism, as implemented in Nigeria, was an adequate response as it favoured majorities and powerful minorities at the expense of smaller ethnic groups.⁸⁰ While ethnic groups ought to be given increased autonomy, Osaghae does not believe that awarding particular regions increased autonomy, sufficiently addressed the needs of ethnic minorities. Thus, federalism has been both praised and criticised as a solution to ethnic conflict in Nigeria. According to McGarry and O'Leary, federalism has a poor track record with federations breaking down throughout Asia and Africa.⁸¹ For federalism to be successful, the division of powers needs to be continually renegotiated and supplementary consociational measures are often needed at sub-central levels of government to maintain the stability of the federation. Despite these difficulties, federalism is an attractive measure for the management of ethnic conflicts, and under certain conditions can be very effective.

⁷⁹ David Lake and Donald Rothchild, *Containing the Fear: The Origins and Management of Ethnic Conflict*, p.61-63.

⁸⁰ Osaghae Eghosa, "Multiple Minority Problems in Nigeria", *Journal of Modern African Studies*, 36 (1):1998, 1-24.

⁸¹ John McGarry and Brendan O'Leary, *The Political Regulation of National and Ethnic Conflict*, p.111-112.

1.3.4.5 Power Sharing

Both historically and more recently, the international community has promoted power sharing by offering formulas institutional blueprints for post conflict political structures and has often sought to induce disputants to accept them through a combination of diplomatic carrots and sticks. Increasingly, the international community is using linkages to other issues such as membership in collective security, trade, and other international organisations to induce states to adopt practices that promote ethnic accommodation. The paradox of promoting power sharing early in the escalation of an ethnic conflict is that at a nascent stage of tensions, parties may be unwilling to embrace power sharing practices because they are not sufficiently desperate or feel insufficiently compelled. At a late stage of conflict, after significant violence, enmities may be too deep for parties to share power for mutual benefit. Determining when a conflict is ripe for a power sharing solution is at best a difficult judgement call requiring intimate knowledge of a situation, especially of the true disposition of the parties and their willingness to live together within a common or shared political framework.

Thus a second paradox is the problem of judging intentions. Hasty adoption of a power sharing arrangement can set the stage for new grievances and strife. Moreover the international community is often asked to secure successful implementation of agreements or to guarantee them which in essence ties the international community to the substance of a settlement. The promotion of power sharing by the international community in situations of deep ethnic conflict is riddled with normative considerations such as potentially rewarding

aggression or appeasement of extremists. It also entails considerable risks such as inducing parties to share power when their underlying perceptions are still deeply suspicious and based on mutual harm. When an international mediator goes beyond facilitating negotiation and backs a power sharing solution in any given conflict at either an early or late stage of escalation, this policy involves choosing sides. This is true of choosing among parties to a conflict often in favour of minorities who seek to limit the power of majorities as well as bolstering more moderate factions within a given party or government against more hard-line elements.

Power sharing involves a wide range of practices not a simple model or formula that can be universally applied. Thus in a given conflict there is no substitute for intimate scholarly and policymaker knowledge in reaching conclusions about whether any given power sharing practice will likely have an ameliorative or potentially adverse effect on a given ethnic conflict. For example in some situations consociational power sharing may be an appropriate interim measure but should not become a permanent feature of political life. Likewise parties in an ethnic conflict may be too insecure to accept the incentive mechanisms of the integrative approach preferring more firm guarantees of consociationalism. In many countries democracy may be a long way off but the international community can exert pressure for the adoption of conflict regulation practices by non democratic states such as fair treatment of ethnic minorities and ethnically diverse security forces. Conditional generalisations can be made that can serve to inform policy. Power sharing arrangements have been generally successful in managing ethnic conflict under the following conditions:

- *They are embraced by a core group of moderate political leaders in ethnic conflicts and these leaders are genuinely representative of the groups they purport to lead;*
- *The practices are flexible and allow for equitable distribution of resources;*
- *There are indigenously arrived at not agreed on as a result of too heavy external pressures or short term zero sum expectations of the parties;*
- *Parties can gradually eschew the extraordinary measures that some power sharing practices entail and allow a more integrative and liberal form of democracy to evolve.*

1.4 Other Issues on the Management of Identity Conflicts

When conflict management is attempted, it is possible to adopt one of the approaches discussed above without taking into account several issues which must be examined if the conflict management strategy is to have lasting success. A few of these issues are discussed below.

1.4.1 Democracy and Ethnic Conflict

Democratisation and ethnic conflict management are two processes identified as being of vital importance in Africa at the moment. Given that ethnic conflict management and democratisation are often cited as two of the most important goals towards which African states should be striving, it is useful to examine the relationship between the two. The coincidence of democratisation and violent ethnic conflict in Eastern Europe and other parts of the world has led some to wonder whether ethnic conflict is not the inevitable result of the end of authoritarian rule, meaning that it can be expected that democratisation will in some way exacerbate ethnic tensions. Welsh argues that democracy widens the scope for ethnic politics - democratisation provides incentives for ethnic mobilisation which can threaten the cohesiveness of the state.⁸² The

⁸² Renée de Nevers "Democratization and Ethnic Conflict" *Survival*, 35(2): 1993, p.31.

arguments suggest that democratisation is likely to spark ethnic conflicts where ethnic tensions had previously been latent. Other writers acknowledge that this has sometimes been the case, but argue that democratisation and ethnic conflict need not go hand in hand. Glickman says that certain types of democratisation allow for the constructive expression and demonstration of ethnic differences, while Smith concludes after a long empirical study that democratisation does not raise or lower ethnic conflict scores.⁸³ Following this line of thought, it can be argued that democratisation and effective ethnic conflict management are not incompatible, but that attention has to be given to the form of democratisation if the eruption of violent ethnic conflict is to be prevented. Cohen posits that democratisation should include proportionality if ethnic conflict is to be prevented, and Glickman proposes that democratisation in Africa should include some form of federalism if ethnic conflict is to be managed effectively.⁸⁴

If ethnic conflict management and democratisation are two of the most important challenges facing Africa at the moment, it makes sense that their impact on each other should be carefully considered. When democratisation is encouraged in Africa, there should be an awareness of the impact democratisation can have on ethnicity, and when ethnic conflict is managed in

⁸³ Glickman Harvey "Issues in the Analysis of Ethnic Conflict and Democratization Processes in Africa Today", in *Ethnic Conflict and Democratization in Africa*, Glickman Harvey (Ed.) (The African Studies Association Press, 1995); Smith Zeric "The Impact of Political Liberalisation and Democratisation on Ethnic Conflict in Africa: An Empirical Test of Common Assumptions" *The Journal of Modern African Studies*, 38(1): 200, p.34.

⁸⁴ Frank Cohen, "Proportional versus Majoritarian Ethnic Conflict Management in Democracies" *Comparative Political Studies*, 30(5): 1997,607-630; Glickman Harvey *Issues in the Analysis of Ethnic Conflict and Democratization Processes in Africa Today*, p.407.

Africa, the impact of ethnic conflict on the democratic process should be given attention.

1.4.2 Resources and Ethnic Conflict

Ethnic conflicts often centre on competition for scarce resources.⁸⁵ The existence of ethnic differences cannot be understood to be the only variable which explains the outbreak of incidences of ethnic conflict.⁸⁶ When states experience periods of economic crisis and cannot provide their citizens with resources, the people may mobilise according to ethnicity in order to compete for the scarce resources which are available. Where certain ethnic groups are advantaged in the state's allocation of resources, tensions between ethnic groups are inevitable. The centrality of oil in many ethnic conflicts in Africa is an example of how competition for a resource can spark conflict between two ethnic groups. In Nigeria there have been several ethnic conflicts which are clearly related to competition over oil reserves. The Niger Delta region has been especially volatile in this respect. Although most of the crude oil in Nigeria comes from this area, the people of the Niger Delta are impoverished and politically marginalised.⁸⁷ The process of oil extraction in their region has not brought them financial or political benefits and has led to the environmental degradation of the land upon which they live. The ethnic groups in the area feel that the major Nigerian ethnic groups have exploited them. This has resulted in

⁸⁵ Donald Rothchild *Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation*, p.75.

⁸⁶ Ihonvbere Julius, "The Irrelevant State, Ethnicity, and the Quest for Nationhood in Africa" *Ethnic and Racial Studies*, 17(1): 1994, 44-60.

⁸⁷ Dokobu "The Niger Delta Oil and the Problem of the Nigerian State" *Conflict Trends*, 3, 2000:20.

a situation where some interest groups in the Niger Delta which were fighting for their interests with regard to the oil-production have degenerated into violent ethnic militias which sabotage oil pipelines and abduct officials.⁸⁸

Oil is also a variable in the ethnic conflict in Sudan. While the south of Sudan has been comparatively disadvantaged in terms of political and economic development, it is in the South that Sudan's oil reserves are found.⁸⁹ The only lasting peace accord in Sudan (the Addis Ababa agreement signed in 1972) allowed the South considerable autonomy which brought peace to Sudan for several years, but limited central government's access to and control over the south's oil reserves.⁹⁰ When Sudan began to experience worsening economic crises during the late 70s, Nimeiri, the leader at the time, breached the Addis Ababa agreement in order to try to gain control of the oil fields in the south.⁹¹ These actions contributed the end of the period of peace in civil war and the re-emergence of the violent ethnic conflict which has still plagues Sudan. In order to address ethnic conflict in Africa, the question of the distribution of resources needs to be examined. Ethnic conflict is inevitable where resources are scarce and unfairly distributed between ethnic groups.

⁸⁸ Agbu Osita, "Post-Transition Conflicts in Nigeria", *Conflict Trends*, 3/2000: 2000, 24-25.

⁸⁹ Peter Woodward "A New Map of Africa? Reflections on the Horn" *Africa Insight*, 23(1): 1993, p.13.

⁹⁰ Taisier Ali and Roben Matthews, "Civil War and Failed Peace Efforts in Sudan" in *Civil Wars in Africa: Roots and Resolutions*, edited by Taisier Ali and Roben Matthews (Eds.), (Montreal & Kingston: McGill-Queens University Press, 1999)

⁹¹ Taisier Ali and Roben Mathews *Civil War and Failed Peace Efforts in Sudan*, p.208-209.

1.4.3 The Question of Religion

Ethnic and religious conflicts frequently intersect. Many African countries are not only ethnically, but also religiously heterogeneous. When religious differences coincide with ethnic differences, religion can serve to exacerbate ethnic differences. In Africa the tension between Christianity and Islam is evident, with the populations of several states being divided between the two faiths. The role of religion in ethnic conflict is evident when examining the ongoing ethnic conflict in Sudan. Sudan is situated geographically across the cultural and religious divide of northern and sub-Saharan Africa, with its population divided between Islam, Christianity and traditional beliefs.⁹² The north of Sudan is predominantly Muslim while the people of the south practice Christianity and traditional religions. These religious differences coincide with ethnic and regional differences with the Islamic people living mainly in the north and being predominantly Arabic; and the people practising Christianity and traditional religions situated in south Sudan and belonging to various non-Arabic ethnic groups.⁹³

Religion has played a significant role in the conflict in Sudan. Non-Islamic religions have come under attack by the northern-dominated state ever since independence.⁹⁴ The various Islamist military governments which have been in power in Sudan have seen Islam as integral to the state of Sudan and threats to

⁹² Glickman Harvey *Issues in the Analysis of Ethnic Conflict and Democratization Processes in Africa Today*, p.209.

⁹³ Glickman Harvey as above at p.51.

⁹⁴ Stavenhagen Rodolfo *Ethnic Conflicts and the Nation-State*, (Great Britain: MacMillan Press Ltd, 1996), p.107.

the state as being threats to Islam.⁹⁵ This belief in the centrality of Islam and the importance of building an Islamic state leaves little room for compromise. The application of Muslim Shar'ia law has created much conflict in Sudan and has led to non-Muslims being treated as second-class citizens.⁹⁶ Observers have warned that a lasting solution in Sudan is unlikely without some kind of compromise on behalf of the northern Arabic Muslims and that at this stage compromise seems unlikely.⁹⁷ In situations where conflict is ethno-religious rather than simply ethnic, management of the conflict is more complicated. Groups with strong religious loyalties may be unwilling to compromise, making the management of ethnic conflict more difficult. Attention must be given to the coincidence of ethnic and religious differences so that ethnic conflict management takes into account the role that religion may be playing in the conflict.

1.4.4 Arms and Ethnic Conflict

A distinct difference between ethnic conflict of earlier times and ethnic conflict today, is the use of sophisticated weapons in contemporary ethnic conflict.⁹⁸ Management of ethnic conflicts has to take into account demilitarisation and also need to pay attention to the physical and psychological wounds caused by the use of destructive modern weapons in ethnic conflicts. During periods of ethnic conflicts mafia-like gangs come into existence and after the conflict

⁹⁵ Taisier Ali and Roben Mathews *Civil War and Failed Peace Efforts in Sudan*, p.196.

⁹⁶ Glickman Harvey *Issues in the Analysis of Ethnic Conflict and Democratization Processes in Africa Today*, p.277.

⁹⁷ Glickman Harvey as above.

⁹⁸ Hussein Adam, "Somali Civil Wars" in *Civil Wars in Africa: Roots and Resolutions*, in Ali and Mathews (Eds.) (Montreal & Kingston: McGill-Queens University Press, 1999), p.170.

there are many who have learnt that it is easier and more profitable to live by the gun than by work.⁹⁹ While weapons still form part of every day life, violent conflict can more easily erupt once again.

1.4.5 Traditional Ethnic Conflict Management Strategies

Throughout the history of Africa, there have been conflicts between competing groups which necessitated the development of various techniques of conflict management. Pre-colonial methods of conflict management have often been disregarded in attempts to resolve contemporary ethnic conflicts in Africa. Yet the history of Africa tells us of many circumstances where people of different ethnic groups lived together in relative peace, meaning that there were successful ethnic conflict management processes in existence years ago.¹⁰⁰ In managing ethnic conflicts today, it may be useful to reconsider these traditional techniques of conflict management which may prove far more useful in the current situations than Western models of conflict management. An example of the possibility of applying traditional mechanisms to manage contemporary conflict, can be seen in the management of conflict in Somalia. The lack of understanding regarding Somali traditions has been suggested as a reason for the poor progress of external mediators of Somali ethnic conflict, and an examination of traditional politics in Somalia has been put forward as

⁹⁹ Virginia Luling, "Come Back Somalia? Questioning a Collapsed State" *Third World Quarterly*, 18(2): 1997, 287-302.

¹⁰⁰ Ihonvbere Julius, *The Irrelevant State, Ethnicity, and the Quest for Nationhood in Africa*, p.53.

being necessary for the permanent resolution of conflict in Somalia.¹⁰¹ In Somali history, clans competed and occasionally engaged in violent inter-clan conflicts, but there was no permanent domination of one clan over others.¹⁰² Traditional processes of mediation between clans involved councils of elders (guurti) who arbitrated between clans.¹⁰³ These traditional councils have been involved to some extent in resolution of conflict in Somalia, especially in Somaliland.¹⁰⁴ Although traditional leaders have been instrumental in effective conflict management, it has also been argued that the use of traditional methods of conflict management is no longer appropriate in many African states because of the erosion of culture in Africa, and the manipulation of traditional systems by self-seeking dictators.¹⁰⁵

While this may be true to some extent, the erosion of culture and tradition in African states cannot be seen to completely invalidate the usefulness of traditional systems of ethnic conflict management. Traditional leaders using traditional methods of conflict management may prove to be successful where other ethnic conflict management techniques have failed and the co-operation of traditional leaders in all ethnic conflict management strategies should be encouraged in order to give legitimacy to these strategies.

¹⁰¹ Laitin David "Somalia: Civil War and International Intervention" in *Civil Wars, Insecurity and Intervention*, Walter and Snyder (Eds.) New York: Columbia University Press, 1999), 167-168.

¹⁰² Adam Hussein "Clan Conflicts and Democratization in Somalia" in *Ethnic conflict and Democratization in Africa*, Harvey Glickman (Ed.) (Atlanta: The African Studies Association Press), 1995.

¹⁰³ Woodward Peter, "Somalia" in *Peacekeeping in Africa*, Oliver Furley and Roy May (Eds.) (Aldershot: Ashgate, 1998), p.154.

¹⁰⁴ Adam, Hussein "Somalia: A Terrible Beauty Being Born?" in *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, William Zartman (Ed.) (Boulder, London: Lynne Rienner Publishers), p.82-83.

¹⁰⁵ Laitin David, *Somalia: Civil War and International Intervention*, p.168-169.

1.4.6 The Role of External Intervention in Transforming Identity Conflicts

Jenone Walker has noted that successful outside intervention in ethnic conflicts is scarce.¹⁰⁶ Why is this so? This section will aim to provide some answers to this question and provide some concrete recommendations, which it is hoped, would contribute to the successful external intervention. As with the previous section, before proceeding with our examination of outside intervention, a few caveats need to be borne in mind. Following this four areas in urgent need of attention on the part of the international community will be discussed. These four areas are: international law, early warning, economic development and peacekeeping.

1.5 Research Questions and Propositions Advanced in this Thesis

The central concern of this thesis is the investigation of the constitutional mechanisms that have been employed in a selected number of cases to peaceably settle identity conflict. The cases in point are Kenya, Sudan and Somalia. In so doing it also poses the following questions;

- a) What political conditions drive people to violence?
- b) What circumstances allow people to settle differences peacefully?

¹⁰⁶ Jenone Walker, "International Mediation in Ethnic Conflicts" in Michael Brown (Ed.) *Ethnic Conflict and International Security*, (Princeton, New Jersey: Princeton University Press), p.165.

- c) What is the role of the international community when relations between groups become violent?
- d) Why can violence be prevented and managed in some cases but not in others?
- e) What are the models of identity conflict regulation and their specific efficacies?
- f) How is it possible to adopt one approach successfully in one case while the same approach failed in an apparently similar conflict elsewhere?
- g) Are there any transferable lessons about conflict management and settlement applicable to cycles of failure in one and the same conflict as well as to other conflicts?

Ethnic conflict has been explained by scholars as either primordial and innate or instrumental and at least partially socially contrived. The extent to which analysts perceive ethnicity as immutable and innate versus socially constructed or manipulated by political leaders influences beliefs about the types of institutions and practices that can best ameliorate conflict along ethnic lines. A critical factor is whether ethnic groups perceive each other in essentialist, threatening terms or pragmatically. Pragmatic perceptions between groups in conflict create opportunities for peaceful management of intergroup relations. Ethnic conflicts can be more or less severe depending in large part on the structure of relationships for example whether identity and socioeconomic

differences overlap. An important predictor of the severity of conflict is the role of the state: Does it stand above conflicts and mediate them? Does a group own the state and use its powers to the detriment of other groups? A common thread that runs through all violent ethnic conflicts is the manipulative role of ethnic group leaders who foster discrimination and mobilise group members against their foes. Ethnic outbidding refers to extremist leaders ethnic group leaders who decry moderation with rivals as a sell-out of group interests. Ethnic conflicts can escalate that is intensify or spread or they can de-escalate resulting in improved intergroup relations. Escalation occurs when background conditions of ethnic strife are combined with conflict triggers or precipitating events. A useful way to conceptualise moves toward more peaceful ethnic conflict management is through a phases or stages approach to de-escalation in which conflicts that can reach a stalemate are managed through protracted negotiations. Ethnic conflicts have usually been managed with non democratic authoritarian practices such as subjugation and control leading to massive human rights violations. Simple majoritarian democracy has presented special problems for ethnically divided societies. The principal problem has been that minority ethnic groups have been seemingly eternally excluded from power through the ballot box.

1.6 Case Selection and Research Methodology

This thesis is a qualitative research project that fuses the conceptual and empirical work on management and settlement of ethnic conflicts. At its core is a study of five cases: Nigeria Sudan, Ethiopia, South Africa and Northern Ireland. The research methodology employed in the piece is a middle way

between the large-N statistical method and the smaller N=1 case-study method. The main pitfall of the large-N statistical method in social science research is that while it is useful for the observation of statistical trends, it does not lend itself to the in-depth qualitative analysis of smaller-N studies.¹⁰⁷ While the large-N approach provides an important benefit in terms of “analytical clarity, parsimony and theoretical elegance,” this frequently comes at the expense of the “richness and depth derived from national or regional case-studies”.¹⁰⁸ Additionally, the higher the number of case studies, the harder it is to achieve conceptual equivalence across them. To properly engage the question of how to best manage and settle ethnic conflicts in pluralistic societies, it is necessary to deal with the details that inform specific cases. Institutional setups do not operate in a political vacuum; it is thus vital to have a proper understanding of the context in which they function. This in turn requires a level of description not found in statistical studies. As such, a large-N statistical research method on its own would be unsuitable for this thesis.

The smaller-N=1 method, by contrast, has the advantage of in-depth analysis of a single case. Scholars such as Andreas Wimmer have applauded it calling it the “new realism” in the field of institutional design¹⁰⁹. The “new realism” asserts that context must trump generality; scholars and practitioners must adopt a

¹⁰⁷ See generally, Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005), p. 69.

¹⁰⁸ Pippa Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* (Cambridge: Cambridge University Press, 2008), p. 77.

¹⁰⁹ Andreas Wimmer, “Towards a New Realism,” in *Facing Ethnic Conflicts: Towards a New Realism*, Andreas Wimmer, Richard J. Goldstone, Donald L. Horowitz, Ulrike Joras, and Conrad Schetter, eds. (Lanham: Rowman and Littlefield, 2004), pp. 340-342.

“tailor approach” in which the idiosyncrasies of each case are given primacy.¹¹⁰ On this account, the search for general lessons is hindered by the seemingly *sui generis* quality to each particular conflict and by the complexities involved therein. The main pitfall of the smaller-N=1 approach is that, while it is strong in descriptive content, it suffers lends itself to weak generalisation in the sense that the broader implications of such studies are often difficult to ascertain.¹¹¹ However there are exceptions to this assertion. One such case is Arend Lijphart’s path-breaking study of the Netherlands, *The Politics of Accommodation*, which provided an invaluable refinement to pluralist theory and served as the platform for the development of consociational theory.¹¹² Nonetheless, the general rule, is that single case-studies are in tension with a central goal of *comparative* politics: they are “unlikely to provide definitive answers.”¹¹³

That which single cases gain in descriptive richness, they frequently lose in wider explanatory power. The use of a single case study approach would constitute a flawed basis for assessing the options and critical issues in the management and settlement of ethnic conflicts, even if the case employs various options and raises an array of critical issues. As Lijphart has noted “[a] single case can constitute neither the basis for a valid generalization nor the

¹¹⁰ Andreas Wimmer, *Towards a New Realism*, as above.

¹¹¹ Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca: Cornell University Press, 1997), p. 53.

¹¹² Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (Berkeley: University of California Press, 1968).

¹¹³ Pippa Norris, *Driving Democracy*, p. 40.

grounds for disproving an established generalisation.”¹¹⁴ It is submitted that this is necessarily the case because, challenging the case-by-case method, it is argued in this thesis that lessons of conflict management and institutional design can be readily identified and promoted across divided polities. While attention must be paid to the issue of context sensitivity, as each divided polity presents its own unique nexus of conflict-producing cleavages, certain patterns of divisions can nonetheless be discerned. More specifically, “there is no such thing as singularity until one compares one case with another. One will not recognize the specificity of an individual case unless one draws parallels with other instances.”¹¹⁵ Context specificity does not preclude general lessons and comparisons; it, in fact, mandates it. The management and settlement of ethnic conflicts and institutional design, then, must be a distinctly comparative enterprise. Herein lies the reason why this thesis treads a middle ground between the one-size-fits-all solution and the tailored approach. In this piece, the “structured, focused comparison” method of analysis is employed.

As outlined by Alexander L. George and Andrew Bennett, this method borrows from the statistical method the practice of asking a set of general questions for each case that are “carefully developed to reflect the research objective and theoretical focus of the inquiry”.¹¹⁶ From the single-case study method, is borrowed the process of fleshing out the historical details of the case under

¹¹⁴ Arend Lijphart, “Comparative Politics and the Comparative Method,” *American Political Science Review* 65 (1971), p. 691.

¹¹⁵ Ulrich Schneckener, “Managing and Settling Ethnic Conflicts: The Context-Design Nexus,” in *Negotiating and Settling Ethnic Conflicts: Perspectives on Successes and Failures in Europe, Africa and Asia*, Ulrich Schneckener and Stefan Wolff, (Eds.) (London: Hurst and Company, 2004), p. 37.

¹¹⁶ Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005), p. 69.

consideration, but on a more limited basis. In essence, “the method is ‘focused’ in that it deals with only certain aspects of the historical cases examined,” specifically those aspects that have theoretical relevance.¹¹⁷ The selection of the following six cases permits me to retain some of the richness and thick description offered by the single case-study method while allowing for a degree of probabilistic generalisation. In picking a medium-N approach (six case-studies), this thesis follows Arend Lijphart’s approach in his most important work on consociational theory, *Democracy in Plural Societies*, which looked at four cases in Western Europe (Belgium the Netherlands, Austria, and Switzerland). However, a plausible criticism of Lijphart’s case-selection is that it is focused on relatively peaceful, prosperous countries with long traditions of democracy, and therefore of little explanatory value for other parts of the world which do not share these features. This project’s case-selection does not suffer from these disadvantages. It is both global in scope and comprises of countries that have considerable duration of experience with conflict management strategies (South Africa, Sudan, Ethiopia, Puerto Rico, Northern Ireland and Nigeria). Unlike Lijphart’s work, it covers cases that are developing, developed as well as cases that are clearly deeply divided, with many of them violently divided. The cases are also temporally diverse. This geographic and temporal diversity in case selection provides an explicit methodological advantage permitting causal inferences about the relationship between specific power-sharing institutions and political stability that hold across time and space.

¹¹⁷ George and Bennett, *Case Studies and Theory Development*, p. 67, p. 70.

1.7 Definitions, Hypotheses and Assumptions

This research thesis is underpinned by two main research assumptions all of which have likewise been assumed by other scholars like Horowitz and Lijphart. First, the political institutional design of a state represents a principal means by which to promote stability and cooperation in divided places. That is, the first theoretical assumption on which this thesis is based is that political institutions designs or a state's political structures matter. The design and structure of appropriate political institutions through which conflict can be peacefully channelled is of crucial importance to the politics of divided places. In this regard, places are often characterised by segregated civil societies, political institutions generally act as "the most prominent, and often the only, channel of communication between disparate groups."¹¹⁸ As Ben Reilly and Andrew Reynolds have observed, institutions or state structures "must facilitate communication channels between groups who need to talk. If they exclude people from coming to the table, then their conflicts can only be solved through force, not through negotiation and mutual accommodation."¹¹⁹ If institutions matter for political stability, what exactly does the notion of political stability entail? The concept remains an elusive one in comparative politics. It has been broadly defined as "the regularity of the flow of political exchanges" and has variously been characterised by the absence of violence, the longevity of government and cabinet duration, the legitimacy of the

¹¹⁸ Benjamin Reilly and Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies*, Papers on International Conflict Resolution, No. 2 (Washington, D.C.: National Academy Press, 1999), p. 4.

¹¹⁹ Reilly and Reynolds, *Electoral Systems and Conflict*, p. 4.

constitutional regime, and the absence of structural change.¹²⁰ Alternatively, it is understood as a multidimensional concept inclusive of system maintenance, civil order, legitimacy and effectiveness. This is the approach followed by Lijphart, who argues that a stable regime is one in which there is a high likelihood of remaining democratic and where there exists a low incidence of, or threat of, political violence.¹²¹ Political instability refers to the failure to maintain the political system and civil order and may be said to result when: the state system collapses by way of coup d'état, there is an increase in political violence and/or the outbreak of civil war, and political extremism becomes more electorally rewarding. Also covered in this piece is what can be termed as imposed stability "imposed stability" which obtains where the conditions of political stability are present but where an exogenous force does the work of maintaining that stability, as through military involvement in the political sphere or through the active involvement of the international community. In such cases, should the exogenous force be removed, the area would likely revert to a situation of political instability. The argument underlining the importance of state structures necessarily implies the crucial value of elite level politics. As Ulrich Schneckener suggests, the consent of elites "is a *conditio sine qua non* for achieving an agreement in the first place" and the extent of their participation helps to determine the long-term stability of any agreement.¹²² Elite level politics represents a necessary piece of the conflict management puzzle. This position can be contrasted with "bottom-up"

¹²⁰ Claude Ake, "A Definition of Political Stability," *Comparative Politics* (1975), p.273. For a review of conceptualizations, see Leon Hurwitz, "Contemporary Approaches to Political Stability," *Comparative Politics* (1973): 449-463.

¹²¹ Arend Lijphart, *Democracy in Plural Societies*, p. 4.

¹²² Ulrich Schneckener, "Managing and Settling Ethnic Conflicts," p. 283; also see Eric Nordlinger, *Conflict Regulation in Divided Societies* (Cambridge, MA: Harvard University Centre for International Affairs, 1972).

approaches that emphasise the reconciliation potential of civil society in the form of networks of engagement and sites of deliberation that bridge the ethnic divide.¹²³ This “social transformationist” perspective argues that elites in divided society are ethnocentric and that accommodating them through institutions exacerbates divisions. The proper way forward from this perspective is to focus on civil society organisations that seek to transcend division – to foster “those movements that crosscut social divisions, and challenge and erode the clash of ethno-nationalisms and create new relationships of mutuality through networking and debate.”¹²⁴ The social transformationist perspective embraces such policies as integrated schooling and housing initiatives and the promotion of inter-group engagements, as in NGOs, sports clubs, trade unions and business associations. The rationale is that as members of the different groups come together in these associational forms of engagement and also in more “everyday forms of engagements” that cross the divide, they will begin to recognize their commonalities and to enjoy the benefits of cooperation. Nonetheless, this thesis argues that bottom-up approaches involving unelected, and often unrepresentative, moderates are no substitute for agreements between authentic, democratically elected leaders of the communities in conflict. Social transformationism is a useful ancillary to

¹²³ See, for example, Ashutosh Varshney, “Ethnic Conflict and Civil Society: India and Beyond,” *World Politics* 53, 3 (2001); Ian O’Flynn, “Review Article: Divided Societies and Deliberative Democracy,” *British Journal of Political Science* 37, 4 (2007), and; Rupert Taylor, “Northern Ireland: Consociation or Social Transformation?” in *Northern Ireland and the Divided World: The Northern Ireland Conflict and the Good Friday Agreement in Comparative Perspective*, John McGarry, ed. (Oxford: Oxford University Press, 2001).

¹²⁴ Taylor, “Consociation or Social Transformation,” p. 47. See also Rupert Taylor, “The Injustice of a Consociational Solution to the Northern Ireland Problem,” in *Consociational Theory: McGarry and O’Leary and the Northern Ireland Conflict*, Rupert Taylor, ed. (London: Routledge, 2009).

elite-level accommodation, but it cannot replace it.¹²⁵ The next theoretical assumption is that demography has an immense bearing on processes of institutional design. Political demography refers to the study of populations, with particular emphasis on the political effects of the size, composition and distribution of population groups.¹²⁶ It is concerned with both demographic realities and perceptions of those realities. A polity's demographic configuration can take multiple forms. The complexity of demography is captured in the following quotation from Benjamin Reilly:

*“Ethnically divided societies tend to be divided in different ways. For example, divided societies can be fragmented into many contending groups (e.g., Papua New Guinea and Tanzania) or balanced between a few similarly sized ones, which can then be broken down into bipolar (e.g., Fiji and Cyprus) or multipolar (e.g., Bosnia) configurations. They can feature dominant majorities (e.g., Sri Lanka) or dominant minorities (e.g., Rwanda). Minorities can be based on indigenous or other homeland societies or on settler diasporas (e.g., Russians in the Baltics). Ethnic groups can be divided by international boundaries between several states (e.g., Kurds) or entirely encapsulated by a single state. Groups can be territorially concentrated or widely dispersed”.*¹²⁷

From the foregoing, three demographic issues in need of explication when approaching considerations of institutional design can be deduced. These are: the number of politically significant groups, their size vis-à-vis the other groups, and their territoriality, meaning their geographic concentration or dispersion. These indicators of demography are closely related. The number of groups can

¹²⁵ Ian O’Flynn, “Progressive Integration (and Accommodation, too), in *Consociational Theory: McGarry & O’Leary and the Northern Ireland Conflict*, Rupert Taylor, ed. (London: Routledge, 2009).

¹²⁶ Myron Weiner and Michael S. Teitelbaum, *Political Demography, Demographic Engineering* (New York: Berghahn Books, 2001), p. 2.

¹²⁷ Reilly, “The ‘Crucial Case’ of Papua New Guinea,” p.163.

range anywhere from two groups to hundreds of different groups; as Reilly illustrates, a polity may have a bipolar configuration, it may be characterized by extreme fractionalization or it may fall somewhere in between these two extremes. Similarly, the size of groups can show a dramatic range of difference. However, it is usually the case, , that to be politically significant, a group should represent a sizable portion of the polity's overall population. "The group must," in other words, "have the membership size and, thus, the mobilization potential to influence central state politics in a meaningful way."¹²⁸

The extent to which a group represents a majority, a plurality, or a minority of the overall population will contribute both to the sort of claims it will make and to the prospects of reasonable response to such claims. Unquestionably, the larger the group size, the more likely it is to derive benefits from the system, including enhanced and effective representation in political bodies, the legitimacy to participate in the political arena, access to legal, bureaucratic, and military channels, and more generally, the right to make demands on the political system.¹²⁹ This means that "the larger the ethnic group within a state, the less it can be ignored."¹³⁰ Horowitz discusses the implications of a 60:40 split in which a majority group and its ethnic party would be able to retain power indefinitely.¹³¹ Where a country is divided between Group A with 60 per cent of the population and Group B with 40 per cent with ethnic party representation on both sides, Group B can become permanently excluded from

¹²⁸ Marshall and Gurr, *Peace and Conflict 2005*, p. 29.

¹²⁹ Milica Z. Bookman, *The Demographic Struggle for Power: The Political Economy of Demographic Engineering in the Modern World* (London: Routledge, 1997), p. 18.

¹³⁰ Bookman, *Demographic Struggle for Power*, p. 18.

¹³¹ Horowitz, *Ethnic Groups*, p. 629.

political power. Similarly, a group that constitutes, say, twenty per cent of the overall population would have more political leverage in a situation where it is one of many smaller sized groups than it would in situations where some variation of the majority-minority configuration obtains, as with an 80:20 split.

From a strictly numerical perspective, the majority, in this sort of scenario, may have little incentive to compromise with the minority. This would be even more the case if that group of twenty per cent was spatially distributed throughout the territory. The geographic dispersion of groups makes political mobilization, in general, and secessionist bids, in particular, difficult. Conversely, if groups are territorially concentrated, secession may appear to be a feasible option. Similarly, when groups are territorially concentrated, it may be the case that demands for autonomy within the current system are given more serious consideration by both majority and minority groups. A group's territoriality will also be informed by whether international state boundaries separate groups from their ethnic kin in other states, as is the case with the nationalist community in Northern Ireland and with the Bosnian Croats and Bosnian Serbs in Bosnia and Herzegovina. Territoriality is also significant at a more symbolic level; as Wolff argues, "territory possesses certain values in and of itself." Those values would entail ownership of natural resources, the extension of goods and services, and military and strategic advantages.¹³² Territory can give rise to irredentist, secessionist, and autonomist claims that would necessarily need to be addressed in the institutional design.

¹³² Gunter and Diamond, "Political Parties," p. 184.

The primary aim of political institutional design in multiethnic polities is the quest to find constructive ways to reduce the political salience, social resonance and intensity of conflict and to thereby opening up the political space for intergroup cooperation and compromise. While many scholars are primarily concerned with the number of groups and other demographic data when proffering conflict-reducing strategies, these tell only a fraction of the story. The demographic configuration of a particular polity does not in itself lead to conflict. There is an important distinction between the diversity of a society and the depth of its divisions. The diversity or pluralism of a polity is a necessary but not a sufficient condition for conflict.¹³³ Considerations of the political salience of ethnicity and how that salience is manifested in the political party system should take precedence because they go further in explaining the adoption and maintenance potential of particular institutional designs. There is a need to study the attitudes and interactions of the conflict groups in the polities under consideration, as the emphasis on political salience does, if institutional remedies are to be efficacious. Doing so provides both explanatory and prescriptive power to processes of institutional design in specific cases.

1.8 Literature review

This piece reviews the book *“Ethnicity in Africa: Towards a Positive Approach”* by Hameso Y Seyoum. In his book, Seyoum analyses ethnicity in Africa from the pre-colonial period to date arguing that emerging nation states must directly confront the issue of ethnicity, irrespective of the negative connotations it has been accorded, in order to realise their development

¹³³ Horowitz, *Ethnic Groups*, p. 299.

agendas. He explicitly states that ethnicity can only be ignored at Africa's own peril. The book consists of five chapters. Chapter one is like an overview of all the issues discussed in the book. In this chapter he argues that the immediate postcolonial state was governed in accordance with the modernisation theory already discussed above. According to Seyoum, in the postcolonial state, nation building was based on expunging ethnicity with the result that "real nations" were superseded by "non-nations" and their histories, cultures and languages were regarded as tribal, backward and irrelevant to development.¹³⁴ He dismisses the modernisation and Marxian conceptions of ethnicity as inadequate and argues for the adoption of an African perspective that treats ethnicity as a form of African identity. To prove his case, Seyoum provides nine case studies namely Nigeria, Zaire, Kenya, Tanzania, Ethiopia, Sudan, Somalia, Rwanda and Burundi thereby demonstrating that these countries have suffered decades of misrule and conflicts due to an inadequate understanding of ethnicity and the management of ethnic relations. In chapter five, Seyoum examines the positive aspects of ethnicity. He submits that well guided, politicised ethnicity can serve various constructive objectives, such as mobilising resources to do away with oppressive rule and assisting in economic development. He gives the examples of countries like Ethiopia, Liberia and Somalia where ethnicity has proved a potent weapon for sorting out the vagaries of personal rule although not without lamentable repercussions.¹³⁵ According to the author postcolonial African states must cautiously respond to ethnic demands by equitably distributing national resources in order to ensure economic and social justice. He warns that states which ignore or fail to

¹³⁴

Hameso Y Seyoum *Ethnicity in Africa: Towards a Positive Approach*, London: TSC Publications (1997).

¹³⁵

Hameso Y Seyoum (1997) at 58.

accommodate ethnic claims are almost certainly doomed to political instability and total collapse.¹³⁶

“Ethnicity in Africa: Towards a Positive Approach” by Hameso Y Seyoum makes a substantial contribution to a positive appreciation of ethnicity. It is noteworthy that the case studies selected by Seyoum have also been selected as part of this research. In as much as the countries selected for analysis are similar, the content of analysis is radically different consequently rendering this piece substantially different from Seyoum’s work. Whereas Seyoum uses Ethiopia, Sudan and Kenya as case studies to exemplify the fact that failure to recognise ethnicity has been the cause of civil strife in the aforementioned countries, this study takes cognisance of this fact and goes a step further by analysing the mechanisms that have been adopted to accommodate ethnicity following the outbreak of political instability and their viability. In this regard, this study seeks to be more exhaustive and precise than Seyoum’s work.

1.9 Structure of the Thesis

Chapter One is an introduction to the piece outlining the structure of the thesis. It is also in this chapter that the hypothesis and theoretical assumptions underlying management and settlement of ethnic conflict are discussed. **Chapter Two** delves into the conceptual framework surrounding the management and settlement of ethnic conflicts. **Chapter Three** analyses the case of Sudan and its experience with federalism, power sharing, autonomy and secession constitutional solutions to identity conflict. **Chapter Four** deals

¹³⁶ Hameso Y Seyoum (1997) at 43.

with Kenya's experience with power sharing and devolution as a constitutional models for identity conflict. **Chapter Five** deals with Somalia's struggle for stable governance and international recognition as a successful state. This chapter advances the concept of autonomy as a tool for the resolution of the identity conflicts plaguing the country. **Chapter Six** concluded this piece by analysing the discussion of the three case studies, reasons for success in some cases and failure in others and advancing recommendations on the possible feasible solutions to other intractable identity conflicts with similar characteristics.

CHAPTER TWO

**CONCEPTUALISING CONFLICT MANAGEMENT AND SETTLEMENT:
CONSTITUTIONAL MODELS OF ETHNIC CONFLICT MANAGEMENT**

2. CONCEPTUALISING CONFLICT MANAGEMENT AND SETTLEMENT: CONSTITUTIONAL MODELS OF ETHNIC CONFLICT MANAGEMENT

2.1 Introduction

Models of ethnic conflict regulation are a distinct feature of managing and settling conflicts by macro political strategies that is via institutional arrangements, rules, mechanisms and procedures, sometimes including the use of force. However practice has shown that bottom approaches to conflict management are more effective in the long run. Any top down approach to conflict management has better chances of success if it is originally founded on a bottom up approach. This chapter will analyse various approaches to conflict management while emphasising the need for any approach adopted to be firmly grounded on societal circumstances rather than being reduced to an academic experimental exercise. The ensuing chapters examine both conceptually and by way of case study four conflict regulating practices or options namely; power sharing, autonomy, ethnic federalism and federations.

2.1 The Role of the Constitution in Management of Cultural Diversity

In this study, the Constitution is a contract between the citizens of a country in regard to the manner in which they will jointly shape their collective destiny, manage their affairs and make their rules.¹³⁷ Being the supreme law of the land, a constitution is vital in employing the federal principle in a bid to politically integrate a pluralistic society. A constitution ought to be construed as

¹³⁷ Heywood, as note 37 above.

more than just rules of government. It ought to assemble the nation's aspirations and codify its common values. Constitutions in multi-cultural countries are invited to deal with this feature. A constitution can put minority guarantees and protections beyond the reach of parliamentary majorities.¹³⁸

Where it is firmly founded, a constitution is capable of generating a sense of security amongst the minorities. Constitutional approaches to multiculturalism have ideally fallen between two opposing paradigms. The first of these is drawn from the classical liberal democratic model.¹³⁹ It places emphasis on the existence of enforceable human rights in the constitution including the rights to individually practice one's religious, cultural or linguistic preference. The second paradigm employs the federal principle and constitutionally recognises cultural or community difference thereby allocating a measure of self-government, group autonomy or group protection. Since this thesis will be concerned with the latter, it is worth briefly discussing first constitutional approach to dealing with multiculturalism.

2.2 Power Sharing Arrangements

The case for power sharing in ethnically divided societies dates back to the 1970s by Eric Nordlinger and Arend Lijphart.¹⁴⁰ In the following, decade Donald

¹³⁸ See Gaili, as note 15 above (2004) *Harvard International Law Journal* 517.

¹³⁹ Haysom, as note 1 above at 222.

¹⁴⁰ Arend Lijphart *Thinking About Democracy: Powersharing and Majority Rule in Theory and Practice*, Routledge 2008.

Horowitz offered important new insights on this regime type.¹⁴¹ In invoking the term power sharing or its related formulations such as consociationalism advocates have used the term variously to refer to institutions, an elite culture and informal decision making practices or policies. More recently it is also in use by scholars of international relations to include informal provisions found in peace settlements and ceasefires. Power sharing arrangements in ethnically pluralistic societies consist of rules that seek to guarantee inclusive decision making, partitioned decision making and predetermined decisions or a combination of these. These rules can provide mandates or relatively hard guarantees and opportunities or relatively soft guarantees.

2.1.1 Inclusive Decision Making

In realms where decisions are binding on all members of a society regardless of their ethnic identity, power sharing institutions seek to reassure minorities that their interests will be taken into account by guaranteeing participation of representatives of all the main ethnic groups in the making of governmental decisions.¹⁴² In practice, power sharing arrangements are seldom fully inclusive because the dominant political elite typically leaves the leaders of small groups who lack bargaining leverage out of the decision making process. Nevertheless the objective is to include all groups “that can threaten political stability” if kept outside the arrangements. The ideal of inclusive decision making sets twin objectives: First is the representation of all major ethnic groups in the central

¹⁴¹ Donald L Horowitz, *Constitutional Design: Proposals Versus Processes*, in *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* 15, 20-22 (Andrew Reynolds ed., 2002)

¹⁴² Id.

decision making organs of the state that is the organs that have jurisdiction over members of all ethnic groups. Second, is decision making procedures within these organs that give a voice in policy outcomes to representatives of ethnic minorities as well as majorities. Inclusion of minority groups in a grand coalition is not a sufficient condition; tokenism is not enough. It is critical that power sharing assigns group representatives in the elite cartel to positions of power such as influential ministries that these are authentic representatives of their communities and that they have real voice in public policy. In practice mandates or relatively hard guarantees of representation in decision making stipulate that specific ethnic groups must occupy designated posts of the central government. For example in Cyprus 1960-1968 the constitution assigned the presidency to the Greek community and the vice presidency to the Turkish community each community held a separate election to fill its assigned post. The president and vice president in turn each appointed the seven Greek ministers and three Turkish ministers from their respective communities in order to constitute the Council of Ministers. Similarly under the Global Ceasefire Accord and the Pretoria Protocol on Political Defence and Security Power Sharing in Burundi signed in 2003, seats in the national assembly and transitional cabinet must be allocated according to a formula of 60 percent to Hutus and 40 percent to Tutsis; positions in the senate and the regular troops of the security forces must be divided evenly between Hutus and Tutsis.

More commonly inclusive decision making is guaranteed by setting aside seats within the national legislature or within a separate upper chamber for representatives designated ethnic groups. Cyprus's constitution for example

guaranteed that 70 percent of the seats in the House of Representatives would be elected by the Greek community and 30 percent by the Turkish community. Under the 2004 Naivasha Protocol on Power Sharing in the Sudan, the northern based National Congress Party is allocated 52 percent of all seats in the transitional National Assembly while the remaining seats are distributed as follows: 28 percent to the southern based SPLA/M, 14 percent to other northern political forces and 6 percent to other southern political forces. Mauritius expands minority representation in its National Assembly by allocating 8 of its 70 seats among the Hindu, Muslim, Chinese and general population to ensure representation of major communities. These are but a few illustrations. Federal states with regions drawn to correspond to ethnic homelands such as India often maintain an upper legislative chamber that guarantees equal representation to each homeland.

Alternatively opportunities for representation in central decision making that is relatively soft guarantees do not assign government posts to probability that all major ethnic groups will in fact be represented. Lijphart has argued for a parliamentary rather than a presidential form of government because it lowers the barriers to entry into the government than single member districts because they lower the barriers to entry into the legislature. Thus constitutional designers can increase the likelihood of coalition governments that over time include most of the major ethnic groups by adopting a combination of parliamentary government with elections by list proportional representation in large magnitude districts with low electoral thresholds. Horowitz advocates voting schemes in presidential elections that require a victor to win support in more than one region of the country. He also for legislative elections that

permit voters to register their first second and lower preferences among candidates and require a victor to command an absolute majority made of first and lower ranked votes. In both of these types of elections candidates must broaden their appeals beyond the demands of a single ethnic group in order to win; as a consequence, victors are likely to represent coalitions of ethnic groups. Whatever type of guarantee is used to expand ethnic representation in government, inclusive decision making also depends on decision rules within the government and legislature to ensure that the voices of minority representatives are in fact registered in policy making. Relatively hard guarantees of inclusion in decisions typically require concurrent support from representatives of different ethnic groups that is ethnic representatives exercise a veto over sensitive issues. For example Cyprus president and vice president each had an independent final veto over decisions of the Council of Ministers and over laws or decisions of the House of Representatives concerning foreign affairs, defence and security. Relatively soft guarantees may require supermajorities in a common legislature so that depending on the actual proportions of seats held by the different ethnic groups, sensitive legislation must garner at least some support from the minority communities in order to pass.

2.1.2 Partitioned Decision Making

Some issues divide ethnic groups deeply from one another but policy to address these issues need not be standardised for the country as a whole. Such issues as traditional or religious practices are especially important to ethnic group members. For these policy realms power sharing typically prescribes

partitioning decision making so that separate agencies of the ethnic groups such as communal legislative chambers or homeland administrations make policies for their own members. Rather than bringing ethnic representatives into the political centre to reach a common policy, partitioned decision making divides the government's decision making powers in these policy realms and allocates these powers among independent governmental decision making agencies in which specific ethnic groups have greater voice sometimes what amounts to an exclusive voice. The most important institutional distinction in granting this type of autonomy to ethnic groups concerns whether power sharing assigns jurisdiction on the basis of the principle of territoriality or personality. The former creates ethnofederalism while the latter creates ethnocorporatism. Ethnofederalism is adopted more frequently because of the ease of creating and administering autonomous regions within territorially based states but territory is only a proxy for ethnicity. Thus the Soviet Union's ethnofederalism assigned most responsibility to territorial units that acted in the name of the ethnic group but many administrations included substantial minorities and sometimes even majorities composed of other nationalities. Ethnocorporatism creates jurisdictions that extend only to members of the community and not to all residents within the territory. This includes such institutions as communal legislative chambers which adopt separate policies for their respective ethnic communities and bureaucratic administrations such as separate school systems for different ethnic communities residing side by side in the same region.

Forms of ethnocorporation were practiced in the Millet system of the Ottoman Empire that granted autonomy to non Muslim confessional communities and

under the Estonian Cultural Autonomy Law of 1925; it was also associated with the proposals for the Austro-Hungarian Empire offered by Karl Renner, Otto Bauer and the Austrian Social Democrats after 1899. Cyprus's 1960 constitution created two Communal Chambers elected separately from the Greek and Turkish communities that had exclusive legislative jurisdiction in matters of religion education, culture and personal status for members of their respective communities. The Communal Chambers were also empowered to create courts to adjudicate civil disputes concerning religious matters and personal status and to impose taxes on members of the separate communities to finance these policies. It is important to note that in power sharing these agencies of ethnic groups are typically not voluntary associations but governmental or state institutions. Individuals under their jurisdiction do not freely choose to join except by escaping to another jurisdiction rather compliance is mandatory for everyone within their jurisdiction and enforcement is backed by the coercive powers of the state exercised by these agencies. Mandated autonomy that is relatively hard guarantees of ethnic autonomy assign agencies to specific ethnic groups.

Opportunities for autonomy that is softer guarantees of ethnic autonomy create agencies that increase likelihood of ethnic capture but do not this. Thus federalism or cantonal autonomy with boundaries drawn without regard to ethnic composition may be a relatively soft guarantee of ethnic autonomy but they afford geographically concentrated ethnic minorities greater voice in local administration and therefore expanded opportunities for self governance. Harder guarantees of ethnic autonomy give these agencies exclusive jurisdiction in specific policy realms. Relatively soft guarantees of ethnic

autonomy give the central government and ethnic agencies concurrent jurisdiction. The latter is softer because it carries significant risk of poaching on the prerogatives of ethnic agencies by a fiscally and politically dominant central government or even outright pre-emption by the central government.

2.1.3 Predetermined Decisions

Formal power sharing rules often set some issues such as the allocation of valuable governmental resources outside the decision making powers of all levels of government. In power sharing these predetermined decisions typically include formulas for proportional allocation of such government resources as educational funds or positions within the bureaucracy and the military. These are issues that the drafters of power sharing institutions do not feel they can entrust to subsequent generations of politicians and the uncertainties of democracy. Thus various Nigerian constitutions since 1979 have made balanced recruitment and balanced allocation of fundamental principles in federal decision making. The 1999 constitution specifies for example that not only “the composition of any of its appointed agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria. Cyprus 1960 constitution mandated that the republic’s army would consist of 2000 men 60 percent were to be Greeks and 40 percent Turks. The police and the gendarmerie were to consist of another 2000 men of these 70 percent were to be Greeks and 30 percent Turks.

Harder guarantees that these 70 percent were to be Greeks and 30 percent Turks. Harder guarantees that these decisions will remain outside the

jurisdiction of all levels government prohibit amendments to the formulas or at least mandate extraordinary procedures such as a constituent assembly to enact a change of rules. Softer guarantees can be amended by some simpler procedure such as legislative majority.

Of course there are subtle differences among the proposals for power sharing institutions. Perhaps the best known is the difference between what is sometimes called the consociational approach of Lijphart and the integrative approach of Donald Horowitz. Consociationalism is characterised by such protections for segmental interests as the grand coalition, mutual veto, proportional allocations and autonomy. The integrative approach seeks to manage conflict through the use of incentives to promote interethnic cooperation in parties and electoral campaigns. Despite such differences the power sharing approach is defined by at least three common characteristics. These approaches share a commitment to what Timothy Sisk calls a coalescent democracy as opposed to competitive democracy; thus governments and legislatures represent inclusive coalitions of ethnic groups. They privilege one dimension of social cleavage-ethnicity-in designing institutions and defining policy equity rather than seeking to identify dimensions of social cleavage in which ethnicity is not the primary dimension that separates majority from minority. And they tend to concentrate powers particularly through federalism or autonomy in a few critical decision making areas in which ethnic interests must be reconciled either at the electoral stage or in the decision making stage.

The case for power sharing is not simply a scholarly discourse; it is intended as practical policy advice as well. Indeed many authors have advised

constitutional commissions in a number of new democracies in ethnically plural societies on the design of their constitutions. The themes of these authors have been adopted as an agenda for action by a number of governmental, international and non governmental organisations advising new states on institutional design. For example scholars associated with the United States Institute for Peace have issued that examine a variety of alternative power sharing arrangements to solve ethnic conflicts. The International Institute for Democracy and Electoral Assistance has issued a handbook that outlines options for negotiators in developing democracies with deeply rooted conflicts. The East Europe Constitutional Design Forum in London has published a handbook on electoral and constitutional models for ethnically divided countries. All advocate some form of power sharing institutions.

2.1.4 The Perils of Power Sharing

The sad irony of power sharing arrangements is that when they are extended to ethnically divided societies they have created both motives and means for the ethnic elites empowered by power sharing to escalate ethnic conflicts. No matter whether the ethnic elites intended it or not this escalation has tended to threaten the consolidation of peace and democracy. Specifically in ethnically divided societies power sharing institutions have given rise to at least seven key problems that have thwarted the consolidation of peace and democracy. These are problems that emerge in ethnically divided societies even when there has not been a recent conflict.

2.1.5 Limits to Democracy

Power sharing limits democracy. Power sharing institutions typically seek to create a stable cartel among the elites of ethnic groups and often other interest groups. As Nils Butenschon notes these elites in plural societies must deviate from competitive practices of political decision making on the national level as is the accepted norm in Western democracies and avoid public appeals to their respective constituencies over the issues that are most divisive among groups. These elites can compromise with another because they can enjoy the discretionary freedom that comes from their predominance over a politically deferential and organizationally encapsulated following. Nordlinger contends that a necessary condition for conflict regulation is a form of structured relations between leaders and non elites in which the leaders are clearly predominant and their demands regularly fulfilled. Yet carried too far powers sharing institutions limit precisely those essential elements that define democracy. Democracy requires competition among elites over the important policy concerns of the public and accountability of the elites to the citizenry on these most important policy issues through regular elections. Such elections permit the citizens to select among competing party elites.

2.1.6 Institutional Weapons

Powers sharing institutions frequently empower the leaders of ethnic groups with the means to challenge the power sharing agreement. Many institutions of inclusive decision-making such as mutual vetoes can be used to begin a game of brinkmanship in which each side threatens to force a deadlock in a

governmental decision-making until the other side grants further concessions. Many institutions of partitioned decision-making such as the power of autonomous homelands in ethno federal states can be abused by regional leaders including ethno military warlords to press central government for further devolution and to extract income that can be invested in future fighting capacity.

This predation in turn can feed the fears and suspicions that give ethnic elites the motive to challenge the power sharing agreement in anticipation of defection by the other side. Power sharing in the highly charged environment at the end of a conflict is complicated by fear and suspicion among ethnic communities and frequently by the reality that each power of government allocated to an ethnic group is an opportunity for it to exploit. Ethnic elites may fear frequently with justification that the vetoes or autonomy granted other groups can be used as weapons to extort concessions. Thus in Cyprus President Makarios complained bitterly of the vice presidents use of veto to wring further concessions for the Turkish minority. Meanwhile Greeks complaints fuelled fears in the Turkish community that the decision rights of the minority were being threatened.

2.1.7 Focus on Inter-Ethnic Allocation

Power sharing institutions shape the agenda of politics and privilege issues of interethnic allocation of power and resources. Consequently the issues that divide ethnic groups from one another come to occupy a central place in politics under power sharing sustain interethnic conflict at high levels and keep

alive fundamental issues of renegotiating the rules of power sharing. For example ethnic elites under power sharing often debate whether the rules of proportionality disadvantage one or another unfairly. This challenge to the predetermined decision is particularly common among elites who believe that the members of their own communities exhibit special skills and achievements and that proportionality discriminates against their more qualified candidates for positions in favour of less qualified members of other ethnic groups. Proportionality may leave ethnic groups residing in wealthier regions particularly aggrieved. In Nigeria for example minority peoples such as those of the oil producing areas in the Niger Delta felt marginalised because the greater part of the benefits were allocated to other states on the basis of need. Similarly as the Soviet Union began to democratise, the wealthier Baltic regions were the first to complain that the redistributive policies imposed by Moscow were unfair. In each of these cases issues of allocation were not only points of interethnic distribution but also fundamental questions concerning revision of the power sharing institutions themselves.

2.1.8 The Second Generation Problem

Even where ethnic elites are initially sincere in their commitments to power sharing, elite incentives particularly but not exclusively in the majority group change once a power sharing arrangement is in place a moral hazard or time inconsistency problem that can be called the second generation problem in power sharing institutions. Although a majority group may perceive that it has an incentive to make concessions on power sharing at the time a peace accord is negotiated, these incentives tend to shift as the contract becomes a reality.

As the need to reassure weaker parties becomes less immediate, the majority party is inclined to focus on the problems of governance and maintaining political power. Its need to act in a conciliatory manner toward ethnic minorities diminishes and the requirements of decisive governance increase raising questions as to the majority groups continuing commitment to the principle of proportionality in civil service recruitment regional allocations or representation in the decision making process. Compromises among elites who negotiated the original power sharing agreement may become particularly difficult to maintain and as a consequence, the power sharing institutions may be threatened when ambitious up and coming politicians engage in outbidding behaviour to outflank the moderate elites within their own community. Under pressure from their constituents to pursue the community's narrow self interest, the political leaders of the majority community in particular will find it harder to compromise in order to realise the common interest of all ethnic groups and to uphold a long term commitment to what at times seems to their constituents to be a disadvantageous arrangement. When ambitious up and coming leaders with more radical demands actually succeed in replacing moderates, the upshot is to complicate still further the maintenance of the ruling elite cartel and therefore the ethnic balance of power. For example Serbian leaders who succeed Josip Broz Tito as part of the collective leadership of Yugoslavia found they were outflanked within Serbia by more radical leaders made holding the federation together more difficult. Subsequently, the outflanking of Milosevic by still more radical nationalists such as Vojislav Seselj and the addition of these radicals to form a parliamentary majority in Serbia led to a further radicalisation of politics in the last year of the Yugoslav Federation.

2.1.9 Governmental Inefficiency

Power sharing arrangements are designed to expand the representativeness of the state but this representativeness often comes at the cost of greater governmental inefficiency. Inclusive decision making particularly by guaranteeing ethnic representation and granting vetoes to ethnic spokesmen and women makes policymaking slower and more likely to end in deadlock, Partitioned decision making agencies and bureaucracies. For example parallel educational systems and parallel courts in the same regions multiply administrative costs. For countries emerging from civil conflict these costs may overtax a very weak revenue base. With additional costs the government may simply have to deliver less in the way of education and other services. For example Edmond Keller and Lahra Smith document that Ethiopia has found that it is an enormous financial burden to develop course texts and train teachers to conduct classes simultaneously in the various languages of the regions. Ethnic leaders and their constituents may quickly grow disillusioned with a government that cannot help them reconstruct their lives after civil war nor provide them with hope for significant improvement in the future.

2.1.10 Governmental Rigidity

Power sharing arrangements tend to be inflexible and unable to adapt to rapidly changing social conditions during a transition from intense conflict. In reassuring all major groups about their autonomy or representation at the political centre, power sharing institutions freeze a status quo that makes political change difficult. Yet a post conflict environment may demand dynamic

arrangements that can shift over time as socioeconomic interests change and new actors enter the political process. In general, however institutions particularly strong institutions that represent credible commitments to power sharing among ethnic groups in divided societies are likely to be sticky. Lebanon's inability to adapt its institutions to a changing social environment except in the face of political crisis and finally civil war attests to this stickiness. Balancing the competing needs for strong institutions and flexible institutions through power sharing may be well beyond the abilities of constitutional designers. This is particularly problematic for completing the transition to democracy. In exceptional cases such as South Africa during its transition from apartheid to non racial democracy, power sharing institutions have facilitated the evolution of stable intergroup relations leading to full democracy. What begins as a pact among ethnic elites must be transformed into dense webs of interdependent relations among an expanding set of political participants. Once in place, power sharing institutions must evolve with the steady adoption of more democratic rules. Yet power sharing institutions is typically create the conditions for the dominant political class to resist change. This resistance may lead to escalating political conflict and repression. Excluded politicians may be too impatient to remain differential as behind the scenes negotiations and compromises slow or even block the transition to democracy.

In the face of opposition from the elite cartel, often the only way for new politicians to break into politics is through the transformation of the power sharing arrangement itself. In reaction the dominant elites may respond indeed they are expected to respond in order to maintain their structured predominance with repression of the leaders questioning the system in the

name of democratisation. For example Lebanese power sharing broke down as newcomers challenged the pre-eminence of traditional elites, these elites attempted to reassert their authority with repression and the elites found it imprudent to continue honouring many of their commitments to one another under the old power sharing rules. Since power sharing is often an elitist approach it tends to resist not only political adaptation to social change as well.

2.1.11 Inadequate Enforcement

It may be difficult to enforce the rules of a power sharing arrangement against opportunistic behaviour by the leaders of ethnic groups that are the major parties to the agreement. It is sometimes difficult to distinguish sanctions from predation. Attempts by group leaders and even attempts by a central government that is supposed to be above all ethnic groups to sanction violations of the rules frequently escalate conflict among ethnic groups and threaten agreement. Without an external guarantor to ensure stability, especially in the early phases of implementation, aggrieved interests can always find reasons to renege on their commitments. Domestic enforcement agencies can be captured by ethnic interests and even when they are not captured, the leaders of some ethnic groups may believe these agencies are partisans of one side. Thus in the last years of the Soviet Union when Mikhail Gorbachev attempted to enforce rules against Estonia and Georgia that prohibited union republics from discriminating against their own minorities this action was taken as escalation of a conflict between the union republic governments and Moscow and it provoked counter escalation by union republic leaders. Gorbachev was seen as a partisan of an empire that kept

Russians in a dominant position in a dominant position over Estonians and Georgians.

Domestic enforcement agencies run jointly can become paralyzed by the same opportunistic behaviour that they are supposed to monitor and sanction. Designers may try to decentralise monitoring and enforcement among the parties to the agreement by permitting ethnic elites to sanction one another for failure to fulfil commitments, but this leads to a proliferation of institutional weapons that makes power sharing even more fragile. Perhaps the best indication of all these intrinsic difficulties in implementing power sharing is the high mortality rates for power sharing arrangements. Many of the cases cited by power sharing advocates as successes have in fact ended in failure. Such failures result in the collapse of democracy renewed ethnic conflict and violence and the abandonment of the power sharing arrangement. For example among the 16 experiments with power sharing institutions cited by Horowitz, 12 were subsequently discarded.

2.1.12 The Conditions Necessary for the Success of a Power Sharing Arrangement

Under proper conditions the experience with power sharing may be more positive. According to proponents of the power sharing strategy seven conditions can favour the success of power sharing institutions even in ethnically divided societies. Yet in ethnically divided societies few if any of these conditions are typically present at the end of the conflicts particularly after conflicts as intense as civil wars.

2.1.13 Elite Dominance

In a power sharing agreement the parties must be able to fulfil their commitments in the contract. This means the ethnic elites must continue to assure one another that they can enforce this agreement within their respective ethnic groups and enforce subsequent decisions reached through its inclusive decision making procedures. These commitments may be more credible as Nordlinger suggests when elites have demonstrated predominance within their group. Yet even in normal times, this type of ethnic solidarity is uncommon. Internal diversity of ethnic groups because of divisions among regions, clans, classes or personalities complicates the processes of negotiating and maintaining durable power sharing arrangements. Ethnic leaders must actively develop a common position within the ethnic community before entering into political exchanges with other spokespersons at the political centre.

This two step process complicates the operation of a power sharing arrangement and increases the likelihood of governmental *immobilisme*. In the rapidly changing conditions that prevail at the end of a conflict, it is unlikely that elite dominance will remain secure. Even if the conflict itself strengthened the unity of the ethnic group, the rapid transition from conflict to peace is likely to encourage both splits among elites within individual ethnic groups and the rise of challengers from the stratum of young up and coming leaders. For example in Northern Ireland a roadblock in the path to implementing the Good Friday Agreements arose quickly when it became apparent in the November 2003 elections to the Northern Ireland Assembly that the moderate leaders of

both protestant Ulstermen and Catholic Irish did not command unified support within their respective communities and could not deliver votes. The two parties that emerged as the largest in the Assembly the Democratic Unionists and the Sinn Fein could not work together to sustain the power sharing agreement. Alternatively where some possess hierarchical organisation, this disparity may pose a threat to other groups that are not organised and may feed fears among the weak about long term commitment of the strong to power sharing. Weakness or erosion of elite dominance within the respective communities can also increase the incentive of members of the power sharing elite to resist compromises or break commitments among themselves. Problems of credible commitments among the elites of different ethnic groups may become particularly acute when the balance of factional power shifts within their respective groups. As extremists within a group gain a substantial following and effectively challenge their representatives in the elite cartel, the existing elites may find it very difficult to continue support for power sharing. It is true as John McGarry and Brendan O Leary assert that the leaders of the rival ethnic communities must fear the consequences of ethnic war and desire to preserve the economic and political stability of the regions. Yet in many circumstances they fear the relatively remote probability of ethnic war less than they fear the immediate threat to their political position from radicals within their respective communities.

2.1.14 A Culture of Accommodation

Where a trans-societal bargaining culture is present as in Belgium Switzerland and India, it facilitates the negotiation of intergroup issues. Where this culture

exists only as an elite culture limited to the power sharing leaders, there may still be a basis for sustained compromises although a much more fragile basis. Major group actors come to anticipate that their rivals will reciprocate their positive moves and when this occurs they are able to interact according to the rules of the political game. Such a bargaining culture, parties to an agreement are more likely to accept costs in the short term or in individual decisions because they expect greater gains in the longer term or in subsequent decisions.

2.2 Autonomy

Autonomy has been defined as a means for the diffusion of powers in order to preserve the unity of a state while respecting the diversity of its population. Etymologically, the term autonomy derives from two Greek words: *auto* meaning self and *nomos* meaning law or rule. Thus the original meaning of the word was the right to make one's own laws. Today the concept is used in three different branches of science: philosophy and its derivatives; the natural sciences and law, political science and international relations. For philosophers autonomy is a person's power to determine by oneself through one's own rational will positive liberty or self mastery; in the natural sciences, the concept means organic independence or the condition of a phenomenon conforming only to its own laws and not being subject to higher rules, that is not a mere form or state of some other organism.

2.2.1 Autonomy as Described by Various Scholars

Georg Jellinek has describes an autonomous entity as one based solely on its own laws and with all the material and functional attributes of statehood: the authority to govern, to administer and to judge. Practically this seems to be a synonym of sovereignty. According to Paul Laband, autonomy always includes the power of legislation but differs from sovereignty in that it can be exercised only within the limits established by the sovereign. A somewhat similar notion of autonomy is found in the writings of Carre de Malberg. An entity may be regarded as autonomous only when it has its own non-derivative original powers of legislation, administration and adjudication. It should be distinguished from self-government... a notion implying that the self-administering entity is subordinated to a superior entity that could have administered it by itself. It is interesting that Carre de Malberg speaks of self-government and administrative decentralisation as if the two terms were interchangeable. For Leon Duguit autonomy implies an area protected from the legislative power of the state. Henry Berthelemy uses the term as a synonym for decentralisation while Maurice Hauriou uses it to describe the discretion that the laws sometimes give to the administration .

Heinrich Dorge defined autonomy by referring to the regimes of autonomy established in the wake of World War I mainly in the Aaland Islands and the Memmel Territory, In his opinion, those regimes have two characteristics: First the authority of the autonomous entity includes all the significant attributes of state power (legislation, adjudication and administration) and secondly those matters that are under the authority of the autonomous body are once and for

all removed from the state's legislative power unless the autonomous entity expressly agrees to a different arrangement. Dorge was aware that some entities designated as autonomous did not in fact meet his definition for example the autonomous republics regions and areas in the Soviet Union; he denied however that these entities enjoyed genuine autonomy. Jacob Robinson examined the nature of autonomy in the context of his seminal study on Memmel by comparing it with sovereignty. In his opinion, internal sovereignty assumes the supreme and unrestricted authority of the state subject only to restrictions that are expressly specified. Autonomy on the other hand exists only in respect to those powers that have expressly been granted. Within the context of UN decolonisation efforts Louis Sohn sums up his conception of autonomy as follows: The concept of an autonomous area is in between the concepts of a non self governing territory and an independent state. The autonomous territory is authorised to deal with economic, social and cultural matters, free from interference by another government. The central government retains powers in the fields of foreign relations and international security are interlinked, the central government may also have some control over security. Rudolf Bernhardt distinguishes between a broad and narrow concept of autonomy.

In its broad sense autonomy denotes the limits of State interference on the one hand and the autonomous determination and regulation of certain affairs by specific institutions on the other hand whereas the narrower sense it denotes protection and self determination of minorities. In his opinion it is in the narrower sense that the notion of autonomy denotes protection and self-determination of minorities. In his opinion, it is in the narrower sense that the

term is employed in modern international law. James Crawford has suggested a shorter definition. For him autonomous areas are regions of a State usually possessing some ethnic or cultural distinctiveness which have been granted separate powers of internal administration to whatever degree without being detached from the State of which they are part. In their 1980 study on *The Concept of Autonomy in International Law* Hurst Hannum and Richard Lillich express the opinion that autonomy and self government are determined primarily by the degree of actual as well as formal independence enjoyed by the autonomous entity in its political decision making process. Generally autonomy is understood to refer to independence of action on the internal hands of the central or national government but occasionally power to conclude international agreements concerning cultural or economic matters also may reside with the autonomous entity in its political decision making process. Generally autonomy is understood to refer to independence of action on the internal or domestic level as foreign affairs and defence normally are in the hands of the central or national government but occasionally power to conclude international agreements concerning cultural or economic matters may also reside with the autonomous entity.

Writing in 1990 Hannum gives a more object oriented definition emphasising the purpose of autonomy: Personal and political autonomy is in some real sense the right to be different and to be left alone; to preserve, protect and promote values which are beyond the legitimate reach of society. The shortest description of autonomy known to this author is that of Heinrich Oberreuter referring to Pohlmann; the opportunity for free self determination within the framework of a legally pre-existing order. A practical definition has been

adopted by Henry Steiner: Autonomy regimes for ethnic minorities... amount to governmental systems or subsystems administered or staffed by a minority or its members. In summary the approaches to autonomy discussed above can be classified into four main categories: One group includes those theories that compare autonomy to a right to act upon one's own discretion in certain matters, whether the right is possessed by an individual or by an official body; others use autonomy more or less as a synonym for independence according to a third notion, autonomy is synonymous with decentralisation; and under a fourth notion, an autonomous entity is one that has exclusive powers of legislation administration and adjudication in specific areas. The latter is called political autonomy as opposed to administrative autonomy which is limited to powers in the sphere of administration. In the literature on minorities' rights autonomy has been used to denote limited self rule. In private law it expresses the power of persons to conclude contracts and perform legally relevant transactions.

2.2.2 An Eclectic Description of Autonomy

Having examined the various theories on the concept of autonomy this thesis advances an eclectic description of autonomy. Due to the fact that there are numerous differences between the definitions already discussed the following description does not accurately reflect or accommodate these differences. A territorial political autonomy is an arrangement aimed at granting to a group that differs from the majority of the population in the state but that constitutes the majority of the population in the state, but that constitutes the majority in a specific region, a means by which it can express its distinct identity. A main

issue involved in the establishment of a regime of autonomy is the division of powers between the central authorities and the autonomous entity. The powers of the autonomy are usually related to matters of culture, economics and social affairs. There are however different degrees of autonomy and the extent of the powers transferred to the autonomous authorities varies accordingly ranging from a very limited to a larger and up to a high concentration of major powers in the above areas. Usually foreign relations and external security are reserved for the central government; however in a few cases the autonomous body has limited powers with the consent of the central government to enter into international agreements and to become a member of a particular organisation. For example Aland is a member of the Nordic Council and with the approval of Finland is permitted to conclude agreements with the Nordic countries.

In order to avoid disputes and misunderstandings it is important that the powers of a regime of autonomy be defined as clearly as possible when it is established. There are usually four different areas of powers to be considered: powers reserved for the central authorities, those fully transferred to the autonomous entity, parallel powers and powers that can only be exercised jointly. In certain cases the central authorities determine a general policy in a number of areas in which the autonomous entity may act and the local authorities are authorised to operate within the limits of this general policy. There is usually a need for cooperation, coordination and consultation between central authorities and the autonomous entity. This is crucial because there is likely to be a close link between their respective powers. In addition certain powers are likely to require joint action. Even if the transferred powers are

carefully and meticulously described when the autonomy is established future difficulties cannot always be prevented. For example there may be differences of opinion regarding to which category of powers a certain practical matter belongs. Similarly a question may arise in an area of powers that had not been considered beforehand or a question may arise that encompasses different areas one of which is within the jurisdiction of the centre and the other within that of the autonomy.

In many cases in order to ensure cooperation the parties establish a joint organ in which both the central government and the autonomous entity are represented such as is the case with the Aland Delegation. In addition the parties may agree upon a special procedure for settling disputes between the centre and autonomous body for example the documents that established the autonomy of the Faroe Islands, Greenland and Memmel. As already noted above, the powers of the autonomous entity usually include legislation, adjudication and administration in those spheres of responsibility that have been transferred to the autonomous entity. In some cases however adjudication remains fully within the authority of the central government. The legislative acts of the autonomous area usually requires confirmation by the central authorities but this confirmation by the central authorities must be given except in severe cases defined in advance for example when those legislative acts amount to an excess of power or undermine the security of the state. The assumption is that the representatives of the population in the autonomous area exercise the relevant powers. Nevertheless coordination is often needed between the centre and the autonomous authorities regarding the appointment of one or more high ranking officials like the representatives

of central government in the autonomous region or the head of local administration. In most cases the official is either appointed jointly or by the local authorities with the consent of the centre or vice versa. The acts of the autonomous entity in the areas for which it has jurisdiction are normally not subject to any control by the central authorities except as mentioned in such cases as excess of jurisdiction. In certain cases the inhabitants of the autonomous region participate fully in the public life both in their region and in the framework of the central government for example in Aland, South Tyrol and in the past in Southern Sudan. A regime of autonomy can be established by an international treaty, by a constitution by a statute or by a combination of instruments of these categories; probably it may even be established by a custom.

2.2.3 Personal or Cultural Autonomy

Up until now this thesis has been concerned with territorial autonomy that is powers granted to the population of a specified geographical area. However this discussion on autonomy would be incomplete without addressing another type of autonomy namely personal or cultural autonomy. Redflood has described personal autonomy as the attribute of a community whose members are connected by individual characteristics such as ethnic consciousness or language and irrespective of their location or abode. In other words this type of autonomy applies to all members of a certain group within the state regardless of the place of their residence. Personal autonomy is usually granted to ethnic, cultural, religious or linguistic minorities. In the case of personal autonomy, the state grants minorities the right to take the necessary steps through their own

institutions in order to protect and implement their own rights. They may act upon their own discretion but within the limits of the laws of the state. In principle each individual should be able to decide whether or not to belong to the minority group; however certain groups in particular religious ones and indigenous populations tend to establish conditions for membership. In certain situations, it may also be difficult to leave a particular group. Personal autonomy has a great advantage over territorial autonomy: As mentioned it usually applies only to people who opt to be members of the group for which it is established. Territorial autonomy on the other hand may apply to all inhabitants of a certain region thus including those who are not members of the group for whose benefit the regime is established and who may even resent it. Territorial has another disadvantage: Since people tend to move from one place to another, the composition of the population of a given region may change; the former majority in the region might become a minority and consequently the regime of autonomy may lose its *raison d'être*. This may be problematic is the relocation that changes the composition of the population is encouraged by the central government. On the hand territorial autonomy has the advantage that in addition to cultural matters, it can also apply to a wide range of social and economic affairs whereas personal autonomy has usually been limited to matters of culture, language, charity, religion and education. Personal autonomy has the advantage of applying to all members of an ethnic group in a country regardless of their location.

2.3 Federalism as a Conflict Management Tool

Any scholar of federalism would acknowledge the complexity in defining federalism in view of the various ways in which it has been employed.¹⁴³ Indeed, one researcher has identified 267 different conceptions of the term.¹⁴⁴ Nevertheless, federalism or the federal principle in this thesis refers to the philosophical or ideological idea that a political organisation should seek to achieve both political integration and political freedom by combining shared rule on some matters and self-rule in various forms on others.¹⁴⁵ Federalism is a normative and philosophical concept based on the notion that the greatest human fulfilment is to be found through participation in a wider community that at the same time favours diversity and protects individuality.¹⁴⁶ The practice of federalism links individuals or groups within various political entities, forming part of a broader single entity, in a lasting but limited union in such a way as to provide for the pursuit of common ends, while maintaining their respective integrities usually through permitting some level of discretion in policy making on their part. This thesis discusses the application of the federal principle in Sudan.

¹⁴³ J Anton *American federalism and public policy* (1989) 3.

¹⁴⁴ See W Stewart *Concepts of federalism* (1984).

¹⁴⁵ J Madison, A Hamilton, and J Jay *The federalist* (1987) 515 opine that as a normative concept federalism entails both elements of self-rule and shared rule. See also D Elazar *Exploring federalism* (1987).

¹⁴⁶ On this definition of federalism see B De Villiers "Federalism in South Africa: Implications for individual and minority protection" (1993) *South African Journal of Human Rights* 375. For the same definition see P King *Federalism and federation* (1982) 159.

2.3.1 Federation as a Method of Ethnic Conflict Regulation

A federation is a distinct political system which typically comprises of a sovereign state in which at least two governmental units, the federal and the regional enjoy constitutionally separate competencies – although they may also have concurrent powers. Both the federal and regional governments are empowered to deal directly with their citizens and the relevant citizens directly elect at least some components of the federal and regional governments. In a federation, the federal government usually cannot unilaterally alter the horizontal division of powers: constitutional change affecting competencies requires the consent of both levels of government. Therefore, a federation automatically implies a codified and written constitution and is normally accompanied at the federal level by a supreme court charged with umpiring differences between the governmental tiers and by a bicameral legislature in which the federal as opposed to the popular chamber may disproportionately represent the smaller regions. Elazar has emphasised the covenantal character of federations, that is, the authority of each government is derived from a constitution and convention rather than from any other government as is the case with autonomy.

Federations vary in the extent to which they are majoritarian in character but most constrain the power of federation wide majorities in particular they constrain the federal demos though there is extensive variation in this respect. The United States, Brazil and Australia allow equal representation to each of their regions in the federal chamber meaning massive over representation for the smaller units. Other federations also over represent less populous units but

not to this extent. Federations differ additionally in the competencies granted to the upper house or federal chamber. Some chambers such as the United States Senate are extremely powerful and arguably more powerful than the House of Representatives because of its special powers over nominations to public office and in treaty making. Others including those in Canada, India and Belgium are weak. In some instances a single state, province or region can block a constitutional change but normally a veto requires a coalition of two or more such entities. Negatively defined a federation is majoritarian to the extent that it lacks consociational practices of executive power sharing, proportionality principles of representation and allocation, cultural autonomy and veto rights. Further it is majoritarian to the extent that it lacks consensual institutions or practices such as separation of powers, bills of rights and courts and monetary institutions insulated from immediate governing majorities. A majoritarian federation concentrates power and resources at the federal level and facilitates executive and legislative dominance either by a popularly endorsed executive president or by a single party premier and cabinet.

Federations can be multinational/multi-ethnic or mono-national in character. In the former, boundaries of the internal units are usually drawn in such a way that national or ethnic minorities control at least some of them. In addition more than one nationality may be explicitly recognised as co-founders and co-owners of the federation. On the other hand national federations may be nationally or ethnically homogeneous (or predominantly so) or they may be organised often consciously so as not to recognise more than one official nationality. This often happens in such a way that the state's national and ethnic minorities are also minorities in each of the constituent units. The

intention behind national federalism is nation building and elimination of internal national differences. The founding and paradigmatic example of a national federation is the United States. The Latin American federations of Mexico, Argentina, Brazil, Venezuela, African federations of Ethiopia and Nigeria adopted its model. American educated intellectuals have often proposed national federations as a way to deal with ethnic heterogeneity in post colonial and post communist societies.

2.3.2 Ethnic Federalism as a Solution to Ethnic Conflict

Ethnic federalism is an attempt to create a territorial solution to ethnic conflict by acknowledging the need to grant some degree of autonomy to ethnic groups within a state but attempts to do so without complete secession. As Professor Tully explains:

The most familiar form of the politics of cultural recognition is the claims of nationalist movements to be constitutionally recognised as either independent nation states or as autonomous political associations within various forms of multinational federations and confederations.

Federalism based on ethnic divisions provides a solution to demands for recognition without dissolving the unity of the nation-state. Ethnic-based federalism is an institutional arrangement that acknowledges and uses ethnic units "as a basis for local governments," in the hopes that doing so will harmonize inter-group conflicts.¹⁴⁷ From another perspective, ethnic federalism is the attempt to align affective communities with political

¹⁴⁷ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* pages 5-6 (1995).

communities.¹⁴⁸ Affective communities are groups held together by a "personal or emotional connection,"¹⁴⁹ such as religion or ethnicity.¹⁵⁰ Political communities are bound by common decision-making processes, not social or emotional ties. A federal structure based on ethnicity is only appropriate when ethnic groups generally associate with a particular territory, and the territorial sub-parts of a nation are, therefore, able to generally align with regions inhabited by distinct ethnic groups.¹⁵¹ The challenge of ethnic federalism is to create a state whose citizens perceive themselves as having a dual identity, both as members of a particular group and as citizens of the nation-state.¹⁵² Those who criticize the system of ethnic federalism claim that rather than facilitate this dual identity, it reinforces the divisions in the society or encourages the creation of new divisions, making tensions higher and fragmentation of the state more likely.¹⁵³ Proponents of the theory argue that political actors will act in accordance with the underlying ethnic power structure, whether it is recognized or unrecognized.¹⁵⁴ Where ethnicity is a powerful force, political actors are not likely to act without reference to ethnicity simply because political structures do not openly reflect or acknowledge ethnicity.¹⁵⁵ Ethnically based federal systems tend to be established where there has been a history of strong centralized government

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Id.

¹⁴⁹

Amy L. Chua, *Depoliticizing Ethnicity*, 48 *American Journal of Comparative Law* (2000) page 181.

¹⁵⁰

Id.

¹⁵¹

Asnake Kefale, *The Politics of Federalism in Ethiopia: Some Reflections*, in *Federalism in Africa: Framing the National Question*, 257, 269- 70 (2003).

¹⁵²

Id.

¹⁵³

Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (2000).

¹⁵⁴

Id.

¹⁵⁵

Amy as note 149 above.

and dominant national power.¹⁵⁶ In response to their past lack of power in the centralized state, minorities within the state may seek some degree of autonomy, the freedom to rule themselves in accordance with their own ways and customs.¹⁵⁷

Critics of ethnic federalism have raised several challenges to this system of government. First, unless a state is divided into irrationally small sections, some number of minority groups will remain in the various sub-parts. These minorities may be excluded from participation in the ethnically-based sub-government or in the local economy. However, ethnic federalism also provides a unique opportunity for developing minority rights. Second, ethnic federal structures are usually asymmetrical in nature, affording each group different rights and privileges.¹⁵⁸ This asymmetry may simply be a product of geography, with some groups historically living on fertile land containing great natural resources and others living on arid land with no natural resources. While federalism may produce a temporary consensus between the different groups in the formation process, asymmetrical systems are inherently difficult to operate, requiring great administrative capacity and political skills already lacking in many developing nations.¹⁵⁹ Asymmetry also results in inequalities that amplify inter-group animosity, threatening the very core of the federal

¹⁵⁶ Alemante G Selassie, *Ethnic Federalism: Its Promises and Pitfalls for Africa*, 28 *Yale Journal of International Law*, 51, 97, (2003).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ "Mwangi S Kimenyi, *Harmonizing Ethnic Claims in Africa*", in *Ethnicity and Governance in the Third World* 101, 116 John Mukum Mbaku, Pita Ogaba Agbese and Mwangi S Kimenyi (Eds) 2001.

system.¹⁶⁰ Administrative difficulties are most problematic in the area of fiscal federalism, an area in which asymmetries may be most strongly felt. Lastly, some argue that since ethnicity holds people together not by a reasonable policy choice, but by emotion, ethnic identity will be manipulated as a political resource and used to create blind support and loyalty.¹⁶¹ Others counter that ethnic federalism does not create a vehicle of manipulation, but merely institutionalizes ethnic politics, and that it is impossible to eliminate, overcome or transcend the cultural dimension of politics.¹⁶²

Proponents of ethnic federalism believe that despite these concerns, the system can still meaningfully negotiate ethnic tensions.¹⁶³ Making the ethnic divisions part of the structure of the state may relieve fears of abuse based on ethnic identity, thus reducing the ability of leaders to manipulate using ethnic identity. Some ethnic theorists maintain that rather than further increase the problems of a nation by increasing friction between ethnic groups and allowing despotic rulers the freedom to use ethnicity to gain the unquestioned support of the people, ethnic federalism may instead actually reduce inter-group tensions.

Such official recognition of ethnic and national differences could help mitigate age-old tensions. After all it is not the diversity that exist between or among peoples and cultures of a given country that causes conflicts, it is instead the way one manages or mis-manages difference. There will always be conflict, and

¹⁶⁰ Id.

¹⁶¹ Christian P Scherrer, *The Structural Prevention of Ethnic Violence* 124-26 (2002).

¹⁶² Alemante as note 156 above.

¹⁶³ Peter H Schuck, *Federalism*, 38 *Case Western Reserve Journal of International Law* 5, 8 (2006).

conflict itself is not unhealthy. Only conflict expressed through violent means is devastating to both nations and peoples. Thus the goal of ethnic federalism is to create a political structure through which ethnic groups may express conflicts peacefully without resort to civil war or violent secession.

2.4 The Potential of Federalism as a Conflict Management Tool

There are at least eight ways in which federal institutions that is, the existence of substate territorial units holding some governmental power that the central government does not hold, can have benign effects on ethnic conflict. Some of these effects involve providing satisfactions at one level of government that are unavailable at others. Others entail restructuring of cleavages, interests, relations and alliances. Firstly, units placed below the central government, whether those are called provinces, regions, or states, can allow a group that is a minority in the country as a whole but a majority in a substate unit to exercise governmental power in ways that would be foreclosed if the whole country were one undifferentiated territory. For example, in Malaysia, where Chinese are about one-quarter of the total population and no longer exercise great power at the centre, they nevertheless are a majority in the state of Penang.¹⁶⁴ The Chief Minister of that state has always been Chinese, and despite the rough edges of ethnic relations there, there is some sense of a government responsive to Chinese interests in Penang.¹⁶⁵ Where groups are territorially differentiated, this is a very common function of federalism, and it can certainly mitigate, but not vitiate, a sense of minority exclusion at the central government level. The important point is that such provincial power,

¹⁶⁴ Scherrer as note 161 above.

¹⁶⁵ Id.

while not completely satisfying, may be sufficient to avert attempts to secede, particularly because most such attempts fail anyway.

Second, the existence of substate units can quarantine conflict within those unit boundaries. Ethnic violence in Malaysia has tended not to spread from one state to another. In the Nigerian First Republic (1960-1966), with three major territorial units (and one much smaller one), every ethnic issue threatened to engulf the whole country and ultimately did in the Biafra War.¹⁶⁶ In the restructured Second and Third Republics, with larger numbers of states, many ethnic issues have become sub national issues limited to one state at a time. The issue of Sharia, or Islamic law--always a delicate problem in a country so evenly divided between Muslims and Christians--has become a state matter, with various solutions in the several northern states.¹⁶⁷ These solutions have not always been reached peacefully, but at least the considerable disorder attending them has tended to be quarantined. Issues of this kind in Nigeria are highly contentious, but the contention is focused on the governmental level at which the power is lodged, and political losses do not necessarily create grievances that spill across boundaries into other units.

Third, federalism can make it possible to mitigate discontent by making special, asymmetric arrangements for regions with special problems or distinctive identities. Indonesia is not formally a federal state but has a heavy measure of devolution to regions. In the case of Aceh, on the northern tip of Sumatra, it has been possible to devolve power to impose Islamic law without devolving

¹⁶⁶ Scherrer as above.

¹⁶⁷ Id.

that power to other sub national units.¹⁶⁸ Quebec's special identity has been recognized in Canada, albeit with difficulty.¹⁶⁹ Asymmetrical federalism in general makes special dispensations possible, but more possible at the periphery than near the centre of power.

Fourth, in ethnically heterogeneous states, regional government provides a site at which politicians of various groups can encounter each other, become familiar with each other, engage in bargaining, and learn about the needs and aspirations of groups other than their own before they rise to the national level, where more complex and delicate issues of national policy may need to be resolved. Training in compromise is important in divided societies. This political socialization function of federalism in multiethnic countries is underappreciated. This may be one reason federalism is more often recommended when groups are territorially separate than when they are intermixed. Yet benign effects are possible in both.

Fifth, division of a country into subunits can create incentives for political actors to see at least some issues in terms of competition among those subunits, rather than among ethnic groups. Consider a country with resource-rich and resource-poor regions. Resource-rich regions are likely to argue for policies that apportion revenue from resources according to the principle of derivation (crudely, revenue should be returned to the place in which it originated), while resource-poor regions are likely to argue for policies apportioning revenue proportionately by population. If resource-rich units and resource-poor units do not coincide with particular ethnic groups, then this

¹⁶⁸ Id.

¹⁶⁹ Id.

argument over revenue will cross-cut ethnic divisions and create allies out of members of groups that may otherwise be antagonistic. One of the oldest hypotheses in ethnic conflict studies suggests that cross-cutting cleavages mitigate ethnic conflict. A major problem in severely divided societies is that it is very difficult to deliberately arrange for cross-cutting cleavages to present themselves. Federalism, however, may inadvertently do what ethnic conflict engineers cannot otherwise do.

Sixth, federalism may activate sub-ethnic cleavages that drop conflict down to the sub national level from the national level or, to put it differently, from the intergroup to the intragroup level. Before India's reorganization of states along linguistic (ethnic) lines in the 1950s, the undivided state of Madras had a high level of conflict between Tamil speakers and Telugu speakers.¹⁷⁰ The reorganization partitioned these two groups, placing Telugus in Andhra Pradesh and Tamils in Tamilnadu, and the structure of cleavages changed dramatically.¹⁷¹ In Andhra, for example, with Tamils absent, conflict took place among three intra-Andhra territorial groups, Telenganas, Coastals, and Ryalaseemas, and among several powerful landowning castes, especially Kammass and Reddis.¹⁷² Politically relevant group identities are malleable. One stimulus to which they respond is the territorial context. All else equal, the smaller the territorial context, the lower the level of politically salient identity. To put the matter crudely, if there are multiple territorial compartments, there are likely to be multiple sub-ethnic conflicts. Inevitably, the more of these there are, the more difficult it is for the country as a whole to be divided along a

¹⁷⁰ Scherrer as note 161 above.

¹⁷¹ Id.

¹⁷² Id.

single overarching cleavage line. One function of federalism, therefore, may be to create such ethnic and sub-ethnic complexity as to reduce the level of conflict the whole country experiences. This function is a corollary, in a sense, of the quarantine function. Countries, such as Tanzania, that have a large number of dispersed groups are generally not as conflict-prone at the national level as those, such as Sri Lanka, with a few large groups that meet at the centre of politics.¹⁷³

Seventh, federalism can serve as a de facto electoral reform. Territorial boundaries serve to partition electorates, sometimes in ways that exacerbate ethnic conflict, sometimes in ways that reduce it. The best example of this in both directions comes from Nigeria. As mentioned, the First Republic had three large regions. One of these, the Northern Region, contained about half the total Nigerian population.¹⁷⁴ The Hausa-Fulani, about thirty percent of the Nigerian population but perhaps twice that percentage in the North, was able to gain control of the Northern Regional Government by securing a large majority for its party, the Northern People's Congress in the Northern legislature and squelching most opposition activity from minority ethnic groups in the North by a combination of patronage and denial of services to dissident areas.¹⁷⁵ Using this strong position in the Northern Region as a base, the NPC was able to win a plurality of seats in the national legislature and, with a junior coalition partner from the south, to control the country as a whole.¹⁷⁶

¹⁷³ Steven L Solnick, "Federalism and State-Building: Post-Communist and Post-Colonial Perspectives", in *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* 171 Andrew Reynolds (Ed) 2002.

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id.

Essentially, the large size of the Northern Region allowed its largest group, with only thirty percent of the total population, a springboard to national power. During and after the Biafra War, Nigeria was redivided, first into twelve and then into nineteen states. During the Second Republic (1979-1983), the North was divided into ten states (out of nineteen), but the Hausa-Fulani were able to control only six of these; the remainder were controlled by non-Muslim and Muslim (but not Hausa-Fulani) political parties, as well as a dissident Hausa party.

The difference was that with new state boundaries, the incentives and disincentives available to the former NPC over the whole Northern Region were limited to those states populated by genuine supporters of the successor to the NPC. In this way, the proliferation of states changed the arenas that groups and parties could dominate. After the reconfiguration of federal units, the Hausa-Fulani were confined to something approximating a proportional share of electoral power, rather than the greater-than-proportional share they had enjoyed previously.¹⁷⁷ No longer could they dominate Nigerian politics from their disproportionately large Northern base. In this sense, federalism amounted to an electoral reform. Eighth, federalism can provide a stimulus for interethnic alignments and coalitions. Once the Hausa-Fulani could no longer govern essentially alone, their political party was driven to seek genuine coalitions with other groups.¹⁷⁸ If, then, federalism helps to proliferate groups and subgroups, or if it helps to confine the power of groups to a more or less proportional share, it will, all else equal, make it impossible for one group to aspire to control the whole government through the democratic process. If that

¹⁷⁷ Solnick as note 173 above

¹⁷⁸ Id.

is so, and if parties remain ethnically based, as they are likely to be, then it follows that incentives to form interethnic coalitions will be enhanced. Interethnic coalitions are much more likely to attend to the interests of multiple groups, thereby reducing conflict, especially if the coalitions are formed before elections.

CHAPTER THREE

POWER SHARING, AUTONOMY AND SECESSION AS CONFLICT MANAGEMENT

TOOLS: SUDAN

3. CHAPTER THREE: POWER SHARING, AUTONOMY AND SECESSION AS AN ANTIDOTES FOR IDENTITY CONFLICT IN SUDAN

Preface

This chapter examines Sudan's experience in grappling with the ethnic question, in particular its resort to federalism and autonomy. On the whole, this chapter will trace the debate on federalism, which has featured all through Sudan's quest for peace and unity. Apart from investigating the manner and content of federalism as has been employed, in particular, the 1972 Addis Ababa Peace Agreement¹⁷⁹ (the Addis Agreement) and the Constitution of 1998 (the 1998 Constitution), the political, sociological, anthropological and psychological issues revolving around these endeavours will be considered. This chapter lays the foundation for a discussion of the present Sudanese political and constitutional order, which is re-introduced the notion of autonomy in Sudanese politics. In the essence, this chapter will serve to bring the recent political and constitutional developments in Sudan into perspective. In doing this, it will also provide historical insight into the character of the conflict, highlighting the key issues that have been at the heart of the civil war. This chapter will equip the reader with a factual background that will enable the ensuing analysis of feasibility the Interim National Constitution. Sudan's constitutional past and devotion to the rule of law is bleak. Sudan has had three transitional constitutions, two permanent constitutions and a series of constitutional decrees regarding constitutional issues in its 48-year history as

¹⁷⁹ The Addis Ababa Agreement on the Problem of South Sudan, Appendix B in M Beshir *The Southern Sudan: From conflict to peace* (1975) 158.

an independent state.¹⁸⁰ This chapter also provides insight into the content and significance of the federal principle as employed in the Interim Constitution that was drafted on the basis of the CPA. The conceptual framework of analysis under chapter two and the federal history of Sudan under chapter three will inspire this analysis. It is hoped that this endeavour will expose the potential perils and possibilities for success of the present constitutional order in Sudan.

3.1 Background

Many scholars have often referred to Sudan as the microcosm of Africa in the sense that it is at one and the same time both Arab and African.¹⁸¹ Whereas the internal cultural composition of Sudan may render it the microcosm of Africa physically, culturally and ethnically, this uniqueness confronts it with multiple political marginalisations rendering it neither distinctly African nor Arab, Muslim nor Christian. Internally, this puts it in an awkward position where the dominant elite mostly from the North desire the country to be Arab and Muslim and its Southern elite desire it to be African and “de-Arabised”.¹⁸² These two contradictory and exclusivist desires have been at the heart of the Sudanese conflict. Since it erupted in 1983, the internal conflict between the North and the South has been reproducing itself time and again in unprecedented patterns of violence. There has been an array of efforts both at the domestic and international stage aimed at resolving this conflict. Of

¹⁸⁰ See M Hoebink *Constitutional perspectives on Sudan* (1999) 6-7.

¹⁸¹ Abd Al Rahim “Arabism, africanism and self-determination in the Sudan” in Y Hassan *Sudan in Africa* 1985 228.

¹⁸² A Mazrui “The multiple marginality of the Sudan” in Y Hassan *Sudan in Africa* (1985) 228; See also M Deng *War of visions* (1998) 35 and 69. According to the author the policy of the North towards the South was that of assimilation whereas the attitude of the South was resistance towards the same.

significance to this study, is the use of the federal principle in the quest for political integration and democratisation in Sudan.

3.2 The Question of Autonomy in Pre-Independent Sudan

Indeed if one wishes to come to terms with a political concept, one must first come to terms with its history in a given context albeit the risk of reconstructing it imperfectly. Rufus Davis has said of this task:

“Those who travel the precarious journey into the past must not expect to find a beginning, nor one simple coherent thing, nor a single path, human institutions are not like that... Neither must they expect to find all the scattered shreds that need only the potter’s skill to bring them back to their original form... And worse for the explorer, there is no register of birth for political ideas, no birth names, no book of dates.”

¹⁸³

Perilous as the journey into the past in the quest for the evolution of a concept may be, this study will proceed as best as can to trace the federal idea in Sudan’s political history. Sudan has a long history of state formation but only a targeted, skeletal history of the same is in order for purposes of this study. Historically, there existed five kingdoms in the area presently known as Sudan namely the Nubia, Maqarra, Alawa, Funj kingdoms and the Fur Sultanate.¹⁸⁴ The Nubia, Maqarra and Alawa kingdoms were Christian kingdoms situate in the South while the Fur Sultanate and Funj kingdom were Islamic and situate in

¹⁸³ See Rufus, as note 15 above at 2.

¹⁸⁴ See H Sharif “Recycling the past in the Sudan: An overview of political decay” in H Sharif and T Tvedt (Eds) *Shortcut to decay: The case of Sudan* (1994) 22; S Fahey and J Spaulding *Kingdoms of the Sudan* (1973) 54; H Idris *Sudan’s civil war: Slavery, race and formational identities* (2001) 33; P Woodward *Sudan 1898-1989: The unstable state* (1990) 23; P Holt *A modern history of the Sudan* (1961) 17; P Holt and M Daly *A history of the Sudan: From the coming of Islam to the present day* (2000) 1.

the North.¹⁸⁵ The precursor of contemporary Sudan is said to date back at the establishment of a semi-centralised Islamic kingdom by the Funj kingdom following its defeat of the Nubia and Alawa kingdoms in 1754.¹⁸⁶ By this conquest, the latter were brought under the central administration of the former. During this period, the cultural process of Islamism/Arabism was a mark of cultural superiority hence it would bestow upon an individual an esteemed status in society.¹⁸⁷ For example, in the Fur Sultanate cultural and racial supremacy was asserted through proof of Arabic descent.¹⁸⁸

3.2.1 The Turko-Egyptian Rule (1821-1885)

The Turko-Egyptian conquest of the Funj and Fur Sultanate in 1821 and 1873 respectively, can be considered the earliest event that brought about a comprehensive centralised system of governance for the area presently known as Sudan. Naturally, as a colonial power extending its domains through military conquest, the Turko-Egyptian rule obliterated the boundaries between indigenous kingdoms and imposed central or unitary rule from Khartoum.¹⁸⁹ Some scholars have opined that this is the period that created the base for the

¹⁸⁵ Sharif, as above; Fahey and Spaulding as above at 55; Idris as above at 33 specifies that the Funj kingdom included the Gezira, the North-eastern parts of Sudan and the riverain region north of Khartoum which is the present day capital city of Sudan.

¹⁸⁶ Sharif, as note 58 above; Woodward, as note 58 above; Holt, as note 58 above at 22.

¹⁸⁷ See Deng, as note 56 above at 31; Sharif, as note 58 above.

¹⁸⁸ See Sharif, as note 58 at 23 where he gives the example of the Fur Sultanate phenomenon “of wise stranger” whereby almost all claimed that their ancestor was a learned man of Arabic origin who was accepted by the original ruler of the groups and given him his daughters hand in marriage. The emphasis here was that of a claim of Arabic descent through patrilineal descent system but an African indigenous affinity through marriage.

¹⁸⁹ Sharif, as at note 58 above 23.

strong centralisation tendencies that have been the hallmark of the Sudanese state up until 1998 when federalism was first constitutionally entrenched.¹⁹⁰ The Turko-Egyptian rule has been described as the most brutal and exacting period of colonial rule that has dominated Sudan.¹⁹¹ Reforms introduced during this period included the centralisation of government, imposition of forced labour and service to the army, imposed taxation and monopolisation of the exiting trade in ivory.¹⁹² There was a policy of forced conversion to Islam and compulsory change of language from indigenous dialects to Arabic.¹⁹³ The two most significant developments contributing to the North-South divide then, were the impoverishment of certain areas of the North through the forms of taxation already mentioned and land ownership, an act which contributed to the dramatic expansion of slave-raiding and slave-owning.¹⁹⁴ Slave raiding was chiefly carried out from the South and while not all Southerners were negatively affected by it, some benefited from collaboration with the merchant companies or the government.¹⁹⁵ Owing to the fact that the slave population in the North during this period was largely drawn from the South, in the popular mind, slaves and blacks were synonymous.¹⁹⁶ The effect of this was that even the Southern Sudanese who converted to Islam or exercised some power in the colonial society, as those in the army did, were stigmatised by their slave status

¹⁹⁰ Sharif, as note 58 above at 30; Holt, as note 58 above at 35; Woodward, as note 58 above at 23.

¹⁹¹ Sharif, as note 58 above at 23-24; Holt and Daly, as note 58 above at 41.

¹⁹² See in this regard, H Hannum *Autonomy, sovereignty, and self-determination: The accommodation of conflicting rights* (1996) 309.

¹⁹³ Hannum, as above; Sharif, as note 58 above at 30; Holt and Daly, as note 58 above at 32.

¹⁹⁴ Hannum, as note 66 above.

¹⁹⁵ J Douglas *The root causes of Sudan's civil wars* (2003) 6; See also Woodward, as note 58 above; F McLoughlin "Economic development and the heritage of slavery in the Sudan" in (1979) 32 *Africa* 361.

¹⁹⁶ Douglas, as above; Deng, as note 56 above at 35.

or their slave origins.¹⁹⁷ Therefore, the incorporation of the whole of the South as the Sudan's exploitable hinterland, the intensification of racial stratification and the widespread identification of people from the South with low status can rightly be viewed as consequences of the economic and political system of Turko-Egyptian colonialism.¹⁹⁸ Around 1881 an Islamic religious movement which came to be known as the Mahdist movement led by Mohammed Ahmed al-Mahdi, emerged in the North bringing to an end the Turko-Egyptian regime. Although some non-Muslims supported this movement, the revolt is widely thought to have been the brainchild of the Islamic community.¹⁹⁹

3.2.2 Anglo-Egyptian rule

In 1898, the British colonialists joined forces with Egypt to conquer Sudan thereby overthrowing the Mahdist state. During the Anglo-Egyptian rule, the North and South were administered as two separate entities.²⁰⁰ In response to frequent rebellions from the South mostly over unequal treatment, the British prohibited most contact between the two regions. For example, from 1922, Southerners could not travel to the North without a special permit and vice-versa.²⁰¹ In addition, Islam and the use of the Arabic language were banned in the South while the activities of Christian missionaries were encouraged

¹⁹⁷ Douglas, as note 69 above.

¹⁹⁸ Douglas, note 69 above.

¹⁹⁹ Hannum, as note 66 above at 312.

²⁰⁰ M Deng *Preventive diplomacy: The case of Sudan* (1997) 2; See also M Wai *The African-Arab conflict in the Sudan* (1981) 35. According to the author, the colonial administration adopted the southern policy, which was based on the premise that the black Africans were racially distinct from the Northern Arab Sudanese and would to this extent be administered separately.

²⁰¹ Wai, as above at 36.

there.²⁰² Little was done during Anglo-Egyptian rule to develop the South hence the existence of great economic disparity between the two regions at independence. Indeed, owing to multi-cultural and economic disparity factors, on the road to independence, the British considered the option of granting independence separately to the South or attaching it to either Kenya or Uganda.²⁰³ However Egyptian and Northern Sudanese pressures succeeded in keeping the two regions together as a united country²⁰⁴

3.3 The Federal Question in the Run Up to Sudan's Independence

Southern demand for a federation dates back to the run-up to independence in 1950 when Southern politicians raised the issue of structuring future relations between the North and South on a federal basis.²⁰⁵ In November 1955, a month before independence, they declared that they were going to endorse the proclamation of independence for Sudan, only if the South were going to be granted considerable autonomy within a federal state.²⁰⁶ The calls for federalism were principally driven by the Southerners' fear of Northern domination that had already begun manifesting itself in the numerical disparity between the South and the North in the legislative assembly.²⁰⁷ In the run up to the grant of independence, a twelve man commission was appointed to *inter*

²⁰² A Alier "The Southern Sudan question" in M Wai (Ed) *The Southern Sudan* (1973) 3.

²⁰³ M Bona *People and power in Sudan: The struggle for national stability* (1981) 24-28.

²⁰⁴ Bona, as above.

²⁰⁵ See M Khalid *The government they deserve: The role of the elite in Sudan's political evolution* (1990) 98; M Wai, as note 84 above at 69.

²⁰⁶ Alier, as note 76 above at 19; See also *Sudan Weekly Digest of Proceedings of the Senate* 22 December 1955 304.

²⁰⁷ There were only 13 Southern members in the legislative assembly as against 75 from the North; see Niblock T *Class and power in Sudan: The dynamics of Sudanese politics* (1898-1985) 65.

alia recommend the way to advance towards self government in Sudan. The Commission produced a draft Constitution which provided for certain safeguards for the South including the appointment of a minister for Southern affairs who was to be responsible for promoting in the Council and introducing in Parliament, measures for the economic and social betterment of the peoples of Sudan²⁰⁸ But these recommendations were rejected by the majority Northern representatives during the ensuing debate in the legislative assembly in January 1952. Later in the same year, Southerners were excluded from crucial constitutional talks that took place in Cairo between the Northern political parties and the Condominium powers.²⁰⁹

These events increased Southern apprehension about the Northerners' intentions towards the South. To most Southern Sudanese, this was clear proof that the Northerners wanted to include the Southerners in the new constitution and the new Sudan on their own terms and not on the terms that the Southern Sudanese wanted.²¹⁰ This increasingly tense situation was further aggravated by the policy of "Sudanisation" through which the working force in the country was to be transformed to a Sudanese one as opposed to a foreign one.²¹¹ Of the 1222 jobs, which were to be Sudanised, 1069 of which were held by Britons and 153 by Egyptians, only 4 were given to Southerners.²¹² This more than anything else at the time, demonstrated to the Southerners that the

²⁰⁸ See the "Report on the Work of the Constitution Amendment Commission" 8 December 1951 South 1/16/48 National Records Office.

²⁰⁹ Alier, as note 86 above.

²¹⁰ A Loria Political awakening in Southern Sudan 1946-1955: Decolonisation and the problem of national integration PhD Thesis University of California Los Angeles (1969) 235-235.

²¹¹ Wai, as note 84 above at 56.

²¹² Wai, as above.

Northerners were just but new colonisers.²¹³ In the heat of the moment, though federalism continued to be their main demand, some of the more radical Southerners of the time began to call for the complete separation of the South from the North. Others called for a referendum under the auspices of the United Nations (UN) to determine the future of the South.²¹⁴ It was against this backdrop of political disenchantment that a revolt broke out in the Southern region of Torit on 18 August 1955. In the aftermath of the mutiny, Southern politicians raised the federal question once again in December 1955 during a debate on the motion for self-determination for Southern Sudan. After a passionate appeal by the Southerners in both houses, the Northern members eventually agreed reluctantly to the insertion of a provision into the bill which stipulated that the Southern demand for a federal system of government would be considered after independence.²¹⁵ In response, Southern politicians deferred the question to after independence in exchange for posts in the government to be formed.²¹⁶

3.4 The Federal Question After Sudan's Independence

No sooner had independence been declared, than the term federalism became a taboo, tantamount to subversion, in the political language of the Northern elite who on the eve of independence were assuring their Southern brothers that they sympathised with their cause.²¹⁷ In 1957, a parliamentary committee

²¹³ *Sudan Report of the Commission of Inquiry Southern Disturbances, August 1955* Khartoum: McCorquodale Company Limited 114.

²¹⁴ E Balance *The secret war in Sudan* (1977) 45; See also Wai, as note 74 above at 69.

²¹⁵ Wai, as note 74 above at 69.

²¹⁶ Sharif, as note 58 above at 40.

²¹⁷ Sharif, as above.

set up to look into the federal question rejected the idea on the ground that it was unsuitable for the Sudan. It then came to the fore that the clause had been inserted as a political manoeuvre rather than as a genuine promise on the part of the North. The then leader of the opposition Mohammed Ahmed Mahgoub explained this as follows:

“We canvassed all the parties to secure unanimity. We encountered some difficulty in convincing the Southerners so we inserted a special resolution to please them pledging that the constituent Assembly would give full consideration to the claims of Southern Members of Parliament for a federal Government for the three Southern provinces.”²¹⁸

In November 1958, the Sudanese government was overthrown in a military coup led by General Ibrahim Abboud and the new military regime set on to deal forcefully with dissent in the South. It became official government policy that the South introduces Islam and Arabic throughout the country with all speed in order to unite the Southern people and Sudan in general with the hope that this would discard calls for federalism. African traditional religions practiced mainly in the South were discouraged and in February 1962, all foreign Christian missionaries in the South were expelled.²¹⁹ As unrest in the South mounted, Northern forces attacked Southern villages with as many as half a million Southerners fleeing into exile.²²⁰ The government of Abboud declared a state of emergency and warned that any talks of federalism would be considered as treason.

²¹⁸ M Mahgoub *Democracy on trial* (1974) 57.

²¹⁹ Wai, as note 74 above at 89.

²²⁰ Wai, as above.

By this time a Southern rebel guerrilla force known as Anya-Nya had been established to resist Northern dominance. The political wing of the Anya-Nya, Sudan African National Union (SANU) repeated the pre-independence calls for federalism through the grant of autonomy to the South. In October 1964, massive general strikes broke out in the North, leading to the fall of the military government. A transitional government replaced the military government and arranged what came to be known as the roundtable conference in March 1965 to discuss the Southern question with a view to reaching an agreement that was to satisfy the regional interests as well as the national interests of Sudan.²²¹

3.5 The 1965 Round Table Conference

Among the significant aspects of this conference were the divisions amongst Southerners as to whether the South should remain a single political unit and if so whether its independence was viable option. Three factions namely SANU (I), SANU (O) and Southern Front (SF) represented the South. The Northern parties consisted of the Umma Party, the National Union Party (NUP), the Peoples Democratic Party (PDP), the Islamic Charter Front (ICF) and the Communist Party. The Northern politicians were prepared to concede only a limited regional autonomy to the South in areas such as primary education, health and roads, leaving control over economic planning, financial policy, state

²²¹ *Documents on the Roundtable Conference* in M Beshir *Southern Sudan: Background to the conflict* (1968) 120 (Appendix) (Hereinafter Documents on the Roundtable Conference).

security, armed forces, foreign affairs and other areas of national policy to the central government.²²²

The Southerners on the other hand, insisted that a federation was necessary to ensure that they would exert control over their own affairs and resources. However whereas there was general agreement amongst the Southerners on their right to self-determination, there was a divergence of views amongst them on how it was to be asserted. SANU (I) insisted that federation was necessary to ensure that the South would exert control over their affairs and resources.²²³ The SF for their part wanted the Southern people to express their opinion by way of referendum. It was their position that in all previous attempts to solve the Southern problem, the wishes and aspirations of the people of Southern Sudan were not ascertained. To find out what they wanted, the SF adopted the position that the Southerners should be allowed to exercise their right to self-determination in an internationally supervised referendum at which they would chose between separation, confederation, federation, local autonomy or the existing unitary system.²²⁴ SANU (O) called for outright secession and the formation of an independent state in the South.²²⁵ With such divergent views it came as no surprise that the conference ended in a deadlock. Ultimately, the conference appointed a twelve-person committee to draw up a working paper on the North-South relations. The Committee, made up of an equal number of Southern and Northern members, deliberated for a year before submitting a report. Although the Committee finally agreed that the

²²² *Documents on the Roundtable Conference* 12.

²²³ *Documents on the Roundtable Conference* 112.

²²⁴ *Documents on the Roundtable Conference* 162; See also B Malwal *People and power in Sudan: The struggle for national stability* (1981) 107.

²²⁵ *Documents on the Roundtable Conference*, 76.

South should be separate from the North, it was still unable to agree on several key issues particularly the most vital question on whether the South should be one region as most Northerners wanted or three regions as advocated by the Southerners.²²⁶ There were also fundamental differences over what relationship would exist between Southern and Northern troops and on the fiscal aspects of the proposed federal arrangement. By the time the Committee's report was submitted, the civil war in the South had degenerated. The then President Ibrahim Abboud resigned as head of state and a transitional Government was appointed to serve under a provisional Constitution of 1956. The Coalition government that came to power after April 1965 reneged on the question of reconvening the conference to discuss the federal question. The coalition was in turn ousted out of power by the military on 25 May 1969 led by Colonel Jaáfar Nimeiri.

3.6 The Addis Ababa Peace Agreement

Nimeiri immediately embarked on the federal question and took steps towards recognising the rights of the Southern people to regional autonomy within a united Sudan. Over the next two years he made a positive step in appointing Southerners to administrative positions in the South.²²⁷ During a visit to Ethiopia in 1971, his government made arrangements for a peace conference to be held in Addis Ababa. The conference called for the grant of autonomy to Southern Sudan and resulted in the Addis Agreement. The Addis Agreement created a federal structure in Sudan and was later incorporated into Southern

²²⁶ R Collins *The Southern Sudan in historical perspective* (1975) 83. See also Alier, as note 76 above at 23.

²²⁷ Hannum, as note 66 above.

Provinces Regional Self-Government Act of 1972 (SPRSA) and the permanent Constitution of 1973. For the first time, the South had its own Regional Assembly, High Executive Council (HEC), Regional Civil Service, Regional Development Corporation, a regional principal language (English) in addition to the national official language (Arabic).²²⁸ At the centre, the South was represented by Southern quotas in the government, national assembly and the army. The country's Second Vice-President was a Southerner and headed the HEC. The Addis Agreement stipulated that the SPRSA could only be altered upon a vote of three quarters of the National Assembly and approval by a referendum in the South.²²⁹ Despite the fact there appeared to be legal safeguards in to the regional autonomy that the South was granted, within the space of little more than a decade the agreement collapsed and brought down with it the "federal experiment" in Sudan. The following section will investigate the content of federalism as employed in the Addis Agreement in a bid to evaluate its strengths and weaknesses in consolidating peace and democracy.

3.7 The Content of Autonomy Under the Addis Ababa Peace Agreement

As alluded to earlier, the 1972 Addis Agreement was given legal status through enactment of the SPRSA of 1972 as an organic law of the Sudan. It was later incorporated into the 1973 Constitution.

²²⁸ Hannum, as note 66 above.

²²⁹ Article 2 of the Addis Agreement.

3.7.1 Legislative Power under the Addis Agreement

Chapter V of the Addis Agreement vested regional legislative authority in a People's Regional Assembly elected by Southern Sudanese citizens resident in the Southern region.²³⁰ The Assembly could legislate over the preservation of public order, internal security efficient administration and the development of the Southern region in the cultural, economic and social fields.²³¹ This legislative competence was subject to the reserved powers of the central government which included national defence, external affairs, currency and coinage, air and inter-regional river transportation, communications and telecommunications, customs and foreign trade (*over certain commodities which the regional government could identify with the approval of the central government*), nationality and immigration, planning and public audit.²³²

The People's Regional Assembly was expected on request to provide the Peoples National Assembly with facts and information concerning the administration of the South.²³³ Further, the People's Regional Assembly could by a two-thirds majority request that a national law it deemed detrimental to Southern welfare be postponed from entering into force. However, the National President had the discretion to grant or deny such request.²³⁴ To safeguard the interests of the Southern region, the People's Regional Assembly could by a majority of its members, request the withdrawal of any Bill presented to the National People's Assembly, which in its view would adversely

²³⁰ Article 8 of the Addis Agreement.

²³¹ Article 11 of the Addis Agreement.

²³² Article 7 of the Addis Agreement.

²³³ Article 12 of the Addis Agreement.

²³⁴ Article 14 of the Addis Agreement.

affect the welfare rights of the citizens in the Southern region.²³⁵ Again in this instance, withdrawal of such Bill was a matter within the president's discretion.²³⁶ The President could veto any Bill of the People's Regional Assembly that he deemed contrary to the National Constitution. Nevertheless, the National People's Assembly could reintroduce such a Bill and according to article 107 of the 1973 Constitution, a two-thirds majority of the National Assembly could override a presidential veto.²³⁷

3.7.2 Executive Power Under the Agreement

The regional executive authority was vested in a HEC headed by a President with a mandate to act in the South on behalf of the National President. According to article 18, the HEC was charged with specifying the duties of the various government departments in the Southern region. The National President appointed the President of the HEC on the recommendation of the Peoples' Regional Assembly.²³⁸ The HEC President in turn proposed its members to the National President for appointment the process being the same for removing appointees from office. As a Chief Executive, the President of the HEC had the constitutional mandate to promulgate administrative regulations enforcement of which was the responsibility of Council Members.²³⁹ The Addis Agreement remained vague on the question of the relationship between the Council and the various ministries of the central government.

²³⁵ Article 15 (i) of the Addis Agreement.

²³⁶ Article 15 as above.

²³⁷ Article 107 of the Constitution of Sudan 1973.

²³⁸ Article 19 of the Addis Agreement.

²³⁹ Article 24 of the Addis Agreement.

All the same the ultimate authority for defining the relationship rested in the hands of the National President.²⁴⁰ Provisions dealing with the relationship between the HEC President and the National President were unclear. For example, article 16 stipulated that the Council acted on behalf of the national administration but article 20 made the Council responsible to the People's Regional Assembly and the President. The National President's constitutional power to regulate the relationship between the Southern administration and the central ministries also was problematic. The Addis Agreement was not clear on how the regional departments should relate to the central ministries and the role of Provincial Commissioners exacerbated this confusion. Provincial Commissioners were nominated by the HEC President and appointed by the National President. Although their work directly concerned matters assigned by the Act to the regional government, these Commissioners reported the central government authorities in Khartoum.

3.8 The Fall of the Addis Ababa Agreement

The Addis Agreement of 1972 forever remains a landmark in the political history of Sudan for having brought about and maintained peace for 11 years. It collapsed when President Nimeiri failed to abide by its commitments. Owing to the fact that the Southern government was entitled to revenues received from natural resources in the South under the Addis Agreement, they were enthusiastic in wooing oil companies to explore the region. United States oil company Chevron Incorporated agreed to explore Southern Sudan in 1974 and in 1978 discovered significant oil reserves. In 1983, Nimeiri's government

²⁴⁰ Article 22 of the Addis Agreement.

through the National Assembly attempted to redraw the boundary between the North and South in such a way as to shift Bentiu and other areas of the South, rich in agriculture and minerals to the North. In addition, in September 1983, under the influence of Hassan Al Turabi the then leader of the National Islamic Front²⁴¹, Nimeiri cancelled the grant of autonomy to the South and introduced Sharia rule throughout the country. All these steps led to strong reactions in the South and eventually to the outbreak of another civil war in the same year.

3.9 Political Developments in Sudan From 1985 to Date

In April 1985 after 16 years in power, the military Government of Colonel Nimeiri was overthrown in a military coup organised by army officers and Transitional Military Council was put in place under the leadership of General Abed Rahman Siwar Al-Dahab. Elections were organized in 1986 that saw the Sadiq Al-Mahdi become Prime Minister. Al-Mahdi's Government lasted less than four years. However, during this period it had started taking some important measures but was faced serious challenges including the continuing war in the South as well as drought and desertification. In June 1989 the current president of Sudan General Omar Hassan Al Bashir assumed power following a military *coup d'état*.²⁴²

²⁴¹ The National Islamic Front is an offshoot of another movement based in Egypt called the Muslim Brotherhood who advocated for a theocratic state.

²⁴² A Lesch *Sudan: Contested national identities* (1998) 113.

3.10 Federal Structure Under the 1998 Constitution of Sudan

The 1998 Constitution is the first one to have formally introduced the federal principle in Sudan's political administration. It came into force on 1 July 1998 and elections of which were boycotted by all major political parties in the country were held. Incumbent President El-Bashir was elected for a further five-year term with his National Congress Party (NCP) assuming 340 of the 360 parliamentary seats. Al Turabi was appointed the Speaker of Parliament. The NCP party members were awarded key positions and possessed strong control influence over the Government, army, security forces, judiciary, academic institutions and the media.²⁴³ Although it created a federal structure in Sudan and provided for certain fundamental rights and freedoms, the 1998 Constitution reflected a strict Islamic ideology. The relationship between the federal government and the states was such that the former had more authority over the latter.²⁴⁴

In 1999, an internal power struggle within the NCP resulted in President El-Bashir declaring a state of emergency, dissolving the Parliament, and suspending important provisions of the Constitution including those related to the structures of the local government in the various states.²⁴⁵ In May 2000 Al Turabi led a split from the ruling NCP thereby establishing a new party called the Popular Congress Party (PCP). Many officials linked to Al Turabi were dismissed from Government and in May 2001 Al Turabi himself was placed

²⁴³ Lesch, as above at 114.

²⁴⁴ K Adar, J Yoh and E Maloka, as note 20 above at 104.

²⁴⁵ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General* 19 available at www.un.org/News/dh/sudan/com_inq_darfur.pdf.

under house arrest and was later accused of organizing a *coup d'état*. At least 70 key members of the PCP were detained without charge or trial, and a number fled in to exile.²⁴⁶

3.11 Federalism In Contemporary Sudan: The Comprehensive Peace Agreement and the Transitional Interim National Constitution

It is important to clarify the legal status of the CPA in the Sudanese constitutional order. Article 225 of the Interim Constitution provides that the CPA is deemed to have been duly incorporated into the Constitution and that any of its provisions which are not expressly incorporated are considered to part of the Constitution.²⁴⁷ The legal effect of this provision is to render it an integral part of the Interim Constitution and therefore part of the supreme law of the country. Therefore, in this study where reference is made to the CPA and the various agreements comprising it, cognisance should be taken of the fact that such references bear constitutional fortitude.

3.12 The Interim National Constitution of Sudan

The Interim Constitution is comprised of 151 articles, 17 parts and 7 schedules. Whereas it is clear that the Interim Constitution does create a federation as qualified by Elazar²⁴⁸ earlier in the study, another clearly evident element of the federal principle employed in the Constitution is autonomy.²⁴⁹ The federal

²⁴⁶ *Report of the International Commission as above.*

²⁴⁷ Article 225 of the Interim National Constitution.

²⁴⁸ Elazar, as note 28 above.

²⁴⁹ Lapidoth, as note 14 above.

structure is created under Part I, Chapter IV, article 177 (1) which stipulates that the Republic of Sudan shall be decentralised with four levels of Government:

- a) *The national level of government exercising authority with a view to protecting the national sovereignty and territorial integrity of the Sudan*
- b) *Southern Sudan level of government exercising authority in respect of the people and states in Southern Sudan*
- c) *The state level of government exercising authority at the state level throughout the country*
- d) *The local level of government existing throughout the Sudan.*²⁵⁰

As for the grant of autonomy section 25 of the Interim Constitution recognises the autonomy of the Government of Southern Sudan and the states of Southern Sudan. This chapter will discuss the significance of federalism in the Interim Constitution under the following headings:

- *The content of Southern Sudanese autonomy.*
- *The impact of federalism on the relationship between the state and religion.*
- *Fiscal federalism in the Interim Constitution.*
- *The right to self-determination of the South.*

3.13 The Content of Autonomy Under the Interim National Constitution

In response to the cultural diversity and the attendant North South civil war that lasted over 40 years between the North and the South, the Interim Constitution employs the federal principle and creates an autonomous arrangement in Sudan.²⁵¹ Article 159 of the Interim Constitution provides for

²⁵⁰ Article 24 of the Interim National Constitution.

²⁵¹ See Lapidoth, as note 14 above.

the establishment in Southern Sudan of a government known as the Government of Southern Sudan (GOSS) with legislative, executive and judicial organs.²⁵² Article 25 recognises the autonomy of the GOSS. It is noteworthy that inasmuch as other states are created by this constitutional dispensation, Southern Sudan is accorded a special status in the political administration of the country.²⁵³ Lapidoth²⁵⁴ refers to such an arrangement as a territorial political autonomy because it is primarily aimed at granting the Southern Sudanese who differ from the majority of the population, a means through which they can express their distinct identity. The GOSS operates in accordance with an Interim Constitution of Southern Sudan and has the following primary responsibilities; promotion of good governance, development and justice, exercise of authority in respect of Southern Sudan and the states of Southern Sudan, acting as a link between the National Government and the states of Southern Sudan and to ensure the protection of rights and interests of the people of Southern Sudan.²⁵⁵

3.14 Executive Power of the Government of Southern Sudan

Executive power in the GOSS is vested in President of Southern Sudan directly elected by the people of Southern Sudan according to the Interim Constitution of Southern Sudan, a Vice President and the Southern Sudan Council of

²⁵² Article 152 of the Interim National Constitution.

²⁵³ The federal principle as employed by the Interim Constitution is therefore an asymmetrical federal arrangement with the Southern Sudan enjoying a special status as compared to other states.

²⁵⁴ Lapidoth, as note 14 above.

²⁵⁵ Article 162 of the Interim National Constitution.

Ministers appointed by the President of the GOSS.²⁵⁶ The tenure of the President of the GOSS is five years and commences from the date of his assumption of office and he/she is subject to re-election for one term only.²⁵⁷ In the event of the post of the President of GOSS falling vacant, pending elections within sixty days and the swearing in of the President elect, his functions are assumed by Vice President of the GOSS.²⁵⁸ This arrangement positively differs from that of 1972 discussed in chapter three whereby in place of the GOSS was a High Executive Council (HEC) and in place of a President of the GOSS was a President. In the previous arrangement, whereas the National President appointed the President of the HEC, the present arrangement under the Interim Constitution is more steadfast and democratic and requires the President of the GOSS to be elected by the people of Southern Sudan.²⁵⁹ In addition the contemporary arrangement is more elaborate on the relationship between the President of the GOSS and the National president than existed between the National President and the President of the HEC under the SPRSA.

Under the SPRSA the HEC acted on behalf of the National President whereas another provision made the HEC responsible to the Regional Assembly. This ambiguity made it unclear whether the President was more responsible to the National President or the Peoples' Regional Assembly. The Interim Constitution is for its part very clear and stipulates that the President of the GOSS is to be the First Vice President of the country. In this regard he is a direct assistant to the National President in the running of the country as a whole and is also

²⁵⁶ Article 163 (1) of the Interim National Constitution.

²⁵⁷ Article 163 (2) of the Interim National Constitution.

²⁵⁸ Article 163 (3) of the Interim National Constitution.

²⁵⁹ See Article 163 (1) of the Interim National Constitution as compared to Article 19 of the Addis Agreement.

directly in charge of running Southern Sudan.²⁶⁰ Unlike the SPRSA where the National President's power to regulate the relationship between the Southern administration and the central ministries was problematic²⁶¹ the Interim Constitution makes the National President and Southern President partners. In this regard, the most crucial decisions affecting the country require the consent of the President of the GOSS. No provision in the Interim Constitution directly mandates the National President to act unilaterally over affairs falling within the mandate of the GOSS. All actions affecting the country including a declaration of war and states of emergency which may entail suspension of parts of the Bill of Rights²⁶², and dissolution of or suspension of any of the state organs²⁶³ with attendant consequences on the South, are to be taken with the consent of the First Vice President who is also the President of the GOSS. Drawing from the above the Interim Constitution ought to be viewed as having stronger legal safeguards than the 1972 federal arrangement that fell apart after bringing 10 years of peace to Sudan.

3.15 Legislative Power of the Government of Southern Sudan

Article 169 of the Interim Constitution provides for the establishment of the Southern Sudan Legislative Assembly. The Protocol on Power Sharing²⁶⁴ and the

²⁶⁰ See Articles 65 (b) and Article 163 (1).

²⁶¹ N Kasfir "Southern Sudanese politics since the Addis Ababa Agreement" 76 (1977) *African Affairs* 143.

²⁶² Article 211 of the Interim National Constitution.

²⁶³ Article 211 of the Interim National Constitution.

²⁶⁴ Protocol on Power Sharing articles 2.2.14, 2.2.6 1.5.5.4 (c) and (d) and 2.11.4.6 (i) in Part II of the Comprehensive Peace Agreement.

Protocol on Wealth Sharing²⁶⁵ that form part of the CPA envisage some of the functions of the Southern Sudan Legislature. Its powers shall include *inter alia* competence to approve plans, programmes and policies relating to state and society and approve the Annual Southern Sudan Budget of revenues and expenditures. The Constitution of Southern Sudan has not at the time of this study been enacted. However, there is in place a Draft Constitution of Southern Sudan (Draft Constitution) premised on the CPA awaiting adoption. Notable in the draft is the independence granted to the Southern Sudanese Assembly. Unlike the Regional Assembly under the Addis Agreement, the National President cannot veto a Bill of the Southern Sudanese Parliament. In addition, unlike the Addis Agreement whereby the Regional Assembly was subject to scrutiny by the National Assembly,²⁶⁶ the Draft Constitution provides for the complete independence of the Southern Sudanese Assembly. In this manner there are stronger safeguards in the present arrangement to guard against abuse of the CPA.²⁶⁷

3.16 Federalism and the Relationship Between State and Religion

The relationship between state and religion has featured as the most divisive issue in the history of Sudan.²⁶⁸ This relationship was very instrumental when

²⁶⁵ Protocol on Wealth Sharing article 15.4 in Part II of the Comprehensive Peace Agreement.

²⁶⁶ Article 12 of the Addis Agreement.

²⁶⁷ Article 99 of the Draft Constitution of Southern Sudan

²⁶⁸ K Adar, J Yoh and E Maloka, as note 20 above at 104. See also A Sidahmed and A Sidahmed *Sudan: The contemporary middle-east* (2005) 116; N Wakoson "The dilemmas of South-North conflict" in F Deng and P Gifford *The search for peace and unity in the Sudan* 90; A El-Affendi *Turabi's revolution: Islam and power in Sudan* 23. See in particular Lesch, as note 125 above at 1 who emphasises that the identity crisis in Sudan has centred on state and religion more than on any other factor.

drafting the Interim Constitution. Indeed Article 1 of the Constitution provides that:

The Republic of Sudan is an independent, sovereign state. It is democratic, decentralised, multicultural, multi-lingual, multi-racial, multi-ethnic, multi-religious country where such diversities exist.²⁶⁹ The Interim Constitution in recognising this diversity provides for a secular and democratic Sudanese state whereby freedom of religion and belief is guaranteed equally to all.²⁷⁰ Different from previous constitutions with the exception of the 1973 Constitution that was premised on the Addis Ababa Peace Agreement of 1972, the Interim Constitution recognises the diversity of the Sudanese state and thereby provides for a secular and democratic state.²⁷¹

In a positive budge, Article 5 of the Interim Constitution permits the applicability of other sources of law in Sudan other than Sharia thereby accommodating other traditions and beliefs. Nationally enacted legislation is divided into two categories namely that applicable to Northern Sudan and the other applicable to Southern Sudan. Nationally enacted legislation having effect only in Northern Sudan has as its source of legislation Islamic Sharia and the consensus of the people²⁷² while that applicable to Southern Sudan has as its sources popular consensus, the values and customs of the people of the Sudan including their traditions and religious beliefs having regard to Sudan's diversity.²⁷³

²⁶⁹ Article 1 of the Interim National Constitution.

²⁷⁰ See Article 38 of the Interim National Constitution on the freedom of creed and worship.

²⁷¹ The 1998 Constitution of Sudan provided for a federal structure but based on Islam. Inasmuch as article 1 of the constitution provided the Sudan was a country of religious tolerance, Article 7 provided declared that jihad, an Islamic notion was duty of every Sudanese. This constitutional quagmire served as the foundation for the manipulation of the Southern Sudanese.

²⁷² Article 5 (1) of the Interim National Constitution.

²⁷³ Article 5 (2) of the Interim National Constitution.

This provision largely addresses the state religion question that has for long hampered peace efforts between the North and South. Also creditable is article 5 (3) (a) which stipulates that where national legislation is currently in operation or is to be enacted and the source of such legislation is religion or custom, residents of Southern Sudan who do not practice such religion or custom may either introduce legislation to allow practices or establish institutions in the state consistent with their own religion or customs.²⁷⁴ In the same vein, Southern Sudanese residents may also refer the law to the Council of States²⁷⁵ to be approved by a two-thirds majority of all the representatives or they may initiate national legislation which will provide for necessary alternative institutions as may be appropriate.²⁷⁶ Moreover, article 6 mandates the state to respect religious rights to worship or assemble, establish and maintain appropriate charitable or humanitarian institutions, acquire and possess movable and immovable property, write, issue and disseminate religious publications, teach religion or belief in places suitable for these purposes, solicit and receive voluntary financial and other contributions from individuals, private and public institutions, train appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief, observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs and communicate with individuals and communities in matters of religion and belief at national and international levels.²⁷⁷

²⁷⁴ Article 5 (3) (a) of the Interim National Constitution.

²⁷⁵ Article 85 of the Interim National Constitution provides that the Council of States is composed of two representatives from each state each elected by the state legislature.

²⁷⁶ Article 5 (3) (b) of the Interim National Constitution.

²⁷⁷ Article 6 of the Interim National Constitution.

The downside of Article 5 is that it fails to address the sources of legislation for states that do not fall in the North or South. During negotiation of the CPA, this was very prominent issue. In effect the Machakos Protocol of July 20 2002 had included a provision to the effect that nationally enacted legislation having effect only in respect of states outside Southern Sudan was to have as its source of legislation Sharia and consensus of the people. The contentious issue was that as crafted, this provision was a recipe for chaos. Some of the plausible arguments raised were that Northerners and Southerners were not neatly divided societies who lived in their respective regions. Presumably it was thought wise in the Interim Constitution not to prescribe Sharia as a source of law for any of the non-Southern states but to leave it ambiguous as it currently is. This article as presently crafted still poses the potential to destabilise the relative peace in the country and create further discontent in the regions in the West Darfur and the East.²⁷⁸ There seems to be a conception that Sudan is neatly divided into two, the South and the North. The reality on the ground is far more complex than this. The same constitution provides for freedom of movement and permits all Sudanese to live wherever they wish in the country. Article 42 (1) provides as follows:

“Every citizen shall have the right to freedom of movement and the liberty to choose his/her residence except for reasons of public health and safety as shall be regulated by law.”

In this regard, many Southern Sudanese have permanently settled in the North and vice versa. Khartoum is the capital city where most jobs and opportunities

²⁷⁸ Not often highlighted in the new is the existence of a rebel group in the eastern part of Sudan Beja area. Earlier this year a rebel group abducted military officers and demanded to be recognised in the political dispensation that was being arranged then between the Northern government and the South.

are situated and is also in the North. It is imperative that many Southern Sudanese would be subject to Sharia law while in the North. Therefore, this constitutional arrangement in the Interim Constitution raises the question of whether the autonomy granted to Southern Sudan includes personal autonomy²⁷⁹ for the Southerners. Lapidoth when discussing the role of autonomy in consolidating a multicultural society, opines that personal autonomy is an integral part of territorial autonomy because it serves to it serves to preserve and promote the religious linguistic and cultural character of a minority.²⁸⁰ A provision guaranteeing other ethnic groupings personal autonomy within their respective regions to be free from the application Sharia laws is required so as to avoid any injustice that may be occasioned to them. However, Lapidoth's concept of personal autonomy does not seem to have been entirely overlooked. Part X of the Interim Constitution does provide for a special kind of administration in the capital city Khartoum that is in the North but forms the main centre of activity. This effectively means that Southerners and other Sudanese from the various regions are bound to conduct their every day activities there. Article 154 emphasises that human rights and fundamental freedoms specified in the Constitution including respect for all religions, beliefs and customs should be guaranteed and enforced in the National capital. Article 156 sets forth five principles that are to guide judges and law enforcement agencies in dispensing justice and enforcing law in the national capital.

These are:

²⁷⁹ See Lapidoth, as note 14 above at 37-38. Lapidoth defines personal autonomy as the right of members of a certain group within the state normally ethnic, cultural, religious or linguistic, within a state regardless of their residence to preserve and promote their identity through institutions established by the minorities themselves

²⁸⁰ Lapidoth, as note 14 above at 38.

- a) *Tolerance shall be the on the basis of peaceful coexistence between the Sudanese people of different cultures, religions and traditions;*
- b) *Behaviour based on cultural practices and traditions which does not disturb public order is not disdainful of other traditions and not in violation of law shall be deemed in the eyes of the law as an exercise of personal freedoms;*
- c) *Personal privacy is inviolable and evidence obtained in violation of such privacy shall not be admissible in a court of law;*
- d) *The judicial discretion of courts to impose penalties on non-Muslims shall observe the long established Sharia principle that non-Muslims are not subject to prescribed penalties and therefore remitted penalties apply according to law;*
- e) *Leniency and granting the accused the benefit of the doubt are legal principles of universal application and required by the circumstances of the Sudan.*²⁸¹

Consideration is made of the fact that Khartoum being the capital city is likely to be cosmopolitan and by virtue of this fact southerners and persons from other regions other than the North ought not to be subjected to Sharia law. Whereas as this provision does not completely exempt non-Northerners from the application of Sharia law it in the very least provides for a mechanism through which some leniency may be exercised in dealing with them.

3.17 Fiscal Power Under the Interim Constitution

Fiscal federalism refers to federalism as an allocative device. This would entail the sharing of wealth and distribution of resources in a federal arrangement.²⁸² With regard to Sudan this refers to constitutional provisions on control over oil income and related resources, which have played a major role in the Sudan conflict since the discovery of oil in 1982. The Interim Constitution provides for

²⁸¹ Article 156 of the Interim National Constitution.

²⁸² See Haysom, as note 1 above.

distribution of resources for the development of the country without discrimination, stating the principle that the sharing and allocation of wealth emanating from the resources of the Sudan shall ensure that the quality of life, dignity and living conditions of all the citizens are promoted without discrimination on grounds of gender, race, religion, political affiliation, ethnicity, language or region.²⁸³ The sharing and allocation of this wealth shall be based on the premise that all parts of Sudan are entitled to development.²⁸⁴ The Interim Constitution also obligates the parties to consult and share the benefits of oil development with individuals who enjoy rights in land.

During negotiation of the Interim Constitution, experts recommended the creation of a trust fund of oil wealth, which could be used to fund reconstruction and rehabilitation of the South to compensate residents of the oil fields for the massive destruction and loss of life that occurred during the war and to help redevelopment of oil-producing areas. The Interim Constitution in this regard provides for the establishment of a “Future Generation Fund” once national oil production reaches two million barrels per day.²⁸⁵ Although the Interim Constitution commits the parties to ensure that all funds and accounts created by that agreement are “on-budget” and that all revenues and expenditures are made public,²⁸⁶ there are no effective oversight mechanisms contained in the CPA to ensure that this takes place. It creates two institutions with control over parts of the oil sector but neither of them

²⁸³ Article 185 (1) of the Interim National Constitution.

²⁸⁴ Article 185 (2) of the Interim National Constitution.

²⁸⁵ See Article 192 (7).

²⁸⁶ See Article 192 (8).

possesses the capacity to independently ensure that oil revenues are managed correctly. The function of the National Petroleum Commission (NPC)²⁸⁷ is to assist the government in formulating policies and guidelines with respect to the petroleum sector and to monitor and assess the impact of those policies, as well as to negotiate and ensure all oil contracts are consistent with these policies.²⁸⁸ Its purpose is to ensure that oil-producing communities and the Southern government have a voice in the decision-making process. While the goals of the NPC may be laudable, its powers do not allow it to independently monitor the way oil revenues are dispersed or ensure that money is actually spent in accordance with the law.

The Fiscal and Financial Allocation and Monitoring Commission (FFAMC) is created to ensure transparency and fairness regard to the allocation of nationally collected funds.²⁸⁹ Composed of three representatives of the National Government, three representatives of the GOSS, and the Ministers of Finance of each state in Sudan, it is empowered to “monitor and ensure that equalisation grants from the National Revenue Fund are promptly transferred to respective levels of government ensure appropriate utilisation and sharing of financial resources; to ensure that resources allocated to war affected areas are transferred in accordance with agreed upon formulae and to ensure transparency and fairness in the allocation of funds to the Government of South Sudan and states/regions according to established ratio and percentages.”²⁹⁰

²⁸⁷ Established under Article 191 of the Interim National Constitution.

²⁸⁸ See Article 191(3) of the Interim National Constitution.

²⁸⁹ See Article 198 of the Interim National Constitution.

²⁹⁰ Article 198 (2) of the Interim National Constitution.

Neither the FFAMC nor the NPC are functionally independent of the government, in fact both are composed almost entirely of high-level government officials. Unlike most oversight commissions in other jurisdictions, neither body is empowered to investigate complaints of mismanagement, much less take action to remedy those actions. Finally, there are no guarantees of access to information possessed by either government or private entities that either body requires to perform even its listed functions. The CPA emphasises that revenue sharing should reflect a commitment to devolution of power and decentralisation of decision-making in regard to development, service delivery and governance.²⁹¹ It further provides that at least 2% of oil revenue shall be allocated to the oil producing states/regions in proportion to output produced in such states/regions.²⁹² Of the remaining oil revenues from the South, a portion will be allocated to an Oil Revenue Stabilisation Account²⁹³ and the remainder to be divided evenly between the government of Southern Sudan and the national government. 50% of any non-oil revenues collected in Southern Sudan is also to be allocated to the Government of Southern Sudan.²⁹⁴

This arrangement may pose problems given the fact that the bulk of oil reserves are in the South (though there is still some disagreement over where the border is and on which side some oil fields are located²⁹⁵) and the great population disparity between North and South. This means that even above

²⁹¹ See the Wealth Sharing Agreement, at Article 1.8. in Part II of the Comprehensive Peace Agreement

²⁹² Article 192 (5) of the Interim National Constitution.

²⁹³ To be established according article 192 (4) of the Interim National Constitution.

²⁹⁴ See Article 192 (6) of the interim National Constitution of Sudan.

²⁹⁵ See the International Crisis Group Report, "New Sudan Action Plan," 4.

and beyond the 2% automatically returned to the South, Southerners will probably receive a much higher portion of revenue per capita than Northerners.

The South has significantly greater development needs than the North.²⁹⁶ The Wealth Sharing Agreement is vague about the specifics about the flow of oil revenue. It is also unclear whether the 50% of revenues from Southern oil will first flow through the central government or not. Though this would seem logical, the CPA specifies only that “All revenues collected nationally for or by the National Government shall be pooled in a National Revenue Fund (NRF) administered by the National Treasury,” without specifying what those revenues will be.²⁹⁷ Thus it is possible for oil and other revenues to accrue directly to the Southern government or state governments without having to flow through the nominally transparent National Revenue Fund. The system of decentralisation may also complicate the process of accounting for revenue distributions and spending within regions. Though the Agreement requires that “all levels of government comply with generally accepted accounting standards and procedures and that there shall be institutions at the state/regions, GOSS and national levels to ensure that funds are distributed according to the agreed government budget, neither of the institutions it creates has authority to supervise government entities other than the National Government.

²⁹⁶ *IRIN News*, “Sudan: School attendance low in south, mainly among girls,” April 19, 2005; *IRIN News*, “Sudan: Inadequate food, health and education for returnees to the south,” April 18, 2005; International Crisis Group.

²⁹⁷ Wealth Sharing Agreement Article 7.1.

If states are to receive oil revenues directly, there are no requirements of transparency or accountability in the Wealth Sharing Agreement that covers those funds. This is especially problematic given the Southern government's wide independent powers to tax revenues, borrow money, and receive foreign aid directly. Though certain Southern government funds, such as the Southern Sudan Reconstruction and Development Fund (SSRDF), must be transparently administered and are subject to an oversight committee, the income garnered from oil revenues, taxes, loans, or aid is not subject to this oversight unless it is channelled into the SSRDF. Thus an independent body is needed to oversee oil revenues flowing both to the central government as well as state or regional governments with the power to investigate violations and enforce the Agreement. Such a body need not focus exclusively on oil revenue monitoring, but may be empowered to monitor and enforce other aspects of the peace agreement as well. Many countries in Eastern Europe, for example, created Ombudsman's offices to monitor the transition from communism to democracy in the early 1990s.²⁹⁸

The peace agreement creates a host of nominally independent institutions to oversee various aspects of the agreement, including National and Southern Sudan Land Commissions to arbitrate land claims and recommend land policies to the various levels of government, an Electoral Commission to oversee legislative elections, and a Human Rights Commission, whose functions are not

²⁹⁸ "The Bill of Rights and the Emerging Democracies" in (2002) 65 *Law and Contemporary Social Problems* 272; R Williams "Earned sovereignty: Bridging the gap between sovereignty and self-determination" (2004) 40 *Stanford Journal of International Law* 118. The Rambouillet Accords, which ended the conflict in Kosovo, provided for the creation of an Ombudsman office, both to prevent further violence against Kosovars and to discourage individual retribution against Serbs.

spelled out. It is crucial that these institutions be given the independent oversight authority and the power to enforce the constitution and law in the areas of their purview. At the same time, the growth of civil society and the development of better education, health, and economic systems in all parts of Sudan will enable citizens to play a more active role in monitoring the activities of the national and regional governments.

3.18 The Right of Self-Determination Under the Interim Constitution

As illustrated in chapter three, the most prolific element of the Sudanese conflict has been the debate on the right to self-determination of the South. Article 219 provides that the people of Southern Sudan have the right to self-determination. Accordingly this right is to be enumerated under a Southern Sudan Referendum Act to be promulgated by the National Legislature at the beginning of the third year of the interim period.²⁹⁹ As soon as the Southern Sudan Referendum Act is established a Southern Sudan Referendum Commission is also to be established. Another Commission titled the Assessment and Evaluation Commission is also to be set up by the President under Article 221 to monitor the implementation of the CPA. The Commission is to conduct a mid-term evaluation of the unity arrangements established under the CPA and in so doing recommend ways of improving institutions and arrangements created there under. Six months before the end of the six-year interim period there shall be an internationally monitored referendum organised the Referendum Commission already mentioned above in cooperation with the National Government and Government of Southern

²⁹⁹ Article 220 (1) of the Interim National Constitution.

Sudan. The people of Southern Sudan shall here after have the right to confirm unity off the Sudan by voting to sustain the system of government established under the Interim constitution and the CPA or vote for secession.³⁰⁰ In the essence the Interim Constitution creates an option of secession for the Southern Sudanese in accordance with their right to self-determination. The right to self-determination of peoples has long been recognised and accepted as legal principle under international law.³⁰¹ The riddle remains as to how effective the right to self-determination is in managing the civil conflict in a multicultural society such as Sudan. The following section will be dedicated to examining the merits or demerits of secession as tool for realising peace and democracy. Borrowing from Russell and McCall³⁰², the following considerations come into play when making an examination on whether secession is justified in a given instance: (i) questions of democracy and democratic rights (ii) racial and ethnic quality (iii) viability of the post-secessionist states. This study will take up each of this at a time applying them to Sudan with a view of reaching an informed opinion on the viability of the impending secession of Southern Sudan.

3.19 Democracy

Whereas the concept of democracy is considered today to be too vague to establish a blue print for government, it may at the least serve to establish a

³⁰⁰ Article 221(2) (a) of the Interim National Constitution.

³⁰¹ I Brownlie Principles of Public International Law 1998, 595. Article 19 Of the African Charter unequivocally declares that nothing shall justify the domination of a people by another. Further, article 20 mandates a right to self-determination.

³⁰² P Russell and S McCall “Can secession be justified? The case of southern Sudan” in D Wai *The Southern Sudan: The problem of national integration* (1973) 95.

rough measure of illegitimate government. The premise from which this study proceeds is that if a large proportion of a population of a state is denied the opportunity both to participate in the decision to form the state and to establish its mode of government, as well as the opportunity to participate effectively in that government after state formation, then this would constitute a very strong argument for secession.³⁰³ But it is noteworthy that the democracy test is a double-edged sword. It should be applied not only to the state as a whole but also to the secessionist movement itself. For if within the population which secessionists claim to represent there are significant segments which have not manifested a will to attach themselves to the movement and are deliberately excluded from its leadership, this would seriously undermine the justice of the secessionist cause.³⁰⁴

Relevant questions that ought to be posed to assist this quest concern the circumstances that surrounded state formation of the Sudanese nation-state as discussed under chapter three. From pre-independent Sudan through the Turko-Egyptian and Anglo-Egyptian rule to the present day Sudan, has anything approximating a social contract taken place? Have the Southerners participated fully in the process of state formation and where the state was formed in the running of the same? Can one objectively say that the birth of the Republic of Sudan had the Southerners' consent and support? The answers to these questions are of paramount importance in assessing the potential perils or success of a decision of Southern Sudan to secede at the end of the interim period.

³⁰³ Russell and McCall, as above.

³⁰⁴ Russell and McCall as note 38 above at 95.

Without regurgitating the federal history of Sudan in chapter three, right from pre-independent Sudan, the predominantly Christian/animist Southern kingdoms of Nubia, Maqarra and Alawa were conquered and subjugated to the Islamic and Northern Funj kingdom. The Maqarra and Alawa were brought under the central administration of the Funj.³⁰⁵ The Turko-Egyptian rule that followed was no different and has been famed for being brutal and characterised by *inter alia* forced conversion to Islam and a compulsory change of language from indigenous dialects to Arabic. These policies were mostly aimed at Southerners who were mostly animist or Christian. The Anglo-Egyptian and Condominium rule was no better with the first attempt to consult the South about its future coming in with the convening of the Juba conference. The next pertinent steps on the path to creation of a Republic of Sudan were the visits to Cairo Egypt by representatives of Northern political parties resulting in the Anglo-Egyptian Agreement of 1953. The South was excluded from these crucial talks that were to lead up to the creation of a Constitution for the new state. By the time independence came forth, Southern Members of Parliament had been bought into accepting to put the federal question to rest. This effectively meant shelving the future and participation of the South.

All in all, through the critical moments of state formation the South were constantly isolated. The effect of this is such that by the time of creation of a Republic of Sudan, the North and South are still so far apart that a single democratic system of majority decision making is unworkable. However, this point by itself would not necessarily justify the break up of state. Opinion in

³⁰⁵ See chapter three page 16.

America on the eve of the civil war was probably divided in this way yet one would scarcely regard this as justifying the secession of Southern Sudan.

3.20 Racial and Ethnic Equality

The argument here is to the effect that if some racially or ethnically distinct section of a state's population were given reasonable legal rights to participate in its government, if the members of this group were consistently regarded as inferior and are treated as inferiors in the day to day social intercourse of the nation, the value of any democratic right they may enjoy would be gravely diminished. If they were regarded as inferior and denied any democratic rights this would constitute an even stronger argument against submitting to the government of those who claimed to be their natural superiors. The question that would be poised here with Sudan is what the situation is as far as racial equality goes.³⁰⁶ The danger with this test is that racial attitudes are notoriously difficult to assess and one would have to look elsewhere for more concrete means of determining the relationship between the two groups.

3.21 Viability of the Post-Secession State

Indeed the justification of important political acts like secession cannot be entirely confined to deontological considerations of justice. Certainly one of the strongest arguments used against secessionist movements in the past has been that they would divide the state into two fragments one or both of which would be severely crippled economically and scarcely able to survive as a viable

³⁰⁶ Russell and McCall, as note 38 above.

nation.³⁰⁷ In addressing the question what the odds and evens are for secession in Sudan the economic effect of such secessionist movement is of critical importance.³⁰⁸ Given the fact that Southern Sudan recently overwhelmingly voted for an independent state of Southern Sudan, one of the major challenges still to be faced and overcome remains the fact that most of the economic activity and infrastructural institutions to manage any wealth exists in the North. Without proper support from Kenya and other African and international friends, the looming secession of Southern Sudan would effectively be like farmer with a grade cow who is no longer able to feed it and puts it up for sale. It would be extremely difficult for Southern Sudan to sustain itself.

3.22 Is Southern Sudanese Secession Therefore Justifiable?

Given the difficult and tumultuous journey from independence to date that Sudan has experienced, the question as to whether the looming secession in Sudan is justifiable or not has been answered by the voting patterns of Southern Sudanese in the January 2011 referendum. Other constitutional mechanism such as federalism which was a long time employed proved ineffective in the long run and thereby justifying the secession of Southern Sudan.

3.23 Conclusion

This chapter has illustrated that the historical process that has separated the Arab/Islamic North and the African/South has its roots in the attempts at

³⁰⁷ Russell and McCall, as above.

³⁰⁸ See in this regard P Collier and A Hoeffler *The political economy of secession* (2002).

Arabisation and Islamisation by the North of the South and in the resistance to these forces in the South. Undeniably, every Sudanese government since independence has been dominated by Northern Arab Muslims. This chapter underscores the significance of ethnic diversity in the Sudanese society. The federal principle has been very instrumental in Sudan's quest for peace and democracy but for has long remained an elusive concept and can even be said to have failed. The Addis Agreement facilitated a period of peace for eleven years but collapsed when it was repudiated by then President Al-Nimeiri. The federal experiment in Sudan in 1972 provides useful indicators on the style of a workable federal arrangement for the country. Also pertinent to the conflict has been the allocation of natural resources in particular oil. This has emphasised the need to provide for a concise fiscal plan in a prospective federal arrangement for Sudan. Lastly, the inability of the North and South to reach a consensus on the style of political administration from the pre-independence era raises the debate on a right to self-determination with a possibility of secession.

Against the backdrop of Sudan's practice of the federal principle discussed in chapter three one can deduce that the Interim Constitution has been a carefully thought out and well drafted document. It takes into account most of the inadequacies of the Addis Agreement and provides legal safeguards to watch against its abuse. Further, it provides for a more steadfast relationship between the National President and the Southern President unlike the Addis Agreement. The Interim Constitution does not contain a claw-back clause permitting the National President to withdraw Southern autonomy or meddle in the affairs of the Southern Government. Instead, it adopts a "cooperation

approach” requiring National President to consult the President of the GOSS in all decisions affecting the country.

The Interim Constitution makes Sudan a secular state and allows for other sources of law other than Sharia in the South. Whereas it fails to do the same for other states not in the North and not forming part of the South, it does establish a mechanism to protect non-Northerners from application of Sharia law while in the Northern capital city of Khartoum. The most attractive feature of the Interim Constitution is its inclusion of a right to self-determination of the South with an option of secession. The viability of secession of Southern Sudan is debatable and will depend on the advancements made by the region during the interim period. Sudan has been afflicted by a civil war mainly between the Arab-North and the African–Animist Christian South for nearly four decades punctuated by an 11-year pause that brought some relief and left useful lessons and indicators of what is required to bring about peace and democracy in the troubled country. One off the options that has been resorted to in the quest for peace and democracy has been political integration along lines of assimilation and coexistence within a framework that accommodates diversity within unity. In essence this has meant resort to the federal principle.

Contrary to the customary conception of federalism in the conventional sense of a federation, federalism in this study has been used to refer to a normative concept capable of varied application. This renders federal political systems such as federations, autonomous arrangements and decentralised or devolved arrangements just but varied applications of the federal principle. Indeed, the federal principle has proved critical as tool of political integration in pluralistic

societies. It has served as a tool of democratisation. In discharging this function of integration, the constitution has proved to be a vital avenue through which it has found expression. The incorporation of the federal principle in the constitutional framework has created federal arrangements that have managed to deal with the challenges of multiculturalism. However this has not been the case in all societies.

The success or failure of the federal principle in addressing the challenges of multiculturalism has been dependent on the nature of the society where it is employed. In Sudan, the historical process that separated the Arab/Islamic North and the African/South had its roots in attempts at Arabisation and Islamisation of the South and in the resistance to these forces in the South. In effect, every Sudanese government since independence has been dominated by Northern Arab Muslims. Critical to the Sudanese conflict has been ethnic diversity. Despite calls for a federation in Sudan, actual resort to the federal principle to meet the challenges of diversity was only achieved in 1972 with the promulgation of the Addis Agreement. The grant of autonomy to the South while successful to the extent of having provided 11 years of peace collapsed when it was repudiated by the then President Al Nimeiri. The 11-year period thus left a lot of lessons to learn about the federal experiment in Sudan. Of these is the importance of taking into account ethnic diversity in any arrangement meant to politically integrate the Sudanese society. Secondly the Addis Agreement underscored the need to establish a well-crafted model of a federal arrangement in terms of content. The design of autonomy as embodied in the Addis Agreement had with it its own flaws, which can be said to have contributed to its eventual collapse. This lesson is a pointer as to the precise

manner and content of federalism required to sustain peace and advance the democratisation process in Sudan.

Thirdly, the demise Addis Agreement and the period 1972-1983 emphasises the need for a concise fiscal plan in any prospective federal arrangement. The distribution of oil is central to any scheme aimed at integrating the Sudanese society. The demise of the Addis Agreement ought to inform the contemporary constitutional order in Sudan that reintroduces the issue of Southern autonomy.

This study unconventionally steers away from the afro-pessimism that characterises most literature on governance in Africa. Viewed from the lens of the historical application of the federal principle in Sudan, the Interim Constitution is a well thought out and well drafted. The inadequacies of the Addis Agreement in failing to provide an unequivocal provision preventing the National President from meddling in the affairs of the South have been addressed. On the relationship between the National President and the president of the HEC or Southern President, is the shift from a “control” approach under the Addis Agreement to “cooperation” under the Interim Constitution. Unlike the President of the HEC under the Addis Agreement who was but a stooge answerable to the National President, the President of the GOSS is to be consulted by the National President on virtually every decision affecting the country as a whole. As regards Southern Sudan he is the Chief Executive. The fiscal plan under the Interim Constitution is flawed and will need to be amended as and when becomes necessary to enhance its functionality. On the controversial issue of state and religion the Interim Constitution makes

commendable strides in making Sudan a secular state. Even more unequivocal than the Addis Agreement, it provides for different sources of law to apply in the South. While it fails to clearly stipulate that eastern and western states may have as sources of law traditions and customs, it goes a long way to provide for freedom of creed and worship. The most appealing feature of the Interim Constitution is its inclusion of a right to self-determination of the South with an option of secession. By so doing it joins the Ethiopian Constitution as being the only two Constitutions with a right to secession. Whether this provision is a good or bad thing is open to debate as has been alluded to in chapter four and will be dependent on whether ones allegiance is with justice or economic realities.

CHAPTER FOUR

POWER SHARING AND DEVOLVED GOVERNMENT: THE CASE OF KENYA

4. CHAPTER FOUR: POWER SHARING, DEVOLVED GOVERNMENT AND THE CHALLENGE OF ETHNIC ACCOMMODATION IN KENYA

Preface

This chapter assesses the nature and impact of institutions of power-sharing and devolved government in Kenya. The focus of the discussion is on the 2008 agreement signed between the country's two main political parties, PNU (Party of National Unity) and ODM (Orange Democratic Movement) and the enactment of a new constitution that has seen the creation of comprehensive devolved system of government. The agreement was agreed upon after a disputed election that sparked a wave of ethnic clashes in which more than 1,000 people were killed and another 300,000 were internally displaced. Signed in March 2008, it has been largely successful in its primary goal: ending the violence and restoring peace in Kenya. Since the implementation of the agreement there has been little inter-communal violence and some of the people displaced by the post-election clashes have been able to return home. Moreover, the agreement has enjoyed wide-spread support from across partisan and ethnic lines. The agreement similar to that of South Africa during its transition from apartheid to a democratic system, is temporary in nature and does not guarantee permanent positions of power to any groups or parties. While the parties to the accord are collaborators in its implementation, they are also foes in the electoral arena that expect to compete vigorously in the next election cycle. The power-sharing agreement, therefore, does not undermine the electoral incentives that the parties would otherwise face in its absence. The main accomplishment of the power-sharing agreement has been

the creation of a Grand Coalition government in which executive functions and cabinet positions are shared between the two main parties. Long-term grievances and underlying issues have not been addressed and remain latent sources of conflict. So far the parties have shown a willingness to work together and compromise. But the Grand Coalition government is facing many serious challenges. Currently, the issue of whether to prosecute perpetrators of the violence domestically or internationally following the International Criminal Courts (ICC) involvement in the PEV is a potentially explosive issue that threatens to destabilise the agreement. The structure of this chapter is as follows. The first section describes the 2008 power-sharing agreement, placing it in the context of long running debates about constitutional reform in Kenya. The next section takes an in depth look at the devolved system of government under Kenya's new constitutional dispensation.

4.1 The Challenges to Political Stability in Kenya: Ethnic Politics

The principal challenge to stability in Kenya comes from the centrality of ethnicity in politics. Kenya, like other African countries, is a highly diverse society. There are approximately 44 ethnic groups in Kenya. While ethnic differences are not automatically salient in multi-ethnic societies, in Kenya such divisions became politicized early, prior to the transition to independence, and have remained central to Kenyan politics since. This section first provides a brief review of the factors that have contributed to the politicization of ethnic differences. It then examines the 2007 election and the post-election violence that led to power-sharing negotiations.

4.2 Brief Historical Review

The divisiveness of ethnic cleavages in Kenya is in large part the result of a history of ethnic favouritism by Kenyan leaders. The first President, Jomo Kenyatta, relied heavily on trusted members of his own Kikuyu ethnic group, particularly those from his home area of Kiambu in Central Province.³⁰⁹ The Kenyatta government's policies were also seen as favouring his own group. Above all, the land redistribution scheme, undertaken shortly after independence, was seen as disproportionately benefiting the Kikuyu.³¹⁰ Because the Kikuyu were perceived to be relatively better off than other tribes at independence, they were able to take advantage of the sale of highly productive land that was purchased from departing white settlers by the government in the 1960s and 1970s and then resold on a "willing-buyer, willing-seller" basis. Rightly or wrongly, the fact that the Kikuyu benefited from the government's land redistribution scheme fed the belief that the Kenyatta government favoured the Kikuyu at the expense of other tribes. After Kenyatta's death in 1978, the Vice President, Daniel Arap Moi, a Kalenjin from the Rift Valley, ascended to the presidency. Like Kenyatta, Moi also relied on an inner circle drawn largely from his own ethnic group, the Kalenjin.³¹¹ Moreover, Moi aggressively promoted his co-ethnics within the government administration, parastatals, the military, and the police, perpetuating the sense that state largesse was distributed along ethnic lines. The advance of Kalenjins

³⁰⁹ Anderson, David 2005 "Yours in Struggle for Majimbo'. Nationalism and the Party Politics of Decolonization in Kenya, 1955-64," *Journal of Contemporary History* 40 (3) pp. 547-564.

³¹⁰ Id

³¹¹ Id

within the government structures came largely at the expense of the Kikuyu.³¹² In 2002, Mwai Kibaki, a Kikuyu from Central Province, became Kenya's third president. Kibaki came to power at the head of a diverse coalition party, the National Alliance Rainbow Coalition (NARC).³¹³ While the party held the promise of creating a broadly inclusive government, in practice, Kibaki, like those before him, was seen as favouring his own group, particularly in promotions to top cabinet and administration positions.³¹⁴

A second factor behind the divisiveness of ethnicity in politics is the party system, which has historically reflected and reinforced ethnic cleavages. Prior to independence, competing parties emerged as champions for different ethnic blocs, turning early electoral contests into an us-against-them battle for control of the state and the resources that come with it. The first party to form in the early 1960s was the Kenya African National Union (KANU), which initially brought together leaders from across the ethnic spectrum, united in their goal of gaining independence from Britain. But within a few years leaders from several smaller tribes split from KANU after becoming convinced that they would never play a major role within the party, which was controlled by Kikuyu and Luo politicians. The break-away faction, headed by leaders from the Kalenjin, Maasai, and coastal groups, formed the Kenya African Democratic Union (KADU). Central to KADU's platform was a demand for a federal constitution that would give ethnic groups greater control over their own affairs and limit domination by larger tribes. This position resonated with Kenyans in the Rift Valley and on the coast who were worried about Kikuyu and

³¹² Anderson as note 309 above.

³¹³ Id.

³¹⁴ Id.

Luo “migrants” snatching up prime land in these areas.³¹⁵ In the two national elections that preceded independence held in 1960 and 1963 ethnic identities largely determined voting behaviour, with voters by and large lining up behind their ethnic leaders.³¹⁶ After independence, Kenya became a de-facto single party state under the KANU government, which had emerged victorious in the 1963 election. For the subsequent two decades opposition parties did not exist in Kenya. When multi-party competition was again legalized in 1991, parties once again formed around ethnic blocs.³¹⁷ In the 1992 and 1997 elections, the opposition parties garnered support from Kikuyu and Luo areas, while the incumbent party, headed by Moi, maintained its strongest support among Moi’s own Kalenjin group and among pastoralists from the Rift Valley.³¹⁸ In 2002 the opposition parties finally united behind Mwai Kibaki, bringing together most tribes, other than the Kalenjin who remained loyal to KANU.³¹⁹

A third factor, which is both a reflection of inter-communal tensions and which has sharpened such divisions, is a history of episodic violence associated with elections. In the multi-party era since 1991, violence between ethnic groups has taken place in three of the four election rounds namely 1992, 1997, 2007. Much of the responsibility for this violence rests with politicians who have exploited latent tensions for electoral gains, fuelling divisions between groups. For example, prior to the 1992 election, Kalenjin politicians in the Rift Valley used fear tactics to mobilize support within their communities, spreading the

³¹⁵ Bienen, Henry 1974 *Kenya: The Politics of Participation and Control*. Princeton, NJ: Princeton University Press.

³¹⁶ Anderson as note 309 above.

³¹⁷ Id.

³¹⁸ Id.

³¹⁹ Id.

idea that the Kikuyu would seek retribution against the Kalenjin if they came to power. Leaders called on the Kalenjin to defend their ethnic homelands, reclaim land that rightfully belonged to them, and chase the Kikuyu out of the area. Reports estimated that 1,500 people died in these clashes and another 300,000 were chased away from their homes, mostly in the Rift Valley, during the months before and after the 1992 election.³²⁰ A similar dynamic was seen in lead-up to the 1997 election, with violence this time occurring both in the Rift Valley and also in some ethnically-mixed regions along Kenya's coast.³²¹

4.3 The 2007 Election

Despite a history of contentious elections, the 2007 campaign has often been described as being like no other. The presidential election featured three main candidates, each from different ethnic groups. The incumbent president Mwai Kibaki, a Kikuyu from Central Province, headed the Party of National Unity (PNU). His main challenge came from Raila Odinga, a Luo from Nyanza Province who led the Orange Democratic Movement (ODM). The election also included Kalonzo Musyoka, a Kamba from Eastern Province, who headed the Orange Democratic Movement-Kenya (ODM-K). The race, which was closely fought by Kibaki and Odinga, was the first election in Kenya's history to pit a Kikuyu against a Luo. Leaders from the two groups have at times worked together, as in the early days of KANU or more recently when Odinga and Kibaki joined forces in 2002 to defeat Moi. However, there is a long history of bad blood

³²⁰ Id.

³²¹ Id.

between the two groups that dates back to the independence era.³²² By the time the 2007 election campaigns got under way, Kenyans were already severely polarized. Despite real achievements made by the Kibaki government in terms of infrastructure, economic growth, education, and expanded political freedoms, many Kenyans felt Kibaki had failed to live up to the promises he offered in 2002. Kibaki had come to power on a promise to end tribalism in Kenya. Yet, after taking office he reneged on a pre-election commitment to create a Prime Minister position that would be filled by Odinga. To many Luos, this was seen as a betrayal. Moreover, during Kibaki's first two years, a divisive constitutional review process occurred, culminating in an acrimonious referendum that pit ethnic groups against each other.³²³ Kibaki's government also became embroiled in a number of conspicuous corruption scandals, betraying his promise to bring an end to the pervasive corruption of the Moi era. But the Achilles heel for Kibaki was the perception that he had favoured his own Kikuyu ethnic group at the expense of others.³²⁴ A survey conducted in mid-October 2007, about two months before the 2007 election, found that the majority (approximately 57%) of Kenyans thought that Kibaki's government served the interests of certain ethnic groups at the expense of others.³²⁵ Moreover, views on this question were highly polarized by ethnic group.

In the election campaign, the opposition ODM and ODM-Kenya played on the perception that Kibaki favoured his own group, using highly emotional appeals

³²² Anderson, David and Emma Lochery 2008 "Violence and Exodus in Kenya's Rift Valley, 2008: Predictable and Preventable?" *Journal of East African Studies* 2(2) 328-343.

³²³ Kenya National Commission on Human Rights 2008. *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-Election Violence*. Nairobi: KNCHR.

³²⁴ Id.

³²⁵ Id.

that tapped into a sense of injustice and resentment. As evidence, the opposition claimed that Kibaki had disproportionately appointed the Kikuyu to top positions in the cabinet and the government administration. Moreover, the opposition charged that Kibaki unfairly favoured the Kikuyu region Central Province in the distribution of funds for social services and infrastructure, while neglecting other parts of the country. At the same time, the opposition claimed that Kibaki had callously persecuted certain groups, for example by evicting Kalenjin squatters from the Mau forest and deporting Muslims from Coastal regions. Opposition appeals tapped into long-standing grievances against the Kikuyu, who have historically dominated Kenya's economy. And campaign rhetoric played on grievances over access to land, arguing that the Kikuyu had unfairly benefited from land redistribution schemes following independence, taking land that rightfully belonged to other communities. Kibaki's party, the PNU, also employed divisive ethnic rhetoric during the campaign. PNU candidates portrayed Odinga as a dangerous man, playing on the fear of the unknown and highlighting negative cultural stereotypes. The PNU argued that Odinga had been involved in a failed coup in 1982 and alleged that he had communist leaning because he had studied in Eastern Europe. In addition, the PNU drew on the stereotype that Luos are irrational and impulsive. They also claimed that Odinga would take revenge on certain ethnic groups if elected. These appeals were designed to generate fear among Kenyans.

As expected, voting closely followed ethnic lines. A survey conducted two weeks before the election found that almost all Kikuyu (94%) intended to vote for Kibaki; almost all Luos (97%) intended to vote for Odinga; and most Kambas (77%) planned to support Musyoka. The vote was less polarized among those

groups that did not have a candidate in the race, though evidence of bloc voting was seen among other groups as well. For example, the vast majority of Kalenjins (91%) and Luhyas (70%) supported Odinga, while most Merus (86%) supported Kibaki.

4.3.1 A “Stolen Election” as Trigger for Post-Election Violence

The national election took place on December 27, 2007. Over the next few days, it became apparent that the Electoral Commission of Kenya (ECK) did not have the capacity to adjudicate between conflicting claims of fraud in the vote counting process.³²⁶ The official figures showed Kibaki ahead of Odinga by a sizable margin, but ODM leaders argued that the vote counts from Kibaki’s strongholds had been inflated after the polls closed. Kenyans watched this drama unfold on TV, as the national media relayed images from the ECK counting centre in real time. Despite lingering concerns about the integrity of the vote tally, the ECK Chairman, Samuel Kivuitu, announced Kibaki as the official winner in the early afternoon of December 30. Less than two hours later, Kibaki was sworn in at a rapidly assembled inauguration ceremony, which was broadcast live on national television. Minutes later, the violence began.

Over the next two months, at least 1,000 people were killed and another 300,000 were chased from their homes.³²⁷ The violence was concentrated in three main areas: the slums of Nairobi, the nation’s capital, Kisumu, the largest town in the Luo area, and in Rift Valley, an ethnically mixed region in which Kalenjins and the Kikuyu live in close proximity. In Nairobi and Rift Valley

³²⁶ Anderson as note 322 above.

³²⁷ Kenya National Commission on Human Rights as note 323 above.

violence took two forms. First, there was a considerable amount of spontaneous rioting. Second, the Kikuyu were targeted. Many Kikuyu had their houses burned down and their businesses destroyed. Many were told to leave the area and not return. And many were killed. Shortly thereafter, reprisal killings began, as the Kikuyu sought revenge. This violence escalated, threatening to spiral into a much larger clash.³²⁸ In Kisumu, violence was mostly in the form of rioting and looting in the city centre. While the mobs targeted Kikuyu-owned stores, the looters generally did not discriminate, destroying most of the property in the central business district.

4.4 Power Sharing in Kenya

The post-election violence in 2008 was the catalyst for a power-sharing deal. But debates about power-sharing in Kenya predate the 2008 deal by several decades. Before examining the 2008 accord, it is therefore worth looking at earlier debates in order to place the current arrangement in context.

4.4.1 Historical Background on Power Sharing in Kenya

The first demands for power-sharing institutions were made by British settlers in the decade prior to Kenya's independence, which was gained in 1963. Fearing that their interests would not be safeguarded once the black majority came to power, the settler community sought to create power-dividing institutions, in the form of a separate administration for their own areas. The settlers feared in particular that they would be subjected to excessive taxation

³²⁸ Jeremy Horowitz, *Powersharing In Kenya: Negotiations and Peace Processes 2008*, 52.

and that their land holdings might not be secure after the black majority came to power.³²⁹ In the lead-up to independence in the early 1960s the white settlers found common cause with KADU, which brought together leaders from several of Kenya's smaller tribes, who were also concerned about the potential for majoritarian domination under Kenya's unitary system. In particular, KADU's leadership worried that the post-independence government would be dominated by Kikuyu and Luo elites who had emerged at the forefront of Kenyan politics in the pre-independence period. KADU advocated for a federal system in which regional authorities would have considerable power over policy and resources at the provincial level. Given that ethnic groups tend to be geographically concentrated in Kenya, the devolution of power to regional bodies would allow ethnic groups a greater degree of local control and autonomy. In the 1963 election that preceded the transition to independence, the central issue was whether the post-independence constitution would include power-dividing provisions, with KADU calling for a federal constitution and KANU arguing for the maintenance of the unitary state.³³⁰ KADU's appeal resonated in particular with pastoralists and coastal people who were anxious about the migration of Luo and Kikuyu farmers into their home areas.³³¹

At the international level, Kenya was also engaged in debates with the British over the terms of independence during the early 1960s.³³² Three rounds of negotiations were held in London between 1960 and 1963. Here again KADU

³²⁹ Anderson, David 2005 "Yours in Struggle for Majimbo'. Nationalism and the Party Politics of Decolonization in Kenya, 1955-64," *Journal of Contemporary History* 40 (3) pp. 547-564.

³³⁰ Id.

³³¹ Id.

³³² Id.

sought a federal constitution, while KANU took the opposite position, arguing that federalism would be cumbersome and excessively expensive for the new country. In the end, KANU ultimately conceded to the federal arrangement, though some of the party's top leaders indicated that they had little intention of honouring the agreement after independence.³³³ Kenya was thus born on December 12, 1963 with a power-sharing, federal constitution that included provisions for elected regional bodies in each of the eight provinces. This arrangement was not to last. KANU had emerged victorious in the 1963 elections, held just before independence. Under Kenya's first president, Jomo Kenyatta, KANU was determined to undermine the regional assemblies before they could get off the ground. The central government refused to provide funds or other support to the Provincial bodies. Without resources and logistical or technical support, the regional bodies found themselves unable to function. At the same time, KADU was beginning to collapse, as several MPs crossed the isle to join with KANU. As the KADU leadership found its position rapidly deteriorating, they made a pragmatic decision to change course. In 1964, the two leading KADU politicians, Ronald Ngala and Daniel arap Moi, formally joined KANU and dissolved their own party. With the collapse of KADU, calls for power-dividing structures ended. Shortly thereafter a bill was passed in parliament to do away with the provincial assemblies.³³⁴ During the subsequent years of single-party rule, demands for constitutional reform were muted. However, following the return to multi-party politics in 1991, calls for constitutional reform resurfaced. Throughout the 1990s a wide range of actors opposition parties, civil society groups, and religious leaders called for constitutional changes. In the main, demands for reform were aimed at limiting

³³³ Id.

³³⁴ Id.

the powers of the president and increasing checks and balances between branches of government.³³⁵ At the same time, reformers once again called for power-sharing innovations, in the form of devolution. In 1997, demands for reform led to the creation of the Inter-Parties Parliamentary Group (IPPG), a working-group of opposition and government MPs. While a minimal set of reforms, primarily dealing with electoral laws, were passed in that year, no major changes were made to the basic structure of the constitution.³³⁶ Following the 1997 election, the government endorsed the creation of the Constitution of Kenya Review Commission, which was ostensibly mandated to create a revised constitution, though again no reforms were actually implemented in the following years. In the subsequent election, held in 2002, debates about constitutional reform once again played a central role. The opposition party, led by Mwai Kibaki, made constitutional reform a core campaign issue, promising to provide a new constitution within 100 days of taking office, if elected. Kibaki and his party, the National Alliance Rainbow Coalition (NARC), handily won the election. The clamour for a new constitution was principally driven by the need to check the powers of the executive through a devolved system of government.

However, once in office promises for constitutional reform quickly faded.³³⁷ Kibaki's new government set up the National Constitutional Conference, which was charged with seeking public input on reform and drafting a new constitution that could be put before the public in a national referendum.

³³⁵ Anderson, David 2005 "Yours in Struggle for Majimbo'. Nationalism and the Party Politics of Decolonization in Kenya, 1955-64," *Journal of Contemporary History* 40 (3) pp. 547-564.

³³⁶ Id.

³³⁷ Id

However, the constitutional review process became highly contentious and ultimately produced a draft which came to be known as the Bomas draft a document that divided the political elite. The draft contained both devolved system of government and power-sharing provisions. It sought to devolve resources and authority to regional bodies and also envisioned the creation of a powerful prime minister who would share executive responsibilities with the President, a measure designed to create a more inclusive central structure. This draft, however, was never put to a public vote. Before the referendum, which was held in 2005, the Attorney General modified the draft, stripping the main power-sharing features from the bill. The final referendum vote on the modified version of the draft, saw politicians and voters divide largely along ethnic lines, and failed by a wide margin.³³⁸ Once again, fundamental reform was deferred. In the 2007 election campaign, constitutional reform, power-sharing and devolved government in particular again emerged as a central campaign theme.³³⁹ The opposition parties ODM and ODM-Kenya called for devolution as a way to increase local control over resources and reduce inequitable treatment by the central government. The debate was often cast in emotional and divisive ethnic terms, as the opposition argued that devolution then being referred to as “majimbo” in Kiswahili would provide marginalized groups with more autonomy while decreasing domination by those tribes that controlled the central government. Views on these reforms were highly polarized by ethnic group. In the past, calls for majimbo had served as a pretext for ethnic cleansing, particularly in the Rift Valley and on the Coast.³⁴⁰ Many voters, particularly the Kikuyu, were deeply concerned about the opposition’s

338 Id.

339 Id.

340 Id.

promises to implement such a policy, fearing that it would lead to the creation of homogenous ethnic zones in which the Kikuyu would not be welcome.

4.5 The 2008 Power Sharing Deal

In the weeks following the post-election violence, a long list of foreign personalities visited the country to try to restore stability and resolve the political impasse between PNU and ODM. This list included Bishop Desmond Tutu, John Kufuor, President of Ghana and outgoing head of the African Union (AU), UN Secretary General Ban Ki-Moon, and US Secretary of State Condoleezza Rice, among others. At the same time, foreign heads of state and international donors put pressure on the two main political parties to bring an end to the violence. Despite these efforts, little progress was made prior to the arrival on January 23 of the negotiating team headed by former UN Secretary Kofi Annan. The negotiations began with a wide gulf in the positions of the two sides. For its part, the opposition party, ODM, believed that it had rightly won the presidential election. ODM's position was that an interim government should be created for a period of six months, after which time the presidential election would be re-run.³⁴¹ On the other side, PNU was unwilling to consider a re-run of the election, and argued instead that ODM should submit any complaints regarding election fraud to the courts. Once it became clear that a re-run of the election was unlikely, the negotiations shifted to seeking terms for a power-sharing arrangement between the two sides. Annan sought to create "inclusionary" power-sharing structures that would divide power and authority between the two parties within the existing unitary state. While ODM

³⁴¹ Jeremy Horowitz, as note 328 above.

sought to include devolution provisions. As the negotiations proceeded, ODM advanced several core demands.³⁴² First was the creation of a prime minister, who would serve as Head of Government and have the authority to appoint and remove government officers, including Cabinet members. Second, ODM demanded that cabinet portfolios be divided equally and that high profile ministries – e.g., Interior and Finance – be shared between the two parties. Third, ODM called for proportionality at all levels of government. Lastly, ODM sought to have the deal entrenched in the constitution. On the other side, PNU demanded that the President remain as Head of Government and retain the authority to determine the composition of the cabinet. The Prime Minister position would oversee the ministries but would not have executive functions related to hiring or firing. At several points during the negotiations, which lasted for five weeks, the intransigence of the two sides threatened to derail the bargaining. The personal dedication and adroit management of the lead mediator, Annan, was of considerable importance in maintaining progress. Early on Annan managed to end the acrimonious war of words that was being waged between the two sides in the media by demanding that both sides stop airing their grievances to the press. At a critical point, Annan also sequestered the entire negotiations process for several days in Tsavo, one of Kenya's wildlife preserves, to remove the process from the limelight in Nairobi, the nation's capital. Finally, in the last stages, when the negotiations were stalled over key details, Annan bypassed the negotiation teams appointed by each party and appealed directly to the principals, the heads of the two parties.

³⁴²

Id.

This move marginalized hardliners within the two camps and led to an agreement. Given the bitterness and distrust that existed at the start of the negotiations, the fact that a deal was reached is a credit to Annan's skilful management of the process. The final deal, reached on February 28, addressed many key issues but left others unresolved.³⁴³ The main provisions related to the creation of a Grand Coalition government. Other more fundamental changes regarding the political system or the deeper grievances that contributed to post-election violence were deferred. The deal called for the creation of a coalition government that included PNU and ODM as equal partners. The position of Prime Minister (PM) would be created and would be filled by the party or coalition with the largest number of seats in Parliament. In practice, this meant that ODM's presidential candidate, Raila Odinga, would fill the seat. Second, two deputy prime minister positions would be created, one to be appointed by ODM and the other by PNU. In appointing cabinet ministers, the principle of "portfolio balance" whereby the number of seats would be assigned in proportion to the parties' strength in parliament would be followed. To safeguard against the possibility of reneging, guarantees were provided to ODM. The Prime Minister would only be removed through a vote of no confidence passed by a majority in parliament. Given that ODM held the largest share of Parliamentary seats, this provision meant that it would not be possible to remove the PM without ODM's consent. Similarly, cabinet Ministers would be removed from office only with concurrence from both parties. And the agreement would be entrenched in the constitution, through a bill passed by Parliament. Other aspects of the agreement remained vague. The first was the powers of the new Prime Minister. The accord stipulated that the PM

³⁴³

Id.

would “co-ordinate and supervise” affairs of government, without specifying exactly what power and authority would be vested in the position and how executive powers would be divided between the PM and the President. Second, the accord left unresolved the question of how long the coalition government would last and what would happen if it collapsed. The agreement stipulated that the coalition could be dissolved if the parliament were dissolved, if the parties agreed in writing, or if one coalition partner withdrew from the coalition. However, the agreement did not specify what would happen if the coalition were to collapse before the next election in 2012. Finally, although not formally part of the power-sharing agreement, the parties to the negotiations also agreed to create investigatory committees to look into allegations of fraud during the election, causes of the post-election violence, and the sources of long-standing grievances in Kenyan society.

4.6 Implementation of the Power sharing Deal

Given the ambiguities in the power-sharing agreement, its success would hinge on the political will of the two sides to the accord. The early signs were not encouraging. The first major task under the accord was the assignment of cabinet posts in the new Grand Coalition government. While both parties were prepared to honour the principal of portfolio balance, as agreed in the accord, initial negotiations deadlocked over which ministries would go to each party. Both sides sought control of the key ministries, such as Finance, Internal Security, and Public Service, among others. The stalemate, which dragged on for several weeks, threatened to undermine the recently-signed accord. In frustration over the delays and PNU’s perceived hard-line position, ODM

supporters in Kisumu and Nairobi returned to the streets for several riots in early April.⁷ Equally frustrated with the impasse, the European Union threatened to cut off aid if a deal was not reached.³⁴⁴ After several tense weeks of negotiations, the parties finally called on mediator Annan to help broker a deal. The final deal, which was announced on April 13, allowed the PNU to keep Internal Security and Finance, while ODM gained other key ministries, including Public Service, Local Government, and Agriculture.³⁴⁵ The cabinet was expanded to 42 posts, in order to accommodate the expanded coalition. The second aspect of implementation concerned the review committees. The first of the three committees of enquiry to get underway, the Independent Review Committee, was charged with looking at electoral fraud during the election. The committee, headed by former South African judge Johann Kriegler, issued what came to be known as the “Kriegler Report” in September 2008. The report ruled that it was not possible to conduct a re-count of the ballots in order to determine the actual winner of the 2007 election, a decision that frustrated some civil society organizations, which had wanted a more full investigation into alleged fraud in the vote counting process.³⁴⁶ The main recommendations of the report related to the overhaul of the Electoral Commission of Kenya (ECK), and particularly the adoption of measures to strengthen the ECK’s independence.

The second investigatory committee, the Commission of Inquiry on Post-Election violence, was mandated to examine the sources and perpetrators of the post-election violence. The Committee, which was headed by High Court

³⁴⁴ Kenya National Commission on Human Rights as note 323 above.

³⁴⁵ Id.

³⁴⁶ Id.

Justice Philip Waki, completed its work in October 2008. Its report, which provides a detailed account of the postelection violence, included a list of alleged perpetrators of the violence. Several current ministers and MPs are were included on the list. The Commission gave the Grand Coalition government 60 days to establish a tribunal to bring the alleged perpetrators to trial, after which time the list of perpetrators would be handed over to the International Criminal Court (ICC) if no such tribunal was created. Given that several top government officials were on the list of alleged perpetrators, it was extremely unlikely that the government would support the creation of a local tribunal with substantive powers. The failure of the government to support a local tribunal has since seen the active involvement of the ICC with the Chief Prosecutor of the Court requesting for summons to issue for six personalities suspected to be behind the post election violence. With the real threat of summons and arrest warrants being issued the government, has backtracked and is lobbying for African Union support to get a deferral of the cases to a local tribunal that will be established.

4.7 Effects of the Power Sharing Agreement

By any measure the power-sharing agreement has been a success in achieving the primary goal of ending the conflict and restoring relative political stability. The violence that had engulfed the country ended with the signing of the agreement. An opinion poll conducted in April 2008, about a month after the power-sharing agreement was reached, showed broad support for the agreement, with 75% of respondents saying they approved of the accord.³⁴⁷

³⁴⁷ Id.

The poll also found strong support across partisan lines, with 75% of ODM supporters and 72% of PNU supporters approving. Moreover, the survey found significant optimism about the future of Kenya. In response to a question about the future of ethnic relations, the largest share of respondents (43%) said that they thought relations between communities would improve in the coming year, with 27% saying that they would get worse, and 30% saying that they would remain the same. At the same time, Kenyans remain concerned about the durability of the power-sharing agreement and the consequences if it were to collapse. Only 36% of respondents thought that the agreement would survive until the next election in 2012. Moreover, 47% of respondents said that there would be renewed violence if the power sharing agreement collapsed.³⁴⁸ Despite the positive effects in terms of stability, the power-sharing agreement in Kenya may be prone to negative side effects. The authors of the larger project, of which this case study is a part, have identified three potential pathologies associated with power sharing. First is the concern that power-sharing agreements may create excessive transaction costs in decision-making, due to supermajority or unanimity provisions, leading to inefficiencies or immobilism. In the Kenyan case, no such provisions were included in the agreement with regard to policy making. The only area in which guarantees were provided was with regard to the dismissal of cabinet ministers, which requires consent from both ODM and PNU. Otherwise, the legislative process is subject to the same rules that existed prior to the power-sharing agreement. Therefore, the concern that minorities may be able to extract an unreasonably high price for cooperation does not apply in the Kenyan case.

³⁴⁸

Kenya National Commission on Human Rights as note 323 above.

The inefficiencies that may exist in the legislative process are a function of the political system that existed before the agreement, not the agreement itself. A second concern is that power-sharing agreements may create an adverse selection problem whereby extremists and ethno-nationalists are favoured over moderates. Again, this does not appear to be the case in Kenya. On the contrary, the leaders of the two parties that signed the agreement, Mwai Kibaki and Raila Odinga, appear to be relatively moderate compared to the hardliners in each side's camp. At several critical points in the negotiations process and after, these leaders have shown a willingness and ability to constrain hard-liners within their own ranks, facilitating compromise across party lines. For example, in the final stages of the negotiations over the accord, Kibaki and Odinga retreated with Annan in a private session to hammer out the last details of the agreement. Again during the negotiations over the distribution of cabinet portfolios, the two party heads retreated behind closed doors to break an impasse that threatened to destroy the Grand Coalition government.

Finally, the third concern is that power-sharing agreements may create moral hazard problems by eliminating the oversight role played by opposition parties. Without an opposition party to check the government, corruption and theft may increase. It may not be time yet to offer a definitive assessment, however, there are signs that the entry into the Grand Coalition has not undermined the oversight role that ODM would have played if it had remained in the opposition. Joining the Grand Coalition does not require ODM to abdicate its oversight role. While ODM and PNU are partners in the governing coalition, they are also adversaries in the electoral arena, keenly aware that they are

likely to face each other again in the next election. For its part, ODM appears determined to demonstrate its competence as a partner in the Grand Coalition government in order to enhance its reputation between now and the next electoral round. The fact that ODM and PNU are likely to face off again in the not-too-distant future also creates an incentive for the two parties to expose instances of corruption in the other's ranks. In June 2008, for example, a prominent ODM MP brought to light allegations that the Finance Minister, a senior PNU member, had acted improperly in selling off a government-owned hotel to a group of Libyan investors.³⁴⁹ In addition, while the power-sharing agreement eliminated the official opposition, it also created new opportunities for oversight within government bodies. Under the power sharing accord, the parties agreed to the principal of portfolio balance in the allocation of cabinet positions. In practice, this principle has been interpreted to mean that there would be balance in the distribution of Ministerial positions and that there would be balance *within* each Ministry. If a top position within a particular ministry was filled by PNU, the second position would be filled by ODM, and vice-versa. In principal, this system of balance *within* ministries allows each party to keep an eye on the other, making it difficult for any one party to create a fiefdom within a particular body.

4.8 Potential for Future Conflict

While the power-sharing agreement has restored stability in Kenya, the potential for renewed conflict remains high. First, the tension created by the election and the postelection violence has left Kenyans polarized along ethnic

³⁴⁹ Kenya National Commission on Human Rights as note 323 above.

lines. Many of the victims who were chased from their lands during the ethnic clashes have yet to return because of lingering fear and distrust. And the fundamental grievances over land distribution, inequalities in wealth, and perceived historical injustices have not yet fully been addressed despite the fact that a new constitution is in place. Equally troubling is the culture of impunity that has long existed in Kenya, whereby perpetrators of violence are not held to account. The periodic cycle of violence during elections now spans several election rounds, dating back to 1991. Many of the same politicians have been repeatedly implicated in violence, particularly in the Rift Valley. For these actors, violence and polarization are useful electoral strategies. The failure to punish political leaders means that they have little incentive to refrain from such behaviour in the future.

Third, there is a danger of an escalation of forces prior to the next election in 2012. Having suffered during the post-election violence, the affected communities may take precautionary measures in advance of the next election cycle. The danger is that the desire by each community to protect its members may result in a security dilemma in which both sides ratchet up their capacity to carry out violence. If this occurs, the potential for large-scale violence is certainly real. Finally, there is the danger that the Grand Coalition could collapse prior to the next election, sparking renewed conflict. The Grand Coalition's durability is vital to the maintenance of peace in Kenya. To date, there have been disagreements between the Coalition partners, but none of these have so far jeopardized the coalition. However, the government is slated to address a number of divisive issues in the coming years, including

constitutional review, prosecution of alleged perpetrators, and land reform, among others. These issues will put the coalition to a test.

4.9 Concluding Remarks on the Power-Sharing Arrangement

With Kenya's power-sharing accord being approximately three years old, some preliminary lessons can be drawn from it. The first lesson relates to the role played by the mediator in power-sharing negotiations. Kofi Annan's extraordinary skill and dedication were extremely important, both in terms of reaching the agreement and sustaining it over time. At crucial junctures during the negotiations process, Annan proved particularly adept at breaking through stalemates, marginalising hardliners, and narrowing the focus of the agreement to issues that could realistically be resolved through negotiations. Moreover, Annan has been actively involved in the sustenance of the agreement since it was signed, returning to Kenya during the crisis over the naming of cabinet members and again to receive the findings of the commissions of inquiry.

Secondly, the Kenyan experience illustrates the point that in post-conflict negotiations there is often a trade-off between short-term and long-term goals. In Kenya it proved expedient to defer many divisive issues during the negotiations, in order to limit the scope of the agreement and produce an accord. However, deferring fundamental issues, such as constitutional reform, land reform, and perceived inequalities between ethnic groups, means that such issues may not be addressed at all or may derail the peace accord in subsequent years. Thirdly, the temporary nature of the agreement appears to offer benefits while also creating risks. The current arrangement seems to have

succeeded in striking a healthy balance between competition and inclusion. By not allocating any fixed positions of power, the agreement forces the parties to continue competing in the electoral arena. This maintains the incentive for the parties to act as checks against each other within the government. Yet, the temporary nature of the agreement also raises the possibility that renewed conflict will occur over basic issues of political inclusion and exclusion in coming elections. The final lesson that emerges from the Kenyan case is that the success of the power sharing agreement in large part hinges on the political will of the two sides. Existing research on peace-keeping agreements suggests that a third-party enforcer is necessary because parties to such deals cannot be trusted to honour the agreement.³⁵⁰ No such third-party enforcer has been available in Kenya. It is therefore largely up to the signatories to determine whether the agreement will succeed or fail. Another line of research into the durability of power-sharing agreements suggests that the details of the agreement account for its success or failure.³⁵¹ Yet, Kenya's power-sharing agreement lacks most of the elements that have been found to sustain such arrangements elsewhere. Instead, the Kenyan deal includes only very minimal guarantees of inclusion and outlines broad principles for power-sharing. Again, this points to the importance of political leadership in sustaining the arrangement. Given that many guarantees are not specified in the agreement, its durability will depend on how it is implemented over time by the signatories.

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4.10 Devolved Government and in the New Constitutional Law

The debate over devolved government has been the single most highly contested and divisive question in the last two decades of Kenya's history. In fact it has been considered as the remedy in agenda four of the power-sharing negotiations discussed above in that it will ensure equal distribution of the country's resources. Preceding its inclusion in the recently promulgated Constitution and up till now, it had and continues to be advanced as the ultimate means of realising equitable distribution of resources, managing the country's ethnic diversity amongst other equitable national goals. The divisiveness surrounding devolved government has centred on a lack of agreement on what form such devolution should take. At long last, so it seems, a design, enunciated under chapter eleven of the Constitution of Kenya 2010, has been agreed upon. This piece examines this design; its potential perils and possibilities for success. Given that such an examination cannot bypass the historiography of Kenya's post-independence discourse, only a skeletal and targeted mention of this historical narrative will be provided for here. In conclusion, this chapter finds that the efficacy of a devolved system of government does not lie in the beauty and intricacy with which it is tailored but more with the resolute and dedicated practice of constitutional principles; in the essence constitutionalism.

4.11 Devolved Government as a Form of Decentralisation

In the most general of terms, decentralisation refers to the transfer of authority from a central government to a sub-national entity.³⁵² Beyond this general definition, the process of decentralisation is a complex undertaking, taking on different meanings in different contexts and according to the desires and plans of those in charge of its design and implementation.

4.11.1 Forms of Decentralisation

There are various ways in which a government may decentralise power to the sub-national level. These are deconcentration, delegation and devolution or devolved government. Deconcentration is the delegation of certain decision making powers to lower, provincial or local levels of the central government.³⁵³ It has a peculiar characteristic in that it is one and at the same time a form of centralisation and decentralisation. In this case, decision making authority is shifted from one locality (the capital) and one individual (the president) to lower levels of the government.³⁵⁴ However, although financial and management responsibility may be shifted to the local units, there remains the hierarchical dependence of the local authority to the central government for appointments, assignments and salaries.³⁵⁵ Deconcentration is the weakest form of decentralisation used mostly in unitary states. This is the typical system of government that Kenya operated under since 1979. Despite its limitations,

³⁵² Boko, *Sylvain, Decentralization and Reform in Africa*, Kluwer Academic Publishers,. 2002, G S Boko, Sylvain, *Decentralization and Reform in Africa*, Kluwer Academic Publishers,. 2002 and D A Rondinelli (Eds.) *Decentralisation and Development: Polity Implementation in Developing Countries* (1983) at 19.

³⁵³ Boko as note 1 above.

³⁵⁴ Id

³⁵⁵ R Crook & J Manor *Democracy and Decentralisation in South-East Asia and West Africa: Participation, Accountability, and Performance* (1998) 11- 12. See also Boko as note 1 above; Cheema and Rondinelli as note 1 above.

deconcentration, if properly carried out (e.g. if the central government provides its local representatives with the means to adequately carry out their devolved functions) can help improve the efficiency and effectiveness of public good provision and service delivery. The case of Rwanda is often given as a case in point. The presumption under a deconcentrated arrangement is that the central government's local representatives are closer to the local populations and can better respond to the local interests than decision makers in the capital city. However, as illustrated above, it does not involve any real transfer of authority; and does not involve independent local governments that are wholly elected or accountable to the local populations. As such any benefit of deconcentration in responding to the preferences of the local communities is limited and largely dependent of political will.

In the case of delegation, the responsibility for decision making with respect to public functions administration is transferred to the semi-autonomous organisations or units that are not wholly under the control of government.³⁵⁶ Such organisations as housing or transportation authorities, public enterprises, regional development corporations etc. may enjoy ample discretion in decision making and may not be subject to the same constraints as regular service personnel.³⁵⁷ They may even be able to charge user fees. Delegation remains a limited form of decentralisation with the difference between it and full political decentralisation being that the lower level organisations to which power is transferred remain ultimately accountable to the central government. Delegation is a more extensive form of decentralisation than deconcentration

³⁵⁶ W Oyugi 'Decentralisation for Good Governance and Development' (2000) 21 *Regional Development Dialogue* 3.

³⁵⁷ Id.

and it is one way to balance local and national government interests. In some cases it may involve a principal-agent type of a relationship in which the central government is the principal and local organisations are the agents.³⁵⁸ In that case an issue that arises concerns finding ways to provide incentives that will induce the local, self-interested agent to behave in ways that are as close as possible to the central government's wishes, the principal situation.

Devolution or devolved government is a form of decentralisation in which the authority for decision making with respect to finance and management is transferred to quasi-autonomous units of local government.³⁵⁹ In other words, devolution is a political concept that denotes the transfer of political, administrative and legal authority, power and responsibility from the centre to lower level units of government created by the national constitution. In a devolved political system, the lower level units of government to which power, authority and responsibility has been transferred (devolved) are more or less autonomous from each other.³⁶⁰ This means that any one level of government is not under any obligation to refer to or seek authority from the centre in order to make and or implement decisions that fall within their exclusive jurisdiction. Devolution forms the foundation for political decentralisation in that it usually involves the transfer of responsibilities to municipalities that elect their own mayors and councils, raise their own revenues and are able to make investment decisions independently of the central government. In such a

³⁵⁸ Oyugi as note 5 above.

³⁵⁹ J C Ribot, African Decentralisation: Local Actors, Powers and Accountability, Democracy, Governance and Human Rights Paper Number 8, 2002 7.

³⁶⁰ Id.

system, local governments have legally recognised geographical boundaries within which they exercise their authority and perform public functions.

4.11.2 The Content of Devolution

Decentralisation may be political, administrative, fiscal or economic. Given that this chapter deals with devolved government as the form of decentralisation under the Constitution of Kenya 2010, the following segment discusses these three methods of decentralisation under the banner of devolution. Administrative devolution refers to the transfer of responsibility for the planning, financing and management of selected public functions from the central government to lower tier units of the government.³⁶¹ These might be field units of government, semi-autonomous public authorities or corporations or regional authorities. Political devolution consists of the creation of sub-national levels of government that are endowed with autonomous decision making power.³⁶² Generally, political devolution is more likely to be successful when conducted within the framework of a multiparty, participatory, grassroots-based system. The sub-national entities (state, provincial district governments, municipalities or counties as the case may be) to which power is devolved in the course of political devolution must be legitimately elected local governments which have legal authority conferred onto them by the people who elected them and enjoy financial autonomy. Constitutional or statutory reforms are often required to strengthen political devolution and establish the credibility of the process. These reforms must confer upon local communities the abilities to freely elect their representatives and the right to self

³⁶¹ See Cheema and Rondinelli as note 1 above.

³⁶² Id.

determination within the law. For example the Constitution of Benin, adopted in December 1990, engages the country on the path of devolved government through elected councils.³⁶³ Subsequently, five different laws have been passed to facilitate the implementation of this process.³⁶⁴ In the Constitution of Mali, under Articles 97 and 98, the autonomy of local communities is provided for and a subsequent implementation law determines the specific structure and functions of devolved local communities.³⁶⁵ Likewise, the Constitution of Burkina Faso devotes Articles 143-145 to the creation of autonomous local communities and various legislative pieces thereafter spell out the specifics of the devolution process.³⁶⁶ The Constitution of Kenya 2010, is the most explicit of the examples so far given devoting an entire chapter comprising of 27 Articles to “Devolved Government”. In the Kenyan case as well, Article 200 provides for the enactment of legislation to specify the details of the process of devolution but a fairly comprehensive outline of the structures and functions of autonomous local governments is constitutionally enshrined lending the ensuing process hefty weight by reducing the possibility of political manipulation through various interpretations of the constitution.

Fiscal devolution refers to the definition and alignment of monetary functions among the different levels of government.³⁶⁷ The responsibilities of which level of governments sets and collects taxes or which tier undertakes what

³⁶³ Boko as note 1 above at 17.

³⁶⁴ Boko as note 1 above at 18.

³⁶⁵ Same as above

³⁶⁶ Same as above.

³⁶⁷ P Smoke, *Fiscal Decentralisation in Developing Countries: A Review of Current Concepts and Practice* United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programme Paper Number 2, February 2001, 9.

expenditures ought to be clearly spelt out. Fiscal devolution if not clearly structured may altogether derail an otherwise plausible devolution program; that is if it is not made clear how local governments are to raise the revenues that they need to face their new responsibilities. A fiscal devolution program must in a straightforward way delineate whether and on what basis local governments can self-finance or recover costs through user charges. It must clearly specify what types and what levels of intergovernmental transfers are undertaken; whether municipalities or counties as the case may be can expand local revenues through property taxes, sales taxes or indirect taxes; whether there is to be any type of co-financing arrangements between the central government and local government; and whether municipalities have the authority to borrow and mobilise funds from local, national or international sources. Economic or market devolution consists of privatisation and deregulation.³⁶⁸ Both of these forms of reforms shift the responsibility for provision of goods and delivery of services from the central government to the private sector. When a government undertakes economic or market devolution reforms, it allows functions that had previously been the primary responsibility of the state to be carried out by private corporations, community groups, cooperatives and non-governmental organisations.³⁶⁹ Generally, economic devolution takes place within the framework of an economic liberalisation program. It can only succeed if the legal constraints on private sector participation in service provision and delivery are removed, thereby allowing competition to take hold between the different private providers. More often than not, these different styles of devolution are carried out simultaneously making it a fairly complex process. In the end, a well designed program of

³⁶⁸ Id.

³⁶⁹ P Smoke as above.

devolution must contain all four approaches to devolution. Political devolution without administrative devolution is possible but probably ineffective. By the same token, the devolution of administrative and political decision making powers to the lower tiers of government without proper financial authority is most likely short lived. Finally, economic devolution is important because the private sector is often more creative than government entities in devising efficient ways of producing and providing a given good or service, making government provision of such a good or service an inefficient use of societal resources.

4.12 The Road Towards Devolved Government in Kenya: Brief Historical Narrative

Kenya's journey towards the present day devolved system can be traced to a decentralised arrangement in the form of deconcentration or the designation of certain decision making powers to lower, provincial or local levels of the Central Government. Kenya has operated under this deconcentrated system through a local government system (provided for under the Local Government Act Cap 265 Laws of Kenya) which had a majority of the structures of a devolved system save for the lack of autonomy of the local levels and a their immense subordination to the central government. This local government system has its roots in the colonial period with the passing into law of the Village Headmen Ordinance in 1902 giving Provincial Commissioners (PCs) powers to appoint locals to be official headmen of a village or group of

villages.³⁷⁰ The headmen were charged with the maintenance of law and order, help in the collection of taxes and in the arbitration of minor cases in the village. In 1903, the colonial government introduced the Township Ordinance for the areas of Nairobi and Mombasa (which were the exclusive preserve of the white settlers) to be run by a District Commissioner (DC).³⁷¹ In 1912 the Local Authority Ordinance was passed setting up a native authority system which failed to be implemented because the colonial government and the settler community could not agree on the actual mechanics, functions and compositions of the authority system.³⁷² In 1924, the Local Native Councils were established under the Native Authority Ordinance. Their main objectives were to encourage and develop a sense of responsibility and duty towards the upcoming state amongst the chief elders and the native population. The Local Native Council was composed of the DC, Assistant DC, Headmen and other locals appointed by the PC.³⁷³ In 1926, a Local Government Commission was established to make recommendations on the structure and functions of a local government system in Kenya. Some of its recommendations were:

- i. A policy of separate development based on the segregation of the different races;
- ii. The establishment of District Councils in the settled area comprising of elected officials;

³⁷⁰ Njogu Gathata, Local Government System in Kenya Cap 265, Laws of Kenya: A Presentation to the North South Cooperation Between Municipal Council of Nyahururu and the Municipalities of Hatulla and Janakal of Finland on the 23rd August to 7th September (Unpublished)

³⁷¹ Id.

³⁷² Njogu as note 19 above.

³⁷³ Njogu as note 19 above.

- iii. The exclusion of Townships from the District Councils which were to have their own advisory committees.³⁷⁴

In 1928, the Local Government District Councils Ordinance was passed establishing District Councils in settled areas. The Municipal Councils Ordinance was also passed elevating Nairobi and Mombasa to the status of Municipalities. In 1930, the Revised Township Ordinance was passed creating two grades of Townships A and B. The DC was mandated to run the grade B Townships exclusively and grade A Townships with the help of an advisory committee. In 1937, a new Native Authority Ordinance was passed providing that Councillors to the Local Native Councils had to be elected by the people. In 1946, Locational Councils were created within the Local Native Councils to provide lower level self rule for the locals.³⁷⁵ In 1950, the Local Government African District Ordinance was passed elevating the Local Native Councils to African District Councils giving the African District Councils a number of powers like that to enter into contracts on their own behalf.³⁷⁶ In 1952, the County Councils Ordinance created the District Councils, County Councils, Urban District Councils and Rural District Councils.³⁷⁷ In 1963, Local Government Regulations were passed establishing a new system of African District Councils.³⁷⁸ Thereafter in 1968, the Transfer of Functions Local Government Act was passed stripping the Local authorities of key responsibilities and transferring them to the Central Government.³⁷⁹ Some of the powers withdrawn from the local

³⁷⁴ Njogu as above.

³⁷⁵ Njogu as above.

³⁷⁶ Njogu as note 19 above

³⁷⁷ Njogu as note 19 above

³⁷⁸ Njogu as note 19 above

³⁷⁹ Njogu as note 19 above

authorities were those of public health, education and road services. The only authorities that maintained a measure of power in these areas were the Municipalities and County Councils. In 1977, the Central Government officially became the major provider of these responsibilities with the enactment of the Local Government Act. Additionally, local authorities lost their financial stability with the abolishment of the Graduated Personal Tax (GPT).³⁸⁰

4.13 Present Day (Transitional) Local Government System

The present day local government system in Kenya is created under the Local Government Act Cap 265 of the Laws of Kenya (LGA) which establishes the various categories of local authorities. These categories comprise of Municipal Councils, County Councils and Town Councils. Municipal Councils are urban local authorities which are larger than County Councils and Town Councils. County Councils cover the rural country sides and are formed along district administrative boundaries. They provide services to rural area residents and have a structure similar to that of the Municipal Councils except that they are presided over by Chairmen instead of Mayors.³⁸¹ Town Councils are towns whose physical and population structure are a notch lower than those of Municipal Councils. They are towns waiting to be elevated to Municipal status upon attaining improved attributes.³⁸²

4.14 Local Government Structure

³⁸⁰ Njogu as note 19 above

³⁸¹ Njogu as note 19 above.

³⁸² Njogu as note 19 above

The local authorities are structured along civic and administrative functions. The civic functions are vested in elected and nominated councillors, the latter who should not exceed one third of the total number. Administrative functions are vested in the Town Clerks in the case of Municipal Councils and Town Councils and County Clerks in the County Councils.³⁸³ Other key administrative officers include the Treasurers, Engineers and Public Health Officers. Each local authority has the clerks department, treasurers department, work department and the environment department. In smaller local authorities, the environment and work department are fused into one. Its noteworthy that Municipal Councils are headed by Mayors while County and Town Councils are headed by Council Chairmen.

4.15 The Functioning of Local Government: The Committee and Full Council System

The local authorities function under a committee and full council system.³⁸⁴ Under this system, each local authority has a committee comprising members of the council supervised by the various relevant departmental heads. Matters pertaining to each of these departments are brought before the committee through notices of motion where they are deliberated upon and resolutions made.³⁸⁵ The manner and conduct of the debate is provided for by the LGA. Resolutions made at the committee level have to be tabled before a full council meeting which is the highest organ in the council under the chairmanship of

³⁸³ R Southall & G Wood 'Local Government and the Return to Multi-Partyism in Kenya' (1996) 95 *African Affairs* 501.

³⁸⁴ Local Government Act (Cap 265 Laws of Kenya).

³⁸⁵ Local Government Act (Cap 265 Laws of Kenya)

the Mayor or Council Chairman and comprised of the elected and nominated councillors. Once such a resolution is adopted at the full council meeting, it becomes policy. This policy then has to be approved by the Minister for Local Government, in the essence the Central Government.

4.16 Local Government's Power to Legislate: By-Laws

Local authorities can enact by-laws which are prohibitions on the conduct of persons within the various authorities that may disrupt public order and smooth running of socio-economic activities therein.³⁸⁶ These laws cover areas of general nuisance, health, environment and conduct of business. The supervisory and regulatory role of the council is performed through the application of these laws. As typical in a deconcentrated system of government, the Minister for Local Government in this case representative of the Central Government has immense powers rendering the system far from any resemblance of a devolved arrangement.. The Minister under the LGA has the powers in effect to approve or disapprove all matters resolved by the local authorities. With the enactment of the Constitution of Kenya 2010 which provides for a more comprehensive system of devolved government under Chapter 11, the current law is likely to be repealed and new legislation on the new system put in place. In fact, ostensibly foreseeing such a move, section 18 of the new Constitution provides that all local authorities established under the LGA existing immediately before the effective date continue to exist subject to any law that might be enacted.

³⁸⁶ Local Government Act (Cap 265 Laws of Kenya)

4.17 Devolution in the New Constitution

The principle of devolution or devolved government involves shared governance at the national level and self governance at the devolved level.³⁸⁷

At the national level, concise sharing mechanisms ensure that the concept of shared governance is realised while the same can be said of the devolved level which is fitted with similar self-governance mechanisms. The degree of devolution varies from one system to another. In certain instances, all three conventional national government functions i.e. executive, legislative and judicial are shared between the various tiers of government. In other instances, there is only a partial devolution of these functions. The choice as to what extent these functions are devolved depends on the specific needs of the society for which they are so being devolved. With the enactment of the new Constitution of Kenya 2010, central to the organisation of government in Kenya is the principle of devolved government. Under this principle, Kenya operates under two constitutionally autonomous levels of government: the National Government and the County Government. This division plays an important role in determination and implementation of public policy and the management of public finances. This segment discusses the basic framework and operation of devolved government in Kenya with specific emphasis on the different level of government, the formal division of powers, the operation of fiscal devolution and the key means of interaction or relationship between the different governments.

³⁸⁷ Mutakha Kangu *Moi University Law Journal Law Africa Publishing Ltd*, Volume 1 April 2008 105.

4.18 National Government in Kenya

While there isn't a specific section defining the National Government as exists for example in the Canadian Constitution³⁸⁸, a concerted reading of Article 1(3) outlines the National Government as comprising of the Executive, Legislature and Judiciary. It is noteworthy that save for the Judiciary, certain Executive and Legislative functions are shared between the National Government and the County Governments. This chapter discusses chapter eleven of the new Constitution which focuses on the County Government and will refer to the National Government in so far as it seeks to explain how the devolved system is intended to function. The National Government is examined in more detail under chapter dealing with separation of powers.

4.19 County Government System

The County Government comprises of the County Assembly and the County Executive Committee.³⁸⁹ The County Assembly is comprised of elected members representing the various wards within the county and has legislative authority conferred upon it by Article 185(1). County Assembly members are not explicitly referred to as councillors in the chapter it remains to be seen the term to be accorded to the elected representatives of the various wards as envisaged in the constitution. The County Assembly has the power to make any laws necessary for or incidental to, the effective performance of the functions

³⁸⁸ "Constitution Acts 1867 to 1982." *Government of Canada*. 17 November 2007. Available at <http://laws.justice.gc.ca/en/const/index.html> [19]

³⁸⁹ Constitution of Kenya 2010, Article 176 (1) 2010.

and exercise of the powers of the County Government as stipulated under the Fourth Schedule.³⁹⁰ Additionally, a County Assembly, while respecting the principle of the separation of powers, may exercise oversight over the County Executive Committee and any other county executive organs.³⁹¹ It may also receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of its infrastructure and institutions.³⁹² The County Executive Committee is headed by a Governor, deputised by a Deputy Governor (who are both directly elected by the electorate) and other members appointed by him with the approval of the County Assembly, from among persons who are not members of the Assembly.³⁹³ The Committee is mandated to;

- a) implement county legislation;
- b) implement, within the county, national legislation to the extent that the legislation so requires;
- c) manage and coordinate the functions of the county administration and its departments;
- d) perform any other functions conferred on it by the Constitution or national legislation.³⁹⁴

The County Executive Committee may also prepare proposed legislation for consideration by the County Assembly and provide the Assembly with full and regular reports on matters relating to the county.³⁹⁵

³⁹⁰ Fourth Schedule to the Constitution of Kenya 2010.

³⁹¹ Constitution of Kenya 2010.

³⁹² Constitution of Kenya 2010

³⁹³ Constitution of Kenya 2010

³⁹⁴ Constitution of Kenya 2010.

4.20 Distribution of Functions Between the National Government and the County Governments

The Fourth Schedule to the Constitution grants various powers to the National and County Governments. The National Government has control over foreign affairs, foreign policy and international trade, the use of international waters and water resources, immigration and citizenship, the relationship between religion and state, language policy and the promotion of official and local languages, national defence and the use of the national defence services, courts, intellectual property rights, labour standards, consumer protection, including standards for social security and professional pension plans, education policy, standards, curricula, examinations and the granting of university charters.³⁹⁶ Other powers of the National Government include agricultural policy, universities, tertiary educational institutions and other institutions of research and higher learning and primary schools , special education, secondary schools and special education institutions. The County Governments share Executive and Legislative functions (the exact degree of both functions to be determined by implementing legislation) with the National Government in areas of agriculture, health services, education, transport and communications, veterinary policy, housing and public works just to mention a few.³⁹⁷ In these areas of shared jurisdiction decisions on the structure and management will have to be based on the principle of shared governance earlier discussed. These areas can be referred to as those in which concurrent

³⁹⁵ Constitution of Kenya 2010

³⁹⁶ Fourth Schedule to the Constitution of Kenya 2010.

³⁹⁷ Id

powers are vested both levels of government. The nature of these powers will presumably be detailed in implementing legislation which is to follow as provided for in the Fifth Schedule.

International constitutional practice has shown that distribution of functions in a devolved system of government, Kenya included, are not cast in stone and may be changed either through constitutional amendments or judicial interpretation of these functions.³⁹⁸ On changes through constitutional amendments, Chapter 16 provides for the procedure to be followed to effect such a change. Given that an amendment relating to the distribution of functions between the two levels of government touches on the structure of the devolved system of government as envisaged under Article 255(1)(i), such procedure must involve the introduction of a Bill in either Houses of Parliament and its passing in both Houses. After Presidential Assent, the Bill must be put before a national referendum in which a simple majority is required to make the Bill law.³⁹⁹ As for changes through judicial interpretation, the Courts under Chapter 10 are given a constitutional role to make decisions on issues touching on the Constitution including its interpretation. As is the case in the Commonwealth, these judicial decisions can in turn, have transformational impacts on the nature and operation of Kenya's devolved system of government.

4.21 Key Elements of Fiscal Devolution in the Kenyan System

³⁹⁸ Mutakha Kangu as note 36 above.

³⁹⁹ Constitution of Kenya 2010.

Fiscal devolution refers to the complex interrelationship between the National Government and the County Governments in the area of finance.⁴⁰⁰ Four elements are central to this financial interrelationship namely national-county taxation powers, revenue allocation, financial equalisation and county revenue funds.

4.21.1 National-County Taxation Powers

Both the National and County Governments have the constitutional power to impose certain direct forms of taxation. Under Article 209, only the National Government may impose income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. County Governments on the other hand may impose property rates, entertainment taxes and any other tax that it is authorised by law. From the foregoing provisions, it is apparent that the responsibility for revenue generation is unequally distributed between the national, county spheres of government. The National Government's taxation power is much more far-reaching while the County Government has limited taxation and borrowing powers. Under Article 212, a County Government has the power to borrow funds from whatever source so long as the sum to be borrowed can be guaranteed by the National Government in addition to being approved by its local Assembly.

4.21.2 Revenue Allocation: Commission on Revenue Allocation

⁴⁰⁰ Mutakha Kangu as note 36 above.

Part 4 of Chapter 12 provides for the equitable sharing of revenue raised by the National Government. Article 215 establishes a Commission on Revenue Allocation for this purpose.⁴⁰¹ The Commission consists of a chairperson, nominated by the President and approved by the National Assembly; two persons nominated by the political parties represented in the National Assembly according to their proportion of members in the Assembly; five persons nominated by the political parties represented in the Senate according to their proportion of members in the Senate and the Principal Secretary in the Ministry of Finance.⁴⁰² Article 216 which provides for the functions of the Commission stipulates that its principal function is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the National and County Governments; and among the County Governments. The Commission is also mandated to make recommendations on other matters concerning the financing of, and financial management by, County Governments, as required by the Constitution and national legislation.⁴⁰³

The basis for allocating a share of the national revenue to the counties is determined by the Senate once every five years by resolution.⁴⁰⁴ In determining the basis of revenue sharing, the Senate is required to take into account take the criteria under Article 203 (1) into account (which provides a detailed list of criteria for determining the “equitable shares”). The Senate is also required to request and consider recommendations from the Commission

⁴⁰¹ Constitution of Kenya 2010.

⁴⁰² Constitution of Kenya 2010.

⁴⁰³ Constitution of Kenya 2010.

⁴⁰⁴ Constitution of Kenya 2010.

on Revenue Allocation, consult the County Governors, the Cabinet Secretary responsible for finance and any organisation of County Governments; and invite members of the public, including professional bodies, to make submissions to it on the matter.

4.21.3 Financial Equalisation in the New Constitution

The purpose of the introduction of the concept of financial equalisation in the Constitution is in line with a commitment to fairness and equity which are central to the overall objective of devolved government under Article 174.⁴⁰⁵ In an ethnically diverse country like Kenya, financial equalisation is meant to ensure that across the country, people have access to reasonably comparable public services at reasonably comparable levels. Kenya is not the only country that provides for a mechanism for redistributing national revenues and addressing disparities among Counties or Provinces in other jurisdictions. In fact, many countries that are federations or practice some form of devolved government involving a central government and several regional governments have similar equalisation systems. Examples are Germany, Switzerland, Australia, India, Pakistan, and South Africa. The United Kingdom for example, has an equalisation approach that takes into account the special fiscal needs of Scotland, Wales, and Northern Ireland.⁴⁰⁶ The following can be deduced as the basics behind the incorporation of financial equalisation as provided for in the Kenyan Constitution:

⁴⁰⁵ Constitution of Kenya 2010.

⁴⁰⁶ Achieving a National Purpose: Putting Equalisation Back on Track, Expert Panel on Equalisation and Territorial Formulae

- a) In accordance with Article 204 (1), the equalisation programme is funded entirely by the national government using taxes paid by Kenyans across the country and not from one or more regions;
- b) The objective of the programme is to address the economic marginalisation of to be defined areas of the country. Article 204 (2) provides that the Equalisation Fund established there under shall only be used to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation. In the essence, those areas or groups that have less ability to pay for public services are entitled to equalisation payments.
- c) According to Article 204 (2) read together with 204 (3) (b), the equalisation payments an area or group receives from the National Government may be conditional; that is they may have strings attached. In such instance the areas or groups have to account to the National Government on how these funds are put to use.
- d) Equalisation is only designed to raise the areas or groups up to a common standard. Areas that enjoy provision of basic services above the common standard do not see any reductions as a result of equalisation.
- e) Equalisation is designed to fill the gap between an area's own capacity to provide basic services to its inhabitants and a common standard across the

country. It is not designed as a permanent entitlement. As an area's or group's wealth increases, the principle dictates that it should receive less money in equalisation payments and none whatsoever if its capacity to provide attains the common standard.⁴⁰⁷

4.21.4 County Revenue Funds

Article 207 (1) establishes a Revenue Fund for each County Government, into which all moneys raised by or on behalf of the County Government are paid into with the exception of money reasonably excluded by an Act of Parliament. These moneys can only be withdrawn from the Revenue Fund only as a charge against the Fund that is provided for by an Act of Parliament or by legislation of the county or as authorised by an appropriation by legislation of the county.⁴⁰⁸ Furthermore, money shall not be withdrawn from the Fund unless the Controller of Budget has approved the withdrawal. An Act of Parliament may make further provision for the withdrawal of funds from a County Revenue Fund and provide for the establishment of other funds by counties and the management of those funds.

4.22 Issues for Consideration in the Enactment of Implementation Legislation

⁴⁰⁷ Marshall, Jim. *Seven Issues in Equalization: A Discussion* Saskatchewan Institute of Public Policy, 2005 available at <http://www.eqttf-pfft.ca/submissions/SevenIssuesinEqualization.pdf>.

⁴⁰⁸ Constitution of Kenya 2010

4.22.1 Financial Equalisation and Composition of the Revenue Allocation Commission

In a devolved system of governance with a financial equalisation program, the most important institution in the realisation of the concept of equalisation is the Revenue Allocation Commission which may be referred to differently depending on the jurisdiction. Given that the function of this Commission is normally to make recommendations to both Parliament and Provincial or County Legislatures (in the case of Kenya) on the equitable sharing of national revenue between the national and local spheres of government, its structure and composition is of paramount importance. In the case of South Africa, the creation of a Financial and Fiscal Commission (FFC) with a membership drawn from all the nine provinces of the country, enabled the depoliticisation of the revenue sharing process and averted a stalemate in the promulgation of the 1996 Constitution.⁴⁰⁹ It was argued that whereas political parties are engines through which the people express their values and views on governance, pegging revenue allocation on political party representation in Parliament would be unsound because this would mean subjecting the peoples of minority party representations in to the desires of those of majority party representation. For example, if the Western Cape Province is a Democratic Alliance Party (DP) zone but the majority party in Parliament is the African National Congress (ANC), the FFC would be structured with a majority ANC representation. In this way, the DP and its followers in the Western Cape, would subject to the wishes of ANC representation irrespective of their

⁴⁰⁹ Article 220, Constitution of South Africa 1996.

majority support for the DP within their own province defeating the object and purpose of devolved governance.

Precariously, in Kenya, Article 215 of the Constitution which establishes the Commission on Revenue Allocation provides that its membership shall comprise of inter alia persons nominated by the political parties represented in the National Assembly and Senate according to their proportion of members in the Assembly or Senate respectively.⁴¹⁰ While it may be explicable that this provision must have been arrived at owing to the political temperatures at the time, so as to reach a compromise, it is gravely erroneous. Just as in the case of South Africa illustrated above, pegging the membership of the Kenyan Commission on Revenue Allocation on political party representation in either house of Parliament, would subject counties with minority party representation to the desires of the majority party irrespective their majority stature within their counties. An example would be where the Orange Democratic Movement (ODM) has a majority in both houses of Parliament and the Party of National Unity (PNU) has a minority in the same. Taking an example of a PNU stronghold County such as Nyeri County, ODM through its numerical advantage in the Commission would have the power to influence revenue allocation to Nyeri County overriding the wishes and concerns of bona fide representatives of the County. In as much as this influence may be legitimate in its own right, it is subject to party politics thereby leaving the county residents and their representatives subject to the majority irrespective of how well informed their concerns may be. This state of affairs would go

⁴¹⁰ Constitution of Kenya 2010.

against the fundamental concept of shared governance which is central to any devolved system.

4.22.2 Developmental Devolved Government

Devolved government has been introduced into Kenya's constitutional landscape with numerous promises chief amongst them is the equal distribution of national resources and the reduction of poverty.⁴¹¹ This section explores the potential contribution of fiscal devolution in alleviating poverty in Kenya. In 2001, recognizing the need to assist impoverished nations more aggressively, United Nations (UN) member states adopted the Millennium Development Goals (MDGs). The MDGs are eight international development goals that all 192 UN member states and at least 23 international organisations have agreed to achieve by the year 2015. They include eradicating extreme poverty, reducing child mortality rates, fighting disease epidemics such as AIDS, and developing a global partnership for development. Whereas Kenya has some of the continent's wealthiest individuals, it is home to one of the world's largest slums. The Kenya Household Budget Survey (KHBS) suggests that in 2005/6 almost half of the population (47 percent) lived in poverty, of which 85 percent were in rural areas.⁴¹² The eradication of poverty, and of related conditions such as inequity and unequal access to basic social needs, is an essential part of Kenya's development agenda, following the government's recognition that long-term political and social stability will otherwise be

⁴¹¹ H.W.O Okoth Ogendo 'The Politics of Constitutional Change in Kenya since Independence, 1963-1969' (1972) 71 *African Affairs* 9.

⁴¹² Kenya Poverty And Inequality Assessment Volume I: Synthesis Report June 2008 Poverty Reduction and Economic Management Unit Africa Region.

unattainable. Some elements require action by the National Government, while others put the onus on County Governments. Within the framework of fiscal devolution County Governments are set to play an important role in the growth and development of Kenya and by implication in the alleviation of poverty going by the objectives of devolution as set out in the Constitution. In exploring the responsibilities of County Governments in alleviating poverty, this section will provide a workable definition of the pro-poor development concept, conceptualise fiscal devolution as a key component of poverty alleviation strategy and discuss the sharing of social responsibilities among the two levels of government in the context of poverty alleviation. Finally, it will examine the relationship between fiscal devolution and the principles of good governance.

4.22.3 Devolved Government and Poverty Eradication

Poverty, which has been defined as the inability to attain a minimal standard of living, has been measured in terms of basic consumption needs or the income required to meet these needs. An important rationale for devolved government is that County Governments, are closer to the people and therefore better equipped to obtain information on local preferences and needs at lower cost and are more likely to conceive and implement pro-poor policies.⁴¹³ Fiscal devolution is meant to boost public-sector efficiency in service delivery, so that the scarce public resources expended on health, education and other social services. It can generate gains in financing, efficiency and quality by devolving resources and decision-making powers to subnational governments for the delivery of services. Fiscal devolution also enhances the

⁴¹³ Etienne Yemek, Understanding fiscal decentralisation in South Africa available at <http://www.idasa.org.za>

accountability and transparency of public institutions in policy-making by bringing expenditure assignments closer to revenue sources and hence to the citizenry. The quality of service provision can also be enhanced since County Governments will be more sensitive to variations in local requirements and open to feedback from the users of services.

Therefore, fiscal devolution can be applied in poverty alleviation strategies in a number of ways. Firstly, to provide opportunities to the poor. Secondly, to empower the poor to take advantage of these opportunities. And thirdly, to protect the poor against their own vulnerability.⁴¹⁴ All these steps involve the implementation of pro-poor interventions within the framework of cooperation between the two levels of government. However, the flipside of this argument is that if not properly implemented devolved government can be a way for the National Government to avoid carrying out its responsibilities. Fiscal devolution can be financially attractive to National Governments because by so doing they shift part of their burden of financing services to County Governments and private providers. In the quest to use fiscal devolution as a pathway to poverty eradication, Kenya could borrow leave from the South African experience, in which an important feature of public finance in the South African devolved system is the pro-poor budgeting. Pro-poor budgeting is financial planning in a manner that poor people are poised to benefit in absolute terms, as reflected in some agreed measure of poverty such as the headcount index. Pro-poor budgeting on the expenditure side is used to address social inequalities and inequities at all levels of government to enhance effective redistribution. The rationale here is that if public goods and services

⁴¹⁴ Etienne Yemek, as above.

are available to all citizens, then people with no income can consume as much as anyone else. The reasoning here is that if essential goods and services become increasingly available to the poor, not only is their state of relative poverty lessened but so is their inequality in relation to others who already have access to these goods and services. An example would be where a newly opened public clinic makes it possible for a previously vulnerable poor child to be immunised against a disease, then, in relation to that disease, the child would be fully equal to all other vaccinated children, rich or poor. Furthermore, the child's life expectancy would be prolonged, closing another gap relative to wealthier children.

4.22.4 Good Governance and Devolved Government

Governance refers to the complex mechanisms and processes used in implementing policy and institutionalising rules and norms within any organisation, institution or society.⁴¹⁵ It involves a combined effort and participation of all stakeholders including state institutions and civil society. Existing literature views good governance as a government's responsiveness to the needs and wishes of citizens for example, bringing the responsibility for providing public services closer to citizens.⁴¹⁶ Former UN Secretary General has referred to good governance as a *sine qua non* for economic and social development.⁴¹⁷ Further, that it is perhaps the single most important factor in eradicating poverty and promoting development. Good governance entails the existence of efficient and accountable institutions. According to this view,

⁴¹⁵ Etienne as note 63 above.

⁴¹⁶ Id.

⁴¹⁷ Id.

governance has to do with the manner in which responsibilities are devolved to government bodies.⁴¹⁸ At all levels, governments must take responsibility and be accountable. In the context of Kenya's devolved system of government, this means that the National Government must enable the County Governments to fulfil these obligations.

The principles of good governance require government institutions to be efficient, effective and consistent. This approach is closely connected to the concepts of transparency, integrity and policy coherence. Good governance mechanisms and rules aim at promoting development, protecting human rights, guiding the respect for the rule of law and accommodating all stakeholders including people to participate in decision-making processes that affect their lives. In theory, the reduction of poverty is more likely to be assured when the people for whom pro-poor interventions are meant are allowed, through empowerment, to effectively participate in these interventions.⁴¹⁹ Therefore devolved government is assumed to facilitate redistribution and poverty alleviation since it brings greater local level control over resources and their utilisation. However, good governance requires institutional capacity and mechanisms to ensure accountability through the capacity to monitor and enforce rules and to regulate societal activities in the public interest. Such requirements involve assigning responsibilities to other state institutions in controlling and verifying that government decisions are formulated and implemented in line with its legal commitments. These institutions will have to include an integrated public sector and relevant administrative legislation, efficient parliamentary oversight, an independent

⁴¹⁸ Id.

⁴¹⁹ Id.

judiciary system and an adequate and independent auditing body. Under a devolved fiscal system, good governance ought to ensure that public resources are effectively and efficiently managed. Additionally, it must ensure effective and sustainable resource mobilisation and its efficient use. In this regard, government and public institutions must ensure greater transparency, predictability, and accountability in the decision-making process. They must provide reliable, relevant and timely information about their activities.

4.22.5 The Promises of Devolved Government: Enhanced Public Service Delivery?

The success of a devolved system of government goes beyond its architecture and design as outlined in the Constitution and Legislative Acts. In fact there is no automatic assurance that a devolved system of government, no matter how well designed, will lead to improvements in public service delivery.⁴²⁰ Where institutional and technical capacity is lacking at the county or local level to deliver even the most basic services coupled with difficulties that local political elites may pose, public service delivery may be dismal if not non-existent. Secondly, even with a plausible pro-poor budgeting scheme in place, the National Government may be risk-taking on the macro-economic level and thereby increasing its vulnerability to financial deficit and an over-expansion of its public sector.⁴²¹ Other problematic issues relating to devolved governance are agreement on a universal quality standard of service provision, which would then enable adequate financial planning for mechanisms like financial

⁴²⁰ Boko as note 1 above.

⁴²¹ Boko as note 1 above

equalisation.⁴²² Finally, where national resources are inadequate, to ensure efficiency, coverage and quality of public service delivery, the efficacy of the devolved system is likely to be hampered despite the fact that financial responsibility for service provision has been delegated from National to County governments. This evidence suggests that the National Government's challenge is to identify the conditions in which increased participation by County Governments enhances the equity, quality and efficiency. Robinson has pointed out the following leading requirements for the success of a devolved system of governance in addition to its design:

- a) Political commitment, for the reason that successful pro-poor devolved service delivery is associated with governing parties that are politically committed to providing opportunities to the poor;
- b) Effective leadership plays a role in fostering local innovation in response to local needs and priorities;
- c) Mobilisation (of political parties, civil society organisations, trade unions and social movements) is essential, in order to take advantage of increased powers and resources, to take part in consultative arenas and to engage in public protest over inadequate service delivery;
- d) Institutionalised participation in decision-making, through consultative bodies designed to provide civic oversight over particular services,

⁴²²

Boko as note 1 above.

facilitating and widening public deliberation, planning and implementation;

- e) Adequate national resources are critical to ensure the equity, quality and efficiency of public services. Inadequate resources often result in poor service outcomes no matter the beauty of design and political commitment;
- f) Technical and managerial capacity is a key determinant of the performance of local officials in relation to service delivery. In other words, the County Governments must be capable of optimising the use of available resources. This also assumes well functioning mechanisms with which the community can voice demands, channels through which authorities can translate these demands into action and instruments of government accountability.

4.22.5 Devolved Government: Bringing Governance Closer to the People Through Citizen Participation

One of the banners under which devolved government was campaigned for, was that it would bring governance closer to the citizenry. The first way in which a devolved system of government does this is by the election of local governments by citizenry. However, fiscal devolution may pose a particular challenge for citizen participation in local governance in view of its technical

complexity and critical significance for the delivery of public services.⁴²³ Participation in this area of devolved governance is likely to be restricted to select groups and individuals with the technical knowhow and would therefore tend to exclude the vast majority of ordinary citizens who pay taxes and consume services provided by local governments. Therefore, fiscal devolution ought to be perceived in its broadest sense as a process which is expected to enhance the opportunities for citizen participation as plainly bringing the decision-making processes closer to people. In so doing, it is then an important step towards creating an environment with opportunities for regular interactions between citizens and county levels of government. Robinson has suggested that despite its complexity, citizens and civil society can participate in fiscal devolution through:

- a) the rules and formulae governing the allocation of grants and revenue-raising powers to local governments;
- b) the decision-making processes concerning the sources and level of locally generated revenues;
- c) the allocation, utilisation and monitoring of earmarked financial transfers;
- d) decisions on the allocation of untied funds and locally generated resources;

⁴²³

Boko as note 1 above

- e) Resources allocated for supporting participatory processes in local governance activities, i.e. capacity-building for civil society and local government actors in participatory techniques.⁴²⁴

4.22.6 Devolved Government and Affirmative Action

Affirmative action is a deliberate policy or programme that is a deliberate policy or programme that seeks to remedy past discrimination by increasing the chances of the affected to participate in what they were previously denied. The object of affirmative action otherwise known as positive discrimination is to enhance the participation of marginalised groups in decision making and implementation and make a difference in the political climate and culture.⁴²⁵ The protection of rights for minorities and marginalised groups is classically provided for under the Bill of Rights. However, the Bill of Rights of itself is inadequate because experience has shown that its efficiency depends on access to courts and capacity of the judiciary give redress.⁴²⁶ That many questions relating to the Bill of Rights border on politics , their justiciability is more often than not impugned. The reasonable implication of this reality is that the Bill of Rights of itself need to be complemented by other devices such as is done by the concept of affirmative action.

The system of devolved government created under chapter eleven of the constitution, acknowledges and employs the principle of affirmative action. The

⁴²⁴ Boko as note 1 above

⁴²⁵ Boko as note 1 above

⁴²⁶ Boko as note 1 above.

chapter makes references to considerations based on gender, minorities and marginalised communities in its provisions. It may be strongly argued from the foregoing that women and ethnic minorities are implicitly considered as special groups in need of constitutional protection and affirmative action.⁴²⁷ Indeed a central theme of devolution the protection of minorities and marginalised groups. Some of the provisions that seek to foster and promote affirmative action include article 175 (c) which requires that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. This is bolstered by Article 177 (1)(c) through which the membership of the devolved units (county assemblies) must comprise of the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.

4.23 A Legislative Framework and Proposals for Incorporation in the Devolved Government Statute

Article 200 of the Constitution envisages the enactment of legislation by Parliament to give effect to the system of devolved government created. The chapter on devolved government is basically the foundation of a much more complex structure that is to be erected in more detail by the legislation envisaged under article 200. Given the skeletal nature of the provisions in the Constitution, this article cannot at the time generate fairly comprehensive model Devolution Act. However, in the following segment, the key issues that ought not go overlooked in the drafting of the Act are outlined.

⁴²⁷ Boko as note 1 above.

4.24 Concluding Remarks

The Devolved Government Act which is set to be enacted should contain a preamble broadly setting out the principles and objectives of devolution expounding or explicating the general principles of devolved government under articles 174 and 175 of the Constitution. The preamble should also set out the vision and aspirations of the people in creating a devolved government and in particular recognise the sovereignty of the people as the basis for devolution of state powers. The preliminary part should provide for the short title of the legislation on devolution and a concise section on interpretation to define the meaning of the key words and phrases used in the Act. The section on interpretation ought to be thorough so as to avoid ambiguities that would see the provisions subjected to numerous court cases for clarification. The part on the County Governments should comprise of articles or chapters on the County Executive Committees and County Assemblies. This chapter should designate the person(s) and title/name of the authority in whom executive power of the regional government is vested in. for purposes of this Section we shall suppose such person or authority shall be known as the Regional County Executive (RCE) This chapter should provide for ways or methods of appointing or electing the RCE, his terms of office and the qualification and condition for holding the said office. Provision for the powers, functions and privileges of the RCE should be made including the oath or affirmation the RCE must make or subscribe before entering upon his office. There should be provision for a Council of Ministers to aid and advise the RCE and setting out its powers, functions and privileges. The modalities for the appointment or election of the Council of Ministers should

be stipulated. It is prudent to make provision for appointment of an Auditor-General for the Region to advise the regional government on legal matters.

This Chapter should provide for the composition of the legislature and state whether the RCE will be a member, and if so, how he will relate to the legislature. The number of members of the regional legislatures should be stipulated. Provision on how the regional legislatures will discharge the functions and powers specified in the Constitution should be made. The Chapter should contain provision for duration of regional legislatures and the qualification for membership. Provisions on when and by whom the regional legislatures shall be summoned should be made including provisions on prorogation and dissolution of the regional legislatures. Provision should also be made on whether the RCEs will have the right to address the regional legislatures and send messages with respect to a Bill then pending in the legislature or otherwise. The Chapter should make provisions for the appointment or election, of the Speakers and Deputy Speakers of the regional legislatures. Their powers and privileges should be provided for. It should be provided how the Speaker or Deputy Speaker may vacate his office, resign or be removed. Provision should be made for other staff of the regional legislatures. The Chapter should make provision for how the regional legislatures shall conduct their business and provide for the powers, privileges and immunities of regional legislatures and their members. The provisions on a devolved system of government under the Constitution of Kenya 2010 are well thought out and provide a sound foundation upon which a more comprehensive piece of legislation may be enacted. Save for the issues

surrounding the Revenue Allocation Commission, namely its composition, it is a promising institution.

CHAPTER FIVE

**THE ELUSIVE SEARCH FOR A LASTING SOLUTION IN SOMALIA: MAKING A CASE
FOR A COMPREHENSIVE AUTONOMOUS ARRANGEMENT**

5. CHAPTER FIVE: THE ELUSIVE SEARCH FOR A LASTING SOLUTION IN SOMALIA: MAKING A CASE FOR A COMPREHENSIVE AUTONOMOUS ARRANGEMENT

5.1 Introduction

Somalia is often considered a failed state.⁴²⁸ It is indisputable that the project to build and sustain a modern state, with internal and external sovereignty as its defining characteristics has failed in Somalia. However, the continuous framing of Somalia as a case of state failure is an analytical strategy that must have definite limits. It must be pointed out that there exist two relatively peaceful and functioning regions of Somaliland and Puntland in the North and North-eastern regions respectively. The fact that Southern Somalia has been war torn for over a decade, has rendered the whole country to be considered failed principally because of the lack of a centrally functioning government. Today the larger part of Southern Somalia is ravaged by famine and civil war. Up until recently, much attention has been given to Somali clan relations and Islamic radicalism as being the root cause of the tragedy. While drought, Islam and clans are repeated themes in Somali history, famine and anarchy as has characterised the South are not. The reality is that a confluence of external forces along with external arms and the internal disruption of the clan system have contributed to the extreme condition of Southern Somalia as witnessed today. This chapter approaches the study of Somalia from a different angle. Instead of taking the modern sovereign state as a universal norm for political

⁴²⁸ David A Lake and Donald Rothchild (Eds.) *The International Spread of Ethnic Conflict* Princeton: Princeton University Press, (1998).

organisation and assuming that it is the only imaginable alternative, the chapter approaches Somalia as a socio-political order. Doing so entails an investigation of the structures and logics that sustain the current order as well as those that may change it. This chapter is a journey through time in the quest for a feasible proposition to the current impasse in Somalia and the advancement of a federated Somalia Republic with three autonomous regions.

5.2 Somalia's Civil War: Assessing The Interplay of Factors

On January 19th 1991, Mohammed Siad Barre, President of Somalia since assumption of power in a military coup in 1969, a former ally of both the Soviet Union and the United States and member of the Marehan clan, fled the capital city Mogadishu with the armies of the United Somali Congress (USC) in hot pursuit.⁴²⁹ He had been ousted from power by a coalition of the USC, the Somali National Movement (SNM) and the Somali Patriotic Front (SPF). In due course and after the deposition of Siad Barre, the three rebel groups which had come together only in the final stages of the rebellion, could not agree upon new leadership for Somalia.⁴³⁰ The Northern based SNM with the Isaak clan as its power base was the first to be formed in 1981. The SNM were not consulted about the composition of the new government by the Southern USC and SPF. Faced with the fact that a united Somalia would most likely be dominated by the Southern factions, the North seceded and declared independence as the Republic of Somaliland on May 18th 1991. Following this action, by November 17th the current civil war in the South had begun.

⁴²⁹ Somalia: Country Profile, p. 16. Africa Watch, "Somalia: A Fight To The Death?" (New York: The Africa Watch Committee, 13 February 1992), Vol. 4, No. 2., p. 5.

⁴³⁰ Id.

Despite the nationalist or Somali trappings of each faction's name, they have each been confined to one or more geographic region and have predominantly comprised of one or more clans. The Hawiye who inhabit Southern and Central Somalia including the area around Mogadishu made up the largest part of the USC. The Ogaden inhabiting South-western Somalia and Ethiopia, formed the majority of the SPF. The Isaak clan inhabiting the northern Somaliland area composed the SNM.⁴³¹ Most of the analyses of the Somali clan structure have attributed the "clan" as the wellspring of today's horrors. However, clans are not necessarily the cause of contemporary violence but one of many factors that are and have been at play. The present state of Somalia results from a complex interaction of the clan factor, colonial history, the role of Islam superpower interference and failed leadership. I will examine these elements in turn.

5.2.1 The Clan Factor in Somalia's Conflict

The Somali people can be considered amongst the most homogeneous in Africa, both ethnically and religiously with Islam being the prevalent religion of choice.⁴³² However, they are strictly divided by an ancient family or clan system that developed in response to the needs of survival in the relatively barren horn of Africa. About 85% of the population are ethnically Somali (the remainder being Bantu and Arab). The Somali people can roughly be divided into six major clan families namely, the Dir, Isaaq, Daarood, Hawiye, Digil and

⁴³¹ "Siad's Somalia," Horn of Africa Report, June 1990.

⁴³² Lee V Cassanelli, *The Shaping of Somali Society*, Philadelphia: University of Pennsylvania Press, 1982, pp. 17-19.

the Rahanwiin.⁴³³ There are further divisions amongst the Daarood into Majerteen, Ogaden, Marehan, Dulbahante and Warsengeli. These structures stand to date as the foundation of political and social life. In a nomadic society in which individuals maintained no fixed address and in which boundaries were by nature fluid, clan allegiance was and remains to date the only form of identification outside of one's name. It was the means to determine one's social standing, their region of origin and who their family and friends were.

The clan structure has a relatively peaceful history demonstrating that the system is not inherently given to intra-clan fighting and especially anarchic violence. In this context, recent clan warfare can be considered unusual because of the presence of intra-clan fighting (between sub-clans). Prior to the recent reign of Al Shaabab in the larger parts of Mogadishu, the civil war in the region was between Mohammed Farrah Aideed and Ali Mahdi Mohammed both members of the Hawiye clan.

5.2.2 The Colonial Factor

During the colonial period of the 19th century, the area in which ethnic Somalis are today found was divided between Britain, Italy, Ethiopia and France.⁴³⁴ As European powers increased their trade presence in East Asia, ports along the Red Sea and the Indian Ocean became important refuelling stations. In 1839, the British established a military garrison and coaling station at Aden on the Al-

⁴³³ Lewis I M (1993) *Understanding Somalia: Guide to Culture, History and Social Institutions* London: Haan Associates, p.47.

⁴³⁴ Lyons, Terrence and Ahmed I Samatar (1995) *Somalia. State Collapse, Multilateral Intervention and Strategies for Political Reconstruction* Brookings Occasional Papers Washington D.C.: The Brookings Institution, p.11.

Yemen coast of the Arabian Peninsula. France established its own fuelling station at Obock in northern Djibouti in 1862 and later added the port of Djibouti, while in 1869 Italy opened a consulate and trade office in the port of Aseb on the Eritrean coast.⁴³⁵ In the late 1800s, Britain signed protectorate treaties with Somali chiefs and, in 1888, signed an agreement with France regarding the boundaries between both countries' claims.⁴³⁶ As British Somaliland became a protectorate of Britain, vice consuls were sent to maintain order and control trade. The first years saw rebellions led by Mohammed "Mad Mullah" Abdullah that ended with the 1920 bombing of Abdullah's base.⁴³⁷

In addition to earlier possessions along the Red Sea coast gained through the Treaty of Wichale, Italy acquired portions of southern Somalia on lease from Zanzibar. Italian Somaliland extended south to the Juba River and east to Ethiopia. In 1897, Italy and Ethiopia agreed on the eastern border of Italian Somaliland. Italy and Britain, which held the land south of the Juba in British East Africa, reached an agreement on the boundaries of their holdings in 1908.⁴³⁸ Some of this land, east of the Juba River, joined Italian Somalia in 1925. In 1936, the newly appointed governor of Italian Somaliland annexed Abyssinia (Ethiopia), forming Italian East Africa, which surrounded French and

⁴³⁵ Id.

⁴³⁶ Encyclopaedia Britannica. "Somalia. Competition among European Powers and Ethiopia." 2007. <http://www.britannica.com/eb/article-37750/Somalia>

⁴³⁷ Bureau of African Affairs. U.S. Department of State. "Background Note: Somalia." December 2007. <http://www.state.gov/r/pa/ei/bgn/2863.htm#history>

⁴³⁸ Bureau of East African Affairs. U.S. Department of State. "Background Note: Somalia." December 2007. <http://www.state.gov/r/pa/ei/bgn/2863.htm#history>

British Somaliland.⁴³⁹ The tensions between the allies and axis powers that led to World War II had a significant impact on the Horn of Africa. Italy declared war on the United Kingdom and seized British Somaliland by force in 1940.⁴⁴⁰ However, in 1941, the British recaptured British Somaliland as well as Italian Abyssinia (Ethiopia/Eritrea), gaining much of Italian Somaliland in the process. During the time of British control from 1941 to 1948, Somalia was primed toward self-government. Italy formally renounced its claim to territorial possession in Somalia in 1947. In 1949, the whole area of Italian Somaliland came under international trusteeship. The UN directed Italy to help the Somalis work toward independence during the ten-year period from 1950 to 1960.⁴⁴¹

An independent Somalia came in 1960 with British Somaliland gaining independence on 26th June and Italian Somaliland following suit on 1st July. The two portions of the country joined to form the Somali Republic. A constitutional conference held in April of the same year established that Mogadishu would be the capital city of the newly formed country. However, the placement of the capital in the South increased the number of southern Somalis employed in government positions, leading to a Southern-dominated central government.⁴⁴² A year later, the people of Somalia adopted the first constitution based on European models. The idea of a unified Somalia that incorporated all communities of Somalis dominated the government's first years. This feeling of pan-Somalism existed not only in Somalia itself but also in

⁴³⁹ History World. "History of Somalia." <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad20>

⁴⁴⁰ Id.

⁴⁴¹ Bureau of African Affairs. U.S. Department of State. "Background Note: Somalia." December 2007. <http://www.state.gov/r/pa/ei/bgn/2863.htm#history>

⁴⁴² Bureau of African Affairs. U.S. Department of State. "Background Note: Somalia." December 2007. <http://www.state.gov/r/pa/ei/bgn/2863.htm#history>

French Somaliland (present-day Djibouti), Northern Kenya, and Somali communities in Ethiopia. Pan-Somalism was so strong that when the Somali communities in Kenya were not given self determination in 1963, guerrilla warfare raged in the area for the next five years. In 1967, the Prime Minister, Mohamed Ibrahim Egal, encouraged the government to renounce its claims on Somali communities outside of the country, thereby strengthening relations with its neighbouring countries. However, many Somalis did not agree with the reconciliation between Somalia and its long-time adversary, Ethiopia.⁴⁴³ A combination of national and municipal elections held in March of 1969 was dominated by the Somalia Youth League (SYL), the country's first political party and an outgrowth of the British movement, Somalia Youth Club, of 1943. It was a predominantly socialist front that united the clans of the country and had extensive ties to Somali groups in Kenya and Ethiopia. Discontent over the outcome of early national elections and allegations of government election fraud is thought to be the main cause of the coup on 21 October, 1969. The army, supported by the police, arrested top government officials and formed a new governing body, the Supreme Revolutionary Council (SRC). Major General Mohamed Siad Barre, an early disciple of African socialism, was elected president by the SRC. In addition, the SRC suspended the constitution, banned all political parties, eradicated the National Assembly, and renamed the country the Somali Democratic Republic.⁴⁴⁴

⁴⁴³ Country Studies. Library of Congress. "Somalia. Coup d'Etat." 1992. <http://countrystudies.us/somalia/20.htm>

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5.2.3 The Islamic Factor

During a serious famine in 1912, Mohammed Abdille Hassan known by the British as the “mad Mullah” was leading a religious rebellion against foreign intervention: British, Italian and Ethiopian.⁴⁴⁵ In the mid-1890s during a pilgrimage to Mecca, Sheikh Mohammed Abdille Hassan met Sayyid Mohammed Salih, founder of the militant Islamic Salihya Order. Hassan already a fervent believer, adopted the Salihya teachings. He changed his name to Sayyid Mohammed and returned to Somalia to preach Islamic reform.⁴⁴⁶ At Berbera, where Sayyid Mohammed settled briefly, he began to zealously teach the new Salihya Order admonishing his fellow countrymen to turn away from their soft living and follow a strict path of Muslim devotion. He denounced smoking, chewing of the narcotic Khat plant and generally condemned hedonistic practices. Over the course of his teaching, Sayyid Mohammed came into contact with European, Christian colonizers and he became gradually convinced that they were bent on destroying the Muslim faith in Somalis. He asserted that Somalia was in danger of foreign influence and exhorted his countrymen to get rid of the English men and other missionaries. His militant version of Islam and assertion of Somali nationalism met opposition from many of the people he wanted to lead. He encountered a great deal of resistance from adherents of the established Qadiriya Order-the dominant strain of Islam in Somalia since the eleventh century. They resented

⁴⁴⁵ Peter Schraeder “From Irredentism to Secession” in Barrington Lowell *After Independence: Making and Protecting the Nation in Postcolonial and Postcommunist States*, <http://www.press.umich.edu/titleDetailDesc.do?id=126246> The University of Michigan Press, at p. 112.

⁴⁴⁶ Id.

the messianism of Sayyid Mohammed's teaching and criticism implicit in it; that Qadiriya practices were stodgy and stale.⁴⁴⁷

By the same token, the North coast where Sayyid had began his teaching was experiencing the benefits of contact with the British for example expanded markets and had yet to experience much of the negative aspects of that contact namely colonisation and exploitation since the British presence was relatively small. In this vein, few Somalis who benefited from this new prosperity cared to listen to Sayyid's message of austerity and piety. In 1898, he moved from the coast into the interior to settle with the Dulbahante, his maternal clan. Significantly, the region he moved to although entirely ethnically Somali, is part of present day Ethiopia. Unlike the coastal dwelling Isaak and Dir clans, the Dulbahante had not signed a treaty with the British. In this regard, he was able to travel widely preaching to pastoral nomads against the Christian missionary efforts. He exploited the external threat of Christianity to encourage peace between warring clans. Everywhere along the way he enhanced his image. He acquired a reputation as a gifted poet and gathered a personality cult around him. His efforts gave birth to the twenty year *jihad* of the "Dervishes" conducted against all Christian colonizers ("dervish was used to refer to any adherent of the Salihya Order and therefore applied to Sayyid's followers) between 1900-1920. The successful results of Sayyid's campaign dealt a devastating blow to British Protectorate Administration. By 1908, having spent funds totally out of proportion to Somaliland's Protectorate's strategic and colonial importance as beef supplier to the port of Aden. The British decided to abandon their settlements and operations in the interior and

⁴⁴⁷ Ahmed, Ali Jimale (Ed) 2005 The Invention of Somalia, Trenton, New Jersey, Red Sea Press, 25.

withdraw entirely to the coast. The Administration also armed the Isaak clan and left them to protect themselves against the Dervishes. This withdrawal was met with Italian protests as it left the Sayyid Mohammed problem solely in their hands. Italy and Ethiopia were also concerned about the eruption of uncontrolled clan warfare with such withdrawal. The British had misunderstood the Sayyid movement. They saw him as an ordinary clan leader acting within the system of inter-clan struggle. They assumed that with the impending Dervish threat, the Protectorate clans would unite, as was the norm among the Somalis and a leader would emerge to guide them. However, the truth of the matter was that Sayyid's movement had transcended the traditional clan structures. Religion, in particular Islam provided the movement with the pan-Somali appeal. This is not to downplay the importance of the clan factor – Sayyid's support was limited primarily to the Ogaden region and it is true that certain inter-clan rivalries did threaten the brittle unity he had established among the Dervishes; and his followers were of a different religious order than most Somalis – nevertheless, the members of the Salihya Order were Muslims. With the British withdrawal together with their bequeathing of a massive supply of arms, the clans were left free to pursue old clan feuds and so they did. During this period, any kind of social organisation disintegrated reducing much of the population to starvation. Sayyid's *jihad* continued until its abrupt end in 1920 with his death.

An even-handed analysis can be drawn between the period of 1900 through to 1900 to today that is by comparing the radical Dervish Islamic movement to the plethora of Islamic movements that have in the last decade and over jostled for control of Mogadishu and Somalia as a whole. These are the Union of Islamic

Courts, Hizbul Islam and the Al Shaabab who are currently in control of the larger part of Mogadishu. In the same way that the Dervish movement was against foreign intervention in Somali affairs, these groups have used the same argument against the Transitional Federal Government (TFG) and the attempts by the African Union to protect the same government and secure its control over Mogadishu.

5.2.4 The Role of Superpower Rivalries in Somalia's Clutter: Scientific Socialism, the Ogaden War, Soviet Union Fallout and United States Involvement

Right from his early years as head of state Barre enjoyed Soviet Union support. In fact, one of his first actions was to introduce the concept of "Scientific Socialism" in the management of Somalia's affairs. According to Barre, this incorporated Islam, socialism based on Marxist principles, and the idea of community development through self reliance.⁴⁴⁸ Siad Barre helped established the Somali Revolutionary Socialist Party (SRSP) in 1976 which was meant to serve as an ideological vehicle for his policy. At the same time, Siad Barre began the nationalization of Somalia's medical services, schools, banks, electricity, and transportation and the government took full control of all the country's exports and imports. In 1975, land was nationalized with farmers received holding on 50 year renewable leases from the government. During the Siad Barre regime, the Somalia's military dependence on Soviet Union equipment and training greatly increased Soviet influence in Somalia. The Soviet Union acquired a variety of military facilities, notably at the northern port of Berbera.

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Id

During this time, in 1974 to be precise, Siad Barre led Somalia to join the Arab League.

One of the primary goals of Siad Barre was to establish a “Greater Somalia” one whose boundaries would have predated those of the colonial partition; this would include the Ogaden, some of Kenya and the whole of Djibouti and would have encompassed an all ethnically Somali territory. However, these efforts were coldly regarded by other African countries the majority of which are multi-ethnic conglomerations. A recognition of Somali claims would have implicitly led to the recognition of the right of every minority ethnic group to declare its independence in pursuit of an ethnically homogeneous entity-declarations that would massively and probably disastrously destabilise Africa. Indeed Siad Barre’s ambitions the Somalia’s calamitous Ogaden war of 1977-1978 which cost Siad Barre his friendly relationship with the Soviet Union. In pursuit of his goal of uniting all Somalis, Barre invaded the Ogaden region of Ethiopia between 1976-1978 using the Western Somali Liberation Front (WSLF). In as much as the Soviet Union supported Barre’s “Scientific Socialist” government, in the same way it did support Mengistu’s Ethiopian Marxist government. The Soviets began supplying the Ethiopian forces with weapons to defeat the Somali incursion and in November 1977, Somalia abrogated its treaty of friendship with the Soviet Union and expelled 6,000 Soviet advisers and experts. Because of this action Somalia basically lost most of its economic and military assistance. By March of 1978, a Soviet and Cuban-led counter attack had re-established Ethiopian control in the main areas of the Ogaden and the Somali government announced the withdrawal of its forces.

The defeat of at Ogaden War and the break with the Soviet Union was followed by a gradual increasing in links with the United States. This was mainly attributable to the United States strategy in the Gulf, following the Soviet intervention in Afghanistan in late 1979. Somalia signed a defence agreement with the United States in 1980, which permitted the use by the latter's military personnel of the air and naval facilities at Berbera. The United States provided Somalia with substantial amounts of aid during the 1980's when the country had to deal with the massive influx of refugees from the Ogaden region but remained hesitant about providing the military aid that was often asked by the Siad Barre regime. An influx of an estimated 80,000 refugees from Ethiopian Ogaden at the end of 1978 led to a regional ethnic imbalance in the North of Somalia. Attempts by the central government in Mogadishu to quell the unrest brought about greater regional turmoil.⁴⁴⁹ Civil unrest eventually led to civil war. The deaths of thousands of civilians prompted a United States led intervention in 1992–93. Operation Restore Hope involved more than 34,000 United States troops sent to help restore order and end starvation.⁴⁵⁰ This mission and its accomplishments were short-lived, however, when the unexpected deaths of 18 United States soldiers was flashed across international media in ghastly fashion in October 1993, the United States and other European nations were forced to negatively reconsider their deployments. Foreign troops were withdrawn by the spring of the following year.

449

Id

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Osman Abdulahi et al (Eds) 2007, *Somalia at the Crossroads: Challenges and Perspectives in Reconstituting a Failed State*, London, Adonis and Abey.

5.2.5 Somalia's Failed Leadership: Personality Cult Syndrome

Over the course of his presidency, Siad Barre had built a cult of personality recreating himself as the father of Somalia. Radio newscasts and public appearances would begin with a song dedicated to "Our Father, the Father of Knowledge." Initially, Barre had constructed a multi-clan framework that strove to develop Somali national consciousness and end clan importance. However, as his power waned later in his rule, he came to rely more and more heavily on his own clan support, he persecuted certain clans and played games of divide and rule with the others. In October 1970, on the first anniversary of the military coup that brought Siad Barre to power, he announced the introduction of Scientific Socialism as already discussed above. This was coupled with a denunciation of tribalism. Barre outlawed clan identifications – in itself a crucial attack on nomadic Somali culture. Somalis engaging in traditional clan activities were subject to fine and/or imprisonment. The government also took over communal activities such as funerals and marriages forcing Somalis to hold these ceremonies at state orientation centres. The importance of the clan and a corresponding ambivalence towards nationalism may be indicated by the method used towards the end of the colonial period and during the first nine years of independence (1960=1969) to establish clan relationships. It had become fashionable etiquette among the European educated Somali elite not to reveal one's clan in favour of the all-purpose appellation "Somali" referring to clan loyalties in the past tense. While it was simple enough to reject the supposedly primitive, pre-colonial identification system, this rejection then posed the problem of a new method of identification. Rather than create or

discover an entirely new system, Somali's increasingly accepted the term "ex-clan" as a way of politely inquiring into or replying about family allegiance.

However, Siad Barre's subsequent action namely empowering his own Marehan clan at the expense of other clans and exploiting clan rivalries would seem to manipulate his cynical manipulation of socialist rhetoric to prevent sectional conflicts from interfering with his rule. Although it was illegal to mention clan affiliations publicly, Siad Barre's power base was a tripartite clan allegiance known by the code name M.O.D. It consisted of the Marehan, the Ogaden and the Dulbahante clans. The M.O.D was cunningly constructed to maintain a tight grip upon sectional tensions that could divide the Somali state. The Ogaden inhabit western Somalia and Ethiopia. Through his mothers kin ties, he could control Somali relations with Ethiopia. Since the Dulbahante occupy both sides of the boundary between former British and Italian Somalilands, his son-in-law could minimise friction between north and south and the Italian and British colonial traditions.

In May 1986, a near fatal car accident involving Siad Barre shattered the longstanding illusion of invincibility of the "Great Leader" persona he had so painstakingly constructed. Consistent with the Somali Constitution, Senior Vice President General Mohammed Ali Samatar stepped forward to be interim leader and declared a state of emergency. In as much as Samatar did not try to undermine Siad Barre's position during this time, the damage had already been done to the President's authority. For the first time in his reign, there was open speculation about who would succeed him. Furthermore, the prematurely de-hospitalised Siad Barre was still physically weak and vulnerable to his own

kinsmen who were frantically trying to shore up their own positions in case Barre lost power. In September 1986, the Central Committee of the Party proposed another seven years for Siad Barre as President. He won 99% of the vote in national elections on December 23rd. After the election, Siad Barre promoted a number of Marehan to the senior ranks of the army and reshuffled the cabinet to give the Marehan stronger control of the Ministry of defence. In February 1987, General Samatar was appointed First Minister in the new government. Because the vital ministries of Foreign Affairs and Defence reported directly to the President instead of the newly created First Minister, Samatar was effectively removed from the chain of command. In fact his office and official residence were quickly taken over by the new Minister of Defence.

Siad Barre had constructed two governments, one officially constituted around General Samatar and the other conducted around the final authority, the President himself. Barre's increasing reliance upon the Marehan destroyed the fragile poly-clan framework he had formerly constructed, leaving him open to opposition from every clan other than his own. This alienation led to brutal repression of opposition which combined with the loss of strategic value after the cold war as already discussed above, left Siad Barre without an ally and led to his quick downfall. Numerous opposition groups proliferated. Army officers, unhappy with the government, formed the Somali Salvation Democratic Front (SSDF), while the Isaaq clan formed SNM. One additional group that weighed into the fray was the USC made up of people from the Hawiye clan. The fighting between these groups and the Barre government worsened an economic crisis and resulted in the division of Somalis along clan lines.⁴⁵¹ As Somalia disrupted

⁴⁵¹ Ahmed, Ali Jimale as note 447 above.

into greater turmoil, Barre retreated to Mogadishu. Somali opposition consisting of USC and SNM forces, based in neighbouring Ethiopia, forced Barre from power on 26 January 1991. As Barre went into exile, the central government in Mogadishu collapsed and the SNM took control of Northern Somalia. Mogadishu and much of southern Somalia remained under control of the USC.⁴⁵²

5.3 The Transitional Federal Government

Over the next five years, several attempts to resolve the conflict and spark reunification were undertaken. Djibouti hosted a major regional conference in 2000. As a result of this, a three-year transitional national government was created.⁴⁵³ This government was headed by Abdulqasim Salad Hassan. Its goal was to create a permanent national government uniting all of Somalia. Somali Peace talks, held in 2002 in neighbouring Kenya, attempted to forge a reconciliation between the government and 20 warlords. Two years later an interim reconciliation took place. On 28 January 2004, Somali leaders agreed on a charter that would establish a new, five-year transitional parliament with 275 members.⁴⁵⁴ In October of that same year, Abdullahi Yusuf Ahmed was elected President of the new Transitional Federal Government.⁴⁵⁵ Despite the creation of a transitional government, Mogadishu was still run by warlords in the first years of this century. However, those warlords were overthrown in June 2006 by the Supreme Council of the Islamic Courts Union (ICU). This

⁴⁵² Osman Abdulahi as note 450 above.

⁴⁵³ Id.

⁴⁵⁴ Id.

⁴⁵⁵ Id.

group, made up of clerics, business leaders and organized militia, overpowered much of southern Somalia. As they grew in power, they sought to overthrow the TFG but were driven from power by joint Ethiopian–TFG forces.⁴⁵⁶

Following the defeat of the Supreme Council of Islamic Courts (UIC), the TFG moved to Mogadishu with the support of Ethiopian forces in January 2007.⁴⁵⁷ Material support from its one-time hostile neighbour continued to pour into Mogadishu as Ethiopia deployed troops throughout 2007. These forces, along with African Union (AU) peacekeeping troops, have made progress in combating the rebels seeking to overthrow the provincial Somali government.⁴⁵⁸ Nonetheless, continuous fighting has taken its toll on the TFG and on civilians.⁴⁵⁹ The UN reports that 60% of Mogadishu’s residents have fled the city due to the fighting, adding to the estimated 1 million displaced Somalis.⁴⁶⁰ According to the director of security at Somalia’s National Security Ministry, the TFG controls only 20% of the country, making it easy for the Islamic rebels to regroup and grow.⁴⁶¹ Presently, the struggle centres on the TFG in its effort to re-establish a permanent central government, with international support mainly from the AU to create a unified Somalia.

5.4 Autonomy as a Feasible Solution to the Somalia Impasse

⁴⁵⁶ Marchal Roland, 2007 Warlordism and Terrorism: How to Obscure an Already Confusing Crisis? The Case of Somalia, *International Affairs*, Volume 83, no.6 pp 841-67.

⁴⁵⁷ Id.

⁴⁵⁸ Id.

⁴⁵⁹ Id.

⁴⁶⁰ Id.

⁴⁶¹ Id.

This study proposes a paradigm shift from considering Somalia as a unitary state to its conceptualisation as an entity with constituent autonomous regions. This assertion is grounded on history and the present day political configuration of the country. Autonomy is diffusion of powers in order to preserve the unity of state while respecting the diversity of population. There are two aspects of autonomy, territorial and personal autonomy, I will concern myself with territorial autonomy as it is the one of relevance to the study at hand. Territorial political autonomy is an arrangement aimed at granting to a group that differs from the majority of the population in the state but that constitutes the majority in a specific region, a means by which it can express its distinct identity mostly through a large measure of self government. The degree of such self government varies depending on the peculiar circumstances of any given case. A main issue involved in the establishment of a regime of autonomy is the division of powers between central authorities and the autonomous entity. There are different degrees of autonomy and the extent of the powers transferred to the autonomous authorities varies accordingly ranging from very limited to larger and up to a high concentration of major powers in the above areas. Usually foreign relations and external security are reserved for the central government however in a few cases the autonomous body has limited powers with the consent of the central government to enter into international agreements and to become a member of a particular international organization. In order to avoid disputes, it is crucial that powers of a regime of autonomy be defined as clearly as possible when it is established. In summary, there are four different areas of powers to be considered; powers reserved for the central authorities, those fully transferred

to the autonomous entity, parallel powers and powers that can be exercised jointly.

5.5 Implementation of Autonomy in Somalia

This work makes a case for a comprehensive autonomous arrangement for the Republic of Somalia. The proposition is for an arrangement that is similar to the one that was brokered for Sudan between the North and South but with adjustments to meet the peculiar circumstances of Somalia. A starting point is the identification of some central or key differences between the two cases. Whereas in Sudan, there is a central government from which the autonomous arrangement was built, in Somalia such central and functioning government has been lacking since 1991. This effectively means that the kind of autonomous arrangement required would be the kind I referred to above that is one in which there is a predominance of parallel powers and powers exercised jointly. First things first. In Somalia we have three regions. Somaliland with a longer history of autonomy with a strong emphasis for total self government and secession from the larger part of Somalia, Puntland relatively stable area with self government and an emphasis for a measure of self government for the regions but within a united Republic of Somalia and Southern Somalia a region in chaos largely due to an attempt to impose an unpopular government on them and a refusal by the international community to accommodate the character of their cultural or religious orientation.

Somaliland is internationally regarded as being an autonomous region of the Republic of Somalia. Since 1991, it has been governed by a secessionist

administration as the Republic of Somaliland. Somaliland declared independence in May 1991, but remains unrecognised by any state or international organisation. However, many foreign governments maintain informal ties with the state, with an increasing number of foreign delegations and embassies having been established in the capital Hargeisa. It is still far from full diplomatic recognition. The Puntland State of Somalia was established in August 1998 after a decision made by local political and traditional leaders following several failed national reconciliation efforts in the wake of the Somali Civil War.

As stipulated in Article 1 of the Transitional Federal Charter of the Somali Republic, Puntland is a part of the Federal State of Somalia. As such, the region seeks the unity of the Somali people and adheres to a federal system of government. Unlike the secessionist region of Somaliland to its west, Puntland is not trying to obtain international recognition as a separate nation. However, both regions have one thing in common: they base their support upon clan elders and their way of organization along lines based on clan relationships and kinship. Since 1998, Puntland has also been in territorial disputes with Somaliland over the Sool and Sanaag regions. Both the Sool and Sanaag regions have declared themselves autonomous parts of Somalia as Northland State (2008)^[25] and Maakhir State (2007), respectively, but Maakhir has rejoined Puntland.

The area I refer to as Southern Somalia is that area south of Puntland that has been under the control of what the international community refers to as Islamists. At present there are three main religious groupings in Southern

Somalia namely: Al Shaabab Mujahidin, Hizbul Islam and traditional Sufi groups, organised under the umbrella of Ahlu Sunnah Wal Jama'a (ASWJ). These exist after another grouping, the Islamic Military Courts were defeated and ousted from control in 2006 by the TFG with the support of Ethiopian troops. Without going deep into the intricate politics of the Southern Somalia to date I will hereafter to explain my support for an autonomous arrangement. Somalia is ripe for an autonomous arrangement. The problem has been that the country has continuously been under pressure to take the form of a unitary state with the transitional federal government as the central functioning government. Despite the intense resistance that this idea has received from Southern Somalia, the international community backed by AMISOM, seem intent on imposing this government on Southern Somalia including Somaliland under one umbrella of Republic of Somalia. It is my contention this approach is utterly misconceived and if there is a persistence on its implementation, it may lead to further destruction of the relatively identifiable configuration of Southern Somalia. Southern Somalia risks becoming a haven of international criminal activity far from its present state of a region under the dominion of Islamic groupings each seeking recognition of their political demands. It can be recalled that recently, Hizbul Islam a religious group that had previously not expressed any intention to engage or participate in the illegal lucrative piracy trade off the southern coasts, recently started demanding a share of the loot obtained from the trade.

Secondly, the rising trend of extremism seen in the religious groupings is a direct response, a form of rebellion against the imposed government in the style of the TFG supported by AMISOM. Only through a fair appreciation and

invitation to negotiation of the groups in Southern Somalia can there be hope for a sustainable peace arrangement. The call to the negotiation table ought not have any pre-conditions. The opposing parties at least in the first instance must be accepted for what they are and stand for. So important is this position, that recently the US has started bending away from its original hardliner stance regarding the Taliban in Afghanistan and Northern Pakistan. There have been insinuations of bringing the Taliban or at least part of their leadership to the negotiation table.

This is because it has been realised that a military approach is rarely the solution to ethnic conflict and secondly that compromise must begin by accepting at least for negotiation purposes the original hardliner positions of opposing parties. There can be no success when one group seeks either total annihilation of the other or a complete alteration of their ideological foundation. It ought to be recalled that the situation or agreement in Sudan was arrived at after both parties accepted the existence of the other and bargained for agreement on other issues like share of the revenues obtaining in the country. The North had to back peddle on its original conception of the SPLM as a terrorist organisation but came to acknowledge it as a liberation movement. On their part, the SPLA on receiving some recognition from the North softened its intentions to annihilate the Northern government by all means. The result was a mutually acceptable autonomous arrangement with the option of secession.

In the same vein, all the groups in Somalia ought to be brought together at the negotiating table. These groups are:

- i. **Representation from Somaliland:** Have traditionally wanted complete self government from the larger republic. Secession in effect
- ii. **Representation from Puntland (Ideally the Transitional Federal Government) and from Ahlu Sunnna Wal Jamaa (ASWJ):** Have traditionally advocated for a Federal Republic of Somalia governed from a central government in Mogadishu ASWJ is much more tolerant of ideological differences, but it remains deeply divided along clan lines.
- iii. **Representation from Al Shaabab Mujahidin, Hizbul Islam**

Initially, Al-Shaabab and Hizbul Islam shared a similar vision and model of Sharia, but they are divided on two crucial issues, pan-Somali nationalism and the political utility of clans. Hizbul Islam's two traditional leaders, Sheikh Hassan Dahir Aweys and Sheikh Hassan Abdullahi Hirsi, "Hassan Turki", are nationalists and strong advocates of the creation of a greater Somalia, which incorporates all the Somali-inhabited regions into one state. Al-Shaabab sees its agenda as much broader than the Somali-inhabited regions of the Horn of Africa. It aspires to creating a new global Islamic Caliphate, with undefined geographical boundaries. Hard-liners in the organisation see nationalism as a legacy of colonialism and part of the problem. They argue that modern nationalism and the idea of a nation-state are alien concepts meant to fragment the *Umma* (the global Islamic community). The other difference is views about clans. Hizbul Islam also takes a pragmatic view of the clan system, which it tries to exploit to achieve its strategic aims. The four main Hizbul Islam affiliates were chosen with a view to achieving some semblance of clan

balance. Views on the clan system within Al-Shaabab are mixed. The hardliners are ideologically opposed to it and see any manifestation of “clan bias” as proof of insufficient commitment to Islam. Less extreme figures sometimes manipulate the clan system to mobilise and achieve short-term objectives but are equally uneasy about getting sucked into Somalia’s clan politics. ASWJ is predominantly a clan alliance that brings together major Hawiye sub-clans inhabiting the central regions of Somalia. ASWJ say that their alliance is animated by the extremist brand of Islam espoused by Al-Shaabab and in defence of traditional Sufi practices. However, territorial and clan calculations also motivate it.

5.6 Conclusion

Engine: IGAD in conjunction with the African Union as was the case with Sudan: Policy Paper.

CHAPTER SIX

CONCLUSION

6. Basic Premises

This thesis has explored the concepts of powersharing, devolution, federalism and autonomy devolution as mechanisms for the management and settlement of ethnic conflicts. In so doing it has posed and answered the following questions; Why do ethnic groups mobilise for political aims? Why do identity conflicts seem so severe and intractable? What are the patterns of ethnic conflict escalation and de-escalation and in what way are they manifested? Are identity conflicts amenable to management and if so what principles apply?

In summary, broadly construed with regard to ethnic conflict in particular, there are two schools of thought to explain the phenomenon of ethnic conflict. The first school termed as primordialism explains ethnicity in terms of inherited group behavioural characteristics argued to be biologically based, that is ethnic group identity passed on from one generation to the next. The other school known as instrumentalism, argue that ethnicity is contextual, fluid and a function of structural conditions in society. Instrumentalists assert that ethnic identities are malleable, that they wax and wane, contingent on a number of variables, including the capacity and skills of political entrepreneurs who can effectively mobilise groups for collective aims and articulate beliefs about common ancestry and destiny. Some instrumentalists alternatively known as structuralists suggest that ethnic identity is socially constructed often created or de-emphasised by power seeking political elites. Instrumentalists often view ethnic conflict as less a matter of inherent incompatible identities and more as a consequence of differential rates and patterns of modernisation between groups; competition where relations among groups vary according to wealth

and social status. In short ethnicity is often a guise for the pursuit of essentially economic interests.

In the debate about the nature of ethnicity, two important facts should be kept in mind or noted. Firstly, each ethnic conflict occurs in its own context and as a result of unique historical developments, structural conditions (especially the structure of intergroup economic relations) and regional and international contexts. It would be hazardous to generalise across all cases with an all-encompassing theory. However the allegiance of scholars to either of these schools, one which sees ethnicity as immutable, innate and another that views it as socially constructed will influence the type of political systems put in place to ameliorate conflict. For example where ethnicity is viewed as immutable and innate, a consociational approach or power sharing and autonomy is likely to be advanced. On the other hand, if ethnic relations are considered socially constructed and more so along intergroup economic relations, the political system advanced may be an integrative mechanism such as devolved government.

What is important is not whether ethnic group identity is innate immutable and fixed or contrived and manipulable, it is that members of an ethnic group perceive the ethnic group to be real. Perceptions are critical in understanding the extent to which intergroup relations can be peaceful or violent. Donald Rothchild has rightly focused on ethnic group perceptions of each other, identifying three basic types: an essentialist perception in which groups perceive physical cultural, or social threats to their vital interests thereby making compromise seem a sign of weakness; pragmatic perceptions in which

conflicts of interest remain acute but compromise is possible on the margins and; reciprocative perceptions in which groups seek to transform the structure of relations to achieve mutual interest primarily through the state as a mediator. Essentialist perceptions are likely to lead to violent intergroup conflict, pragmatic perceptions allow for an occasional truce or cooperation in limited spheres and reciprocative perceptions lay the foundation for long term peaceful cooperation amongst groups.

Patterns of identity politics can be discerned that can help clarify the distinction between successfully regulated multiethnic societies and the violent intercourse of deeply divided societies. A clear perception of the basic patterns that identity politics takes may lead to more consistent policy prescriptions about what type of practices can help alleviate or manage tensions. In this analysis three issues are of central concern;

- a) the structure of social cleavages;
- b) the relationships between ethnic groups and the state and;
- c) the stages of phases of conflict escalation or de-escalation.

The salience or prominence of ethnicity as a social differentiator and the intensity of ethnic ties are very critical predictors of violence. Salience and intensity are tied closely to the perceived stakes of ethnic relations. The questions that may be posed in this regard are; What are the expected costs of defeat? What threats to group survival or well being are perceived? The stakes are arguably highest when group identity is threatened or challenged, in particular symbols of ethnic identity and destiny that are held sacred to the group and are neither divisible nor amenable to compromise or trade-off.

Horowitz has given as an example of such symbol language which is considered as an incommensurate good not easily amenable to compromise. There is a broad scholarly consensus that when social cleavages are reinforcing rather than overlapping, the potential for conflict is more acute. This is more so when segments of a society are hierarchically arranged that is when there is one distinct group or coalition of groups dominating the others. Dual societies such as Rwanda and Sri Lanka where the politics often takes the form of zero sum game are especially intractable or difficult. An exception often advanced by scholars is the case of South Africa in which the structure of social cleavages was strongly reinforcing along the lines of race and class but which nonetheless proved tractable or solvable over the long term. Another example is that of Northern Ireland with better prospects of peace today than in the past thirty two years or so. Two scholars Rabushka and Shepsle have offered a simple and useful typology of multiethnic societies based on the structure of social cleavages and power relationships. In this regard, a differentiation can be made amongst four types of deeply divided societies as follows:

- i. *Fragmented Societies*. In a fragmented society, there are more than four major mobilised ethnic groups none of which is clearly dominant. Examples of fragmented societies are Afghanistan, India, Nigeria and DRC.
- ii. *Balanced Societies*: Balanced societies are those with four or fewer clearly identifiable groups and they can either be bipolar e.g. Cyprus and Northern Ireland or multipolar e.g. Bosnia.

- iii. *Dominant Minority Societies*: In these societies a dominant minority can wield power to the exclusion of a significant majority. Examples include Rwanda, Burundi, Syria and apartheid South Africa.
- iv. *Dominant Majority Societies*: These are societies in which a majority group dominates ethnic minorities e.g. Croatia, Russia, Estonia, Sri Lanka and Israel.

6.1 Mechanisms for Management of the Identity Question

This piece has examined the following constitutional mechanisms for ethnic conflict management in light of the cases of Kenya, Sudan and Somalia.

6.1.1 Powersharing Arrangements

Nearly all the peace accords negotiated in the past fifteen years have included powersharing in one form or another. As powersharing gains popularity as a mode of conflict management and its frequency increases, it becomes increasingly important to assess its foundational principles. Power sharing or consociation has been defined by Arend Lijphart as a set of principles that when carried out through practices and institutions provide every significant identity group or segment in a society representation and decision making abilities on common issues and degree of autonomy over issues of importance to the group.

The main institutional features of a consociation or power sharing arrangement are a grand coalition executive which is inclusive of the polity's main segments;

segmental autonomy, which can be either territorial or corporate in form; mutual vetoes on matters of vital importance to the segments; and the promotion of the principle of proportionality throughout the public sector, including the electoral system. These can be summarised in a more succinct way as follows:

- a) Grand Coalition Government Including Representatives of All Major Linguistic and Religious Groups
- b) Cultural Autonomy for these Groups
- c) Proportional Representation In Political And Civil Service Appointments
- d) Minority Veto With Regard To Vital Minority Rights And Autonomy

6.1.2 Devolution

In the most general of terms, devolution refers to the transfer of authority from a central government to a sub-national entity.⁴⁶² Beyond this general definition, the process of devolution is a complex undertaking, taking on different meanings in different contexts and according to the desires and plans of those in charge of its design and implementation.

6.1.2.2 Forms of Devolution

⁴⁶² Boko, Sylvain, *Decentralization and Reform in Africa*, Kluwer Academic Publishers,. 2002, G S Boko, Sylvain, *Decentralization and Reform in Africa*, Kluwer Academic Publishers,. 2002 and D A Rondinelli (Eds.) *Devolution and Development: Polity Implementation in Developing Countries* (1983) at 19.

Devolution or devolved government is a form of decentralisation or decentralised government in which the authority for decision making with respect to political, administrative and legal authority is transferred to quasi-autonomous units of local government.⁴⁶³ In other words, devolution is a political concept that denotes the transfer of political, administrative and legal authority, power and responsibility from the centre to lower level units of government created by the national constitution. In a devolved political system, the lower level units of government to which power, authority and responsibility has been transferred (devolved) are more or less autonomous from each other.⁴⁶⁴ This means that any one level of government is not under any obligation to refer to or seek authority from the centre in order to make and or implement decisions that fall within their exclusive jurisdiction. Devolution forms the foundation for political devolution in that it usually involves the transfer of responsibilities to municipalities that elect their own mayors and councils, raise their own revenues and are able to make investment decisions independently of the central government. In such a system, local governments have legally recognised geographical boundaries within which they exercise their authority and perform public functions.

6.1.3 Federalism as a Conflict Management Tool

Any scholar of federalism would acknowledge the complexity in defining federalism in view of the various ways in which it has been employed.⁴⁶⁵

⁴⁶³ J C Ribot, *African Devolution: Local Actors, Powers and Accountability, Democracy, Governance and Human Rights Paper Number 8*, 2002 7.

⁴⁶⁴ Id.

⁴⁶⁵ J Anton *American federalism and public policy* (1989) 3.

Indeed, one researcher has identified 267 different conceptions of the term.⁴⁶⁶ Nevertheless, federalism or the federal principle in this thesis refers to the philosophical or ideological idea that a political organisation should seek to achieve both political integration and political freedom by combining shared rule on some matters and self-rule in various forms on others.⁴⁶⁷ Federalism is a normative and philosophical concept based on the notion that the greatest human fulfilment is to be found through participation in a wider community that at the same time favours diversity and protects individuality.⁴⁶⁸ The practice of federalism links individuals or groups within various political entities, forming part of a broader single entity, in a lasting but limited union in such a way as to provide for the pursuit of common ends, while maintaining their respective integrities usually through permitting some level of discretion in policy making on their part.⁴⁶⁹ This thesis discusses the application of the federal principle in Sudan.

⁴⁶⁶ See W Stewart *Concepts of federalism* (1984).

⁴⁶⁷ J Madison, A Hamilton, and J Jay *The federalist* (1987) 515 opine that as a normative concept federalism entails both elements of self-rule and shared rule. See also D Elazar *Exploring federalism* (1987).

⁴⁶⁸ On this definition of federalism see B De Villiers "Federalism in South Africa: Implications for individual and minority protection" (1993) *South African Journal of Human Rights* 375. For the same definition see P King *Federalism and federation* (1982) 159.

⁴⁶⁹ D Elazar *Exploring federalism* (1987) 5; A Gaili "Federalism and the tyranny of the religious majorities: Challenges to federalism in Sudan" (2004) *Harvard International Law Journal* 513; R Lapidoth *Autonomy: Flexible solutions to ethnic conflicts* (2000) 50; D Elazar "Federalism v. decentralisation: The drift from authenticity" (1976) 6 *Publius: The Journal of Federalism* 12.

6.1.4 Autonomy

Autonomy has been defined as a means for the diffusion of powers in order to preserve the unity of a state while respecting the diversity of its population. A territorial political autonomy is an arrangement aimed at granting to a group that differs from the majority of the population in the state but that constitutes the majority of the population in the state, but that constitutes the majority in a specific region, a means by which it can express its distinct identity. A main issue involved in the establishment of a regime of autonomy is the division of powers between the central authorities and the autonomous entity. The powers of the autonomy are usually related to matters of culture, economics and social affairs. There are however different degrees of autonomy and the extent of the powers transferred to the autonomous authorities varies accordingly ranging from a very limited to a larger and up to a high concentration of major powers in the above areas. Usually foreign relations and external security are reserved for the central government; however in a few cases the autonomous body has limited powers with the consent of the central government to enter into international agreements and to become a member of a particular organisation. For example Aland is a member of the Nordic Council and with the approval of Finland is permitted to conclude agreements with the Nordic countries.

In order to avoid disputes and misunderstandings it is important that the powers of a regime of autonomy be defined as clearly as possible when it is established. There are usually four different areas of powers to be considered: powers reserved for the central authorities, those fully transferred to the

autonomous entity, parallel powers and powers that can only be exercised jointly. In certain cases the central authorities determine a general policy in a number of areas in which the autonomous entity may act and the local authorities are authorised to operate within the limits of this general policy. There is usually a need for cooperation, coordination and consultation between central authorities and the autonomous entity. This is crucial because there is likely to be a close link between their respective powers. In addition certain powers are likely to require joint action. Even if the transferred powers are carefully and meticulously described when the autonomy is established future difficulties cannot always be prevented. For example there may be differences of opinion regarding to which category of powers a certain practical matter belongs. Similarly a question may arise in an area of powers that had not been considered beforehand or a question may arise that encompasses different areas one of which is within the jurisdiction of the centre and the other within that of the autonomy.

In many cases in order to ensure cooperation the parties establish a joint organ in which both the central government and the autonomous entity are represented such as is the case with the Aland Delegation. In addition the parties may agree upon a special procedure for settling disputes between the centre and autonomous body for example the documents that established the autonomy of the Faroe Islands, Greenland and Memmel. As already noted above, the powers of the autonomous entity usually include legislation, adjudication and administration in those spheres of responsibility that have been transferred to the autonomous entity. In some cases however adjudication remains fully within the authority of the central government. The

legislative acts of the autonomous area usually requires confirmation by the central authorities but this confirmation by the central authorities must be given except in severe cases defined in advance for example when those legislative acts amount to an excess of power or undermine the security of the state. The assumption is that the representatives of the population in the autonomous area exercise the relevant powers. Nevertheless coordination is often needed between the centre and the autonomous authorities regarding the appointment of one or more high ranking officials like the representatives of central government in the autonomous region or the head of local administration. In most cases the official is either appointed jointly or by the local authorities with the consent of the centre or vice versa. The acts of the autonomous entity in the areas for which it has jurisdiction are normally not subject to any control by the central authorities except as mentioned in such cases as excess of jurisdiction. In certain cases the inhabitants of the autonomous region participate fully in the public life both in their region and in the framework of the central government for example in Southern Sudan. A regime of autonomy can be established by an international treaty, by a constitution by a statute or by a combination of instruments of these categories; probably it may even be established by a custom.

Redslob has described personal autonomy as the attribute of a community whose members are connected by individual characteristics such as ethnic consciousness or language and irrespective of their location or abode. In other words this type of autonomy applies to all members of a certain group within the state regardless of the place of their residence. Personal autonomy is usually granted to ethnic, cultural, religious or linguistic minorities. In the case

of personal autonomy, the state grants minorities the right to take the necessary steps through their own institutions in order to protect and implement their own rights. They may act upon their own discretion but within the limits of the laws of the state. In principle each individual should be able to decide whether or not to belong to the minority group; however certain groups in particular religious ones and indigenous populations tend to establish conditions for membership. In certain situations, it may also be difficult to leave a particular group. Personal autonomy has a great advantage over territorial autonomy: As mentioned it usually applies only to people who opt to be members of the group for which it is established. Territorial autonomy on the other hand may apply to all inhabitants of a certain region thus including those who are not members of the group for whose benefit the regime is established and who may even resent it. Territorial has another disadvantage: Since people tend to move from one place to another, the composition of the population of a given region may change; the former majority in the region might become a minority and consequently the regime of autonomy may lose its *raison d'être*. This may be problematic is the relocation that changes the composition of the population is encouraged by the central government. On the hand territorial autonomy has the advantage that in addition to cultural matters, it can also apply to a wide range of social and economic affairs whereas personal autonomy has usually been limited to matters of culture, language, charity, religion and education. Personal autonomy has the advantage of applying to all members of an ethnic group in a country regardless of their location.

6.2 Findings on the Case Studies

6.2.1 Sudan

This chapter examines Sudan's experience in grappling with the ethnic question, in particular its resort to federalism and autonomy and finally the Southern Sudanese decision to secede. On the whole, this chapter traces the debate on federalism, which has featured all through Sudan's quest for peace and unity. Apart from investigating the manner and content of federalism as has been employed, in particular, the 1972 Addis Ababa Peace Agreement⁴⁷⁰ (the Addis Agreement) and the Constitution of 1998 (the 1998 Constitution), the political, sociological, anthropological and psychological issues revolving around these endeavours are considered. This chapter lays the foundation for a discussion of the present Sudanese political and constitutional order, the re-introduction of autonomy in Sudanese politics and the decision to secede from the North. In the essence, this chapter serves to bring the recent political and constitutional developments in Sudan into perspective. In doing this, it provides historical insight into the character of the conflict, highlighting the key issues that have been at the heart of the civil war. This chapter equips the reader with a factual background that will enable the ensuing analysis of feasibility present day political order.

On secession, important political acts like secession cannot be entirely confined to deontological considerations of justice. Certainly one of the strongest arguments used against secessionist movements in the past has been that they

⁴⁷⁰ The Addis Ababa Agreement on the Problem of South Sudan, Appendix B in M Beshir *The Southern Sudan: From conflict to peace* (1975) 158.

would divide the state into two fragments one or both of which would be severely crippled economically and scarcely able to survive as a viable nation.⁴⁷¹ In addressing the question what the odds and evens are for secession in Sudan the economic effect of such secessionist movement is of critical importance.⁴⁷² Given the fact that Southern Sudan recently overwhelmingly voted for an independent state of Southern Sudan, one of the major challenges still to be faced and overcome remains the fact that most of the economic activity and infrastructural institutions to manage any wealth exists in the North. Without proper support from Kenya and other African and international friends, the looming secession of Southern Sudan would effectively be like a farmer with a grade cow who is no longer able to feed it and puts it up for sale. It would be extremely difficult for Southern Sudan to sustain itself.

6.2.1.1 Is Southern Sudanese Secession Therefore Justifiable?

Given the difficult and tumultuous journey from independence to date that Sudan has experienced, the question as to whether the looming secession in Sudan is justifiable or not has been answered by the voting patterns of Southern Sudanese in the January 2011 referendum. Other constitutional mechanisms such as federalism which was a long time employed proved ineffective in the long run and thereby justifying the secession of Southern Sudan.

⁴⁷¹ Russell and McCall, as above.

⁴⁷² See in this regard P Collier and A Hoeffler *The political economy of secession* (2002).

6.2.2 Kenya

This chapter assesses the nature and impact of institutions of power-sharing and devolved government in Kenya. The focus of the discussion is on the 2008 agreement signed between the country's two main political parties, PNU (Party of National Unity) and ODM (Orange Democratic Movement) and the enactment of a new constitution that has seen the creation of comprehensive devolved system of government. The agreement was agreed upon after a disputed election that sparked a wave of ethnic clashes in which more than 1,000 people were killed and another 300,000 were internally displaced. Signed in March 2008, it has been largely successful in its primary goal: ending the violence and restoring peace in Kenya. Since the implementation of the agreement there has been little inter-communal violence and some of the people displaced by the post-election clashes have been able to return home. Moreover, the agreement has enjoyed wide-spread support from across partisan and ethnic lines. The agreement similar to that of South Africa during its transition from apartheid to a democratic system, is temporary in nature and does not guarantee permanent positions of power to any groups or parties. While the parties to the accord are collaborators in its implementation, they are also foes in the electoral arena that expect to compete vigorously in the next election cycle. The power-sharing agreement, therefore, does not undermine the electoral incentives that the parties would otherwise face in its absence. The main accomplishment of the power-sharing agreement has been the creation of a Grand Coalition government in which executive functions and cabinet positions are shared between the two main parties. Long-term grievances and underlying issues have not been addressed and remain latent

sources of conflict. So far the parties have shown a willingness to work together and compromise. But the Grand Coalition government is facing many serious challenges. Currently, the issue of whether to prosecute perpetrators of the violence domestically or internationally following the International Criminal Courts (ICC) involvement in the PEV is a potentially explosive issue that threatens to destabilise the agreement. The structure of this chapter is as follows. The first section describes the 2008 power-sharing agreement, placing it in the context of long running debates about constitutional reform in Kenya. The next section takes an in depth look at the devolved system of government under Kenya's new constitutional dispensation. In conclusion, the powersharing arrangement in Kenya has so far proved effective in at least bringing about a period of peace just as was the case in South Africa during the transition period. In addition it has facilitated the enactment of a new constitutional order in which a devolved system of government has been put in place. What remains to be seen is whether Kenya will transit peacefully into the new order come the next general elections in 2012.

6.2.3 Somalia

Somalia is often considered a failed state.⁴⁷³ It is indisputable that the project to build and sustain a modern state, with internal and external sovereignty as its defining characteristics has failed in Somalia. However, the continuous framing of Somalia as a case of state failure is an analytical strategy that must have definite limits. It must be pointed out that there exist two relatively

⁴⁷³ David A Lake and Donald Rothchild (Eds.) *The International Spread of Ethnic Conflict* Princeton: Princeton University Press, (1998).

peaceful and functioning regions of Somaliland and Puntland in the North and North-eastern regions respectively. The fact that Southern Somalia has been war torn for over a decade, has rendered the whole country to be considered failed principally because of the lack of a centrally functioning government. Today the larger part of Southern Somalia is ravaged by famine and civil war. Up until recently, much attention has been given to Somali clan relations and Islamic radicalism as being the root cause of the tragedy. While drought, Islam and clans are repeated themes in Somali history, famine and anarchy as has characterised the South are not. The reality is that a confluence of external forces along with external arms and the internal disruption of the clan system have contributed to the extreme condition of Southern Somalia as witnessed today. This chapter approaches the study of Somalia from a different angle. Instead of taking the modern sovereign state as a universal norm for political organisation and assuming that it is the only imaginable alternative, the chapter approaches Somalia as a socio-political order. Doing so entails an investigation of the structures and logics that sustain the current order as well as those that may change it. This chapter is a journey through time in the quest for a feasible proposition to the current impasse in Somalia and the advancement of a federated Somalia Republic with three autonomous regions. This work makes a case for a comprehensive autonomous arrangement for the Republic of Somalia. The proposition is for an arrangement that is similar to the one that was brokered for Sudan between the North and South but with adjustments to meet the peculiar circumstances of Somalia. A starting point is the identification of some central or key differences between the two cases. Whereas in Sudan, there is a central government from which the autonomous arrangement was built, in Somalia such central and functioning government

has been lacking since 1991. This effectively means that the kind of autonomous arrangement required would be the kind I referred to above that is one in which there is a predominance of parallel powers and powers exercised jointly. First things first. In Somalia we have three regions. Somaliland with a longer history of autonomy with a strong emphasis for total self government and secession from the larger part of Somalia, Puntland relatively stable area with self government and an emphasis for a measure of self government for the regions but within a united Republic of Somalia and Southern Somalia a region in chaos largely due to an attempt to impose an unpopular government on them and a refusal by the international community to accommodate the character of their cultural or religious orientation.

Somaliland is internationally regarded as being an autonomous region of the Republic of Somalia. Since 1991, it has been governed by a secessionist administration as the Republic of Somaliland. Somaliland declared independence in May 1991, but remains unrecognised by any state or international organisation. However, many foreign governments maintain informal ties with the state, with an increasing number of foreign delegations and embassies having been established in the capital Hargeisa. It is still far from full diplomatic recognition. The Puntland State of Somalia was established in August 1998 after a decision made by local political and traditional leaders following several failed national reconciliation efforts in the wake of the Somali Civil War.

As stipulated in Article 1 of the Transitional Federal Charter of the Somali Republic, Puntland is a part of the Federal State of Somalia. As such, the region

seeks the unity of the Somali people and adheres to a federal system of government. Unlike the secessionist region of Somaliland to its west, Puntland is not trying to obtain international recognition as a separate nation. However, both regions have one thing in common: they base their support upon clan elders and their way of organization along lines based on clan relationships and kinship. Since 1998, Puntland has also been in territorial disputes with Somaliland over the Sool and Sanaag regions. Both the Sool and Sanaag regions have declared themselves autonomous parts of Somalia as Northland State (2008)^[25] and Maakhir State (2007), respectively, but Maakhir has rejoined Puntland.

The area I refer to as Southern Somalia is that area south of Puntland that has been under the control of what the international community refers to as Islamists. At present there are three main religious groupings in Southern Somalia namely: Al Shaabab Mujahidin, Hizbul Islam and traditional Sufi groups, organised under the umbrella of Ahlu Sunnah Wal Jama'a (ASWJ). These exist after another grouping, the Islamic Military Courts were defeated and ousted from control in 2006 by the TFG with the support of Ethiopian troops. Without going deep into the intricate politics of the Southern Somalia to date I will hereafter to explain my support for an autonomous arrangement. Somalia is ripe for an autonomous arrangement. The problem has been that the country has continuously been under pressure to take the form of a unitary state with the transitional federal government as the central functioning government. Despite the intense resistance that this idea has received from Southern Somalia, the international community backed by AMISOM, seem intent on imposing this government on Southern Somalia including Somaliland

under one umbrella of Republic of Somalia. It is my contention this approach is utterly misconceived and if there is a persistence on its implementation, it may lead to further destruction of the relatively identifiable configuration of Southern Somalia. Southern Somalia risks becoming a haven of international criminal activity far from its present state of a region under the dominion of Islamic groupings each seeking recognition of their political demands. It can be recalled that recently, Hizbul Islam a religious group that had previously not expressed any intention to engage or participate in the illegal lucrative piracy trade off the southern coasts, recently started demanding a share of the loot obtained from the trade.

Secondly, the rising trend of extremism seen in the religious groupings is a direct response, a form of rebellion against the imposed government in the style of the TFG supported by AMISOM. Only through a fair appreciation and invitation to negotiation of the groups in Southern Somalia can there be hope for a sustainable peace arrangement. The call to the negotiation table ought not have any pre-conditions. The opposing parties at least in the first instance must be accepted for what they are and stand for. So important is this position, that recently the US has started bending away from its original hardliner stance regarding the Taliban in Afghanistan and Northern Pakistan. There have been insinuations of bringing the Taliban or at least part of their leadership to the negotiation table.

This is because it has been realised that a military approach is rarely the solution to ethnic conflict and secondly that compromise must begin by accepting at least for negotiation purposes the original hardliner positions of

opposing parties. There can be no success when one group seeks either total annihilation of the other or a complete alteration of their ideological foundation. It ought to be recalled that the situation or agreement in Sudan was arrived at after both parties accepted the existence of the other and bargained for agreement on other issues like share of the revenues obtaining in the country. The North had to back peddle on its original conception of the SPLM as a terrorist organisation but came to acknowledge it as a liberation movement. On their part, the SPLA on receiving some recognition from the North softened its intentions to annihilate the Northern government by all means. The result was a mutually acceptable autonomous arrangement with the option of secession.

In the same vein, all the groups in Somalia ought to be brought together at the negotiating table. These groups are:

- a) **Representation from Somaliland:** Have traditionally wanted complete self government from the larger republic. Secession in effect
- b) **Representation from Puntland (Ideally the Transitional Federal Government) and from Ahlu Sunnna Wal Jamaa (ASWJ):** Have traditionally advocated for a Federal Republic of Somalia governed from a central government in Mogadishu ASWJ is much more tolerant of ideological differences, but it remains deeply divided along clan lines.
- c) **Representation from Al Shaabab Mujahidin, Hizbul Islam**

Initially, Al-Shaabab and Hizbul Islam shared a similar vision and model of Sharia, but they are divided on two crucial issues, pan-Somali nationalism and the political utility of clans. Hizbul Islam's two traditional leaders, Sheikh Hassan Dahir Aweys and Sheikh Hassan Abdullahi Hirsi, "Hassan Turki", are nationalists and strong advocates of the creation of a greater Somalia, which incorporates all the Somali-inhabited regions into one state. Al-Shaabab sees its agenda as much broader than the Somali-inhabited regions of the Horn of Africa. It aspires to creating a new global Islamic Caliphate, with undefined geographical boundaries. Hard-liners in the organisation see nationalism as a legacy of colonialism and part of the problem. They argue that modern nationalism and the idea of a nation-state are alien concepts meant to fragment the *Umma* (the global Islamic community). The other difference is views about clans. Hizbul Islam also takes a pragmatic view of the clan system, which it tries to exploit to achieve its strategic aims. The four main Hizbul Islam affiliates were chosen with a view to achieving some semblance of clan balance. Views on the clan system within Al-Shaabab are mixed. The hardliners are ideologically opposed to it and see any manifestation of "clan bias" as proof of insufficient commitment to Islam. Less extreme figures sometimes manipulate the clan system to mobilise and achieve short-term objectives but are equally uneasy about getting sucked into Somalia's clan politics. ASWJ is predominantly a clan alliance that brings together major Hawiye sub-clans inhabiting the central regions of Somalia. ASWJ say that their alliance is animated by the extremist brand of Islam espoused by Al-Shaabab and in defence of traditional Sufi practices. However, territorial and clan calculations also motivate it.

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**Appendix 1: Text of the Power-Sharing Agreement of February 28,
2008**

ACTING TOGETHER FOR KENYA AGREEMENT ON THE PRINCIPLES OF
PARTNERSHIP OF THE COALITION GOVERNMENT

Preamble:

The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost. Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process. With this agreement, we are stepping forwarding together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise. This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

To resolve the political crisis, and in the spirit of coalition and partnership, we have agreed to enact the National Accord and Reconciliation Act 2008, whose provisions have been agreed upon in their entirety by the parties hereto and a draft copy thereof is appended hereto.

The key points are:

- a. There will be a Prime Minister of the Government of Kenya, with authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- b. The Prime Minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority.
- c. Each member of the coalition shall nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- d. The Cabinet will consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders.
- e. The Prime Minister and Deputy Prime Ministers can only be removed if the National Assembly passes a motion of no confidence with a majority vote.
- f. The composition of the coalition government will at a] l times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.

- g. The coalition will be dissolved if the Tenth Parliament is dissolved; or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
- h. The National Accord and Reconciliation Act shall be entrenched in the Constitution.

Having agreed on the critical issues above, we will now take this process to Parliament. It will be convened at the earliest moment to enact these agreements. This will be in the form of an Act of Parliament and the necessary amendment to the Constitution. We believe by these steps we can together in the spirit of partnership bring peace and prosperity back to the people of Kenya who so richly deserve it. Agreed this date 28 February 2008

Signed by:

Hon. Raila Odinga, Orange Democratic Party

H.E. President Mwai Kibaki, Government/Party of National Unity

Witnessed by:

H.E. Kofi A. Annan, Chairman of the Panel of Eminent African Personalities

**H.E. President Jakaya Kikwete, President of the United Republic of Tanzania
and Chairman
of the African Union.**

The National Accord and Reconciliation Act 2008

Preamble:

There is a crisis in this country. The Parties have come together in recognition of this crisis, and agree that a political solution is required.

Given the disputed elections and the divisions in the Parliament and the country, neither side is able to govern without the other. There needs to be real power sharing to move the country forward.

A coalition must be a partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans.

Description of the Act:

An Act of Parliament to provide for the settlement of the disputes arising from the presidential elections of 2007, formation of a Coalition Government and Establishment of the Offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with and incidental to the foregoing.

1. This Act may be cited as the National Accord and Reconciliation Act 2008.
2. This Act shall come into force upon its publication in the Kenya Gazette which shall not be later than 14 days from the date of Assent.

3. (1) There shall be a Prime Minister of the Government of Kenya and two Deputy Prime

Ministers who shall be appointed by the President in accordance with this section.

(2) The person to be appointed as Prime Minister shall be an elected member of the National Assembly who is the parliamentary leader of -

(a) the political party that has the largest number of members in the National Assembly; or

(b) a coalition of political parties in the event that the leader of the political party that has the largest number of members of the National Assembly does not command the majority in the National Assembly.

(3) Each member of the coalition shall nominate one person from the elected members of the National Assembly to be appointed a Deputy Prime Minister.

4.(1) The Prime Minister:

a) shall have authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya including those of Ministries;

b) may assign any of the coordination responsibilities of his office to the Deputy Prime Ministers, as well as one of them to deputise for him;

c) shall perform such other duties as may be assigned to him by the President or under any written law.

(2) In the formation of the coalition government, the persons to be appointed as Ministers and Assistant Ministers from the political parties that are partners in the coalition other than the President's party, shall be nominated by the parliamentary leader of the party in the coalition. Thereafter there shall be full consultation with the President on the appointment of all Ministers.

(3) The composition of the coalition government shall at all times reflect the relative parliamentary strengths of the respective parties and shall at all times take into account the principle of portfolio balance.

(4) The office of the Prime Minister and Deputy Prime Minister shall become vacant only if -

(a) the holder of the office dies, resigns or ceases to be a member of the National Assembly otherwise than by reason of the dissolution of Parliament;

or

(b) the National Assembly passes a resolution which is supported by a majority of all the members of the National Assembly excluding the ex-officio members and of which not less than seven days notice has been given declaring that the National Assembly has no confidence in the Prime Minister or Deputy Prime Minister, as the case may be; or

(c) the coalition is dissolved.

(5) The removal of any Minister nominated by a parliamentary party of the coalition shall be made only after prior consultation and concurrence in writing with the leader of that party.

5. The Cabinet shall consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers.

6. The coalition shall stand dissolved if:

(a) the Tenth Parliament is dissolved; or

(b) the coalition parties agree in writing; or

(c) one coalition partner withdraws from the coalition by a resolution of the highest decision-making organ of that party in writing.

7. The prime minister and deputy prime ministers shall be entitled to such salaries, allowances, benefits, privileges and emoluments as may be approved by Parliament from time to time.

8. This Act shall cease to apply upon dissolution of the tenth Parliament, if the coalition is dissolved, or a new constitution is enacted, whichever is earlier.