

T.C

ISTANBUL COMMERCE UNIVERSITY

INSTITUTE OF SOCIAL SCIENCE

GRADUATE SCHOOL OF AFRICAN STUDIES AND INTERNATIONAL RELATIONS PROGRAM

CONSTITUTIONALISM AND CHALLENGES TO DEMOCRACY IN KENYA

Master's Thesis

Maryam Sucaad AHMEDNOOR

200023332

Istanbul, 2022

T.C

ISTANBUL COMMERCE UNIVERSITY

INSTITUTE OF SOCIAL SCIENCE

GRADUATE SCHOOL OF AFRICAN STUDIES AND INTERNATIONAL RELATIONS PROGRAM

CONSTITUTIONALISM AND CHALLENGES TO DEMOCRACY IN KENYA

Master's Thesis

Maryam Sucaad AHMEDNOOR

200023332

Advisor: Prof. Dr. Mim Kemal Öke

Istanbul, 2022

ABSTRACT

The Kenyan Constitution of 2010 has been highly regarded as a progressive document. It has not been fully implemented to warrant the amendments a good example is the three-quarter gender rule being enforced in parliament. This study's general objective is to assess "Constitutionalism and Challenges to Democracy in the Kenya context". A realist approach is adopted to ground the study. The realist approach views the importance of human nature in global politics in that they hold the notion that man is egocentric and constantly hungry for power. The study further established the pattern of governance during the independence wave that swept Africa followed by coups and then manipulation of democracy by constitutionally lifting the term limits. Kenya has not yet reached the term limits but has tried to manipulate the constitution through the building brides Initiative which was found to be unconstitutional by the supreme court. The political space in post-independence Kenya has been characterized by ethnicity, a weak political system, propaganda, and weak electoral institutions. Kenya promulgated the Constitution in 2010 that devolved the system of governance. The devolution system in Kenya aims at strengthening institutions and devolving power to the county level thus promoting democracy, good governance, and equitable economic development. The 2010 Kenyan constitution domesticates all international treaties and conventions that Kenya has ratified. This is seen in article 2(5) which provides that general rules of international law shall form part of the law of Kenya. The study concludes that there is a need for strengthening governance structures. The study recommends that constitutional and legal reforms that support democracy and good governance be embraced and the independence of the judiciary upheld.

Key Terms: *Constitutionalism, Democracy, Governance, Elections, Devolution*

ÖZET

2010 Kenya Anayasası ilerici bir belge olarak kabul edilmektedir. Değişiklikleri garanti etmek için tam olarak uygulanmamıştır. Parlamentoda uygulanan dörtte üç cinsiyet kuralı buna iyi bir örnektir. Bu çalışmanın genel amacı, "Kenya bağlamında Anayasacılık ve Demokrasiye Meydan Okuyanları" değerlendirmektir. Çalışmayı temellendirmek için gerçekçi bir yaklaşım benimsenmiştir. Realist yaklaşım, insan doğasının küresel siyasetteki önemini, insanın benmerkezci ve sürekli güce aç olduğu fikrine sahip oldukları için ele alır. Çalışma, Afrika'yı kasıp kavuran, ardından darbeler ve ardından anayasal olarak terim sınırlarını kaldırarak demokrasinin manipüle edildiği bağımsızlık dalgası sırasında yönetişim modelini daha da ortaya koydu. Kenya henüz süre sınırına ulaşmadı, ancak yüksek mahkeme tarafından anayasaya aykırı olduğu tespit edilen Gelinler İnisiyatifi aracılığıyla anayasayı manipüle etmeye çalıştı. Bağımsızlık sonrası Kenya'daki siyasi alan, etnik köken, zayıf bir siyasi sistem, propaganda ve zayıf seçim kurumları ile karakterize edilmiştir. Kenya, 2010 yılında yönetişim sistemini devreden Anayasa'yı ilan etti. Kenya'daki yetki devri sistemi, kurumları güçlendirmeyi ve gücü ilçe düzeyine devretmeyi, böylece demokrasiyi, iyi yönetişimi ve adil ekonomik kalkınmayı teşvik etmeyi amaçlıyor. 2010 Kenya anayasası, Kenya'nın onayladığı tüm uluslararası anlaşmaları ve sözleşmeleri evcilleştirir. Bu, uluslararası hukukun genel kurallarının Kenya hukukunun bir parçasını oluşturmasını öngören 2(5) maddesinde görülmektedir. Çalışma, yönetişim yapılarının güçlendirilmesine ihtiyaç olduğu sonucuna varmaktadır. Çalışma, demokrasiyi ve iyi yönetimi destekleyen anayasal ve yasal reformların benimsenmesini ve yargının bağımsızlığının korunmasını önermektedir.

Anahtar Terimler: *Anayasacılık, Demokrasi, Yönetişim, Seçimler, Yetki devri*

DECLARATION

Academic and Ethical Rules Declaration of Conformity

I, Maryam Sucaad Ahmednoor, do declare that in conformity with the academic and ethical rules and regulations:

- I attained all the information and documents in the thesis within the framework of academic rules.
- I have presented all visual, auditory, and written information and results in accordance with scientific ethics.
- I indicate the relevant works in accordance with scientific norms in case the works of others are used. I cited all the works I used as a source.
- I have not done any tampering with the data used.
- I have not submitted any part of this thesis at this university or another university as another thesis.

DEDICATION

This research thesis is dedicated to my father and mother for their understanding and support during my studies.

ACKNOWLEDGMENT

My sincere acknowledgment goes to my supervisor Prof. Dr. Mim Kemal Öke for his guidance and dedication to seeing the proposal completed in time. My heartfelt gratitude goes to all individuals who contributed in earnest to this study. University Staff, deserve special thanks for their guidance, prompt responses to queries, encouragement, advice, understanding, and patience throughout the challenging period of preparing a thesis. My gratitude goes out to all my classmates especially those who worked together with me for great success in every assignment given.

TABLE OF CONTENTS

Abstract ..... **iii**
Declaration ..... **iv**
Dedication ..... **v**
Acknowledgment ..... **vi**
Table Of Contents ..... **vii**
Acronyms And Abbreviations ..... **ix**
Operation Definition Of Terms ..... **x**

CHAPTER ONE: INTRODUCTION **1**
1.0 Introduction 1
1.1 Study Objectives 6

CHAPTER TWO: THEORETICAL FRAMEWORK **8**
2.0 Theory Of International Relations 8
2.1 Theories On Constitutionalism 10
2.2 Theories On Democracy 13
2.3 Constitutionalism And Democracy In Africa 15
CHAPTER THREE: HISTORICAL FRAMEWORK **19**
3.1 Introduction 19
3.2 Research Design 19
3.2.1 Historical Documentary Analysis 19
3.2.2 Colonial Archival Documents 21
3.2.3 Data Analysis And Presentation 21
3.3 Kenyan Pre-Independence Era 22
3. 4 Kenyan Independence Era 23
3. 5 Successive Kenyan Constitutional Amendments 25
3.6 Introduction Of Multiparty System 32
CHAPTER FOUR: CONTEMPORARY DEMOCRACY IN KENYA **36**
4.0 Introduction 36
4.1 Democracy And International Law 36
4.2 Party Systems In Kenya 37
4.3 The Rule Of Law In Kenya 38
4.4 Devolution And Democracy In Kenya 39
4.5 The Electoral System In Kenya 41
4.6 Electoral Crisis In Kenya 42

CHAPTER FIVE: SWOT ANALYSIS OF THE KENYAN CONSTITUTIONALISM AND DEMOCRACY 47
5.0 Introduction 47
5.1 Strengths Of The Kenyan Constitutionalism And Democracy 47
5.2 Weakness Of The Kenyan Constitutionalism And Democracy 48
5.3 Opportunities In The Kenyan Constitutionalism And Democracy 49
5.4 Threats To Kenyan Constitutionalism And Democracy 50
CHAPTER SIX: CONCLUSION AND RECOMMENDATION 52
6.1 Conclusion 52
6.2 Recommendations 53
6.3 Area Of Further Study 54
REFERENCE 55

ACRONYMS AND ABBREVIATIONS

FKE	Federation of Kenya Employers
NACOSTI	National Commission for Science, Technology, and Innovation
NEP	New Economic Policy
SC	Supply Chain
SME’s	Small and Medium Enterprises
SPSS	Statistical Package for Social Sciences

OPERATION DEFINITION OF TERMS

Constitutionalism:	Authority of governance that comes from the people.
Democracy:	System of governance through elective representation
Devolution:	Statutory entrustment of services from the national government to county governments
Elections:	Selection of political representatives by the people
Governance:	Norms and structural accountability of representation by the political leadership

CHAPTER ONE: INTRODUCTION

1.0 Introduction

In the African Continent state governance has proved elusive from independence and seldom has the continent sought political intervention from her colonial masters. The continent has 54 states and nearly half of the countries are signatories to the UN charter.

The linkage between state and society in Africa is fragile and occasioned by dictatorial tendencies by the state. African political elites emerged during the power transition from colonial masters they inherited the constitutions as they were dispensed.

African governance has not escaped recurrent episodes of violence orchestrated due to fragile constitutions and lack of democracy. Governance and conflict have proved to be intertwined in most African states that experience state and society gaps.

Africa is enshrined with ethnic diversity that drives ethnic conflict and bad governance. Liberal governance enhances rights-based legitimacy from the rule of law, free and fair elections, and free society.

Kenya formerly colonized by the British Colony for over 150 years up until 1963 was disenfranchised by the colonial masters leading to a collective revolt by the native communities in a bid to attain a free society status.

The West minister model constitution written in London was the first Kenyan Constitution and guided the first general elections in which Kenya African National Union (KANU) triumphed against Kenya African Democratic Union (KADU).

Decolonization led to the establishment of newly independent states during the twentieth century. The government of Kenya was formed on 12/12/1963 however; Kenya did not become a republic until 1964.

The Government of the Republic of Kenya has 47 counties under the 2010 constitutional dispensation with each county having its semi-autonomous county government.

Contemporarily the national government of the Republic of Kenya has devolved most of its functions except the health sector.

Democracy system of government encourages the participation of the citizens of the country and through an elective representative; the government is governed based on the people, by the people, and for the people of that respective country.

Pro-democratic efforts to restructure the country have been eminent as long as the pre-independence days. Kenya has struggled with manipulating the constitution to suit the political dispensation of the day.

Political players in Kenya have tried to adopt progressive constitutions of other jurisdictions with the hope of improving democracy and governance. The research topic of this paper is; Constitutionalism and Challenges to Democracy in Kenya.

There has been a series of transitions in Kenyan politics in the field of democracy since the country gained its independence. For instance; the 1992 and 1997 elections, the 2002 election, former President *Moi*'s Legacy: A Nation Impoverished by Corruption, and constitutional reforms among others.

By highlighting the significant changes in Kenyan Politics, I would be able to answer whether or not the changes have brought about significant outcomes in the country or not. Jomo Kenyatta of Kenya African National Union (KANU) was the first Native Prime Minister of Kenya while Queen Elizabeth II of England was the dejure Head of State. The Constitution of Kenya was changed to the presidential system less than one year after forming the government giving rise to a dictatorial regime.

The 2010 Kenya Constitution was considered a genesis to achieving democracy in the Nation but once again it proved to be elusive with the recent calls for reforming the 2010 Kenyan Constitution by political players.

Democracy entails the active and meaningful participation of the citizens of a country in public affairs thus creating a democratic state. Kenya's identified challenge of ethnicity and identity in politics affects the electoral system in the executive arm of the country.

The citizenship definition is anchored on the constitution where rights, obligations, and responsibilities are spelled out to the sovereign. Governance powers are either distributed or limited, allocation of state resources is prescribed and state agents are created by the constitution. Political authority is derived from the constitution and suffices to say constitutionalism that focuses on a free society.

In most cases, ideological pronouncements and the people's aspirations are demonstrated through the constitution. The interactions of the government are shielded procedurally in the Constitution as the logical instrument of state power. The essence of the constitution is to prevent political tyranny and oppression of the citizenry.

The constitution in essence upholds sovereignty while prescribing citizenry and state rights and obligations outlining what is required and expected from all the stakeholders thus being the legal fundamental system that anchors a country.

The Constitution guarantees substance and procedure while promulgating citizenry rights, freedoms, and ideological pronouncements. The constitution as a logical instrument acts as an arbiter between the state and its citizens in regulating society.

The constitution as a written legal framework further guarantees a free society by enhancing constitutionalism which as a political theory governs state and society's political engagement on rights and justice.

Political analysts state that any political discourse has a constitution in place written or unwritten thus the constitution cannot be narrowed down to a description of legal principles but a protraction of constituted polity and shaped with character and discourse.

The standards of constitutionalism require that the state be bound by its constitution in the first instance. In essence, this will translate to a government that is held accountable to the people while respecting its legal framework.

Apartheid in the former South Africa, Sani Abacha's Nigeria, Idi Amin's Uganda, and Jeane Bedel Bokassa's Central Africa are just a few instances of nations on the African Continent that had constitutions lacking constitutionalism.

Constitutions without constitutionalism mean the legal instruments were present but seldom followed thus considered illegitimate and crafted to support state terror. These constitutions alienated the people treating them with a lot of contempt and arbitrary arrest and detention.

The illegitimate constitutions were never subjected to referendums or public participation nor were they made available to the people for scrutiny except by the custodians. The citizens could not debate the documents for fear of being arrested on trumped-up charges like treason.

The sanctity of the constitution in the African Continent was desecrated thus democracy and good governance were subverted disdainfully negating the post-independence gains and promises of democracy.

In all fairness to both political and military regimes in the African continent, the constitution only becomes necessary where its Articles propagate their interest however in most cases it is ignored as a merely written document.

State capture and impunity are the adamant effects of having a constitution without constitutionalism. Political fanaticism, corruption, and wastage of public resources are evident where constitutionalism is aloof.

Further non-compliance with the existing legal framework submerges the state into violence and intimidation as a means to an end in attaining social and political order and alignment.

State-sponsored elimination, assassination, kidnapping, and incarceration become a common feature when constitutionalism is not espoused. The citizens live with fear and unprotected thus patriotism is lessened.

Adherents of religious congregations emancipate nefarious behavior and diabolical thinking in cases where constitutionalism is abhorred thus obstructing societal change and moral dynamism. The Church has the duty of guiding the state and its citizens in embracing positive values to enhance co-existence.

Maladministration of public institutions and resources is often associated with indiscipline by state officers who got the opportunity into government because their political party formed government and not because of their qualifications.

Lack of motivation by state officers translates to the capricious discharge of state functions and running away from corruption. Individuals that are not motivated would disdainfully disregard rules and regulations including constitutional provisions.

Malevolent disregard for societal norms leads to un constitutionalism in that gross behavior and lack of commitment to the constitution make people want to attain higher social status and comfort without putting so much work into play.

Professionalizing the military and the police service into serving the people by protecting and upholding the constitution is one way of entrenching constitutionalism. Empowering and separating the Judiciary from the other two arms of government would strengthen its resolve on enhancing proper enforcement of the law by respecting and upholding the constitution.

Leadership and respecting the constitution in the African context have been devoid of good governance. Upholding, protecting, and respecting the constitution that our leaders were sworn into office has proved to be very elusive in the continent including ridiculing court rulings that are not favorable to the state.

The State in most African countries develops programs and structures that obscure the constitution and constitutionalism by duplicating contradictory roles including but not limited to upholding the constitutional dispensation hence impoverishing the nation.

Inefficiency in state transparency and systemic corruption by state officers and political representations is key to the abrogation of the constitution, especially in instances where the public declaration of the wealth of serving officers is not declared hence disproportionate earnings.

Cronyism is impertinence to constitutionalism in that unnecessary positions are created for friends and elites at the expense of the state thus leading to unscrupulous expenditure and less investment in economic development.

The creation of unnecessary political offices translates to more police officers guarding the politician than the electorates. The civil service becomes an instrument of championing the state agenda and fanning corruption and disregarding probity.

The lack of constitution and constitutionalism has brought about economic exploitation and ethnic violence mirrored in political dissent. Ember of violence amongst ethnic groups clamoring for political positions has permeated the continent.

The research examined the arms of the government as independent bodies, and the (2010) constitution of Kenya to understand the people's political participation. The research will also focus on the African Union's commitments to promote democratic principles and institutions, human rights, popular participation, and good governance and how all these are reflected in democracy in Kenya.

1.1Study Objectives

1. To evaluate the Theoretic and the Practical Aspect of Constitutionalism and Challenges to Democracy in Kenya.

2. To establish the context from a historical perspective to answer the holistic Aim of the Study

3. To assess the Weaknesses and The Strength of Constitutionalism And Challenges To Democracy In Kenya

4. To examine the Evolutionary Events that will Provide Insights into the Current Landscape

CHAPTER TWO: THEORETICAL FRAMEWORK

2.0 Theory of International Relations

This chapter introduces epistemological approaches to international relations and their relationship to "Constitutionalism and Challenges to Democracy in Kenya". A general overview would help understand the technical concepts that govern ontological backgrounds in International relations. The current study focused on the realist approach in addressing Constitutionalism and Challenges to Democracy in Kenya. Realism focuses on the reality of IR by expanding on the link between human behaviorism and state brokerage and power.

International relations have been regarded to have transpired from the West based on the influence and power of the 54 states that comprise the United States of America. The flourishing of this concept catapulted in the west due to the democracy while it stagnated in Asia and Europe as a result of an ideology that muffled citizens.

International Relations can greatly be associated with World War 1 during the settlement with the great powers. The need for open agreements in place of hidden covenants contributed to the war outbreak. It can be argued at the same time that the advent of international relations was to strengthen international laws and treaties.

Therefore, International relations have their roots in World War 1 and its branches in World War 11 which again plays a secondary role in enriching it. The peaceful World order was sought through international relations and as a result, the League of Nations was started. The need to reinforce human resources in this new field necessitated the creation of norms and standards in international relations.

The collaboration of nations and non-governmental organizations regarding fields of security, politics, and economic development has been described as International Relations (IR). Conventionally alliance politics formed the dimensions of International Relations and focused on the arms race, world peace, and affluence. IR has been defined as a branch of political science concerned with relations between nations and primarily with foreign

policies definition focuses on interrelations between states and non-state actors across the globe.

Further one may allude to the fact that IR focuses primarily on the global interstate system while attempting to elucidate behavioral and cultural approaches employed by different nations amongst themselves. The various behavioral approaches propelled by states explain the treaties and balance of power currently witnessed globally. Further, it depicts the several global groupings and economic blocks in terms of investments, arms trade, and immigration.

It must be noted with concern that several writers have differed in their definitions of IR, Scholars like Stanl Hoffmaney. Hoffman have no acceptable way of defining IR. Professor Schleicher on the other hand gives a basic definition that focuses on relations among states. Quincy Wright views IR as viewing historical inter-group relations. It must be mentioned that Professor Morgenthau states that IR primarily concerns the struggle for power amongst nations.

This is supported by Norman Podelford and George Lincoln who feel that state politics and power relations are grounded on IR. Harold and Margaret Sprout give a wider definition that includes political interactions and opposition with a come element of conflict. Hartman on the other hand feels IR is when states accommodate each other in terms of national interests. Palmer and Perkins feel that IR is concerned with state systems.

Geo-politics and the inequalities among nations and cultural differences necessitated the need for a standard orientation in world affairs this heightened power politics and militarization. Emergent definitions of international relations during the interwar period became more prevalent. This was shrouded by propaganda and intelligence agencies in planning for the war. Some of the outcomes of wartime planning were the modern-day computer that eventually orchestrated a different view of international relations.

In international relations the state is a unitary actor according to realism theory. Realism focuses on the past in most cases and holds that the same behavior tends to give repetitive

patterns and in the Kenyan democratic context the desire for power by politicians to the extent of Balkanizing the people into voting cohorts.

The predictability of the Kenyan democratic space is as a result of political greed exhibited by the political elites in desiring to control government. Realism in the Kenyan context is confrontational and this in most times leads to disruptive transitional power exchange.

The realist approach views the importance of human nature in global politics in that they hold the notion that man is egocentric and constantly hungry for power. Therefore laws that dominate mankind must be upheld and subjected to the people with the common view of protecting state interests.

This means that states as major actors in trying to increase their capabilities would control other nations in some form of colonialism thus increasing wars and shaping the nature of geopolitics. Therefore in such a structure, the state concerns security issues, and annexation is the top priority on their agenda (Viotti and Kauppi, 1993).

2.1 Theories on Constitutionalism

By supporting the rule of law and all human rights, constitutionalism establishes constraints on tyrannical governments to control the arbitrary dispensation of political power. Constitutionalism is conceivably the opposite of a dictatorship. Constitutionalism defends individual freedoms and serves as a fundamental check on government, which strengthens democracy.

This does not expressly imply that governments that have adopted constitutionalism are constitutional governments since constitutionalism is an evolving process and that is why Kenya most recently wanted to reform the current celebrated human rights-centered constitution that they adopted in 2010.

Africa in the process of self-discovery emulates a continent that despite embracing constitutionalism has suffered authoritarian tendencies that are supported by the exiting constitutions that support tyranny as witnessed by unending conflicts.

Emerging African states from independence all swore to uphold constitutionalism, the rule of law, and human rights however this was the case since violence and coup became the order of the day, the State of Kenya was also not spared by the attempted coup in 1982.

In the African continent, states have been victims of having a constitution without constitutionalism severally. The legitimacy of the legal documents in this case the constitution in most of these states was in question thus terror instruments of governance.

Kenya immediately became a one-party state up until 1992 when she amended the constitution to allow multiparty democracy. This transition came at a high cost in that many political activists were indefinitely detained and tortured indeed this was the price Kenya had to pay for democracy to be entrenched.

The logic and dynamics of constitutionalism is a revolving process that takes time to nurture and build involving all stakeholders including but not limited to the state, non-state actors, and public participation of which the resultant matrix is democracy and good governance. The essence of constitutionalism is to strengthen the people's sovereignty guided by a foundational character that brings the people's aspirations into unmet expectations and societal norms.

The Constitution is the supreme law of the land as depicted by Article 2 of the Constitution of Kenya bares supremacy therefore any law that contravenes it is considered inconsistent and null and void as far as the consistency is concerned. Therefore the outright diction between the constitution and constitutionalism is that while the latter focuses on the political system, its composition, and implementation the other focuses on the protection of the political system. However, the underlying factor is embracing and enforcing the constitution for the good of the nation.

Constitutionalism in essence ensures that the state lives up to the aspirations of the citizenry and this must be anchored on a legislative agenda that is contemplative of the wishes of the electorate. The Kenyan Constitution of 2010 has been exhaled as one of the most liberal

constitutions in the continent in that it has a robust chapter on human rights. Despite this being the position its interpretation has been tedious and the courts have seldom intervened to elucidate the legal position, (Kramon and Posner 2011: 89–94; Barkan and Mutua 2010; Hassan 2015).

The people of Kenya expressed overwhelming delight with the promulgation of the new constitution this was depicted by 68.7% in favor of the current constitution while 31.3% were against people's expectation for affordable living and development inter alia triggered this political shift (Gichuki 2016).

The overwhelming shift demonstrated that the hopes of the citizenry had faded on the old constitution and it seemed the current constitution was a new beginning for the country consequently a referendum was conducted and subsequent adoption of the constitution introduced devolution of government to county-level where seemingly access to resources was guaranteed.

Inclusivity has been the elusive subject in Kenyan politics coupled with tenets of democracy and good governance supported by constitutionalism. The Constitution has been likened to a living document and therefore amending the constitution to the changing environment should not be an uphill task.

The only viable way to check the excesses of government is when separation of the three arms of government is guaranteed. This not only distributes power to the various organs but arbitrary actions are curtailed, (Bannon 2006; Adar and Munyae 2001). The new Constitution of 2010 equally sought to stamp out elitism by introducing vetting of all state officers by parliament before parliamentary approval and presidential appointments. It further sought to address presidential election petitions and this was demonstrated by the landmark ruling in 2017 nullifying the presidential elections.

State security organs are over sighted by an independent civilian body that carries out inquests into incidences that fringe on human rights and recommends severe action against officers who are found culpable. The issues of women, youth, and persons with disability

have been addressed by the new constitution and selective representative positions created for these groups to represent them in parliament and the policy formulation stage.

2.2 Theories on Democracy

The African Continent viewed the need of consolidating the rule of law through an acceptable democratic change of guard as a sign of determination by member states to uphold democracy and good governance within the continent.

The democratic conceptualization has been orchestrated by various political players within the continent during this postcolonial era with not much success. The mixed reactions have in some instances improved the quality of democracy and in some situations created constitutional dictatorship as witnessed in the continent. The status of democracy in Kenya could be accessed through the way elections are organized, governance, press and political freedoms, and separation of power among many other democratic indicators that are globally available.

Democratic processes are enabled by robust freedom of information and human rights initiatives in strengthening society. The media play a crucial role as the fourth estate in highlighting the state of the nation.

The government censors or applies pressure to the media houses on what, how, and when to report. Policies that support freedom of the press are necessary for the democratic process and are hoping to achieve this Kenyan Constitution of 2010 enshrined this position. The post-colonial theory adopted in this study resonates with the fact that most African countries have adopted a western political model and structure that seems not to be adaptable within the continent because of our different values system.

Though disputable democracy cannot in itself be attributed to the failure of governments in the continent while most western governments can meet their challenges this is not the situation in the continent where the barrel of the gun is the most common feature.

Kenya like many of her counterparts in the continent has fairly demonstrated her commitment to democratic tenets in contemporary politics however she is yet to attain full democracy status as per the definition of democracy.

The Kenyan Constitution in Article 1(2) supports representative democracy this is in essence governance by the representation of the electorate. Kenya has not yet embraced public participation which is a key component of representative democracy and relied heavily on institutional representation.

Democracy is influenced by other common factors including political, socio-economic, cultural, and technological factors. The concerted efforts of policymakers stimulated cohesion in consolidating governance. Democracy has over has e been comprehensively illustrated by political scientists thus increasing the scope of its intuition and meaning within the political setup allowing for various indicators that determine its existence and status, (Munck and Verkuilen 2002; Coppedge et al. 2011; Schedler 2001; Treier and Jackman 2008).

These indicators which include free and fair elections, liberty of expression, press liberty, and separation of powers, even in advanced democracies have proved to be elusive in measuring the exact status, and in some cases, the said freedoms are delimited by statutes.

Democracy and good governance have once again proved to be elusive and tortuous in Kenya. It is yet to be firmly established whether the decaying political structures, elitism, or lack of moral integrity to curb corruption have contributed to this state of affairs.

Kenya politicians have reduced themselves to political merchants in that political power is no longer used to empower the people but instead use to trade deals using government resources on wealth acquisition.

Kenya on her part has continually struggled in achieving these freedoms and sadly a lot of human life has been lost in the quest of attaining these freedoms. The Law Courts have made meager gains most especially in honoring orders made by them against the state. An argument has been on the offing as to whether the African continent could successfully

adopt western democracy or should she integrate key aspects to her tailor-made democracy to diffuse the political tensions within the continent.

Kenya has consistently witnessed post-election violence with claims of trumped-up elections in every cycle ever since the advent of multiparty elections. Despite electoral reforms violence has pegged the nation with unending election disputes. This brings into question the compatibility of the different models of democracy.

Retrospectively what Africa in general and Kenya, in particular, lacks in her democratic model is a meritocracy, transparency, and accountability from the election body and successive state actors, a lot of conman ship and corruption is embedded in her elections.

Democracy to a larger extent fathoms the discrepancy between the various continents in terms of development and lack of it. A system where constitutionalism and good governance are emulated means the nation will set out what it hopes to achieve and religiously monitor its undertaking on meeting the national objectives.

The progress made by African states and Kenya in terms of democracy is far below the expected position. Africa and Africans are an educated lot who seemingly are expected to make progressive decisions that should stir development given their abundant resources.

Democracy has been viewed as a means to an end and not an end in itself therefore not connoting good governance. Sovereignty ought to reside by the people however state capture is normally engineered by the elite in propagating their interests. Human social development can only be enhanced through a democratic process coupled with good governance hence promoting collective freedom, peace, stability, and justice for the people through the various arms of government.

2.3 Constitutionalism and Democracy in Africa

In the African context, the use of the term democracy has various connotations and has always depicted open political competition infused with fairness and seeks to serve the governed and not the governing.

In pre-colonial Africa, most societies had resisted political authority and the colonialists encountered albeit little resistance colonialists most cases, societies that had leaders either imposed their lithe threader or if the leader collaborated they retained the same.

After the Second World War, the West realized the need to forge the base back home and therefore it became expensive to control their colonies. The only viable way to predict outcomes in their former colonies was to introduce democracy.

The representative institutions introduced by the colonial government may have hugely introduced electoral competition that was meant not to guarantee democratic rights and freedoms of the people but instead, photos promote the colonial agenda in form of neo-colonialism.

The wave of independence and self-rule that swept throughout Africa and the subsequent massive failure of African states within the context of self-rule come as a surprise because this was anticipated. Take Kenya for example in 1963 she gets her independence in 1964 she is declared a republic.

She incorporates the *mau mau* fighters into the national police force and orders that anyone found with the homemade gun will be arrested, she declares the land that the freedom fighters were fighting for as state land so, in essence, the freedom fighters fought for nothing.

She further adopts the land title system, tax, and national identity cards imposed by her people as regulation last but not least she adopts common lawfully as it is basic and also retains colonial judges to help her run the state.

In other words, self-rule in Africa was a fallacy in that all the Anglophone countries retained the English culture while the francophone countries inherited the French culture to this modern-day and this has heavily influenced their style of democracy.

During the wave of independence and the formation of successive governments, the opposition leaders were convinced to join the government to help govern the country at this stage elitism emerged, corruption, and unitary states.

Then came the second wave which was characterized by coups from the military who formed government and soon realized they could not govern and returned it to civilian rule who know now again started applying dictatorial tendencies and widespread corruption to rule.

The third wave could be associated with manipulation of democracy where heads of state removed the term limits set by their constitutions so we had constitutions without constitutionalism across most states in Africa.

This new trend is extremely worrying in that in East Africa alone we have three countries that have taken this route in West Africa two countries and in the Northern Africa one country and equally one in South Africa, this portrays the fact that Africa is undergoing a constitutional coup and is not yet democratic and free from dictatorship.

These constitutional coups weaken elections, constitution, constitutionalism, governance, and democracy in Africa and could ultimately lead to violent mobilization and political conflict if not checked. It suffices to state that many civilian and military dictatorships in Africa have gone away despite setting back most African economies. Semblance of democracy can be traced in sub-Saharan Africa despite the numerous conflicts for resources that are ravaging the continent.

Abuse and violation of human rights are still rampant, election fraud is still common, freedom of the press and association is still curtailed, and state impunity and corruption are still a source of worry to the African democracy.

Three democratic functions are associated with elections namely building strong democratic institutions, minimizing state impunity, and ability to change government and new public services. However regular, transparent, free, and fair elections remain a façade in Africa.

It must be emphasized that will free and fair elections entrench democracy they could also on the other hand where ethnicity is rampant hamper minority communities and most especially where political parties lack economic ideology but thrive on ethno cultural and religious agendas.

Kenya has had her share of majoritarian tyranny anchored on ethnicity however the new constitution devolved the system of governance and this has to some considerable extent reduced national violence in that every unit called a county has a governor and county assembly to address its affairs the national government has a distinct role to play.

African nations therefore must entrench democracy by upholding constitutionalism, human rights, and press freedoms, refrain from using state resources for political rallies, and make it affordable for their citizens to seek electoral office.

The marginalized community or groups should be given representation this include including women, the youth, and disabled people, and through their representation are allowed to voice their concerns about how they want to be governed.

CHAPTER THREE: HISTORICAL FRAMEWORK

3.1 Introduction

In this study, the research methodology and the logical approach adopted are provided. The research uses qualitative data that outlines broadly the explanation for a level of analysis. Furthermore, a chronological summation of the usage of the data and a detailed explanation of the collection and the analysis methodology is explained providing the findings and recommendations of the research.

3.2 Research Design

The study adopted a Historical research design that predominantly looked into past events and drew conclusions that pre-empted future events. Data from different historical sources were synthesized in line with the study objectives. The design engaged to collect and analyze data was commenced by understanding the data methodology and the research's objectives. The method used was considered most appropriate to best respond to the research purposes modeled.

The information was gathered from a variety of sources, including books, journals, articles, documents, reports, studies, policy documents, and literature on constitutional challenges to democracy in Kenya from 1963 to 2010.

3.2.1 Historical Documentary Analysis

This analysis takes into account not just what had been said or written about the subject but also what Kenya's constitutionalism and democracy had actually accomplished, as well as the difficulties encountered. The use of documentary analysis was chosen to study Kenya's constitutional challenges.

As a result, it differs from the conventional literature study since it provides proof of how the scenario was brought about. Books, journals, papers, documents, reports, research, and policy documents are among the documents evaluated in this data set.

In order to take a comprehensive approach to data gathering, it was crucial to define the field of study and establish its boundaries with the initial research questions (Cohen et al., 2000). The examination of these questions would then give the study a historical context.

These research questions needed a technique that could provide both a historical record of events and a meaningful portrayal of Constitutionalism and Challenges to Democracy in Kenya during the previous 47 years in order to provide historical context for answering the study's overarching goal (1963-2010).

A variety of research techniques were available that could have been used to respond to the formulated first research questions. In order to produce a historical narrative of events, there are arguments in favor of using techniques like case studies, surveys, and ex-post facto research. These techniques, however, would not have offered the comprehensive approach to data collecting required to build a big enough picture from which to choose and analyze pertinent data and, consequently, accomplish the research goal.

It was necessary to do historical research in order to completely respond to the research issues provided. This required using record and document analysis while keeping in mind the pertinent paradigms and sources. Consequently, the strategy used for this research might be referred to as documentary analysis.

It is impossible to manipulate cause and effect in historical study in a way that is independent of other factors. However, it has been suggested that it can adhere to the same norms that define scientific research in that it can be systematic and unbiased (Mouly, 1978). (Borg, 1963). It is described as a "systematic and objective location, evaluation and synthesis of data to establish facts and draw inferences about historical occurrences" in the source (Cohen, Manion, and Morrison, 2000). (Cohen et. al, 2000).

The primary feature of this methodology is the reconstruction of events using a rigid portrayal of a past era and drawing conclusions that give a knowledgeable understanding of the events that helped shape Kenya's current constitutional and democratic challenges. In

order to best respond to the initial research questions, documentary analysis was determined to be the most suitable research method.

3.2.2 Colonial Archival Documents

The study was a viable endeavor because unpublished data were available in government research facilities. There were key documents that were used in this study that offered a wealth of pertinent information and data. Most of the archival sources included were government documents created during colonial rule, and like all such archives, they reflected the official colonial viewpoints on democracy and constitutional law.

The documentary analysis started in 2021 with the goal of exploring and analyzing the analyzable literature on the policy, practice, and research pertaining to Kenya's Constitutionalism and Challenges to Democracy throughout the preceding decades.

A preliminary analysis of the pertinent literature found a scarcity of impartial studies that articulately detailed and assessed Kenya's history of democracy. This documentary analysis explains the main topics and problems in each of these parts and places them in a historical context.

3.2.3 Data Analysis and Presentation

A comprehensive evaluation of the study data during the selection phase was crucial to help the data's verification and validation once it had been structured. Prior to making notes on the pertinent chapters and sources listed in the paper, it was necessary to first analyze the contents of the documents and search the index for relevant keywords. In order to enable the arrangement of the data in several simultaneous ways, including chronological and major themes in line with the research questions, the sources of the data were identified according to whether they are primary or secondary sources.

In order to ensure that the study data was reliable enough to permit insightful analysis, a number of issues needed to be resolved at this next step of the procedure. This procedure

included both internal and external historical critique to assess the value and correctness of the data and to determine the validity or genuineness of the data.

The standards for assessing the validity, credibility, representativeness, and meaning of documents were based on this. For a true assessment of the research's utility and how it "fits" with other data, an evaluation of the research's objective, methodology, and epistemology was required.

These inquiries also offered a consistent framework for choice and analysis to ensure objectivity, and they were crucial in determining the validity of the study. As a result, the findings and suggestions derived from the data were correct and this faithful depiction was ensured.

This set of questions has also been used to identify, analyze, and cite sources of information in order to support claims made and contradict them throughout this thesis.

3.3 Kenyan Pre-independence Era

The European Imperial powers disenfranchised Kenyans for 73 years making her a British colony. Originally 42 tribes were counted as Kenyan tribes however currently 2 more tribes have been added making it 44 tribes this was after the *mMakonde* originally from Mozambique and Indians from India were officially recognized as Kenyans.

These communities were severally discriminated against and severely tortured by the colonialist and white settlers both physically and psychologically (Sheriff, 1985). The independence of Kenya in December 1963 was characterized by an accumulation of events which included violent resistance the infamous *MauMau* rebellion that began in 1952, civil protests and demonstrations by trade unionists, and petitions to the United Nations which led to negations held in Nairobi and Lancaster in London. It equally must be emphasized that administratively the Kenyan colony had become too expensive to maintain by the British.

The Lancaster and Nairobi negotiations bore the first Kenyan constitution which was a Westminster model written in London by the representatives of the various emerging Kenyan political parties and the British Foreign Affairs Office responsible for overseas colonies.

The British wanted to indirectly have control of the country divide and rule was inevitable through enhancing tribalism and that is why even today they still have a stake in the governance of the country in the form of development partner. This state of affairs could be attributed to the fact that some white settlers were not ready to go back home and therefore their interest had to be protected by Britain.

3. 4 Kenyan Independence Era

Pro democratic-democratic struggles' have characterized Kenya's prospect-independence-independence political scene most notably restructuring the democratic space. Ethnicity, weak political system, propaganda, and weak electoral institutions have put Kenya in a precarious position in terms of deteriorating into anarchy.

The independence celebrations were short-lived like in every independent African state at that time in that the governance challenges started emerging this time round being perpetrated by fellow Africans themselves.

This state of affairs can be attributed to the fact that Kenya adopted the colonial system of governance thus neo-colonialism emerged to this date however with a more polite term known as capitalism.

The 1963 Constitution marked the end of colonial rule making Kenya a dominion headed by a prime minister appointed by the Queen of England who also was the commander in chief of the armed forces. The constitution propagated a regional system of government as opposed to the latter which was provincial.

In 1963 Kenya experienced her first autonomous general election and Kenya African National Union (KANU) won the elections against Kenya African Democratic Union

(KADU). This arguably could be termed the period that Kenya as a nation got her governance system wrong to this date, (Muigai, 2004).

Before her Independence, during the Lancaster negotiations and constitutional writing process KADU had championed a parliamentary system of the presidential election while KANU wanted a presidential system, (Hodder-Williams, 1980).

It must be emphasized that the proponents of KANU out of greed and self-interest felt that they had some form of entitlement to the presidency having been detained during the quest for independence and therefore a parliamentary system could not portend well for them.

The first evidence of modern tribalism was in 1961 when elections were carried out between KANU and KADU. KANU received support from the *Luo*, Embu, *Kisii*, *Kikuyu*, *Meru*, and Kamba, while KADU got support from the pastoralist communities, (Bennet, 1931).

Prior to their significant split, the Kikuyus and Luo made up the majority of the Kenya African Democratic Union (KADU), an alliance of tiny tribes that feared the patronizing nature of KANU. With the anticipation of Independence and quelling of the *Mau Mau* insurgency ongoing, district political parties and associations were operational.

These political outfits were purely tribal both in identity and formation take for instance the *Kalenjin* Political Alliance, the Masaai United front was registered during this period. Later they disbanded and formed KANU.

Land issues were emotive at this time the minority tribes, therefore, decided to form their party KADU at the behest of the white settlers to counter KANU which ironically was now the *Kikuyu-Luo* alliance, (Mueller, Susan, 1984).

In 1962 the Kamba tribe felt marginalized and decided to form their political party known as African Peoples Party so that they could bargain for inclusion in government. This strategy worked and as soon as the Kamba elites were absorbed into government the party died a natural death.

To briefly lay some emphasis on this fact, the *mau mau* fighters were ordered to surrender all their weapons and either join the army or police force and any person who did not conform would be treated as a terrorist.

The lands that the freedom fighters were up in arms for all reverted to the state and Kenya being a capitalist nation they were required to purchase land from the Government. Equally, tax and Identification cards were still upheld by the new government the violations that the freedom fighters fought in vain and even lost their lives to that effect.

The tribalism seed was sown and was now growing into the present-day version of animosity, in 1966 three years after Independence the *Luo –Kikuyu* alliance split, and *Oginga* Odinga formed his party called the Kenya Peoples Union (KPU). In 1969 during Kenyatta's visit to Kisumu and subsequent rejection by the *Luo* KPU leaders were detained and the party banned, Kenya became a de facto one-party state, (Okoth-Ogendo, 1972).

3. 5 Successive Kenyan Constitutional Amendments

In the 1964 Constitution, KANU decided to change the constitution from the Westminster model to a purely presidential system following a parliamentary amendment and propagated capitalism instead of socialism. Kenya had become a Republic. The then opposition leader Daniel Moi was coerced to join the state and given the position of the vice presidency.

The fruits of independence immediately became a mirage while poverty and discrimination enhanced (Muigai 2004 Malhotra 1990). The government then banned the opposition party which made it close to impossible for those that were in the other parties to politically stand a chance (Widner 1993).

Following the successful completion of this task, numerous minor constitutional modifications started to take effect, completely changing the text. The Vice President, who was chosen by the elected Members of the House of Representatives, was created by the Constitution of Kenya (Amendment) Act No.28 of 1964.

Following that, the Kenyan Constitution (Amendment) Act No. 38 of 1964 abolished the clause permitting regions to levy independent regional revenue, making the regions entirely dependent on handouts from the state. This centralization of authority damaged the majimbo system.

The Kenyan Constitution (Amendment) Act No. 14 of 1965 changed the need for parliamentary approval of a state of emergency from a majority to a simple majority (65 percent in both chambers).

In addition, the threshold for Parliament to modify the Constitution was lowered from 90% in the Senate and 75% in the House of Representatives to just 65% in both Houses. With a simple majority in the house, they had to monopolize the constitutional amendment process.

The Kenyan Constitution (Amendment) Act No. 17 of 1966 attempted to establish that a Member of Parliament would forfeit their seat in Parliament if they missed more than eight consecutive sessions without the Speaker's consent or were sentenced to a term of imprisonment not to exceed six months. A member of parliament who was found guilty of the aforementioned offenses could receive a pardon from the President.

Initially, this change appeared to be intended to ensure that Members of Parliament would show up to their scheduled sessions, but it may also point to a mechanism to get rid of disloyal members. Furthermore, it gave the President broad authority to name people to all levels of the public service and to remove them at will, evoking a sort of autocracy.

A Member of Parliament was compelled to quit his seat if he left the political party that supported him during the election while that party was still a parliamentary party under the terms of the same year's Constitution of Kenya (Amendment) Act No. 17 of 1966.

This modification was implemented as a result of the Kenya African National Union, the country's ruling party, losing sitting parliamentarians to the Kenya People's Union (KPU). In essence, this amendment was passed to fix Oginga Odinga, the then vice president, who had quit and most members had followed to KPU.

In 1966, Act No. 18 of the Constitution of Kenya (Amendment) Act transferred emergency powers from parliament to the President. Therefore, the President could decide to impose incarceration without charge. Political leaders have occasionally been jailed without a trial, and then released after the elections.

The then-president Jomo Kenyatta felt that his presidency was being threatened because the majority of the people had believed that after independence socialism would be embraced however he employed capitalism and most Kenyans fell out with his government.

By eliminating the Senate and joining the two Houses, the Constitutional Amendment Act No. 40 (1966) created a unicameral legislature in 1966. After being eliminated, the senate and the regions were later reinstated in the 2010 constitution.

The Kenyan Constitution (Amendment) Act No. 16 (1968) eliminated the final remnants of majimboism (regionalism) in 1968. Any previous laws passed by the regional assemblies were revoked, the Province Councils were disbanded, and the Constitution was amended to remove all references of provincial and district boundaries. The Constitutional Amendment Act No. 45 of 1968 stipulated that the President may be chosen in a General Election rather than a National Assembly election.

The Kenyan Constitutional Act No. 5 (1969), a consolidating Act that gathered all of the constitutional revisions made since 1963, was passed in 1969. The Kenyan Constitution Amendment Act of 1974 reduced the voting age from 21 to 18 years old. Kiswahili became an official language by the National Assembly's Constitution of Kenya (Amendment) Act No. 2 of 1974.

The Constitution of Kenya (Amendment) Act of 1975 stipulated that bills could be introduced in English or Kiswahili and debated in either language. The Kenyan Constitution (Amendment) Act No. 14 of 1975 expanded the President's exclusive prerogative of mercy to include the ability to pardon those found guilty of electoral violations.

Following the dissolution of the East African Community in 1977, the Court of Appeal of Kenya and the Court of Appeal for East Africa were established by the Constitution of Kenya (Amendment) Act No. 13 (1977). As a result, the Chief Justice could serve as a judge on the Court of Appeal as well as the High Court. He or she would serve as the chair of the Appellate judges if he or she was a Court of Appeal judge at any given moment.

English was made an official substitute for Kiswahili in parliamentary procedures, including the introduction and discussion of bills, in 1978 thanks to the Constitution of Kenya (Amendment) Act No. 1 (1978).

According to the Constitution of Kenya (Amendment) Act No. 5 (1979), a public official had to resign at least six months prior to the elections if they wanted to run in the parliamentary elections.

Kenya became a one-party state by virtue of a constitutional amendment that restricted constitutional review in 1982. (Cheesman, 2003). The then-President Daniel Moi decided to firmly control Kenya after an air force soldier coup attempt failed, and subsequent parliamentary elections in 1983 and 1988 further strengthened the one-party regime.

The infamous Section 2A of the Constitution, which made Kenya a one-party state, was added by the Constitution of Kenya (Amendment) Act of (1982). The Kenyan Constitution (Amendment) Act No. 7 (1984) gave the High Court finality over the handling of election petitions in 1984. The Kenyan Constitution (Amendment) Act No. 6's Section 89 was abolished in 1985.

Under the Constitution of Kenya (Amendment) Act No. 14 of 1986, the positions of Controller, Auditor General, and Attorney General were no longer guaranteed tenure, which reduced the independence of the two offices.

The maximum and minimum number of parliamentary seats was both set at 188. The Kenyan Constitution of Kenya (Amendment) Act No. 20 of 1987 made all capital offenses included in the Penal Code (Cap. 62) that are punishable by death non-billable.

The Kenyan Constitution (Amendment) Act No. 4 (1988) modified the requirement for keeping capital crime suspects. Previously, such suspects could not be detained for more than 24 hours (Lumumba, P.L.O., et al, 2011).

As a result of the amendment, suspects of capital charges may no longer be detained for more than 14 days. The Public Service Commission, High Court, and Court of Appeal judges all lost their security of tenure in the same year that the Office of the Chief Magistrate and Principal Magistrate was established.

The Public Service Commission, High Court justices, and Court of Appeal judges' security of tenure was reinstated in 1990 by the Constitution of Kenya (Amendment) Act No. 2 (1990). The maximum number of seats increased to 210 from 188 and the minimum number to 68 under the Constitution of Kenya (Amendment) Act No. 10 of 1991.

The Constitution of Kenya (Amendment) Act No. 10 (1997), which repealed Section 2A of the Constitution and replaced it with Section 1A, strengthened the aforementioned in 1997. As a result, Kenya went from being a one-party state to becoming a multi-party state, which brought about the introduction of pluralism. The Constitution's Sections 7, 33, 41, 42A, 82, and 84 were altered.

The Constitution of Kenya Review Act (2002), which established the legal foundation for extensive constitutional amendments, was launched by the state in 2002. A constitutional review body, the Constitution of Kenya Review Commission (CKRC), led by Professor Yash-Pal Ghai, was established to carry out the Act's provisions. Its mission is to promote civic education, solicit public input, and create a draft constitution for consideration by an expanded National Constitutional Conference (NCC).

Further in 2002, all the tribes ganged up against KANU and they victoriously exterminated the dragon. However three years in government they split again, and tribalism reared its head again and it does up until now.

In 2002 a coalition of political parties came forth and formed the National Alliance of Rainbow Coalition (NARC) party, this time around despite having ideological conflicts on

who will lead the party, members managed to accept Kibaki as their leader and this is how KANU was defeated by a landslide win.

The people of Kenya thought that for once tribalism will be a thing of the past and that unity and prosperity will reign. Barely less than two years into power NARC disintegrated into tribal cocoons.

In 2005 when the national referendum to change the constitution the supporters of the change having chosen the symbol of an orange to depict change formed their part called the Orange Democratic Party (ODM) while the once opposed formed the party of national unity (PNU). Both parties once again had tribal inclinations ODM was for the rest of Kenya while PNU was for the Kikuyu.

In 2007 elections that brought Kenya to the brink of a failed state with vicious post-election violence targeting the *Kikuyu* community was a result of years of tribalism that was used by successive regimes to the detriment of their people.

Kenyan politics has always been devoid of Ideology, we have notable recent examples of shameless politicians who were against the Jubilee party name-calling them during the campaign period, when they lose the elections they immediately become political orphans and start praising the government that they despised a few moments ago hoping to be absorbed in the government. This breed of politicians who lack ideology tends to pursue tribal patronage to survive politically.

In 2008 the Constitution of Kenya (Amendment) Act (2008) created a coalition government by establishing the office of the Prime Minister and the Deputy Prime Minister. This was necessary following the disputed elections of December 2007 and the ensuing violence that continued into 2008.

In 2009 the constitutional review process was a sequel to the 2000-2004 process. The draft constitution rejection by Kenyans in the referendum of 2005 meant that the 1963 constitution remained the basic law of Kenya. The Disputed presidential election results that were presented in 2007 provoked an unprecedented wave of political violence and

killings across Kenya claiming over 1000 lives and causing the displacement of hundreds of thousands.

In 2010 Kenya's long constitutional review process finally came to end when the people overwhelmingly voted for the adoption of the new Constitution on 4th August 2010. Kenya's system of governance has got far-reaching changes with the introduction of this document. The government had no option but to decentralize power by creating the national government and the county government. A system of checks and balanced is ensured between the executive, legislative and judicial.

The 2010 Constitution introduces a Bill of Rights that seeks to protect and promote Kenyans' social, economic, and political rights. The protections of socio-economic rights are also an important addition to the 2010 Constitution. Principles and values of governance are emphasized, with an entire chapter being devoted to leadership and integrity.

The 2010 constitution having been promulgated in Kenya came to eradicate a personality-based type of politics however tribalism has entrenched itself more than ever, and each election year tribalism strengthens itself more. Every election year endorsements from tribal warlords are sought; these tribal shenanigans encourage tribalism and defeat its eradication.

Political party registration was made possible by the 2010 Constitution. With over 70 political parties in Kenya today, it was necessary to revise the political parties' legislation to include a mechanism for coalitions.

Despite the influx of political parties Kenya still suffers her biggest problem of tribalism and tribal-centered political parties. The architects of modern tribalism were political parties that were squalling for power from as early as 1961.

3.6 Introduction of Multiparty System

Further, the same year saw the infamous Section 2 A being repealed the one-party system provisions of the constitution and a multiparty system were established hence multiparty elections were held the following year in December.

Kenya was a one-party state by virtue of its constitution, therefore activists had to work to get section 2A abolished. After a protracted battle with the government, section 2A was eventually removed, and Kenya became a multiparty state. In 1991, the other tribes united to establish the Forum for the Restoration of Democracy (FORD), which stood up against the Kalenjin, Masaai, and pastoral communities that were still loyal to KANU.

In the 1992 first multi-party elections the reason why KANU triumphed against FORD was that the card of tribalism and lack of trust as earlier indicated caused the party to split before the elections and President *Moi* won the elections with a landslide victory.

The *Luhya* community wanted to have their lead the party according to them they are the second largest community after the Kikuyu, while the *Luo* felt that the Kikuyu had once held leadership so it was their turn to return the favor.

The *Kikuyu* wanted one of their own so eventually, the party disintegrated into Ford people by *Oginga* Odinga, while Ford *Asili* by *Matiba*. Meanwhile, tribal clashes were being witnessed in rift valley because the residents supported KANU, and since FORD reflected the rest of the county the regime was in a panic. The *Kikuyu –Luo* alliance started to reemerge again in 1993, Charles *Rubia*, *Matiba,* and the Odinga'sOdinga were all not in KANU having rebelled against the regime.

At the beginning of 1990, the *Luo-Kikuyu* merge had started to take shape, the Odinga and *Matiba* were having discussions, and the then regime of KANU was represented by the KAMATUSA is the *Kalenjin, Masaai, Turkana,* and *Samburu* tribes passed a resolution against multi-parties, meanwhile, Raila and his crew were detained for organizing a pro-multiparty rally the famous *sasa saba* (7th July 1990).

The detention of Raila, *Matiba,* and Rubia instead of nipping the multiparty bud, sprouted civic and pro multiparty supporters to actively agitate for the same, Paul *Muite*, *Gitobu Imanyara*, *Mukhisa Kituyi*, James *Orengo* and several young professionals joined the bandwagon. A coalition was formed and the chairman was *Oginga* Odinga while his vice-chairman was Masinde Muliro.

FORD was founded in July 1991 enjoining all major ethnic communities in Kenya except the KAMATUSA. The United States of America played a role especially the then ambassador o support the opposition by intervening whenever they were arrested, the British also threatened to cut donor funding to the government insisting on democracy. KANU and section 2(A) could not stand the pressure and they gave in to multiparty politics, this was the official ushering in of multi-tribal politics that stand to date.

Tribalism reared its head once again and the change influenced by the opposition was never to last. More tribal parties emerged and towards the 1992 elections FORD split into two tribal cocoons, FORD *Asili* led by *Matiba* a *Kikuyu* and FORD Kenya by *Oginga*. This background sets the stage for the current Tribalism theatrics in modern Kenya.

In 1992 for the first time theoretically, *Moi* and KANU were facing a landslide defeat history was being re-written again however practically tribalism would not allow KANU to be defeated. FORD would split the votes while KANU would maintain the tyranny of numbers and take the day.

The KAMATUSA had regrouped and were now wielding violence against other communities that had settled in the rift valley the propaganda was you either vote for KANU or pack leave. The *Kikuyu* were not so lucky at *Molo*, this was the first ethnic cleansing that set the stage for the second ethnic cleansing in 2007 post-election violence that almost tore Kenya apart.

GEMA community on the other hand felt that they stood no chance with FORD *Asili* despite one of their standing on that ticket, they decided to convince Mwai *Kibaki* to resign as the minister of health and form his party (Democratic Party).

Kibaki was not the ideal candidate for the *Kikuyu* because they felt he was cowardly and hesitant to protect their interest, *Matiba* on the other hand brave and fierce was ailing in Britain has suffered a stroke after incarceration.

Matiba remained the *Kikuyu* favorite despite his ailing health the *Kikuyu* elites kept reassuring their supporters that *Matiba* was strong yet in fact he was in poor health and could not even read and write.

Jaramogi *Oginga* decided to pull the first one on the pack and announced his interest in the presidency this did not go down well with the *Luhya* community because they felt it was their time to eat.

Jaramogi is not innocent at all when it comes to tribalism; his secretary was his daughter-in-law while the executive director was *Anyang Nyong'o* a fellow *Luo*. His son *Raila* muscled himself in party matters despite not having any position apart from membership, *Oyugi,* (1994).

The major presidential candidates (*Moi*, *Matiba*, *Kibaki*, and *Jaramog*i) results reflected the ethnic numbers and votes one amassed there was a correlation between the number of votes and the tribe of the presidential candidate.

In *Moi*'s case, he had roped in the *Luhya*, *Kisii*, *Akamba,* and *Meru* into KANU thus acquiring a landslide win against his competitors. KANU had survived while the rest had learned their lesson and retreated to strategies how they will fight another day and that day was 1997, Morton, (1998).

In 1997 the same thing happened again split votes this time around Raila *Odinga* was in the race his father had retired, and *Matiba* also had retired. *Kibaki* was still in the race amongst other contenders KANU won the day.

In effect, the President was allowed to form his government from members of other political parties, the role of nominating members to parliament was transferred from the president to the parliamentary parties, the number of electoral commissioners was

increased, and voter education and ensuring free and fair elections were included as additional roles of the electoral commission.

The Kenyatta regime was surrounded by the Kiambu Mafia, while his predecessor was surrounded by the Kabarnet syndicate, Mwai Kibaki had the Mount Kenya Mafia which Uhuru Kenyatta inherited. No wonder it is not a coincidence that Kenya's successive presidents were wealthy with huge tracts of land. In instances, where patronage failed bankruptcy, faced the defectors and they got whipped back into supporting the state.

CHAPTER FOUR: CONTEMPORARY DEMOCRACY IN KENYA

4.0 Introduction

Democratic establishments in contemporary Kenya have been made out of rigorous demonstrations, botched or rigged elections, and violent confrontations in some cases. Kenyan Political parties and the state have both in various instances challenged the status quo thus the inauguration of the 2010 Kenyan Constitution that encompasses democracy and devolution of government.

4.1 Democracy and International Law

The majority of international agreements pertaining to democracy have been ratified by Kenya; however, there are four exceptions. These agreements relate to the status of stateless people, the reduction of statelessness, the protection of migrant workers and their families, and finally the convention on the political rights of women.

Kenya has equally shown commitment to adopting and implementing the African Union Protocols having demonstrated peace and less emotive elections it was given a good governance rating by the African Peer Review Mechanism in 2006 and one year later this was watered down by the 2007 election violence that curbed the country.

Despite the government ratifying these international treaties those that threaten state power are normally ignored a case in point is the Rome Statute of the International Criminal Court (ICC) in 2013 Kenya threatened to pull out of the Hague.

Kenya signed the African Charter on Democracy, Elections, and Governance (ACEDG) however it is yet to ratify the charter. The charter promotes the values and principles of democracy and adherence to the rule of law while promoting free and fair elections.

The 2010 Kenyan constitution domesticates all international treaties and conventions that Kenya has ratified. This is seen in article 2(5) which provides that general rules of international law shall form part of the law of Kenya.

The Kenyan Constitution equally bares an obligation on the president to ensure the implementation of the various treaties and convections through the actions of his cabinet secretaries.

4.2 Party Systems in Kenya

The multiparty system was first adopted in 1991 by the then President Daniel Moi and this was seen as a huge step towards engraving democracy in Kenya. It must be emphasized that this achievement was after demonstrations and pressure groups including religious leaders intervened on behalf of the citizen's quest for democracy.

In Sub-Saharan Africa, most governments had adopted populism as a strategy for leading the country. In Kenya, every segment of the population was not content with the KANU leadership this dissent descended in numerous political protests for liberalization.

The enactment of multiparty in Kenya can be viewed as the second democratic liberation from the one political party politics which was viewed as some form of dictatorship due to a lack of inclusivity in nation-building.

Surprisingly Kenya still faces the challenges witnessed during the party one-party state era albeit adoption and introduction of multiparty. The mayhem witnessed in 2007 during the controversial general elections depicts a country despite the huge democratic gains made had not demonstrated enacting of the same.

Kenya has for a long time been considered the East African powerhouse and in 2007 risked being a failed state due to contested elections. Electoral disputes every five-year cycle exposes the fact that weak institutions, ethnic nationalism, corruption, and a widening socio-economic inequality coupled with youth disentrancement have put the country on a downhill trend.

The democratic gains that Kenya made over the years eroded as witnessed through the flawed general election of 2007 followed by horror and widespread mayhem when citizens turned against each other disputing the election results.

The electoral commission of Kenya had declared the incumbent President *Mwai Kibaki* as the winner of the contested elections his main rival *Raila Odinga* and his supporters took to the streets and Kenya was up in flames, especially in opposition strongholds.

The violence left 2000 people dead and over 500, 000 people displaced to camps within the country while the economy suffered a $1.5 billion loss, (Africa Research Institute, 2008). It took the intervention of the International Community and the African Union for a truce to hold.

4.3 The Rule of Law in Kenya

Kenya's successive governments have concentrated more power on the presidency and this has been seen as the source of political impunity. The imperial presidency notion has been embedded in the country since the colonial administration.

Constitutional Amendments began with the first Kenyan president after independence and the aim was to consolidate power on the presidency. The government went unchecked thus the semi-federal system and bicameral legislature had to give way to an imperial presidency.

The practice of concentrated power on the executive has been witnessed in successive governments arguably there has been dissent and suppression of citizenry political views. The foundational principles of participatory democracy were watered down after the promulgation of the independence constitution.

The other arms of government were equally interfered with to support the concentration of executive power. Policies fronted by influential politicians were made to champion this populist agenda and consequent dictatorship.

This situation brought about subjugation of government ministries and state institutions in policy making because the president had to sanction. Severe consequences emanated when failure to implement the presidential sanctions emanated.

The above style of leadership was quite common with the first and second presidents of the Republic of Kenya however the third president departed from this culture and expanded the policy-making space by adopting the participatory approach.

This approach never lasted long and soon the government was at it again with minimal consultation and presidential sanctions this necessitated the need for a constitutional requirement on public participation which the 2010 Kenyan Constitution embraced in articles 10,118,124,201,221 and 232.

The Kibaki government promised its citizenry a myriad of hope and wellness by improving the economy and creating jobs for the youth most importantly political reforms on governance and democracy.

This proved not to be the case in that the government needed to control parliament in terms of having sufficient numbers. The NARC coalition had split in 2005 and therefore members of opposition led by *Raila Odinga* controlled parliament for the government business to pass unopposed there was a need for numbers.

4.4 Devolution and Democracy in Kenya

The independent Kenyan system of governance was through the local government which was answerable to the Central Government headed by the President this system was supported by the local government Act.

Primarily they were mandated to provide public service at the district level, collect revenue and enact by-laws that aided them to govern resources while stimulating economic growth based on the available resources at the grassroots.

Kenya had 175 local authorities clustered into municipalities, towns, and councils based on the population and size of the area. The governance model was based on elected and nominated membership headed by Minister for Local Government.

The minister was the key resource person and his directive was consulted on every activity around the country on matters directly under his docket therefore critical decisions could not be made without his indulgence.

In virtually all the council's mayoral elections have been conducted this position was considered a very prestigious position in that the mayors held in trust community resources and matters accountability were scantly considered.

Often conflict would arise between the council and administrative authorities it must be emphasized that the administrative authorities represented the central government at the district level and were answerable to the Minister for local government.

The effectiveness of the local government structure was limited by the central government on public service delivery because it was indirectly decentralized by the central government. It must be noted that the Minister for local government reported to the president and implemented presidential sanctions.

After the 2013 elections, the promulgated constitution of 2010 was implemented and this saw the end of the local governments and the rise of the County governments, Kenya now had 47 counties headed by Governors.

This new system brought about two levels of governance the national and county level that is anchored on the following principles, democracy, public participation, separation of powers, service delivery, and inclusivity of gender, youth, and persons with disability in the management of the country’s affairs.

The county government system has two tiers of government. The first is the county assembly, which is comprised of members of the county assembly and is presided over by the speaker of the assembly.

Then we have the county executive committee headed by the governor who equally appoints his deputy and it also comprises ministers who implement policy and the day-to-day running of the county.

The County Assembly as spelled out in the constitution contains seats for women, youth, disabled and marginalized communities so that inclusivity in representation is optimum. The county governors only serve two terms in office the constitution has been silent on the deputy governors' position.

4.5 The Electoral System in Kenya

Kenya has held disputed elections periodically every five years and has equally changed the electoral commission. The first past the post electoral system has not been effective in Kenya in terms of promoting peace in the country during and after the elections.

The electoral system in Kenya contains gaps in that the principle of equal votes did not adhere to rather a balkanization and voting around ethnic lines were adopted thus leading to electoral violence after disputing elections as was witnessed in 2007.

For Kenya to attain the principle of free and fair elections, a fifty-plus one system that is based on the majority rule has been adopted and it suffers the same weakness witnessed in the first past the post system which is a simple majority rule. Kenyan politics lack ideology and is heavily tribal-based consequently the government is associated with the president's tribe.

Ever since the introduction of multi-party politics, political alliances break after the elections only to regroup as new ethnic outfits in the next elections. 2010 has not addressed the electoral system however the political parties Act and parliament through enabling legislation can address this gap.

Kenya adopted a two-round system for the presidential race while in the National assembly and senate the first past the post rule is still applied. The Kenyan 2010 constitution set a requirement that for one to lead the country the candidate must receive more than half the votes cast and 25% in half of the 47 counties.

This requirement was not well thought through as witnessed in the last general election of 2017 where the incumbent president *Uhuru Kenyatta* and the opposition leader *Raila*

Odinga all got above 25 % of votes from the 47 counties leading the opposition chief to swear himself as the president in a disputed election.

This electoral system of winners takes still promotes conflict and disputes in every election there is a need to reform and strengthen the opposition with a shadow government upon losing or better still in the Kenyan context expand the government to accommodate several ethnic interests since Kenyan is a polarized nation.

Kenya's transition to democracy and the institutionalization of political parties would lessen the polarization of political parties and subsequent elections along ethnic and regional lines. Despite the legalization of political parties, the office of the registrar of political parties has not implemented the law, therefore there are still many other ways that it could be done.

Kenya as a nation has no shortfall in terms of laws. The 2010 Kenyan constitution has been commended as one of the best constitutions however Kenya has equally been the worst county in implementing the constitution such in the irony that befalls her and its citizens.

Weakened institutions lead to chaotic elections since the independent electoral and borders commission and the office of the Registrar of Political Parties lack the funding and support laws necessary to fulfill their responsibilities.

4.6 Electoral Crisis in Kenya

The international community pressured Kenya to return to pluralist democracy in 1991 the then President Daniel *Moi* proposed the removal of section 2A of the Constitution which by defacto had made Kenya a one-party state.

The 1992 and 1997 elections were marred with electoral violence, ethnic fighting, a fractured opposition, and a disorganized electoral board that aided massive vote-rigging. Such situations led to KANU’s landslide victory and subsequent retention of power.

In 2002 KANU suffered a resounding defeat by the National Alliance Rainbow Coalition (NARC) an alliance of the various small opposition parties that came together to field one candidate.

This was the beginning of party coalitions in governing Kenya since no party could single-handedly field a candidate and win the elections. The ruling party conceded defeat and hand over power to the third president of the Republic of Kenya president Mwai Kibaki.

In the 2007 elections, the democratic gains achieved by Kenya have almost washed down the drain with devastating electoral malpractice and violence. The elections were disputed and people started fighting along ethnic lines.

Kenya had held a constitutional referendum in 2005 it was at this point that the country fast-tracked its adoption and the subsequent implementation of a devolved government in 2013 to avoid the ethnicity witnessed in 2007 electoral violence.

Kenya's electoral 2007-2008 crisis weakened Kibaki's popular wave and optimism and ethnic polarization had reached their all-time high since all the tribes had mobilized themselves against one tribe, (Anderson et. al, 2008).

The unity witnessed in 2002 when NARC came into power had now been fragmented into tribal entities after the disputed 2007 elections. The citizenry felt that they needed a change of government because their expectations and promises made by the NARC government stood unfulfilled.

Die-hard strong positions were being held by the government and the opposition leader and only took the international intervention for a coalition government to be formed and normalcy restored.

NARC elite disintegrated largely because of populism that was anchored on ethnic nationalism that was rampant during the campaign periods with politicians asking their voters to elect the various party officials from their parties setting the ground for post-election violence.

During the 2005 referendum, anti-Kikuyu rhetoric had built within the country it had become 41 tribes as constituted then against one tribe the Kikuyu, this strategy was adopted again in the run-up to the 2007 elections and the results were severe. The marginalization

and suffering of the majority of Kenyans against the backdrop of trade and commerce orchestrated by the Kikuyu had led to many Kenyans thinking that since the government was headed by the Kikuyu then the community was favored as compared to the rest of the citizenry, (Chege, 2008).

The other proposed observation by various political analysts is that the ODM party led by *Raila Odinga* had signed various memorandums of understanding with the Muslim community which is predominantly huge this was a formidable voting bloc. The youthful strata of 18-35 also contributed widely to enlarging the voting register and the propaganda of creating one million jobs every year when the former government manipulated their voters into participating in the elections.

The contested elections were divisive due to the much-anticipated mantra of change that the youth were hopeful for and also ethnicity that had blocked the change this was a position that the country had taken and would soon erupt into violence. The opinion polls also played a role in swaying voters in that their predictions became a source of debate by the two main presidential candidates and the campaigning team either disputing them especially when they did not favor them.

The political instability would also be hugely attributed to the opinion polls in that various research methodologies were applied in collecting data that formed the final opinion in some cases skewed results were adopted thus the difference in reporting. The 2007 elections were the first of its type in the information age to be carried out in Kenya through cyberspace and social media being the tool of campaigns, bulk SMS and emails were also adopted in the campaigns regulating this space proved to be difficult.

In cyberspace differentiating facts from fiction is quite difficult, especially with the Photoshop capability, propaganda moved very fast among the youthful strata who are mostly glued to social media thus the spread of rumors, (Cheeseman 2008). During the post-election violence humanitarian relief and reconciliation were transmitted through the

cyberspace in equal measures as hate and violence, and the mainstream media sought to augment rather than reconcile the populace.

The Kenyan elections ended up being an intractable ethnic-oriented conflict that saw some parts of the country witness communities that were not from the region expelled ruthlessly and their rights violated under national and internal law. Kenya has witnessed a peaceful and emotive change of guard in 2002 after being led by the KANU government for 24 years people were largely peaceful on the voting day however several deaths were witnessed on the pre-elections day.

The moment the votes tallying and counting started to trickle in as anticipated ODM in their strongholds had established a very long lead in terms of votes however the counting slowed down then the PNU strongholds started registering equal measures of votes closing the gap.

When Kibaki was announced the winner and hurriedly swore in as president Kenya was already burning, looting, killing and rape were some of the tragic offenses widespread the police intervened with a mutiny of the protesters. In parliament ODM had 99 seats while PNU had 43 seats however in allied party groupings 103 parliamentarians stood with ODM and 104 with PNU the ruling party at the time, Kalonzo Musyoka had sided with the Government, (ECK 2007).

There was no foreign dignitary of the state press coverage during the wearing in that was done in the evening neither pomp nor splendor. Kibaki wanted to get the state mercenary within his grip in no time and kept quiet in the statehouse as the country was burning including the Kiambaa massacre that affected his kin (Kikuyu) who were burnt in Church alive.

The situation was worsened when the then Chair of the electoral commission agreed that there were electoral irregularities and he could neither confirm whether PNU won the elections nor that he had been subjected to undue pressure to release the results.

The International electoral observers declared that the election was flawed and the credibility of ECK and the results were of the questionable character bearing in mind some polling stations had a hundred percent turnout which statistically was not possible. The Courts were viewed as pro-Kibaki bearing in mind he had just nominated several judges to the court of appeal and High court months before the presidential elections, eventually, African Union had to intervene and a coalition government was formed for peace to reign.

CHAPTER FIVE: SWOT ANALYSIS OF THE KENYAN CONSTITUTIONALISM AND DEMOCRACY

5.0 Introduction

SWOT analysis characterizes the strength, weaknesses, opportunities, and threats faced by the democratic system in Kenya. The democracy in Kenya has been a mixed reaction of various approaches albeit the survival of the Nation since independence in 1963.

5.1 Strengths of the Kenyan Constitutionalism and Democracy

The Kenyan Constitution of 2010 which has been praised globally as one of the progressive constitutions can be seen as the anchor of democracy in the young Nation of Kenya, allowing various democratic rights to be enforced. The constitution guarantees predictable democratic outcomes based on the rule of law and is subservient to good governance that supports separation of powers and controls political discretionary authority.

The judiciary ought to be seen enforcing the terms of the constitution and independent of executive meddling. In 2007 before the general elections, President *Kibaki* had appointed judges to the high court and courts of appeal this explains why the opposition refused to take their election dispute to court. In 2017 the opposition took their election dispute to court and the landmark ruling by the Supreme Court nullifying the elections was witnessed since they felt that the courts were impartial.

The devolution system in Kenya aims at strengthening institutions and devolving power to the county level thus promoting democracy, good governance, and equitable economic development. However Kenyan politicians are yet to appreciate devolution instead what is being witnessed is devolved corruption. The Electoral Dispute resolution Court has been strengthened to handle electoral petitions after elections. The courts have outlined shorter and faster dispensation of all electoral matters and equally increased the human resource capacity in all courts that have jurisdiction.

In Kenya today public servants have to resign from government three months before the general elections if they wish to participate in an elective position. This equally goes with

the use of public financial or material resources for campaigns constitute an electoral offense.

Government Institutional Frameworks have been strengthened to improve governance architect to nurturing democracy and sustainable economic development. Before the promulgation of the 2010 constitution, Kenya was prone to institutionalized violence, (Waki Report, 2008).

Institutionalized violence creates a cycle of impunity perpetrated by state officers and no accountability and deliberate poor coordination of security apparatus in terms of intelligence and response to violence and social protection, (Munyae, 2001).

Institutional effectiveness can only be achievable when clear objectives and goals are formulated and mandated for the established institutions to achieve while maintaining public transparency.

The Civil Society in Kenya has for a long time been at the forefront in checking the excesses of government and political actors. Gains have been achieved though there is still a lot that needs to be done under this space. Notably in the Kenyan democratic space, the human rights activists have suffered the most in that they have constantly agitated for democracy, good governance, and a stop to the pilferage of public funds.

5.2 Weakness of the Kenyan Constitutionalism and Democracy

The Independent Electoral and Boundaries Commission (IEBC) was founded in 2011 by the constitution after the disbandment of the Electoral Commission of Kenya (ECK) that had previously 2007 manhandled the elections. The IEBC has equally performed dismally just as its predecessor the ECK and Kenya is still not out of the woods yet in matters of elections. Political intimidation, assassinations, and vote-rigging have been witnessed in previous elections to the extent of the Supreme Court nullifying the elections in 2017.

The growth of democracy in Kenya is challenged by rampant corruption that has devolved into the County government level coupled with social discrimination and injustice with nonprocedural and nontransparent decision-making public officers.

Civil liberties are still curtailed by pockets of institutionalized violence that lead to the disappearance of human rights activists despite the constitutional gains made by the country with the region. Corruption is abated due to the lack of regulatory burden and strong institutions that can win a conviction. Most corrupt suspects get acquitted due to a lack of sufficient evidence that can compel the courts to take action.

Kenya is not deprived of laws or institutions but the quality of policy making is what is ailing the country's democratic space. Even though the constitution guarantees predictability it is seldom realized due to corruption and lack of mandatory obligations to enact political functions.

Visionless leaders, a divided nation on ethnicity and poverty, set Kenya for national collapse despite the credible constitution and political structures that mirror the country. Politics and politicians that lack ideology and are driven by greed are what the country is witnessing.

Previously the Judiciary is the only institution cementing the country together and once this institution is adulterated then Kenya’s downfall will begin. Therefore good leadership is of essence to bridging this democratic gap in the Country. State Interference in political affairs hampers democratic gains made by the country. The policies made that are unconstitutional to confuse the citizenry and make the nation unstable are seemingly void in Kenya

5.3 Opportunities in the Kenyan Constitutionalism and Democracy

Being a part of the East African Regional Block gives Kenya the chance to avoid disintegrating, as it nearly did in 2007 due to an electoral dispute. The neighboring nations would step in to help find peaceful solutions to the nation's political unrest.

The democratic space provided by the constitution encourages Public Opinion on divergent matters that arise in the country. Opinion Polls and the media do provide crucial information that influences political outcomes.

5.4 Threats to Kenyan Constitutionalism and Democracy

Kenya has suffered historical ethnicity even before colonization hence its deep-rooted polarization outcome. The problem in Kenya is the ethnicisation of politics and governance through the balkanization of indigenous communities to support parties and not ideology.

Ethnic politics secure an economic advantage to certain communities against the whole citizenry and it was thought that devolution would cure this economic discrimination. The president of the day would maintain a stranglehold on the government to support his community.

Marginalization as a result of ethnicity in terms of calculated government projects would spur skewed development to politically correct ethnic communities that enjoy the full support of the state. It is either by design or default that even the recruitment of security service men favors certain ethnic communities thus weakening social protection in times of a crisis due to the commission or omission of the state officers in averting crime.

Ethnicity is a social construct that politicians manipulate in dispensing public resources so that communities that are not in tandem with the political class bear the brunt of economic deprivation and consequent marginalization. The Land question has proved to be very emotive in Kenyan politics and intertwined with ethnicity and political manipulation especially every five years during the election cycle and this has considerably threatened democracy in Kenya, (IED, 2007).

The violence witnessed in 2007 had inclinations toward land-related grievances and this can be attributed to the marginalization and corruption by the previous governments and historical injustices on land dispensation, (IREC, 2007). Poor manipulative leadership breeds poverty through policies that are not sustainable and lack quality and that are how

democracy is affected in Africa in that the populace becomes handout dependent and not self-sufficient thus affecting the quality of democracy.

CHAPTER SIX: CONCLUSION AND RECOMMENDATION

6.1 Conclusion

The East African Nation, Kenya, is strategically placed as the gateway to the global community through the high seas therefore in terms of trade, she forms a formidable economic hub in the region. The democratic gains and governance structures that have been attained in the country need to be strengthened since the region depends on the import and export market of Kenya and Tanzania.

Since Somalia is a failed state, the region would stall economically if there is disquiet in Kenya which is considered the economic gateway of East Africa, and if she goes into electoral violence the region in particular and Africa, in general, would bear the brunt economically thus reducing world GDP since it is through her that the other regional wider markets unfold.

The founding father of this nation, Kenya – Jomo Kenyatta fifty-nine years ago pledged to support democracy, his cabinet, minister, Tom Mboya helped him and fifty-nine years apart his son Uhuru Kenyatta has pledged to support democracy and good governance as enshrined in our robust 2010 Constitution.

The people of Kenya overwhelmingly welcomed the devolved governance system however ten years after its implementation devolved corruption has been the norm of the day.

The evils like corruption, tribalism, nepotism, clan-ism, and many embarrassing cases of abuse have all come back into county government administration. Tribalism or ethnicity was a major problem but at the county level, it is worse because it has come down to nepotism.

The people believed that the new constitution which has ushered in the devolved governance would consider all kinds of people those people with disabilities, the marginalized people, the minority within the community and thus reducing the tendency of negative tribalism, negative nepotism.

The politicians have been noted as the most dangerous people spreading negative tribalism among Kenyans. The politicians should be discouraged is spreading negative tribalism, and nepotism in the provincial administration and county administration. It is therefore the strong arm of the national government the judiciary that will save Kenyans from all the abuses and uphold democracy.

The ramifications of a destabilized Kenya in 2007 witnessed landlocked countries suffer shortages in various vital products and a sharp increase in basic commodities due to disruptions to the supply chain.

Poor leadership has affected the growth of Kenya in that by 1960 Singapore, South Korea, the Philippines, and Malaysia were of the same pedigree as Kenya meaning that the Kenyan economy is behind almost 35 times what it should be today.

6.2 Recommendations

The Kenyan Constitution of 2010 has been highly regarded as a progressive document that has supported democracy and constitutionalism. Governance structures that have been embedded in the devolution of power and resources to the people despite their background are being encouraged. Therefore the need for Constitutional reforms and holistic legal review that support democracy and good governance need to be enhanced.

The integrity of the electoral management board should be above reproach, particularly regarding elections and the outcomes to avoid the anarchy witnessed in 2007 when the Electoral body did not even know who had won the elections despite the massive vote-rigging.

Transparency in state operations and validation of constitutionalism and democracy, good governance, and the electoral process can be achieved when instructions tasked with particular functions carry their mandate to fruition without fear or favor. Adequate mechanisms that check all political stakeholders should be put in place to manage the electoral process and must be put in place to guide and protect the democratic gains realized by the country.

The enhanced modern technology that curtails electoral fraud by availing accurate, credible, and transparent results through real-time electronic transmission of verifiable votes from all over the country to the national tallying center should be implemented.

The devolved governments will succeed if corruption, tribalism, and nepotism will be eradicated and this will be possible only if the constitution and the judiciary are empowered to deal with the vices.

Ever since Kenya got her independence up until President Moi's Era, the county has suffered dictatorships which was a challenge to constitutionalism and democracy, the state's main aim was to keep law and order while exploiting the democratic right of the citizenry however after the promulgation of the 2010 constitution such abuses have drastically reduced hence the need for the independence of the judiciary to be upheld.

6.3 Area of Further study

The study proposes that devolution and the adoption of the 2010 constitution be investigated so as to measure the constitutional and democratic gains made from 2010-2022

REFERENCE

Adar KG, Munyae IM (2001) Human Rights abuse in Kenya under Daniel Arap Moi, 1978. *Afr Stud Q* 5(1):1

Africa Research Institute. (2008). Kenya: A nation fragmented. *Briefing Note* 0801.

Anderson, D and Lochery, E (2008) 'Violence and Exodus in Kenya's Rift Valley, 2008: Predictable or Preventable?', *Journal of East African Studies*, Vol. 2. No.2: pp.328–342.

Bannon AL (2006) Designing a constitution-drafting process: lessons from Kenya. *Yale Law J* 116:1824

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

Chege, M. 2008. Kenya: back from the brink? *Journal of Democracy* 19, no. 4: 12539.

Cheeseman, N. 2008. The Kenyan elections of 2007: An introduction. *Journal of Eastern African Studies* 2, no. 2: 16684.

Electoral Commission of Kenya (ECK). 2007. *Parliamentary seats won per party*, 2007.

Gichuki N (2016) Kenya's constitutional journey: taking stock of achievements and challenges. *Recht Afr* 18(1):130–138

Hodder-Williams R (1980) Kenya after Kenyatta. *World Today* 36(12):476–483

Institute for Education in Democracy (IED) (2007) Pre-Elections Observation: Registration of Voters in 2007, An Audit. Nairobi: IED; Report of the Independent Review Commission on the General Election of 2007 held in Kenya on 29, December 2007 Kenya: *Government Printer*

Independent Review Commission (IREC) (2008) Report of the Independent Review Commission on the General Election of 2007 held in Kenya on 29 December 2007, Kenya.

Lumumba, P.L.O., Mbondenyi, M., and Odero, S. (eds.) (2011), *The Constitution of Kenya*: Contemporary Readings Law Africa Publishing (K) Limited

Malhotra V (1990) Kenya Under Kenyatta, vol 10. *Kalinga Publications*, Delhi

Muigai G (2004) Jomo Kenyatta and the rise of the ethnic nationalist state in Kenya. In: Berman B, Kymlicka W, & Eyoh D (eds) *Ethnicity and Democracy in Africa*. (pp 200–217), Boydell & Brewer

National Cohesion and Integration Commission (2011), Ethnic Audit of Kenya's Civil Service. Nairobi: *National Cohesion and Integration Commission* (NCIC).

Okoth-Ogendo, H.W. (1972). The Politics of Constitutional Change In Kenya Since Independence, 1963–69. *African Affairs,* 71(282), 9-34. doi:10.1093/oxford journals.afraf.a096213

The Republic of Kenya. (2008). Report of the Commission of Inquiry into Post-Election Violence. Nairobi: *Government Printer*.

Sheriff AMH (1985) *Social formations in pre-colonial Kenya*. In: Ogot BA (ed) Hadith 8: Kenya in the 19th century. Anyange Press, Kisumu, pp 1–31

The Independent Review Commission (IREC) on the general election held in Kenya on 27th December 2007. Nairobi: *Government Printers.*

Widner JA (1993) *The rise of a party-state in Kenya: From "Harambee*!" to "Nyayo!". University of California Press, Berkley