

**Lifting The Translucent Veil: The Erroneous Implementation Of Article 56 On Kenyan Somalis**

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## Declaration

I, ASHA SAMANTAR, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

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

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Ms. MUKAMI WANGAI

## **Abstract**

Article 56 of the Constitution of Kenya dictates that the state is mandated to ensure protection of the rights of minorities and marginalised groups. This provision aims to align the social, political and economic factors of minority groups with the rest of society. The state of Kenya has a history punctuated by acts of de-humanization, de-legitimization and de-nationalization of Kenyan Somalis. Through an analysis of Article 56, this paper seeks to demonstrate that as a result of preconceived notions, the state has failed to recognize the need for reform in ensuring that Kenyan Somalis are afforded utmost protection across all fronts. The community for the past decade has been shrouded with illegal raids, arbitrary arrests and restricted access to state services in dint of their ethnic and religious background. This has led to a complex and unconstitutional system of arbitrary state procedures implemented across the country, mainly in the former Northern Frontier District. Consequently, informal forms of ultra vires are employed by agents of the state, specifically the Kenyan police force. Further, the dissertation outlines that attempts by the state to integrate ethnic minorities, has produced futile results. The paper will comment on the contributions that historical events such as the Wagalla Massacre and Shifta War have had on the current situation. Lastly the paper will provide recommendations on the protection and inclusion of Kenyan Somalis, and methods through which Article 56 may be implemented efficiently to protect minorities and marginalized groups in Kenya.

## List of abbreviations

ACmHPR	African Commission on Human and Peoples' Rights
GSU	General Service Unit
HRW	Human Rights Watch
ICCPR	International Covenant on Civil & Political Rights
IPOA	Independent Policing Oversight Authority
KANU	Kenya African National Union
KDF	Kenya Defence Forces
KNCHR	Kenya National Commission on Human Rights
NCIC	National Cohesion and Integration Commission
NCIA	National Cohesion and Integration Act
NFD	Northern Frontier District

## **List of legal instruments**

Constitution of Kenya

Indemnity Act

National Cohesion and Integration Act

National Police Service Commission Act

Registration of Persons Act

## **Conventions, Declarations and Protocols**

African Charter on Human and People's Rights

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

International Covenant on Civil & Political Rights

## **List of cases**

*Rangal Lemeiguran & Others v Attorney General* (2006) eKLR

*Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR

*Communication of Katangese Peoples' Congress v Zaire*, ACmHPR Comm 75/92

*Mohamed Mire v Attorney General & Another* (2016) eKLR

## CHAPTER 1: INTRODUCTION

### 1.1 Background

The emergence of Kenya Somalis as ethnic minorities was a result of the secessionist movement between 1963 and 1969. In a bid to unite the Northern Frontier District (NFD) region with the Republic of Somalia, ethnic Somalis formed political parties to champion the cause. Due to this tension, the treatment afforded to Kenyan Somalis has become blurred, with the Kenya Defence Forces (KDF) acting under the umbrella of arbitrariness.

As a result, the state embarked on the transformation of its legal framework to uphold the rights of ethnic minorities. This was spearheaded by the promulgation of the 2010 Constitution and resultant establishment of institutions such as the Kadhi's Court.<sup>1</sup> The protection of minority rights under Article 56 of the Constitution highlighted the importance of inclusion and protection of marginalised communities. However, these achievements were inevitably overshadowed by the illegitimate treatment of Kenyan Somalis in dint of their ethnic, social and economic status. There was no effort to align their fundamental rights with the rest of the country.<sup>2</sup> Areas inhabited by Kenyan Somalis have remained the most insecure regions of the country. This insecurity saw the re-emergence of a xenophobic regime, with the Somali community believing that their very existence was threatened.

Institutionalized procedures such as illegal raids have been employed to intimidate the community.<sup>3</sup> Disruption of access to state services, arbitrary arrests and unlawful confinement have become habitual for Kenyan Somalis. This has led the Somali community to believe that the state is acting in retaliation to various terrorist attacks carried out by perpetrators of Somali origin.<sup>4</sup>

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<sup>1</sup> Article 170, *Constitution of Kenya* (2010).

<sup>2</sup> Otunnu O, 'Factors affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A historical Overview' 12 *York University Centre for Refugee Studies Journal* 5, 1992, 1.

<sup>3</sup> Human Rights Watch, *Welcome to Kenya: Police Abuse of Somali Refugees*, 2010, 8.

<sup>4</sup> Human Rights Watch, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*, 2016, 32.

## **1.2 Statement of problem**

Albeit Article 56 of the Constitution of Kenya directs that the State shall integrate minorities and marginalized communities into society. The violation of Article 56 has led to the intensification of unlawful actions against Kenyan Somalis such as abuse, illegal detention and raids.

## **1.3 Statement of objectives**

This paper aims to evaluate the means through which Kenyan Somalis, in clear contravention of legislation and the constitution are subjected to forms of premeditated abuse and torture. Its basis is that it is essential that state conduct upholds the provisions of Article 56 of the Constitution. Furthermore, the paper will analyse the current legal framework protecting the rights of minorities and marginalised communities. The paper proposes to submit that there exists a discrepancy between legislative provisions and the manner in which Kenyan Somalis are treated which contradict the principles of civic nationalism and has further led to the politics of belonging. Lastly, the paper will provide recommendations to ensure that the constitutional threshold which treatment of Kenyan Somalis is expected to meet is up to par, and in its absence shall suggest the enactment of appropriate legislation.

## **1.4 Hypotheses**

This paper hypothesizes that there is discordance between legal provisions which attempt to integrate ethnic minorities and the treatment afforded to Kenyan Somalis by the state. It accredits historical and social factors to this phenomenon.

It further hypothesizes that although the State has partially applied the provisions of Article 56, institutionalized procedures bar access to state services. Additionally, the deliberate deprivation of fundamental rights creates a loophole for the mistreatment of Kenyan Somalis by the KDF. Consequently, there is need to effectively remedy these violations and ensure the consistent practice of legal actions.

## 1.5 Research questions

The paper will intend to answer the following questions:

- 1) What is the legal framework concerning the protection of the rights of minorities and marginalized communities in Kenya?
- 2) Are there any factors, and if so, what contributions have they made to the current treatment of Kenyan Somalis considering the state's duty to implement affirmative action programmes?
- 3) What is the treatment afforded to Kenyan Somalia by the state in light of the provisions of Article 56?

## 1.6 Justification of the study

The relevance of this study stems from historical developments. The emergence of Somali refugees led to the establishment of minorities and marginalized groups. The NFD region, which was dominantly inhabited by Somalis was not aligned with respective areas of Kenya across economic, social and political spheres.<sup>5</sup> Within major cities such as Nairobi and Mombasa, the Somali community transformed suburbs, most notably Eastleigh, Nairobi into homes away from home.<sup>6</sup> The rest are scattered across the North-Eastern counties of Garissa, Mandera and Wajir.

Moreover, this raises the question, what has led to the classification of Kenyan Somalis as both citizens and strangers in Kenya? With the promulgation of the 2010 constitution, the new provisions extensively highlighted the importance of protecting ethnic minorities, which in turn has not been applied practically. In an effort to uphold their legal obligations, the Kenyan government took steps, all of which proved to be unsuccessful. In 2013 they formed a committee made up of government officials and members of the Eastleigh business community but failed to address police abuse which had been plaguing the Somali community. Recommendations were made prior to investigate the sources of abuse and the command responsibility of those who failed to prevent these abuses and punish those responsible.<sup>7</sup>

Throughout the years, various discriminatory procedures have been institutionalized which has created a pathway for extreme violations of the law. Contrary to its international obligations to protect ethnic minorities under the International Covenant on Civil and Political Rights

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<sup>5</sup> Otunnu O, 'Factors affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A historical Overview,' 12.

<sup>6</sup>[https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/03/heres-what-it-means-to-be-somali-in-kenya/?utm\\_term=.db4682f32764](https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/03/heres-what-it-means-to-be-somali-in-kenya/?utm_term=.db4682f32764) on 9 February 2019.

<sup>7</sup> Human Rights Watch, *Welcome to Kenya: Police Abuse of Somali Refugees*, 2010, 20.

(ICCPR), the operations of Kenya's law enforcement agencies have been shrouded by extrajudicial killings.<sup>8</sup>

As a result of political conflict along ethnic lines, Kenyan Somalis are privy to restricted access to government services. This exclusion is attributed to the growing threats from Somali extremist organizations on Kenyan soil. Thus, this paper affirms that although the constitution ensures the protection of minority rights, the state through its actions demonstrates non-adherence of the protective legislation in place.

### **1.7 Theoretical framework**

Considering the disparate treatment afforded to Kenyan Somalis, efforts have been made to break the causal link. During the 19<sup>th</sup> Century Karl Marx through his social conflict theory propounds that those with societal privileges tend to be less exposed to hostility and opposition.<sup>9</sup> This highlights the superiority complex that the State uses as a weapon against its inferior subjects. He also blames socialization and conforming behaviour for the multidimensional discrimination which has led to conflict presenting itself as a means of achieving consensus<sup>10</sup> Marx states that:

*'The various institutions of society such as the legal and political system are instruments of ruling class domination and serve to further its interests.'*

The statistical discrimination theory propounded by Kenneth Arrow offers a more plausible explanation. Statistical discrimination is defined as '*an individual being treated differently because of information associated with his/her racial group membership*'.<sup>11</sup> The practice of profiling not only gives rise to explicit prejudice, but advances the curtailment of fundamental rights.

The theory of formal equality introduces the notion of 'treating like cases alike and unlike cases unlike'. The human rights-based approach acknowledges the need for concern for dignity and respect of the person. As good as Kenya's justice system may seem on paper, in practice it falls short of the ideals it is based upon. When actions are premised on social and ethnic differences it is likely to result in gross injustices. Human rights incorporate various principles

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<sup>8</sup> Article 27, International Covenant on Civil and Political Rights.

<sup>9</sup> Fredman S, *Discrimination Law*, Oxford University Press, Oxford, 2002, 18.

<sup>10</sup> National Research Council, *Measuring Racial Discrimination*, National Academies Press, Washington DC, 2004.

<sup>11</sup> Arrow K, 'The Theory of Discrimination' Working Paper Number 30A, 1971, 1

<https://dataspace.princeton.edu/jspui/bitstream/88435/dsp014t64gn18f/1/30a.pdf> on 6 February 2019.

such as universality, indivisibility and inalienability which are too wide of an area to cover. As Article 56 of the Kenyan Constitution seeks to integrate minorities, the study narrows its discussion to the representation of Kenyan Somalis as a marginalised community.<sup>12</sup>

### 1.8 Literature review

Jeremie Gilbert in his article *Constitutionalism, ethnicity and minority rights in Africa* highlights the importance of the 2010 Constitution in conceptualizing the emergence of marginalized communities. He further suggests that due to the focus on marginalization, the state is according privileges to ethnic minorities.<sup>13</sup> In his 2011 thesis Reginald M.J. Oduor attributes historical events in Kenya to the shift of ethnic minority rights.<sup>14</sup>

Keren Weitzberg in her book *We Do Not Have Borders: Greater Somalia and the Predicaments of Belonging in Kenya* investigates the vast array of human rights abuses against Kenyan Somalis that the state has amassed. In a report titled 'Welcome to Kenya: Police Abuse of Somali Refugees and Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya', Human Rights Watch (HRW) recognizes the need for accountability across all fronts of government, whether acting in its own capacity or through its agents.<sup>15</sup> The latter enounces immediate action to investigate allegations of extrajudicial killings and torture .

Sean Bloch in his article *Statis and Slums: The Changing Temporal, Spatial, and Gendered Meaning of 'Home' in Northeastern Kenya* attributes the origins of the longing struggle to the Shifta War.<sup>16</sup> This period of time saw the state of Kenya introducing forced settlements, as a means to keep watch of Somalis who were suspected of plotting against its citizens. This is thoroughly discussed in *Factors Affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A Historical Overview*. Ogenga Otunnu traces the source of conflict to tension between the Kenyan government and inhabitants of the former NFD region.<sup>17</sup>In a bid to unite the NFD region with the Somali Republic, ethnic Somalis formed political parties to

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<sup>12</sup> Article 56, *Constitution of Kenya* (2010).

<sup>13</sup> Gilbert J, 'Constitutionalism, ethnicity and minority rights in Africa: A legal appraisal from the Great Lakes region' 11 *International Journal of Constitutional Law* 2, 2013, 440.

<sup>14</sup> Oduor R, 'Ethnic minorities in Kenya's emerging democracy: Philosophical foundations of their liberties and limits', Unpublished PHD thesis, University of Nairobi, Nairobi, 2011, 113.

<sup>15</sup> Human Rights Watch, *Welcome to Kenya: Police Abuse of Somali Refugees*, 2010, 94.

<sup>16</sup> Bloch S, 'The Changing Temporal, Spatial and Gendered Meaning of 'Home' in Northeastern Kenya' 58 *The Journal of African History* 3, 2017, 413.

<sup>17</sup> Otunnu O, 'Factors affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A historical Overview,' 1.

champion the cause. As a result of this conflict the distinction between ethnic Somalis and Kenyan Somalis has become blurred, with police forces acting under the umbrella of arbitrariness.<sup>18</sup> Otunnu touches on the process of ethnic screening which was introduced to curb the security situation in the NFD region.

In *Screening of Ethnic Somalis: The Cruel Consequences of Kenya's Passbook System*, HRW refers to ethnic screening as an institutionalised procedure, which has led to the inherent classification of Somalis as second-class citizens.<sup>19</sup> Tabea Scharrer in *Ambiguous Citizens: Kenyan Somalis and The Question of Belonging* attributes the ambiguous citizenship of Somalis to the politics of belonging which creates confusion as to how they fit in the Kenyan sphere.<sup>20</sup>

Lastly, Sharon Chepkirui Kitur in her dissertation *Refugees a Threat to National Security: Case Study Kenya* investigates the legality of the screening process. Her work also discusses whether the drastic measures taken by the government in ensuring renewed security has yielded positive consequences.<sup>21</sup>

## **1.9 Research design**

### **1.9.1 Research design & methodology**

This paper will rely on secondary data. Secondary data encompasses the 2010 Constitution of Kenya, acts of parliament and international declarations. It further comprises but is not limited to: journal articles, reports, books and other relevant literary works

Sources of data include the university library and internet resources. Due to its qualitative nature, the data relied on will be used to examine the hypotheses along with the statement problem.

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<sup>18</sup> Otunnu O, 'Factors affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A historical Overview,' 1.

<sup>19</sup> Human Rights Watch, *Screening of Ethnic Somalis: The Cruel Consequences of Kenya's Passbook System*, 1990, 3.

<sup>20</sup> Scharrer T, 'Ambiguous Citizens: Kenyan Somalis and The Question of Belonging' 12 *Journal of East African Studies* 3, 2018, 13.

<sup>21</sup> Kitur Chepkirui S, 'Refugees a Threat to National Security: Case Study Kenya' Unpublished LLB Thesis, Strathmore University Law School, Nairobi, 2016, 27.

### **1.9.2 Assumptions**

- 1) The legislative framework of Kenya caters for ethnic minorities.
- 2) The treatment of Kenyan Somalis is as a result of historical and social factors.
- 3) Areas largely inhabited by Kenyan Somalis serve as territories for terrorists, thus posing a threat to the fabric of Kenyan society.

### **1.9.3 Limitations**

Research may be limited by:

- 1) Sources may present a biased view due to the sensitivity of the treatment of Kenyan Somalis. This includes government reports, case law and police reports.

### **1.9.4 Chapter breakdown**

Chapter 1 shall serve as the introduction and will highlight the background to the study, the theoretical framework as well as the literature review. It will summarize the research design, methodology and provide a clear assertion of the sources of data to be relied upon.

Chapter 2 shall analyse the theoretical framework behind this study. It will explain the relation between the theories discussed and the topic at hand.

Chapter 3 shall examine the legal framework which protects the rights of minorities and marginalized communities. It will comment on the historical occurrences which spearheaded the establishment of this legal regime.

Chapter 4 shall assess the place of Kenyan Somalis in Kenya including an analysis of the factors which contribute to the discrimination they face. It will further scrutinize the power of the police forces.

Chapter 5 shall provide a conclusion as well as findings and recommendations.

### 1.9.5 Time line/duration

The time line for completion of chapters is shown below:

<b>Chapter</b>	<b>Completion</b>
Chapter 1	15 May 2019
Chapter 2	30 June 2019
Chapter 3	15 July 2019
Chapter 4	20 September 2019
Chapter 5	5 November 2019

## CHAPTER 2: THEORETICAL FRAMEWORK VALIDATING THIS STUDY

### 2.1 Introduction

This chapter will examine the theoretical framework supporting this study. It will discuss the applicability of the social conflict theory by attributing the treatment of Kenyan Somalis to lack of societal privileges. Further, an analysis of the statistical discrimination theory will demonstrate the relationship between marginalization and state action. Lastly, the formal equality theory will examine the connection between equality and social exclusion.

### 2.2 Social conflict theory

#### 2.2.1 Notions behind the social conflict theory

Karl Marx propounded that those with societal privileges tend to be less exposed to hostility and opposition. The theory places emphasis on the system of oppressed versus the oppressor.<sup>22</sup> Through the use of legal and political systems, the state exercises ruling class domination. As a result of the influx of Kenyan Somalis inhabiting the North-eastern region, there has been deliberate prevention of aligning these areas socially, economically and politically with the rest of the country.<sup>23</sup> This leads to those affected not having access to societal privileges, thus they are prone to be targets of hostile state agencies. The practice of ethnic screening is embodied in this theory whereby Kenyan Somalis are mandated to undergo a process so as to prove their authenticity.<sup>24</sup> The systems of the state, acting in a hostile manner has led to the politics of belonging. It has become common practice for state agencies to swindle funds from innocent Kenyan Somalis with the threat of charging them with unsubstantiated criminal offences.<sup>25</sup> Due to severity of the charges, the only recourse is to facilitate payment to the officers.<sup>26</sup>

This encompasses ethnic discrimination by the state. Marx through his theory propounds rather than upholding consensus and conformity, the oppressor will operate solely based on domination and power. As state agencies are appointed to duly carry out their functions, their

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<sup>22</sup> Fredman S, *Discrimination Law*, 14.

<sup>23</sup> Otunnu O, 'Factors affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A historical Overview,' 1.

<sup>24</sup> Human Rights Watch, *Screening of Ethnic Somalis: The Cruel Consequences of Kenya's Passbook System*, 1990, 7.

<sup>25</sup> Human Rights Watch, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*, 2016, 56.

<sup>26</sup> Human Rights Watch, *"You Are All Terrorists": Kenyan Police Abuse of Refugees in Nairobi*, 2013, 31.

discriminative practices become so normalized that it presents itself as an institutional procedure, regardless of its negative connotations. Through illegal dawn raids in Somali dominated areas, the police force is able to depict that these institutionalized procedures are executed so as to protect the country from threats.<sup>27</sup>

### **2.2.2 Historical appraisal of the social conflict theory**

Furthermore, this theory actualizes conflict presenting itself as a means of achieving consensus. An illustration of this can be deduced from the Shifta War. The conflict which took place between 1963 and 1968 saw ethnic Somalis who inhabited the NFD region attempt to have the area seceded to Somalia. With hostility at an all-time high, the Kenyan Government through its agency, the General Service Unit (GSU), forced ethnic Somalis into *manyattas* which were essentially informal concentration camps.<sup>28</sup> As a consequence, this war initiated years of gross abuses and repressive measures by the Kenyan police in the absence of a consensus. These abuses emerged 12 years after the Shifta War, and led to catastrophic events such as the Wagalla Massacre of 1987 which resulted in the loss of 297 lives, with many burnt beyond recognition.<sup>29</sup>

### **2.2.3 Role of legal and political sectors in advancing disintegration**

Marx focuses on the role that the legal and political sectors play in fuelling this dispute. It is a common occurrence, that whilst illegal raids are being carried out, the police forces abuse their powers to commit offences such as rape, beatings and extortions. In turn, when the matter is brought before the courts, the perpetrators are not charged for any of the offences listed above. This is where failure of the legal system plays a major role. The courts are hesitant to charge a police officer as it may open floodgates, for those seeking legal recourse.<sup>30</sup>

Politics plays a major role in ethnic discrimination by states. Divide along ethnic lines has led to a social- economic construct whereby the notion of ethnic-based politics remains supreme. This disassociation occasions the limitation of resources to communities less favoured by those

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<sup>27</sup> Human Rights Watch, *“You Are All Terrorists”*: Kenyan Police Abuse of Refugees in Nairobi, 2013, 37.

<sup>28</sup> Otunnu O, ‘Factors affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A historical Overview,’ 5.

<sup>29</sup> Otunnu O, ‘Factors affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A historical Overview,’ 4.

<sup>30</sup> Human Rights Watch, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*, 2016, 2.

in power and thus a consequential breakdown in law and order.<sup>31</sup> It has become a countrywide phenomenon that political opinion weighs heavily on the treatment of minorities in Kenya. Institutional support with regards to ethnic discourse prescribes the support that ethnic groups derive from state institutions. Politicians are known to employ the use of anti-Somali political rhetoric.<sup>32</sup> This ultimately creates justification for the abusive behaviour against Somalis. Following the attack at Garissa University, the government stalled all financial transactions being sent from Somalia into Kenya through money transmitting agencies.<sup>33</sup>

Furthermore, the practice around issuance of identification documents to Somali Kenyans is clouded by discrimination through extreme vetting processes which compel Kenyan Somalis to produce additional documentation such as their grandparent's birth certificate or a letter from the local chief recognizing their ties to the local community.<sup>34</sup> This ultimately leads to the notion of not belonging.

## **2.3 Statistical discrimination theory**

### **2.3.1 Inimical information**

This theory propounded by Kenneth Arrow is based on the belief that individuals are treated differently due to information associated to their racial group/membership. Arrow proposes that deliberate racial segregation and discrimination based on personal characteristics leads to uninformed decision making.<sup>35</sup>

### **2.3.2 Extortion by security forces**

Due to the preconceived view that Somalis are terrorists, police forces raise false accusations which give rise to human rights abuses. These accusations provide the police with an opportunity to use Kenyan Somalis as cash machines. This practice has become so common, that it is rare to find a Kenyan Somali who has not had money extorted from them as a result

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<sup>31</sup> <https://www.pambazuka.org/democracy-governance/ugly-beauty-ethnicity-and-politics-kenya> on 21 August 2019.

<sup>32</sup> Human Rights Watch, *From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis*, 2009, 26

<sup>33</sup> <https://nairobi.news.nation.co.ke/news/kenya-freezes-money-transfers-to-somalia-over-suspected-terror-links> on 14 May 2019.

<sup>34</sup> Scharrer T, 'Ambiguous Citizens: Kenyan Somalis and The Question of Belonging,' 502.

<sup>35</sup> Arrow K, 'The Theory of Discrimination' Working Paper Number 30A, 1971, 1

<https://dataspace.princeton.edu/jspui/bitstream/88435/dsp014t64gn18f/1/30a.pdf> on 6 February 2019.

of repeated threats from the police. The influx of Somali refugees, has led to these threats being accompanied with further threats of unwarranted prosecution.<sup>36</sup>

### **2.3.3 Deterioration of human rights**

The presence of information asymmetry also plays a major role in facilitating statistical discrimination. In a 2014 submission to the Universal Periodic Review, Human Rights Watch detailed the deterioration of the human rights situation. They stated that the police have been constantly implicated in the statistically fuelled torture, disappearance and unlawful killings of individuals of Somali Muslim origin.<sup>37</sup>

Across the international plane and in light of Article 56 of the Constitution of Kenya, the International Covenant on Civil and Political Rights (ICCPR) of which Kenya is a state party is of importance. Article 27 of the Covenant instructs states to uphold the rights of minority groups. In the grand scheme of things, actions by the state of Kenya obstruct this form of integration into society.<sup>39</sup>

Over recent years there has been an overwhelming military presence in the North-Eastern region specifically in Garissa, Mandera and Wajir counties. This is attributed to the large presence of Somali-Kenyans within the region. The operations of KDF soldiers, which are presented to the public and mass media as counterterrorism operations are used to mask blatant human rights abuses such as the unlawful detainment of mainly young, Somali, Muslim males which highlights the effects of statistical discrimination.<sup>40</sup>

## **2.4 Formal equality theory**

### **2.4.1 Introduction**

This theory which is considered a moral principle of justice, states that two persons with equal status in at least one normative aspect must be treated equally. Emphasis is based on rationality, that is, it would be irrational to treat equal cases unequally without justification.<sup>41</sup>

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<sup>36</sup> Human Rights Watch, *“You Are All Terrorists”*: Kenyan Police Abuse of Refugees in Nairobi, 2013, 29.

<sup>37</sup> <https://www.hrw.org/news/2014/06/16/kenya-submission-universal-periodic-review> on 14 May 2019.

<sup>39</sup> Article 27, International Covenant on Civil and Political Rights.

<sup>40</sup> Human Rights Watch, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*, 2016, 16.

<sup>41</sup> Johnson B and Jordan R, ‘Why Should Like Cases Be Decided Alike? A Formal Model of Aristotelian Justice’, Princeton University, 2017, 2.

## 2.4.2 Aristotelian philosophy

‘Treat like cases as like, and unlike cases as unlike’. This maxim formulated by Aristotle in his work titled, ‘*Nicomachean Ethics*’ highlights the applicability of the formal equality theory. He suggests that the justification of equal behaviour vis-à-vis unequal behaviour should be held at much higher pedestal than usual.<sup>42</sup> H.L.A Hart, who concurs with the theory supposes that the interpretation of this theory is inconclusive. However, he states that it complements other principles to exclude segregation and injustice.<sup>43</sup> Furthermore, this theory promotes individual justice as the basis of moral claims. This focus on fairness underlines the need for consistent and equal treatment.<sup>44</sup>

## 2.4.3 Application of the formal equality theory in Kenya

In the context of Kenya, this theory is applied in a manner which promotes segregation and racial injustice rather than its reduction. The police force deliberately use institutionalized procedures such as ethnic screening to segregate Kenyan Somalis from the rest of Kenyan society. The process of ethnic screening is based loosely on Aristotle’s maxim ‘treat like cases alike and unlike cases unlike’. It was a procedure used in the 1990s which required all Kenyans of Somali origin to carry a special identification card.<sup>45</sup> This led to the conception of a class-based system whereby Kenyan Somalis were categorized as second-class citizens. As a result of the Shifta War, Kenyan Somalis were required to register and prove their belonging which resulted in the dual exclusion of both the North-Eastern region and its inhabitants.<sup>46</sup>

Following a number of mass terrorist attacks in Kenya the blame was geared towards the Somali community as a whole owing to the fact that the perpetrators were of Somali origin. Most notably, an IED attack carried out on a mini-bus in Eastleigh in November 2012 unleashed a wave of widespread abuse of the Somali community.<sup>47</sup> Kenyan security forces launched ‘Usalama Watch’, an operation which targeted mainly ethnic Somalis and Kenyan Somalis. During the operation, homes were raided which resulted in scores of people being rounded up, arbitrarily arrested and detained at Pangani Police Station. Moreover, these

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<sup>42</sup> Aristotle, *The Nicomachean Ethics of Aristotle Book V*, trans. F.H. Peters, Kegan Paul, Trench, Truebner & Co Ltd, 1906.

<sup>43</sup> Johnson B and Jordan R, ‘Why Should Like Cases Be Decided Alike? A Formal Model of Aristotelian Justice’, Princeton University, 2017, 5.

<sup>44</sup> Johnson B and Jordan R, ‘Why Should Like Cases Be Decided Alike? A Formal Model of Aristotelian Justice’, Princeton University, 2017, 2.

<sup>45</sup> Human Rights Watch, *Screening of Ethnic Somalis: The Cruel Consequences of Kenya’s Passbook System*, 1990, 3.

<sup>46</sup> Scharrer T, ‘Ambiguous Citizens: Kenyan Somalis and The Question of Belonging,’ 4.

<sup>47</sup> Human Rights Watch, *“You Are All Terrorists”: Kenyan Police Abuse of Refugees in Nairobi*, 2013, 22.

individuals were falsely charged with no evidence to substantiate the charges.<sup>48</sup> Through this, one can conclude that the police forces aimed to treat like cases alike, although not with the aim of upholding equality and justice.<sup>49</sup> The treatment of Kenyan Somalis is ascribable to the merging of social, ethnic and historical conflict. The state fails to safeguard the rights of Kenyan Somalis as a minority group in ignorance of the principles of equality and accountability. Historical events such as the Shifta War initiated institutionalized ethnic discrimination which forms a fallacious precedent.

Chapter 3 shall examine the current legal framework governing the integration of minority groups into society. The theories explained above demonstrate the effect that inimical information and lack of societal privileges have on the disintegration of Kenyan Somalis. However, the legal framework denotes initiative by the state to improve the integration of ethnic minorities.

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<sup>48</sup> Human Rights Watch, *“You Are All Terrorists”*: Kenyan Police Abuse of Refugees in Nairobi, 2013, 39.

<sup>49</sup> Human Rights Watch, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*, 2016, 16.

## **CHAPTER 3: DOMESTIC & INTERNATIONAL LEGAL FRAMEWORK GOVERNING THE RIGHTS OF MINORITIES**

### **3.1 Introduction**

This chapter will examine the legal framework governing the protection of minorities and marginalized groups in Kenya. It will begin with a historical appraisal and proceed to dissect the consequential enactment of legislation spanning over a period of 40 years. It will further demonstrate the relevance of the theories discussed in relation to lack of adherence to legal provisions and its consequential effect on the disintegration of Kenyan Somalis.

### **3.2 Constitutional development in Kenya**

#### **3.2.1 Promulgation of the 1963 constitution**

The colony and protectorate of Kenya came to an end when independence was conferred on 12 December 1963. This came six months after the Kenya African National Union (KANU), led by Jomo Kenyatta, won the first universal elections by a wide margin.<sup>50</sup> Resultantly the newly independent state founded its constitution.<sup>51</sup> Chapter II of the 1963 constitution provided for the protection of fundamental rights and freedoms of the individual. The independence constitution acknowledged the right to personal liberty and protection from discrimination amongst many others. Although the constitution was amended through the Lancaster Constitution of 1969, the latter still failed to address the rights of ethnic minority groups. Furthermore, the amended Constitution failed to acknowledge the presence of minority groups and marginalized communities.<sup>52</sup> It however, did recognize customary law as a legitimate source of law, which contributed to the acknowledgement of ethnic multiplicity within Kenya.<sup>53</sup>

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<sup>50</sup> Nyangena K, 'Jomo Kenyatta: An epitome of Indigenous Pan-Africanism, Nationalism and Intellectual Production in Kenya' 6 *African Journal of International Affairs* 1, 2003, 7.

<sup>51</sup> Gilbert J, 'Constitutionalism, ethnicity and minority rights in Africa: A legal appraisal from the Great Lakes region,' 440.

<sup>52</sup> Oduor R, Ethnic minorities in Kenya's emerging democracy: Philosophical foundations of their liberties and limits, Unpublished PDH Thesis, University of Nairobi, Nairobi, 119.

<sup>53</sup> Oduor R, Ethnic minorities in Kenya's emerging democracy: Philosophical foundations of their liberties and limits, Unpublished PDH Thesis, University of Nairobi, Nairobi, 130.

### **3.2.2 The 1969 Lancaster constitution**

Following the proclamation of Kenya as a de facto one-party state in 1965, political dominance along ethnic and tribal lines further excluded ethnic minorities from society.<sup>55</sup> The 1980s saw a spurge of attacks by security forces authorised by the government against marginalized communities, notably the Wagalla Massacre of February 1984. The attack which was carried out by Kenyan security forces targeted Kenyans of Somali origin living in the North-Eastern region. In an attempt to enforce ethnic cleansing in the region, civilians were beaten and raped en masse. The operation came to an end several days later on a decommissioned airstrip where a disputed number of civilians were killed, although reports claim that the figure surpasses one hundred. In their findings, the Truth, Justice, and Reconciliation Commission attributed the events surrounding the Wagalla Massacre to the systematic abuse and dehumanization of the Somali population.<sup>56</sup> Not only is it difficult to situate the Wagalla Massacre within a legal mandate, it places emphasis on the despotic exercise of power against Kenyan Somalis by the state.

The establishment of a class-based system proved fatal to the desperation of ethnic minorities to be integrated into Kenyan society.<sup>57</sup> Karl Max discusses this concept under the social conflict theory. He attributes the establishment of a ruling class domination to a system of oppression and hostility. The Kenyan government administers the North-Eastern region as a barred region, separate from the rest of the country.<sup>58</sup>

### **3.3 Development of a legal framework concerning the rights of minorities and marginalised groups**

The ratification of the new constitution created a shift in dynamics whereby the law acknowledged and provided for the protection of minority rights. Kenya became signatory to a number of regional and international instruments which contributed to the integration of ethnic minorities. The International Covenant on Civil & Political Rights makes reference to the protection of ethnic minorities in Article 27. Being a member of the African Union, Kenya

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<sup>55</sup> <http://www.janda.org/ICPP/ICPP2000/Countries/9-CentralEastAfrica/96-Kenya/96-Kenya63-00.htm> on 23 September 2019.

<sup>56</sup> Weitzberg K, *We Do Not Have Borders, Greater Somalia and the Predicaments of Belonging in Kenya*, Ohio University Press, Athens, 2017, 145.

<sup>57</sup> Oduor R, *Ethnic Minorities in Kenya's Emerging Democracy: Philosophical Foundations of their Liberties and Limits*, Published PDH Thesis, University of Nairobi, Nairobi, 143.

<sup>58</sup> Oduor R, *Ethnic minorities in Kenya's emerging democracy: Philosophical foundations of their liberties and limits*, Unpublished PDH Thesis, University of Nairobi, Nairobi, 92.

is bound by the provisions of the African Charter on Human & People's Rights. Article 22 of the Charter provides for the right of economic, social and cultural development of all peoples.<sup>59</sup>

The 2004 draft constitution of Kenya introduced the integration of ethnic minorities into Kenya's constitutional framework. Article 43 provided that marginalized groups and communities are entitled to enjoy all the rights and freedoms set out in the Bill of Rights<sup>60</sup> Through these developments, it can be deduced that the state of Kenya acknowledged the need to develop domestic legislation for the protection and integration of ethnic minorities, in order to prevent the occurrence of events such as the Wagalla Massacre.

### **3.3.1 2010 Constitution**

Considering that the constitution is the supreme law of the land, it was of utmost importance that it recognized the importance of upholding minority rights. There are various provisions which outline the legal parameters of the protection of minorities. Article 10(2)(b) binds all state organs to promote social justice, inclusiveness, equality and non-discrimination of marginalized communities.<sup>61</sup> Further, Article 21(3) dictates that all state organs have the duty to address the needs of members of minority and marginalized communities.<sup>62</sup> The mandate to protect minority rights is also placed on the county governments. Article 174(e) guides the county government to protect and promote the interests and rights of minorities and marginalized communities.<sup>63</sup> Article 56 forms the basis of the constitutional framework. The article in its entirety focuses on minorities and marginalized groups. It directs the state to put in place affirmative action programmes to ensure that minorities and marginalized groups are integrated into Kenyan society. This is through public participation, special opportunities in educational and economic fields and access to employment.<sup>64</sup> This integration across all spheres of life poses the question as to the extent of government control in adhering to these provisions.

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<sup>59</sup> Oduor R, Ethnic minorities in Kenya's emerging democracy: Philosophical foundations of their liberties and limits, Unpublished PDH Thesis, University of Nairobi, Nairobi, 77.

<sup>60</sup> Minority Rights Group International, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, 2005, 8.

<sup>61</sup> Article 10(2)(b), *Constitution of Kenya* (2010).

<sup>62</sup> Article 21(3), *Constitution of Kenya* (2010).

<sup>63</sup> Article 174(e), *Constitution of Kenya* (2010).

<sup>64</sup> Article 56, *Constitution of Kenya* (2010).

### 3.3.2 National Cohesion and Integration Act (NCIA)

The enactment of this act was considered a breakthrough in legislation protecting minorities in Kenya. It diminished discrimination based on ethnic, religious or racial grounds in a bid to prevent disintegration. Section 10 of the NCIA deems discrimination by state agencies and authorities unlawful, unless the discriminative act is in pursuance of another act i.e. a judicial act whether by a court of law, tribunal or other person.<sup>65</sup> Additionally, the Act establishes the National Cohesion and Integration Commission (NCIC) under Section 15. The purpose of the commission is to facilitate and promote equal opportunity, and peaceful co-existence between persons of different ethnic and racial communities of Kenya.<sup>66</sup> In November 2011, the commission released a press statement concerning the rising religious, ethnic and political intolerance in Kenya. However, it failed to propose any feasible solutions for the eradication of this intolerance, bearing in mind that those affected were from the Cushitic community particularly Kenyan Somalis.<sup>67</sup>

### 3.3.3 Inconclusive contributions of case law

The 2010 Constitution does not provide a definition for the term minority. In the case of *Rangal Lemeiguran & Others Attorney General*, the court proposes the definition under Article 27 of the International Covenant on Civil and Political Rights.<sup>68</sup> In deducing this definition, the court stated that minority groups should encompass non-citizens.<sup>69</sup>

Further, in the case of *Joseph Letuya & 21 others v Attorney General & 5 others*, the court stated:

*‘...the minority status of a community therefore is determined by the numerical disadvantage of a community that has distinct ethnic, religious or linguistic characteristics.’<sup>70</sup>*

In the communication of *Katangese Peoples’ Congress v. Zaire*, the African Commission on Human and Peoples’ Rights (ACmHPR) deliberated on the inalienable right of peoples to determine their economic and social development under Article 20. The Commission held that

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<sup>65</sup> Section 10(2)(b)(i), *National Cohesion and Integration Act* (Act No. 12 of 2008).

<sup>66</sup> Section 25(1), *National Cohesion and Integration Act* (Act No. 12 of 2008).

<sup>67</sup> [https://www.cohesion.or.ke/index.php?option=com\\_content&view=article&id=109](https://www.cohesion.or.ke/index.php?option=com_content&view=article&id=109) on 1 December 2019.

<sup>68</sup> *Rangal Lemeiguran & Others Attorney General* (2004) eKLR.

<sup>69</sup> *Rangal Lemeiguran & Others Attorney General* (2004) eKLR.

<sup>70</sup> *Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR.

the right of self-determination is exercisable to the extent that it is consistent with the sovereignty and territorial integrity of Zaire.<sup>71</sup>

### **3.4 Conclusion**

From the analysis above, it is clear that there exists a strict and clear legal regime which protects the rights of minority groups. Legislation enacted post-independence failed to address the fundamental rights of ethnic minorities. Following the enactment of the 2010 Constitution, there has been an array of provisions in separate legislation which ensure the integration of marginalized communities into society.

The next chapter will discuss the exclusion of Kenyan Somalis within society by the state in light of relevant legislation. It will further affirm the manifestation of the theories discussed in state practice through despotic tactics and discriminatory operations.

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<sup>71</sup><https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1207&context=hrbrief> on 23 September 2019, 1.

## **CHAPTER 4: ANALYSIS OF DISINTEGRATION OF KENYAN SOMALIS CONTRARY TO THE CURRENT LEGISLATIVE FRAMEWORK ON MINORITIES AND MARGINALISED GROUPS**

### **4.1 Introduction**

This chapter shall address the mistreatment of Kenyan Somalis by the state. It shall link the current legislative framework with the role of historical factors. It will then, through themes, demonstrate methods of mistreatment which are in clear contravention of Article 56 of the Constitution of Kenya. Lastly, it will scrutinize the role of the State in contributing to the ongoing struggle of Kenyan Somalis.

### **4.2 Historical background to the origination of Kenyan Somalis**

From the late 19<sup>th</sup> century, the state of Somalia was administered through established British and Italian colonies. As a result of economic and political pressures a large proportion of its population fled and settled in various parts of Africa, including the NFD region.<sup>72</sup>

#### **4.2.1 Significance of Shifta war in the development of a discriminatory regime**

Following the establishment of the NFD region in 1925, it became a stronghold for Somalis who sought refuge in Kenya. They continued working as merchants and traders beyond the geographical boundaries of Kenya.<sup>73</sup> From the onset, the Shifta War served as the induction of Somalis into Kenyan society as stateless people. Ethnic Somalis sought to align the NFD region with Somalia, despite resistance from the Kenyan government who dismissed their case based on the premise that they were driven by a nationalist agenda.<sup>74</sup> The heavily contested NFD region posed a threat to the territorial integrity of newly-independent Kenya. Consequently, in 1963 conflict broke out between opposing armies which was halted by the signing of a Memorandum of Understanding by Heads of State.<sup>75</sup>

Six years after the historic signing, Kenyan Parliament enacted the Indemnity Act.<sup>76</sup> The Act restricts the institution of legal proceedings in respect of acts committed by public officers or members of the armed forces. It was drafted with the aim of shielding government officials

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<sup>72</sup> Turton E, 'Somali Resistance to Colonial Rule and the Development of Somali Political Activity in Kenya' 13 *The Journal of African History* 1, 1972, 4.

<sup>73</sup> Weitzberg, *We Do Not Have Borders*, 27.

<sup>74</sup> Weitzberg, *We Do Not Have Borders*, 112.

<sup>75</sup> Weitzberg, *We Do Not Have Borders*, 133.

<sup>76</sup> Section 3, *Indemnity Act* (CAP 44 of 2012).

from liability for gross abuses and human rights violations committed between 1963 and 1967.<sup>77</sup> The Act not only prevented those affected to seek recourse in law, it is a prime example of the State's unwillingness to uphold the newly enacted legislation.

#### **4.2.2 State aspiration turned massacre post 1980**

In the 1980s the differentiation of Somalis was driven by their leader's failed attempt of seceding the NFD region. Siad Barre, who served as president of the Somali Republic from 1969 to 1991 was heavily criticized for his iron fist approach in ruling the state through intimidation and extrajudicial persecution.<sup>78</sup> By employing despotic tactics such as confiscation of property, the government of Kenya incited clan violence, which criminalized any economic activity by a member of the Somali clan, as a means of destabilizing their economic position.<sup>79</sup> The Wagalla massacre of 1984 served as the final spark which triggered the onslaught of Kenyan Somalis under the guise of political stability. Over the course of four days, members of the KDF mercilessly killed countless Somalis. The rationale of this operation was linked to the intent of the Kenyan government to dehumanize and enforce the process of ethnic cleansing.

#### **4.2.3 Ethnic screening**

Introduced during the Moi regime, this process required all Kenyans of Somali origin aged 18 and above to carry special identification cards which were distinct from the ordinary identification cards acquired by citizens of Kenya.<sup>80</sup> This process aimed to purportedly validate the legitimacy of Kenyan Somalis who sought refuge in the NFD region. Its implementation led to the intrinsic categorization of Kenyan Somalis as second-class citizens.<sup>81</sup> Following the entry of unregistered and unprocessed Somali immigrants, the process which was meant to last weeks turned into an institutionalized procedure. Upon proving their authenticity, Kenyan Somalis were mandated to carry special identification cards to access state services such as trade, land transactions and education.

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<sup>77</sup> Weitzberg, *We Do Not Have Borders*, 134.

<sup>78</sup> Ingiriis M, 'The Making of the 1990 Manifesto: Somalia's Last Chance for State Survival' *12 Northeast African Studies* 2, 2012, 3.

<sup>79</sup> Weitzberg, *We Do Not Have Borders*, 148.

<sup>80</sup> Human Rights Watch, *Screening of Ethnic Somalis: The Cruel Consequences of Kenya's Passbook System*, 1990,2.

<sup>81</sup> Weitzberg, *We Do Not Have Borders*, 148.

Karen Weitzberg in her book titled ‘We Do Not Have Borders: Greater Somalia and the Predicaments of Belonging in Kenya’ explores the historical and political factors concerning the emigration of Somalis to northern Kenya. It was reported that the purpose of this scheme, which was backed by government influence, was to create a domino effect in crippling the economic and social stability of the Somali community. Not only did this procedure lead to the separation of families, it posed various psychological and social effects. Furthermore, it fostered fear and intimidation, which set into stone, the classification of Kenyan Somalis as stateless people. The ignorance of fundamental human rights solidified the significant contrast between Kenyan Somalis and Kenyans.<sup>82</sup>

### 4.3 Identification documents

Following the termination of the screening process in 1989, the government moved towards a more controversial tactic, threatening the sole instrument through which Kenyan Somalis could be afforded the same treatment as Kenyans. The process of acquiring citizenship documents whether in the form of identification cards or passports was riddled with denials and refusals by government agencies fuelled by ethnic manipulation for political ends.<sup>83</sup> This emphasizes the importance of acquiring citizenship documents as a means of enjoying rights enshrined in the constitution. Section 2 of the Registration of Persons Act requires all Kenyan citizens aged 18 or over to obtain a national ID card.<sup>84</sup> Failure to acquire an ID card restricts access to acquisition of a passport, purchase of property and employment.<sup>85</sup> The acquisition of identity cards was shrouded by constant demands by the state for Somalis to undergo a rigorous vetting process, referring them back to their county of origin, which in most cases forms part of the North-Eastern region. Consequently, a system of bribery and discrimination arose whereby the vetting committee members selected by government officials refused applications for citizenship based on trivial matters such as clan superiority and names with Islamic connotations.<sup>86</sup>

The principles of *jus soli* and *jus sanguinis* seem to have no significance due to the overriding interest in ethnic divide. The former dictates that citizenship is acquired from the place of birth whilst the latter principle dictates that citizenship is acquired from either one or both parents.<sup>87</sup> The effects of disintegration can be clearly seen in the case of *Mohamed Mire v Attorney*

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<sup>82</sup> Weitzberg, *We Do Not Have Borders*, 149.

<sup>83</sup> Kenya Human Rights Commission, *The Dilemma of Citizenship in Northern Kenya*, 2008, 17.

<sup>84</sup> Section 2, *Registration of Persons Act* (CAP 107 of 2012).

<sup>85</sup> Kenya Human Rights Commission, *The Dilemma of Citizenship in Northern Kenya*, 2008, 33.

<sup>86</sup> Kenya Human Rights Commission, *The Dilemma of Citizenship in Northern Kenya*, 2008, 36.

<sup>87</sup> Kenya Human Rights Commission, *The Dilemma of Citizenship in Northern Kenya*, 2008, 51.

*General & Another*.<sup>88</sup> The petitioner, who was directed to apply for his identification card in the North-Eastern part of Kenya, had his request rejected without lawful justification. He claimed that his rights under the constitution, particularly the right of equality and freedom from discrimination were violated. The High Court of Kenya held that rejection by the respondents was unconstitutional, and thus the petitioner was wrongfully denied the ID card.<sup>89</sup>

Although the constitution does not accord specific ethnic groups privileges it does aim to encourage the state to ensure that marginalized groups can enjoy the same level of protection as dominant communities.<sup>90</sup>

#### **4.4 Illicit raids**

Various attacks were carried out in Garissa and Mandera between 2011 and 2012. The Garissa Church attacks of July 2012 carried out by Al-Shabaab militants killed seventeen people and left fifty injured. Following the wave of insecurity and loss of lives, security forces were ordered by the government to carry out raids to weed out suspected terrorists in predominantly Somali neighbourhoods such as Eastleigh. Between November 2012 and January 2013, police forces unlawfully entered homes and carried out raids in clear contravention of due process of the law. The detainees were held for lengthy periods and subjected to abuse, torture and rape at the hands of the security forces.<sup>91</sup> Not only does this raise questions as to the legitimacy of the raids, it also highlighted violations of international law, particularly Article 4 of the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which mandates the state to uphold the fundamental rights and freedoms of ethnic minorities.<sup>92</sup> Rather than protecting the rights of Kenyan Somalis, the government deliberately ordered security forces to attack a whole community in retaliation to the heinous attacks by a handful of individuals. Due to their misconstrued classification as ‘cash cows’, police officers extort money from Kenyan Somalis backed by threats of unwarranted prosecution and deportation.<sup>93</sup> Numerous victims reported crimes of rape to social workers, as it would be retrospective to report to the police station where the officers carry out their duties from. Furthermore, the victims feared publicization of the crimes, due to stigmatization from the

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<sup>88</sup> *Mohamed Mire v Attorney General & Another* (2016) eKLR.

<sup>89</sup> *Mohamed Mire v Attorney General & Another* (2016) eKLR.

<sup>90</sup> Gilbert J, ‘Constitutionalism, Ethnicity and Minority Rights in Africa,’ 436.

<sup>91</sup> Human Rights Watch, “*You Are All Terrorists*”: *Kenyan Police Abuse of Refugees in Nairobi*, 2013, 37.

<sup>92</sup> United Nations General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN A/RES/47/135 18 December 1992.

<sup>93</sup> Human Rights Watch, “*You Are All Terrorists*”: *Kenyan Police Abuse of Refugees in Nairobi*, 2013, 38.

community and police retaliation. In broad daylight, the officers would violently beat and harass families, claiming that their identification documents were fraudulently acquired.<sup>94</sup>

The NCIC, established in 2008 failed to implement programmes or policies which remedied the separation of ethnic minorities from society.<sup>95</sup> Procedures such as illegal raids negate this duty and contribute to the disintegration of Kenyan Somalis. Being construed as criminals and illegal immigrants places a heavy burden on their legitimacy within Kenyan society.

#### **4.5 Economic and social disparities in the north eastern region**

Following various attempts at aligning the economic, social and political sectors of the NFD region with the rest of the country, Kenyan Somalis anticipated that the introduction of devolution would give rise to equal distribution of resources across counties despite the geographical isolation of the region.<sup>96</sup> Due to their strategic proximity to Somalia, the counties of Mandera, Garissa and Wajir have been shrouded by constant insecurity, with the highest levels of insecurity reported between 2012 and 2014.<sup>97</sup>

In November 2014 Al-Shabaab militants carried out one of the deadliest attacks on Kenyan soil, killing 147 students at Garissa University. Defence forces carried out counter-offensive operations with no justification for their agenda.<sup>98</sup> Xenophobic criteria used by the defence forces singled out Kenyan Somalis, a move which was counter-productive to the implementation of Article 56 of the Constitution. Kenyan Somalis were targeted as militants from the Al-Shabaab group are predominantly of Somali origin.

Due to the imbalance in the social structure, marginalized communities are relatively resistant to change which in turn makes them vulnerable to significant reforms by the state.<sup>99</sup> Due to the complexity in obtaining identification documents, voter registration in the North-Eastern region stood at a mere 32.5%, compared to 66% nationwide prior to the 2013 general elections.<sup>100</sup> Institutionalized procedures such as this prevent Kenyan Somalis from

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<sup>94</sup> Human Rights Watch, *“You Are All Terrorists”*: Kenyan Police Abuse of Refugees in Nairobi, 2013, 39.

<sup>95</sup> Ghai Y and Ghai J, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, Global Centre for Pluralism, Ottawa, 2013, 46.

<sup>96</sup> Weitzberg, *We Do Not Have Borders*, 159.

<sup>97</sup> <http://theconversation.com/why-al-shabaab-targets-kenya-and-what-can-be-done-to-stop-attacks-109958> on 1 December 2019.

<sup>98</sup> Human Rights Watch, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*, 2016, 15.

<sup>99</sup> Cover R, ‘The Origins of Judicial Activism in the Protection of Minorities’ 91 *The Yale Law Journal* 7, 1982, 1299.

<sup>100</sup> Scharrer T, ‘Ambiguous Citizens: Kenyan Somalis and The Question of Belonging’ 12 *Journal of East African Studies* 3, 2018, 500.

participating in the political sphere of society. The lack of state presence within these counties has led to tensions between local communities over economical degradation, employment and access to state services.<sup>101</sup>

#### **4.6 Obstructed access to justice**

Following the use of subjective criteria in the 2012 Eastleigh raids to determine subjects of deportation, local police officers working in conjunction with the KDF arbitrarily held arrestees for lengthy periods in police stations across the capital. Around 5% of deportees were afforded legal representation based on the mere fact that they were wealthy. There were no precautions taken to safeguard the rights of vulnerable women and children, despite numerous appeals which fell on the deaf ears of the state.<sup>102</sup> Although no official figure has been released, it is estimated that around 500 detained Somalis were deported without lawful cause. Consequently, legitimate citizens experienced statelessness as they were forced to adapt to a place which they were unfamiliar with. This correlation can be linked to the maxim by Aristotle of treating like cases like and unlike cases unlike. The use of subjective reasoning by the state trumps the objective characteristics of Kenyan Somalis resulting in negative connotations.<sup>103</sup> The government claims that the operation was warranted so as to ensure state security. Security forces employed the use of the threat of presenting arrested persons to court as terrorists as a habitual mechanism. As some were unable to pay police bribes, they were arrested and held in local police stations for indefinite periods. The rights of these individuals guaranteed under Chapter 4 of the Constitution of Kenya were not safeguarded, particularly the right to be informed promptly of the reason for arrest.<sup>104</sup> Upon seeking recourse in law, for arbitrary detention, the police officers working in conjunction with court officials, would charge them with a wide array of criminal offenses.<sup>105</sup> In early 2013, 88 detainees including 35 minors were charged jointly in court but had their case thrown out due to lack of sufficient evidence.<sup>106</sup>

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<sup>101</sup> Scharer T, *Ambiguous Citizens: Kenyan Somalis and The Question of Belonging*, 12 *Journal of East African Studies* 3, 2018, 497.

<sup>102</sup> Human Rights Watch, *“You Are All Terrorists”: Kenyan Police Abuse of Refugees in Nairobi*, 2013, 30.

<sup>103</sup> Johnson B and Jordan R, *‘Why Should Like Cases Be Decided Alike? A Formal Model of Aristotelian Justice*, Princeton University, 2017, 2.

<sup>104</sup> Human Rights Watch, *Welcome to Kenya: Police Abuse of Somali Refugees*, 2010, 15.

<sup>105</sup> Article 49 (a)(1)(i), *Constitution of Kenya* (2010).

<sup>106</sup> Human Rights Watch, *“You Are All Terrorists”: Kenyan Police Abuse of Refugees in Nairobi*, 2013, 39.

#### **4.7 Conclusion**

The integration of Kenyan Somalis into society has been negatively impacted by the state despite their inherent statelessness. The margin of appreciation concerning interpretation of legislation towards Kenyan Somalis seems to have widened to a point where discriminatory procedures govern their day-to-day activities. This is in spite of the legislative framework which seeks to narrow their minority status. This can be seen through their lack of political participation and infringement of their fundamental rights and freedoms enshrined in the Constitution.

## CHAPTER 5: CONCLUSION

### 5.1 Introduction

This chapter discusses the findings, recommendations and conclusion of the study. The purpose of this study was to highlight the non-implementation of legislation which promotes minorities and marginalized groups through the treatment accorded to Kenyan Somalis.

### 5.2 Findings

- a) *On the legal framework governing the rights of minorities and marginalized communities.*

The absence of legislation during post-independence Kenya marked the start of a raging war against ethnic minorities and marginalized communities. Due to their lack of public participation, the state established a heavily monitored and destitute home away from home, namely the NFD region as a base for Kenyan Somalis. With the emergence of a class-based society and an increase of Somali immigrants, it appeared that the formulation of legislation would be hindered through state action. Following a 40-year period, there emerged a shift of dynamics, whereby a legal framework was developed which secured the protection of the fundamental rights and freedoms of ethnic minorities. From the analysis of the legal framework in Chapter three, it is evident that there is a surfeit of legislation aiming to protect the rights of Kenyan Somalis. The narrowly tailored framework which was notably spearheaded by the newly promulgated Constitution acknowledged the inequitable position of minorities and mandated the state to put into place affirmative action programmes. This agenda on one hand accentuates the state's interest to protect minority rights and on the other provides a comprehensive basis for the standard that state action must fulfil. However, in spite of the legislation in force, the state has acted below par in ensuring adherence of Article 56.

*b) Dis-integration of Kenyan Somalis in light of the current legislative framework*

The dis-integration of Kenyan Somalis from Kenyan society takes the form of practices and institutionalized procedures endorsed by the state. Firstly, of importance, is the pre-existing disadvantageous status that Kenyan Somalis face as a consequence of historical and political conflict between the States of Kenya and Somalia. Secondly, the establishment of the NFD region facilitated the carrying out of atrocities such as the Wagalla Massacre by Kenyan security forces in dint of their ethnic and social status of Kenya Somalis. Events such as the Shifta War served as the induction of Kenyan Somalis as stateless people. Segregated from the rest of the country, this region remained under heavy military control, with restricted access to information both in and out of the region. The presence of wealth and power asymmetry was as a result of restricted access to the social spheres of society. The community most notably in the NFD region remain in a destitute state, concealed from the prying eyes of international organizations and the public at large.

The promulgation of the 2010 Constitution embodied a transformative step in the recognition of minorities and marginalized groups. The implementation of institutionalized procedures by the state paved the way for the committal of human rights abuses against Kenyan Somalis. Failure to recognize validly acquired identification documents led to arbitrary raids carried out in Somali dominated areas of Nairobi. These illicit raids were portrayed to the public as lawful procedures which endeavoured to weed out suspected terrorists. The victims claimed that security forces targeted young women, raped them and silenced them with the looming threat of deportation. Once held in detention, the accused persons would be made subject to various forms of extreme torture and harassment. In applying the social conflict theory propounded by Karl Marx, the state, rather than accounting for the lack of societal privileges afforded to Kenyan Somalis, solidified the system of oppressor versus the oppressed.

### **5.3 Recommendations**

By adopting an effects analysis approach, it is evident that the disintegration of Kenyan Somalis has become rampant. Giving prominence to the advancement of Kenyan Somalis on the social ladder of Kenyan society would not only prove beneficial to those affected but would also contribute to the adherence of legislation on integration.

**(i) On the legal framework concerning the protection of rights of minorities and marginalized communities in Kenya.**

The first step in ensuring adherence would be recognition by the state of the human rights atrocities being committed against Kenyan Somalis within the borders of Kenya. Only after this has been achieved can steps be taken to remedy the situation. Under the current framework, the Independent Policing Oversight Authority (IPOA) could within its mandate create a division which primarily handles complaints brought by individuals who claim a violation of Article 56 by police and security forces. The Kenya National Commission on Human Rights (KNCHR) should focus its efforts towards the investigation of conduct by state affairs which does not adhere to Article 56. Recognition of violations by the state, would not only mandate state agencies to uphold the protection of minorities, it would draw special attention to the gravity of such violations and ensure that Kenyan Somalis are afforded the protections enshrined in Article 56.

**(ii) On the factors which have contributed to the current status of Kenyan Somalis within society**

Historically, events such as the Wagalla Massacre confirmed the non-inclusive status of Kenyan Somalis within society. The stigmatization and false public perception should be eradicated by the state in conjunction with various bodies such as the Kenyan police force and state owned media.

**(iii) On the treatment afforded to Kenyan Somalis by the State**

A key point which seeks emphasis is the severity of the crimes committed against Kenyan Somalis. So as to guarantee accountability within the police force, steps should be taken to provide civic education for officers on the protections afforded to ethnic minorities within the legislative framework of Kenya. Further, although a blanket of immunity is informally granted to police officers, necessary measures should be put into place to ensure that those who commit crimes against marginalized communities shall face the consequences. Authorities such as IPOA commenced investigations concerning sporadic cases of police abuse across Kenya, but failed to address the widespread and systematic violence inflicted upon the Kenyan Somali

community.<sup>107</sup> The National Police Service Commission Act of 2011 outlines their oversight role of police training to enhance the capacity of police officers.<sup>108</sup>

However, in a 2013 report Amnesty International emphasized the lack of police training and recommended the implementation of a police vetting system and training curriculum so as to ensure accountability for human rights violations by police forces.<sup>109</sup>

**(iv) On how to uphold the rights of Kenyan Somalis**

Creating a system of good governance within Kenya would enhance diversity, promote state security and ultimately the integration of ethnic minorities. The state in conjunction with its law enforcement agencies should ensure the involvement of ethnic minorities in the integration process in order to enhance transparency and accountability.

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<sup>107</sup> <http://www.ipoa.go.ke/wp-content/uploads/2017/11> on 1 December 2019.

<sup>108</sup> Section 10(1)(m), *National Police Service Commission Act* (CAP 185C of 2012).

<sup>109</sup> Amnesty International, *Police Reform in Kenya: "A Drop in the Ocean"*, 2013, 33.

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