# Contextualizing Constitutionalism: Multi-Party Democracy in the African Political Matrix

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**Submitted to**

**Central European University**

**Department of Legal Studies**

**In partial fulfilment of the requirements for the degree of**

**Doctor of Juridical Science**

**Budapest, 2014**

The dissertation contains no materials accepted by any other institution for any other degree and no materials previously written and/or published by another person unless otherwise acknowledged.

s/Gedion T. Hessebon

## Contents

# Acknowledgment

As I reach the final stretch of this project, on which I have been working for the last four years, my heart is filled with gratitude. There are many people who have encouraged me and supported me in various ways. Those to whom I am indebted are far too many to list. But I would particularly like to thank Professor Renata Uitz who from the very inception of the project to its completion has been an exceptional mentor and supervisor. I am very much indebted for her constant support, encouragement and guidance. I was very fortunate to have such a committed and insightful supervisor. My future students would be lucky if I could become half the supervisor that she has been to me. I would also like to thank Professor Michael Hamilton who has served as a co-supervisor at the initial and critical stage of this project. I am very grateful for all his inputs, comments and suggestions. I would also like to thank my family and all my friends who have been by my side in so many ways. I am particularly grateful for their prayers which have sustained me over the years.

Above all, in the words of the Psalmist, I would like to say, "*I lift up my eyes to the mountains—where does my help come from? My help comes from the Lord, the Maker of heaven and earth.*" Naturally, the errors and defects in dissertation are mine and mine alone!

# Abstract

The last two decades and half represent the longest spell of multi-party democracy in most African countries. The transition to democratic rule that begun in the early 1990's has not given way to the complete and categorical backsliding to autocratic rule which many countries in the continent had experienced in the mid-sixties and seventies. However, despite the staying power multiparty democracy has shown since the 1990's in Africa, its fate has not been very rosy. The return to democracy has been hampered to a great extent by the prevalence of abuse of incumbency as well as by ethnic conflicts. In this dissertation, the author argues that there are certain structural factors in the demographic composition, political economy and history of many African countries which form a political matrix that is hostile to multi-party democracy. The prevalence of antagonistic relations and competition among ethnic groups as well as the problem of abuse of incumbency emanate from this political matrix. The main contention of this dissertation is that to respond to these problems and optimize the chances of robust and enduring democracies in Africa, there is a need for contextualizing constitutionalism. Contextualizing constitutionalism requires understanding the adverse effect of the African political matrix on multiparty democracy and designing constitutions that try to fortify constitutional democracy from the threats that emanate from these effects. Contextualization of constitutionalism is the process through which the generic concept of constitutionalism could be adapted, expanded and effectively deployed to meet the needs and specific circumstances of parts of the world which have political environments different from parts of the world where the concept of constitutionalism historically originated from.

To study empirically how such contextualization might work, a comparative case study has been undertaken. The countries covered in this case study, namely Ethiopia, Ghana, Nigeria and Kenya have all experienced the problems mentioned earlier to varying degrees. The constitutions of these countries have also been used to address these problems with different levels of success. Comparing the constitutional strategies of these four countries in dealing with abuse of incumbency and ethnicity, we can see that contextualizing constitutionalism indeed makes a difference in sustaining multiparty democracy and enhancing its quality. Specifically, clear and detailed rules prohibiting abuse of incumbency, well entrenched term limit provisions for the head of the executive, reinforcing separation of powers and checks and balances, establishing independent bodies to support constitutional democracy and enhance horizontal accountability are useful ways of minimizing abuse of incumbency. When it comes to problems related with ethnicity, using territorial decentralization, the electoral system, the form of government, affirmative action and political party regulation regimes to foster recognition of ethnic groups and national integration seem to be necessary. These instruments should be carefully calibrated in such a way that the balances will tilt towards integration without denying recognition to ethnic diversity and the need to address historical injustices. Such a careful mix of integration and accommodation is likely to avoid instability and the collapse of the democratic order.

Looking beyond the countries covered in the case studies, we can observe that these approaches of dealing with abuse of incumbency and ethnicity are finding their way into constitutions that are being made in the latest constitution making wave in Africa. With increasing migration of constitutional ideas among African countries, the

contextualization of constitutionalism is increasingly attaining a continental character. This character is underpinned by the need to ensure democratic governability and stability while checking hegemonic executives and stemming off ethnic conflict which is a common imperative in most sub-Saharan African countries. While the emphasis on these issues distinguishes African constitutionalism from western constitutionalism- by virtue of the fact that contextualization of constitutionalism is still an attempt to have a system of government that is democratic and liberal- there is a great deal of commonality between western and African constitutionalism.

# Introduction

This dissertation has two interrelated objectives. The first is to see how constitutional design could be used to craft constitutions that give multi-party democracy a fighting chance of survival in an inhospitable political environment. The second and more specific objective is to draw lessons about best practices in constitutional design for the purpose of curbing abuse of incumbency and ethnic conflicts in various African countries. The main claim that is advanced in the dissertation is that the political economy, history and ethnic composition of most African countries gives rise to a political matrix that militates against multiparty politics in Africa and necessitates designing constitutions which takes into account this context. Designing such constitutions (or even interpreting and applying constitutions with such a mentality) amounts to contextualizing constitutionalism and is essential for the consolidation of constitutional democracy in Africa.

With these objectives in mind, the paper is divided in seven chapters: Chapter One provides a brief historical background of constitutional developments in Africa using the metaphor of waves. This will be followed by a description of the structural factors and components that make up the African political matrix and the adverse implication of this matrix for multi-party democracy and constitutionalism. Chapter One will also provide a review of the relevant literature on constitutionalism and democratic transitions in Africa. This review focuses on four recurrent themes in the literature which have a common thread in that they underscore the need for contextualizing constitutionalism in Africa.

In Chapter Two, the author argues that there is a liberal democratic imperative in Africa. Despite the serious challenges that the African political matrix poses to the

functioning of democracy, the author would argue that from a normative point of view the adoption of liberal democracy in Africa is necessary. Furthermore, the author would argue that that for there to be functioning liberal democracies in Africa there is a need to contextualize constitutionalism.

While the first two chapters deal with more abstract and theoretical issues, the subsequent four chapters will be empirical case studies. Chapter Three will provide a comparative case study of the experience of Ethiopia, Ghana, Nigeria and Kenya with regard to abuse of incumbency since the 1990's. Based on this discussion, Chapter Four will be used to identify and discuss features and qualities of constitutions that affect the prevalence of abuse of incumbency. Chapter Five will be devoted to discussing if and to what extent ethnic relations in these four countries have posed a problem for the functioning of a democratic system. Chapter Six will be used to identify and discuss the various strategies used by these countries to address or prevent antagonistic ethnic relations.

Chapter Seven will reflect on the case study chapters and draw a number of observations by way of conclusion. Furthermore, it will also relate the lessons drawn from the case study chapters with the latest constitution making wave in Africa and explore the connection of this wave and contextualization of constitutionalism in Africa. This Chapter Seven will also address the role and significance of the migration of constitutional ideas in the process of contextualization particularly in the latest constitution making wave. The author hopes that in addition to providing some answers to the questions posed above, this dissertation will contribute to the global discourse on comparative constitutional law by injecting the experiences of African constitutional systems that are not frequently studied.

The major hypothesis that is advanced in this dissertation is that, all actors engaged in the process of constitution building in Africa need to be sensitive to the difficulties that arise from the African political matrix which pose serious challenges to constitutional democracy and need to contextualize constitutionalism to give it a fighting chance against the challenges it faces. Contextualization of constitutionalism is a process of ensuring the compatibility of a constitution with the political circumstances of a country so that the constitution could optimize the survival and consolidation of constitutional democracy. As such the notion of contextualization as used in this dissertation is a way of conceptualizing this process in which constitutional drafters play the most important role.

To support this claim in this dissertation, the author would undertake a comparative case study of how the constitutional systems of Ethiopia, Ghana, Nigeria and Kenya have handled abuse of incumbency and the issue of ethnicity. The temporal scope of the study would focus on the performance of the constitutional systems of these countries starting from the early 1990's. Given that these four states, just like most other African states, were under various forms of autocracies that outlawed multiparty democracy for most of the period before 1990, 1990 is a logical cut off period for this study.

The selection of the four countries is based on a number of factors. In terms of their record as democracies, these countries are broadly representative of the spectrum of democratic performance over the continent. While Ghana has the best track record as a stable democracy among these countries, Kenya and Nigeria fall somewhere in between with a chequered record while Ethiopia has the least democratic credential

among these four countries.[1] The diversity of the democratic track record of these countries is important for the comparative case study because it affords us an opportunity to see if this difference in democratic performance had anything to do with the presence or lack of constitutional contextualization in these countries. Another factor that has been important for selecting these countries is that, in terms of their size, economic status and ethnic diversity, they are fairly comparable. Furthermore, relatively speaking, literature about these countries is more accessible.

In relation to the selection of these countries, a number of questions might arise. One obvious question is why none of these countries covered in this dissertation are francophone countries. Unfortunately, because of the author's linguistic limitations, no francophone country could be included in the study. Another question that might arise is why South Africa is not included in this study as one of the comparators. Given the relative success and visibility of the South African Constitution, it would not be surprising if one is puzzled with the absence of South Africa from the set of comparators. There are several explanations for the exclusion of South Africa. To start with, South Africa is the most industrialized and economically advanced African state. Furthermore, due to long years of anti-apartheid struggle led by the ANC, racial and not ethnic identity happens to be the politically more salient identity in South

[1] According to the Freedom House's democratic index, Ghana is considered free, Kenya and Nigeria are considered partly free while Ethiopia is considered not free See Ghana available at http://www.freedomhouse.org/country/ghana;Nigeria at http://www.freedomhouse.org/country/nigeria; Kenya at http://www.freedomhouse.org/country/kenya and Ethiopia at http://www.freedomhouse.org/country/ethiopia (all urls in his foot note last accessed on October 5, 2013). On the Economic Intelligence Unit Democracy index, Ghana, Kenya , Nigeria and Ethiopia are ranked 78, 104, 120 and 123 respectively; See Democracy index 2012 Democracy at a standstill; A report from The Economist Intelligence Unit available at https://portoncv.gov.cv/dhub/porton.por_global.open_file?p_doc_id=1034, last accessed on October 5, 2013).

Africa.[2] These reasons make South Africa not an ideal comparator with most African countries. In addition to these factors, given that the South African constitutional system has been among the constitutional systems quite extensively covered in the comparative constitutional literature, it seems that a study of countries that have received less attention would add more value to the field of comparative constitutional law.

Another question that would arise in relation to the selection of the countries for the case study is how, considering that the post-colonial legacy of the countries in the case study has been considered as one of the factors that constitute their political matrix, Ethiopia can be included among the comparators despite not having been colonized. The author would argue that, though Ethiopia was not colonized by a European power like the other countries in the case study, the Ethiopian Empire had left behind a legacy comparable to the colonial legacy that we observe in other African countries. Through its pervasive and brutal use of violence, its extractive and predatory bent as well as its decidedly autocratic form of rule, the Ethiopian empire was very similar to the colonial states in the rest of Africa.[3] Therefore, its legacy in terms of the historical antecedents it left behind as well as the various ethnic groups it brought into one political economic sphere of intense competition for scarce resources, the Ethiopian Empire was not much different from the colonial states in the rest of Africa.

When discussing challenges to the smooth functioning of a constitutional liberal democracy in the context of the African political matrix, there are many challenges

[2] Elirea Bornman, "Emerging Patterns of Social Identification in Post-apartheid South Africa," *Journal of Social Issues* 66, no. 2 (2010): 255–257.
[3] See Teshale Tibebu, *The Making of Modern Ethiopia: 1896-1974* (The Red Sea Press, 1995), 21–53.

that one could think of. In this dissertation, the author would focus on two particular challenges which are *abuse of incumbency* and *antagonistic ethnic politics.* These problems often lead to conflict and a sham democracy or a breakdown of the democratic order. In this dissertation, the author would try to identify constitutional design strategies of minimizing these problems and try to understand and conceptualize these constitutional strategies as successful contextualization of constitutionalism.

The author has three objectives in undertaking this research. The first objective is identifying best practices and constitutional solutions that could be helpful in addressing the specific problems (abuse of incumbency and antagonistic ethnic politics) that would be discussed in the case study chapters of the dissertation. The second objective of the dissertation would be to understand how the generic concept of constitutionalism could be adapted, expanded and deployed by contextualizing it to meet the needs and specific circumstances of parts of the world different from where it has historically originated from. The third objective of the dissertation is contribute to the scholarship on comparative constitutional law in which countries from sub-Sahara Africa with the exception of South Africa are barely studied.

# Chapter One: The African Political Matrix as a Challenge to Multi- Party Democracy

### *Introduction*

In 1957, Ghana's independence ushered in a new era and marked the beginning of a decade in which most African countries gained their formal independence. In the famous words of Harold Macmillan, the 1960's was a decade in which 'winds of change' were sweeping over Africa.[4] After independence, postcolonial states[5] in Africa had two major projects.[6] The first project was that of bringing about economic growth which would translate into improvement of living standards.[7] The second project was that of forging a single nation in each state out of the various ethnic groups that found themselves within the territorial bounds of the new states.[8] These projects, which were presented by academics as well as politicians as 'modernization', 'nation building', 'industrialization' or 'development', were all used by the postcolonial African governments as excuses to justify their autocratic orientations.[9] In countries like Tanzania, Kenya, Ghana, Zambia and Senegal this orientation took the form of a one-party state; and in Ethiopia, Nigeria, the then Zaire and Mali military and personal rule by a lone dictator were the orders of the day. The relative economic

[4] J. D Fage, *A history of Africa* (Routledge, 1995), 460 ; See also Frank. Myers, "Harold Macmillan's 'Winds of Change' Speech: A Case Study in the Rhetoric of Policy Change," *Rhetoric & Public Affairs* 3, no. 4 (2000): 564-565. Harold Macmillan was the Prime Minister of the United Kingdom under whose administration the decolonization of most Sub-Saharan African states occurred.

[5] In this dissertation, the term "post-colonial" will be used to refer to the period between late 19 50's and 1990. For a discussion of what justifies drawing the line on the post colonial paradigm at the end of the 80's, See Crawford Young, "The end of the post-colonial state in Africa? Reflections on changing African political dynamics," *African Affairs* 103, no. 410 (January 1, 2004): 23 -49.

[6] Paul Tiyambe Zeleza and Dickson Eyoh, *Encyclopedia of Twentieth-Century African History* (Routledge, 2002), 227.

[7] Ibid.

[8] Roland Anthony Oliver and Anthony Atmore, *Africa since 1800* (Cambridge University Press, 2005), 305.

[9] Donald L. Gordon, "African Politcs," in *Understanding Contemporary Africa*, 4th ed. (Lynne Rienner Publishers, 2006), 73.

backwardness of these young states coupled with their ethnic diversity provided a background which made arguments against democracy based on the demands of nation-building and economic growth sound plausible.[10] After independence, constitutions were amended to do away with limits on the power of the executive and to proscribe political dissent and contest.[11] At times, entire constitutions were abrogated and suspended.[12] So, in the post-colonial states of Africa, constitutionalism and democracy were brushed aside not too long after independence. Ostensibly this was done so that the ruling elites could pursue development and nation-building, unhindered and with a single minded focus.

The normative hegemony of the autocratic one-party governance model came to an end in Africa right about the end of the Cold War. Just as Ghana's independence had marked the beginning of a host of African countries gaining formal independence, Benin's National Sovereign Conference in 1990 signified the beginning of what has been dubbed the 'second liberation' of Africa.[13] Most post-colonial states in Africa had a lackluster performance in delivering the economic, social and political 'goods' they promised to deliver. Furthermore, with the end of the cold war many of the dictators all over Africa who used to enjoy considerable material and moral support from the contending super powers lost the largesse of their benefactors which was essential in maintaining their hold on power. A combination of these factors and the widespread discontent and mobilization of the citizenry of many African countries



[10] See Benyamin Neuberger, "Has the Single-Party State Failed in Africa?," *African Studies Review* 17, no. 1 (April 1, 1974): 173-178.
[11] Ibid., 73-74.
[12] Ibid.
[13] Michael Bratton and Nicolas Van de Walle, *Democratic experiments in Africa: regime transitions in comparative perspective* (Cambridge University Press, 1997), 111.

brought to an end the era of the unapologetic *dejure* autocrat.[14] In this new era, few autocrats could continue openly defying the internal and external pressure for political liberalization. As a result, since 1990, multi-party elections have been held routinely[15] and there is a marked improvement in the level of political liberties enjoyed in contemporary African states as compared with what used to be the case in post-colonial African states.[16]

Though the general trend in the continent has been towards the opening up of political space for contestation and multi-party politics, there is a considerable degree of difference when we look into the exact form and quality of the democratic transition in different African countries. In few African countries, the changes that began in the early 1990's have led to the progressive consolidation of democracy, while in many others the change has not meant much more than the introduction of the formal trappings of multi-party elections.[17] The countries in which the transition to democracy has been relatively successful include Ghana, Mali[18], Benin,[19] and

[14] Ibid., 107-113.

[15] Staffan I. Lindberg, *Democracy and elections in Africa* (JHU Press, 2006), 54-56; See also Gabrielle Lynch and Gordon Crawford, "Democratization in Africa 1990-2010: an assessment," *Democratization* 18, no. 2 (2011): 275-310 where it is noted that "Before 1989, only Botswana and Mauritius held regular multi-party elections, but by mid-2003, 44 of the sub-continent's 48 states had held "founding elections",while 33 had undertaken a second set of elections, 20 had completed three sets of elections, and seven had held four or more uninterrupted electoral cycles.33 By 2007, 21 countries had convened a fourth set of legislative elections – with 137 legislative elections in 41 sub-Saharan African countries (excluding Botswana and Mauritius) between 1989 and the end of 2007, and over 120 competitive presidential elections in 39 countries."

[16] See "Freedom in Sub Saharan Africa.pdf," 5–6, accessed September 18, 2013, (Freedom House, 2009)http://www.freedomhouse.org/sites/default/files/Freedom%20in%20Sub%20Saharan%20Africa.pdf.

[17] Michael Bratton and Nicolas Van de Walle, *Democratic experiments in Africa: regime transitions in comparative perspective* (Cambridge University Press, 1997), 120; Richard A. Joseph, "Africa, 1990-1997: From Abertura to Closure," *Journal of Democracy* 9, no. 2 (1998): 3-17.

[18] Despite the 2012 military takeover of power in Mali, Mali's democracy of two decades prior to the coup could be considered as a relative success story. The coup, and the inability of Malian democracy to resolve the Tuarage rebellion shows that even relatively successful democracies remain to be fragile.

[19] See Rachel M. Gisselquist, "Democratic transition and democratic survival in Benin." *Democratization* 15, no. 4 (2008): 789-814.

Zambia.[20] In contrast, in countries such as Nigeria, Ethiopia, Kenya, and Uganda, the transition has faced serious setbacks and has been stalled for a considerable period of time. However, the elections held in Nigeria in 2011 were the cleanest and most peaceful since the inauguration of the Fourth Republic, while in Kenya a new constitution has been adopted in 2010 through a referendum and seems to have invigorated the judiciary and the rule of law.[21] These developments warrant cause for cautious optimism.

In the first section of this chapter, the metaphor of waves will be used to provide a broad framework for sketching constitutional developments in the continent. This sketch is necessary to provide a historical background for the discussion on the contextualization of constitutionalism in Africa throughout the dissertation. In the second section of the chapter, through a discussion of various factors that constitute the African political matrix or environment, an attempt will be made to show the inextricable link between antagonistic ethnic relations and unlimited executive power. This discussion will be reinforced in the third section of the chapter with a discussion of the militating effects of the African political matrix and its accompanying neo-patrimonial form of rule on constitutionalism and multi-party democracy.



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[20] See Gordon Crawford, "Consolidating democracy in Ghana: progress and prospects?," *Democratization* 17, no. 1 (2010); *Democracy index 2010Democracy in retreatA report from the Economist Intelligence Unit* (the Economist Intelligence Unit, 2010), 5.

[21] See *Democracy index 2010, Democracy in retreat, A report from the Economist Intelligence Unit*. See *EUROPEAN UNION ELECTION OBSERVATION MISSION FEDERAL REPUBLIC OF NIGERIA GENERAL ELECTIONS 2011, PRELIMINARY STATEMENT* available at http://www.eueom.eu/files/pressreleases/english/preliminary-statement-nigeria2011_en.pdf and accessed on December 1, 2011.See also for example Scott Baldauf, *Kenya's new chief justice pushes reform of courts*, November 19, 2011, the Christian Science Monitor, available at http://www.csmonitor.com/World/Africa/2011/1119/Kenya-s-new-chief-justice-pushes-reform-of-courts ( and last accessed on November 27,2013.

The final section of the chapter will be devoted to a discussion of four major themes in the literature on multi-party democracy and constitutionalism in Africa. These themes are 'executive hegemony and imperial presidencies', 'the effects and accommodation of ethnicity', 'economic critiques and discontents with the liberal democratic model' and 'autochthony and cultural contextualization of constitutionalism'. The first two themems happen to be very much related to the focus of the case study chapters of this dissertation. Therefore, the discussion of those themses also provides a literature review useful for the case study chapters.

### *1.1 Four Constitution-Making Waves in Africa*

The metaphor of waves has been initially and most famously used in relation to democratization by Samuel Huntington[22] and later on, this metaphor has been applied in relation to constitution-making by Jon Elster.[23] Elster notes that constitution-making tends to occur in waves and that although some of the clusters or waves of constitution-making (i.e. *the phenomena of constitution-making in different countries within the same period*) might be coincidental at times, in many instances, there would be a common triggering event that affects many countries and that leads to a wave of constitution making.[24] It should be understood that the term 'constitution-making' is used in this setting very broadly to include not only the adoption of brand new constitutions but also significant constitutional revisions that result in qualitative changes in the constitutional order of a country. In this chapter, the metaphor of waves will be applied in relation to constitution-making in Africa to provide an

[22] See Huntington, Samuel P. *The third wave: Democratization in the late twentieth century*. Vol. 4. University of Oklahoma Press, 1991.

[23] I would like to acknowledge Professor Markus Boeckenfoerde from whom I got the idea of viewing the on-going constitutional review processes in Africa using the metaphor of 'constitution-making waves. Jon Elster, "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45, no. 2 (1995): 364-396.

[24] Ibid., 368–373.

outline and a frame for analyzing constitutional developments in sub-Saharan Africa since the days of independence.

The 1960's brought about a sea of change in the political landscape of Africa. It was the decade in which most African countries gained their independence.[25] This was also the time where the first constitution making wave in Africa was in full swing. Constitutions were among the various accessories of statehood needed by the new states as they made their debut in to the world of sovereign states. It was important both for symbolic and practical purposes that the new states were outfitted with new constitutions upon independence.[26] Almost invariably, the new constitutions of the independent African states were modelled upon the constitutions of their erstwhile colonial rulers.[27] One might hence, in ill humour say that the new constitutions were hand-me-down constitutions.

Anglophone African countries adopted constitutions with a parliamentary system of government that imitated the Westminster model.[28] These constitutions, however, were not complete imitations of the British Constitution since they had incorporated justiciable bills of rights.[29] Nevertheless, the judges who were mostly holdovers from the colonial era and influenced by the doctrine of parliamentary sovereignty (which technically has been supplanted with supremacy of the written constitution in the newly independent African states) were very deferential towards the political

[25] Patrick Manning, *Francophone Sub-Saharan Africa 1880-1995*, 2 edition (Cambridge University Press, 1999), 143–147; Robert I. Rotberg, *A Political History of Tropical Africa* (Harcourt, Brace & World, 1965), 362–370.

[26] See Hastings WO Okoth-Ogendo, Constitutions without constitutionalism: reflections on an African political paradox. American Council of Learned Societies, 1988.

[27] Michael Crowder, "Whose Dream Was It Anyway? Twenty-Five Years of African Independence," *African Affairs* 86, no. 342 (January 1, 1987): 19.

[28] Y. P. Ghai, "Constitutions and the Political Order in East Africa," *The International and Comparative Law Quarterly* 21, no. 3 (July 1, 1972): 411–412.

[29] Robert B. Seidman, "Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form an Legitimacy," *Wisconsin Law Review* 1969 (1969): 108–110.

branches and left the bills of rights atrophy by complying with the whims of the governments of the day.[30] In francophone Africa as well, the newly independent countries adopted constitutions that were closely modelled after the 1958 Gaulleist Fifth Republic French Constitution.[31] We can consider these independence constitutions as having been made in the *first wave of African constitution making*. Ghana's 1957 Constitution and Nigeria's and Kenya's Constitutions of 1963 could all be considered as forming part of this first wave of African constitution making.

These constitutions of the first wave, however, did not last for long. The endemic military *coup d'état* brought an end to many post-independence civilian administrations in these newly independent states and resulted in the suspension of constitutions.[32] Even where the armed forces kept put in their barracks, civilian governments morphed into one-party dictatorships in countries such as Kenya and Tanzania.[33] Of course all of these were supposedly for the sake of national unity or development which necessitated, according to those in power and their apologists, the concentration of power in one party or a supreme leader.[34] In any case, constitutions were repealed, suspended or amended beyond recognition.

The *coup d'état*s and *de facto* emergence of one party dictatorships, even when they might not, strictly speaking, be considered as acts of constitution making, brought



[30] Robert B. Seidman, "Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa," *Ohio State Law Journal* 35 (1974): 827.
[31] Victor T. Le Vine, "The Fall and Rise of Constitutionalism in West Africa," *The Journal of Modern African Studies* 35, no. 2 (June 1, 1997): 184.
[32] Patrick J. McGowan, "African Military Coups D'état, 1956–2001: Frequency, Trends and Distribution," *The Journal of Modern African Studies* 41, no. 03 (2003): 6; George Klay Kieh and Pita Ogaba Agbese, *The Military and Politics in Africa: From Engagement to Democratic and Constitutional Control* (Ashgate Publishing, Ltd., 2004), 38–39.
[33] See Naomi Mitchinson, "One Party Rule in Africa," *The Round Table* 73, no. 289 (1984): 38–44.
[34] Peter Anyang' Nyong'o, "Africa: The Failure of One-Party Rule," *Journal of Democracy* 3, no. 1 (1992): 91; See alsoSamuel Decalo, "The Process, Prospects and Constraints of Democratization in Africa," *African Affairs* 91, no. 362 (January 1, 1992): 9–11.

about significant change with regard to the content, relevance and at times even the very existence of the constitutions they affected. Therefore, it is possible to think of the period during which most of these events took place as *the second wave of constitution-making* in Africa. These amendments, repeals and suspensions of constitutions were common from the late 1960's through the 70's and 80's. The continent was beset by economic turmoil and political instability especially after the 1974 international oil crisis.[35] During these times of crises, the constitutions adopted during independence were not spared and were either modified to serve as the legal basis for one party rule or discarded in their entirety.[36]

In Kenya, a series of constitutional amendments after independence such as amendments to abolish the senate and regional governments in the 1960's,[37] and an amendment to turn Kenya into a one party state in 1982[38] substantively changed the independence constitution. In Nigeria, the *coup d'etats* of 1966 and 1983 suspended constitutions that have been in operation only for three years and brought forth administration by successive military juntas that lasted for thirteen and fifteen years respectively.[39] In Ghana as well, the *coup d'etats* of 1966, 1972 and 1981 led to the repeals of the republican constitutions that were in place and resulted in extended military rule.[40] In Ethiopia, a military coup took place in 1974 and resulted in military



[35] See Nicolas Van de Walle, *African Economies and the Politics of Permanent Crisis, 1979-1999* (Cambridge University Press, 2001).
[36] Alex Thomson, *An Introduction to African Politics* (Routledge, 2010), 111–112.
[37] Okoth-Ogendo, "The politics of constitutional change in Kenya since independence, 1963-69." African Affairs (1972), 19-20 and 28..
[38] Kibuta Ong'wamuhana, "Party Supremacy and the State Constitution in Africa's One-Party States: The Kenya-Tanzania Experience." *Third World Legal Stud*. (1988), 80.
[39] Kehinde M. Mowoe, *Constitutional Law in Nigeria*, ( Malthouse Press, 2003), 7 and also The Constitution Suspension and Modification Decrees No. 1 of 1966, No 1 of 1984.
[40] See U. U Uche, "Changes in Ghana Law since the Military Take-Over." *Journal of African Law* 10, no. 2 (1966): 106-111 and Björn Hettne, "Soldiers and politics: The case of Ghana." *Journal of Peace Research* 17, no. 2 (1980): 173-193.

rule till 1987.[41] In all these instances of military rule was supposed to be provisional but had a staying power that was incomparable to the civilian administrations that could not even finish a single term.[42]

By the end of the 1980's, however, a new dynamic was already in motion. Due to the deep discontent of citizens about the political stagnation and economic downturns which drove many to protest as well as a result of the changes in the international arena, the autocrats in many African countries had to embrace democracy at least in rhetoric.[43] Political liberalization and the opening of the political space for multiparty contestation were increasingly becoming necessary to assuage the growing frustration of the people. When the USSR bowed out of the cold war, African states which had hitherto benefited from being clients of one or the other superpower suddenly found themselves in a unipolar world where they had to kowtow to the political conditionalities set by the triumphal west of the 90's.[44] The fall of the Berlin Wall had resulted in constitution-making waves in other parts of the world as well, principally in eastern and central Europe as is noted by Jon Elster.[45]

Therefore, another round of constitution-making and revisions were undertaken in many African countries. Bills of rights were revived and multiparty elections were



[41] Andargachew Tiruneh, *The Ethiopian Revolution 1974-1987: A transformation from an aristocratic to a totalitarian autocracy*, Cambridge University Press, 1993, 173.
[42] Samuel Decalo, "Modalities of civil-military stability in Africa." *Journal of Modern African Studies* 27, no. 4 (1989): 547-578.
[43] Richard A. Joseph, "Africa: The Rebirth of Political Freedom," *Journal of Democracy* 2, no. 4 (1991): 18–20.; See Filip Reyntjens, "The Winds of Change. Political and Constitutional Evolution in Francophone Africa, 1990–1991," *Journal of African Law* 35, no. 1–2 (1991): 44–55; Stephen P. Riley, "Political Adjustment or Domestic Pressure: Democratic Politics and Political Choice in Africa," *Third World Quarterly* 13, no. 3 (January 1, 1992): 542–546.
[44] John A. Wiseman, *The New Struggle for Democracy in Africa* (Avebury, 1996), 69-74.
[45] Jon Elster, "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45, no. 2 (1995), p.369.

reintroduced.[46] Therefore, it could be said that in the 1990's, there was a *third constitution making wave* in sub-Saharan Africa. Charles Fombad, who deems the constitutions made in the 90's as the third generation of constitution-making notes;

> The drafting of new constitutions and the revising of old constitutions by most African countries in the 1990s was a clear recognition of the need for radical changes to the status quo ante. In some cases, it meant a total break with a dreadful past-such as apartheid in Southern Africa-but in most cases it meant recognizing that a constitutional framework built around the one party system that had bred authoritarian and dictatorial rule was a recipe for political instability and economic decline.[47]

However, this is not the end of our story. At the moment, Africa is witnessing *a fourth wave of constitution-making and reforms*. The fourth wave coincides with an ongoing attempt to improve upon the deficiencies of the constitutions of the third wave. Besides the northern African states which have adopted new constitutions in the aftermath of the Arab spring and which might arguably be considered as forming part of the fourth wave of constitution-making in Africa, a number of countries in sub-Saharan Africa are currently undertaking comprehensive constitutional review processes.[48] Kenya has adopted a new constitution as recently as 2010 and is still in the process of implementing it.[49] South Sudan is in the midst of a long constitution making process, poised to have its first permanent constitution as an independent country.[50] Zimbabwe has also adopted a new constitution in 2013.[51] Constitutional

[46] Christopher Clapham, "Democratisation in Africa: Obstacles and Prospects," *Third World Quarterly* 14, no. 3 (January 1, 1993): 434.

[47] Charles Manga Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects," *Buffalo Law Review* 59 (2011): 1009.

[48] Constitutional review in this sense and as used throughout this chapter, unless the context indicates otherwise, refers to processes of comprehensive constitutional reform and amendments. Therefore, it should not be confused with processes of constitutional adjudication in which the constitutionality of executive and legislative acts are determined.

[49] Macharia Nderitu, Ivy Wasike, and Thuita Guandaru, *History of Constitution Making in Kenya* (Media Development Association & Konrad Adenauer Foundation, 2012), 73–79.

[50] Zacharia Diing Akol, "A Nation in Transition: South Sudan's Constitutional Review Process" (Sudd Institute, February 17, 2013), http://www.suddinstitute.org/publications/show/a-nation-in-transition-south-sudan-s-constitutional-review-process/.

review processes are underway and at different stages of progress in Tanzania,[52] Zambia,[53] Liberia,[54] Malawi[55] and Ghana.[56] Calls for such review have also been very persistent in Nigeria and there is an ongoing controversial constitutional reform process which might lead to an overhaul of the 1999 Nigerian Constitution.[57] Therefore, it would not be farfetched to speak of a fourth constitution-making wave in Africa at the end of the last decade of the 21st century. In the remaining part of this chapter, for the sake of convenience, constitutions being made in the fourth constitution-making wave in Africa will be referred to as constitutions 4.0.

To understand the fourth constitution making wave in Africa as well as constitutions 4.0 and to put them in the proper context, it is important to bear in mind that in the past twenty years, problematic elections, conflicts along ethnic lines and the shallowness of the purported transition to democracy have underscored the need for a more comprehensive constitutional reform to address these problems. The constitutional experiments and innovations in countries like South Africa and also in central and Eastern Europe have also made it clear that the transition to democracy in

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[51] "Zimbabwe Approves New Constitution," *BBC*, March 19, 2013, sec. Africa, http://www.bbc.co.uk/news/world-africa-21845444.

[52] Abdulwakil Saiboko, "Tanzania: Constitution Review Exercise On Track," *Tanzania Daily News*, January 6, 2013, http://allafrica.com/stories/201301060011.html.

[53] MARTIN NYIRENDA, "Zambia: Muchinga Debates First Draft Constitution," *The Times of Zambia (Ndola)*, January 28, 2013, http://allafrica.com/stories/201301281236.html?page=5.

[54] D. Wah Hne, "Liberia: Constitution Review Committee Marches On," *The New Dawn*, February 28, 2013, http://allafrica.com/stories/201302280549.html.

[55] "Malawi's New Attorney General Says Govt. Will Act on Constitutional Review Pleas | Nyasa Times Malawi Breaking News in Malawi," accessed March 4, 2013, http://www.nyasatimes.com/2012/12/07/malawis-new-attorney-general-says-govt-will-act-on-constitutional-review-pleas/.

[56] "Constitution Review Commission Dissolved | Politics 2012-08-15," accessed March 4, 2013, http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=247683.

[57] "Nigeria Gets New Constitution 2013 – Ihedioha," *Nigerian Horn Newspapers*, accessed March 4, 2013, http://nigeriahornnewspapers.com/index.php?option=com_content&view=article&id=777:nigeria-gets-new-constitution-2013--ihedioha&catid=48:national-news; "Is Constitution Review Exercise Doomed?," accessed March 4, 2013, http://www.tribune.com.ng/news2013/index.php/en/house-of-reps/item/4556-is-constitution-review-exercise-doomed.

Africa cannot be successful without constitutionalism. In the early 1990's, the buzz words of the transition and political liberalization in Africa were human rights, rule of law and democracy.[58] Constitutionalism did not figure prominently in that story. As Prempeh contends, the constitutional reformers in the early 1990's had a limited vision of constitutional reform and have failed to introduce what he calls structural constitutionalism.[59] Furthermore, he notes that the reformers were more concerned with the opening of avenues for the political class to access and attain power than they were with structurally constraining and transforming political power. The pitfall of such an approach seems to have been understood now and building the appropriate constitutional framework foster democratic government and peaceful ethnic relations has become clear.[60] Despite the troubles and chaotic scenes created in the experiment with multiparty politics, so far, unlike the1960's, there have not been calls for abandoning the multiparty systems and returning to one party rule.[61] Rather, there seems to be agreement that to overcome the challenges, there is a need to reform existing constitutions drawing from the experience with multiparty politics in the past two decades. Therefore, it could be said that the necessity of contextualizing constitutionalism (that is adapting constitutionalism by taking in to account the prevalent political matrix in most African countries) for the consolidation of

[58] See Michael Bratton and Nicholas Van de Walle, *Democratic experiments in Africa: Regime transitions in comparative perspective*. Cambridge University Press, 1997, 108-109; see also Kwasi Prempeh, "Africa's 'constitutionalism revival': False start or new dawn?," International Journal of Constitutional Law 5, no. 3 (July 1, 2007): 495; Prempeh, "Presidents Untamed," Journal of Democracy 19, no. 2 (2008): 11.

[59] See K. Prempeh, "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa," Tulane Law Review 80, no. 4 (2006): 1293- 1295.

[60] See Prempeh note 61 above.

[61] Public surveys in different African countries show that most citizens support democracy from other alternative forms of governance. Renske Doorenspleet, "Critical Citizens, Democratic Support and Satisfaction in African Democracies," *International Political Science Review* 33, no. 3 (June 1, 2012): 203–285, doi:10.1177/0192512111431906; See also "AfroBarometer: Democracy Making a Headway in Africa - Afrik-news.com : Africa News, Maghreb News - The African Daily Newspaper," accessed March 26, 2013, http://www.afrik-news.com/article15762.html.

democracy underlies the fourth constitution making wave and constitutions 4.0 in Africa.

### *1.2 Exploring the African Political Matrix*

In assessing the failure or success of constitutionalism in African countries in the past twenty years, the discussion has to take in to account the political matrix that prevails in these countries and the challenge it poses to democracy. Hence, it will be important at the outset to discuss this political matrix and its relationship with democracy. When reference is made of the African political matrix in this dissertation, the term is not meant to imply that there is a uniform, overarching continental political matrix that we could find in all African countries. To do so will be to deny the prevalence of a great deal of diversity in the conditions that exist in different African countries. Nor is the notion meant to insinuate that there is something uniquely and essentially "African" in the politics of African countries.

Rather, the term will be used to denote a constellation of the factors that are prevalent in most African countries south of the Sahara. These factors interact with one another and constitute the background within which power relations take place and significantly affect political behavior at all levels of society. The factors that constitute this political matrix or environment are:

1. The political economy of the state;
2. The autocratic and extractive legacy of the colonial as well as the post-colonial states; and,
3. The ethnic diversity of African states.

These three factors, in relationship with one another, create something that is beyond their mere aggregation. The interplay of the factors transforms each in such a way that considering each factor in isolation form the others would not lead to a proper understanding of how the African political matrix affects the transition to democracy all over the continent. Hence, in the following discussion, an attempt will be made to show how these three factors interact and what their interaction brings about.

In most African countries, the state is in control of the commanding heights of the economy. A large chunk of the national economy is either directly controlled by the state or susceptible to various types of indirect state control and manipulation. In most instances, revenues from mineral resources or the export of cash crops like cocoa and coffee and foreign aid are directly controlled by the state.[62] Besides these resources that the state directly controls, the state is also capable of channeling resources in the market in ways that would be advantageous to any groups it favors. Berry describes this state of affairs as follows:

> …apart from outright nationalisation of land and other assets, African governments' efforts to accelerate economic development served to concentrate control of economic opportunities-jobs, contracts, foreign exchange-in the hands of the state. State power could also be used to manipulate rules of access to land, labour and capital by influencing legislation, administrative practices or the outcomes of judicial procedures. In short, access to the state became a precondition for doing business successfully. [63]

Therefore, the private actors in the market are very much dependent on the goodwill and cooperation of the holders of state power for their continued existence and



[62] Gavin Williams, *Fragments of Democracy: Nationalism, Development and the State in Africa* (HSRC Press, 2003), 14–16.
[63] Sara Berry, "Social Institutions and Access to Resources," *Africa: Journal of the International African Institute* 59, no. 1 (January 1, 1989): 44.

profit.[64] In effect, the internal political economy of most African states is such that political power is an essential means for accumulating wealth.[65]

The prospects of upward economic mobility largely depend on one's relation with power.[66] Hence, instead of productive relations being the base on which a political superstructure is built, power relations are the base on which the economic superstructure is constructed.[67] This state of affairs naturally makes political power something that is highly sought after, among other reasons, for the promise of economic reward it holds. This is more so given the scarcity of economic opportunities for ordinary citizens and the prevalence of poverty in most African states. To escape poverty and to improve their life chances, the most enterprising and ambitious in society will aspire to gain political power.

The internal political economy of African states which has been described in very broad terms above interacts with the legacy of the colonial and postcolonial state. Both the colonial and postcolonial states have been, in most African countries, extractive and predatory. They were states the *raison d'être* of which was the extraction of resources for the benefit of the metropole in colonial times and for the benefit of the ruler and his retinue in the post-colonial state. Such extraction was made possible by a mix of violent suppression of resistance and the cooption of elites to join the clientelistic networks through which the extracted resources were

[64] Larry Diamond, "Class Formation in the Swollen African State," *The Journal of Modern African Studies* 25, no. 4 (December 1, 1987): 577.
[65] Ibid., 578; Bruce J. Berman, "Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism," *African Affairs* 97, no. 388 (July 1, 1998): 334.
[66] Dwayne Woods, "Civil Society in Europe and Africa: Limiting State Power through a Public Sphere," *African Studies Review* 35, no. 2 (1992): 89; See also Larry Diamond, "Class Formation in the Swollen African State," *The Journal of Modern African Studies* 25, no. 4 (December 1, 1987).
[67] Richard L. Sklar, "The Nature of Class Domination in Africa," *The Journal of Modern African Studies* 17, no. 4 (December 1, 1979): 537 &550.

distributed among the few local beneficiaries.[68]

Naturally accountability to colonial subjects and post-colonial 'citizens', was virtually non-existent.[69] These patterns of behavior and the apparatus of predatory rule are the legacies of the colonial and post-colonial states that still constitute an important part of the political matrix in most African states. Coupled with the political economy described above, the effect of the legacy of the colonial and post-colonial state is to reinforce the tendency of the upwardly mobile to seek political power directly or by proxy for the purpose of self-enrichment. Furthermore, this legacy also affects the manner in which power will be sought, acquired and retained. That is partially the reason why violence and suppression as well as cooption- the instruments that have served the colonial and postcolonial states- persist till the present day. In relation to this, it should be noted that though the difference in the style of colonial rule that was employed by the French and the British could be of some importance, it does not seem to be very decisive for democratic survival. Regardless of the differences in style or the intellectual and normative paradigms that underpinned these differences, in practice both French and British colonial rule were equally despotic and violent.[70]

The discussion so far has focused on two factors that constitute the African political matrix. These are the political economy and the colonial as well as postcolonial legacy of most African countries. The interplay of these factors occurs within the context of considerable ethnic diversity which significantly shapes the political matrix of African states. In the extractive and predatory state wherein a small group of elites



[68] Young, "The end of the post-colonial state in Africa?," 26 & 34.
[69] Ibid., 27.
[70] See Mahmood Mamdani, *Citizen and subject: contemporary Africa and the legacy of late colonialism* (Princeton University Press, 1996); Tejumola Olaniyan, "Africa: Varied Colonial Legacies": 280.

maintains its hold over power through violence, repression and cooption, ethnic diversity interjects its own dynamics.

To begin with, there is a great likelihood that the ambitious elites who compete for political power and the access to scarce resources which it provides will try to mobilize support by invoking ethnicity.[71] Therefore the competition of the ambitious and upwardly mobile could easily take the form of ethnic rivalry over the control of resources. Given the belief that an ethnic kin in power is more likely to be beneficent towards her/his ethnic kin than an ethnic other, the enterprising elites of each ethnic group could expect support from the ethnic groups they belong to. Even if all ethnic groups cannot aspire for political hegemony, still all can strive to be in the 'winning minimum coalition' that is in power. Failure to be in such coalition will mean exclusion from the network through which the distribution of resources is carried out.

In circumstances where resources are scarce and disproportionately concentrated with the state, exclusion from such networks would be disastrous for those outside the network. It could mean loss of all forms of economic privileges for the elites of the excluded ethnic group and being disadvantaged in the provision of public services and goods for the majority belonging to the excluded ethnic group.[72] This intensifies the competition for power, making it a "do or die" affair which could turn violent and lead to a disregard of constitutional norms.[73] As many scholars have noted, ethnic

[71] David Welsh, "Ethnicity in Sub-Saharan Africa," *International Affairs (Royal Institute of International Affairs 1944-)* 72, no. 3 (July 1, 1996): 485; It should still be noted there are empirical findings, though tentative, which show that the relevance of ethnicity in party preference is different from country to country and even from party to party. See Matthias Basedau et al., "Ethnicity and party preference in sub-Saharan Africa," *Democratization* 18, no. 2 (2011): 462-489.

[72] Solomon Dersso, "Post-colonial nation-building and ethnic diversity in Africa.," in *Ethnicity, Human Rights and Constitutionalism in Africa* (Kenyan Section of the International Commission of Jurists, 2008), 15.

[73] See also Jean-Paul Azam, "The Redistributive State and Conflicts in Africa," *Journal of Peace Research* 38, no. 4 (July 1, 2001): 439; Nathan Jensen and Leonard Wantchekon, "Resource Wealth

difference in itself is unlikely to result in antagonistic and violent relationships unless it is coupled with poverty, inequality and marginalization.[74] Unfortunately, ethnicity coexists with widespread poverty, marginalization and inequality in many African countries.

It is under such circumstances that neo-patrimonial form of rule which is based on asymmetrical, reciprocal patron-client relationship prevails. It is true that, in the literature regarding ethnicity in Africa, the 'primoridialist' vs 'instrumentalist' alternative perspectives are increasingly being abandoned for a nuanced constructive understanding of ethnicity. However, it should be noted that even the major proponents of a 'constructivist view' of ethnicity such as Crawford Young recognizes the instrumental deployment of ethnicity in the competition for political power and resources.[75] Furthermore, there is also empirical evidence that lend credence to the instrumental view of ethnicity in African politics.[76]

To summarize the discussion so far, the capacity of the state to directly or indirectly channel economic resources for the benefit of power holders and those in their clientelistic network; the scarcity of other avenues of securing comparable amount of resources; the historically entrenched colonial and postcolonial patterns of behavior of

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and Political Regimes in Africa," *Comparative Political Studies* 37, no. 7 (2004): 818; John Mbaku and Chris Paul, "Political Instability in Africa: A Rent-Seeking Approach," *Public Choice* 63, no. 1 (October 1, 1989): 66.

[74] Amartya Sen, "Violence, Identity and Poverty," *Journal of Peace Research* 45, no. 1 (January 1, 2008): 12; See also Paul Collier, *The political economy of ethnicity* (Centre for the Study of African Economies, University of Oxford, 1998), 9, http://ideas.repec.org/p/csa/wpaper/1998-08.html Collier argues that " Although ethnically diverse societies are not directly prone to violent conflict, in the absence of democracy they are prone to poverty and this in turn makes them vulnerable to conflict."; Eghosa E. Osaghae, "State, Constitutionalism, and the Management of Ethnicity in Africa," *African and Asian Studies* 4, no. 1-2 (2005): 99.

[75] M. Crawford Young, "Revisiting Nationalism and Ethnicity in Africa", December 7, 2004, 13, http://www.escholarship.org/uc/item/28h0r4sr.

[76] See for example, Benn Eifert, Edward Miguel, and Daniel N Posner, "Political Competition and Ethnic Identification in Africa," *American Journal of Political Science* 54, no. 2 (April 1, 2010): 507 This study is based on over 35,000 respondents in in 22 surveys conducted in 10 countries.

rulers; and ethnic diversity are factors that constitute the African political matrix. While there are local variations in the history, politics and economy of African states, there is a great deal of commonality in their political economy, scarcity of economic opportunities and the negative legacies of past autocratic and extractive regimes among most sub-Saharan African countries. It is within this matrix that the neo-patrimonial logic of power operates and takes an ethnic slant. It is also this matrix and the resulting neo-patrimonial form of rule that create a hostile environment for democracy and constitutionalism. At this point, it will be useful to discuss the notion of neo-patrimonialism briefly. In the subsequent section of this chapter, an attempt will be made to describe how this political matrix and neo-patrimonialism militate against aspirations to establish constitutional democracy.

### *1.3 The African Political Matrix, Neopatrimonialism and Implications for Constitutionalism and Democracy*

In the previous section, an attempt has been made to describe a matrix that could help in conceptualizing the interaction of various factors that are of crucial importance in the politics of many African countries. An important question that could arise in relation to this political matrix is how it affects democracy and constitutionalism. If the experience of post-colonial African countries is something to go by, the political matrix described above has a distinctively adverse effect on democracy. From the contemporary reality of most African countries, we can observe that this political matrix is posing an enormous obstacle for the realization of democratic governance and constitutional rule. In this section of the chapter, an attempt will be made to discuss how this is so. The focus will be particularly on the neo-patrimonial form of rule that is prevalent in most African countries and other related effects of the political

matrix described above.

In the first place, the political matrix described above provides a strong *motive* for the "political class" to subvert any constitutional order that is supposed to limit power, secure basic rights and facilitate democratic governance.[77] It may be argued that power naturally tends to induce those who hold it to resist restrictions on their power and in fact to grasp for more power and to hold on to it as long as humanly possible. While this might well be true, the 'African political matrix' is likely to make this very human predilection even more pronounced.

In addition to the natural strong desire that human beings have to assert and retain power over other human beings, the disproportionate material rewards of having power and the disproportionate deprivation that might be entailed by the loss of power, is likely to propel the political class to contest for power aggressively. In such an aggressive contest, both those who are in and out of power will have little use for constitutional niceties. Those in power will not think twice about abusing their power and taking full advantage of their incumbency, even in ways that are in violation of legal norms and in complete disregard of the normative requirement of a democratic system.[78] Using the state machinery to harass, abuse and intimidate opponents and to rig elections are some of the manifestations of such a 'no holds barred' contests for political power. While the routine and brazen abuse of power for the purpose of securing ones tenure in office is an option available only for incumbents, the mobilization of one's ethnic kinfolk and the use of violence are instruments in the contest for power which are available for political elites who are both in and out of

[77] See Yash Ghai,'Chimera of Constitutionalism: State, Economy, and Society in Africa' in Swati Deva (ed), *Law and (In) Equalities—Contemporary Perspectives* (2010), 327.

[78] Marina Ottaway, "From political opening to democratisation." *Democracy in Africa. The Hard Road Ahead. Boulder: Lynne Rienner Publishers* (1997), 5-6.

government. The intensity of political competition that arises from the political matrix pushes politicians to employ such instruments and to act in a manner which is hostile to the consolidation of democracy and constitutionalism.

Furthermore, the political matrix also makes it easy for the political elites to use violence, ethnicity and abuse of power in their effort to acquire and/or, retain political power. The political matrix we have discussed above also militates against democracy and constitutional rule by providing undemocratic historical *antecedents* that inform current political practice in various ways.[79] These antecedents are sources of negative lessons for contemporary political actors as to how they should or could behave. These antecedents also have the effect of normalizing undemocratic behavior and disregard for constitutional rule and often crystallize as set patterns of behavior that are quite difficult to change.

The other way in which the political matrix described above militates against democracy is by providing an *environment* that is hostile to constitutional democracy and conducive for the persistence autocratic and oppressive regimes. The form of rule that is prevalent in many African countries- the continued existence of which is a result of the political matrix we have discussed above- is neo-patrimonalism.

Neo-Patrimonalism is a form of rule or domination that is derived from the combination of and "simultaneous operation"[80] of two ideal forms of rule identified by Max Weber. The two ideal types that co-exist in a neo-patrimonial system of rule

[79] For instance in relation to state security agencies Dehéz observes that the autcraic past of many sub-Saharan African countries make their security services unaccustomed to civilian oversight and highly politicised resulting in adverse effects for democracy. See Dustin Dehéz, "Security sector reform and intelligence services in sub-Saharan Africa: capturing the whole picture." *African Security Review* 19, no. 2 (2010): 38-46.

[80] Christian von Soest, "What Neopatrimonialism Is –Six Questions to the Concept" (presented at the "Neopatrimonialism in Various World Regions" GIGA German Institute of Global and Area Studies, Hamburg, 2010), 3.

are the patrimonial and the legal-rational forms of rule. In neo-patrimonial form of domination, the combination of these two ideal forms is such that:

> …two systems exist next to each other, the patrimonial of the personal relations, and the legal rational of the bureaucracy. Naturally these spheres are not isolated from each other; quite to the contrary, they permeate each other; or more precisely, the patrimonial penetrates the legal-rational system and twists its logic, functions, and effects.[81]

In neo-patrimonial form of rule, the difference between public and private interests is not distinct.[82] The ruler's private interest is not distinguished from what is in the interest of the ruled. The ruler does not exercise his authority and expect to be obeyed merely because of her/his authority emanating from the law but rather because of the network of patronage that links him with his clients whom he provides with various privileges and benefits in return for their loyalty and obedience.[83] In such systems of rule, rights and obligations are not determined by formal, universal and abstract rules applied by a neutral professional bureaucracy. Rather, the system is particularistic and informal in its determination of rights and obligations which are worked out on the basis of patron-client networks that span from the top of the hierarchy and which often straddle ethnic divisions.[84]

In a neo-patrimonial form of rule, these features of patrimonial rule are present though qualified to the extent that the legal-rational form of rule has managed to constrain and limit them. In most African countries, to varying degrees, modernization has brought about the formalization of power, the development of a bureaucratic

[81] Gero Erdmann and Ulf Engel, "Neopatrimonialism Revisited: Beyond a Catch-All Concept," *SSRN eLibrary* (February 2006): 18, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909183.
[82] Michael Bratton and Nicolas Van de Walle, "Neopatrimonial Regimes and Political Transitions in Africa," *World Politics* 46, no. 4 (July 1, 1994): 458.
[83] Ibid.; Farid Guliyev, "Personal rule, neopatrimonialism, and regime typologies: integrating Dahlian and Weberian approaches to regime studies," *Democratization* 18, no. 3 (2011): 583-584.
[84] Larry Diamond, "The Rule of Law versus the Big Man," *Journal of Democracy* 19, no. 2 (2008): 145.

administrative apparatus with the attendant distinction between the public and private domain of interest. But due to the limited success in this regard and also the excessively broad formal power the law vested in the executive, neo-patrimonialism is still prevalent in many African countries.[85] However, there is evidence that there is increasing institutionalization and formalization of politics which is reducing the scope of patrimonial politics.[86]

To recap the discussion so far, the African political matrix provides a *strong incentive*, *historical antecedents* and *conducive environment* for political behaviors which undermine democracy and constitutional rule. Such behaviors include the use of violence in the contest for political power (political violence), the illicit use of public office for purely partisan political objectives (abuse of incumbency) and the antagonistic political mobilization of ethnic groups (politicization of ethnicity). These behaviors are instrumentally useful for the political elite in the competition for power and the access to scarce resources which power within the context of the African political matrix guarantees.

### *1.4 Major Themes on the Study of Constitutionalism and Multi-Party Democracy in Africa*

While the constitutions of the post-colonial African states had been famously characterized by Okoth-Ogendo as "constitutions without constitutionalism"[87] and as such, of little practical significance, with the onset of the third constitution making

[85] Migai Akech, "Constraining Government Power in Africa," *Journal of Democracy* 22, no. 1 (2011): 97-98.

[86] See Daniel N. Posner and Daniel J. Young, "The Institutionalization of Political Power in Africa," *Journal of Democracy* 18, no. 3 (2007): 126-140; Gabrielle Lynch and Gordon Crawford, "Democratization in Africa 1990–2010: an assessment," *Democratization* 18, no. 2 (2011): 284.

[87] See H. W. O. Okoth-Ogendo and American Council of Learned Societies, *Constitutions without constitutionalism: reflections on an African political paradox* (American Council of Learned Societies, 1988).

wave, there has been an increasing level of scholarly engagement with constitutions of African states. Furhtermore, the process of democratic transition in Africa which vary from country to country and which are not linear even within one country are being studied by scholars interested in democratization in general and by area specialists who study African politics and society.[88] An overview of this literature reveals that there are four major interrelated themes that run across the legal and social science literature which focus on:

- Executive hegemony and imperial presidencies
- The effects and accommodation of ethnicity
- Economic critiques and discontents with the liberal democratic model
- Autochthony and cultural contextualization of constitutionalism

In the subsequent parts of the chapter an attempt will be made to briefly survey these four themes. It should be noted from the outset that there is an underlying agreement about the need for contextualizing constitutionalism among the scholars whose work fall in the various themes However, the direction and approach towards contextualization advocated for by proponents of the various themes is not necessarily the same.

### A. Executive Hegemony and Imperial Presidencies

The overwhelming dominance of executive power in many African states seems to be among the biggest stumbling blocks for democracy in the continent. Therfore, it

[88] See for example, Larry Jay Diamond and Marc F. Plattner, *Democratization in Africa* (JHU Press, 1999); Michael Bratton and Nicolas Van de Walle, *Democratic experiments in Africa: regime transitions in comparative perspective* (Cambridge University Press, 1997); Earl Conteh-Morgan, *Democratization in Africa: the theory and dynamics of political transitions* (Greenwood Publishing Group, 1997).

cannot come as a surprise that one of the recurrent themes that run in the literature regarding constitutionalism and democracy in Africa relates to the shortcomings of the democratization process during the third wave in taming excutive power. Many scholars argue that the introduction of multiparty democracy in the early 1990's in most African countries has not gone far enough and has not transformed the nature of the state. One of the recurrent strands in this theme focuses on the continued and overwhelming dominance of the executive branch of government in most African states. The dominance of the executive, as well as the fusion of the legislature and the executive (which will be discussed in some length later on) in fact make it difficult to apply the standard separation of powers framework in relation of African constitutions.

The 'Big Man', the larger than life figure that dominates the political life of the nation and who wields almost absolute power, was the typical president in the post-colonial state. Power was concentrated in the hands of such presidents and exercised with very little restraint and accountability.[89] Some argue that the reintroduction of multi-party democracy in the 1990's has not changed this reality in a meaningful manner. One such scholar is Kwasi Prempeh who argues that the constitutional reform undertaken in many African countries during the third constitution making wave did not go far enough since the focus of these reforms was the opening of the political space for multiparty competition (pluralism) and not constraining the power of governments (constitutionalism).[90] Prempeh contends that, as a result, African constitutional

[89] Goran Hyden, *African Politics in Comparative Perspective* (Cambridge University Press, 2006), 94–116.

[90] Kwasi Prempeh, "Africa's 'constitutionalism revival': False start or new dawn?," *International Journal of Constitutional Law* 5, no. 3 (July 1, 2007): 495; Prempeh, "Presidents Untamed," *Journal of Democracy* 19, no. 2 (2008): 11; Prempeh, "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa," *Tulane Law Review* 80, no. 4 (2006): 1293- 1295 ,

systems at the moment suffer from executive hegemony manifested with an imperial presidency.[91] As a solution to these problems, he argues that there is a need for further and more comprehensive constitutional reform in Africa.[92]

The excess of presidential power and its adverse consequences for democracy in African states have been discussed by many other scholars as well. Muna Nudulo argues that in most countries, there is a lack of constitutional checks and balances to restrain presidential power and this leads to a situation where the legislature and the judiciary become subservient to the president.[93] Oda van Cranenburgh, in her comparative study of the institutional basis of presidential powers encompassing 30 African countries, has shown the prevalence of a high level of presidential power in many African countries.[94] She has tried to establish statistically that high presidential power severely erodes freedom and leads to democratic break down in African states.[95] In another study, she has argued that in most African countries, high presidential power has been further accentuated by the fusion of power between the legislature and the executive leading to a prevalence of hyper-presidential regimes.[96]

Charles Fombad also argues that "one of the major problems that was not addressed by the post-1990 constitutional reforms was the issue of African absolutism, caused by the concentration and centralization of power in one man, the president, and in one

Prempeh contends that the constitutional reformers in the early 1990's had a limited vision of constitutional reform and particularly they have failed to introduce what he calls structural constitutionalism" .

[91] Kwasi Prempeh, "Africa's 'constitutionalism revival'," 498; See also Kwasi Prempeh, "Presidents Untamed," 111-119.

[92] Prempeh, "Africa's 'constitutionalism revival'," 506.

[93] Muna Ndulo, "Presidentialism in the Southern African States andConstitutional Restraint on Presidential Power," *Vermont Law Review* 26: 769-771.

[94] Oda van Cranenburgh, "'Big Men' Rule: Presidential Power, Regime Type and Democracy in 30 African Countries," *Democratization* 15, no. 5 (2008): 953 and 970.

[95] Ibid., 968.

[96] Oda Van Cranenburgh, "Presidentialism And Separation of Powers in Africa's Hybridregimes" (presented at the IPSA/ECPR Conference: Whatever Happened to North-South?, Sao Paulo, 2011), 14, http://saopaulo2011.ipsa.org/sites/default/files/papers/paper-821.pdf.

institution, the presidency, and the abuses of powers that go with this."[97] He also notes that this problem is compounded by the prevalence of dominant parties which are controlled by the head of the executive and his close allies.[98]

Rakner and van de Walle, also explore the dominance of the presidency in African politics and they note that "the single biggest impediment to truly competitive democracy in Africa is the overwhelming dominance of the presidency."[99] They argue that this dominance has contributed greatly to the weakness of opposition parties since it translates into a huge advantage for the incumbent against the opposition parties which normally have meager resources.[100] Van de Walle also makes a link between the clientelistic "access to state resources" enjoyed by elites in government and the overwhelming dominance of the executive that exist in African states.[101]

As the diagnosis of the above scholars shows, the detrimental effect of excessive executive hegemony on the prospects of the consolidation of democracy in Africa is evident. Executive dominance and hegemony impede the consolidation of democracy by rendering the other branches of government impotent to discharge their constitutional responsibility of holding the government of the day legally and politically accountable. Furthermore, the prevalence of imperial presidencies also undermines the consolidation of democracy by giving incumbents the tools and resources they need to keep the opposition enfeebled.



[97] Charles Manga Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects," *Buffalo Law Review* 59 (2011): 1024.
[98] Ibid., 1025.
[99] Lise Rakner and Nicolas van de Walle, "Opposition Weakness in Africa," *Journal of Democracy* 20, no. 3 (2009): 113.
[100] Ibid., 112.
[101] Nicolas van de Walle, "Presidentialism and Clientelism in Africa's Emerging Party Systems," *The Journal of Modern African Studies* 41, no. 02 (2003): 309-313.

### B. Ethnic Divisions, Conflicts and Accommodation

Ethnicity is another common theme that we find in the constitutionalism and democratization literature in Africa. Issues related with ethnicity have been dealt with quite extensively in the literature on African politics from different angles. It could be said that there are three rather common angles from which the issue of ethnicity is treated in the relevant literature.

This first perspective in the literature is predominantly analytical, focusing on the significance of ethnicity in the politics of African states. Examples of such literature would be the works of Rothchild and Posner. In his analysis of ethnic relations in African states, Donald Rothchild argues that the regime types that exist within a state will depend on whether or not competition for state power arises out of a desire to control scarce resources or out of latent and subjective grievances related with inequality, status, identity, recognition and so forth.[102] According to Rothchild, in countries where grievances based on subjective or psychological or even symbolic factors exist, it is more likely that those in dominant positions will opt to consolidate power at the center.[103] On the other hand, where competition among ethnic groups is over distributive material goods, the tension between groups is susceptible to political compromises.[104]

Another scholar, who has adopted an analytical approach toward the study of ethnicity and politics in Africa, is Daniel Posner. Posner's study of the interplay of institutions and ethnic politics was based on his case study of Zambia and he contends that his

[102] Donald S. Rothchild, *Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation* (Brookings Institution Press, 1997), 1–20.
[103] Ibid., 25-27.
[104] Ibid., 29-30.

findings could be extended to most African countries and as well as to countries beyond the African continent.[105] His study shows that since it is generally assumed that elected officials will favor their ethnic kin in the distribution of resources, voters tend to vote along ethnic lines and conscious of this fact, politicians running for office are likely to mobilize support along ethnic lines.[106] However, given the multiplicity and fluidity of ethnic identities, which ethnic identity would be decisive, (i.e. whether a broader and more inclusive or a narrower and less inclusive identity), is determined by the imperative of attaining a 'minimum winning coalition'.[107] Therefore, politicians and voters will strive to rely on the ethnic identity that will be broad enough to enable them to win the electoral contest but at the same time not too broad so as to minimize their share of the spoils of victory.[108] This being the case, the boundaries within which the competition is being held- whether it is a national, regional, or local contest- affect what constitutes a 'minimum winning coalition' and what ethnic identity the voters will follow in voting and the politician will invoke to mobilize support.[109]

The second strand in the literature on ethnicity in African politics is concerning self-determination and ethnic autonomy from a normative point of view. These discussions pertain to the wisdom of recognizing and accommodating ethnic diversity through granting autonomous self-governance to ethnic groups- Marina Ottaway, Francis Deng, Solomon Dersso; the manner in which 'traditional' or customary laws and authority should be dealt with- Mahmood Mamdani; and the right to self-

[105] Daniel N. Posner, *Institutions and Ethnic Politics in Africa (Political Economy of Institutions and Decisions)* (Cambridge University Press, 2005), 138.
[106] Ibid., 251-288.
[107] Ibid.
[108] Ibid.
[109] Ibid.

determination- Francis Deng. These scholars do not focus on specifics countries and use case studies but address the issue of ethnicity in relation to recognition, autonomy and self-determination in Africa in general though they refer to the experience of various African countries to illustrate some of the points they make.

Marina Ottaway argues that African states must accept ethnic identities as inevitable and legitimate if they desire to prevent the occurrence of violent conflicts.[110] She argues that though largely artificial and of modern origin, ethnic identities in Africa have crystallized since colonial times and that cynical manipulation of ethnic identity in the post-colonial African state has been rampant.[111] Taking these into account, the salience of ethnic nationalism internationally as well as the accentuating effect of multi-party elections on ethnic identities, Ottaway argues that recognition and acceptance of ethnic identities is essential to avoid violent ethnic conflicts.[112]

Ottaway's views seem to be shared by Francis Deng who also argues for the recognition of ethnic groups on the basis of the right to self-determination.[113] Both Deng and Ottaway deem nation-building that denies official recognition to and is hostile to the institutionalization of ethnic diversity as unhelpful in managing ethnic conflicts. A similar position is also taken by Solomon Dersso who observes that the post-colonial-nation building project was typically meant to create a nation state and aspired to bring about unity through homogeneity.[114] He argues that this approach and the polices it ensued have been colossal failures and have led to further ethnic

[110] Marina Ottaway, "Ethnic Politics in Africa: Change and Continuity," in *State, Conflict, and Democracy in Africa*, ed. Richard Joseph, 1999, 299-319.
[111] Ibid.
[112] Ibid.
[113] Francis Mading Deng, *Identity, Diversity, and Constitutionalism in Africa* (US Institute of Peace Press, 2008), 64–66,126–129.
[114] Solomon A. Dersso, "Constitutional Accommodation of Ethno-Cultural Diversity in the Post-Colonial African State," *South African Journal on Human Rights* 24 (2008): 568.

antagonism, socio-economic inequality in favor of dominant ethnic groups and the denial of cultural and political plurality.[115] Based on this argument, he calls for an approach to nation-building that "recognizes the reality of the various ethno-political communities constituting a state and institutionalizes mechanisms to accommodate their interest".[116] Another scholar who expresses similar views is the renowned African constitutional law scholar Ben Nwabueze. Nwabueze argues that in addressing the national question in Africa can undertaking successful nation building federalism and respect for the autonomy of various ethnic-cultural groups is essential.[117]

The positions of Ottaway, Deng, Nwabueze and Solomon seem to be opposed to the views of Mamdani who decries what he considers to be the failure to de-ethnicize customary power as a great failure of the post-colonial state.[118] Mamdani argues that the colonial state in Africa institutionalized through its laws and political practice two identities; one racial and one ethnic.[119] The racial divide divided the indigenous from non-indigenous and subjected the latter to the civil law or common law and the former to customary law.[120] The ethnic divide distributed the indigenous population in to separate ethnic groups and subjected them to their own respective "traditional rulers" and "customary laws".[121] In this scheme of things, race was supposed to reflect civilizational hierarchy and ethnicity is translated as horizontal cultural diversity.



[115] Ibid., 568-570.
[116] Ibid., 568.
[117] Benjamin Obi Nwabueze, *Constitutional Democracy in Africa: Constitutionalism, Authoritarianism and Statism* (Spectrum Books, 2003), 313–319.
[118] Mahmood Mamdani, *Citizen and subject: contemporary Africa and the legacy of late colonialism* (Princeton University Press, 1996).
[119] Ibid., 16-18.
[120] Ibid., 21.
[121] Ibid., See also Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press, 2002).

Another perspective from which the issue of ethnicity and politics in Africa is treated in the relevant literature focuses on the various attempts of different African countries to address problems associated with ethnic politics and manage ethnic diversity through the electoral/party system.[122] Bogaards, in his study of the electoral and party systems of African countries in relation to ethnicity, discusses a wide range of electoral systems that have been developed in different African countries.[123] He argues that these electoral systems should be categorized based on their vision of the function of the party-system which could be *blocking, aggregating or translating* ethnic divisions in the polity.[124] He favors the aggregating function of parties as the most desirable and constituency pooling as the most suited electoral system for this function.[125]

### C. Critiques and Discontents with the Liberal Democratic Model and Economic Policies

A third theme that runs across the literature on constitutionalism and democracy in Africa is a critique of liberal democracy and its accompanying economic model. These critiques object to the liberal constitutional democratic paradigm as being ill suited and even dangerous in the African context.

One such critique is Isa G. Shivji who argues that "the result of constitutional reform leading to liberal constitutions and multiparty polity in the early 1990's have been



[122] This is an issue that will be discussed at some length in Chapter Six of the dissertation.
[123] See Matthijs Bogaards, "Electoral Systems, Party Systemsand Ethnicity in Africa," in *Votes, Money and Violence Political Parties and Elections in Sub-Saharan Africa*, ed. Matthias Basedau, Gero Erdmann, and Andreas Mehler (NORDISKA AFRIKAINSTITUTET, Sweden Universit y of KwaZulu-Nata l Press , SOUTH AFRICA, 2007), 168-189.
[124] Ibid., 169.
[125] Ibid., 188.

extremely mixed but by and large disappointing".[126] He asserts that the "ideologies and images of liberal democracy are neither new nor feasible nor plausible forms of political organization in our [African] countries".[127] According to him, the pitfalls of liberal constitutional reform arise from the "irreconcilable contradiction between the rhetoric of constitutionalism …. on the one hand and economic reforms based on marketization, privatization and withdrawal of the state from the economic sphere….".[128]

The contradiction lies, according to Shivji, in the fact that the rhetoric of constitutionalism is based on the accountability and responsiveness of legitimate governments to their own people, while the 'neo-liberal' economic reforms have virtually decimated the sovereignty of states which have no power to determine their economic policies (which are dictated to them by the IMF, WTO and the World Bank at the behest of powerful transnational corporations).[129] This in turn results, according to Shivji, in an intense economic stratification of society and erosion of national consensus forcing the state to resort to coercion to the detriment of the constitutional order. Furthermore, the "neo-liberal" economic reforms create socio economic conditions that would make constitutional orders fragile and unstable.[130] Therefore, he calls for a new constitutional and democratic dispensation in Africa based on '*popular livelihood'*, '*popular participation'* and '*popular power/ sovereignty* rooted in *social justice and equity'* as opposed to in the theories of natural justice and equality which



[126] Issa G. Shivji, *Where Is Uhuru?: Reflections on the Struggle for Democracy in Africa* (Pambazuka Press, 2009), 60.
[127] Ibid., 13.
[128] Ibid., 61-62.
[129] Ibid.
[130] Ibid.

he dismisses as 'liberal' and 'bourgeoisie'.[131]

In this argument, Shivji seems to view constitutionalism as inseparable from marketization, privatization and as necessarily requiring the withdrawal of the state from the economic sphere. Regardless of the view that one might have about the wisdom of such economic policies, it might be misguided to conceive them as necessarily sanctioned by liberal constitutionalism. The economic liberalization and reform sanctioned by the Structural Adjustment Programs of the Bretton Woods institutions are not necessary components of constitutional democracy. In fact such measures had often been taken for better or worse in many African countries in political environments that have no resemblance with a liberal constitutional democracy. This is particularly true when we note that the bulk of foreign investment in Africa presently comes from China and could hardly be said to have been legitimized by the rhetoric of liberalism and constitutionalism. In Sudan, Angola, Ethiopia and a number of other African countries the kind of economic relations which are decried by the left are mushrooming despite the absence of meaningful multiparty democracy and basic political freedoms. So, the polemics against capitalism should be decoupled from a critique of liberal democracy in Africa which should be assessed on its own merit by seeing the economic conditions and track record of the countries in which democracy is faring better.

Shivji's critique of constitutionalism is difficult to accept to the extent that it fails to distinguish constitutionalism from economic policies which prescribe a *laissez-faire* minimalist state. While it is difficult to imagine a liberal constitutional democracy with a command economy and where state ownership is the principal form of

[131] Ibid., 14,15,63.

ownership, liberal democracy and constitutionalism could function with a whole range of economic models.[132] Therefore, in the absence of a necessary link between constitutional democracy and the sort of economic policies Shivji (perhaps rightfully) criticizes, his critique of constitutionalism is not justified. Furthermore, the lack of clarity in the alternatives he proposes is an additional shortcoming of his proposal. It is not very clear what institutional form *popular livelihood, popular participation* and *popular power/ sovereignty* rooted in *social justice and equity* ' will take and what sort of constitutional framework they require. Therefore, it is very difficult to assess them and take positions in favor or against them.

Critiques of liberal democracy similar to that of Shivji and which also have direct implications on constitutionalism are common in the literature about democratization and human rights in Africa. For instance, Alfred Ndi argues that Amartya Sen's conception of development as freedom is not valid in the African context.[133] He cites various factors which he thinks would make liberalism, in the political and economic sphere, unsuccessful in Africa. Such factors according to Ndi include among others, the privileged position of the group over the individual, neo-patrimonial outlooks on politics and the economy as well as the absence a popular mentality geared towards optimization of profit.[134] He contends, that under such circumstances, "in Africa, the ideals of multi-party democracy, free speech, the liberal press, etc., have been merely a means for legitimizing capitalist relations that have led to new class divisions, new bourgeois relationships with international capital, the exploitation of the working

[132] See the contrast between progressive and new constitutionalism in Stephen Gill, "New Constitutionalism, Democratisation and Global Political Economy∗," *Pacifica Review: Peace, Security & Global Change* 10, no. 1 (1998): 29–30.
[133] Alfred Ndi, "Why Liberal Capitalism Has Failed to Stimulate a Democratic Culture in Africa," *Journal of Developing Societies* 27, no. 2 (June 1, 2011): 177 -200.
[134] Ibid., 194.

class, and so forth.".[135]

While Ndi's contention that liberal capitalism has failed and has not been good for democracy in Africa could be accepted, his assertion that multiparty democracy and civil and political rights have caused harm to the economic welfare of African states is not persuasive. His polemics against civil and political freedoms as well us multi-party democracy which depicts them as alibis for the exploitation of Africa by international capital does not bear close scrutiny. This is so because there are countries that have been most friendly to international capital both in the past and also presently while their track record as liberal democracies is abysmal. Mobutu's Zaire, Houphouët-Boigny's Côte d'Ivoire, and Moi's Kenya were very friendly to international capital. However, no one can contend that their economic policies were in any way legitimized or facilitated by their respect for civil and political freedoms or by the prevalence of a multiparty system, since there was neither freedom nor democracy under their rule (even though for the later half of his rule Moi's Kenya was ostensibly a multiparty democracy).

Furthermore, currently in many African countries we do not see a necessary correlation with multiparty democracy and capitalist relations which Ndi denounces. This is particularly true when we note that the bulk of foreign investment in Africa presently comes from China[136] and could hardly be said to have been legitimized by the rhetoric of liberalism and constitutionalism. In Equatorial Guinea,[137] Ethiopia,[138]

[135] Ibid., 185.

[136] See Denis M. Tull, "China's Engagement in Africa: Scope, Significance and Consequences," *The Journal of Modern African Studies* 44, no. 03 (2006): 459–479; see also Klaver Mark and Trebilcock Michael. "Chinese Investment in Africa." *The Law and Development Review* 4, no. 1 (2011): 168-217..

[137] "The Plundering of Equatorial Guinea," *The Guardian*, October 31, 2011, http://www.theguardian.com/commentisfree/2011/oct/31/equatorial-guinea-corruption-us-assets(last accessed on September 19,2013).

Angola,[139] and a number of other African countries, the kind of economic relations which are decried by the left are mushrooming despite the absence of meaningful multiparty democracy and basic political freedoms. So, the argument against neo-liberal economic policies should be decoupled from a critique of liberal democracy in Africa. Constitutionalism and democracy should be assessed on their own merit without however disregarding the economic conditions and track record of the countries in which democracy is faring better.

Tukumbi Umumba-Kasongo also argues that liberal democracy has failed in Africa and that it has failed to "address the core issues of African societies, such as equal distribution of resources, social justice, employment, gender equality and individual and collective rights".[140] He advocates for a social and consociational democracy, a strong state focused on delivering social and economic goods as opposed to liberal democracy and multi-party elections which he considers as having failed African states.[141] These views echo the arguments of Claude Ake who had asserted that the movement for democracy in Africa had its own unique features which justify deviation from the conventional and liberal understanding of democracy.[142] Such deviation, according to Ake, is the prominence that should be given to the economic welfare of citizens over abstract legal and political rights.[143] He argues that democracy should have a strong economic as well as political component in Africa and that the state should be able to intervene in the economy to induce growth and redistribute the

[138] See Tom Lavers, "Patterns of Agrarian Transformation in Ethiopia: State-mediated Commercialisation and the 'land Grab'," *Journal of Peasant Studies* 39, no. 3–4 (2012): 795–822.
[139] See Deborah Brautigam, *The Dragon's Gift: The Real Story of China in Africa* (Oxford University Press, USA, 2010), 273–277.
[140] Tukumbi Lumumba-Kasongo, *Liberal democracy and its critics in Africa: political dysfunction and the struggle for social progress* (Zed Books, 2005), 202.
[141] Ibid., 202-203.
[142] Claude Ake, "The Unique Case of African Democracy," *International Affairs* 69, no. 2: 241-244.
[143] Ibid., 242.

benefits of economic growth.[144]

Makau Mutua's critique of human rights, particularly, his analysis of how a human rights based approach to the democratic transition in South Africa has hindered the economic objectives of the anti-apartheid struggle, can also be read in the same light.[145] Mutua argues that the rights discourse which had been constitutionalized during transition entrenched the existing economic inequalities and made it difficult for the A.N.C to take policy measures aimed at redistribution and the economic empowerment of the black majority.[146] He also makes a broader assertion that political democracy is insufficient in Africa and that it has to be complemented by a 'strong welfare state or social democracy.[147]

The arguments of Tukumbi, Ake and Mutua seem to converge on two points. The first is that the vision of constitutional democracy in Africa should not be limited to or even be primarily about negative freedoms. The second point of convergence seems to be that the constitutional framework of African states should be such that governments will have a wide policy leeway to pursue social and economic objectives such as economic growth, wealth redistribution and the like. Perhaps in concrete terms, these would mean that there would be a weak private property regime and more robust socio-economic component in the form of rights, policy objectives and policy directives in constitutions.

Whatever the merits of such proposals, they are not necessarily incompatible with a constitutional democracy and could be taken as suggestions for fine tuning

[144] Ibid.
[145] Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002), 140-142.
[146] Ibid.
[147] Makau Mutua, "Human Rights in Africa: The Limited Promise of Liberalism," *African Studies Review* 51, no. 1 (2008): 34.

constitutionalism to meet the socio-economic needs of African states. There might be a risk that such proposals could legitimize and create the opportunity for the further aggrandizement of the executive branch of government and the undermining of political democracy and freedoms. However, the risk would be worth taking since poverty and the associated evils pose the most serious threat to human dignity in many African countries that by far surpasses the threat from autocratic rule.

To recap the discussion so far which related to the economic critiques and discontents with the liberal democratic model, such critiques range in terms of their proposed departure from constitutional democracy. Some are quite radical and could be interpreted as denouncing multiparty elections and civil and political rights. There are also more measured critiques which seem to call for supplementing or improving upon the liberal democratic model by infusing it with socioeconomic rights and other elements meant to advance popular socioeconomic welfare. The radical critiques are not very clear in the institutional framework their alternative proposals will take,[148] but it looks as though competitive multiparty elections and first generation human rights are not going to figure prominently and could be dispensable in their constitutional vision. If that is the case, then such critiques cannot be taken too seriously as they would run against to the contemporary popular and political consensus which rightfully makes basic political freedoms and periodic democratic elections as necessary though not sufficient conditions for the legitimacy of



[148] In fact, J.S Saul, who supports the call of Shivji for "popular" as opposed to "liberal" democracy concedes that proponents of such views face difficulties " in defining what the alternative model-'popular democracy'-might actually be expected to look like concretely under African conditions See John S. Saul, "'For Fear of Being Condemned as Old Fashioned': Liberal Democracy Vs. Popular Democracy in Sub-saharan Africa," in *Democratization in Africa: Faith, Hope, and Realities*, ed. Kidane Mengisteab and Cyril K. Daddieh (Praeger Publishers, 1999), 42.

governmental power.[149]

It is impossible to imagine- in the modern state- popular participation and sovereignty being manifested in the absence of basic political freedoms and periodic multiparty democratic elections. Rejecting multiparty democracy and negative freedoms because of dissatisfaction with the liberal economic model would be to throw out the baby with the bathwater. The inadequacies of the neoliberal economic model might justify the adoption of an economic model that allows the state to have a more active role in the economy by steering the private sector and pursuing polices meant to alleviate directly economic inequality and poverty. However, it does not justify an outright and wholesale denouncement of multiparty democracy and constitutionalism.

### D. Autochthony and Cultural Contextualization of Constitutionalism

One of the themes that runs in the scholarly analysis of contemporary constitutions in Africa relates to the need for cultural contextualization and autochthony of constitutions. Deng argues that the "external origins of African constitutionalism" and "their lack of contextualization to African cultures" have contributed to the crises that many African countries find themselves in.[150] Deng, after providing an overview of what he calls the "African culture and worldview,"[151] discusses specific cultural norms and values held by specific communities which he believes are also widely shared throughout Africa. These values and norms are personhood and governance

[149] Public surveys in different African countries show that most citizens support democracy from other alternative forms of governance Renske Doorenspleet, "Critical Citizens, Democratic Support and Satisfaction in African Democracies," *International Political Science Review* 33, no. 3 (June 1, 2012): 203–285, doi:10.1177/0192512111431906; See also "AfroBarometer: Democracy Making a Headway in Africa - Afrik-news.com : Africa News, Maghreb News - The African Daily Newspaper," accessed March 26, 2013, http://www.afrik-news.com/article15762.html.

[150] Francis Deng, *Identity, Diversity, and Constitutionalism in Africa* (United States Institute of Peace, 2008), 211.

[151] Ibid., 77-84.

among the Akan, *Ubuntu* among the Bantu and various values of the Dinka such as their sense of dignity (*dheeng*), justice and harmonious human relations (*cieng*) and the *Gacaca* (as encapsulating at its core not just dispute settlement but "also broad-based consultation toward building a consensus") of Rwanda.[152] Deng goes on to argue that these values have relevance to contemporary challenges of constitutionalism such as conflict management, the effective participation of identity groups in a popular democratic system of governance, human and people's rights, culturally oriented development and changing gender relations toward equality[153].

Along the same lines, Mazrui argues that "constitutionalism in Africa can never take root if there is no massive consultation with traditional culture, custom and legal precedents."[154] It is interesting that both Mazrui and Deng read the cultural values and practices of the continent as providing some form of precedent and justification for self-determination and arrangements meant to accommodate diversity. Maxwell Owusu also argues for the necessity of cultural contextualization and emphasizes the need for the "discovery and establishment of workable institutional structures … suited to contemporary African circumstances that embody preexistent democratic values, ideals and principles."[155] Another scholar, exploring the impact of Arab and European imperialism on constitutional thought in Africa argues that in ancient African political thought, ownership of the state was that of the political community and not the rulers.[156] He argues that this conception of state ownership by the

[152] Ibid., 85-102.
[153] Ibid., 103.
[154] Ali Mazrui, "Constitutional Change and Cultural Engineering: Africa's Search for New Directions," in *Creating Opportunities, Facing Challenges* (Fountain Publishers, 2001), 20.
[155] Maxwell Owusu, "Domesticating Democracy: Culture, Civil Society, and Constitutionalism in Africa," *Comparative Studies in Society and History* 39, no. 1 (January 1, 1997): 143-144.
[156] Peter Ekeh, "The Impact of Imperialism on Constituional Thought in Africa," in *Constitutionalism And Society In Africa* (Ashgate Pub Ltd, 2004), 3-25.

community has been perverted by European and Arab Imperialism and the perversion has been perpetuated by nationalist leaders of postcolonial Africa.[157] Hence, he asserts, "…the way forward in reforming African states and constitutions is to march backwards towards the tenets of African political cultures."[158] While identifying the same problem, that is the alien and imposed nature of African constitutions and states (and their consequent lack of legitimacy), Ben Nwabueze prescribes not the mere cultural contextualization of African constitutions but overall social and intellectual decolonization.[159] He argues that such decolonization should occur through 'education for civic virtues' and an 'ethical revolution'.[160]

Richard Sklar, on the other hand, suggests that traditional law/custom might clash with principles of constitutionalism and he underscores the need to find common ground to avoid collision between cultural values of African societies and constitutionalism.[161] An-nai'im also argues that "the legitimacy and suitability of African constitutionalism need somehow to tap the consciousness of a particular people, which in the case of African societies would include the recollection of relevant pre-colonial ideas and historical experiences of each society."[162] An-nai'im contends that Islam could play a role in buttressing the cultural and religious legitimacy of constitutionalism in African countries societies which are predominantly



[157] Ibid.
[158] Ibid., 39.
[159] Benjamin Obi Nwabueze, *Constitutional Democracy in Africa: Constitutionalism, authoritarianism and statism* (Spectrum Books 2003) 337-339; Benjamin Obi Nwabueze, *Constitutional Democracy in Africa: The return of Africa to constitutional democracy* (Spectrum Books 2004) 233
[160] Benjamin Obi Nwabueze Nwabueze, *Constitutional Democracy in Africa* (n 160 above) 233-294.
[161] Richard Sklar, "On the Study of Constitutional Government in Africa," in *Constitutionalism and Society in Africa*, 50.
[162] Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press, 2006), 33.

Muslim.[163]

The views of the authors discussed above and also those of other scholars having the same views such as Makau Mutua[164] underscore the necessity and desirability of rooting constitutionalism in local history, tradition and culture. The crux of the argument of the authors whose views are presented above is that for constitutionalism to be effective in Africa, it must reflect the cultural norms and historical experiences of African societies.

Underlying these arguments is a belief that "constitutions serve as the state's charter of identity by delineating the commonly held core societal norms and aspirations of the people, constitutions provide the citizenry with a sense of ownership and authorship, a sense that 'We the People' includes me."[165] Such an understanding of the relationship between identity and constitutions is associated with an 'essentialist paradigm' of constitution making. Hanna Lerner identifies different ways of understanding the relationship of identity and constitutions which she presents as ideal-type models. These are the "essentialist constitutional model of the nation state" and the "liberal-proceduralist approach of 'constitutional patriotism'" championed by Habermas and the "incrementalist approach' which she favors[166] .

The essentialist paradigm towards constitutional making "views constitutions as legal embodiments of pre-constitutional homogenous unities, which gain their legitimacy



[163] Id., 99.
[164] See Makau Mutua, "Human Rights in Africa: The Limited Promise of Liberalism," *African Studies Review* 51, no. 1 (2008): 9-10.
[165] Hanna Lerner, "Constitution writing in deeply divided societies: the incrementalist approach," *Nations and Nationalism* 16, no. 1 (January 1, 2010): 69.
[166] Ibid., 70, on constitutional patriotism; see also Müller, Jan-Werner, *Constitutional patriotism*, Princeton University Press, 2009, 46-58.

through an exercise of the people's *constituent power."*[167] Therefore, in this paradigm the legitimacy of a constitution is dependent upon the extent to which it reflects the cultural identity and normative world view of the 'ethnos' which doubles as *the constitutent power*. This paradigm is very much similar to what M. Rosenfeld has called the German constitutional model which is characterized by the salience of ethnic identity in forming constitutional identity.[168] Rosenfeld illustrates this paradigm using Germany as an example of a country in which there is a strong link between constitutional and national identity.[169]

The views that have been discussed above, which call for culturally autochthonous constitutions in Africa, reflect such essentialist or ethno-centric understanding of constitutional identity. However, this approach could be very problematic. This is so because this understanding of the relationship of cultural identity and constitutions can work only for constitutions of nation states that are largely or perceived to be ethnically homogenous. The model is ill suited for multi-ethnic states in which the various ethno-cultural communities within the state tend to have very different- and at times incompatible- normative world views.[170]

For example, if we were to take the Husa-Fulani of northern Nigeria or the Yoruba of south-eastern Nigeria and the Igbo of south western Nigeria, one will be hard-pressed to find a common denominator in the cultural repertoire of these communities that could have been utilized to render the Nigerian Constitution culturally



[167] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011), 6.
[168] See Michel Rosenfeld, *The identity of the constitutional subject: selfhood, citizenship, culture, and community* (Routledge, 2010), 152-156.
[169] Ibid.
[170] J.A.A. Ayoade, "The African Search for democracy: Hopes and Reality", in *Democracy and Pluralism in Africa* (Lynne Rienner, 1986), 29..

autochthonous.[171] The acephalous Igbo who had no kings in pre-colonial Nigeria, did not share much with the hierarchical, centralized and monarchal political culture of the Youruba or the northern emirates that could serve as a foundation for an autochthones Nigerian Constitution.[172] The same argument could be made in relation to a number of other African countries. In Uganda, the north and the south historically had different modes of social organization. The Buganda in the south had a centralized and hierarchical monarchial system that was at odds with the more egalitarian dispensation of the acephalous societies in what is now northern Uganda.[173] If we were to take another example, the absolutist monarchial form of governance of historical Ethiopia is very much at odds with the egalitarian and democratic dispensation of the Oromo *Gadda* governance system.[174]

African states are often constituted by culturally diverse communities and, therefore, coming up with a culturally autochthonous constitution that could reflect the values, aspirations, traditions and pre-colonial forms of social organization of all these communities at the national level is quite difficult.[175] This difficulty is further accentuated by the fact that the patriarchal orientation of most pre-colonial cultural values and norms coupled with other cultural practices, values and rituals could be incompatible with the aspiration to establish democratic, egalitarian constitutional

[171] See Richard L. Sklar, *Nigerian Political Parties: Power in an Emergent African Nation* (Africa World Press, 2004), 6–16.
[172] Rex D. Honey, "Nested Identities in Nigeria," in *Nested identities: nationalism, territory, and scale*, ed. Guntram Henrik Herb and David H. Kaplan (Rowman & Littlefield, 1999), 178-180.
[173] See John Tosh, "Colonial Chiefs in a Stateless Society: A Case-Study from Northern Uganda," *The Journal of African History* 14, no. 3 (January 1, 1973): 473-490; L. A. Fallers, "Despotism, Status Culture and Social Mobility in an African Kingdom," *Comparative Studies in Society and History* 2, no. 1 (October 1, 1959): 11-32.
[174] See Asmerom Legesse, *Oromo democracy: An indigenous African political system* (Asmara: Red Sea Publishers, 2000); Donald Crummey, "Abyssinian Feudalism," *Past & Present*, no. 89 (November 1, 1980): 115-138.
[175] John A. Wiseman, *Democracy in Black Africa: Survival and Revival* (Paragon House Publishers, 1990), 15.

order in which the dignity and right of all citizens is respected.[176] As one Kenyan historian notes after a careful examination of a number of pre-colonial African political systems, the democratic credentials of these systems is far from certain and in fact a number of such traditional systems were undemocratic.[177] Therefore, an attempt to bring about the cultural contextualization of constitutions in Africa in an essentialist, ethno-centered paradigm should be rejected at the national level, while perhaps such a project might be desirable and fruitful at the sub-national level in designing and implementing sub-national constitutions to some degree.[178]

Of course, this cannot be the final word on the issue of autochthony and cultural contextualization of constitutionalism in Africa. The project could be undertaken in a different and more suitable paradigm which is the post-colonial constitutional model that Rosenfeld identifies. This model, in Rosenfeld's own words:

> is characterized by the predominance of a process involving an ongoing struggle between identification and differentiation from the colonizer's constitutional identity, through concurrent negation and affirmation of the latter. This model, as in the case of India, is likely to lead to success where a workable balance between acceptance, rejection and transformation of the colonizer's constitutional culture could be achieved.[179]

In this approach, constitutional identity [180] will not focus on the ethnic composition

[176] See 'Abd Allāh Aḥmad Na'īm, *African Constitutionalism and the Role of Islam* (University of Pennsylvania Press, 2006),156-158..

[177] Vincent G Simiyu,. "The democratic myth in the African traditional societies." *Walter Oyugi et. al* (1988),51 -68.

[178] One can imagine that it would be easier to come up with a culturally autochthonous constitution for the states comprising the Ethiopian or Nigerian federation as compared with coming up with a culturally autochthonous constitution at the federal level for Nigeria or Ethiopia. This is so because both in Nigeria and Ethiopia, naturally, the level of heterogeneity deceases in the states as compared with the country as a whole.

[179] Rosenfeld uses the term constitutional identity to refer to the collective self-image of members of a polity and their mentality towards power which is distinct but linked to pre and extra constitutional traditions and identities. See Michel Rosenfeld, "Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example," *Cardozo Law Review* 19 (1998 1997): 1892 and 1896..

[180] Ibid.

of the polity and will not run the risk of being partial to any of the various ethno-cultural communities that comprise the demos. This approach provides the opportunity to be eclectic and critical to about ones received constitutional traditions and gives enough space for constitutional contextualization.

Such pragmatic approach sounds more appealing in the African context among other reasons because it allows the incorporation of the most widely shared cultural values- such as *Ubuntu*- which have the potential to reinforce the consolidation of constitutional democracy in Africa. Noting that most African cultures have values that are the similar to *Ubuntu,* some have described *Ubuntu* "as a universal African concept which is found amongst all African cultures and in all African languages, and although different languages have different names for ubuntu, its basic meaning and worth remains the same."[181] Values like *Ubuntu,* which more or less transcend ethnic divisions and are compatible with the underlying principles of modern constitutional democracy, could be synthesized with constitutionalism to enhance the cultural legitimacy of African constitutions.[182] This must be seen as an ongoing project that does not stop during the design of constitutions but rather must continue in their interpretation and application. In a case concerning the constitutionality of the death penalty in South Africa, *S v Makwanyane and Another,* the concept of *Ubuntu* figured prominently and Justice Mokgoro notes in his concurring opinion: "our own (ideal) indigenous value systems are a premise from which we need to proceed and are not

[181] Ilze Keevy, "African philosophical values and constitutionalism: A feminist perspective on ubuntu as a constitutional value." PhD diss., University of the Free State, 2008, 324.

[182] Tom Bennett, "Human Rights and Customary Law Under the New Constitution," Transformation: Critical Perspectives on Southern Africa 75, no. 1 (2011): 79, doi:10.1353/trn.2011.0016.See also Nkhata, MJ 2010, *Rethinking governance and constitutionalism in Africa : the relevance and viability of social trust-based governance and constitutionalism in Malawi*, LLD thesis, University of Pretoria, Pretoria, pp 32-40 viewed 2013, September 17 < http://upetd.up.ac.za/thesis/available/etd-06202011-092912./ > See also *S v Makwanyane and Another* (CCT3/94) [1995], Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004], Dikoko v Mokhatla (CCT62/05) [2006]

wholly unrelated to our goal of a society based on freedom and equality."[183]

In relation with the issue of cultural contextualization of constitutionalism, the other issue that could be raised would be the status that should be accorded to traditional forms of power and customary and religious laws. Some scholars have argued for legal pluralism as well as the recognition and incorporation of traditional, customary rulers by African states as necessary for the sake of stability and as a way of enhancing the legitimacy of African states.[184] Specifically on the issue of customary power exercised by the 'traditional' rulers or chiefs, there is an ongoing debate among 'modernists' and 'traditionalists'.[185] The argument from the side of the traditionalists is based on the premise that traditional rulers enjoy more legitimacy compared with the state and that the rural population is more familiar with traditional forms of rule which are also more adapted to local needs and experiences.[186] Such claims are often substantiated by point out the indispensability of traditional disputes resolution mechanisms such as *Gacaca* in Rwanda which cannot be supplanted by the modern state centric judicial system.[187] The argument from the modernists has depicted such forms of power as archaic, undemocratic, unprogressive vestiges of the past and/or inventions of colonial powers that have been tools for colonial domination and hence

[183] S v Makwanyane and Another (CCT 3/94)/Mokgoro J, Para 100. It is interesting to note that although Ubuntu has been explicitly mentioned in the Postamble of 1993 Interim Constitution of South Africa, it has not been mentioned in the final 1996 Constitution of South Africa., See Ilze Keevy, "African philosophical values and constitutionalism: A feminist perspective on ubuntu as a constitutional value." PhD diss., University of the Free State, 2008, 272-275

[184] Jacques Fremont, "Legal Pluralism, Customary Law and Human Rights in Francophone African Countries," Victoria University of Wellington Law Review 40 (2009, 2010): 165.

[185] See Carolyn Logan, "Traditional Leaders In Modern Africa: Can Democracy And The Chief Co-Exist?," Afrobarometer Working Paper, 2008.

[186] Sanele Sibanda, "When Is the Past Not the Past? Reflections on Customary Law Under South Africa's Constitutional Dispensation," Human Rights Brief 17, no. 3 (January 1, 2010): 32, http://digitalcommons.wcl.american.edu/hrbrief/vol17/iss3/6.

[187] See for example Aneta Wierzynski, "Consolidating Democracy through Transitional Justice: Rwanda's Gacaca Courts," *New York University Law Review* 79 (2004): 1934.

of dubious legitimacy.[188] Therefore, the modernists would argue, "traditional rulers" should not have a significant place and a decisive role in democratic Africa.

Similar arguments are also forwarded in relation to the recognition of customary and religious laws which are of particular importance when it comes to the regulation of land holding, inheritance and marriages. This could be observed from the *Bhe* case in South Africa in which the constitutionality of customary laws that excluded women from intestate succession of land; or the *Kedja Beshir* case in which the applicant challenged the constitutionality of a Sharia Court that assumed compulsory jurisdiction over an inheritance case she was involved in in Ethiopia.[189] In both cases, customary or religious legal norms that were disadvantageous to women were successfully challenged through constitutional litigation. The position that constitutional democracy should take on this debate is one important issue that has to be addressed in the contextualization of constitutionalism in African states. Perhaps, the most pragmatic and reasonable approach to this issue seems to be to recognize that though not universally, traditional authorities and customary or religious laws command great respect and are deeply rooted. Therefore, attempting to uproot them will be impossible and in some sense undesirable. Hence, recognizing these norms and authorities, cooperating with them and inducing their reform in some aspects seem to be the approach that should be adopted where customary and religious rules and power command a substantial level of loyalty.



[188] See Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (Princeton Series in Culture/Power/History), 1st edition (Princeton University Press, 1996).

[189] See Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004], Dikoko v Mokhatla (CCT62/05) [2006] and See Getahun Kassa,. "Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System." *Afrika Focus* 20, no. 1-2 (2007): 88-93 for an English summary of the Kedija Beshir case

In concluding this section of the chapter, the following observations seem to be in order: the discussion so far was meant to highlight some of the major themes in the comparative constitutional law and democratization scholarship on the continent and is not an exhaustive treatment of the literature. The purpose of the discussion was rather to provide a background within which the focus of this research could be situated. At this juncture, before pointing out what will be the focus of this research and where it will fit among these four themes, it will be useful to underscore the common thread that runs through all four themes. This common thread is *the need to contextualize constitutionalism in Africa*. This thread will be taken up and expanded upon in a section in the next chapter of this dissertation.

***Conclusion***

In contemporary Africa, elections have become routine and at least every country save the odd cases like Swaziland and Eritrea are- at least nominally- democracies. In reality, the system of governance in most countries lags far behind their democratic aspiration and/or pretentions. The discussion so far points out that a web of factors including the legacy of the colonial and post-colonial states; ethnic diversity and the political economy of African states create a very challenging environment for constitutionalism and democracy to take root. In this environment, neo-patrimonial form of rule with an overwhelming dominance of the executive branch of government thrives. Ethnic competition for resources and power become very intense and not so infrequently result in violence along ethnic lines. The political matrix creates the opportunity, incentives, historical antecedents and instruments for antagonistic ethnic politics, political violence and abuse of power. If constitutional multi-party democracy is to become the reality, there is a need to address these multiple challenges.

# Chapter Two: Transforming the African Political Matrix: In Search of Constitutional Solutions

### *Introduction*

The discussion in the previous chapter leads to a number of important questions concerning democracy and constitutionalism in Africa. These questions revolve around the desirability, feasibility and relevance of the liberal democratic conception of constitutional democracy in Africa. After all, as we can see from the previous chapter, the answer to these questions is not exactly settled. The cultural and economic critiques of liberal democracy in the African context, calling for autochthonous African constitutions and insisting that democracy should have economic dimensions, seem to challenge the desirability and relevance of the liberal constitutionalism. Furthermore, the practical challenges to the functioning of democracy that arise from the African political matrix discussed in the previous chapter would lead us to question if a liberal democratic constitutional order would be feasible in most African countries.

This chapter will be devoted to discussing these questions. In the first section of this chapter, the author will argue that despite the objections and reservations of the cultural and economic critiques of liberal democracy, the liberal democratic vision of constitutional democracy is relevant and desirable in Africa, and that any concessions to these critiques must not undermine the essence of the liberal democratic model. In the second section of the chapter, the author would argue that to meet the real and practical challenges that liberal constitutional democracy faces in the African context, it is necessary to contextualize the constitutionalism. The last section of this chapter will outline how in this dissertation, this project would be undertaken.

### *2.1 The Liberal and Democratic Imperative of Constitutionalism in Africa*

The liberal democratic model of constitutionalism, as we have seen in the previous section of this dissertation, has many critiques and its overall feasibility and normative desirability is subject to some contention.[190] Some criticize the model for being too western and culturally alien. Others criticize it for focusing on formal, individual and 'bourgeoisie rights' at the expense of substantive socio-economic rights that are of more significance to the majority of Africans.

The purpose of this section of the chapter is to argue that there is a liberal *and* democratic imperative, so to speak, that should be respected for any contemporary African constitution to be considered legitimate. In order to establish this claim, the author would provide a very brief description of what he considered to be the essence of the liberal and democratic imperative and then proceed to showing why a constitutional order that disregards this imperative should be considered illegitimate and unacceptable. It should be borne in mind that the discussion below is not intended to be an in-depth and independent analysis of liberal democracy but an attempt to establish a working definition of the concept in relation to the need to contextualize constitutionalism in Africa.



[190] It should be noted that criticism of the liberal democratic model is not something uniquely African and there is a long tradition of such criticism both from the left and the right in the western world and there also have been some critiques from a supposedly cultural perspective in Asia. See; Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press, 1988); Donald K. Emmerson, "Singapore and the 'Asian Values' Debate," *Journal of Democracy* 6, no. 4 (1995): 95–105. There are also republican critiques of liberal democracy in constitutional theory which emphasize the importance of self-rule and non-domination as the ideals to be perused by constitutionalism, See Bellamy, Richard. "Republicanism, democracy, and constitutionalism."*Republicanism and Political Theory* (2008): 159, See also Philip Pettit, "Republican freedom and contestatory democratization." *Democracy's value* (1999): 163-190.

### A. Defining Liberal Democracy

Barry Holden, after defining democracy and liberalism separately, brings together his definition of the two concepts and defines liberal democracy as:

> a political system in which a) the whole people positively or negatively, make, and are entitled to make, the basic determining decisions on important matters of public policy; and b)they make, and are entitled to make, such decisions in a restricted sphere since the legitimate sphere of public authority is limited.[191]

According to this scholar, liberal democracy is to be understood as a compound of two elements, namely democracy and liberalism. Bearing this in mind, the discussion in this section will highlight various conceptions of democracy as well as their relationship with liberalism. At the outset, it should be noted that conceptions of democracy could be thin/proceduralist or thick/substantive.

One of the most widely cited definitions of democracy and a classic example of a proceduralist conception of democracy is the one by Joseph Schumpeter. According to Schumpeter,: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[192] This definition provides a clear and precise criterion to determine whether or not a system is democratic. Its clarity and simplicity makes it attractive. However, it has been criticized for being too minimalist, a descriptive reflection of the status quo, too proceduralist and lacking in substantive normative content.[193] Schumpeter's conception of democracy and also similar conceptions that focus on the democratic process and electoral procedure have

[191] Barry Holden, *Understanding Liberal Democracy* (Allan, 1988), 12–13.
[192] Joseph A. Schumpeter, *Capitalism, socialism and democracy* (Harper Perennial, 2008), 269.
[193] See for example David M. Ricci, "Democracy Attenuated: Schumpeter, the Process Theory, and American Democratic Thought," *The Journal of Politics* 32, no. 2 (May 1, 1970): 239-267; Jack L. Walker, "A Critique of the Elitist Theory of Democracy," *The American Political Science Review* 60, no. 2 (June 1, 1966): 285-295.

also been criticized for pretending to be value neutral and objective, while in fact they are conservative and laden with their own normative implications.[194]

Przeworski defends this minimalist and procedural conception of democracy by arguing that even if democracy defined in minimalist terms might not guarantee other laudable goals such as representation, equality or rationality of policies, it is still worth having because it enables society to avoid bloodshed.[195] This is, so he argues, because the "mere possibility of being able to change governments can avoid violence" and that the fact that the change of governments is brought about through votes indicates the distribution of powers in society and is likely to induce compliance with the results of the electoral result.[196]

Samuel Huntington also adopts a procedueralist conception of democracy and defines it as a political system in which the "most powerful collective decision makers are selected through fair, honest and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote".[197] Lipset and Lakin also adopt a similar definition and define democracy as "an institutional arrangement in which all adult individuals have the power to vote, through free and fair competitive elections, for their chief executive and national legislature".[198] While still minimalist (in the sense that it focuses on the democratic process and procedure as opposed to its outcome) a more elaborate and often cited conception of democracy is the one provided by Robert Dahl. Dahl defines

[194] Quentin Skinner, "The Empirical Theorists of Democracy and Their Critics: A Plague on Both Their Houses," *Political Theory* 1, no. 3 (1973): 287-289.
[195] See Adam Przeworski, "Minimalist Conception of Democracy: A Defense," in *Democracy's value*, ed. Ian Shapiro (Cambridge University Press, 1999).
[196] Ibid., 45.
[197] Samuel P. Huntington, *The third wave: democratization in the late twentieth century* (University of Oklahoma Press, 1991), 7.
[198] Seymour Martin Lipset and Jason M. Lakin, *The democratic century* (University of Oklahoma Press, 2004), 19.

democracy as an ideal system that is absolutely responsive to all of its citizens.[199] He then goes on to assert that for a government to be so responsive there have to be three necessary conditions, namely:

> All full citizens must have unimpaired opportunities: 1. to formulate their preferences, 2. to signify their preferences to their fellow citizens and the government by individual and collective action, 3. to have their preferences weighed equally in the conduct of the government, that is weighted with no discrimination because of the content or source of the preference.[200]

He further argues that for these three basic conditions to be present, the following eight institutional guarantees are necessary:

1. Freedom to form and join organizations

2. Freedom of expression

3. Right to Vote

4. Eligibility for public office

5. Right of political leaders to compete for support and votes

7. Free and fair elections

8. Institutions for making government policies depend on votes and other expressions of preference.[201]

He notes that the above guarantees constitute different dimensions of democratization, namely, contestation and participation.[202] Acknowledging that no system empirically fulfills all these requirements completely and enables full contestation and participation, Dahl calls the real life systems that most approximate these conditions

[199] Robert Alan Dahl, *Polyarchy: participation and opposition* (Yale University Press, 1971), 2.
[200] Ibid.
[201] Ibid., 3.
[202] Ibid., 4.

and guarantees in reality as *polyarchies.*[203]

The common denominator of the above procedueralist definitions is their understanding of democracy as:

1. A system, procedure or an arrangement;

2. It is a procedure or an arrangement in which, in principle, all the adult population of a polity are entitled to participate in as voters, contestants or any other auxiliary capacity (for example as commentators, critiques, activists and so on);

3. It is a competitive process;

4. It is a procedure through which those who are to fill the highest echelons of political power and decide on major policy issues are to be elected.

Such definition of democracy clearly has in mind a representative democracy and not a direct democracy of the Athenian type. This is justifiable since even the smallest of countries in the contemporary world have population sizes that would make direct democracy utterly unworkable. Furthermore, in contemporary societies, few people would have the energy, time and interest to be fully engaged in a direct democracy, perhaps with the exception of the lowest tier of local government. For these reasons, when we talk of democracy in the contemporary world, it has to be about representative or indirect democracy by default. In addition to being a mechanism of overcoming the unworkability of direct democracy, representative democracy is also lauded for being "a comprehensive, filtering, refining, and mediating process of

[203] Ibid., 9.

political will formation and expression".[204]

Hence, for the purpose of this dissertation, democracy is understood as the form of governance in which all adult citizens are legally free to participate in any capacity of their choosing in the process of electing and influencing those who hold important public offices and make binding collective decisions. While a system that meets such a description would deserve to be called a democracy, it is conceivable that such a system could not be a liberal democracy. In fact, many contemporary democracies are electoral democracies which meet only the minimalist procedural requirements of democracy.[205] To be considered a liberal democracy, a democracy needs to manifest certain features in addition to meeting these formal requirements. Only then could a democracy be described as a liberal democracy. These additional features are not necessarily elements of democracy but are requirements of liberalism. When a democracy meets these requirements, it is possible to say there is a democracy in a thicker or more substantive sense.

Having pointed out that a thicker conception of democracy would juxtapose democracy with liberalism, we need to define the concept of liberalism. While refusing to provide his own concise definition, Stephen Holmes notes, "Liberalism is classically defined as an attempt to limit the power of the state for the sake of individual freedom".[206] John Rawls, who is considered among one of the most influential proponents of liberalism also posits as one of his two principles of justice

[204] Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006), 6. A similar view is expressed by James Madison in the Federalist Papers ; see James Madison , The Federalist No. 10, The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection , *Daily Advertiser*, Thursday, November 22, 1787

[205] See Steven Levitsky and Lucan Way, "The Rise of Competitive Authoritarianism," *Journal of Democracy* 13, no. 2 (2002): 51–65.

[206] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1995), 17–18.

as fairness the right of each person to "an equal right to a fully adequate scheme of equal *basic rights and liberties*, which is compatible with a similar scheme for all".[207] (Emphasis added).

While these two scholars emphasize what liberalism wants to protect, namely freedom and liberties of individuals, other scholars have focused on the evils that liberalism wants to avoid. For instance, Judith Skhlar, emphasizes the preoccupation of liberalism with the avoidance of cruelty that could be inflicted by the powerful on the weak and the fear that arises due to the inequality of power among rulers and the ruled.[208] In relation to this, she notes:

> [G]iven the inevitability of that inequality of military, police and persuasive power which is called government, there is evidently always much to be afraid of. And one may, thus be less inclined to celebrate the blessings of liberty than to consider the dangers of tyranny…[209]

As much as fear of tyranny and the need to limit the power of governments to protect the freedom of citizens have been among the principal objectives of liberalism, the need to protect the autonomy of the individual to choose her/his conception of a good life, tolerance and accommodation of a plurality of ideas of what constitutes the good are also important strands of political liberalism.[210] Therefore, the ambition and aspiration of securing such freedoms is also part and parcel of liberalism.

Having discussed political liberalism and democracy separately, we now have to address the relationship between these two concepts. As has been already noted, not

[207] John Rawls, "Justice as Fairness: Political Not Metaphysical," *Philosophy & Public Affairs* 14, no. 3 (July 1, 1985): 227.
[208] Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Harvard University Pess, 1989), 21–38.
[209] Ibid., 27.
[210] See Charles Larmore, "Political Liberalism," *Political Theory* 18, no. 3 (August 1, 1990): 339–340; Bruce Ackerman, "Political Liberalisms," *The Journal of Philosophy* 91, no. 7 (July 1, 1994): 364–365.

every democracy is a liberal democracy. There have been and still are illiberal democracies.[211] It should be noted that the reverse scenario is also a possibility and one can imagine a liberal polity that is not democratic.[212] However, despite the historical and contemporary occurrences of illiberal democracies and liberal autocracies, it is widely acknowledged that there is a synergy and symbiosis between liberalism and democracy. Liberalism reinforces and makes democracy possible and without democracy liberalism would have a precarious existence and would peter out eventually.[213] At the same time, liberalism qualifies and puts limits to democratic rule. The liberal democratic model requires that there be certain limits on the rule of the majority. Therefore, it could be said that though symbiotic, the relationship of liberalism and democracy is still one in which there is a degree of tension.[214] It is at this juncture that constitutionalism comes into the picture since in its contemporary rendition constitutionalism wields democracy and liberalism together and provides the legal institutionalization of liberal democracy.[215] That is why understanding liberalism and democracy is essential to make sense of contemporary constitutionalism especially in its classic and western manifestation.

In light of some of the critiques of liberal democracy discussed in the earlier section of this chapter, it might be worthwhile to discuss the relationship of liberal democracy

[211] Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton & Co., 2003), 89–119.

[212] And as some scholars have argued there have been historical examples of such regimes Marc F. Plattner, "From Liberalism to Liberal Democracy," *Journal of Democracy* 10, no. 3 (1999): 121–122., doi:10.1353/jod.1999.0053; See also Daniel Brumberg, "The Trap of Liberalized Autocracy," *Journal of Democracy* 13, no. 4 (2002): 56–68.

[213] See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), See; Holmes, *Passions and Constraint*, 136–137.

[214] Andras Sajo, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999), 54.

[215] Louis Henkin, "New Birth of Constitutionalism: Genetic Influences and Genetic Defects, A," *Cardozo Law Review* 14 (1993 1992): 535–536.; Larry Diamond, *Developing Democracy: Toward Consolidation* (JHU Press, 1999), 12.

with capitalism and the right to private property. This is because some of the economic critiques of liberal democracy seem to make the policy dictates of neo-liberalism integral elements of liberal democracy. Although it is hard to think of a functioning liberal democracy in the setting of a command economy and the absence of a regime of private property, liberal democracy is not incompatible with significant levels of public ownership, an economically activist state that intervenes in the economic realm and carries out redistributive economic policies.[216] The liberal component of a liberal democratic constitutional order does not preclude a strong government, regulation of the market or welfare policies.[217] In fact some liberals would argue that liberalism would demand and justify a strong, yet limited government capable of protecting rights, fostering human development and providing a level of social welfare.[218]

The Constitutions of India and South Africa, the social democracies of the Scandinavia and the New Deal era in the United States could be considered as examples that demonstrate the fact that a liberal democratic constitution does not as of necessity beget a Thatcher or a Reagan. After all, it should not be forgotten, as Jack Donnelly points out, that there is a radical liberal tradition in which "individualism is moderated by social values, private property rights are limited rather than absolute, and civil and political rights are coupled with economic and social rights."[219] Therefore, political liberalism should not been seen as inseparable from laissez-faire

[216] See Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (Vintage Books, 1996); See also Jessica Wang, "Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism," *Journal of Policy History* 17, no. 03 (2005): 257–293.
[217] Holmes, *Passions and Constraint*, 18–31.
[218] See Michael P. Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective," *Social Philosophy and Policy* 24, no. 01 (2007): 266–288.
[219] Jack Donnelly, "Human Rights and Western Liberalism," in *Human Rights in Africa: Cross-Cultural Perspectives*, ed. Abdullahi Ahmed An-Na'im and Francis Mading Deng (Brookings Institution Press, 1990), 33.

economics and extreme forms of economic liberalism.

### B. The Case for Liberal Democracy in Africa

Given the above discussion of political liberalism and democracy, liberal democracy could be broadly and roughly defined as a political system that synthesizes self-governance of the people through their elected representatives and a system of institutionalized guarantees of fundamental rights and liberties. Having defined the concept as such, when we come to contemporary Africa, there is a liberal democratic imperative in the sense that a constitutional regime that does not institutionalize liberal democracy could not be considered legitimate. In other words, constitutional orders that are, be it in practice or on paper, either illiberal or non-democratic should be considered as illegitimate. Naturally, this assertion would raise questions regarding its normative basis. There are both universal and particular normative bases for the preceding assertion. A universalist justification of liberal democracy would be that the equal worth of and dignity of each human being requires that everyone be protected from tyranny, oppression and be entitled to have a say in the important decisions that affect her/him.[220] These moral justifications for the protection of fundamental rights and democratic governance are obviously not specific to any continent. As such they are applicable and valid in Africa as well.[221]

It is true that there is a degree of cultural peculiarity to liberal democracy and there might be significant differences between African and western world outlooks.[222]



[220] See also Robert A. Dahl, *Democracy and Its Critics* (Yale University Press, 1991), 83–106.; Ronald Dworkin *Justice for Hedgehogs* (Belknap Press of Harvard University Press, 2011), 356–363.

[221] Y. Mokgoro, "Ubuntu and the Law in South Africa," *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1, no. 1 (1998): 7.

[222] See Josiah A. M. Cobbah, "African Values and the Human Rights Debate: An African Perspective," *Human Rights Quarterly* 9, no. 3 (August 1, 1987): 309–331; See also Bhikhu Parekh, "The Cultural Particularity of Liberal Democracy," *Political Studies* 40 (1992): 160–175.

However, none of these could be a ground to justify illiberal and undemocratic regimes in the continent. Even if the liberal democratic model is of western origin; and not culturally autochthonous in Africa, it should be recalled that the same could be said about postcolonial African states. These states which are legacies of western colonial rule have proved to be oppressive and tyrannical. Much of the administrative structure and coercive capability of contemporary African states do not originate from traditional or pre-colonial African societies. The very notion of modern statehood with a set boundary, monopolization of the legitimate use of force has its genesis in the west. Consequently, it would be ill-advised to disregard the remedies that have been developed to contain the excesses of the modern state in the part of the world where it first came of age. Just as it would be hazardous to import cars without importing with them traffics rules and regulation, the importation of the modern state without the domestication of the rules and regulations that proscribe its abuse is and so far has proved to be disastrous. This has been amply proven both during colonial rule and post-colonial autocracies.

Another justification for the assertion that illiberal and undemocratic rule in Africa is illegitimate stems from the repeated, legally binding as well as non-binding commitments that African countries have made both at the continental and international levels to respect democratic and liberal norms. These solemn declarations and treaty commitments cannot simply be dismissed as having no normative weight. They reflect the aspiration of the majority of Africans to live in freedom and participate in a meaningful manner in their own governance. Just to mention some of the legally binding commitments African states have entered in to regarding fundamental rights and democratic rule at a continental level, the African

Charter on Human and Peoples Right as well as the African Charter on Democracy, Elections and Governance could be cited.

Furthermore, when transforming the Organization of African Union into the African Union, (the former being impeccably indifferent to the internal politics of its member states) African states have given the new organization a clear mandate to promote "democratic principles and institutions" as well as "human rights".[223] The African Peer Review Mechanism, which is a flagship program of the New Partnership for Africa's Development also provides democracy and good political governance as one of its thematic focus areas.[224] These official and legal avowals of democracy and fundamental rights are also reinforced by popular support for democratic governance as has been confirmed by credible opinion poll surveys.[225]

Coming to the moral justifications for liberal democracy that are more specific to Africa, the author submits that the human suffering visited upon the majority of Africans at the hands of both external and internal actors provide a justification for liberal democracy that is in a way specific to Africa.[226] From slavery to colonialism, apartheid and postcolonial autocracies, much indignity and pain has been inflicted upon the majority of Africans. The anti-colonial struggles and popular movements for democratic governance in the 1980s have been responses to these man-made

[223] The African Union Constitute Act, Article 3(g and h).

[224] Declaration on Democracy, Political, Economic and Corporate Governance, New Partnership For Africa's Development (NEPAD), Articles 7-15, available at http://www.eisa.org.za/aprm/pdf/APRM_Declaration_Governance.pdf( last accessed on October 1, 2013).

[225] Public surveys in different African countries show that most citizens support democracy from other alternative forms of governance Renske Doorenspleet, "Critical Citizens, Democratic Support and Satisfaction in African Democracies," *International Political Science Review* 33, no. 3 (June 1, 2012): 203–285, doi:10.1177/0192512111431906; See also "AfroBarometer: Democracy Making a Headway in Africa - Afrik-news.com : Africa News, Maghreb News - The African Daily Newspaper," accessed last on March 26, 2013, http://www.afrik-news.com/article15762.html.

[226] The appropriatness or suitability of liberal democracy is also a subject of debate and discussion in Asia, for example see Daniel A. Bell, *Beyond liberal democracy: Political thinking for an East Asian context*. Princeton University Press, 2009.

calamities. These experiences, the suffering as well as the protest against the suffering, the indignity as well as the fight for a dignified life give special weight to liberal and democratic norms in Africa.

The bitterness of these experiences makes any apologetics of tyranny and autocracy morally repugnant. These horrors of the past could occur because most Africans were ruled by rulers whose power was not subject to effective legal limits and on whom the citizenry had very little control. These rulers cynically and at times not so cynically invoked the need to improve the material conditions of the population and the cultural peculiarity of liberal democracy to reject calls for constitutional limits on their power and democratic accountability. These self-serving arguments of the autocrats have grown stale and lost the respectability they once had even within the academia.

Based on the above arguments, the author maintains that there is a liberal and democratic imperative in Africa. In other words, to attain legitimacy, African sates need to have constitutional orders that provide limits necessary to guarantee fundamental freedoms and mechanism through which citizens would choose and hold their rulers accountable.[227]

### *2.2 The Need for Contextualizing Constitutionalism and the Importance of Constitutional Design*

#### A. The Need for Contextualizing Constitutionalism

Even if a liberal democratic imperative is established at the normative level, its practical feasibility is not without difficulties. In the discipline of political science,

[227] It should be borne in mind, however, that these are necessary and not sufficient conditions for the legitimacy of the states. The performance of the state in bringing about socio-economic development as well as law and order are also additional requirements of legitimacy that are in some ways related with the liberal democratic imperative.

there is a well-developed body of literature which deals with the question of whether or not liberal democracy could take hold in low-income countries.[228] Moreover, the challenges of sustaining stable democratic government in divided societies where ethnic and other identities have considerable political salience is also something that has been written a lot about.[229] As has been discussed in the previous chapter, the African political context is one in which ethnic identity; poverty and the legacy of brutal autocracies create a political matrix which is very challenging to democracy and constitutionalism.

This situation gives rise to a dilemma. If one is to accept that there is a liberal democratic imperative at the normative level, but at the same time there are real and serious difficulties in sustaining liberal democracy in the African political context, what ought to be done? As the review of the literature on African democracy and constitutionalism in Chapter One suggests, there is a need for contextualization of constitutionalism. In all four themes that have been discussed above in the last section of Chapter One, there seems to be a consensus that constitutionalism has to be adapted in one way or the other for it to be effective in Africa. Some have argued that it should be adapted by being infused with African cultural values; some have argued that it should be adapted in such a way that it will protect Africans from the effects of neo-liberal economic policies and the institutions that promote such policies, others



[228] See Larry Diamond, "Economic Development and Democracy Reconsidered," *American Behavioral Scientist* 35, no. 4–5 (March 1, 1992): 450–499; See also Seymour Martin Lipset, "Some social requisites of democracy." *Classes and Elites in Democracy and Democratization: A Collection of Readings* 1083 (1997): 37.

[229] See Arend Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy* 15, no. 2 (2004): 96–109, doi:10.1353/jod.2004.0029; Donald L. Horowitz, "Democracy in Divided Societies," *Journal of Democracy* 4, no. 4 (1993): 18–38, doi:10.1353/jod.1993.0054; Rotimi T. Suberu, "Democracy in Divided Societies," *Journal of Democracy* 4, no. 4 (1993): 39–53, doi:10.1353/jod.1993.0056; Ben Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge University Press, 2001).

have argued that the contextualization of constitutionalism in Africa should focus on how the excessive hegemony of the executive branch of government could be undone, there are also those who have argued that constitutionalism should be tailored in Africa to neutralize antagonistic ethnic relations and manage peacefully ethnic diversity.

The implicit common denominator of all these arguments is their agreement that constitutionalism in its conventional, western mold will not be adequate in Africa. The point of divergence between the various themes, which of course are not mutually exclusive, is that they have different focus areas and approaches regarding the contextualization of constitutionalism. While they agree that constitutionalism should be contextualized in Africa, they differ as to how and in what aspects it should be contextualized. Therefore, in a manner of speaking it could be said that the above scholars are in different ways, echoing the call of Haberson who has proposed "the emergence of a field of comparative constitutionalism that will centre on the relationship between processes of constitution building and the socioeconomic, political and cultural environments within which they are interrelated".[230]

The focus of this research might not squarely fall in any of the four major themes identified in Chapter One. Nevertheless, this research could be considered as having greater affinity with the second and fourth themes discussed above. Namely, these are 'executive hegemony and imperial presidencies' and 'the effects and accommodation of ethnicity'. The choice to focus on these two themes in this research might be construed as an implied judgment on the merit of the various themes discussed above and it raises a question as to what justifies the focus on these two issues and not on the

[230] John W. Harbeson, "Constituions and Consistitutionalims in Africa: A Tentative Theoretical Exploration," in *Democracy and Pluralism in Africa*, ed. Dov Ronen (Lynne Rienner, 1986), 16.

other two. The choice to focus on these two themes is partially a matter of the personal preference of the researcher. But the choice is not simply based on an arbitrary personal preference, but rather is rooted in some objective considerations.

The first consideration is the fact that the cultural contextualization of constitutionalism, while a worthy intellectual endeavor and something that should be in the long-term research agenda of African constitutional scholars, is arguably not a pressing issue as compared with the other themes. In all likelihood, it is reasonable to assume that constitutionalism will benefit and will be more successful in the continent, if it is rooted and contextualized in the cultural and historical milieu of the African countries in which it is struggling to thrive. But as has been pointed out earlier, this project is not easy and is fraught with some inherent problems. This is so especially due to the fact that the overwhelming majority of African states have ethnically and culturally fragmented populations.

The consideration of how much the neo-liberal/liberal economic model is suitable in African states is also a question worth pondering. However, while there is an interesting emerging discourse about a possible model of democratic developmental states, the constitutional implications (if any) of such model are far from being clear.[231] Furthermore, experiments with varieties of socialism that reject the capitalist model have been abandoned in countries like Tanzania, Mali and Ethiopia and are unlikely to make a comeback in the foreseeable future. Therefore the author would submit that the two themes of inquiry regarding the cultural and economic

[231] However, as some have argued, at the very least it can be said that any democratic developmental state has to have a constitutional dispensation that would guarantee multiparty electoral politics and competition See Omano Edigheji, "A democratic developmental state in Africa." *A Concept paper. Available at <Web page http://www. cps. org. za/cps% 20pdf/RR105. pdf >*, last accessed on September, 21, 2013(2005)16.

contextualization of constitutionalism in Africa, while intellectually worthwhile and stimulating do not address the pressing and grave challenges to constitutionalism in the continent.

In many African countries the pressing challenges at the moment stem principally from antagonistic regional or ethnic relations that paralyze politics and lead to conflict as well as the overbearing dominance of a personalized executive branch which are stifling democracy. As has been demonstrated in the previous chapter discussions, these two problems are not isolated and are in fact inextricably linked to one another. In the literature that has been discussed in relation to these two themes, there is a tendency to treat these two problems in isolation from each other. However, as has been shown through a discussion of the African political matrix and its implications for democracy, antagonistic ethnic relations and executive power unlimited by law reinforce each other. To overcome the challenge these two problems present to constitutional democracy in the continent, there is an obvious need to adapt or contextualize constitutionalism to the African political matrix.

### B. The Importance of Constitutional Design

Contextualizing constitutionalism, as proposed in this dissertation is very much an exercise within the domain of constitutional design. Mittal and Weingast argue on the basis of their analysis of America's first century as a republic that constitutional design could contribute greatly to democratic stability.[232] One major strand of their argument is that "appropriately designed constitutional limits lower the stakes of

[232] See Sonia Mittal and Barry R. Weingast. "Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century." *Journal of Law, Economics, and Organization* (2011).

politics by creating self-enforcing limits on politics."[233] Another author who emphasizes the importance of constitutional design in fostering democracy is Susan Alberts who underscores the positive correlation between the development of constitutionalism and the institutionalization of democratic politics.[234] She specifically argues that the dispersal of power is essential for constitutions to provide incentives which will induce compliance with the constitution by all relevant actors.[235] In another study by the same author, the experience of Uruguay and Ecuador is analyzed to demonstrate that "political institutions facilitate the emergence of constitutionalism and democratic institutionalization when they make it costly for political actors to violate the rules of the democratic game."[236]

Alberts focused on the constitutional provisions providing for the terms of and survival in office of the legislature and the executive as well as electoral rules and the party systems of these two countries. She argues that these constitutional provisions were designed in such a way in Uruguay that they encouraged political actors to comply with the constitution out of their own interest thereby fostering constitutionalism and democracy while in Ecuador the reverse was the case. Weingast and Mittal have further developed the above insights about constitutional design and developed a theoretical model meant to demonstrate that constitutional design is decisive on the stability and continuity of democracy.[237] In their model, they try to show that counter-majoritarian constitutional provisions are of great importance in making democracy self-enforcing.



[233] Ibid., 12.
[234] See Susan Alberts, "How Constitutions Constrain," *Comparative Politics* 41, no. 2 (2009): 127-143; Susan Alberts, "Why Play by the Rules? Constitutionalism and Democratic Institutionalization in Ecuador and Uruguay," *Democratization* 15, no. 5 (2008): 849-869.
[235] Alberts, "How Constitutions Constrain," 131.
[236] Alberts, "Why Play by the Rules?," 850.
[237] See Mittal and Weingast, "Self-Enforcing Constitutions.", note 233 above.

Even Adam Przeworski- usually cited for his views which cast serious doubt as to whether democracy could survive in poor countries- agrees that constitutional design is important for democratic survival. While he considers the importance of constitutional design to be not so great in wealthy societies, he considers it decisive for poor countries. He asserts "...while democracy survives in wealthy countries under a variety of electoral institutions, poorer countries must get their institutions right".[238] Elkins, Ginsburg and Melton, based on their analysis of the endurance of constitutions, argue that in addition to the environment within which a constitution operates and a host of other factors, constitutional design affects the durability of constitutions. They point out to "flexibility, specificity and inclusion" as features of constitutions which enhance a constitution's endurance.[239]

Many of these authors subscribe to the view that democracy could be self-enforcing in the sense that the institutional set up of politics could be designed to generate incentives for all relevant players to adhere to the democratic rules of the game. One of the implications of this proposition is that in the African context, success or failure of constitutional democracies could be greatly affected by the institutional choices made during the adoption of constitutions. This is one of the important premises of this study as well and that is why the emphasis of this dissertation will be on the design and contents of constitutions.

If we accept the view that constitutional design matters and that it contributes to the survival of a democracy then we have to ask ourselves how those entrusted with the task of crafting constitutions should go about their task. In the contemporary world,

[238] Adam Przeworski, "Self-enforcing Democracy," in *The Oxford Handbook of Political Economy*, ed. Barry R. Weingast and Donald A. Wittman (Oxford University Press, 2006), 320.
[239] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009), 202.

there is a widespread agreement that for a constitution to be durable and legitimate, it needs to be made in a participatory process. Nevertheless, even in the most participatory processes, there are technical experts who play a crucial role in framing a constitutional text and designing the basic architecture of a constitutional order and in its proper contextualization.[240] It should also be understood that the work of these constitutional experts is just one step in the initial stages of a long process of constitution building which includes subsequent interpretation and application of a constitution.[241]

The central question in the process of contextualization is what rules, institutions or constitutional design option will be practically more effective in curbing the adverse effects of the African political matrix and in fostering constitutional democracy in a hostile political environment. Contextualization, which is guided by these questions, as will be discussed in more detail in Chapter Seven of this dissertation, is a very pragmatic and practical exercise. It is not a grand recreation of a constitutional model in search of cultural autochthony or an ideological utopia. It is an inquiry that takes in to account past failures, successes as well as fears and aspirations together and tries to see what works best in the context of each country to realize accountable and limited government.

***Conclusion***

In the preceding sections of this chapter, an argument for the normative validly and weight of a liberal democratic constitutionalism in Africa has been presented.

[240] For a more detailed discussion of what constitutes contextualization of constitutionalism, see section 7.5 of Chapter Seven.

[241] Yash Ghai, and Guido Galli, *Constitution building processes and democratization*. International IDEA, 2009, 235.

Furthermore, it has also been pointed out that for liberal democracy to take root in Africa, there is a need to contextualize constitutionalism and that the contextualization of constitutionalism should focus on issues like ethnicity and abuse of incumbency. It has also been noted that, a proper constitutional design is crucial for democratic stability. Therefore, the role of those who frame the constitution in contextualizing constitutionalism is essential. Based on these observations and having in the background the insights of the first chapter of the dissertation, the next four chapters of the dissertation will provide comparative case studies of the experiences of the constitutional systems of four African countries with ethnicity and abuse of incumbency.

# Chapter Three: Abuse of Incumbency in Africa: Case Studies

### *Introduction*

In the 2011 Ugandan election, parliament approved a supplementary budget of 256 million USD and appropriated a large portion of this money to the office of the Presidency.[242] As has been widely reported, most of this money was used by the president and candidates from his party to bribe voters and give cash hand-outs during their campaign.[243] This is a rather obvious and dramatic example of state power being used by an incumbents to entrench itself in power.

Such abuse of incumbency, as will be discussed in more detail in the next section of this chapter, runs against the prohibition in a democracy of using governmental power for self-perpetuation and self-entrenchment by those in power.[244] It also happens to be one of the major problems that arise out of the political matrix discussed in Chapter One. The prevalence of abuse of incumbency has hindered the transition to and consolidation of democracy in many African countries. It has also been a cause of conflict and political instability.[245]

Disputes about the fairness and integrity of electoral processes had disastrous consequences in various African countries. Therefore, it is understandable that enhancing the credibility and integrity of the electoral system and minimizing abuse of incumbency has been one of the focal points of constitutional reform in Africa. It is

[242] Uganda election: Yoweri Museveni wins fresh term, *BBC* 20 February 2011, available at http://www.bbc.com/news/world-africa-12516562, last accessed on August, 8, 2014.

[243] Uganda's election; Rambo reigns, *The Economist*, Feb 24th 2011, http://www.economist.com/node/18236940, last accessed on August, 8, 2014.

[244] Andras Sajo, "Government Speech in a Neutral State," in *Democracy and the rule of law*, ed. P. Gifford and Dorsen, N. (CQ Press, 2001), 374.

[245] See Ursula E.Daxecker, "The cost of exposing cheating International election monitoring, fraud, and post-election violence in Africa." *Journal of Peace Research* 49, no. 4 (2012): 503-516.

for these reasons that abuse of incumbency is a subject of this case study chapter. The case studies in this chapter are also meant to provide insight as to why and how constitutionalism should be and is being contextualized in Africa. With this objective in mind, in the first section of the chapter the focus of the discussion will be on the definition, scope and effects of the problem of abuse of incumbency. The following section of the chapter will explore the incidence of abuse of incumbency in Ghana, Ethiopia, Nigeria and Kenya.

### *3.1 Abuse of Incumbency: Scope, Definition and Effects?*

#### A. Definition

Abuse of incumbency might take various forms. For example, Levitsky and Way identify three major ways through which incumbents might abuse their incumbency and make the playing field uneven. These forms of abuse of incumbency practiced using the incumbents' privileged access to material and financial resources which are both in public and private possession, their privileged access to the media as well as their control of regulatory and law enforcement state agencies.[246]

Abuse of incumbency is the illegitimate or illegal use of public resources or powers for primarily partisan ends by an office holder. Chemerinsky defines abuse of incumbency as "the use of government resources not available to any other candidates, to aid an incumbent running for election."[247] Abuse of incumbency could be considered as a specific form of abuse of power by officeholders. Gardner

[246] Steven Levitsky and Lucan A. Way, "Why Democracy Needs a Level Playing Field," 58-60.
[247] Erwin Chemerinsky, "Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency," *Ohio State Law Journal* 49 (1989 1988): 774.

illustrates this point by showing two distinct forms of abusing incumbency.[248] He points out that one usual form of abuse of power or incumbency is when officials use their office to enrich themselves.[249] In this form of abuse of power the primary motive is personal material gain and we normally refer to it as corruption. Political considerations do not figure prominently in this case.

The second form of abuse of power or incumbency occurs "when officials use the governmental resources at their disposal for the purpose of maintaining themselves in power."[250] This is the form of abuse of incumbency which is the focus of this chapter. At times it is difficult to draw a line between these two forms of abuse of power. For example, one could take the Kenyan Anglo Leasing corruption scandal where part of the motivation for the embezzlement was related with building the campaign finances of those in power.[251] Another example could be the Ghanaian corruption scandal involving one of the major financiers of the ruling NDC party.[252]

To say that there is an abuse of incumbency in a particular situation for the purpose of this study, we need to look in to three elements. The first element to look at is *whether or not whatever resource, opportunity, power or advantage that has been utilized is one that has been obtained because the individual or party that used it happens to be in government*. If the candidate or party in question has used resources that are obtained independently of its position as a holder of public office, then one cannot really talk about abuse of incumbency. By definition, for there to be an abuse of

[248] James A Gardner, "Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power, The," *Fordham Law Review* 60 (1992 1991): 220-221.
[249] Ibid., 220.
[250] James A Gardner, "Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power, The," *Fordham Law Review* 60 (1992 1991): 220.
[251] See Michela Wrong, It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower (HarperCollins, 2010).
[252] See "Ghana: Orchestration and Unfolding of Woyomegate," available at http://allafrica.com/stories/201203050638.html, last accessed on October 15, 2013.

incumbency the conduct that is being described as an abuse should be that of an incumbent. An incumbent is a person, group of persons or a political party who are currently in office and controlling the government formally. In contrast, the actions of influential groups, individuals, non-governmental institutions or power-brokers that who have a lot of political clout and who influence political life, cannot be considered as abuse of incumbency so long as these individuals and entities are not holding public office and are not exercising governmental authority. It is important to delineate the notion of incumbency like this because, otherwise, the concept of 'abuse of incumbency' will become too broad, too detached from ordinary and common sense understanding and will have a diminished utility.

Formally speaking, the incumbent might at times be outside the ongoing political contest. This could happen because of the existence of a term limit that makes it impossible for the incumbent to run for office at the end of her/his current term or in situations where the incumbent is a military government overseeing a transition to civilian rule. Technically in such situations there could not be abuse of incumbency because the incumbent is not running for office and is not part of the ongoing electoral contest. However the incumbents in reality have clear preferences and links with the political parties and candidates that are actually taking part in the contest. Many examples could be furnished to illustrate this appoint. For example, in the 2007 Presidential election in Nigeria, President Obasanjo, the incumbent was not eligible to run because of a constitutional term limit. However, in the presidential election, one of the contestants was a candidate handpicked by Obasanjo and running on the ticket of Obasajnjo's political party which Obasanjo was leading. In these circumstances, it will be unreasonable to say that there could not be abuse of incumbency simply

because the President himself was not running for re-election. One could say that he was running vicariously through his preferred successor and any illegal and illegitimate use of his powers as President with the view to enhance the chances of victory of such candidate could be considered as abuse of incumbency. In another example from Nigeria, the founding election of the Fourth Republic conducted in 1999 under the military government which was overseeing a transition to civilian rule. During this election, technically speaking, none of the contestants were incumbents. However, as most commentators have noted the military government overseeing the transition as was rather partial to the PDP and its flag bearer Obasanjo who was a former General and Military head of state himself. In such a situation, the illegal or illegitimacy uses of governmental power by the military regime to give an undue advantage in the contest for power could qualify as abuse of incumbency.

The second element of what constitutes abuse of incumbency is the end or purpose for which the power or resources in question has been utilized. *The end towards which the power or resource has been employed should be clearly partisan as opposed to being for the benefit of the general public in discharge of the responsibilities attendant to the office of the incumbent*. In connection to this point, it is important to highlight that though normally abuse of incumbency is perpetrated by an incumbent party or office holder trying to stay in power, we could also expand the notion to include situations in which the incumbent abuses power to ensure that s/he will be succeeded in office by his/her preferred candidate. Therefore not all abuses of incumbency as we will see in subsequent discussions occur to ensure that the incumbent personally will continue in office.

The third component of abuse of incumbency that we need to pay attention to is *the*

*illegitimate or illegal nature of such use of power and resources*. Very often abuse of incumbency involves actions by incumbents that are directly or indirectly prohibited by law. Even when the actions constituting abuse of incumbency are not actions that have been outlawed by positive law, such actions are illegitimate in a democratic polity. There illegitimacy stems from the basic assumption that in a democratic order the political contest for power is supposed to be between political parties including the governing party and not between the government and political parties.

When incumbents use governmental resources and powers to advance their personal and partisan political fortune, such acts blur the distinction between the governing party and the government. As A. Sajo notes, "democracy is based on the prohibition against governmental self-perpetuation" and the involvement of state agencies or resources in the democratic process in a partisan manner is a breach of the obligation of neutrality of the state.[253] Hence such acts undermine the basic assumption of a democratic political order and are considered illegitimate in a democratic order.

At this point a question which needs to be answered is how one can distinguish between the legitimate exploitation by an incumbent of the natural and inherent advantages of incumbency[254] from the illegitimate and illegal uses of her/his incumbency that could be considered as abuses of incumbency. Levitsky and Way argue that we need to have a high threshold to distinguish abuse of incumbency from



[253] Andras Sajo, "Government Speech in a Neutral State," in *Democracy and the rule of law*, ed. P. Gifford and Dorsen, N. (CQ Press, 2001), 374.

[254] See David R. Mayhew, "Incumbency Advantage in U.S. Presidential Elections: The Historical Record," *Political Science Quarterly* 123, no. 2 (2008): 201-228; See James E. Campbell, "The Return of the Incumbents: The Nature of the Incumbency Advantage," *The Western Political Quarterly* 36, no. 3 (1983): 434-444 for interesting theoretical and empirical discussion and illustration of the concept of incumbency advantage.

the routine advantages of incumbency that those in office benefit from.[255] Accordingly, Levitsky and Way adopt the following criteria to determine if there is abuse of incumbency: "1) state institutions are widely abused for partisan ends; 2) the incumbent party is systematically favored at the expense of the opposition; *and* 3) the opposition's ability to organize and compete in elections is seriously handicapped." [256] So the partisan manner in which power is used, the systematic nature of such use and the widespread scope of the use of power for partisan ends are critical in distinguishing abuse of power from mere uses of the advantages of incumbency.

These authors emphasize the impact of abuse of incumbency and the fact that it creates an uneven playing field. Nwanegbo and Alumona adopt a definition of abuse of incumbency along similar lines underscoring its effect on the field of contest. They define abuse of incumbency as "the interplay of forces through which an incumbent leader or party attempts to influence and manipulate the constitutional and institutional framework that guides the electoral process thereby creating an unequal playing field for the contest in the electoral competition."[257]

### B. Scope and Effects of Abuse of Incumbency: Towards a Working Definition

At this juncture it will be important to make some observations regarding the scope of the concept of abuse of incumbency. Very often, abuse of incumbency is associated with electoral competition and is as a result it not that much attention is given to abuse of incumbency that is not directly connected with elections and is temporarily

[255] Steven Levitsky and Lucan A. Way, "Why Democracy Needs a Level Playing Field," *Journal of Democracy* 21, no. 1 (2010): 58.
[256] Ibid.
[257] C. Jaja Nwanegbo and Ikenna Mike Alumona, "Incumbency Factor and Democratic Consolidation in Nigeria's Fourth Republic," *The Social Sciences* 6, no. 2 (2011): 126.

removed from election periods. However, it is important to note that abuse of incumbency is something that could occur even outside the electoral cycle and in matters that do not have a direct connection with an election. A simple such example from Ethiopia will be the use of governmental buildings as party offices, civil service or teachers short term 'trainings' lasting for a few weeks financed by the state and in which prospective and current public servants are given lectures about the ideology and program of the ruling party as well as pressured to enlist as members of the party. The biased coverage of state owned media, the use of the coercive instrument of the state as well as the administrative apparatus of the state to the detriment of opposition parties, candidates and to give undue advantage to incumbents. Since the political contest for power and influence is an ongoing thing that is not limited to the election period, abuse of incumbency is cannot also be confined to the election period.

Regarding the scope of abuse of incumbency, another related point that needs to be taken into account is that it is not necessarily confined to inter-party competition and that at times there could be abuse of incumbency even in intra-party contests. What matters is that governmental powers or resources are used to advance the partisan interest. The partisan interest advanced could be that of one party against another, that of one candidate against another or it could also be the interest of one faction of a political party against the other. It is also possible to conceive of and there are concert examples as well that the 'victims' of abuse of incumbency could be members of a governing coalition. In cases like Zimbabwe where there is a coalition government in which one member of the coalition is more established and in control of key state resources and coercive instruments of the state, such control could be used in a fashion that amounts to abuse of incumbency.

Coming to the issue of the effects of abuse of incumbency, when abuse of incumbency occurs in a systematic fashion and when it is pervasive, it diminishes the democratic nature of the polity to that extent. It is difficult to think of any country, even among those with old and relatively speaking established democracies, where there are no instances of abuse of incumbency. But there is obviously a difference in the prevalence of abuse of incumbency in various countries. The greater the prevalence of abuse of incumbency and the more systematic it is, the greater its effect to make the country less and less democratic. In the countries in which the constitutions provide for a democratic system of governance formally but where there is pervasive and institutionalized abuse of incumbency, then though nominally a democracy, that country becomes in effect an electoral autocracy.

The prevalence of abuse of incumbency is clearly and casually related with regime type.[258] The more there is abuse of incumbency in a country, the more uneven the playing field will be for those in the political contest. Depending on the extent to which there is abuse of incumbency, the country in question will have a regime type which is some form of defective democracy which might be an electoral autocracy that is either hegemonic or competitive. The less there is abuse of incumbency, the country in question will approach a liberal democracy and even if it does not become a full-fledged liberal democracy, it would have a regime that will at least qualify as an electoral democracy.

Hence, the working definition of abuse of incumbency in this dissertation is, *any conduct in which state powers or resources are used to give an illegal or illegitimate advantage to an incumbent or the incumbent's preferred party or candidate*

[258] See Steven Levitsky and Lucan A. Way. *Competitive authoritarianism: hybrid regimes after the cold war*. Cambridge University Press, 2010.

*undermining the fairness of the political contest*. In relation to this definition of abuse of incumbency it should be clear that the inquiry in this and the next chapter of this dissertation is not limited to abuse of incumbency that occurs during and in relation to elections. Political contest between various actors is an ongoing affair that does not begin and end with elections. Therefore, the understanding of abuse of incumbency that is operational in this dissertation is one that goes beyond abuse of incumbency that is directly related with an electoral contest. In the next section of this chapter, an attempt will be made to show the prevalence of abuse of incumbency to varying extents in a number of African states along this comprehensive working definition.

### *3.2 Abuse of Incumbency in Selected African States*

Abuse of incumbency is a phenomenon that could be observed probably in all countries where contest for political power among various political parties takes place.[259] Reasonably, one could expect it to be even more prevalent in young democracies and also countries in which have made rather dubious 'transitions' to democracy.[260] Since the political liberalization of the early 1990's in Africa and the resumption of multi-party electoral contests, abuse of incumbency has been a serious hindrance to the consolidation of democracy in many African countries. The prevalence of the problem varies in terms of its specific manifestation as well as magnitude from one country to the other and from time to time even within the same country.

In this section of the chapter, the discussion is intended to at providing an overview of

[259] For an example of a clear case of abuse of incumbency in an established democracy see "Chirac found guilty of corruption," *BBC*, December 15, 2011, sec. Europe, http://www.bbc.co.uk/news/world-europe-16194089.

[260] For a discussion of the various ways in which incumbents in electoral authoritarian regimes manipulate the political process see Andreas Schedler, "Elections Without Democracy: The Menu of Manipulation," *Journal of Democracy* 13, no. 2: 36-50.

the problem of abuse of incumbency in the selected African countries since the early 1990's till the present time. The discussion is meant to highlight the major forms of abuse of incumbency in each country in the past two decades and obviously does not document in detail the instances of abuse of incumbency. The sources used for the discussion are mainly reports of electoral observers and secondary literature produced by scholars.

### A. Nigeria

Since gaining independence in 1960, Nigeria had gone through a series of civilian administrations which have been overthrown by the military. In 1999, after sixteen years of military rule by four different generals in which transition to democracy and civilian rule were continually postponed, the Fourth Republic was inaugurated with a new Constitution in 1999. The transition that had eluded Nigeria for more than a decade and half was made possible partly due to the sudden death of General Sani Abacha who had been orchestrating a sham election to turn himself into a civilian President under a new Constitution. Upon his death, his successor, General Abdulsalami Alhaji Abubakar, oversaw a quick transition to civilian rule and promulgated a new Constitution.[261]

Since Nigeria embarked upon yet another round of civilian rule and multiparty democracy in 1999, abuse of incumbency has been one of the major defects which have seriously and adversely affected the transition to democracy in Nigeria. Starting from the founding election of the fourth Nigerian Republic, abuse of incumbency has been a permanent fixture of the Nigerian political system. When the military

[261] See Peter Lewis, "Nigeria: An End to the Permanent Transition?," *Journal of Democracy* 10, no. 1 (1999): 141-156.

government led by General Abdulsalami Alhaji Abubakar oversaw the transition to civilian rule, many commentators have observed that it was partial to the People's Democratic Party (PDP) which was the party with the strongest ties with the military and northern power base[262]. This preference of the military government to be succeeded by the PDP has contributed to the victory of the PDP at the Federal and State level elections.[263] The military government's preference of PDP and the PDP's Presidential candidate Olusegun Obasanjo meant that the PDP could enjoy the financial support of the military and engage in all forms of election rigging with the complicity of the electoral commission and the government of the day.[264] The financial backing of the PDP by the military was one of the factors that aided in the victory of the PDP.[265] Furthermore, systematic rigging of the election evidenced by 100% voter turnout in some states and more than 10 million phantom voters on the voter registrar indicated the connivance of the incumbents in rigging the election in favor of the PDP.[266]

Proceeding to the next round of elections held in 2003, Omotola notes:

> [t]he PDP's massive victory was due largely to the power of incumbency, which enabled it to have substantial and unhindered access to state machineries, including the treasury, mass media, INEC, and the security forces. As the party in power, it also enjoyed good patronage from wealthy individuals and corporate bodies in terms of financial donations in exchange



[262] See also Abdul Raufu Mustapha, "The Nigerian Transition: Third Time Lucky or More of the Same?," *Review of African Political Economy* 26, no. 80 (June 1, 1999): 282; Adebayo Williams, "Briefing: Nigeria: A Restoration Drama," *African Affairs* 98, no. 392 (July 1, 1999): 410.

[263] J. Shola Omotola, "Elections and democratic transition in Nigeria under the Fourth Republic," *African Affairs* 109, no. 437 (October 1, 2010): 544.

[264] Darren Kew, "'Democrazy: Dem Go Craze, O': Monitoring the 1999 Nigerian Elections," *Issue: A Journal of Opinion* 27, no. 1 (January 1, 1999): 29; Julius O. Ihonvbere, "The 1999 Presidential Elections in Nigeria: The Unresolved Issues," *Issue: A Journal of Opinion* 27, no. 1 (January 1, 1999): 60.

[265] Ihonvbere, "The 1999 Presidential Elections in Nigeria," 59.

[266] Kew, "Democrazy," 29-30.

for the protection of their business interests.[267]

The Transitional Monitoring Group, a coalition of civic associations in Nigeria, also notes that desperate to remain in office, the administration in power had manipulated the process of party and candidate registration to shut out its opponents using the Independent National Electoral Commission (INEC) as an instrument.[268] One way in which the President manipulated the INEC was by withholding the funds needed by the Commission for the election.[269]

The EU Election Observation Mission to Nigeria (2003),[270] reports observing many instances of abuse of incumbency. In its final report, the Observation Mission notes that both at the state and federal level incumbent candidates and parties were getting media coverage that was much favorable to them both in terms of amount and content.[271] The Mission noted that many state-owned broadcast media both at the state and federal level were very biased towards incumbent candidates and parties in their coverage of the election.[272] This has enabled the PDP to dominate the media scene to the detriment of the fairness and competitiveness of the electoral process.[273] Though there were private independent broadcasters, the state owned media outlets were much numerous, the ratio of federal and state owned broadcast media to that of private owned broadcast being 8 to 1.[274] As a result, the dominance of the incumbent party and candidates over the airwaves could not have been effectively neutralized by their

[267] Omotola, "Elections and democratic transition in Nigeria under the Fourth Republic," 546.
[268] *Preliminary Report on the National Assembly Elections. Held on Saturday, April 12, 2003* (Transition Monitoring Group (TMG)), 1-2, http://www.gndem.org/sites/default/files/Preliminary%20Report%20on%20the%20National%20Assembly%20Elections%20Held%20on%20Saturday,%20April%2012,%202003.pdf.
[269] Ibid., 2-3.
[270] See *Nigeria: European Union Election Observation Mission Final Report*, 2003.
[271] Ibid., 50-52.
[272] Ibid.
[273] Ibid.
[274] Ibid., 48.

challengers by availing themselves of the private media. Though the print media, as observed by the Mission were more balanced in their coverage of the election, due to the high illiteracy rate and the economic as well as physical inaccessibility of newspapers to many ordinary citizens, radio and TV were the most accessible media making the coverage of the broadcast media crucial for the existence of a level playing field in the electoral contest.[275] Perhaps bearing this in mind, the electoral law and the Nigerian broadcasting code provide rules imposing on state owned media an obligation of being impartial.[276] However, the National Broadcasting Commission which was supposed to enforce these rules itself was partial to the ruling party and the Observers Mission noted that while the Commission was quick to enforce the rule against commercial/private broadcasters, it was rather reluctant when it came to violations by state and federal owned broadcasters.[277]

The illicit exploitation of incumbency was not only manifested in the use of the state controlled media, but also in the use of the state administrative apparatus and various state facilities and resources for clearly partisan purposes. The EU Mission in its report notes that "in most states, the governors' offices were used as electoral HQ and rally points for supporters and caravans. Cases where the administrative structure had been mobilized and fully integrated in the incumbent candidate's campaign machinery were noticed particularly at the local government level".[278]



[275] Ibid., 48,52-53.
[276] See Electoral Act, 2002 An Act to Regulate the Conduct of Federal, State and Local Government Elections and to Repeal the Electoral Act 2001; and For Connected Purposes; " 94. (1) A government owned print or electronic medium shall give equal access on daily basis to all registered political parties and/or candidates of such political parties. (2) A denial of such access and equal time constitutes an offence punishable in the first time with a fine of N500,000 and the withdrawal of the license of the offending electronic media house by the National Broadcasting Commission for a period of 12 months on any subsequent violation."
[277] *Nigeria: European Union Election Observation Mission Final Report*, 50.
[278] Ibid., 27.

Another avenue of abuse of incumbency in Nigeria that was important in the 2003 elections was the power of the President to appoint the head of the Independent National Electoral Commission (INEC) and the same power that state governors had *vis- a- vis* state electoral commissions. The power of incumbent heads of governments to appoint and remove the officers in charge of their electoral process has given an advantage to incumbents over their challengers.[279]

Efforts to get a remedy from the judiciary by the political rivals of the incumbent have proved to be largely ineffective. The Supreme Court rejected the petition of Muhammadu Buhari who was the principal opposition candidate contesting for the presidency in 2003. The Supreme Court, in a decision that was handed two years after the election (by which time Obasanjo was half way through his second term as President) confirmed the validity of Obasanjo's election to the Presidency. Reports indicated that the Supreme Court's decision was influenced by the pressure exerted upon the justices by the incumbent office holder to have a decision favorable to him.[280]

These forms of abuse of incumbency and the ensuing damage to the fairness of the electoral process have not been limited to the 2003 election. The same problems have also occurred in the 2007 election. In fact in the lead up to the 2007 election, President Obasanjo who aspired to amend the Constitution's term limit clause and run for a third term systematically used his incumbency in his effort to outmanoeuvre Atiku Abubakar, his major rival for the presidential nomination of the ruling

[279] Ibid., 42.
[280] See "Supreme Court Verdict Upholding 2003 Election - Identifying The Casualties" (US Embassy, Abuja Nigeria, Cable), http://wikileaks.org/cable/2005/08/05ABUJA1497.html.

party.[281] This has been accomplished among other means by using the state security agencies. In his account of the struggle between Atiku and Obasanjo, Okolie notes that, Obasanjo completely isolated Atiku by:

> ....using security agencies to frighten the governors into abandoning Atiku in his [Obasanjo's] favor; use state resources to create a new moneyed group who would be loyal to him and not Atiku; use security agencies to frighten the moneyed people who were loyal to the Vice President; progressively strip the Vice President of all privileges and accoutrements of office; cut off state patronage to the Vice President's business interests and those of his non-repentant friends. …..use the election umpire, INEC, and other state agencies, especially the security forces, to manipulate the elections;[282]

While these were only some of the strategies employed by President Obasanjo, one can observe that Obasjanjo's power as an incumbent president was what made it possible for him to use these strategies against his rival.

While the President succeeded in effectively frustrating the presidential aspiration of Atiku, he still did not manage to secure the constitutional amendment he needed to run for a third term. President Obasanjo could not succeed in his attempt to have the Constitution amended to have a third term largely due to the his Vice President's efforts to mobilize ruling party parliamentarians in both houses of parliament and the campaign of civil society organizations against the Presidents third term agenda.[283] The President's bid for a third term was also hugely unpopular with the general public and this also contributed to the Senate's reluctance to pass the proposed constitutional amendment.[284] However, despite his failure in running for a third term, Obasanjo's incumbency was crucial in ensuring the victory of his handpicked successor in the

[281] Andrew C. Okolie, "The 2007 General Elections in Nigeria: An Account of the Politics of Personal Rule in an African Country by a former Presidential Aide," *The Review of Black Political Economy* 37, no. 2 (2010): 160.
[282] Ibid., 158.
[283] J. Shola Omotola, "'Garrison' Democracy in Nigeria: The 2007 General Elections and the Prospects of Democratic Consolidation," *Commonwealth & Comparative Politics* 47, no. 2 (2009): 203.
[284] Jean Herskovits, "Nigeria's Rigged Democracy," *Foreign Affairs* 86, no. 4 (July 1, 2007): 120.

2007 elections. The Independent National Electoral Commission (INEC) whose head is appointed with the involvement of the President rendered the President's main rival and political arch enemy Atiku ineligible to run for the presidency and though this decision was overturned by the High Court, the decision of the High Court came very late to have meaningful impact on the election.[285]

Though it could be argued that the conflict between Obasanjo and Atiku is an intra-party conflict, given that Obasanjo had relied upon the INEC to disqualify Atiku from the 2007 Presidential election, it could still be considered an instance of abuse of incumbency. This is so because, in this case what we have is an incumbent president who is using his influence over an organ of state to disqualify a political rival who intended to run for the presidency through a misuse of the legal system.

The problem of state owned media significantly biased towards the incumbent party, the use of state resources for electioneering purposes by the incumbent party were problems that continued to persist in the 2007 elections rendering the playing field unequal for the contestants[286]. The EU Observes Mission notes that "there were widespread public reports of abuse of state resources, particularly state media, vehicles, civil servants, public funds, aid programs and buildings."[287] The Domestic Election Observation Group also noted the "partisanship of INEC and security agent" as one of the lapses of the 2007 election which it claimed was programmed to fail.[288]



[285] *Nigeria Final Report:European Union Election Observation Mission 2007,* 2007, 7.

[286] See *Nigeria Final Report:European Union Election Observation Mission 2007;* see also *Action Congress (AC) and Alhaji Atiku Abubakar vs. Independent National Electoral Commission (INEC) Supreme Court Of Nigeria,* 29th June 2007 SC.69/2007,2007(6) LEDLR 10; [2007] Vol.10 M.J.S.C. 125

[287] Ibid., 19.

[288] *An Election Programmed to Fail:Preliminary Report on the Presidential and National Assembly ElectionsHeld on Saturday, April 21, 2007* (Domestic Election Observation Group), 5, http://www1.american.edu/ia/cdem/nigeria/report_070421.pdf.

As noted by Osiki, the abuse of incumbency was not limited to state media, administrative apparatus and funds but also included state security services.[289] Osiki notes that " in several instances security men, including police, soldiers, customs officers, prison officers, Road Safety officers, State Security officers and Civil Defence officers who were deployed to ensure free and fair elections were accused of conniving with politicians to forcefully take away ballot boxes and other electoral materials at gun point".[290] Ajayi also documents in detail the manner in which the security services including the police aided the PDP. He asserts that the security forces collaborated with the incumbent party among others by scaring opponents, by scarring away and harassing voters and stuffing ballots.[291] The use of administrative and regulatory bodies of the state has also been noted to have been used by the PDP and Obasanjo. In addition to the INEC service to the incumbent by disqualifying Atiku,[292] the Nigerian anti-corruption agency, the Economic and Financial Crimes Commission (EFCC) was also accused of selective prosecution which are politically motivated.[293] All in all, the Nigerian experience shows how prevalent abuse of incumbency is and to what extent the state machinery could be used as an instrument of self-entrenchment by those in power.

### B. Kenya

After independence in 1963, slowly but surely, Kenya first turned into a *de facto* one-

[289] See Omon M. Osiki, "'Gold, Guns & Goons': the complexity of electoral irregularities in Nigeria, 1999-2007," *Information, Society and Justice* 3, no. 2 (2010).
[290] Osiki, "'Gold, Guns & Goons': the complexity ofelectoral irregularities in Nigeria, 1999-2007," 159.
[291] See Kunle Ajayi, "Security Forces, Electoral Conduct and the 2003 General Elections in Nigeria," *Journal of Social Sciences* 13, no. 1 (2006).
[292] Tahir Mamman and P. Chibueze Okorie, "Nurturing Constitutionalism through the Courts: Constitutional Adjudication and Democracy In Nigeria", page 4.
[293] Kunle Animashaun, "Regime Character, Electoral Crisis and Prospects of Electoralreform in Nigeria," *Journal of Nigeria Studies* 1, no. 1: 11.

party state under its first president, Jomo Kenyatta. Then with the 1983 amendment of its Constitution, Kenya formally became a one-party state under its second President Daniel Arap Moi who succeeded Kenyatta when the later passed away. However, due to internal and external pressure for political reform, President Moi had to reintroduce multi-party election in Kenya.[294] After the repeal of the 1983 amendment to the Constitution that made Kenya a *de jure* one party state, Daniel Arap Moi and the party he was leading, Kenya African National Union (KANU) entered the first election as incumbents. Since the reintroduction of multi-party politics in Kenya in 1992, Kenya had held four general elections.

In the first two elections- 1992 and 1997- abuse of incumbency was a factor that had contributed to the success of the incumbent President Arap Moi and his party KANU. Many commentators have noted that the success of KANU and President Arap Moi was largely a result of the fractured nature of the opposition which enabled the incumbent to win the elections despite securing only a minority of the votes cast.[295] While this is true, abuse of incumbency cannot also be overlooked as an important factor that contributed to the electoral victory of President Arap Moi and KANU. In Kenya, especially during the Moi era, the most frequent and significant forms of abuse of incumbency were; the use of state funds for electioneering and vote buying, the restrictions imposed on freedom of assembly and movement of the opposition candidates and also the mal-apportionment: of electoral districts by the electoral commission as will be discussed in detail below.

In 1992, when KANU won the majority of parliamentary seats (100 seats out of 188),

[294] See Frank Holmquist and Michael Ford, "Kenya: Slouching toward Democracy," *Africa Today* 39, no. 3 (1992): 97-111.

[295] Roger Southall, "Moi's Flawed Mandate: The Crisis Continues in Kenya," *Review of African Political Economy* 25, no. 75 (March 1, 1998): 102.

the average number of registered voters in constituencies won by KANU was 33,352 while for constituencies in which the opposition parties won was 51,850.[296] Furthermore, when additional seats were being introduced to the national assembly prior to the 1992 election to adjust to demographic changes since the 1966 constituency delimitation, the major urban areas which were considered to be strongholds of the opposition did not have any additional seats though their population has doubled since the original constituency delimitation.[297] Partly as a result of this mal-apportionment, KANU, which only won 29.7 % of the total votes cast for parliamentary seats, won 53.2% of the seats in the national assembly.[298] This demarcation of the constituencies was revisited in 1996 prior to the second election but that redrawing of the constituencies also favored the incumbent party.[299] Given the fact that these revisions were undertaken by a Commission that lacked independence and was subject to political interference, once can say that the mal-proportioned constituencies were not accidents but results of abuse of incumbency.[300]

In the 1992 and 1996 elections, restrictions on the freedom of movement and assembly of opposition party candidates were also important instruments used by KANU to optimize its chances of victory. As Barakan and Henderson note, "the government, acting through the Provincial Administration and the police, also made it hard for the opposition to organize, open branch offices, or address the public in rural

[296] See "Supreme Court Verdict Upholding 2003 Election - Identifying The Casualties" (US Embassy, Abuja NIgeria, Cable), http://wikileaks.org/cable/2005/08/05ABUJA1497.html. See also Roddy Fox, "Bleak Future for Multi-Party Elections in Kenya," *The Journal of Modern African Studies* 34, no. 04 (1996): 604.
[297] Ibid., 601-602.
[298] Joel D. Barkan and Robert E. Henderson, *Toward Credible and Legitimate Elections in Kenya:IFES Assessment Report* (International Foundation for Election Systems, 1997), 18.
[299] Ibid.
[300] See "allAfrica.com: Kenya: There Should Be No More Political Gerrymandering," http://allafrica.com/stories/201201110269.html acessed on March 17, 2012.

areas. Permits to hold rallies were denied, issued late, or cancelled."[301] Stephen Ndegwa also documents many laws and regulations some from colonial times which were enforced by the government to restrict the campaigning activities of the opposition parties.[302] These included:

1. The use of a colonial era law to deny, withdraw and cancel permits to public assemblies called by the opposition

2. Use the Public Collections Act to deny license for the collection of funds for the opposition

3. Use the Preservation of Public Security Act to restrict the movement of opposition candidates.[303]

Such abuses of incumbency were possible because there was no comprehensive constitutional and legal reform to break the continuity in the legal and administrative edifice of the autocratic colonial and postcolonial past. For instance, there was no political and campaign finance legislation in Kenya until the adoption of the Political Parties Act of 2007.[304] The colonial era Native Authority Ordinance was carried over as the Public Order Act and the Chief's Authority Act.[305] Ciekawy notes that these laws "created to enable colonial administrators to limit the number of people who assembled in any one place and to monitor gatherings of people, thereby inhibiting political activity. Today it is the same act that is used to deny opposition party leaders

[301] Joel D. Barkan, "KENYA: LESSONS FROMA FLAWED ELECTION," *Journal of Democracy* 4, no. 3: 93.
[302] See Stephen N. Ndegwa, "The Incomplete Transition: The Constitutional and Electoral Context in Kenya," *Africa Today* 45, no. 2 (April 1, 1998): 193-211.
[303] Ibid., 198-199.
[304] *The Money Factor in Poll Ra; A Monitoring Report of the 2007 General Election* (Coalition for Accountable Political Financing (CAPF), April 2008), 9-10.
[305] Diane Ciekawy, "Constitutional and Legal Reform in the Postcolony of Kenya," *Issue: A Journal of Opinion* 25, no. 1 (January 1, 1997): 16.

permits for meetings and rallies."[306]

The forms of incumbency that have been discussed in relation to Nigeria such as the use of public resources for partisan purposes[307] and disproportionately favorable coverage of the incumbent by state owned media have also been observed in the 1992 and 1997 elections in Kenya.[308] Barkan notes that that "so great was the flow of money from the Central Bank of Kenya to the president and KANU nominees that the money supply increased by an estimated 40 percent during the last quarter of 1992..." [309]

In the 2002 General Election, the problem of mal-apportionment had persisted. Despite a decision by the High Court that the delimitation of boundaries and the disparity in the number of registered voters among the various constituencies are unconstitutional, the Electoral Commission still held the election with the constituency configuration that favored the incumbent.[310] The EU Observers Mission notes the disparity among various electoral districts by pointing out that the electoral district with the largest number of registered voters has 152,906 registered voters while the constituency with the least number of voters has 8,977 registered voters. In 2002, the significantly biased coverage of the state media favoring the candidates of the incumbent party has also continued especially in the electronic media that is more accessible to most voters.[311] This is to be observed from the fact that the Kenyan Broadcasting Corporation dedicated 67% of its political programs to cover the

[306] Ibid.
[307] Barkan and Henderson, *Toward Credible And Legitimate Elections In Kenya:IFES Assessment Report*, 11.
[308] Barkan, "Kenya: Lessons Froma Flawed Election," 94.
[309] Ibid.
[310] *Kenyag Eneral Elections, 27 December 2002: European Unionelection Obervation Missionfinal Report*, 2002, 17.
[311] Ibid., 16-17.

incumbent party.[312] The problem of inequitable media coverage of the parties contesting the election was also observed in the 2007 election.[313]

On a positive note, the restrictions on freedom of movement and assembly that had characterized the earlier elections were not seen in the 2002 and 2007 election. In the 2007 election, the problem of constituency delimitation persisted and there was still a significant disparity in the number of registered voters in the various constituencies. Though the Electoral Commission tried to redraw the constituency boundaries, this effort were blocked by parliament and hence the Commission has to settle for the adjustment of the borders of 15 constituencies.[314] The use of state resources for electioneering activities of the incumbent party and the partiality of the state owned media towards the incumbent were also problems that persisted in the 2007 election.[315] The Coalition for Accountable Political Financing, which was comprised of various Kenyan civic organizations, has extensively documented such abuse of incumbency in its observer's report of the 2007 Election. In its report, the Coalition notes:

> Reports from all provinces and 71 constituencies indicated that the misuse of state resources was dominant among incumbent politicians. This involved use of state vehicles…. In addition, there was the use of officers of the provincial administration to mobilise for campaign rallies…, use of coercion to extort money from private businesses, use of state media to propagate partisan information, use of government premises for party meetings, involvement of senior public officers in presidential campaign planning, use of government resources to produce material for campaigns (e.g. Government Printer) and fuelling private vehicles using funds from government.[316]



[312] Ibid., 27.
[313] *Kenya Final Report General Elections 27 December 2007; European Union Election Observation Mission*, 24-26.
[314] Ibid., 13.
[315] Ibid., 21 and 21-24. .
[316] *The Money Factor in Poll Racea Monitoring Report of the 2007 General Election*, 37-38.

### C. Ethiopia

The transition to democracy in Ethiopia started in 1991 with the military demise of the Marxist-military regime led by Mengistu Hailemariam.[317] Since then, four general elections have been held under a new constitution that provided the legal framework for multiparty democracy. In all these elections, though to a varying degree, the Ethiopian People's Revolutionary Democratic Front (EPRDF), the rebel group that replaced the previous regime has used its incumbency to perpetuate itself in power. Even before these general elections which were conducted after the adoption of the new constitutional framework, local elections and elections for the Constitutional Assembly were held by the Transitional Government. Starting from these elections, abuse of incumbency has been a constant feature of electoral practices in Ethiopia. Harbeson notes that by embedding its cadres in the newly set up electoral structures and the use of intimidation of voters and opponents with the presence of armed personnel of the incumbent party around polling stations, the EPRDF had affected the outcome of the elections in its favor.[318]

In the first general election under the new Constitution, which was held in 1995, the most significant opposition groups boycotted the election claiming that the intimidation of voters and the harassment of opposition parties by the government precluded the possibility of there being a meaningful election. Commenting on this situation, Terrence Lyons notes:

> The ruling party had the enormous benefits of incumbency. The presence of

[317] See Alex de Waal, "Ethiopia: Transition to What?," *World Policy Journal* 9, no. 4 (October 1, 1992): 719-737; Kinfe Abraham, *Ethiopia: from bullets to the ballot box : the bumpy road to democracy and the political economy of transition* (The Red Sea Press, 1994).

[318] J.W. Harbeson., "Elections and Democratization in Post-Mengistu Ethiopia," in *Postconflict Elections, Democratization, and International Assistance*, ed. Krishna Kumar (Lynne Rienner Publishers, 1998), 121-123.

> its officials in urban *kebelles* and peasant associations - first created by Mengistu's regime as the local units of administration and control- provided the EPRDF with a further and perhaps most significant advantage. Under the TGE, these institutions continued to serve as the local structures responsible for distributing vital services, and were used as the basis for building an effective party machine.[319]

In the general elections held in 2000, many opposition parties took part in order not to lose their recognition by the Electoral Board (a party that does not take part in two consecutive elections will lose its status as a political party according to the Ethiopian electoral law).[320] In this round of general elections as well, similar abuses of incumbency were observed. In his study of one of the areas where the opposition provided the strongest competition to the EPRDF, K. Tronvoll notes that the incumbent party used the local administrative units which were under its control, the threat, transfers or dismissals from job, the provision of fertilizers and food aid as instruments of pressure and control for its own partisan ends.[321] The 2005 election was a watershed event in many respects. In relative terms, the government provided a more level playing field and as a result there was a much more competitive election. Though there still were instances of intimidation, harassment and the use of public resources and the governmental administrative structure by the incumbent party for partisan purposes, the political environment was more relaxed and free. In the period prior to the polling day, the most nefarious forms of abuse of incumbency were not that prevalent. But a few days after polling day, the incumbent party used its incumbency to declare itself the winner before the end of the counting of the votes

[319] Terrence Lyons, "Closing the Transition: The May 1995 Elections in Ethiopia," *The Journal of Modern African Studies* 34, no. 1 (March 1, 1996): 140.

[320] Kjetil Tronvoll, "Voting, Violence and Violations: Peasant Voices on the Flawed Elections in Hadiya, Southern Ethiopia," *The Journal of Modern African Studies* 39, no. 4 (December 1, 2001): 699 See also Article 38 of the "Political Parties Registration Proclamation No. 46/1993."

[321] Kjetil Tronvoll, "Voting, Violence and Violations: Peasant Voices on the Flawed Elections in Hadiya, Southern Ethiopia," *The Journal of Modern African Studies* 39, no. 4 (December 1, 2001): 703-704.

and all demonstrations were banned for one month and the security forces heavily crack down any sign of protest and arrested opposition politicians, civic organization leaders and journalists.

After the 2005 general elections, the EPRDF used state resources and the administrative structure to recruit members in urban areas, among the young and educated. A 'carrot and stick' approach was used to lure these segments of society which have hitherto been seen as favoring the opposition[322]. Educational, employment, promotion opportunities and credit facilities in micro-credit and small scale enterprises schemes were provided as incentives for membership and active participation in the ruling party.[323] Due to these measures, the there was a dramatic increase in the membership of the ruling party and within a year the number of members more than quadrupled and become 4,000,000 strong.[324]

The abuse of state power for partisan purposes is particularly important and pervasive in Ethiopia through local administrative units are the focal instruments of actuating the control of the ruling party over the population. Documenting the various ways through which local administration units play this role Zemelak Ayele makes the following observations which are worth quoting at length:

> In order to hold public rallies, demonstrations, or public meetings, local authorities need to be "informed: of the arrangements so that they can provide security. If local officials cannot provide security-and often they allege that they "cannot"-such rallies, meetings and demonstrations cannot take place. *Kebele* community halls, which in most cases are the only available venues for public meetings, are owned and controlled by local authorities. Moreover, local communities, both in urban and rural areas,

[322] Lovise Aalen and Kjetil Tronvoll, "The 2008 Ethiopian local elections: The return of electoral authoritarianism," *African Affairs* 108, no. 430 (January 1, 2009): 115.
[323] Ibid.
[324] Ibid.; according to Tornvoll, the figure for the membership of the ruling party has actually become 5 million Kjetil Tronvoll, "The Ethiopian 2010 federal and regional elections: Re-establishing the one-party state," *African Affairs* 110, no. 438 (January 1, 2011): 12.

> depend on local government for their basic services. ….*Woredas* [districts] service delivery, including education, agriculture extension service and health care. *Woredas*, city administration and *kebeles* issue and renew birth certificates and identification cards which are indispensable to receiving any service…The houses which were nationalized by the *Derg* and rented out to the people are still under the ownership of the *Kebele* and those who stay in these houses are under a constant threat of eviction. Local authorities effectively use these powers to ensure the continued dominance of the EPRDF. [325]

The control of the local administration units by the ruling party which was initially a result of sham elections controlled and crudely manipulated by EPRDF, it has also been reinforced by the destructing of local administration units which enlarged the number of seats in *Kebelle* Councils or Assemblies to 300. This has meant that a political party competing at the smallest level of local governance in local elections will have to field at least 150 candidates. While EPRDF had all the resources and at its disposal to field millions of candidates the sheer number of candidates that they are required to field had ensured that they do not even stand a chance to compete.[326] The increase of the number of council seats at the *Kebelle* level from 15 to 300 meant that there were 3.6 million seats being contested for *Kebelle* and *Woreda* Councils.[327] This effectively shut out the opposition parties from the competition since it was impossible for them to mobilize resources and even find so many candidates who will risk the ire of the ruling party and run for local government councils.[328]

Human Rights Watch in its report "*One Hundred Ways of Putting Pressure*" documents various ways through which EPRDF uses state resources and

[325] Zemelak Ayele, "Local government in Ethiopia: still an apparatus of control?," *Democracy And Development* 15, no. 1 (2011): 17-18.
[326] Serdar Yilmaz and Varsha Venugopal, "Local Government Discretion and Accountability in Ethiopia," International Studies Program Working Paper 08-38 (Andrew Young School of Policy Studies, Georgia State University), 8.
[327] Aalen and Tronvoll, "The 2008 Ethiopian local elections," 116.
[328] Kjetil Tronvoll, "The Ethiopian 2010 federal and regional elections: Re-establishing the one-party state," *African Affairs* 110, no. 438 (January 1, 2011): 13.

administrative structures for political control and to stifle dissent.[329] As indicated in this report, the apparatus of control goes even below the *Kebelle* level using a system of cells of 10 to 50 households with the cell leaders reporting to the head of the *Kebelle* administration.[330] Access to resources distributed by the local administration units such as seeds, fertilizers, food aid are also used to pressure the population to join the ruling party.[331] The ruling party had also mobilized and politicized the civil service since 2005 through capacity building or policy awareness trainings sponsored by the state and at which civil servants are pressured to join the party or risk adverse consequences.[332] Such techniques are also used in high schools and colleges targeting teachers as well as students.[333]

In addition to these, the ruling party had used particularly the broad definition of the offense of terrorism and encouraging terrorism to prosecute the most critical journalists and opposition politicians.[334] The judiciary's lack of independence and the compliant and clearly partisan prosecutors' office has meant that the ruling party could use the 'judicial' process with no difficulty to silence dissent.[335] The prosecutions in 2011 of journalists and opposition politicians has further reinforced the atmosphere of fear and coerced conformity in the political sphere that was visible



[329] See Ben Rawlence, *"One hundred ways of putting pressure" violations of freedom of expression and association in Ethiopia* (New York NY : Human Rights Watch (HRW), 2010).
[330] Ibid., 22-24.
[331] Ibid., 22-26.
[332] Ibid., 28-30.
[333] Ibid., 30-32.
[334] See United Nations News Service Section, "Ethiopia's anti-terrorism laws must not be misused to curb rights – UN", February 2, 2012, http://www.un.org/apps/news/story.asp?NewsID=41112&Cr=journalist&Cr1=; Melhik A. Bekele, "Counter-terrorism and the suppression of political pluralism: An examination ofthe Anti-terrorism Proclamation of Ethiopia" (LLM, South Africa: University of Pretoria, 2010), 44-45.
[335] See Assefa Fiseha, "Separation of powers and its implications for the judiciary in Ethiopia," *Journal of Eastern African Studies* 5, no. 4 (2011): 702-715.

at the wake of similar prosecutions in 2005 which followed the 2005 election.[336] The monopoly of the ruling party over the airwaves, using the regulatory arm of the state and also state owned radio and TV stations has also made it impossible for dissenting voices and opposition political parties to be heard.[337] The government had also jammed radio and satellite TV broadcasts from abroad which are critical to it.[338] Though such action is patently illegal the government had not even bothered to deny that it is behind the jamming of the Amharic broadcasting of the Voice of America.[339]

On top of all these the National Electoral Board of Ethiopia has also been an important instrument which is used by the ruling party to perpetuate its self in power. The Electoral Board has been complicit in the electoral routine frauds that have been perpetrated in Ethiopia. It has also been instrumental in the strategy of the ruling party to splinter the most prominent opposition parties. This happens when splits, which the opposition alleges have been induced by the state, occur in opposition parties and when the Electoral Board decides to award the names and electoral symbol of the opposition party in question to the weakest faction. All in all, abuse of incumbency seems to have become increasingly pervasive in Ethiopia. As has been shown above, the extent of the abuse of incumbency that is prevalent in Ethiopia has ultimately resulted in the scuttling of the process of democratization.



[336] See *Ethiopia: Dismantling dissent: Intensified crackdown on free speech in Ethiopia* (Amnesty International, 2011).

[337] See Wondwosen Teshome, "Media and multi-party elections in Africa: The case of Ethiopia," *International Journal of Human Sciences* 6, no. 1 (January 10, 2009): 92-99; see also Terje S. Skjerdal, "Conflicting professional obligations among government journalists in Ethiopia" (presented at the IAMCR Congress,, Stockholm, Sweden, 2008).

[338] "CPJ wants Ethiopia to probe jamming of German radio broadcasts," http://www.panapress.com/CPJ-wants-Ethiopia-to-probe-jamming-of-German-radio-broadcasts--12-768262-42-lang2-index.html; "THE DAILY STAR :: News :: Local News :: Sehnaoui: Jamming of Arabsat coming from Ethiopia," http://www.dailystar.com.lb/News/Local-News/2012/Feb-16/163438-sehnaoui-jamming-of-arabsat-coming-from-ethiopia.ashx#axzz1oW6DfFgc.

[339] "Ethiopia admits jamming VOA radio," *BBC*, March 19, 2010, sec. Africa, http://news.bbc.co.uk/2/hi/8575749.stm.

### D. Ghana

After gaining independence in 1957, Ghana officially became a one-party state in 1964. Within three years after turning Ghana in to a one-party state, President Kwame Nkrumah was ousted in a military coup in 1969. Though the military transferred power to a civilian government in 1969 under a new Constitutional order, the new civilian administration stayed in power only for three years and was overthrown by a military coup. Then again another civilian government was installed 1979 to be ousted by another coup just after two years.[340] The last coup maker Flight Lieutenant Jerry Rawlings, whose was staging his second coup in 1981 stayed in power till 1992 as the head of the Provisional National Defence Council (PNDC). Therefore, Lieutenant Jerry Rawlings and his newly formed party NDC (National Democratic Congress) contested the first election in the Fourth Ghanaian Republic as incumbents.[341]

The reintroduction of multiparty democracy occurred in Ghana with the adoption of the 1992 constitution of the fourth Republic. Since then, Ghana had conducted five general elections. In these elections and the overall competition between the two major Ghanaian political parties, the problem of abuse of incumbency has been manifested. This has been the case particularly in relation to the use of state resources and administrative structure as well as state owned media. However, it should be noted that the problem both in terms of its magnitude and effect has been less pronounced in Ghana as compared with the other countries that have been discussed

[340] Roger Gocking, *The history of Ghana* (Greenwood Publishing Group, 2005), 91-185.

[341] See E. Gyimah-Boadi, "Notes on Ghana's Current Transition to Constitutional Rule," *Africa Today* 38, no. 4 (December 1, 1991): 5-17; David Abdulai, "Rawlings 'Wins' Ghana's Presidential Elections: Establishing a New Constitutional Order," *Africa Today* 39, no. 4 (December 1, 1992): 66-71.

so far.

Starting with the 1992 election, David Abdulai attributes the victory of Rawlings and the NDC to their use of:

> the so-called "organs of the revolution," which were instruments of the PNDC's rule… They include the Committees for the Defence of the Revolution (CDRs), Commando Units, the 31st December Women's Organization, the June 4 movement, Peoples Militias, and Mobisquads. All of these organizations were part of a system of popular control through intimidation. They were a disguised offshoot of the NDC and started the campaign for Rawlings' presidency long before the lifting of the ban on party politics. [342]

E. Gyimah-Boadi notes that "the ability to exploit incumbency and to commandeer state resources was a key, factor in Rawlings-NDC electoral victories in both 1996 and 1992"[343]. These state resources include the state owned media as well as resources like state vehicles.[344] The situation with the state owned media seemed to have improved after the decision of the Supreme Court of Ghana, in which the court declared in that the Ghana Broadcasting Corporation had the obligation to provide equitable access to the various political parties.[345] This case arose when the state owned broadcasters aired a two hour defence of the budget by ruling party but denied the main opposition party the opportunity to air its views on the matter. The Supreme Court of Ghana invoked article 55(11) of the Ghanaian Constitution and decided in favor of the National Patriotic Party.[346] The proliferation of private electronic and print media had also contributed greatly to lessening the effect of the privileged access of the incumbent party to the state owned media.

[342] Abdulai, "Rawlings 'Wins' Ghana's Presidential Elections," 69.
[343] E. Gyimah Boadi., "Ghana: The Challenges of Consolidating Democracy," in *State, Conflict, and Democracy in Africa*, ed. Richard Joseph (Lynne Rienner Publishers, 1999), 419.
[344] Ibid.
[345] *New Patriotic Party v. Ghana Broadcasting Corporation* [1993-94] 2 GLR 354 (SC)
[346] For a concise summary of the case see Kwadwo Appiagyei-Atua, *Audit of Key Legislation in Ghana for Information Access Opportunities* (Commonwealth Human Rights Initiative (CHRI), 2009), 27.

In the 2000 election where the incumbent party NDC lost both the parliamentary and presidential elections, the incumbent enjoyed the advantage of government motor vehicles and facilities [347] but had limited financial resources at its disposal due to a hike in the price of oil that necessitated costly subsidies (leading some to speculate that the limited finances have constrained the ability of the NDC to woo voters with its largess).[348] One might wonder if the incumbent had lost the election, could we say that there really has been abuse of incumbency. In this connection, it should be clear that the existence of abuse of incumbency does not necessarily mean that the incumbent will succeed in her/his attempt at self-perpetuation. But the fact that in Ghana, there has been peaceful transfer of power twice from one party to the other indicates that the problem of abuse of incumbency in Ghana has been kept within bounds.

In the 2000 election, commentators have noted that the state owned media has provided a fair allocation of air time and a more reasonable coverage compared to previous elections as noted by Temin and Smith.[349] Ayee observes that the opposition parties had access to the media that ensured a competitive political environment through both state owned and the private media.[350] In its observation of the 2004 election, the Ghana Center for Democratic Development noted that there have been partisan conduct among civil servants who are supposed to be non-partisans and that there were instances in which official state events were turned in to campaign events



[347] Paul Nugent, "Winners, Losers and Also Rans: Money, Moral Authority and Voting Patterns in the Ghana 2000 Election," *African Affairs* 100, no. 400 (July 1, 2001): 408.
[348] Ibid., 413.
[349] Jonathan Temin and Daniel A. Smith, "Media matters: evaluating the role of the media in Ghana's 2000 Elections," *African Affairs* 101, no. 405 (October 1, 2002): 590.
[350] J. Ayee, "The 2000 General Elections and Presidential Run-off in Ghana: An Overview," *Democratization* 9, no. 2 (2002): 166-167.

by the incumbent.[351]

In the 2008 election, once again the most notable issue of abuse of incumbency in Ghana was the use of state owned media. As far as the use of state resources are concerned, the EU Observation Mission notes that "in general there was no tangible sign that incumbency or access to state resources was exploited during the election campaign period or on a national level."[352] The mission noted that the coverage of the electoral process by the state owned electronic media was biased to the ruling party.[353] However, as noted by most commentators, the private media (147 private FM Radios and 300 News Papers) have mitigated the impact of the state owned media's bias to the NNP.[354]All in all, compared with the three countries discussed above, Ghana seems to have had a better record of minimizing abuse of incumbency. Abuse of incumbency in Ghana had not been as problematic as it has been in the other countries and partially this could be attributed to the strength of its institutions and the merit of its constitutional design as will be discussed in the next chapter of this dissertation.

***Conclusion***

The discussion in the preceding sections of this chapter clearly shows that abuse of incumbency, is a problem that is prevalent to varying degrees in all four countries under investigation in this dissertation. The prevalence of the problem had a detrimental effect on the quality or even existence of democracy in all four countries. While the problem has been so severe that it had turned Ethiopia in to a *defacto* on

[351] *Ghana Center for Democratic Development (Cdd-Ghana) Abuse of Incumbency and State Administrative Resources in Election 2004* (Cdd-Ghana, October 2004), 4.
[352] *Ghana Final Report Presidential and Parliamentary Elections 2008* (European Union Election Observation Mission, February 2009), 19.
[353] Ibid., 22.
[354] See also Peter Arthur, "Democratic consolidation in Ghana: the role and contribution of the media, civil society and state institutions," *Commonwealth & Comparative Politics* 48, no. 2 (2010): 209-210; George Asare, "The media liberalization and democracy : experiences from Accra, Ghana," Master thesis, 18, http://munin.uit.no/handle/10037/2394.

party state, it has turned Nigeria in to a competitive autocracy. In Kenya the prevalence of the problem coupled with other factors such as ethnic tensions has resulted in violent conflicts and had disastrous consequences. In Ghana, where the problem is less pronounced and pervasive, though one cannot say there is a consolidated and mature liberal democracy, a stable electoral democracy has taken root. While Ghanaian democracy leaves much to be desired, in terms of its stability and periodic alternation of parties in power, it is the envy of most sub-Saharan Africa countries.

The discussion of the experience of the four countries also shows that abuse of incumbency could take various forms. The most common forms of abuse of incumbency include, the use of state owned media outlets for the partisan propaganda of the incumbent, the use of media regulatory state organs to harass private media outlets that are critical to the incumbent, the use of state funds, facilities, properties and administrative structures for partisan ends and the subversion and manipulation of electoral management bodies. Furthermore, the use of the national security apparatus, the police and the public prosecutor's office to harass, intimidate and punish opponents is also another form of abuse of incumbency that has been observed in some of the countries discussed above. Having discussed the prevalence and forms of abuse of incumbency in the countries selected for the case study, the next chapter of the dissertation will explore qualities and features of a constitution that could contribute to the prevalence of or for tackling abuse of incumbency.

# Chapter Four: Minimizing Abuse of Incumbency: Contextualizing Constitutionalism

### *Introduction*

While the political matrix of most African countries creates a challenging environment for constitutional democracy to take root, the constitutional design of these countries should not be overlooked as contributing to these challenges. The experience of the four countries which are the subjects of the above case study could be instructive in this regard. The constitutional orders of these countries have contributed to and sometimes helped to mitigate the problem of abuse of incumbency. In this chapter, the focus of the discussion will be the features of the constitutions of these countries that have contributed to or minimized the prevalence of abuse of incumbency.

The first feature of the constitutions that has contributed to the prevalence of abuse of incumbency is the dearth of clear, detailed prohibitions of the various forms of abuse of incumbency in the constitutions of many of these countries. As will be shown in a subsequent section of this chapter, this problem goes beyond the standard textual gaps and open textured provisions which characterize many constitutions. The second feature of the constitutions of these countries that has contributed further to the problem is weak systems of checks and balances capable of delivering horizontal accountability. The third feature of these constitutions that has contributed to the problem is the absence of or compromised existence of democracy supporting institutions that could have been instrumental in minimizing abuse of incumbency and the dominance of the executive. Each of these features that contribute one way or the other to the prevalence of abuse of incumbency will be discussed separately in the

following sections of this chapter with a focus on the ways in which constitutionalism should be contextualized to minimize abuse of incumbency.

On account of these experiences, in this chapter of the dissertation, the author will attempt to show how constitutionalism should be contextualized to minimize abuse of incumbency in African countries. The first section of the dissertation will discuss the standard solutions to the problem of abuse of incumbency which are staple features of most democratic constitutions. Then, the next sections of the chapter will argue that in addition to these standard solutions, there is a need to contextualize constitutionalism in Africa in the following ways. The first way to contextualize constitutionalism in response to abuse of incumbency is by adopting clear, detailed and specific rules that prohibit various forms of abuse of incumbency. The second is by strengthening the operation of the mechanisms of checks and balances, particularly judicial review. The third is by reinforcing the checks and balances with independent institutions of horizontal accountability/democracy supporting institutions.

### *4.1 Standard Solutions for Abuse of Incumbency: A look at the Constitutional Tool box*

In any society desiring to establish and sustain a democratic order of governance, abuse of incumbency is a threat that needs to be dealt with. In order to safeguard democracy from the threat of abuse of incumbency, there are a number of standard constitutional solutions that have been implemented with some success in a number of countries. These solutions, forming part of the arsenal of constitutionalism include separation of powers and checks and balances, judicial review and an enforceable bill of rights. Of course, these constitutional mechanisms are supported by the political

process and conventions/traditions as well as by statutory schemes[355] that reduce the incidence and gravity of abuse of incumbency. In this section, a cursory look at the above mentioned standard constitutional solutions to the problem of abuse of incumbency will be provided. For the sake of illustration, the experience of some of the established constitutional democracies of the world will be referred to whenever appropriate.

The threat abuse of incumbency poses to self governance was something that was not lost on the Framers of one of the earliest written constitutions, namely the Constitution of the United States. The Founding Fathers of the United States were very much concerned with the possible rise of a self perpetuating tyrannical executive magistrate.[356] They feared the transformation of the president into an elected monarch and animated by this fear, they considered and provided some safeguards in the Constitution. One of the safeguards they considered but did not put in the Constitution was presidential term limits.[357] The idea of term limits was originally rejected based on a view that if the President's eligibility to serve in that capacity is limited, he would not be motivated enough to do his job well and in fact might be tempted to optimize in an illicit manner the personal advantages and benefits he could get from the office before his term of office comes to an end.[358] This view was premised on the belief that the prospect of reelection will motivate the President to discharge his

[355] See for example (regarding the statutory rules and norms mentioned above) Chapter 15: Political activity of certain state and local employees of the United States which imposes serious restrictions on partisan activities of civil servants and 5 U.S.C. § 2301 : US Code - Section 2301 providing for a merit system in the recruitment of civil servants.

[356] Brion McClanahan, *The Founding Fathers Guide to the Constitution* (Regnery History, 2012), 92–96.

[357] See Alexander Hamilton, Federalist Papers No 71, *The Duration in Office of the Executive*, From the New York Packet Tuesday, March 18, 1788 and Federalist Papers No 73, *The Same Subject Continued, and Re-Eligibility of the Executive Considered*, From the New York Packet Friday, March 21, 1788.

[358] See "The Federalist Papers : No. 72," available at http://avalon.law.yale.edu/18th_century/fed72.asp.

responsibilities with more zeal and more conscientiously.[359] Later on, after FDR's four term presidency aroused similar fears, the Twenty-Second Amendment was introduced to provide presidential term limits. As a result, presidential term limits now form part of the standard instruments of minimizing abuse of incumbency.

One of the principal standard solutions to address the problem of abuse of incumbency is the system of separation of powers and checks and balances. This point is driven home by James Madison in Federalist numbers 47 and 51. In these essays, Madison makes the case that to avoid tyranny, which is not the same thing but closely related to abuse of incumbency, separation of powers is essential and that to maintain effective separation of powers there needs to be a system of check and balances.[360] The Watergate Scandal that resulted in the resignation of President Nixon because of the combined judicial and legislative scrutiny he was under has borne out the wisdom of Madison's views expressed in Federalist 47 and 51.[361]

In countries with a parliamentary form of government where the legislature is unlikely to play the same role that it played in the United States with regard to the Watergate scandal since there is a fusion of the legislature and the executive as a rule in parliamentary systems. Therefore, in such countries, the judiciary had to bear the burden of restraining the political branches from abuse of incumbency. The judiciary discharges this responsibility by exercising its power of judicial review to enforce individual rights or maintain the allocation of power laid down in a constitution and protecting the integrity of the constitutional system. As such judicial review is an



[359] Ibid.

[360] See "The Federalist Papers No 47," http://avalon.law.yale.edu/18th_century/fed47.asp; "The Federalist Papers No 51," http://avalon.law.yale.edu/18th_century/fed51.asp.

[361] For a discussion of the role of the Judiciary and Congress in the process of holding President Nixon accountable for the abuse of his incumbency see Archibald Cox, "Watergate and the U.S. Constitution," *British Journal of Law and Society* 2, no. 1 (July 1, 1975): 1-13.

important mechanism of reducing the incidence and gravity of abuse of incumbency.

This could be illustrated not only by the role that the US Supreme Court had played in the Watergate saga but also by the experience of countries like India and Germany. In India, especially during the turbulent years of Indira Ghandi, the power of judicial review exercised by the Supreme Court, even if not completely effective, was the most important check on abuse of executive powers and ultimately on abuse of incumbency. The judiciary first and for most provided a check on abuse of incumbency by the prime minister when her election to parliament was challenged by an opponent that she has misused governmental resources in her election effort in violation of the relevant statutory law. The Allahabad High Court accepted some of these allegations and decided that Indra Ghandi's election to parliament was invalid.[362] During the period when the Court had stayed the judgment and the punishment of a six year ban on participation in elections, a state of emergency was declared and the Prime Minister pushed through parliament a constitutional amendment that prohibited judicial inquiry of the validity of the election of prime ministers.[363] The Supreme Court of India, while upholding her election repudiated the constitutional amendment as unconstitutional reasoning that it is inconsistent with the basic structure of the constitution.[364]

In Germany as well the Constitutional Court had played an important role as a guardian of the democratic process by providing a check on abuse of incumbency.[365]

[362] W. H. Morris-Jones, "Whose Emergency — India's or Indira's?," *The World Today* 31, no. 11 (November 1, 1975): 455.
[363] See W. H. Morris-Jones, "Whose Emergency — India's or Indira's?," *The World Today* 31, no. 11 (November 1, 1975): 451-461.
[364] Raju Ramachandran, "The Supreme Court and the Basic Structure Doctrine," in *Supreme But Not Infallible* (Oxford University Press, 2000), 115-116.
[365] See Donald P. Kommers, "The Federal Constitutional Court: Guardian of German Democracy," *Annals of the American Academy of Political and Social Science* 603 (January 1, 2006): 111-128.

The most direct instance of the Court addressing the problem of abuse of incumbency is in the *Official Propaganda* case where the Court declared unconstitutional the use of governmental agencies and resources to distribute leaflets which in effect amounted to election propaganda for the ruling Social Democratic Party.[366] The Court gave a judgment in favor of the opposition Christian Democrats noting that the practice that they complained against constituted a violation of the principle of parliamentary democracy, equality of parties and free and fair elections.[367]

It should be noted that separation of powers, checks and balances and particularly judicial review have not made even the established democracies immune from abuse of incumbency. In the United States for example, the problem of political gerrymandering is something that the Supreme Court has manifestly failed to address despite the harm such abuse of incumbency causes to the democratic process.[368] In India, despite the decisions of the judiciary regarding abuse of incumbency by the Prime Minister, the Prime Minister had invoked emergency powers to arrest many of her opponents and critics.

At this juncture, a question that needs to be dealt with is the extent to which these standard solutions could be used in tackling abuse of incumbency within the context of the African political matrix. As will be shown in the sections below and in the last chapter of the dissertation, the position taken in this dissertation is that, these standard solutions discussed above are indispensable yet inadequate to tackle abuse of incumbency in most African countries. In other words, separation of powers and checks and balances as well as judicial review are not sufficient constitutional

[366] Ibid., 119.
[367] Ibid.
[368] See *Vieth v. Jubelirer*, 541 U.S. 267 (2004)

responses to abuse of incumbency and they need to be reinforced in various ways to address the problem of abuse of incumbency. The various ways of reinforcing and complementing the standard solutions to abuse of incumbency will be discussed in the remaining part of the chapter.

### *4.2 The Lack of Clear, Detailed Provisions*

The forms of abuse of incumbency that are prevalent in the four countries whose experience has been discussed in the first section of this chapter could be categorized as:

- abuse of state controlled media and media regulatory organs
- abuse of state resources and administrative structures
- subversion of electoral management bodies
- abuse of state coercive instruments & security services.

This section advances the claim that the lack of clear and detailed provisions prohibiting these various forms of abuse of incumbency has contributed to the prevalence of abuse of incumbency. To support this claim, the first sub-section of the paper will explore the presence or lack of clear and detailed constitutional provisions prohibiting abuse of incumbency in the four countries under study. The second sub section will be devoted to showing under what circumstances such provisions are likely to be adopted and to show that such provisions could make a difference in tackling abuse of incumbency.

#### A. A Survey and Analysis of Provisions Prohibiting Abuse of Incumbency

When we look into the constitutions of Kenya, Ghana, Ethiopia and Nigeria, we find

very few provisions that directly prohibit these kinds of conduct by incumbents. As far as abuse of state controlled media and media regulatory organs are concerned, the Constitution of Ghana is an exception in that it has one chapter (chapter 12) dedicated to provisions on the freedom and independence of the media. In this chapter, and also in other parts of the Ghanaian Constitution as well, there are clear and detailed provisions which prohibit abuse of state owned and controlled media by incumbents. Article 55 (11) of the Ghanaian Constitution provides that: "The state shall provide fair opportunity to all political parties to present their programs to the public by ensuring equal access to the state-owned media." In the same vein, Article 55 (12) stipulates that "All presidential candidates shall be given the same amount of time and space on the state-owned media to present their programs to the people." Article 162(3) of the Ghanaian Constitution goes further and provides that, "There shall be no impediments to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a license as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information." Furthermore, Article 163 stipulates that "All state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions." A cumulative reading of these provisions provides a prohibition of the monopolization and abuse of state owned media by the incumbent as well as the use of media regulatory organs to create obstacles at the point of entry or during operation for private media outlets.

Unlike the Ghanaian Constitution, the constitutions of Nigeria, Kenya and Ethiopia do not have clear and detailed provisions prohibiting abuse of incumbency in connection with the media. Though the Ethiopian Constitution provides under Article 29(5) that

"Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion," clearly the Ghanaian Constitution surpasses all three constitutions in question in the precession, clarity and detail of its provisions prohibiting abuse of incumbency in relation to the media.

When we come to the other forms of abuse of incumbency, one will be hard pressed to find clear and detailed prohibitions of abuse of state resources and administrative structures, subversion of electoral management bodies and abuse of state coercive instruments. One could argue that such prohibitions are implied or they go without saying but given the political matrix of these countries which increases the potential for abuse of incumbency greatly, that seems to have been an ill-advised approach. As has been noted in Chapter One, the political matrix of most African countries provides the incentive, means and precedents that make abuse of incumbency pervasive.

The Constitution of Ghana seems to fare better in providing prohibitions of the abuse of incumbency that seem to be lacking in the Nigerian, Ethiopian and Kenyan constitution. Article 46 of the Ghanaian Constitution provides that "Except as provided in this Constitution or in any other law not inconsistent with this Constitution, in the performance of its functions, the Electoral Commission, shall not be subject to the direction or control of any person or authority." Article 47(3) also provides that "The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota." These provisions prohibit mal-apportionment of electoral districts and any conduct by the executive that undermines the independence of the electoral

management body. [369]

The Nigerian Constitution has provisions that establish the need for equitable apportionment of electoral districts,[370] provisions requiring certain institutions including the national electoral management body to be independent [371] and also prohibiting abuse of power in relation to public prosecution.[372] However, the Nigerian Constitution does not have provisions that proscribe abuse of the administrative apparatus of the state or the state security services which have been routinely abused by the executive in Nigeria for partisan purposes.

When it comes to Kenya, the old Constitution had provisions which stipulate the independence of the electoral commission,[373] the public service commission[374] as well as the operational autonomy of the attorney general in making decisions concerning prosecutions[375] and the provision providing for equitable apportionment of electoral districts.[376] Other than these provisions which are in one way or another related with minimizing abuse of incumbency, one cannot find provisions that explicitly and directly proscribe the various kinds of abuse of incumbency discussed in the first section of this chapter. The forms of abuse of incumbency that are not clearly proscribed in the previous Kenyan Constitution include abuse of state owned media,

[369] Article 191 of the Ghanaian Constitution also provides that "A member of the public services shall not be (a) victimized or discriminated against for having discharged his duties faithfully in accordance with this Constitution; or (b) dismissed or removed from office or reduced in rank or otherwise punished without just cause." The provision could be seen as protecting public servants from retaliation resisting efforts by the incumbent to use them as instruments for its own partisan ends. Though these provisions could not be considered comprehensive and detailed enough to proscribe various forms of abuse of incumbency, nevertheless they are still better in relative terms when compared with the other constitutions under study in this dissertation.
[370] Article 72.
[371] Article 158 (1).
[372] Article 174 (3).
[373] Article 41( 9).
[374] Article 106 (12).
[375] Article 26 (8).
[376] Article 42 (3) (*a*),(*b*),(*c*),(*d*),(*e*)and (*f*) .

media regulatory organs and abuse of state resources (material and financial).

The Ethiopian Constitution is even terser in providing rules proscribing various forms of abuse of incumbency. There is a provision stipulating that "The armed forces shall carry out their functions free of any partisanship to any political organization(s)."[377] There is also a provision providing that the National Electoral board shall not be subject to any influence and should be independent and impartial.[378] However, the Ethiopian Constitution has no provisions regarding the use of state financial and material resources, state administrative and security forces other than the army for partisan purposes. The Ethiopian constitution is also silent about possible abuse of incumbency of the powers of the office public prosecutor.

An interesting exercise will be to contrast these constitutions discussed above with the new constitution of Kenya and the Constitution of South Africa. The new Kenyan Constitution of 2010 enjoins the legislature to enact legislation which will regulate the fair and equitable use of state owned media as well as restricting use of state resources for partisan purposes.[379] It also has a provision which limits the state's ability to impose entry restrictions on the private electronic media to those requirements "necessary to regulate the airwaves and other forms of signal distribution".[380] Furthermore, it prohibits political manipulation of licensing procedures[381] and which also proscribes abuse of state owned media by an incumbent.[382] There are also provisions specifically providing for the editorial autonomy of state owned media,

[377] FDRE Constituion Article 87(5).
[378] FDRE Constituion Article 102 ( 1) .

[379] Article 92 (a), (b) and (h).
[380] See The Constitution of Kenya, 2010, Article 34 (3).
[381] Ibid.
[382] Article 34(4) (a),(b) and(c ).

their obligation to be impartial and entertain diversity opinions.[383] The new Kenyan Constitution also provides very detailed provisions regarding the electoral management;[384] prohibiting mal-apportionment[385] and the use of state resources by political parties for partisan purposes save in instances which are authorized by an act of parliament or the Constitution.[386] The Constitution also has detailed provisions meant to prohibit abuse of the security services and the office of the persecutor for partisan purposes.[387] It is interesting to note that the South African Constitution also has provisions similar to the provisions of the Kenyan Constitution which have just been described in this paragraph.[388]

### B. The Adoption and Effects of Anti-Abuse of Incumbency Provisions

Z. Elkins, T. Ginsburg and J. Madison, in their investigation of the endurance of constitutions argue that the specificity of constitutions helps in enhancing their longevity.[389] They assert that "specificity, which refers to both detail and scope, facilitates constitutional enforcement by facilitating agreement as to the contents and meaning of the constitution".[390] In the African context, K. Prempeh also argues that "Flat prohibitions and bright-line rules, not open-ended or discretion-based provisions, hold far better prospects for checking runaway presidential power."[391] These scholars were not directly discussing the issue of abuse of incumbency, but their insight seems to have a clear relevance and relation to curbing abuse of

[383] Ibid .
[384] Article 81. (e).
[385] Article 89 (5) and (6).
[386] Article 91 (2) e).
[387] 157. (10), (11) and 239 (3)
[388] Constitution of the Republic of South Africa Article 179(4), 181(2) 197(3), and 199 (7).
[389] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009), 103.
[390] Ibid., 207.
[391] H. Kwasi Prempeh, "Presidents Untamed," *Journal of Democracy* 19, no. 2 (2008): 120.

incumbency through constitution making. As such they could be understood as arguing that specific provisions with clear prohibitions are more likely to prevent abuse of incumbency.

The experience of the Nigeria, Ethiopia, Kenya and Ghana supports such view. Ghana, the country with the constitution which relatively has the most detailed and specific constitutional provisions meant to prohibit abuse of incumbency has one of the best democratic track record in the last two decades in sub-Saharan Africa. On the other hand, Ethiopia, with the Constitution which has the least specific and detailed provisions meant to prohibit abuse of incumbency has seen its transition to democracy falter and ultimately reversed. Nigeria, also a country with a constitution lacking in specific and detailed provisions prohibiting abuse of incumbency also has a very poor democratic record. Kenya, while it seems to have a more promising democratic future with a constitution that has very detailed and specific provisions concerning abuse of incumbency, its track record so far, though better than that of Nigeria and Ethiopia, had still left much to be desired.

The fact that the Ethiopian, Nigerian or the old Kenyan constitutions were bereft of specific and detailed provisions concerning abuse of incumbency will perhaps not be very surprising when we look at the circumstances in which these constitutions were adopted. The 1999 Nigerian Constitution was adopted- one could even say imposed- by a military regime in a manner that excluded the public. The priority of the regime seems to have been to transfer power to a civilian administration that is sympathetic to the military and is least likely to change the *status quo*. Genuine democratization and transformation of power relations between the government and the public, was not really the priority for the military regime that promulgated the Nigerian Constitution

of 1999. Given that the Constitution is a product of a regime and a process which were inherently undemocratic it cannot come as a shock that the 1999 Nigerian Constitution does not have as much specific and detailed provisions intended to prevent abuse of incumbency. After all, the 'transition' was more in from than in substance and the constitution was not meant to usher a new democratic era by its sponsors in a way that will upset existing power relations.

In the Ethiopian case as well, the political group that was firmly and exclusively in control of the constitution-making process was an armed group which has succeeded in a long and bloody civil war. The overriding interest of this group was to ensure that it will be stay in power as long as possible under the new constitutional dispensation. Detailed provisions prohibiting abuse of incumbency that could potentially deter efforts of self-perpetuation in power were incompatible with the perceived self-interest of the political group that absolutely dominated the constitution making. As a result, such provisions are lacking in the Constitutions to the detriment of constitutionalism and democracy in the country.

When it comes to Kenya, till August 2010, the Constitution in operation in Kenya was the 1969 Constitution which replaced the independence Constitution of 1963. The 1969 Constitution was adopted in a time when centralization of power was the prevailing logic. Till the reintroduction of multiparty elections, the amendments to the 1969 Constitution have been geared towards strengthening the executive. In this period of Kenya's constitutional history, where a one-party autocracy was established, first in fact and then in law, preventing abuse of incumbency was clearly a non-issue. Even when the Constitution was amended to reintroduce multi-party politics in 1992 for the ruling party and the incumbent president, introducing constitutional provisions

that would limit abuse of incumbency was clearly against their self-interest.

Once the internal demands and the external pressure for democratization are mollified by the reintroduction to multi-party democracy, the call for comprehensive constitutional reform had been cleverly frustrated by various ways. Even after President Arap Moi's administration was replaced by a new administration in the first democratic transfer of power, with the rejection of the Bomas Draft in a referendum efforts at constitutional reform could not succeed.[392] The long and complicated effort at constitutional reform failed in 2005 because both the process and the substance of the Bomas Draft Constitution were incompatible with the demands of key civil society and political groups within the ruling Rain Bow coalition.[393] These disagreements were carried over to the 2007 election and the violent conflicts which ensued after the election.[394]

After a long and protracted process and violent conflicts that brought the nation to the precipice, successful completion of the constitutional reform process was a must for the political elites of the country. Within a framework adopted in the post-election negotiations and with the support of most of the major actors, the new Kenyan Constitution was written in a democratic and consensus driven process in which the public at large and civil society also participated. The most important thing to note about this process was that it was not dominated by any single political group. All the principal contestants to power were involved in the process. Another thing worth nothing is that, none of these actors were sure of their position after the next round of

[392] See Alicia L. Bannon, "Designing a constitution-drafting process: lessons from Kenya." The Yale Law Journal (2007): 1824-1872.
[393] See Michael Chege, "Kenya: back from the brink " *Journal of Democracy* 19, no. 4 (2008): 125-139.
[394] Ibid.

elections. This uncertainty meant that any of the principal actors could find themselves in opposition or in government after 2012. Therefore, it was in everyone self-interest to ensure that whoever forms the first government in the second Kenyan republic will not be able to easily perpetuate him/her in power as has been the norm so far. This self-interest of the main political actors coinciding with the desire of the demands of civil society has facilitated the adoption of detailed and specific provisions that clearly prohibit abuse of incumbency.

### *4.3 Checks and Balances: Horizontal Accountability as a Deterrent of Abuse of Incumbency*

From the discussing of the standard constitutional solutions for abuse of incumbency in one of the previous section of this chapter, one can see that the system of checks and balances between the three branches of government could be an important means of reducing abuse of incumbency. From the experience of the US, Germany and India, it is possible to see that horizontal inter-branch accountability can be used to address the problem of abuse of incumbency. Coming to the countries that are the focus of this study, we note that the system of checks and balances has not been very effective in addressing the problem of abuse of incumbency. Given the political matrix discussed in Chapter One, this is hardly surprising.

To start with the legislative branch of government, the legislative branch of government could potentially address the issue of abuse of incumbency in two major ways. One way is by enacting laws that prohibit various forms of abuse of incumbency to operationalize to and reinforce constitutional rules**.** The other way in which the legislative branch of government could address the problem of abuse of incumbency is by exercising its parliamentary oversight and control powers over the

executive and other organs of the state.

As far as legislating on the issue of abuse of incumbency is concerned, in all of the countries under study, the legislators have enacted laws prohibiting different forms of abuse of incumbency.[395] These laws could be subject to legitimate criticism on a number of grounds. To start with these legislations are most of the time in the form of electoral codes meant to govern the conduct of all parties during the electoral process. These legislations do not single out the governing party's conduct and subject it to the stringent regulation it should be subject to throughout its incumbency. By adopting a somewhat neutral or impartial stand towards all political parties while only the incumbent party could engage in abuse of incumbency, these legislations seem oblivious to the political matrix prevalent in African countries and fail to squarely address the problem of abuse of incumbency. In their comprehensiveness and detail as well, the legislations might leave much to be desired. But at the end of the day, there are legislations that prohibit abuse of incumbency in its various forms in all of the countries under study. The prevalence of abuse of incumbency is despite and not because of the lack of ordinary statutes that prohibit if not all many forms of abuse of incumbency.

Hence, where the legislatures of the various countries in question fail abysmally is not with regard to their function as law-makers but with their oversight and control

[395] See for example Proclamation To Ensure The Conformity of the Electoral Law of Ethiopia Proclamation with the Constitution of the Federal Democratic Republic of Ethiopia (Proclamation No. 111/1995 ) With amendments made by Proclamation to Provide For the Amendment of the Proclamation to Make Electoral Law of Ethiopia Conform with the Constitution of the Federal Democratic Republic of Ethiopia (Proclamation No. 438/2005 ) and A Proclamation to Provide for The Electoral Code of Conduct for Political Parties (Proclamation No. 662/2009); See also Electoral Act 2006 of Nigeria and An Act to Repeal The Electoral Act 2006 and Re-Enact the Independent National Electoral Commission, Regulate the Conduct of Federal, State and Area Council Elections and For Related Matters, 2010; See also the National Assembly and Presidential Elections Act (Chapter 7, revised edition 2009) (Kenya).

function. This should not be surprising however, since in all the countries under study, with the exception of Kenya, unified governments are the norm. In Nigeria and Ghana, this has been the case even though both countries have a presidential form of government. In Nigeria, the PDP has been able to control both the executive and the legislative houses since the inauguration of the fourth republic. In Ghana, though there has been a transfer of power from the NDC to the NPP and then back the NDC, Ghana always had a unified government since the establishment of its fourth Republic in 1992. In Ethiopia, where the Constitution had put in place a pure parliamentary form of government, naturally there has been a unified government since the establishment of the second republic in 1995. Therefore, in all these countries, there have not been divided governments or a situation where the legislative branch has been controlled by one party and the executive controlled by another party. This has meant that the majority of parliamentarians are from the party that controls the executive and the partisan interest of most parliamentarians is to ignore if not to facilitate abuse of incumbency.

The interest of ruling party members in the executive and that of those in parliament coincide more often than not. As a result, parliaments are hardly using their oversight and control function to hold the executive and members of parliament accountable for abuse of incumbency. Furthermore, the very attractive rewards the executive offers for individual parliamentarians and their constituencies induces parliamentarians to refrain from doing much that could upset the executive. The executive could reward loyal parliamentarians with a post in cabinet, a lucrative appointment as an executive or board member of a para-statal enterprise and also undertake development projects in her/his constituency enhancing her/his re-election bid. Those in the executive

normally hold senior leadership positions in the party hierarchy as well and have a decisive role in determining who could stand as a candidate of the ruling party in future elections. All of these give those in the executive branch of government effective levers to neutralize parliament as a possible check on their excess and abuse of incumbency.

Coming to the judiciary, as the experience of India and Germany indicates, it is possible for it to play an important role in checking abuse of incumbency by those in the political branches of government. We can also see from the experience of the countries in question that the judiciary in fact plays a crucial but limited role in addressing problems of abuse of incumbency.

One of the important limitations of the judiciary in addressing the problem of abuse of incumbency is the fact that remedies to abuse of incumbency by the judiciary often come too late and do very little to undo the damage that has been already done. This could be seen for example in the case of Nigeria where the decision of the Supreme Court (*AC v INEC* [2007] 12 NWLR (Pt 1048) 220) invalidated the Electoral Commission's decision to render the candidate nominated by the political party Action Congresses ineligible to run for the 2007 presidential elections.[396] However, by the time this decision was handed down by the judiciary, not more than a week was left till voting day.[397] A similar scenario arose in Ethiopia as well where the Supreme Court overturned the ban imposed by the national electoral Board against a coalition of domestic NGOs prohibiting them from observing the 2005 election. The decision

[396] Aminu Adamu Bello, "Judicial Review as an Efficient Tool for Electoral Reform in Nigeria," *SSRN eLibrary* (May 16, 2008): 7, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119526&download=yes.

[397] Ben Rawlence and Chris Albin-Lackey, "Briefing: Nigeria's 2007 general elections: Democracy in retreat," *African Affairs* 106, no. 424 (July 1, 2007): 501-502.

the Supreme Court was handed in just a week before voting day, leaving very little time for the organizations to train and deploy observers outside the capital city.[398] At the same time, as the experience of the Ghanaian judiciary in enabling the opposition to access state owned broadcasters illustrates, the judiciary could be instrumental in tackling abuse of incumbency.[399]

Furthermore, ordinary courts whose expertise and overall orientation is towards resolving specific and individual election disputes are usually ill-suited to address systemic problems of abuse of incumbency. Without a clear mandate and the institutional setup needed to carry out that mandate, procedurally, institutionally and doctrinally ordinary courts are not well disposed to proactively address widely prevalent and systematic abuse of incumbency. Matters are made even worse when the independence of the judiciary is wantonly undermined by the executive. The marginal or compromised role that the judiciary had in prior authoritarian regimes in all of these countries has also meant that the ordinary judiciary was ill-suited to take on the political branches and the problem of abuse of incumbency.

### *4.4 Democracy Supporting Institutions and Abuse of Incumbency*

The failure and insufficiency of the traditional system of checks and balances to restrain executive hegemony and the abuse of incumbency that comes along with it in many African countries has led some scholars to suggest that it might be necessary to enforce this system with a fourth branch of government. One of the earliest suggestions along this line was made by Larry Diamond in relation to Nigeria. In his

[398] Wondwosen Teshome B., "Civil Society and Democratization in Africa:The Role of the Civil Society in the 2005Election in Ethiopia," *International Journal of Human and Social Sciences* 4, no. 2 (2009): 85; *OSJE* v *National Election Board of Ethiopia*, Federal Supreme Court(Ethiopia) , 2005.
[399] *New Patriotic Party v. Ghana Broadcasting Corporation* [1993-94] 2 GLR 354 (SC).s

initial formulation of the idea, Larry Diamond had argued that the military should form a fourth and distinct branch of government.[400] He also argued that the military instead of elected officials should have control over; the Code of Conduct Bureau and Tribunal, the Federal and State Electoral Commissions, the Police Service Commission, the Judicial Service Commission and the National Population Commission.[401] He argued that giving the military such regulatory and administrative functions will reduce abuse of political power by elected officials and be good for stability.[402] Later on Larry Diamond reformulated his proposal that the military should have a supervisory role and control. Given the increasingly corrupt and undemocratic conduct of the military, the evolution of his view is quite understandable. In the reformulated version of his proposal for the institutionalization of a fourth branch of government, he asserts:

> The separation of powers between executive, legislative and judicial branches as proved inadequate in Nigeria to ensure the integrity of the democratic process. Hence, what is needed is almost a fourth branch of government, truly autonomous from party politics in its origins, composition and functioning. Such a new arm of government must have authority to oversee the appointment, funding and operation of crucial procedural institutions. The latter would be defined as 'those institutions that must remain above party conflict and independent of party control if the democratic process is to work.' [403]

In the reformulated proposal, he also suggests that 'a network of federal and state ombudsmen' as well as a 'General Accounting Office' should be included in this fourth branch of government.[404]

Similar proposals have also been made by a number of other scholars. One such

[400] Larry Diamond, "Nigeria in Search of Democracy," *Foreign Affairs* 62, no. 4 (April 1, 1984): 016.
[401] Ibid., 917-918.
[402] Ibid., 918.
[403] Larry Diamond, "Issues in the Constitutional Design of a Third Nigerian Republic," *African Affairs* 86, no. 343 (April 1, 1987): 216-217.
[404] Ibid., 217.

scholar is Kwasi Prempeh whose work is discussed at some length in Chapter One. Prempeh, advocating for what he calls structural constitutionalism contends that there is a need for "installation of credible checks and balances between the political branches (parliament and president), *strong and independent agencies of horizontal accountability*, and meaningful devolution of power to the local level"[405] (emphasis added). Therefore, Prempeh's argument for structural as opposed to juridical constitutionalism could be read as an advocacy for the constitutional establishment and strengthening of democracy supporting institutions.

Charles Fomabad as well, discussing the agenda for constitutional reform in Africa in of the coming decade, argues that there is a need to entrench what he calls 'key principles and institutions of Accountability. The institutions he refers to are: "the ombudsman; human rights commission; a public accounts committee; an auditor-General offices; an access to information commission; a media commission; an independent prosecuting authority; an anti-corruption agency; a judicial service commission; a minority rights commission; an independent electoral commission; and an electoral boundaries commission".[406] This list of institutions as well as the list of guiding principles is largely based on Chapter 9 of the Constitution of South Africa. Coming to the guiding principles, Fombad notes the importance of the principles of independence and impartiality stipulated in the South African Constitution.

Sujit Choudhry, focusing on the experience of South Africa and the phenomena of

[405] H. Kwasi Prempeh, "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa," *Tulane Law Review* 80 (2006 2005): 1259.
[406] Ibid., 1046.

a dominant party democracy which according to him threatens the sustainability of constitutional democracy in South Africa, argues that the South African Constitutional Court should take this threat seriously and develop its jurisprudence in a manner that is cognizant of this threat. Based on this premise, he comes up with a number of doctrines, some of which he teases out of the case law of the Constitutional Court, which he thinks could be useful in sustaining a constitutional democracy in a context in which a long term one party dominance is a given. One such doctrine is the doctrine of anti-domination. He defines this definition as a "a doctrine that would render illegitimate any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party."[407] This doctrine essentially provides for a very sweeping and general prohibition of abuse of incumbency as opposed to the specific prohibitions of different forms of abuse of incumbency.

The other doctrine, the doctrine of anti-capture, is a doctrine that Choudhry fashions based on the constitutional provisions and case law regarding independent institutions created by the South African Constitution.[408] Of course these institutions are the same institutions that Fombad has identified and advocated for as key institutions of accountability that should be institutionalized in future constitutional reforms in Africa. Choudhry in addition to the institutions found under Chapter 9 of the South African Constitution, takes into account in his formulation of the anti-capture doctrine other independent agencies such as the Public Service Commission which are found in other chapters of the Constitution.

[407] Sujit Choudhry, "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy," *Constituional Court Reciew 2* (2009) 40.
[408] Ibid., 55.

He also adds to this list the Judicial Service Commission and the National Prosecuting authority. Choudhry argues that the existence of the establishment of these institutions and the case law of the Constitutional Court in connection with these institutions underscores the need for the exercise of certain governmental functions outside the "chain of political control and command".[409] He argues that the need for such institutions is lies in the "the risks of politicization and partisan abuse by the governing party".[410]

It is interesting to note that all of the scholars whose work has been discussed above in this section of the chapter seem to agree on the need to insulate certain governmental powers from the reach of partisan politics. Diamond focusing on Nigeria, Choudhry on South Africa and Prempeh and Fombad reflecting on constitutionalism in Africa in general seem to have come to the same conclusion. The point of agreement seems to be the importance of constitutionally independent agencies and organs of state to tackle the problem of abuse of incumbency. The experience of the four jurisdictions which are the focus of this study also validates the merit of their insight.

In this regard it will be useful to start the discussion with the lessons we can draw from the success, albeit a qualified success, of Ghana. Ghana has succeeded in establishing a working electoral democracy and one can say that the calling card of Ghanaian democracy is the credibility of its electoral process. The credibility of the electoral process is largely attributable to the impartiality and integrity of its electoral management body.[411] The two major political parties in Ghana which

[409] Ibid.
[410] Ibid., 58.
[411] See Emmanuel Debrah, "Measuring Governance Institutions' Success in Ghana: The Case of the

ordinarily do not see eye to eye one much else agree that the Electoral Commission of Ghana is truly independent. This confidence in the Commission has meant that despite the razor-thin margins of victory in successive elections and despite the very acrimonious relations of the two parties, there has not been a breakdown of the democratic order in Ghana in 20 years.

The interesting question from the perspective of this study is if and how the Constitution of Ghana has contributed to the independence of the Commission. The Constitution has indeed contributed to the independence of the Commission by guaranteeing for the commissioners tenure security and also by providing terms of service comparable with the judges for the chairperson and deputy chairpersons of the Commission.[412] Furthermore, the Constitution also provides for the financial autonomy of the Electoral Commission.[413] The Commissioners are appointed by the President of the Republic on the advice of the Council of State.[414] The Council of State is a 25 member advisory organ that has the constitutional mandate to advise "the President in the performance of his functions."[415] This is so particularly in relation to appointments to be made by the President. The composition of the Council is such that the president in addition to the 11 members he appoints directly to the Council could easily have people loyal to him and his party. Therefore, the appointment procedure to the Ghanaian Electoral Commission cannot really be said to contribute much to the independence of the Commission. What is contributing to the independence of the



Electoral Commission, 1993-2008," *African Studies* 70, no. 1 (2011): 25-45.
[412] See Constitution of Ghana 1992, Article 44.
[413] Ibid., 54.
[414] Ibid, Article 70(2).
[415] Ibid, Article 89 (1 and 2).

Commission from the perspective of the Constitution is the term of service, tenure security and financial autonomy that the commissioners enjoy.[416]

The Ghanaian Constitution also offers another interesting example of the importance of independent democracy supporting institutions when we look at the National Media Commission of Ghana.[417] This Commission has in addition to its overall function to promote and safeguard freedom of the media has the mandate of "to insulate the state-owned media from governmental control".[418] The Constitution has vested this Commission with the necessary regulatory and administrative powers to discharge this function. The Commission could be credited for the relative yet considerable measure of success that Ghana had in reducing abuse of incumbency in connection with state owned media. The success of the institution in turn depends on the independence it has been afforded by the Constitution. The Ghanaian Constitution has insured the independence of the National Media Commission through the process of appointment of commissioners and the financial autonomy granted to the Commission. Interestingly, the Constitution provides for a unique appointment procedure for the members of the National Media Commission. Unlike other agencies established by the Constitution and which are supposed to be independent the President does not get to appoint Commissioners to the National Media Commission after consultation with the State Council. The Commission has fifteen members out of



[416] Mathias Hounkpe and Ismaila Madior Fall, *Electoral Commissions In West Africa A Comparative Study* (Friedrich-Ebert-Stiftung, 2010), 108-109.
[417] Generally speaking, such institutions are becoming more and more the norm as we can see in the comparative constitutional law literature. See Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*. Edward Elgar Publishing, 2014., 96.
[418] See the Constitution of Ghana 1992167(c).

which the President appoints two and parliament appoints three.[419] The remaining ten members are appointed by various professional and religious associations. "The Ghana Bar Association, the Publishers and Owners of the Private Press, the Ghana Association of Writers and the Ghana Library Association, the Christian group (the National Catholic Secretariat, the Christian Council, and the Ghana Pentecostal Council), the Federation of Muslim Councils and Ahmadiyya Mission, the training institutions of journalists and communicators, the Ghana Advertising Association and the Institute of Public Relations of Ghana and the Ghana National Association of Teachers" are entitled to appoint one representative each.[420] The Ghana Journalists Association is entitled to appoint two representatives to the commission. Therefore, appointees of from the political branches of government are clearly in the minority in the Commission. The National Media Commission, just like the Electoral Commission is also entitled to draw its budget directly from the national consolidated fund and is not financially dependent on the executive.

While the National Media Commission and Electoral Commission of Ghana provide positive examples of how a constitution could be instrumental in establishing institutions independent from the control and influence of the political branches, Nigeria and Ethiopia provide ample lessons of how constitutions could fail in this regard. In Nigeria, for example, the President has the power to appoint all the Resident Electoral Commissioner and is entitled to appoint the members of the Electoral Commission as well as the Chairperson of the Commission subject to confirmation by the Senate. Under this arrangement, the first President Obasanjo has appointed members of the ruling party to the commission and also as Resident

[419] The Constitutionn of Ghana (1992), Article 166.
[420] Ibid. Article 166(1).

Electoral Commissions. As a result, the electoral commission is perceived as partisan to the ruling party and has been a huge part the abuse of incumbency problem.[421]

In Nigeria, there is no media commission or council comparable to the one in Ghana. The Nigerian Constitution does not establish such state organ. There are statutorily created National Broadcasting Commission, the Nigerian Press Council, and the National Communications Commission. Of these three organs, the one that is most important is National Broadcasting Commission because of the accessibility and influence of the electronic media as compared with the print media in most of Africa. Due to a large illiteracy rate, the inaccessibility and expensiveness of newspapers, the majority of Africans rely on the electronic media to get information and as a result most African governments have been more intent on controlling the broadcast media than the print media.[422] Members of the National Broadcasting Commission are appointed by the President.[423] There is not even a requirement of approval of these appointments by any of the legislative houses.[424] Their term of office is for three years and renewable once. Therefore, the President could hand pick and appoint very loyal commissioners and replace those whose performance does not please him in a short period of time. Clearly the National Broadcasting Commission which is the equivalent of the Ghanaian National Media Commission lags behind greatly in terms of

[421] See Moveh David Omeiza, "Analysis of the Structure of Nigeria's Independent National Electoral Commission," *European Scientific Journal* 8, no. 3 (2012).

[422] Sam Chege Mwangi, "A Search for an Appropriate Communications Modelfor Media in New Democracies in Africa," *International Journal of Communication* 4 (2010): 6.

[423] See National Broadcasting Commission Decree No 38 of 1992 Laws of the Federation of Nigeria.

[424] Akeem M. Adeyanju and Dr Jenkeri Zakari Okwori, *Nigeria, Research Findings and Conclusions* , (BBC World Service Trust, available at http://downloads.bbc.co.uk/worldservice/trust/pdf/AMDI/NIG_AMDI_Report.pdf and last accessed on December, 11, 2013 ), 2006 33

independence from its Ghanaian counterpart. Not surprisingly it is seen as an instrument of control by the government and not as a protector of the freedom of the media and the independence of the state owned media from political instrumentalization by the incumbent.

When we come to the Ethiopian experience as well, one can observe similar problems. The Ethiopian Constitution, just like the Nigerian Constitution provides for an 'independent' electoral board[425] but does not provide for any institution to police the state owned media from abuse of incumbency and does not insulate the regulation of the mass media from partisan interests. The Ethiopian Constitution provides that the National Election Board should be independent and impartial and stipulates that its members shall be appointed upon the recommendation of the Prime Minister.[426] Given the parliamentary form of government established by the constitution and the first past the post single member district electoral system, a single party could easily attain a majority in the parliament. Therefore, it is extremely unlikely that there will be a situation in which the executive and the parliament will be controlled by different parties (one could say this, although theoretically possible, is virtually impossible). This means, as has also been observed in practice, the party in power would nominate and appoint the members of the electoral board. This constitutional arrangement has gravely undermined the independence of the Board and contributed to the consolidation of a defector one party state in Ethiopia.

When it comes to media regulatory organs, as has been noted earlier, the Ethiopian Constitution does not establish such institutions. However, such

[425] FDRE Constitution, Article 102.
[426] Ibid.

institutions have been established statutorily and not even a pretense of maintaining their independence has been made. One such organ is the Ethiopian Broadcasting Authority. This organ has the overall power to license and regulate the broadcast media in Ethiopia and is run by its own internal board. The legislation establishing the Authority leaves the number of board members to be determined by the government and that the members are to be appointed by the government upon recommendation by the Ministry of Information. The legislation in question also provides clearly that the Authority is accountable to the Minister of Information.[427] The State Broadcasters, i.e. the Ethiopian Television and Radio services, are overseen by a General Manager appointed by the executive and overseen by a board with all the members appointed by the parliament upon recommendation of the government. For the same reasons raised in relation to the Broadcasting Authority, this arrangement is clearly ill-suited to ensure the independence and impartiality of the state owned broadcasting services. In practice as well, it has resulted in a very partisan state media which is a propaganda machine for the ruling party.

The importance of independent constitutionally established state oversight institutions which have the function of supporting democracy among other things by reducing abuse of incumbency could also be inferred from the new Kenyan Constitution. The new Kenyan Constitution institutionalizes such organs in an elaborate manner and with painstaking care to ensure their independence. These institutions include the Independent Electoral and Boundaries Commission, Judicial Service Commission, the Public Service Commission, National Police

[427] Broadcasting Service Proclamation No. 533/2007

Service Commission.[428] The Constitution provides that these organs will have the objective of "secure the observance by all State organs of democratic values and principles" and shall "promote constitutionalism".[429] The Constitutions stresses the independence of these institutions and constrains the discretion of the president in appointing to these offices by laying down criteria to be met and values that should be uphold in the appointments which are subject to approval by parliament.[430] The Constitution provides for the financial autonomy of these commissions and offices and also provides for tenure security.[431] Tenure security is guaranteed by establishing non-renewable six years term of office and clearly stipulated exceptional grounds of removal and a very strict procedure for removal. The removal procedure for officers of these institutions has three steps. First, for a commissioner or a holder of one of the offices established under Chapter 15 to be removed from office, a complaint alleging that serious violation of a law or the Constitution, gross misconduct, incapacity, incompetence or bankruptcy must be submitted to the legislature by any interested person.[432] Then the legislature will have to be satisfied with the allegation and if the legislature is satisfied that the allegation is well founded then it will refer the matter to the president.[433] If the President is entitled to suspend the person against whom the allegations have been made and then assemble a three person panel to investigate the allegation and submit a report and a binding recommendation to the president.[434] The Constitution also restricts the power of the president to appoint members to such

[428] Constitution of Kenya (2010) Article 248.
[429] Ibid, Article 249(1).
[430] Ibid, Article 250(1-5).
[431] Ibid, Article 250(6-9).
[432] Ibid, Article 251(1).
[433] Ibid, Article 251(2-3).
[434] Ibid, Article 251(6).

panel. One member has to be a current or ex-judge of a superior court and the other two must be individuals qualified to be appointed High Court judges.[435] However, the President has more discretion in appointing a fourth member who "is qualified to assess the facts in respect of the particular ground for removal".[436] Given these provisions, it seems that unseating someone holding office under Chapter 15 of the Constitution is not an easy task.

Therefore, taking into account the manner of appointment, financial and operational autonomy as well as tenure security provided by the Constitution, one can say that the new Kenyan Constitution has established a sphere of governmental authority removed from partisan politics and ability to rein on abuse of incumbency. In addition to the Chapter 15 institutions, the Kenyan Constitution also establishes a Director of Public Prosecutions separate from the office of the Attorney General.[437] The autonomy of the Director of Public Prosecutions is protected principally tenure security provided for the office.[438] The Director of Public prosecutor is to be appointed by the President subject to the approval of the National Assembly.[439] The Director has a non-renewable eight-year term of office.[440] The grounds and procedures of removal are similar though to the procedure for the removal of office holders of commissions and offices under Chapter 15. However, the Kenyan Constitution does not provide for a media regulatory organ which will protect the state owned media from abuse of incumbency. Rather, the Constitution has imposed an obligation to establish such

[435] Ibid, Article 251(5).
[436] Ibid, Article 251(5) (c).
[437] Ibid, Article 157(1).
[438] Ibid, Article 157(5).
[439] Ibid, Article 157(2).
[440] Ibid, Article 157(5).

an institution on the legislature.[441] The Constitution stipulates that the media regulatory organ to be established by parliament should be "independent of control by government, political interests or commercial interests" and "reflect the interests of all sections of the society".[442]

At this juncture, it is important to point out that the role of independent democracy supporting institutions/ institutions of horizontal accountability in reducing abuse of incumbency is not that of replacing conventional checks and balances of the three traditional branches of government. Instead these institutions discussed in this section are supposed to supplement and reinforce checks and balances between the traditional three branches of government. It can be said that there is a symbiotic relationship between a properly functioning system of checks and balances and a network of independent institutions supporting democracy in which both reinforce each other. This could be illustrated with the experience of Ghana where the judiciary stepped in when the national media Commission had failed to guarantee the impartiality of state owned media. South Africa also provides a number of examples in which judicial review was stem the tide of politicization of the democracy supporting and allied institutions. On the other hand, one could hardly think of an independent judiciary without an independent judicial service commission or a parliament capable of providing some scrutiny and criticism to the executive without an independent electoral management body.

***Conclusion***

The prevalence of abuse of incumbency in many African political systems is very

[441] Ibid, Article 34(5).
[442] Ibid, Article 34(5) (a-b).

much related to the political matrix that has been discussed in Chapter Two of this dissertation. One way in which the political matrix is related with abuse of incumbency is in its tendency to reinforce and accentuate the natural inclination of all most all incumbents to hold on to power as long as possible. In any political system, most politicians who are in power dread the prospect of relinquishing power and will go to a great length to stay at the helm if it is possible to do so. This is not a uniquely African phenomenon. The African political matrix that has been described in the preceding chapter reinforces this tendency. The network of political elites who are currently in power and their clients who belong to their network of patronage have every reason to see in great foreboding the day they will part with power. Their access to political power pays huge economic dividends and is also seen to be the only security from being marginalized in the political life of the country. The incumbents fear that once they step down and relinquish power to their political opponents they will lose the economic privileges they enjoy currently, risk prosecution, dispossession of what they have acquired so far and exclusion in the political process. By losing their political power they fear that they will jeopardize their political and economic interests which seem to be without any safeguard unless they are in power.

The political matrix of African countries raises the premium on political power so high and the stakes are simply too great for the incumbents to let their fate be decided by free and fair elections. It will seem almost irrational for them to subject their political future on which their economic interest and political survival depends to a process that they cannot control and manipulate. The political matrix greatly enhances the inclination of incumbents to stack the cards in their favor. In the political matrix most African incumbents operate in, not to do so will be seen by most incumbents as a

suicidal madness. Therefore, there is a very strong motivation to abuse incumbency that arises out of the political matrix or environment of most African countries.

For example, while Kenyatta was in power in Kenya, his own ethnic community the Kikuyu were said to have benefited more from his rule than others.[443] When he was succeeded by Arap Moi's upon his death, the Kalenjin, which is the ethnic group that Moi hails from and other rift valley ethnic groups were said to be preferred by the state.[444] The Kikuyu elite around Kenyatta had been trying hard to ensure that Moi, who was Kenyatta's deputy, will not succeed him automatically upon his death.[445] After failing in this effort of political manoeuvre, there was a coup attempt once Moi assumed office.[446] Such rivalries between the elites of the various ethnic groups of Kenya have continued till recently. In this fierce competition, abuse of incumbency is just one useful instrument available to those in power. In Ethiopia as well, the determination of the ruling party that has been in power since 1991 as well as the equally determined stand of many of its opponents to dislodge it has a lot to do with the rivalry of elites of different ethnic groups.[447] The clique leading the TPLF fears losing the economic advantages it had secured and the wealth it has amassed in the past twenty years as well as the possibility of retribution. This fear as well as the desire to continue profiting from the status quo is strong motivations to abuse ones incumbency to stay in power.

In addition to providing such a strong motivation to stay in power the political matrix



[443] Joel D Barkan, "Kenya after Moi," *Foreign Affairs* 83 (2004): 88.
[444] Ibid., 89.
[445] M. Tamarkin, "From Kenyatta to Moi: The Anatomy of a Peaceful Transition of Power," *Africa Today* 26, no. 3 (1979): 22-23.
[446] Barkan, "Kenya after Moi," 88-89.
[447] John Abbink, "The Ethiopian Second Republic and the Fragile 'Social Contract'," *Africa Spectrum* 44, no. 2 (2009): 14.

of most African countries is related with abuse of incumbency in that it provides very instructive historical precedents of abuse of power. These precedents are provided by both the colonial and post-colonial African states. These precedents gleaned from the autocratic immediate past of most African states are relevant since they instruct and embolden the current incumbents in their behavior and also in that they desensitize the polity to what should otherwise have been considered outrageous behaviors. Furthermore, the political matrix also creates an enabling environment that makes abuse of incumbency rather easy to undertake and get away with. The political economy of African states which is an integral component of the political matrix discussed in the Chapter Two and which is largely state dominated as well as the autocratic legacy of the past provide great instruments of abuse of incumbency.

Therefore, if constitutionalism is to succeed in this political context, the conventional approaches of minimizing abuse of incumbency have to be reinforced. This should be done particularly by adopting clear, detailed and specific rules that prohibit various forms of abuse of incumbency. It is also important to complement the checks and balances among the three traditional branches of government with independent institutions of horizontal accountability or 'democracy supporting institutions'. Such are measures that are needed to enhance the prospects of success of constitutionalism in the African political context. Therefore, they could be considered as essential requirements of contextualizing constitutionalism in African states.

# Chapter Five: Ethnic Diversity and Constitutionalism in Africa: Case Studies

### *Introduction*

In all the four countries included in this study, ethnicity is politically salient. In all these countries, although not to the same extent, politicized ethnicity has given rise to conflicts and caused instability. In Ghana, other than sporadic and localized ethnic conflicts ethnicity had not resulted in a major crisis at the national level so far. It could be argued that the Ewe – Akan/Ashanti rivalry has and still threatens the stability of the democratic order in Ghana but, so far a breakdown of the democratic order had been successfully avoided. Ghana has maintained its political stability and there is every reason to expect that this stability will continue and Ghanaian democracy will be consolidated. In Nigeria, although ethnicity has not lost its salience in politics at all, a repeat of the ethnic conflict and civil war that had torn apart the entire nation during the first decade after independence has been avoided. After the 2007 elections in Kenya, ethnic tensions that have been simmering for years and which have been flaring up during elections in the past two decades had ultimately culminated in the worst ethnic conflict and violence in Kenyan history. In Ethiopia, although the civil war in which various ethno-regional armed groups took the lead had come to an end in 1991, ethnic relations in the political sphere have become increasingly problematic with the adoption of ethnic federalism in the early 1990's.

In all these four countries, constitutions have been used to address the above problems to a varying extent and using different approaches. In Nigeria, a very conscious and elaborate constitutional engineering has been one of the responses to the ethnic conflicts

that brought the first republic to an end. In Ethiopia, just like in Nigeria, at least for the last two decades the Constitution has become a major instrument of addressing the issue of ethnicity. In Kenya and Ghana in contrast, constitutional design had not been used that extensively and that deliberately to address the problems related with ethnicity. However, with the adoption of the new Kenyan Constitution of 2010 which was informed by the 2007 crises that had demonstrated the shortcomings of the previous Kenyan constitution, Kenya seem to have begun in earnest to address the issue of ethnicity using its Constitution.

In this chapter, the experience of each of these four countries with the politicization of ethnicity will be discussed. Furthermore, the constitutional response of each country to ethnicity will be explored and evaluated. In the next chapter, the common themes and solutions that have been adopted in all or most of these countries will be discussed at some length.

### *5.1 Ethnic Diversity and Constitutionalism: The Nigerian Experience*

#### A. A Brief Historical Sketch

The Nigerian state is purely a creation of the British Empire's colonial conquest in West Africa.[448] The conquest of what is now Nigeria started with the annexation of Lagos as a colony by the British Crown and later on the establishment of protectorates and colonies in what is now southern Nigeria by the Royal Niger Company which took over the Oil Rivers Protectorate of the Crown in 1886.[449] In 1899, the charter of the Royal Niger

[448] James Smoot Coleman, *Nigeria, Background to Nationalism* (Berkeley: University of California Press, 1971), 45.
[449] Elizabeth Allo Isichei, *A History of Nigeria* (London; New York: Longman, 1983), 362–363; see also Sir Alan Burns, *History of Nigeria* (G. Allen & Unwin ltd., 1929), 126–152.

Company was revoked and the Crown took over the administration of the territories that were till then governed by the company.[450] Just around that time, the British government took over and consolidated the territorial advances made and treaties concluded by the Royal Niger Company in northern Nigeria and established the Protectorate of Northern Nigeria.[451] These two entities (i.e. the *Colony and Protectorate of Southern Nigeria* and *the Protectorate of Northern Nigeria*) were administered separately till they were amalgamated in 1914.[452] After the amalgamation of these various colonies and protectorates which have been acquired through force and 'diplomacy', the Colony and Protectorate of Nigeria came in to existence.[453]

The amalgamation of the Lagos Colony with the Protectorate of Southern Nigeria and the further amalgamation of the Southern Colony and Protectorate with the Protectorate of Northern Nigeria were largely motivated by economic factors.[454] It was not cultural or historical affinities and considerations which lead to the creation of Nigeria. Rather, the need to support the cost of administration of the northern protectorate with the revenue gathered from the south was the single most important factor behind the amalgamation.[455] Furthermore, the amalgamation did not mean real political and economic integration.[456] The colonial state maintained a distinct administrative structure for the east, west and



[450] Ibid., 162–63.
[451] John Charles Hatch, *Nigeria: The Seeds of Disaster*, First Edition edition (NTC/Contemporary Publishing, 1970), 167.
[452] Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999), 68.
[453] Julius O. Adekunle, "Nationalism, Ethnicity, and National Integration: An Anaylsis of Political History," ed. Ikime Obaro (Heinemann, 1980), 407.
[454] T.N. Tamuno, "British Colonial Administration in Nigeria in the Twentieth Century," in *Groundwork of Nigerian History*, ed. Ikime Obaro (Heinemann, 1980), 393.
[455] Toyin Falola and Matthew M. Heaton, *A History of Nigeria* (Cambridge University Press, 2008), 68.
[456] Ibid., 69.

especially the north.[457] Furthermore, successive constitutions adopted prior to and during independence as well, established a federal state with three regions in each of which one of the three major ethnic groups (i.e. the Yoruba in the west, the Igbo in the east and Hausa-Fulani in the north) constituted a majority.[458]

Therefore, since its inception the Nigerian state was an amalgam of various ethnic groups which have no prior history of common statehood. The pre-colonial history and colonial rule did not also foster a common national identity. In fact it could be said that the modern phenomena of ethnicity emerged during colonial rule.[459] For starters the system of indirect rule and the organization of the colonial administration led to the crystallization of ethnic identities that existed in very fluid forms till then. Particularly the east, west and north division and parallel administration through native authorities was crucial for the ascendancy of Igbo, Youruba and Hausa-Fulani ethnic identities with great political significance. Elizabeth Isiche notes; "By seeing subject peoples primarily in ethnic terms (rather than, for instance in economic terms) colonial rulers did much to ensure that they viewed themselves in the same way. They assumed that ethnic groups had corporate interest and characteristics, until it finally became true that they did."[460]

Another important development during colonial rule was the fact that various ethnic communities that had hitherto been largely self-sufficient and did not have continuous and competitive interaction had to compete for scarce resources in the new urban centers



[457] Elizabeth Allo Isichei, *A History of Nigeria* (London; New York: Longman, 1983), 391.
[458] John Charles Hatch, *Nigeria: a History* (London: Secker and Warburg, 1971), 205–212; Michael Crowder, *The Story of Nigeria* (London: Faber, 1978), 242–257..
[459] Okwudiba Nnoli, *Ethnic politics in Nigeria* (Fourth Dimension Publishers, 1978), 36.
[460] Elizabeth Allo Isichei, *A History of Nigeria* (London; New York: Longman, 1983), 392.

to secure the economic opportunities created in the colonial economy.[461] In this competition, ethnic networks institutionalized through mutual self-help associations based on ethnicity were of crucial importance.[462] As Nigeria came close to independence, three parties championing the causes of the elites of the three regions with territories in which the three major ethnic groups were dominant became prominent. With the expansion of the franchise for regional and national assemblies prior to independence, the Action Group led by Obafemi Awolowo, the National Council of Nigeria and the Cameroons (NCNC) led by Nnamdi Azikiwe and the Northern People's Congress emerged as the parties of the Yoruba (the dominant ethnic group in the west), the Igbo (the dominant group in the east) and the Housa-Fulani (the dominant ethnic group in the north).[463]

The unmistakable link between these parties and their ethnic support base was also clearly demonstrated by the ties the political parties had with the communal ethno-cultural associations of the respective ethnic community that constituted their political base.[464] These ethnic cleavages also coincided partially with a south-north (Christian-Islam) religious divide. Discussing the colonial legacy in Nigeria and its relation to ethnicity, Larry Diamond identifies as important legacies of the colonial era; the fact that the different regions of Nigeria were administered without being actually integrated, the development and educational gap between the south and the north, the promotion of



[461] Ibid., 73.
[462] Ibid., 103.
[463] John Charles Hatch, *Nigeria: a History* (London: Secker and Warburg, 1971), 213.
[464] Id. 201-202. The Action group had close links with the EGBE OMO ODUDUWA (an ethno cultural association of the Yoruba), the Ibo State/Federal Union on the other hand was associated with the NCNC, while the Northern People's Congress had links with the Bauchi Improvement Association.

ethnic consciousness as well as the emergence of a state that is much bigger than all other actors in the economy and society.[465] He also notes that:

> As the colonial state extended and deepened its control over economic and social life, and as state control began to be opened to indigenous competition, personal income and modern occupational status as well as the control and distribution of national wealth became even more dependent upon position in and access to the state. The state thus became the instrument for the formation and consolidation of class domination ….the desire to achieve elite social status and to accumulate wealth to obtain a place in the emergent dominant class thus motivated a fierce hunger for political power. The competition between these parties was animated by fear of domination and also the economic rewards of political control that they all anticipated upon independence.[466]

The northerners were afraid of being dominated and marginalized by the elites of the east and the west who were more exposed to western education and had secured a foot hold in the modern economy.[467] Those in the south feared domination by the populous north in which more than half the Nigerian population lived.[468]

Independence came in such a setting and by the time the first Republic came into existence, the elites of the north and the east had formed a coalition government in which the Action Group was the official opposition at the federal level.[469] The coalition of the north and the east (National Council of Nigeria and the Cameroons) and the north (Northern People's Congress) was a tactical alliance and it was not based on principle or common political viewpoints.[470] Using their control at the center, the eastern and northern elites undermined the Action Group government in the west by exploiting a schism

[465] Larry Jay Diamond, *Class, Ethnicity, and Democracy in Nigeria: The Failure of the First Republic* (Syracuse University Press, 1988), 41-43.
[466] Ibid.
[467] Toyin Falola and Matthew M. Heaton, *A History of Nigeria* (Cambridge University Press, 2008), 92-93.
[468] Charles R. Nixon, "Self-Determination: The Nigeria/Biafra Case," *World Politics* 24, no. 04 (1972): 487.
[469] Larry R. Jackson, "Nigeria: The Politics of the First Republic," *Journal of Black Studies* 2, no. 3 (March 1, 1972): 282. .
[470] Paul Anber, "Modernisation and Political Disintegration: Nigeria and the Ibos," *The Journal of Modern African Studies* 5, no. 2 (September 1, 1967): 175.

between the regional premier of the west and the leader of the party who was leading the parliamentary opposition at the center.[471] This created one of the major political crises of the brief first republic. Other major crises occurred when each regional government tried to inflate the census result of its own region with the view to be gain more seats and political clout at the center.[472] A subsequent and more serious crisis arose following the first national election after independence.[473]

The election pitted a coalition of parties which had their core support base in the south against the predominantly northern coalition.[474] The electoral process was seriously flawed and marred by irregularities and violence.[475] During the political instability that followed the national election and an election in the western region, officers hailing from the east staged a coup in which many prominent northern politicians were killed.[476] General Ironsi, who was of Igbo extraction, became a military head of state.[477] The fact that the coup was staged mainly by officers from the east while the causalities were almost exclusively prominent northern politicians aggrieved northerners.[478] Furthermore, General Ironsi was perceived as favoring fellow Igbos in his administration and as a result a counter coup was staged by northern officers.[479] This was also accompanied by massive violent attacks on Igbos living in northern Nigeria.[480] The following crises

[471] John Charles Hatch, *Nigeria: a History* (London: Secker and Warburg, 1971), 225-226.
[472] Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999), 108.
[473] Id., 105-106.
[474] Douglas G. Anglin, "Brinkmanship in Nigeria: The Federal Elections of 1964-65," *International Journal* 20, no. 2 (April 1, 1965): 176.
[475] Id. 179.
[476] Margery Perham, "Reflections on the Nigerian Civil War," *International Affairs (Royal Institute of International Affairs 1944-)* 46, no. 2 (April 1, 1970): 232–233; E. Wayne Nagziger, "The Political Economy of Disintegration in Nigeria," *The Journal of Modern African Studies* 11, no. 04 (1973): 512.
[477] Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999), 117.
[478] Claude E. Welch, "Africa's New Rulers," *Africa Today* 15, no. 2 (April 1, 1968): 9.
[479] Joseph C. McKenna, "Elements of a Nigerian Peace," *Foreign Affairs* 47, no. 4 (July 1, 1969): 670.
[480] Ibid.

almost led to the dismemberment of Nigeria and one of the deadliest civil wars in post-colonial Africa.[481] Fleeing the violent attacks against them, Igbos flocked to the east and the military head of the eastern region declared the independence of the eastern region as the 'Republic of Biafra'.[482]

After the civil war and another coup and assassination of a head of state, the second republic was inaugurated in 1979.[483] However, the corruption and economic mismanagement of the civilian administration made it unpopular and the second republic came to an end through a military coup.[484] After a lengthy transition process (which was deliberately prolonged by a military head of government reluctant to relinquish power) a new constitution was adopted and elections were held to commence what was supposed to be Nigeria's third republic.[485] However, the winner of the election was from the south, specifically from the south west and his victory was unacceptable for the northern military and political establishment who were well entrenched in power by then.[486] The election was invalidated and the winner languished in jail till 1999 only to be poisoned just when his freedom seemed most imminent.[487] Finally, in 1999, due to the sudden death of General Sani Abacha whose brazen corruption and brutality had totally



[481] Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999), 119-126
[482] Billy J. Dudley, "Nigeria's Civil War," *The Round Table* 58, no. 229 (1968): 28.
[483] Richard L. Sklar, "Democracy for the Second Republic," *Issue: A Journal of Opinion* 11, no. 1/2 (April 1, 1981): 14; Peter Koehn, "Competitive Transition to Civilian Rule: Nigeria's First and Second Experiments," *The Journal of Modern African Studies* 27, no. 03 (1989): 40–403..
[484] Larry Jay Diamond, "Nigeria's Perennial Struggle," *Journal of Democracy* 2, no. 4 (1991): 74.
[485] Peter M. Lewis, "Endgame in Nigeria? The Politics of a Failed Democratic Transition," *African Affairs* 93, no. 372 (July 1, 1994): 324.
[486] Ajayi Ola Rotimi and Julius O. Ihonvbere, "Democratic Impasse: Remilitarisation in Nigeria," *Third World Quarterly* 15, no. 4 (December 1, 1994): 677.
[487] Peter Lewis, "Nigeria: An End to the Permanent Transition?," *Journal of Democracy* 10, no. 1 (1999): 152.

discredited the military's overt involvement in politics, the fourth Nigerian republic was brought in to existence and a new constitution was promulgated by the military.[488]

### B. Nigerian Constitutional Engineering to Manage Ethnicity

The 1999 Constitution of Nigeria and the successive constitutions adopted after the demise of the first republic share a number of features that were put in place to address the question of ethnicity. After the disastrous effects of ethnic rivalry between the elites of the three major ethnic groups in the first Republic, the need to come up with a constitutional framework that will prevent a similar tragedy was high on the agenda of those who framed the 1979 Constitution. In fact, one could say that this was the overriding concern for the framers of the 1979 Constitution. The solutions and innovations adopted in the 1979 constitution had largely been kept intact in subsequent Nigerian constitutions. These solutions and innovations include: [489]

- a switch from the parliamentary to a presidential form of government[490]
- a requirement of geographic spread of the votes of a successful presidential candidate[491]
- the regulation of political parties and a ban of sectional/ethnic parties to foster parties with a national identity[492]
- the creation of new states[493]

[488] Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999), 117.
[489] Rotimi T. Suberu, *Federalism and Ethnic Conflict in Nigeria* (US Institute of Peace Press, 2001), 35-36.
[490] See Article 122 of the 1979 Nigerian Constitution.
[491] See Articles 125 and 126 of the 1979 Nigerian Constitution.
[492] See Articles 201-209 of the 1979 Nigerian Constitution.

- The introduction of the federal character principle.[494]

The switch from a parliamentary to a presidential form of government was deemed appropriate for a number of reasons. The first reason was the view that the division of ceremonial and executive powers between a head of state and government was perceived to be alien to the traditional 'African' conception of leadership.[495] The other and perhaps more substantive reason was the belief that the presidential form of government was more likely to engender a strong executive with a broader national support base than that would be the case in a parliamentary form of government (which had made it possible for an unapologetic regional party control the federal government in the second general election after independence).[496]

Successive Nigerian constitutional framers have maintained that the presidential form of government twined with a requirement that in addition to wining a plurality or a majority in an election, a presidential candidate should win a quarter of the votes at least in two third of the states, will give rise to a government with a wider regional support base. The separation of powers between the executive and the legislature as well as the enhanced importance of upper houses in presidential forms of government leading to a more dispersed power structure was also taken in to account in making the switch from a Westminster parliamentary form of government to a presidential form of government.[497]

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[493] First Schedule the 1979 Nigerian Constitution.
[494] See Article 14(3) of the 1979 Nigerian Constitution.
[495] J.D Ojo, "The Executive Under the Nigerian Constitutions, 1960-1995," in *Federalism and Political Restructuring in Nigeria*, ed. Kunle Amuwo et al. (Spectrum Books, 1999), 299; E. Alex Gboyega, "The Making of the Nigerian Constitution," in *Nigerian Government & Politcs under Military Rule 1966-79*, ed. Oyeleye Oyediran (The Macmillan Press Ltd, 1979), 247.
[496] Ojo, "The Excutive Underthe Nigerian Constitutions, 1960-1995," 300; Rotimi T. Suberu and Larry Diamond, "Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria," in *The Architecture of Democracy*, ed. Andrew Reynolds (Oxford University Press, 2002), 241.
[497] Suberu, *Federalism and Ethnic Conflict in Nigeria*, 36-37.

The parliamentary form of government was also faulted as being likely to give rise to the acrimony and tension that had existed between the President and the Prime Minister in the last days of the first republic.[498]

To ensure that the presidential form of government will not result in a president with a narrow ethnic and regional support base, the framers of the 1979 Constitution introduced a requirement of vote distribution according to which a successful candidate should win at least a quarter of the votes in two third of the states.[499] In a subsequent formulation of the vote distribution requirement occasioned by the adoption of a new constitutions in 1993 after a second round of military administration, the rule had been modified and instead of a plurality, a majority was required and the threshold of vote distribution had been changed from a quarter to a third of the votes in two third of the states.[500] The current Nigerian Constitution had however reverted to the requirement of a plurality of all the votes cast and a quarter of the votes in two third of all the states of the federation plus the federal capital.[501]

To avoid the return of the divisive role that political parties had in the first republic by pitting one region/ethnic group against the other, the 1979 and subsequent Nigerian Constitutions had tried to come up with various strategies of creating parties with a national as opposed to sectional outlook. Essentially these strategies could be divided in two categories. The first element of this two pronged approach was a ban of not just

[498] Bolade M Eyinla, "Prognosis for the Organization of the Executive Arm of Government in Nigeria's Fourth Republic," in *Federalism and Political Restructuring in Nigeria*, ed. Kunle Amuwo et al. (Spectrum Books, 1998), 324; Gboyega, "The Making of the Nigerian Constitution," 247.

[499] Donald L. Horowitz, "Electoral Systems: A Primer for Decision Makers," *Journal of Democracy* 14, no. 4 (2003): 118-119.

[500] Benjamin Reilly, "Political Engineering and Party Politics in Conflict-Prone Societies," *Democratization* 13, no. 5 (2006): 820 .

[501] Constitution of the Federal Republic of Nigeria 1999, Section 133 and 134.

ethnic parties but also of names, party mottos and symbols associated with any particular ethnic or religious group.[502] So, we could consider this to be a negative or prohibitive approach.

In addition to these, there were requirements that the head-quarters of all parties should be located in the capital of the Federation, that the leadership of the party should be composed of individuals from at least two-third of the states and that all political parties should be open for membership to all Nigerians.[503] These second set of rules were meant to promote the emergence of parties that are more representative and inclusive. They seem to go further than mere prohibitions and are intended to affirm or promote truly national parties. The combined effect of these rules was supposed to block the reemergence of ethnic parties and facilitate the aggregation of the interest of different ethnic groups in to large multi-ethnic parties.[504] After the collapse of the second republic, the military regime under General Babangida even attempted to establish a two party system in which only two state sanctioned and state sponsored parties will compete in elections.[505] While this 'two-party' system did not survive the abortive inaugural election of 1993, the rules introduced by and the approach of the 1979 Constitution meant



[502] The Constitution of the Federal Republic of Nigeria 1979, Section 202.
[503] The Constitution of the Federal Republic of Nigeria 1979, Sections 202 and 203.
[504] Matthijs Bogaards, "Electoral Systems, Party Systemsand Ethnicity in Africa," in *Votes, Money and Violence Political Parties and Elections in Sub-Saharan Africa*, ed. Matthias Basedau, Gero Erdmann, and Andreas Mehler (Nordiska Afrika Institutet, Sweden Universit y of KwaZulu-Nata l Press , South Africa, 2007), 172.
[505] Haruna Dlakwa, "Ethnicity in Nigerian Politics: Formation of Politcal Organizations and Parties," in *New Strategies for Curbing Ethnic and Religious Conflicts in Nigeria*, ed. F.U Okafor (Fourth Dimension Publishers, 1997), 129-130; Oyeleye Oyediran and Adigun Agbaje, "Two-Partyism and Democratic Transition in Nigeria," *The Journal of Modern African Studies* 29, no. 2 (June 1, 1991): 226-227.

to prohibit ethnic parties and promote genuinely national parties with widespread support had found their way to the current Nigerian Constitution.[506]

Another way in which the 1979 Constitution as well subsequent Constitutions have tried to tackle the problem of ethnic conflicts that bedeviled the first republic is through the creation of new states. Invariably, these new states have actually been created by the various military regimes and were given recognition to by the constitutions that provided the legal foundation for subsequent civilian administrations.[507] The creation of new states was justified by three major reasons. The first reason was to satisfy the aspiration of minority ethnic groups that felt aggrieved by the original three state federation of the independence Constitution in which they were dominated by the three big ethnic groups.[508] The minority groups in each of the three original states had been agitating for the creation of their own states and the creation of new states was meant to address this demand.[509]

[506] Constitution of the Federal Republic of Nigeria 1999, Sections 222 and 223.

[507] All of the new states created after the collapse of the first Nigerian republic were created during various episoides of military rule. When the first military coup in Nigeria brought an end to civilian rule in 1966, there were only four states in the federation. In 1967, the military administration of General Yakubu Gowon increased the number of states in to 12, in 1975, the military administration of General Murtala Muhammed increased the number of states to 19 (this was the number of states adopted endorsed by the 1979 Nigerian Constitution), in 1987 the number of states was increased to 21 and in 1991 it was increased to 30 both during military rule under General Ibrahim Babangida and in 1996 the number of states increased to 36 during the administration of General Sani Abacha. The 1999 Constitution, which is the current Constitution of Nigeria has capped the number of states at 36. See H. (Henry E. ) Alapiki, "State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy," *African Studies Review* 48, no. 3 (2005): 58–61.

[508] Adegboyega Somide, "Federalism, State Creation and Ethnic Managment in Nigeria," in *Problems and Prospects of Sustsaining Democracy in Nigeria,* ed. Bamidele A. Ojo (Nova Science Publishers, Inc., 2001), 34.

[509] Tekena N. Tamuno, "Separatist Agitations in Nigeria Since 1914," *The Journal of Modern African Studies* 8, no. 04 (1970): 583 and R. T. Akinyele, "States Creation in Nigeria: The Willink Report in Retrospect," *African Studies Review* 39, no. 2 (September 1, 1996): 76.

The creation of the new states was also meant to bring an end to the coincidence of state and ethnic identity of the three major ethnic groups in the first republic.[510] The fact that the three major ethnic groups were closely identified with the three original states after independence was considered by many as having greatly contributed to the tensions and conflicts that were ever present in the first republic. By dividing the major ethnic groups in to multiple states and creating new states in which minority ethnic groups dominate, the framers of the 1979 Constitution intended to disperse and diffuse the destabilizing rivalry between the major ethnic groups and the attendant centrifugal tendency.[511] Furthermore, the creation of new states was also deemed necessary to obviate the problems that arose out of the overwhelming dominance that the northern state had due to its population and geographic size that dwarfed the southern states.[512] Under the independence Constitution of Nigeria, this imbalance had enabled the northern politicians to easily dominate politics at the federal level and in order to ensure that this will not happen again, the creation of new states was considered necessary.[513] Under the current, 1999 Constitution of Nigeria, the 36 states are designed so that they would each more or less be equal in their population size.[514]

Another enduring feature of the constitutional innovations introduced in the 1979 Nigerian Constitution is the 'federal character' principle.[515] This principle was enshrined



[510] Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999), 68.
[511] Brian Smith, "Federal-State Relations in Nigeria," *African Affairs* 80, no. 320 (July 1, 1981): 357–359.
[512] Rotimi T. Suberu, "The Struggle for New States in Nigeria, 1976-1990," *African Affairs* 90, no. 361 (October 1, 1991): 501.
[513] Ibid.
[514] Rotimi Suberu, "Federalism in Africa: The Nigerian Experience in Comparative Perspective," *Ethnopolitics* 8, no. 1 (2009): 73
[515] The federal character principle will be discussed in some detail in Chapter Six of this dissertation.

under Section 14(3) of the 1979 Nigerian Constitution as a directive principle of state policy in the following terms:

> The composition of the federal government or any of its agencies and the conduct of their affairs shall be carried out in such a manner as to recognize the federal character of Nigeria and the need to promote national unity and to command national loyalty. Accordingly, the predominance in that government or its agencies of persons from a few states or from a few ethnic or other sectional groups shall be avoided.

The principle was meant to be applicable at the federal, state and local government level and also both in the civil service and public enterprises.[516] The framers of the 1979 Constitution and subsequent Nigerian constitution deemed the wide scope of application of the federal character principle to be necessary for the representation, inclusion and integration of all Nigerians.[517] The principle was seen as a bulwark against the sort of ethnic domination and intense rivalry that had characterized the first republic by ensuring fair access for all groups to the 'national cake'.[518]

Actuating this principle, the 1979 Constitution obliged the President to appoint at least one person from each state in his cabinet and reflect the federal character of Nigeria in the appointment s/he makes to various high offices.[519] The federal character principle is supposed to operate in relation to the composition of the armed forces as well.[520] The current i.e. the 1999 Constitution of Nigeria, has kept the federal character principle and

[516] Duna Abubakar, "The Federal Character Principle, Consociationalism and Democratic Stability in Nigeria," in *Federalism and Political Restructuring in Nigeria*, ed. Kunle Amuwo et al. (Spectrum Books, 1998), 167.
[517] John A. A. Ayoade, "Ethnic Management in the 1979 Nigerian Constitution," *Publius: The Journal of Federalism* 16, no. 2 (March 20, 1986): 83 ; D.A Guobadia, "Ethnicity and National Integration," in *Ethncityand National Integration in Nigeria: Recurrent Themes*, ed. D.A Guobadia and A.O Adekunle (Nigerian Inistitute of Advanced Legal Studies, 2004), 38.
[518] Okwudiba Nnoli and United Nations Research Institute for Social Development, *Ethnicity and development in Nigeria* (Avebury, 1995), 151.
[519] The Constitution of the Federal Republic of Nigeria 1979, Section 135(3) and 157.
[520] The Constitution of the Federal Republic of Nigeria 1979, Section 197(2).

has in fact established a Federal Character Commission mandated with the implementation and enforcement of the principle.[521]

Another important feature of Nigerian Constitutional practice that could be considered as having played some integrative role is the constitutional order of Nigeria is the scheme of vertical and horizontal revenue sharing. In this scheme, the Federal government collects taxes and royalties from the most lucrative revenue sources which it maintains in the "federation account".[522] The revenue in the Federation account is then vertically and horizontally divided between the federal government, the states and local governments.[523] The Constitution stipulates six factors that must be taken in to account when the President and the National assembly adopt a formula for the distribution of the revenue in the Federation Account. While the distribution of the revenue raised from mineral resources had been a source of grievance in the oil producing states (based on the derivate principle these states are guaranteed automatically 13% of the revenue raised from the resources in their states),[524] it had served as a sticking glue to reinforce the integrative and accommodative instruments of the Nigerian Constitutional order.[525]

The above measures have become enduring elements of successive Nigerian constitutions. In addition to these constitutional instruments that have been central in Nigeria's attempt to manage ethnic conflicts, there have also been some other strategies that fall outside of the Constitution. The most notable example is the practice or

[521] Constitution of the Federal Republic of Nigeria 1999, Third Schedule, Part I(c).
[522] Constitution of Nigeria 1999, Article 162. (1).
[523] Constitution of Nigeria 1999, Article 162. (3)
[524] Constitution of Nigeria 1999, Article 162. (2); See also Cyril I. Obi, "Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta," *Canadian Journal of Development Studies/Revue Canadienne D'études Du Développement* 30, no. 1–2 (2010): 219–236
[525] Rotimi Suberu, "The Nigerian Federal System: Performance, Problems and Prospects," *Journal of Contemporary African Studies* 28, no. 4 (2010): 466.

convention of zoning. According to this practice, the office of the President and the speakers of the two houses are rotated periodically among the different ethno-regional groups of Nigeria.[526] This practice is not mandated by the Constitution and used to be an unwritten rule of the political party that has been ruling Nigeria since the reestablishment of civilian administration in 1999.[527] However, the rule has been included in the constitution of the ruling party since 2009.[528] Though there have been several attempts to constitutionalize the practice of zoning, such attempts have been rejected by on the ground that it would amount to formally entrenching ethnic and regional identities.[529] The discussion so far had provided a brief descriptive overview of the Nigerian approach to address the challenges associated with Ethnicity. In the next subsection, an attempt will be made to evaluate their effectiveness and shortcomings.

### C. Evaluating the Nigerian Experience

Given the threat of all three states of the Nigerian Federation before 1970 to leave the Nigerian Federation, the continued existence of the Nigerian state through the past four decades is no small achievement. Partially, this is something that has been accomplished because of the constitutional design adopted in 1979 and resuscitated with some modifications in 1999. The approach that Nigeria had followed since 1979 to address problems related to ethnicity had been a combination of accommodative and

[526] Ayo Awopeju, Olufemi Adelusi, and Ajinde Oluwashakin, "Zoning Formula and the Party Politics in Nigerian Democracy: a Crossroad for PDP in 2015 Presidential Election," *Research on Humanities and Social Sciences* 2, no. 4 (2012): 14–15.

[527] Ibid.

[528] See *Nigeria End Buggins's turn*, The Economist (Oct 28th 2010), available at http://webcache.googleusercontent.com/search?q=cache:yZFALp1wEkUJ:www.economist.com/node/17361354+&cd=2&hl=en&ct=clnk&gl=za&client=firefox-a and last accessed on October 31, 2013.

[529] Ukerter G. Moti, Power Sharing, Allocation of Patronage and Political Stability in Nigeria, available at http://www.academia.edu/1338918/POWER_SHARING_ALLOCATION_OF_PATRONAGE_AND_POLITICAL_STABILITY and last accessed on October 31, 2013.

integrationist strategies. The creation of states in which minority ethnic groups constitute majorities and the federal character principle could be considered as the accommodative components of the Nigerian approach. On the other hand, the form of government and electoral rules as well as regulation of parties put the accent on integration rather than on accommodation. The combination of these strategies could be said to have been successful to some extent in Nigeria. The qualified success of the Nigerian approach has been primarily in creating a system which ensured that most of the political class has a stake in the continued existence of the Nigerian state. With the increase of the number of states from three to thirty six and the constitutionally guaranteed distribution of the oil revenue to these states, the political elites of most ethnic groups have a strong economic incentive to stay in the Federation. Therefore, with the exception of the elites from the oil producing states who could be economically better off if their state was to secede from the federation, the political class in Nigeria seem to be determined to avoid the dismemberment of Nigeria.[530]

By creating many new states and local governments, distributing Nigeria's considerable income from its oil fields through intergovernmental transfer from the center to the state and local governments as well as ensuring access to bureaucratic and political appointments at the federal level through the application of the 'federal character' principle, most members of the Nigerian political class are kept on board concerning the continued existence of the Nigerian state.[531] The creation of more than thirty states in lieu of three large states has also reduced the threat of secession considerably. As a result

[530] Jibrin Ibrahim,"The transformation of ethno-regional identities in Nigeria." Identity Transformation and Identity Politics under Structural Adjustment in Nigeria , edited by Attahiru Jega (2000): 24-40.

[531] Rotimi Suberu, "Federalism in Africa: The Nigerian Experience in Comparative Perspective," *Ethnopolitics* 8, no. 1 (2009): 75-76.

a repeat of a full-fledged civil war for secession witnessed from 1967-70 has been avoided so far.

Furthermore, the requirement of geographic spread for a successful bid at the presidency has also meant that those aspiring for the presidency cannot confine their appeal to one part of the country.[532] As of necessity, they have to get some support from regions other than the ones they hail from and as a result they cultivate alliances with elites from other regions. This is also further reinforced by the rules that are designed to prohibit the emergence of ethnic parties and promote parties with a national orientation. Even though Nigerian parties that are ostensibly national are still associated with a specific region in which they enjoy solid support, contemporary Nigerian parties are more nationally oriented than the parties in the first Nigerian republic. [533] Both in terms of the composition of their leadership and appeal, the major contemporary Nigerian parties exhibit more diversity and little of the ethnic/regional purity of the first generation Nigerian political parties.[534]

However, the constitutional model adopted in Nigeria to reduce and manage ethnic conflicts had been limited and has some serious shortcomings. One serious shortcoming of the system as it exists is that it reinforces the rent-seeking and neo-patrimonial logic of politics.[535] Given the enormous amount of resources at their disposal once in power, the political class had been able to be corrupt, utterly malfeasant and still evade legal and

[532] Benjamin Reilly,. "Presidentialism Reconsidered: The Relevance of an Old Debate." *Ethnopolitics* 12, no. 1 (2013): 89.

[533] Brandon Kendhammer, "Talking Ethnic but Hearing Multi-ethnic: The Peoples' Democratic Party (PDP) in Nigeria and Durable Multi-ethnic Parties in the Midst of Violence," *Commonwealth & Comparative Politics* 48, no. 1 (2010): 49-50.

[534] Matthijs Bogaards, "Ethnic Party Bans and Institutional Engineering in Nigeria," *Democratization* 17, no. 4 (2010): 741–742.

[535] See Rotimi T. Suberu, "Prebendal Politics and Federal Governance in Nigeria" *Democracy and Prebendalism in Nigeria: Critical Interpretations* (2013): 79-103.

political responsibility.[536] The approach discussed above rather too pragmatically embraces the 'national cake psychosis' by making distribution and consumption at the center of politics. [537] The system is primarily designed to ensure that the political elites of all groups will get their 'fair share of the national cake'. This has proved to be very problematic in a number of ways. It has perpetuated a national economy in which consumption by the political class trumps public investment and the enrichment of office holders is given priority over the provision of basic social services and public goods.[538] This model has also contributed to the persistence of corruption which is implicitly legitimized by a constitutional design that is primarily preoccupied with ensuring access to and 'fair' distribution of resources to the bureaucratic and political elites. The innovative constitutional engineering had paid little attention as to how those who are guaranteed access to political power and state resources will be held accountable by ordinary citizens. Though corruption and obscene levels of embezzlement have characterized the Nigerian state,[539] successive Nigerian constitutions seem to have paid more attention as to how the political power (opportunity to enrich oneself and friends) as well as bureaucratic positions (also offering opportunity for self-enrichment) could be distributed in a way that the elites of the various ethnic groups would be satisfied and

[536] Daniel Egiegba Agbiboa,. "Between corruption and development: the political economy of state robbery in Nigeria." *Journal of business ethics* 108, no. 3 (2012): 330-332.

[537] Jeremiah O. Arowosegbe, "Violence and national development in Nigeria: The political economy of youth restiveness in the Niger Delta." *Review of African Political Economy* 36, no. 122 (2009): 576.

[538] Human Rights Watch. (2007), Chop Fine: the human rights impact of local government corruption in Rivers State, Nigeria, New York: Human Rights Watch, 28-39.

[539] In one of the cases of corruption that have been reported recently, a parliamentary investigation has unearthed that 6.8 billion USD has been siphoned from public coffers using the national oil import subsidy. Ironically even members of the parliamentary committee who produced the report about this scandal were reported to have taken bribes from businesses who do not want to be named in the report. See "Nigeria's President Jonathan 'Must Act over Fuel Scam'," *BBC*, May 28, 2012, sec. Africa, http://www.bbc.co.uk/news/world-africa-18238973.See also See also "Nigerian Graft Probe Lawmaker Quizzed over Bribe," *Google News*, accessed November 5, 2013, http://www.google.com/hostednews/afp/article/ALeqM5hz8we6oqn3RWciqAQ4LOr3huUEmw?docId=CNG.1815be775395569d8679fdff80121218.3a1&hl=en.

have neglected how ordinary the office holders and public servants could be held politically and legally accountable. For example, the 1999 Nigerian Constitution has not provided for the establishment of an anti-corruption agency and the Economic and Financial Crimes Commission of Nigeria is established by statute has been ineffective due to its politicization and lack of independence.[540]

Furthermore, reinforcing the political economy of resource extraction, distribution and corruption, the constitutional design in Nigeria had kept the economic incentive to contest for power very high. Given the command of the state directly and indirectly over a large portion of the economy, especially the revenue from oil and natural gas, the current constitutional design does not diminish the attractiveness of politics as a rewarding enterprise for the accumulation of wealth.[541] Therefore, even where there are not violent conflicts at the national level between the major ethnic groups, the high economic premium of power has meant very intense competitions for political office at all levels of state. For both those who are in office and those seeking political office, the stakes for winning are so high that politics is turned in to a 'do or die' matter.[542] This

[540] See Economic and Financial Crimes Commission (Establishment) Act 2002, Laws of the Federation of Nigeria. Interestingly this law provides under Article 2(3) that "The Chairman and members of the Commission other than ex-officio members shall be appointed by the President subject to the confirmation of the Senate." But once appointed the commissioners seem to serve at the pleasure of the President since the law empowers the president to remove any commissioner at any time on "for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct or if the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office." ( see Article 3(2)). Clearly the independence of the commission leaves much to be desired given the Presidents considerable appointment and removal powers. See also Arinze Ngwube and Chuka Okoli, "The Role of the Economic Financial Crime Commission in the Fight Against Corruption in Nigeria," *Journal of Studies in Social Sciences* 4, no. 1 (April 23, 2013): 104.

[541] Adekunle Amuwo, "Between Elite Protectionism and Popular Resistance: The Political Economy of Nigeria's Fractured State Since Juridical Independence," *Journal of Contemporary African Studies* 28, no. 4 (2010): 430–431.

[542] See Paul Collier, and Pedro C. Vicente. "Votes and violence: evidence from a field experiment in Nigeria." (2008) Working Paper. CSAE (University of Oxford),available at http://www.csae.ox.ac.uk/workingpapers/pdfs/2008-16text.pdf , last accessed on 04, November 2013.

state of affairs has created a fertile ground for the emergence of political god-fathers and the criminalization of politics.[543] Men who manage to build a network of clients and armies of unemployed youth place their protégés or their own self as governors and brazenly steal from state coffers. The primacy of distribution of the legitimate and not so legitimate perks of political office in the Nigerian approach of accommodation and integration has therefore militated against the consolidation of democracy.

The other problem in the Nigerian approach is that it has given rise to demands for the creation of more and more states and local governments.[544] This is not surprising given the economic rewards and the opportunities the establishment of a new state offers. The prospect of new civil service jobs and political offices to be filled by local elites and allure of the annual transfer of funds from the federal government had given rise to demands for creation of new states and local government units.

This dynamic which had resulted in the creation of 36 states has contributed to the diminishing capability of the states and the ever growing power of the federal government. Their small size and limited economic capacity had made most states dependent on the federal government for their budget. The financial dependence of the states on federal transfers and also the overall dominant position of the federal government in the distribution of power have made federal political offices highly sought after. Therefore the grand prize in the contest for power continues to be the presidency.



[543] Isaac Olawale Albert,. "Explaining 'godfatherism'in Nigerian politics." *African Sociological Review/Revue Africaine de Sociologie* 9, no. 2 (2006): 79-105.

[544] See Henry Alapiki,. "State creation in Nigeria: Failed approaches to national integration and local autonomy." *African Studies Review* 48, no. 3 (2005): 49-65.

The powerful executive presidency,[545] which was initially intended to be a symbol of national unity that transcends ethnic divides, has proved to be a divisive bone of contention.[546] Since Nigeria's switch from parliamentary to presidential form of government, the contest for the presidential office has repeatedly led to ethnic tension and conflict between the north and the south. In the Presidential election of 1979, the interpretation of the geographic spread rule and whether or not the candidate from the north had actually met that requirement was very controversial.[547] This controversy undermined the legitimacy of the second republic right from the outset. In 1993, what was supposed to be the launching of a third republic was aborted because the winner of the election was a candidate from the southwest. This is so because the northern and military establishments were not willing to accept a southerner as president.

[545] One might assume that a US type presidential system that allocates substantial powers to the other branches of government to check and balance the exercise of executive power would disperse power in a polity. However, in Nigeria the routine disregard of judicial rulings by the president, gross manipulation, downright bribery of members of the two legislative houses have enabled the executive to become dominant. Furthermore, using his control over the party machinery, as well as the national electoral and anti-corruption commission to attack opponents and reward loyalists. This has enabled the presidents to control their party and also cause opposition politicians to defect in search of patronage from the president. See, V. Adefemi Isumonah, "Imperial Presidency and Democratic Consolidation in Nigeria," *Africa Today* 59, no. 1 (2012): 50–64. .See also Fawole, W. Alade. "Executive-Legislature Relationship." *Nigeria's Democratic Experience in the Fourth Republic Since 1999: Policies and Politics* (2012 Kunle Amuwo and A. Sat Obiyan eds.): 28 and . Eugene N. Nweke. "The Principles and Practice of Separation of Power in Nigeria: A Study of Olusegun Obasanjo's Civilian Regime" *Nigeria's Democratic Experience in the Fourth Republic Since 1999: Policies and Politics* (2012, Kunle Amuwo and A. Sat Obiyan eds.): 66-68.

[546] Ukoha Ukiwo, "Politics, ethno-religious conflicts and democratic consolidation in Nigeria." *The Journal of Modern African Studies* 41, no. 1 (2003): 133.

[547] The controversy arose in relation to the application of the 1979 Constitution's two vote distribution rule which provided that a Presidential candidate must win a quarter of the votes at least in two thirds of the sates that form the Nigerian Federation. It so happened that one of the candidates, Alhaj Shehu Shagari , who had secured a plurality of the votes has secured at least a quarter of 12 states out of 19 states. The Federal Electoral Commission interpreted the relevant constitutional provision as requiring the successful presidential candidate to win at least a quarter of the votes in 12 states and a quarter of the votes in a 0 .67 of a state( meaning one sixth of the votes in a thirteenth states). The runner up Chief Obafemi Awolowo contested this interpretation before the Supreme Court but the Supreme Court also upheld the interpretation of the electoral commission. See Richard A. Joseph, "Democratization under military tutelage: crisis and consensus in the Nigerian 1979 elections." *Comparative Politics* 14, no. 1 (1981): 78-81; See also Chief Obafemi Awolowo V. Alhaji Shehu Shagari & Ors : (1979) LPELR-SC.62/1979.

Under the current, 1999 Constitution as well, the powerful office of the Federal President has been a cause for tension. Despite the ruling party PDP's convention of zoning, the desire of the first president to extend his term limit, the illness and death of President Yardua before the northern turn at the presidency was completed have put the constitutional system under a lot of strain. When President Yardua was seriously ill, for about half a year, rather than hand over the power of the president to the vice president (who was from the south), the inner circle of the president were willing to risk a power vacuum while the president was out of the country and concealed from everyone but his family and closest aides.[548] Once the President died, another source of contention was whether or not the ruling Peoples' democratic Party should nominate the vice president, who had by then become the President, as its candidate for the presidency or nominate some on from the north in adherence to the zoning convention of the party.[549] Talk of a 2015 run by President Goodluck is already causing alarm with northern politicians in the ruling party and might led to serious conflict.[550]

The importance of the office of the president and the great patronage opportunity it comes with makes the contest for the presidency even within one party very intense. These competitions have so far been along ethnic/regional lines. Therefore, despite the geographic spread rule, the Presidential form of government in which executive power is

[548] See Adam Nossiter, "President of Nigeria Dies After Long Illness," *The New York Times*, May 5, 2010, sec. World / Africa, http://www.nytimes.com/2010/05/06/world/africa/06nigeria.html.

[549] See "Nigeria's Leader Gets Poll Boost," *BBC*, December 17, 2010, sec. Africa, http://www.bbc.co.uk/news/world-africa-12017404. See also "Chaos In Northern Governors Forum Over Jonathan" *The Will*, 27/01/2011 14:54:00. http://thewillnigeria.com/politics/7348.html

[550] See "PDP Crisis: Obasanjo Asks Jonathan to Forget 2015…Ministers Under Surveillance for Weeks before Removal," *Sunday Trust Online*, accessed November 4, 2013, http://sundaytrust.com.ng/index.php/top-stories/14352-pdp-crisis-obasanjo-asks-jonathan-to-forget-2015-ministers-under-surveillance-for-weeks-before-removal.

ultimately vested in one person has proved divisive and an object of intense regional rivalry. The application of the federal character principle also seems to have the effect of reinforcing ethnic divisions.

### *5.2 Ethnic Diversity and Constitutionalism: The Ethiopian Experience*

#### A. A Brief Historical Sketch

Ethiopia is a country with a long and continued history of statehood that spans millennia, but the formation of the modern Ethiopian state in its current territorial shape is an occurrence of the late ninetieth century.[551] During the colonial scramble for Africa, Emperor Menelik II, who was one of the many feudal lords contesting for supremacy in the Christian highlands of Ethiopia (which some refer to as Abyssinia) emerged the last man standing when one after the other of the contestants died in internal and foreign military engagements.[552] Even before this time, while he was King of the province of Shoa and just an aspirant to be King of Kings of Ethiopia, Menelik had been expanding his territory to the south to people and lands that had not been under Ethiopian imperial rule in a long time or in some cases never at all.[553] This expansion had been accomplished by the brutal use of force or the threat of use of force.[554] The main motivation for this expansion seems to have been economic considerations.[555] By bringing these territories to his rule, Menelik and his vassals were able to acquire vast, fertile and rich land and

[551] See Jean DORESSE, *Ethiopia Ancient Cities & Temples*, First Edition edition (Frederick Ungar Publishing Co, 1959 .), 7–186.
[552] Harold G. Marcus, *A History of Ethiopia* (University of California Press, 1994), 77-90 .
[553] Ibid., 77-90.
[554] Bahru Zewde, *A history of modern Ethiopia, 1855-1991* (James Currey, 2001), 60-68.
[555] Teshale Tibebu, *The Making of Modern Ethiopia: 1896-1974* (The Red Sea Press, 1995), 39-40; Edmond J. Keller, "Ethiopia: Revolution, Class, and the National Question," *African Affairs* 80, no. 321 (October 1, 1981): 527.

turned the occupants of this land in to serfs.[556] The newly acquired territories were also rich with coffee and other commodities that were in demand for export.[557] The conquest, which was fiercely resisted by many of the polities and peoples that were about to become subjects of the empire, was largely facilitated by the access to superior, modern firearms enjoyed by Menilik's army.[558]

Due to this Shoan expansion, by the time Menilk consolidated his position as King of Kings of Ethiopia and secured his empire from European colonial ambitions (save for Eritrea which he had conceded to Italy) at the turn of the 20th century,[559] the Ethiopia that had emerged was territorially much larger and culturally/ethnically much diverse than it had ever been before. These diverse groups had different levels of proximity, access and loyalty to the state till the end of the monarchy. The most privileged group which had the most access to the state and the resources it commanded were the Shoan nobility.[560] Next in the feudal pecking order came the nobility of other provinces of the Christian highland Kingdom with whom the Shoan nobility shared the same cultural heritage in the form of Coptic Orthodox Christianity and to an extent the Amharic language.[561] These included the nobles of Wello, Gonder, Gojam and Tigray who are called "Abyssinians" by some

[556] See Siegfried Pausewang and Ifo-Institut für Wirtschaftsforschung. Abteilung Entwicklungsländer, *Peasants, land, and society: a social history of land reform in Ethiopia* (Weltforum Verlag, 1983).
[557] Mulatu Wubneh, Yohannis Abate, and Thomas Leiper Kane Collection (Library of Congress. Hebraic Section), *Ethiopia: Transition and Development in the Horn of Africa* (Boulder, Colo.: Westview Press, 1988), 14.
[558] Margery Perham and Thomas Leiper Kane Collection (Library of Congress. Hebraic Section), *The Government of Ethiopia,* (London: Faber, 1969), 294.
[559] The Shoan expansion and lasted from 1875 till 1898, See Margery Perham and Thomas Leiper Kane Collection (Library of Congress. Hebraic Section), *The Government of Ethiopia,* (London: Faber, 1969), 294.
[560] John Young, *Peasant Revolution in Ethiopia: The Tigray People's Liberation Front, 1975-1991* (Cambridge University Press, 2006), 42.
[561] See Harold G. Marcus, "The End of the Reign of Menilek II," *The Journal of African History* 11, no. 04 (1970): 578–579..

scholars.[562] The case of the Tigrian nobility was a bit special in that although an integral part and the cradle of the historic Ethiopian state, Tigray had a distinct ethnic and linguistic identity.[563] Even with the onset of the modernization process which was almost in full swing by the time of Emperor Hailesilasie came to power in 1930; the preeminence of the Shoan nobility was still maintained.

The traditional nobles of the southern territories acquired by Menelik's conquest were recognized and accorded some status in depending on how they had responded to Menelik's advance.[564] Though this recognition was not part of any formal legal or constitutional as a matter of custom it was observed till Emperor Hailesilasie's project of modernization and centralization was well advanced in the late 1950's and 60's.[565] Those who had submitted peacefully were allowed to continue as rulers of their fief as vassals of the Emperor and were slowly assimilated to the northern nobility.[566] Those who had resisted Menelik's conquest were replaced by governors appointed by the emperor from the northern nobility. After Menelik, though there had been a brief succession of a youthful Emperor followed by a the reign of Empress Zawditu, the man who left a permanent mark on the Ethiopian state was Emperor Hailesilasie who was the regent and the real power behind the throne for most of Empress Zawditu's reign.[567]

During his long reign, modernization of the state was the single most important item on the agenda. In his drive for modernization, he centralized power and almost effectively

[562] Asamenew G. W. Gebeyehu, "The Background to the Political Crisis in Ethiopia," *Ufahamu: A Journal of African Studies* 18, no. 1 (January 1, 1990): 31–32.
[563] Young, *Peasant Revolution in Ethiopia*, 42.
[564] Zewde, *A history of modern Ethiopia, 1855-1991*, 60-71.
[565] Teshale Tibebu, *The Making of Modern Ethiopia: 1896-1974* (The Red Sea Press, 1995), 42-43 and 105–133.
[566] Ibid.
[567] Edward Ullendorff, *From Emperor Haile Selassie to H.J. Polotsky: An Ethiopian and Semitic Miscellany* (Otto Harrassowitz Verlag, 1995), 229–230.

eliminated the role of the traditional hereditary lords.[568] He relied on a new cadre of educated bureaucrats and a modern standing army to consolidate power at the center.[569] This gave rise to a new class of modern elites distinct from the traditional hereditary nobility.[570] Nevertheless, due to the disproportionate access to education in different parts of the country as well as the implicit cultural prerequisite of advancement in the system, even the new elites were largely from the Amharic speaking, Christian parts of the country.[571] The fact that Amharic was used as the language of government and administration at all levels also excluded non-Amharic speakers from entering the nascent but growing civil service which provided the most important avenue for social and economic mobility in a predominantly agrarian society.[572] Though Amharic is one of the most widely spoken languages in Ethiopia, it is the mother tongue of only people in parts of the northern highlands of Ethiopia and a majority of Ethiopians speak other languages as their mother tongue. Except urban dwellers and the educated, very few people outside the northern highland spoke Amharic even till today.[573]

[568] Bahru Zewde, *A history of modern Ethiopia, 1855-1991* (James Currey, 2001), 201-208; 60-71.
[569] Edmond J. Keller, *Revolutionary Ethiopia: From Empire to People's Republic* (Indiana University Press, 1991), 132; See alsoRobert L. Hess, *Ethiopia, a New Political History by Richard Greenfield* (American Historical Association, 1966), 168. .
[570] Paulos Milkias, "Traditional Institutions and Traditional Elites: The Role of Education in the Ethiopian Body-Politic," *African Studies Review* 19, no. 3 (December 1, 1976): 87; See also Bahru Zewde, *Pioneers of Change in Ethiopia: The Reformist Intellectuals of the Early Twentieth Century* (Boydell & Brewer, Limited, 2002).
[571] John Young, "Regionalism and Democracy in Ethiopia," *Third World Quarterly* 19, no. 2 (June 1, 1998): 192; Christopher Clapham, "Centralization and Local Response in Southern Ethiopia," *African Affairs* 74, no. 294 (January 1, 1975): 73; Solomon Gashaw, "Nationalism and ethnic conflict in Ethiopia," in *The Rising Tide of Cultural Pluralism The Nation-State at Bay*, ed. Crawford Young (University of Wisconsin Press, 1993), 141.
[572] Seyoum Y. Hameso, "The Language of Education in Africa: The Key Issues," *Language, Culture and Curriculum* 10, no. 1 (1997): 8–9.
[573] Teshome G. Wagaw, "Conflict of Ethnic Identity and the Language of Education Policy in Contemporary Ethiopia," *Northeast African Studies* 6, no. 3 (1999): 77.

Though not officially articulated in an elaborate fashion, the approach to ethnicity was one of assimilation in which a mix of Christian highland Amharic culture and modern western education, institutions and legal codes were supposed to mold a common Ethiopian identity.[574] This approach was being challenged particularly by young radical students from non-Amharic speaking ethnic groups.[575] The grievance of those from the south was particularly pronounced because southern peasants who were reduced to serfdom during Menelik's conquest were being evicted from their lands.[576] While the tenancy system accorded some security to northern peasants, the southern peasants who had been turned in to serfs for ethnic others were forced to suffer much harsher conditions with the introduction of mechanized commercial farming in the early 1970s.

These simmering grievances and resentments turned into armed political movements for self- determination when the 1974 revolution broke out.[577] Even before the 1974 Revolution, there have been earlier regional revolts against central rule in Tigray, in Gojam and Bale. These were mainly peasant revolutions triggered by specific grievances related with the tax burden and did not pose a sustained ideological challenge to the Imperial regime. The military regime that came to power during the revolution nationalized all land and tried to address the problems emanating from the land holding system.[578] However, conceiving the opposition to the imperial regime largely if not

[574] Alemseged Abbay, "DIVERSITY AND STATE-BUILDING IN ETHIOPIA.," *African Affairs* 103, no. 413 (October 2004): 594-598.
[575] Aregawi Berhe, "The origins of the Tigray People's Liberation Front," *African Affairs* 103, no. 413 (October 1, 2004): 576.
[576] Paul Brietzke, "Land Reform in Revolutionary Ethiopia," *The Journal of Modern African Studies* 14, no. 4 (December 1, 1976): 637-660.
[577] Edmond J. Keller, "The Ethnogenesis of the Oromo Nation and Its Implications for Politics in Ethiopia," *The Journal of Modern African Studies* 33, no. 4 (December 1, 1995): 46-56; Keller, "The Ethnogenesis of the Oromo Nation and Its Implications for Politics in Ethiopia."
[578] Marina Ottaway, "Land Reform in Ethiopia 1974-1977," *African Studies Review* 20, no. 3 (December 1,

exclusively in class terms, the military rulers were not willing to make concessions to ethnic demands.[579] The regime tried to suppress these demands by force and took to new levels the centralization of the state and continued with the implicit policy of assimilation.[580] The civilian opposition to the military regime was divided on the issue of the 'nationalities question' and some argued that the historical injustice in Ethiopia was class based and underplayed the significance of ethnicity while others contended that there was an ethnic oppression which could be remedied only be the recognition of the right to self-determination of all Ethiopian ethnic groups.

Ultimately, the military regime was defeated in the civil war and that was followed by the secession of Eritrea and the coming in to power of a front that is a coalition of various ethnic based parties. The core of these group belonged to former students who espoused the centrality of the right to self-determination in addressing the 'nationalities' question and who formed the Tigray Liberation Front (TPLF). The TPLF in turn became the nucleus of the Ethiopian People's Revolutionary Democracy Front (EPRDF). Proclaiming a fundamental break from the past in its approach to ethnicity, the EPRDF put in place a new Constitution in 1995. The Constitution adopts a clearly accommodationist approach to the question of ethnicity.

### B. Ethiopian Constitutional Engineering to Manage Ethnicity



1977): 79-90; Andargachew Tiruneh, *The Ethiopian Revolution, 1974-1987: A Transformation from an Aristocratic to a Totalitarian Autocracy* (Cambridge University Press, 1993), 85-124 .

[579] Christopher Clapham, *Transformation and Continuity in Revolutionary Ethiopia* (CUP Archive, 1990), 195-220.

[580] Kidane Mengisteab, "New Approaches to State Building in Africa: The Case of Ethiopia's Ethnic-Based Federalism," *African Studies Review* 40, no. 3 (December 1, 1997): 121.

To start with, the Constitution presents itself as a covenant between the "Nations, Nationalities and Peoples" (herein after NNPs) of Ethiopia.[581] The Constitution attributes its authorship to these NNPs which it declares to be sovereigns and the constituent powers of the Ethiopian state.[582] The principle of Self-determination of NNPs is also provided as the corner stone the new constitutional order.[583] The new constitutional order recognized the right of all NNPs:

- For unconditional self-determination up to secession (Article 39(1))
- To use their language and promote their culture (Article 39(2))
- To establish their own institutions of self-governance and to be represented in state and federal governments (Article 39(3)).

The recognition of these rights was accompanied by the establishment of a federal form of government in which nine regional states were established (Article 47(1)). Most of the regional states are designated by the name of the ethnic group with a majority in the region, clearly implying that the regional states are the home states for these ethnic groups. Only three states out of nine are not designated by the name of ethnic groups.[584] These three regional states are inhabited by various ethnic groups, none of which constitute a majority but are still considered to be indigenous to the locality they inhabit. Through these regions and sub- regional local administrative units, the Constitution tries



[581] Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Preamble
[582] Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Preamble, Paragraph 1 and Article 8 (1) & (2).
[583] Id., Preamble Para. 1 and Article 39(1).
[584] These are the State of Benshangul/Gumuz, the State of the Southern Nations, Nationalities and Peoples and the State of the Gambela Peoples Regional states.

to realize the right to self-governance of the NNPs.[585] Those NNPs which do not have their own regional state are accommodated through the establishment of their own *Zonal*, *Woreda* or even *Kebelle* administrations which are respectively the highest, intermediate and lowest level of sub-regional state levels of administration.[586]

While Amharic has been retained as the working language of the Federal Government and some of the regional states, many of the regional states and sub-regional units have adopted the language spoken by the ethnic majority in that region or unit as their official language.[587] These local languages have also been adopted as mediums of instruction at the primary school level in the respective regions or units in which they serve as the official languages of administration.[588]

Almost all the regions and the sub-regional units with special status are governed by ethnic parties that explicitly claim to represent specific ethnic groups and are members of or associated with the front that is the ruling party at the federal level.[589] Therefore, these parties are also represented at the federal level in parliament and in the executive. Members of these parties represent their constituencies who have directly elected them to

[585] Asnake Kefale, *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study (Routledge Series in Federal Studies)*, 1 edition (Routledge, 2013), 26–31.

[586] Regassa, "State Constituions in federal Ethiopia: A Preliminary Observation", 2004, http://camlaw.rutgers.edu/statecon/subpapers/regassa.pdf; C. Van der Beken, "Ethiopia: constitutional protection of ethnic minorities at the regional level" (Ghent Africa Platform (GAP), 2007), http://www.gap.ugent.be/africafocus/pdf/07-20-12-Vanderbeken2.pdf.

[587] Lahra Smith, "The Politics of Contemporary Language Policy in Ethiopia," *Journal of Developing Societies* 24, no. 2 (June 1, 2008): 222-224.

[588] Carol Benson, Kathleen Heugh, Berhanu Bogale, and Mekonnen Alemu Gebreyohannes. "Multilingual education in Ethiopian primary schools." *Multilingual education and sustainable diversity work: From periphery to center* (2012):32.

[589] The Ethiopian Peoples' Revolutionary Democratic Front is a permanent coalition of four ethno-regional parties with a left leaning ideological orientation. The Front has its own executive and central committee in which the four member parties are represented in equal numbers. The front also has a Organizational or party conventions held every three years.

the 'House of Representatives' (the lower house of parliament) in single member district first past the post elections (save the 20 seats reserved for minorities).[590]

Furthermore, in the 'House of Federation' (i.e. the upper house of Parliament), members represent specific ethnic groups. As such the House of Federation is in a manner of speaking a house of NNPS or ethnicities. The Constitution provides that members of this House could be elected directly by the respective NNPs that they represent or by the legislative houses of the regional states. Each ethnic group is supposed to have at least one representative in the House of Federation and an additional one member per every million of the population of the ethnic group.[591] The House of Federation does not have legislative powers but has important non legislative functions. These includes its power to determine the formula for the transfer of federal grants to the regional states, its power to mediate and arbiter disputes among regional states, ethnic groups and as well as its power to settle constitutional disputes and exercise the power of constitutional review.[592]

The overall approach of the Ethiopian Constitution to ethnic diversity is to embrace ethnicity and turn it into a building block for a federation that brings together the various ethnic groups within Ethiopia. In contrast to the approach of Nigeria and other African countries that have focused on integration by blocking the translation of ethnicity into political identity and representation, the Ethiopian approach had focused on accommodation and promotes the translation of ethnic identity in to political identity and representation.



[590] Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Article 54(1) and (3).
[591] Id., Article 61(1) and (2).
[592] Id., Article 62.

A number of arguments are forwarded to justify this approach. The first justification is the argument that recognizing the right to self-determination up to secession, to self-rule and shared rule as well as the cultural and linguistic rights of ethnic groups is democratic.[593] Those who argue along this line contend that any other approach would mean the use of coercion against ethnic groups who are asserting their legitimate entitlement and as such would be undemocratic. Another arguments concern the efficacy of the 'self-determination' approach in preserving unity and the territorial integrity as well as continued existence of the Ethiopian state.[594] The argument goes that, ethnic groups will be more likely to remain within Ethiopia so long as their right to self-determination is respected and they have the option of exiting the federation whenever they so desire. The proponents of the approach also laud its suitability to address past historical injustices and alleviate the condition of those who were politically and economically marginalized.[595]

In addition to the prospect of promoting ethno-regional justice in terms of fair distribution of political power, economic resources the proponents of the system extol its capacity to recognize and promote the cultures and languages of various ethnic groups that have been hitherto denigrated. Finally, the proponents of the system also emphasize that such a system that is explicitly based on ethnicity allows all ethnic groups to be represented at all levels of government and makes the state more inclusive.

### C. Evaluating the Ethiopian Experience

[593] Minutes of the Council of Representatives of the Transitional Government of Ethiopia, 94th Regular Session, and 1986 Julian Calendar (1994 Gregorian calendar), pp108-125.
[594] Id.
[595] Id.

The Ethiopian constitutional approach to address the question of ethnicity has been very controversial both in the academic and political spheres since its introduction.[596] Given that it has been twenty years since its introduction, one could reasonably expect that the experience in the last two decades have put to the test the system and exposed its weakness and strengths. However, it should be noted that because of the highly centralized control that the leadership of the ruling party exercises through most of the country, the full implications of the particular Ethiopian brand of federalism have not materialized yet.[597] It is very difficult at the moment to foresee how exactly the system will work when such control or 'centralized democracy' in the parlance of the ruling party does not exist anymore. Be this as it may, the following observations could still be made about the accomplishments and shortcomings of the system so far.

One important achievement of the Ethiopian constitutional approach to ethnicity is the affirmation and recognition it provides for the various ethnic groups that have been denied any official recognition in the past. Prior to 1991 the overall disposition of the Ethiopian state privileged one language and cultural identity over others. The Orthodox Christian Amharic speaking central and northern highlander was made out to be the quintessential Ethiopian, especially in the imperial era.[598] The language of instruction in schools, the working language in courts and administrative units down to the local level were Amharic. As a result, those who belonged to this privileged ethno-cultural group or who were sufficiently assimilated could get public sector jobs and identify with the state.

[596] Asnake Kefale, "Federal Restructuring in Ethiopia: Renegotiating Identity and Borders along the Oromo–Somali Ethnic Frontiers." *Negotiating Statehood: Dynamics of Power and Domination in Africa*: 76.

[597] See Lovise Aalen, "Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: The Case of Ethiopia," *International Journal on Minority and Group Rights* 13 (2006): 250-251.

[598] Solomon Gashaw, "Nationalism and ethnic conflict in Ethiopia." *The Rising Tide of Cultural Pluralism: The nation-state at bay* (1993): 144.

The new Constitutional approach in Ethiopia has radically altered that. It has recognized clearly the ethnic and cultural diversity of Ethiopians and made it possible for these groups to use their own language in schools, courts and public offices.[599]

One important consequence of this is the rise of local political and bureaucratic elites at the various administrative levels. The establishment of local and regional governments using the local langue as the official language of the regional or local government had facilitated the emergence of a class of administrators, civil servants, judges and teachers drawn from the local population almost in all parts of the country.[600] In the past, such positions were largely filled not by locals but by people from the north and central highlands whose proficiency in Amharic gave them an advantage in the competition for these positions.

Furthermore, the current Ethiopian constitutional approach to ethnicity has guaranteed a reasonably fair allocation of the resources from the center to the regions. In the past two decades an unprecedented amount of public resources is being made available from the center to what used to be the peripheries. The fiscal federalism and decentralization of the past two decades have made a wider portion of the population beneficiaries of the revenues raised by the center. The concentration of resources at the center and the disproportionate allocation of public funds for development to certain parts of the country have been bought to an end because of the new constitutional dispensation. In addition to this, the current constitutional approach to ethnicity has also facilitated greater



[599] Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Ashgate Publishing, Ltd., 2010), 234-235; Assefa Fiseha, *Federalism and the accommodation of diversity in Ethiopia: a comparative study* (Wolf Legal, 2006), 444.

[600] Terrence Lyons, *Ethiopia: Assessing Risks to Stability*. Center for Strategic and International Studies (CSIS), 2011, 11.

representation and inclusion of the various ethnic groups of the country at the center. Therefore, to a great extent, the current constitutional dispensation of the Ethiopian state could be said to have addressed the various grievances of hitherto marginalized ethnic groups in Ethiopia.

On the other hand there are many discontents with the system among those who have vehemently objected to the establishment of ethnic federalism in Ethiopia and even among those who in principle endorse the idea of ethnic federalism. Some of the discontents are concerning the constitutional design and rules themselves and others are regarding a pattern of deviation from the Constitution that go counter to its letter and spirit. To start with the first set of shortcomings, one significant problem with the current constitutional setup is its inability to treat the various ethnic groups in a consistent, coherent and principled manner. While the Constitution in principle recognizes the full right to self-governance of all NNPs in whom it proclaims all sovereignty resides, when it comes to the determination of the form of self-governance that each particular ethnic group gets, there is an asymmetry that is difficult to explain. Some ethnic groups have their own regional state government; some have their own zonal or *Woreda* and some even *Kebelle* administration. The criteria that was used to determine the form of self-governance each ethnic group gets is not clear. While some ethnic groups with a considerably large population have been consigned to sub regional level, some ethnic groups with a smaller population size have their own regional state.

Though the Constitution has laid down a procedure through which each ethnic group could create its own regional state, the ruling party had used strong-arm tactics to forestall efforts of different ethnic elites who aspired to establish their own regional

state or upgrade the form of self-rule they were assigned to. One very good example of this would be the persistent demand of the Sidama, the most populous ethnic group in the multiethnic Southern Nations, Nationalities and Peoples Regional State (SNNPRS) to have their own regional state instead of having a zone within the SNNPRS.[601] This demand has largely been suppressed through a violent crackdown by the federal government.[602] This is despite the fact that the demand for statehood had been formally and duly submitted to the Council of Nationalities (CON) of the SNNPRS.[603]

The Constitution's promise that each and every ethnic group has the right to form its own regional state or determine the form of self-rule it will have coupled with the benefits of creating one's own regional state has led to demands for statehood, zonal or special administrative unit status. Had all these demands been met, the proliferation of new regional states would have been unmanageable and would have resulted in the squandering of scarce resources in the expensive undertaking of establishing and sustaining an endless succession of new regional states or zones. However, the Constitution had not made administrative feasibility and economic considerations a factor to be taken in to account in the creation of new states.

Another problem that has arisen out of the current Ethiopian approach to ethnicity is its failure to appreciate the fluidity of ethnic identity. The Constitution seems to be premised on the belief that everyone has a clearly identifiable and static ethnic identity. This

[601] See The Sidama Nation across the Globe Mark 11th Year Anniversary of Looqqe Massacre Sidama Community United Kingdom, May 25, 2013 London, available at http://www.sidamaliberation-front.org/Looqqe%2011th%20Anniversary.pdf and last accessed on November, 14, 2013; See also Lovise Aalen, *The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilisation Under Ethnic Federalism* (BRILL, 2011), 4.

[602] Berhanu Gutema Balcha, *Restructuring State and Society: Ethnic Federalism in Ethiopia*, (SPIRIT – Doctoral Programme Aalborg University Denmark SPIRIT PhD Series Thesis no. 8,2007), 214.

[603] Tsegaye Regassa, "Learning to Live with Conflicts: Federalism as a Tool of Conflict Management in Ethiopia - An Overview," *Mizan Law Review* 4 (2010): 57 foot note 22.

assumption has proved problematic and has resulted in difficulties relating to the demarcation of the administrative boundaries of the different regions, the recognition of a particular group as a distinct ethnic group as well as the insistence of the state in attaching an ethnic label to all its citizens. These problems have caused a number of conflicts and the frustration of many with the system. The issue of the boundaries of the regional states has particularly proved problematic and a source of violent and deadly conflicts.[604] A very good example of this would be the border conflict between the Somalia and Oromia National Regional States.[605]

Furthermore, another problematic aspect of the current system is the creation of minorities who are not indigenous to the ethnic enclave in which they reside. The emphasis on ethnicity excludes these people from participating fully in the political and economic life of the localities in which they live. There have also been instances in which such minorities have been forced to leave their place and move to their supposed 'ethnic homeland'. A notable and recent example of these would be the eviction of nonindigenous residents of the Benishangul Gumuz regional state.[606]

But the most worrisome and controversial aspect of the Ethiopian approach to ethnicity has been the provision of an unconditional right to secession accorded to each ethnic group in the country.[607] Many fear that this provision will destabilize the country and

[604] See J. Abbink, "Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism.," *Journal of Contemporary African Studies* 24, no. 3 (2006): 397.

[605] See Marco Bassi,"The politics of space in Borana Oromo, Ethiopia: demographics, elections, identity and customary institutions." *Journal of Eastern African Studies* 4, no. 2 (2010): 221-246; See also, Boku Tache and Gufu Oba "Policy-driven Inter-ethnic Conflicts in Southern Ethiopia." *Review of African Political Economy* 36, no. 121 (2009): 409-426.

[606] *Federal government admits wrong on Ethiopians evicted from Benishangul,* ESAT News , April 25, 2013, available at http://ethsat.com/2013/04/27/federal-government-admits-wrong-on-ethiopians-evicted-from-benishangul/ and last accessed on November 15, 2013.

[607] Sarah Vaughan, "Civic and Ethnic Nationalist Narratives in Ethiopia." *Against Orthodoxy: Studies in*

ultimately result in its dismemberment. Despite the insistence of the framers of the Constitution that the recognition of the right to secession will dampen demands for secession, there are still political movements claiming to represent different ethnic groups and demanding the right to secede.[608] These have forced the government to resort to coercion to suppress these political groups whose avowed aim is to secure the independence of their ethnic homeland.[609]

In addition to the problems that arise from the constitutional design and rules, the disparity between the reality on the ground and the constitutional rules is an important cause of grievance. This is particularly the case when it comes to the dominance of one ethnic group in the security apparatus and among high and middle ranking officers of the army.[610] The overrepresentation of the people of Tigrian origin in these and similar sensitive positions as well as the continued dominance of the Tigray Peoples Liberation Front in the ruling Ethiopian People's Revolutionary Democracy Front has led many to argue that ethnic federalism in Ethiopia is a facade that is serving as an instrument of indirect rule as well as to divide and rule.[611] Many contend that this political dominance of people of Tigrayan origin has also translated in to an ever increasing concentration of wealth in the private sector among ethnic Tigre business people. In addition to the perception that there is an emerging Tigrian *nouveau riche*, the large business empire run



*Nationalism* (2011): 154.

[608] Assefa Mehretu, "Ethnic Federalism and Its Potential to Dismember the Ethiopian State", *Progress in Development Studies* 12, no. 2–3 (July 1, 2012): 115–116.

[609] Belachew Gebrewold, "Ethiopian Nationalism: An Ideology to Transcend All Odds," *Africa Spectrum* 44, no. 1 (January 1, 2009): 88.

[610] Lovise Aalen, *The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilisation Under Ethnic Federalism* (BRILL, 2011), 4.

[611] Merera Gudina, "Electoral Authoritarianism and Democratic Governance in Ethiopia." *Setting of New Social Science Research Agendas for Africa in the 21st Century* (2011): 109 and 118.

by an endowment of the TPLF has also strengthened the belief that the distribution of wealth is skewed to the advantage of members of one ethnic group.[612]

### *5.3 Ethnic Diversity and Constitutionalism: The Kenyan Experience*

#### A. A Brief Historical Sketch

Kenya, as most other African states is a creation of a colonial project which started as a quasi-private enterprise and then was taken over by the British Empire.[613] Kenya was different to some extent in that because of the temperate climate in its highlands which were found to be suitable for European settlement; it was designated to be a settler colony.[614] Accordingly, the native population in the highland that is today called 'the white highlands' were evicted to make way for European settlers. While this is a significant and important aspect of Kenya's colonial history that had serious implications in post-independence Kenya,[615] in many other aspects, British colonial rule in Kenya showed many similarities with colonial rule in other British colonies in Africa. The system of indirect rule was used by the British and to make this system workable, the colonial administration needed to categorize the population along ethnic/tribal lines.[616]

[612] See Sarah Vaughan, and Mesfin Gebremichael. "Rethinking business and politics in Ethiopia: The role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray." *Retrieved August* 16 (2011): 2012.

[613] John Lonsdale and Bruce Berman, "Coping with the Contradictions: The Development of the Colonial State in Kenya, 1895–1914," *The Journal of African History* 20, no. 04 (1979): 867.

[614] W. T. W. Morgan, "The 'White Highlands' of Kenya," *The Geographical Journal* 129, no. 2 (June 1, 1963): 140.

[615] See Karuti Kanyinga, "The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya," *Journal of Contemporary African Studies* 27, no. 3 (2009): 325-344; Prisca Mbura Kamungi, "The politics of displacement in multiparty Kenya," *Journal of Contemporary African Studies* 27, no. 3 (2009): 345-364.

[616] Sara Berry, "Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land," *Africa: Journal of the International African Institute* 62, no. 3 (January 1, 1992): 332& 340.

The combined effect of missionaries and the colonial state helped the crystallization of existing ethnic identities and their politicization.[617]

The interaction of the colonial state and the local population did not always foster ethnic solidarity within one group and at times it had also been marked with internal divisions. The *Mau Mau* rebellion by the Kikuyu against the British, which begun in the early 1950s and went till 1960, pitted the Kikuyu collaborators against the rebels.[618] While the violent struggle of the *Mau Mau* against the settlers and the colonial government was mainly a Kikuyu uprising, the political party that was leading the movement for independence was not so ethnically confined. The *Kenya African National Union (KANU)* which led the movement for independence brought most of the large ethnic groups, particularly the Kikuyu and the Luo together and could be considered as a national political party at that point in Kenyan history.[619]

Just before independence, during the constitutional negotiations at Lancaster House which took place from 1960-63, there were three groups in the alignment of political forces in Kenya. The largest and the most important was the alliance of biggest ethnic groups in Kenya (i.e. the Kikuyu, the Luo, the Kamba and the Luyha) represented by the KANU.[620] In this party, the alliance of Jomo Kenyatta and Oginga Odinga, who were prominent political figures at that time hailing from the Kikuyu and the Luo ethnic groups respectively, was crucial in enabling KANU to emerge as party with a claim of



[617] Rok Ajulu, "Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective," *African Studies* 61, no. 2 (2002): 253; Gabrielle Lynch, "Negotiating Ethnicity: Identity Politics in Contemporary Kenya," *Review of African Political Economy* 33, no. 107 (March 1, 2006): 54.
[618] See Daniel Branch, "The Enemy Within: Loyalists and the War Against Mau Mau in Kenya," *The Journal of African History* 48, no. 02 (2007): 291-315.
[619] D. Pal S. Ahluwalia, *Post-Colonialism and the Politics of Kenya* (Nova Publishers, 1996), 33.
[620] "Politicised Ethnicity, Competitive Politics and Conflict in Kenya," 257-258.

being a Pan-Kenyan political party. The smaller ethnic groups were represented by the *Kenya African Democratic Union* (KADU).[621] In addition to these parties, the European settlers in Kenya were an important constituency allied with KADU.[622] Though of not equal significance, the Muslim and Arabized population on the coastal area where the Sultan of Zanzibar had some territorial claim were also represented and took part in the Lancaster house negotiations.[623]

During these negotiations, one of the most important and controversial issues was the question of how the Kenyan state will be structured. The smaller ethnic groups represented by KADU, fearing domination by the larger ethnic groups and the white settlers concerned about the prospect of a majoritarian dominant central government advocated for the structuring of Kenya along federal lines and the creation of regions ( or *Majimbo* as regions were popularly called in Swahili).[624] This proposal was supported by the British as well and Kenya gained its independence with a quasi-federal constitution with a parliamentary form of government with the queen as its head of state.

However, once Kenya gained independence, the dominant party KANU which had an overwhelming victory in the first round of elections undertook a number of constitutional amendments. The first among these amendments was the evisceration of regional autonomy and the transformation of Kenya into a unitary state.[625] This was justified on

[621] George Bennett, "Kenya's Frustrated Election," *The World Today* 17, no. 6 (June 1, 1961): 255.
[622] Charles Hornsby, *Kenya: A History Since Independence* (I.B.Tauris, 2013), 62.
[623] B.A Ogot, "The Decisive Years 1956-63" in Bethwell Allan Ogot , and William Robert Ochieng, eds. *Decolonization and Independence in Kenya: 1940-93*. Ohio State University Press, 1995, 67.
[624] David M. Anderson, "'Yours in Struggle for Majimbo'. Nationalism and the Party Politics of Decolonization in Kenya, 1955-64," *Journal of Contemporary History* 40, no. 3 (July 1, 2005): 552; Robert Maxon, "Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century," *Kenya Studies Review* 1, no. 1 (2009): 14-15.
[625] H. W. O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963-69," *African Affairs* 71, no. 282 (January 1, 1972): 19-20.

arguments based on the need for nation building and the specter of tribalism that regional divisions would entail. *Majimboism, i.e.* support or advocacy for political decentralization was so thoroughly denounced and it was turned in to pejorative term that is indistinguishable with tribalism.[626] After the passing of the constitutional amendment which abolished political decentralization and settled the issue of *majimbo* in favor of the KANU position, aware of their obvious and seemingly permanent exclusion from power, leaders of KADU dissolved their party and joined the ruling party.[627] As a result, there ceased to be any parliamentary opposition in Kenya and Kenya became a *de facto* one party state.[628] The carrot and stick tactic of KANU was effective in coopting leaders of KADU who saw no benefit in remaining as an opposition with the lost cause of *majimboism* as its platform. The fact that KADU was subsumed by KANU was presented by the government of the day as another step in the efforts to stem the tide of tribalism. The whole idea of opposition to a governing authority was also projected as inconsistent with African culture and governance ethos.[629]

Another important development during this period was the ideological schism between the President and the Vice President. While President Kenyatta had rather conservative political leanings and wanted to maintain stronger economic and political ties with Britain and America the Vice President, Oginga Odinga was allied with communist countries and advocated for a measures of redistribution to alleviate the condition of the

[626] Anderson, "'Yours in Struggle for Majimbo'. Nationalism and the Party Politics of Decolonization in Kenya, 1955-64," 547.
[627] M. Tamarkin, "The Roots of Political Stability in Kenya," *African Affairs* 77, no. 308 (July 1, 1978): 308 ; Roger Southall, "Moi's flawed mandate: the crisis continues in Kenya," *Review of African Political Economy* 25, no. 75 (1998): 101 ; Ahluwalia, *Post-Colonialism and the Politics of Kenya*, 35.
[628] David Seddon, *A Political and Economic Dictionary of Africa* (Routledge, 2013), 286.
[629] Peter Wanyande, "Democracy and the one-party state: The African experience." *Democratic theory and practice in Africa* (1988): 71.

landless and poor Kenyans.[630] This schism resulted in a fall out between the two politicians and Odinga established the Kenya People's Union (KPU) with other left leaning politicians who had defected from KANU.[631] President Kenyatta responded by introducing a constitutional amendment that made all the members of parliament who had defected from KANU lose their mandate.[632]

As a result, elections were held in 1966 in many parliamentary districts to fill the parliamentary seats that had become vacant. In this contest between KANU and KPU in what was termed the 'little general election', a clear ethnic pattern of voting emerged. KPU won in parts of Kenya where the Luos (Odinga's ethnic group) were the majority and KANU won in the areas where the Kikuyu were the majority.[633] This development contributed to the ethnicization of the originally ideological clash between the conservatives in KANU and Odinga. In addition to this development, the assassination of Tom Mboya, a leading Luo politician and presidential aspirant in KANU, which many suspected was the doing of either Kenyatta or his close Kikuyu associates contributed to the rising ethnic tensions in Kenyan politics.[634] All of this culminated to a dramatic incident in which President Kenyatta got a very hostile reception in 1969 in Nyazaland (a



[630] Daniel Branch, *Kenya: Between Hope and Despair, 1963-2011* (Yale University Press, 2011), 52-55; Jim Bailey and Garth Bundeh, *Kenya: The National Epic* (East African Publishers, 1993), 160.
[631] Charles Hornsby, *Kenya: A History Since Independence* (I.B.Tauris, 2012), 159.
[632] George Bennett, "Kenya's 'Little General Election'," *The World Today* 22, no. 8 (1966): 341.
[633] Branch, *Kenya*, 60-61; Ajulu, "Politicised Ethnicity, Competitive Politics and Conflict in Kenya," 260; See also George Bennett, "Kenya's 'Little General Election,'" *The World Today* 22, no. 8 (August 1, 1966): 336–343. .
[634] P. Anyang' Nyong'o, "State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of Presidential Authoritarianism 1963-78," *African Affairs* 88, no. 351 (April 1, 1989): 243; Stanley Meisler, "Tribal Politics Harass Kenya," *Foreign Affairs* 49, no. 1 (October 1, 1970): 143.

dominantly Luo area) where he was present for a commencement of a hospital and his security detail fired shots at the crowd.[635]

The cumulative effect of these occurrences as well as the centralization of power and its personalization with an increasingly powerful President was a pattern of ethnic favoritism particularly in relation of the distribution of land that was formerly occupied by European settlers and the ethnicization politics in Kenya.[636] The Kikuyu were seen to be in the ascendancy and beneficiaries of the booming Kenyan postcolonial economy.[637] The fact that many landless Kikuyu were settled by the government in the Rift Valley province, on land that the Massai and Kalenjin considered to be rightfully theirs reinforced the ethnic divide in the country.[638]

Determined to maintain their economic advantage and political preeminence, Kikuyu elites and those from their cousin ethnic groups the Embu, and Meru started a movement to forestall Vice President Daniel Arap Moi who was a Kalenjin from succeeding the ageing President Kenyatta.[639] The association of Gikuyu, Embu, and Meru Association (GEMA), campaigned to have the constitution changed so that the Vice President will not succeed the President automatically upon the latter's death.[640] These movements were bought to an end by the powerful Attorney General who himself was Kikuyu and who

[635] Branch, *Kenya*, 88; See also "Witness recalls the 1969 Kisumu massacre that marked Jomo Kenyatta's visit", *Standard Digital*, October 28th 2013, (available athttp://www.standardmedia.co.ke/mobile/?articleID=2000096439&story_title=witness-recalls-the-1969-kisumu-massacre-that-marked-jomo-kenyatta-s-visit and last accessed on November, 11, 2013)
[636] Kanyinga, "The legacy of the white highlands," 328-333.
[637] G. B. Lamb, "The Political Crisis in Kenya," *The World Today* 25, no. 12 (December 1, 1969): 543; Ken Omolo, "Political Ethnicity in the Democratisation Process in Kenya," *African Studies* 61, no. 2 (2002): 214.
[638] Kanyinga, "The legacy of the white highlands," 328-333.
[639] Jennifer A. Widner, *The Rise of a Party-state in Kenya: From "Harambee" to "Nyayo!"* (University of California Press, 1992), 113-118.
[640] Ahluwalia, *Post-Colonialism and the Politics of Kenya*, 81-82; Nyong'o, "State and Society in Kenya," 48-50.

seemed to have envisioned to become the power behind the throne.[641] As a result, upon the death of Kenyatta, Arap Moi became the President.[642] Arap Moi's ethnic favoritism to the Kalenjin and the attempted coup against Moi's government by a group of predominantly Luo air force men and politicians in 1992 meant that the trend of increasing ethnicization of politics continued during Moi's presidency as well.[643]

The resumption of multiparty politics in Kenya also did very little to abate to ethnicization of politics.[644] Various politicians with presidential aspirations formed parties that served primarily as instruments for mobilizing their ethnic base.[645] A decade after the resumption of multiparty electoral contests, the opposition coalition brought together the biggest names in Kenyan politics who claimed to represent different ethnic groups and successfully contested the 2002 election.[646] But once they won the election and the office of the President had been captured by Kibaki and a close circle of Kikuyu associates the coalition of started to fall apart.[647]

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[641] Samuel M. Makinda, "Kenya: Out of the Straitjacket, Slowly," *The World Today* 48, no. 10 (October 1, 1992): 188; Kate Currie and Larry Ray, "State and Class in Kenya - Notes on the Cohesion of the Ruling Class," *The Journal of Modern African Studies* 22, no. 4 (December 1, 1984): 568-569.

[642] M. Tamarkin, "From Kenyatta to Moi: The Anatomy of a Peaceful Transition of Power," *Africa Today* 26, no. 3 (1979): 21-37.

[643] Ajulu, "Politicised Ethnicity, Competitive Politics and Conflict in Kenya," 262-263; Jeffrey Steeves, "Presidential succession in Kenya: The transition from Moi to Kibaki," *Commonwealth and Comparative Politics* 44, no. 2 (2006): 212-213; Branch, *Kenya*, 156; Nancy Drexler, *Kenyan Stability: Is the Situation Deteriorating?* (Federal Research Division Library of Congress, February 1985), 12, http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA303415.

[644] Omolo, "Political Ethnicity in the Democratisation Process in Kenya," 215-219.

[645] David Throup, "Elections and Political Legitimacy in Kenya," *Africa: Journal of the International African Institute* 63, no. 3 (January 1, 1993): 390; Sebastian Elischer, "Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya," *SSRN eLibrary* (February 2008): 12-16, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114123.

[646] Joel D. Barkan, "Kenya after Moi," *Foreign Affairs* 83, no. 1 (January 1, 2004): 87-100; David M. Anderson, "Briefing: Kenya's Elections 2002 — Dawning of a New Era?," *African Affairs* 102, no. 407 (April 2003): 331.

[647] Michael Chege, "Kenya: Back From the Brink?," *Journal of Democracy* 19, no. 4 (2008): 129-130; Nic Cheeseman, "The Kenyan Elections of 2007: An Introduction," *Journal of Eastern African Studies* 2, no. 2 (2008): 174.

Kibaki reneged on many aspects of the deal he had reached with Odinga prior to the election. Kibaki's circle seemed very little inclined to part with the centralized and personalized power enjoyed by the office of the President and frustrated efforts of constitutional reforms which were part of the deal for the formation of the National Rainbow Coalition prior to the election.[648] Furthermore, ethnic favoritism and the alleged disproportionate share of the Kikuyu in the economy helped cast the administration of President Kibaki as a Kikuyu government working for the benefit of one ethnic group more than others.[649] All these meant that, in the 2005 constitutional referendum and leading up to the 2007 election, there was an increasing ethnicization of politics that pitted the Kikuyu and allied ethnic groups against the Luo, Kalenjin and their allies.[650] Under these circumstances, the stakes were very high during the 2007 General Election and neither party was willing to admit defeat leading to violence and the death of thousands of Kenyans.[651]

### B. The Old Kenyan Constitution and Ethnicity

Kenya's approach to the issue of ethnicity starting with the rejection of decentralization/ regionalism or *majimboism* immediately after independence was a mixture of an official

[648] Among the most important elements of the Memorandum of Understanding that was the basis of the National Rainbow Coalition were devolution of power from the center and the creation of an office of prime minister who shares executive power with the President. Branch, *Kenya*, 258; Godwin R. Murunga and Shadrack W. Nasong'o, "Bent on Self-Destruction: The Kibaki Regime in Kenya.," *Journal of Contemporary African Studies* 24, no. 1 (January 2006): 10; Jeffrey Steeves, "Beyond democratic consolidation in Kenya: ethnicity, leadership and 'unbounded politics'.," *African Identities* 4, no. 2 (October 2006): 205.

[649] Joel D Barkan, "Kenya's Great Rift," *Foreign Affairs*, February 2008, http://www.unc.edu/world/2008Seminars/Kenya%27sGreatRift.pdf; Jeffrey Steeves, "Presidential succession in Kenya: The transition from Moi to Kibaki," *Commonwealth & Comparative Politics* 44, no. 2 (2006): 203.

[650] Peter Kagwanja and Roger Southall, "Introduction: Kenya - A democracy in retreat?," *Journal of Contemporary African Studies* 27, no. 3 (July 2009): 262.

[651] Susanne D. Mueller, "The Political Economy of Kenya's Crisis," *Journal of Eastern African Studies* 2, no. 2 (2008): 200; See also See Susanne D. Mueller, "Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya," *Journal of Contemporary African Studies* 29, no. 1 (2011): 99–117.

rhetoric that emphasized unity, a highly centralized form of government and a coalition of politicians from most ethnic groups in the dominant KANU party. The centralization of power and the brief legal and the long factual prohibition of opposition parties were partly strategies meant bring about ethnic integration. Once multi-party elections were reintroduced in Kenya, a geographic spread rule was introduced for Presidential elections as an additional mechanism of integration. However, generally speaking, till the aftermath of the post-election crisis of 2007, Kenya hardly used its constitution as an instrument of neither integration nor accommodation of ethnic diversity.[652]

Unlike other African countries like Ethiopia or Nigeria where there has been a conscious and systematic effort to design constitutions particularly designed to address the issue of ethnicity, in Kenya the old Constitution had a rather marginal role in dealing with ethnicity.[653] The federal option, endorsed both in Ethiopia and Nigeria was rejected immediately after independence. Kenya did not adopt something like a 'federal Character principle' or its equivalent as Ethiopia had.[654] Unlike Nigeria, Kenya has not adopted a regulatory framework for political parties with the aim of ensuring their national character.[655] As a result, there was not a ban of ethnic parties in Kenya till 2008.[656] All in all, Kenya could hardly be said to have consciously used its constitution as an instrument of either integration or accommodation of ethnicity.

[652] Laurence Juma, "Ethnic Politics and the Constitutional Review Process in Kenya," *Tulsa Journal of Comparative & International Law* 9 (2002 2001): 472–473.
[653] See Rotimi Suberu, "Federalism in Africa: The Nigerian Experience in Comparative Perspective," *Ethnopolitics* 8, no. 1 (2009): 67–86; Yonatan Tesfaye Fessha, "Federalism, Territorial Autonomy and the Management of Ethnic Diversity in Africa: Reading the Balance Sheet," *L'Europe en Formation* n° 363, no. 1 (March 1, 2012): 269.
[654] Ibid.
[655] See Matthijs Bogaards, "Ethnic Party Bans and Institutional Engineering in Nigeria," *Democratization* 17, no. 4 (2010): 730–749.
[656] Anika Moroff, "Comparing Ethnic Party Regulation in East Africa," *Democratization* 17, no. 4 (2010): 735.

After the resumption of multiparty electoral contest in Kenya in 1992, although there has been a strong movement compromising religious leaders, opposition political parties and civil society organizations, the movement could not succeed because of the intransigencies of both the Moi and Kibaki administrations. Despite the fact that one of Kibaki's main platforms in 2002 was the adoption of a new Constitution within 100 days after taking office, Kenyans had to wait till 2010 for a new Constitution. The allure of power was too much for Kibaki and his associates to selflessly change a constitution in place that gave theme enormous powers with a new constitution that seriously constrained them. Therefore, from independence till the adoption of the new and current Constitution of Kenya, Kenya's constitutional strategy of handling the question of ethnicity (though there was not a conscious, articulated strategy to speak of ) was the centralization of power and cooption of opponents from different ethnic groups by the all-powerful President.

### C. Evaluation of the Kenyan Experience and a Glance at the 2010 Kenyan Constitution

Before proceeding to see the approach adopted in the new Kenyan constitution, it will be necessary to evaluate the consequences of the Kenyan constitutional approach to ethnicity till 2010. This approach has clearly not worked and had been disastrous. The centralization of power with the presidency had led to the continuous and deadly competition of the political elites to attain that office. The personalization of power had created a situation in which to feel secure and be fairly (one could also say favorably) treated by the state, people compelled the need to see their ethnic kin as president. Other

than the informal political process, there was also no mechanism for ethnic groups that felt marginalized in the distribution of resources and opportunities to get redress.

Coming to the new Constitution of Kenya adopted in 2010, we can see that it is a constitution designed with a view to address problematic ethnic relations. The Constitution attempts to do these through a combination of three strategies. These strategies are:

1. Re-structuring of power relations through devolved government and through enhancing the inclusivity and representativeness of the central government;
2. Ensuring more equitable distribution of resources and opportunities among ethnic communities;
3. Guaranteeing the right to non-discrimination and equality of citizens

With regard to the first strategy, the most significant constitutional development has been the adoption of devolved government in Kenya. The 2010 Kenyan Constitution has created forty seven counties with their own executive and legislative councils.[657] With the introduction of devolved government, the Constitution aims to foster national unity, recognize diversity, and recognize the right of communities to manage their own affairs, to protect minorities and marginalized groups as well as ensure the equitable allocation of resources.[658] At the same time, due to their relatively small size and constitutional status as "counties" and not states in a federal arrangement, the counties can hardly provide the basis of the ethnic mobilization of centrifugal forces. Furthermore, extending the diffusion of power that had hitherto been centralized, the counties are represented by directly elected senators and this arrangement provides regional interests a voice at the

[657] Constitution of Kenya 2010, First schedule.
[658] Constitution of Kenya 2010, Article 174.

center.[659] The constitution also requires political parties to have a national character and reflect "the regional and ethnic diversity of the people of Kenya" in their party list.[660] Furthermore, the Constitution requires that the Cabinet of the central government reflect the ethnic and regional diversity of Kenya and provides that for a presidential candidate to be successful in his bid for the presidency, s/he needs to win not only the majority of the votes cast nationally but also at least a quarter of the votes cast in each of more than half of the forty seven counties.[661] Through a combination of these strategies, the Constitution tries to avoid a repeat of the days in which one ethnic group dominated the state.

The second strategy adopted in the new Kenyan Constitution is the way in which the Constitution tries to ensure the fair and equitable distribution of resources and opportunities in the form of budgetary allocation for development, state sector employment or access to land. The Constitution provides that the revenue raised nationally shall be allocated between the counties and national government equitably[662] and reserves a minimum of 15% of revenue raised by the national government to be distributed among the countries.[663] The Constitution also establishes an equalization fund which shall be used "to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible." [664] This strategy is supposed to do away with the sense of marginalization and

[659] Id. Articles 96 and 97.
[660] Id. Article 91.
[661] Id. 138(4) (a and b)
[662] Id. 202(1)
[663] Id. Article 203(2)
[664] Id. Article 204.

relative deprivation that often fuels ethnic division and animosity. Therefore, it is a strategy of fostering national unity and integration.

The Constitution also establishes an independent commission which is supposed "to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government" among the counties and the national government.[665] The Constitution also stipulates that the awarding of contracts and procuring services and goods by public entities should be equitable and fair and that previously disadvantaged groups should be taken in to account.[666] Furthermore, the Constitution imposes on parliament a duty to enact a procurement legislation that will operationalize these principles.[667] Finally, the Constitution also stipulates that the various arms of government should be staffed in such a way that they reflect the ethnic and regional diversity of Kenya.[668] The Constitution also provides equitability of access as one of the elements that should characterize land policy in Kenya.[669] Therefore, it would be fair to say that the new Kenyan Constitution is designed with the view to facilitate the equitable distribution of resources and opportunities controlled by the state.

Finally, the new Kenyan Constitution also enshrines a right to equality and nondiscrimination and the right of all Kenyans as citizens to move freely take residence in and own property any part of the country.[670] These provisions are intended to ensure the equal treatment of Kenyans and to put an end to recurrent forced displacement of



[665] Id. Articles 215 and 216.
[666] Id. Article 227.
[667] Ibid.
[668] Id. Articles 94(2), 130(2), 238(2)(d), 240, 241(4), 246(4) and 250(4).
[669] Id. Article 60(1).
[670] Constitution of Kenya 2010. Articles 27, 39 and 40.

Kenyans from the putative ethnic homeland of this or that ethnic group.[671] Therefore, in these ways, the new Kenyan constitution attempts to ensure that the rights of citizens are not abridged on the basis of ethnicity. All of the above strategies are strategies that are supposed to facilitate national integration and cohesion by addressing marginalization and exclusion that often result in ethnic conflict.

### *5.4 Ethnic Diversity and Constitutionalism: The Ghanaian Experience*

#### A. A Brief Historical Sketch

Ghana, the former Gold Coast as it was known during colonial times, is another creation of the British Empire. Therefore, though named after an ancient African polity upon independence, Ghana in its current form and shape is an entity that came in to existence at the turn of the 20th century.[672] Besides colonial origins of the Ghanaian state, Ghana also resembles other African countries in the abundant ethnic diversity that is to be observed in the composition of its population. There are supposed to be around 90 ethnic groups in Ghana but there are four major groupings of these ethnic groups based on linguistic and cultural affinity. These four major ethnic groupings are the Akan who constitute nearly 50% of the total Ghanaian population , the Mole-Dagbon, the Ewe and Ga-Dangme who constitute 15.2%, 11.7%, 7.3% of the total population.[673]

When we see the political history of Ghana, although there have been localized incidents of ethnic conflict particularly in the north in relation to land claims and chieftaincy

[671] See Prisca Mbura Kamungi, "The Politics of Displacement in Multiparty Kenya," *Journal of Contemporary African Studies* 27, no. 3 (2009): 345–364.
[672] Gocking, Roger, *The history of Ghana*. Greenwood Publishing Group, 2005, p.12. The British established the Gold Cost int the coastal areas in 1874, incorporated the Asante hinterland in tot he colony in 1901 and added the northern territories as a protectorate in 1902.
[673] 2000 Population and Housing Census: Summary Report of Final Results, p.5.

issues, at the national level there has not been serious ethnic conflicts as has been the case in Nigeria, Ethiopia or Kenya.[674] Although there has been a recurrent pattern of rivalry between the Ewe and the Akan that arguably goes back to the eve of independence when the Togoland Congress Party aspired to unite Ewes in both British and French Togo and form an independent state for the Ewe, so far ethnicity has not been destabilizing and too problematic in Ghana.[675] This rivalry has resurfaced with the coup that brought an end to the first Ghanaian republic in 1966 and the subsequent military administration which was perceived to be Ewe dominated.[676] The rivalry had persisted even after the end of the military rule and into the inaugural election of the second Ghanaian Republic, held in 1969, in which the two contesting parties were seen as being Akan and Ewe dominated.[677]

However, this perception was tempered by two important factors. The first factor is the fact that although both parties had a strong support base among specific ethnic and regional groups, there were also significant differences in the ideological leanings of the parties that enabled them to transcend the ethnic divide to some extent. These two parties were formed along two distinct opposing ideological outlooks which took shape in Ghana during the first Ghanaian republic. Named after the main ideologues and protagonists of the first Ghanaian republic, these are the *Busia/Danquah* and *Nkrumah* traditions. When

[674] Jönsson, Julia. "The overwhelming minority: Inter-ethnic conflict in Ghana's Northern Region."*Journal of International Development* 21, no. 4 (2009): 507-519; see also Langer, Arnim,- and Ukoha Ukiwo. "Subjective realities: perceptions of identity and conflict in Ghana and Nigeria." *Journal of International Development* 21, no. 4 (2009): 483-494.

[675] Brown, David. "Sieges and Scapegoats: the politics of pluralism in Ghana and Togo." *Journal of Modern African Studies* 21, no. 3 (1983): 431, p 442.

[676] Ibid, see also Gyimah-Boadi, E. "The Political Economy of 'Successful'Ethno-regional Conflict Management." *Can Democracy Be Designed? The Politics of Institutional Choice in Conflict-Torn Societies* (2003), p.121.

[677] Austin, Dennis. "Return to Ghana." *African Affairs* 69, no. 274 (1970): 67-71. These are the Progress party which was thought of as the Akan party and the the National Alliance of Liberals Ghana which was perceived to be Ewe dominated.

we look in to the essence of these political leanings or traditions (to use the parlance used by most commentators of Ghanaian politics) basically they are "the body of ideas associated with Nkrumah - socialism, anti-imperialism, etc., and, on the other hand, by those of J. B. Danquah and K. A. Busia - political and economic liberalism, pro-West".[678]

The other important factor that helped in tempering the potentially destabilizing Ewe-Akan rivalry was the fact that the northern regions of Ghana which is inhabited by a diverse and smaller set of ethnic groups served was not caught up in the Akan-Ewe rivalry.[679] Though the Progress Party led by Busia won the election in 1969, the government it formed could not even finish its term since a military coup brought the second Ghanaian republic to an end in 1972.

Besides the unpopular economic policies of the government of the Progress Party and the reduction of military spending, the view that the Busia government discriminated against Ewe officers in the army contributed to the motivation of the coup plotters.[680] The Supreme Military Council that ruled Ghana after the 1972 coup is perceived as having been ethnically inclusive and representative.[681] When military power was transferred to a civilian government and elections were held in 1979, one of the two major contending parties the Popular Front Party had a regional and ethnic base among the Akan and



[678] Anebo, Felix KG. "Voting Pattern and Electoral Alliances in Ghana's 1996 Elections." *African Journal of Political Science* 2, no. 2 (1997): 38, pp 40-41.
[679] Anebo, Felix KG. "Voting Pattern and Electoral Alliances in Ghana's 1996 Elections." *African Journal of Political Science* 2, no. 2 (1997): 38, pp 42.
[680] Hettne, Björn. "Soldiers and politics: The case of Ghana." *Journal of Peace Research* 17, no. 2 (1980): 173-193.
[681] Chazan, Naomi. "Ethnicity and politics in Ghana." *Political Science Quarterly*97, no. 3 (1982): 461, p. 465.

projected itself as the successor of the right leaning parties from the two previous Ghanaian republics.[682]

The party that won the election, the People's National Party presented itself as the successor of the left leaning tradition of Nukrumha, was not particularly associated with any particular ethnic or regional group (though it won fewer seats in the central Akan regions which were the strongholds of the Popular Front Party).[683] The third Republic also faced the same fate as its predecessors when mid-level officers toppled the civilian government which the decried for corruption and economic mismanagement in 1981. The officers behind the coup established the Provisional National Defense Council and lead by the populist air force officer J.J Rawlings, tried to establish an ethnically inclusive government.[684] In 1992, with the resumption of multi-party politics in Ghana, the PNDC metamorphosed into the NDC (National Democratic Congress) and become one of the two major contending parties in the fourth Ghanaian Republic.

Since the onset of the fourth republic in 1992, the two major parties in Ghana are popularly perceived as aligned to the Akan and the Ewe due to the strong support that the NDC enjoys in the Volta region (which is predominantly inhabited by the Ewe) and the hold of the NPP (the New Patriotic Party) among the *Ashaniti* who constitute the largest sub group of the Akan.[685] Therefore, the rivalry of the two parties is to some extent seen in ethnic terms. Despite this rivalry, both parties have handed over power to the other

[682] Id., pp476-478.
[683] Ibid; See also Rothchild, Donald, and E. Gyimah-Boadi. "Ghana's Return to Civilian Rule."*Africa Today* 28, no. 1 (1981): 3, p.12.
[684] Jeong, Ho-Won. "Liberal economic reform in Ghana: A contested political agenda." *Africa Today* 42, no. 4 (1995): 82, p. 97.
[685] See Fridy, Kevin S. "The elephant, umbrella, and quarrelling cocks: Disaggregating partisanship in Ghana's fourth republic." *African Affairs* 106, no. 423 (2007): 281-305; see also Nugent, Paul. "Ethnicity as an explanatory factor in the Ghana 2000 elections."*African Issues* 29, no. 1/2 (2001): 2-7.

party when defeated in elections and the scenes violence which have been witnessed in the 2005 Ethiopian elections or the 2007 elections in Kenya have not occurred in Ghana. What is particularly striking about this is the fact that both in 2000 when the NDC handed power to the NPP and in 2008 when the NNP handed over power to the NDC, the elections were highly contested and particularly in 2008 the margin of victory was very small.[686] In both cases, a run-off election was required and in 2008 the margin of victory was less than 0.5%.[687] These facts prompt the question why and how Ghana was able to avoid the tragic consequences of the virulent ethnicization of politics that had been observed in other African countries. However, before addressing this question, it would be necessary to discuss Ghana's constitutional approach towards ethnicity.

### B. Ghana's Constitutional Approach towards Ethnicity

Starting with the Nkrumah days, there is some level of continuity in Ghana's legal and constitutional approach towards the issue of Ethnicity. The Ghanaian constitutional approach towards ethnicity has hinged up the twin pillars of anti-discrimination and the suppression of ethnic political and associational activities. Both of these principles were introduced by President Kwame Nkrumah in 1957 in the form of the Avoidance of Discrimination Act.[688] As has been discussed above, this was in the context of opposition President Nkrumah faced from various ethnic and regional parties.[689] This law forced the

[686] See Gyimah-Boadi, Emmanuel. "A peaceful turnover in Ghana." *Journal of Democracy* 12, no. 2 (2001): 103-117 and Gyimah-Boadi, Emmanuel. "Another step forward for Ghana." *Journal of Democracy* 20, no. 2 (2009): 138-152.
[687] Gyimah-Boadi, Emmanuel. "Another step forward for Ghana." *Journal of Democracy* 20, no. 2 (2009): 138, p. 138.
[688] Dennis Austin,"Ghana since Independence." *The World Today* (1961), 93; see also Richard Asante, "The politics of managing ethnic cleavages, inequalities, nation-building, and democratization in Ghana." *Transregional Center for Democratic Studies, the New School* (2004).
[689] Ibid.

amalgamation of these parties in to a single opposition party called the United Party.[690] During the various military administrations that ruled Ghana, there were attempts to address the issue of ethnicity by banning competitive partisan politics and instituting inclusive noncompetitive political systems.[691] However, with the return to civilian rule and multiparty democracy, the 1992 Ghanaian Constitution has reinforced has resorted to the original approach of Nkrumah and incorporated provisions proscribing ethnic based discrimination and banning ethnic political mobilization and associations.[692] The Constitution also bans speech that might incite ethnic hatred and what it dubs ethnic propaganda.[693]

The Ghanaian Constitution Review Commission, which led a comprehensive review of the 1992 Constitution and submitted its findings and proposals in 2011 had received some submissions from the public proposing *inter alia,* the adoption of consociational principles in the constitution in the form of a rule that requires "all the major ethnic groups should be represented in appointments to public offices" as well as in "in employment in the public and private sectors",[694] rules regarding rotation of the presidency among different parts of the country,[695] electoral rules that require presidential candidate win a minimum percentage of votes in a designated number of districts[696] and the introduction of bicameralism.[697]



[690] Ibid.
[691] Naomi Chazan. "Ethnicity and politics in Ghana." *Political Science Quarterly*(1982), 469.
[692] The Ghanaian Constitution Review Commission, From a Political to a Developmental Constitution, (2011), 765-766.
[693] Ibid.
[694] Ibid.
[695] Ibid.
[696] Ibid.
[697] Ibid.

The Commission, which took into account the experience approaches of Nigeria, Ethiopia and Kenya in its analysis, rejected all these proposals since it deemed them inconsistent with the successful approach of the 1992 Constitution.[698] The Commission reasoned that all of these proposals undermine the Constitution's role as an instrument of fostering a unitary state committed to fostering national unity and cohesion.[699] The Commission held the view that the instruments of ethnic accommodation employed in Ethiopia and Nigeria would be counterproductive in Ghana and fuel ethnic divisions.[700] The Commission, while concerned with occasional ethnic clashes at the local level in some parts of the country and persistent ethnic bloc voting during national elections, seems to be of the view that the current approach of the Ghanaian constitution towards ethnicity has served Ghana well and should be retained and strengthened.[701] Therefore, even in the foreseeable future, it is unlikely that there would be any major shifts in Ghana's constitutional approach towards the issue.

### C. Evaluating the Ghanaian Experience

As has been pointed out earlier, Ghana could be considered a success story in avoiding major ethnic conflicts when compared to many African countries. There are a number of reasons that could explain Ghana's relative success in avoiding ethnic conflicts and a breakdown of the democratic order due to intense ethnic rivalry. One such important reason is the fact that historically, most Ghanaian leaders have avoided the politicization of ethnicity. Although there have been occasional allegations of ethnic favoritism, starting from Kwame Nkrumah who was the head of government and later head of state

[698] Id., 766-769.
[699] Ibid.
[700] Ibid.
[701] Ibid.

since independence, successive Ghanaian governments have refrained from indulging in blatant ethnic favoritism. Rather, there has been a practice of ethnic inclusiveness in the composition of the government and symbolic gestures meant to foster a Ghanaian identity that is not consigned to one ethnic group.[702] Though the investment of public resources have favored the naturally endowed and economically vital southern parts of Ghana (where the Akan and Ewe live), successive Ghanaian governments have made it a point to make efforts, however unsuccessful, to improve the economic conditions of northern Ghana.[703] These symbolic and substantive measures by the governments have been essential in minimizing the ethnicization of politics and the creation of a north south cleavage as has occurred in Nigeria.

Just before and after independence, the traditional elites and conservative elements of the educated Akan and particularity the Ashanti called for a federal form of state and wanted to avoid protect their privileges and institutions.[704] These efforts were frustrated by the administration of Kwame Nkrumah, who was an Akan himself. Nkrumah and his party the CPP outlawed the National Liberation Movement and cracked down on their

[702] Langer, Arnim. "Living with diversity: The peaceful management of horizontal inequalities in Ghana." *Journal of International Development* 21, no. 4 (2009): 534, p. 542. , As Langer notes;
" ... for instance, Nkrumah's practice of alternating dress on public occasions was continued by most heads of state. Other examples of culturally inclusive practices and measures are among others: the persistent refusal by consecutive Ghanaian governments to promote a particular local language (especially Twi/Akan) as the country's national language; the active state support for the study and teaching of the country's major local languages; the incorporation by institutions such as the Ghana Dance Ensemble of songs and dances from all major ethnic groups (Lentz and Nugent, 2000); the conscious effort to ensure that radio and television programmes are broadcast in all major languages (Ibid); the custom that representatives from the government attend the most important ethnic and/or traditional festivals and durbars throughout the country on a regular basis."

[703] Asante, Richard, and Emmanuel Gyimah-Boadi. "Ethnic structure, inequality and governance of the public sector in Ghana." *United Nations Research Institute for Social Development* (2004), pp2-3.

[704] Morrison, Minion KC. "Political parties in Ghana through four republics: a path to democratic consolidation." *Comparative Politics* (2004): 421, p. 435; see also Apter, David E. "Ghana's independence: triumph and paradox." *Transition* 98, no. 1 (2008): 6, p.10.

movement.[705] However, given Nkrumah's ethnic background and the obvious ideological and political as opposed to ethnic motives behind these moves, the situation was not susceptible for claims of ethnic marginalization and domination. Despite increasingly becoming autocratic and his other faults, Nkruma was seen by many as a committed Pan-Africanist and far removed from petty ethnic politics.[706]

Because of the legislation introduced by Nkrumah banning particularist/ethnic parties, which were calling for a federal government, these parties were forced to form a coalition to challenge his party the CPP.[707] The coalition of these parties, in which the Akan were dominant, gave rise to a political tradition and ideological orientation that has persisted till today. In opposition to Nkrumah's populist, leftist mass based CPP, his opponents who were mainly educated professionals, traditional chiefs and well to do traders formed a conservative and elitist party. Even though Nkrumah banned this party as well and Ghana became a one party state before he was deposed in a military coup, these political traditions/leanings that took shape in the aftermath of independence laid the foundation for the institutionalization of a two party system in Ghana.[708]

This two party system, in which a set of ideological and political traditions serve as rallying points, has been instrumental in minimizing the potential of ethnicity for political mobilization. The Nhkrumanist mantel of the center left party of the everyday man has been taken over by the NDC which was formed by the former military head of state JJ

[705] Welch Jr, Claude E. "The Right of Association in Ghana and Tanzania." *The Journal of Modern African Studies* 16, no. 4 (1978): 639, pp 646-649.
[706] Saaka, Yakubu. "Recurrent Themes in Ghanaian Politics: Kwame Nkrumah's Legacy." *Journal of Black Studies* 24, no. 3 (1994): 263, pp 265-266.
[707] Carbone, Giovanni M. "Developing multi-party politics: stability and change in Ghana and Mozambique." (2003), p. 7.
[708] Whitfield, Lindsay. "'Change for a Better Ghana': Party Competition, Institutionalization and Alternation in Ghana's 2008 Elections." *African Affairs*108, no. 433 (2009): 621, PP 627-630.

Rawlings. The Dhanqua-Buasi tradition tracing its origin to the first and second Ghanaian Republics is currently embodied by the NPP. The ideological leaning of these parties has enabled them to counter their perceived ethnic leaning. For example, it is interesting to note that, despite the view that the NDC enjoys solid support among the Ewe, neither the current President of Ghana who run on the NDC ticket nor his predecessor who was also a candidate fielded by the NDC are Ewes.[709]

***Conclusion***

The discussion in this chapter demonstrates that the competition for power among the elites of various ethnic groups has been and still is a common phenomenon. The discussion shows the destabilizing effect of such competition and also how it could have a detrimental effect on what are already fragile experiments with democracy. We have also seen that to varying degrees there has been an effort in these countries to use constitutional design as a way of managing ethnic relations and avoiding and reducing ethnic conflicts. In the next chapter of this dissertation these approaches will be compared and analyzed to see common patterns and trends with the view to understand how constitutionalism is being contextualized in these four countries in response to the challenge of ethnicity.



[709] The current president, John Dramani Mahama hails from one of the smaller ethnic groups of northern Ghana while the late John Atta Mills was of Fante (one of the Akan sub groups) ethnic origin.

# Chapter Six: Shades of Accommodation and Integration: Approaches towards Ethnic Diversity in Africa

### *Introduction*

Having discussed the experience of Nigeria, Ethiopia, Kenya and Ghana with relation to ethnicity and its politicization, as well us how the constitutional systems of these countries have dealt with ethnicity, we will not proceed to a discussion of the issue of ethnicity from a different perspective. Particularly, the first section of this chapter will provide a theoretical overview of ethnicity and constitutionalism. That discussion will be followed in section two with a discussion of various approaches towards constitutional design in divided societies. The last section will be devoted to a reflection on and a discussion of the experience of the four countries mentioned above through the theoretical framework provided in the first two section of this chapter. This reflection and analysis will focus on four aspects of constitutional design that are the most important and relevant to addressing ethnicity through the structuring of the state and the contextualization of constitutionalism.

### *6.1 Ethnic Diversity and Constitutionalism: A Brief Theoretical Background*

Ethnic homogeneity is a rare and exceptional phenomenon to observe in any part of the world.[710] Despite the prominence attained by nationalism- "primarily a political principle which holds that the political and the national unit should be congruent"[711]-in the last two centuries, diversity in terms of ethnicity, culture, language and religion characterizes



[710] See for example, Fearon, James D. "Ethnic and cultural diversity by country." *Journal of Economic Growth* 8, no. 2 (2003): 195-222.

[711] Ernest Gellner and John Breuilly, *Nations and Nationalism, Second Edition (New Perspectives on the Past)*, 2 edition (Cornell University Press, 2009), 1.

most contemporary states.[712] Historically, such diversity in the body politic has been handled in various ways in different contexts and times. Before the end of WWI and the breakup of the multi-ethnic Ottoman and Austro Hungarian Empires, questions regarding the appropriate way of handling ethnic diversity within a state were not a major preoccupation of political thinkers. With the breakup of these empires and subsequent creation of various new states a half-heated attempt was made to draw international boundaries that would ensure the nation and the state would coincide.[713] Nevertheless, this effort was not successful and many of the new states and had national minorities within their borders.[714] Therefore, the issue of national minorities became a major concern for the architects of the post-WWI world order. As a result an international normative and institutional framework under the auspices of the League of Nations was established as a mechanism of protecting the rights and advancing the welfare of national minorities.[715] However, the international scheme of minority rights protection was not successful and given the way it was exploited by the Third Reich to destabilize its neighboring states and provide a pretext for its aggressions, the interwar approach of handling ethnic diversity within a state through international guarantees, treaties and organizations did not survive WWII.[716]



[712] David Welsh, 'Domestic Politics and Ethnic Conflict', in Michael E. Brown (ed.), Ethnic Conflict and International Security (Princeton, NJ: Princeton University Press, 1993), p. 45. Welsh noted as far back as 1993 that " of the approximately 180 states that exist today, fewer than 20 are ethnically homogenous, in the sense that ethnic minorities account for less than 5 prcent of the population."

[713] See Karen Barkey , and Mark Von Hagen, eds. *After empire: Multiethnic societies and nation-building: The Soviet Union and the Russian, Ottoman, and Habsburg empires*. Westview Press, 1997, 133.

[714] Ibid.

[715] Mark Mazower, "Minorities and the League of Nations in interwar Europe."*Daedalus* (1997): 49-51.

[716] Jennifer Jackson Preece, "Minority rights in Europe: from Westphalia to Helsinki." *Review of international studies* 23 (1997), 84.

In the first four decades after WWII, the discourse regarding the approach a state should adopt in handling ethnic diversity became a largely domestic concern.[717] Despite the creation of many new multiethnic states with the dissolution of the British and French colonial empires, unlike what has happened at the end of WWI, there was no attempt to set up an internationalized scheme for the addressing the problems that might arise in the context of ethnic diversity.[718] The UN system, unlike the League of Nations did not have an elaborate institutional and normative framework to deal with the question of national minorities.[719] Furthermore, fearful of the risk of secession and breakup of the newly minted states they have become leaders of, political elites in African and Asian states tried to deemphasize ethnic diversity.[720] Therefore, since the end of WWII and till the fall of the Berlin wall, the most sustained and robust discussion regarding the appropriate way of handling ethno-linguistic and cultural diversity has been in the domestic fora and in the western world,[721] particularly in countries such as Canada, Belgium, the UK and Spain which had to grapple with the demands of nationalist movements for more autonomy and even secession. Furthermore, large scale immigration and the diversity that arises as a result have also made questions pertaining to the appropriate response to ethnic diversity of critical importance among political thinkers and policymakers in the west. However, it should be noted that the issue of ethnic diversity as it relates to ethnic

[717] Ibid.
[718] Steven C Roach, "Minority Rights and an Emergent International Right to Autonomy: a historical and normative assessment." *Int'l J. on Minority & Group Rts.* 11 (2004), 418.
[719] Jelena Pejic, "Minority Rights in International Law." *Human Rights Quarterly*19, no. 3 (1997): 666-671.
[720] Hurst Hannum. "Contemporary Developments in the International Protection of the Rights of Minorities." *Notre Dame L. Rev.* 66 (1990), 1446.
[721] Particularly since the fall of the Berlin wall, the issue of ethnic diversity is becoming internationalized both in the UN and regional human rights frame works. Generally speaking, at the international level there is an agreement that minorities have the right to enjoy their culture, to use their language, to profess and practice their religion, participate in the social, economic and public life of the state in which they love.

and national minorities has become more internationalized both in the UN and regional human rights frame works since the fall of the Berlin Wall.[722] Generally speaking, at the international level there is an agreement that minorities have the right to enjoy their culture, to use their language, to profess and practice their religion, participate in the social, economic and public life of the state in which they live.[723]

In these western liberal democracies, the assumption that the liberal state is blind to ethnic origin and that it holds a position of benign neutrality towards cultural differences has been subject to cogent criticism.[724] The model of universal rights and abstract equality has been found wanting in light of the growing appreciation that culture and one's cultural community are essential for one to make meaningful life choices and that misrecognition of one's identity is a significant harm, be it to an individual or the group that is UN/misrecognized.[725] Based on such criticism, some have offered communitarian alternatives to liberalism while others have tried to provide models of liberalism that take in to account cultural diversity.

Before importing this discourse about multiculturalism to Africa or Asia, it is important to note that the main preoccupation of the discourse is with ethnic and cultural diversity in the context of established liberal democracies that are industrialized western welfare states.



[722] See *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* ( Un General Assembly, 1992); Framework Convention for the Protection of National Minorities ( Council of Europe, 1995)

[723] Daniel Moeckli, ,Sangeeta Shah, Sandesh Sivakumaran, and David Harris. "International Human Rights Law." (2010), 385; see also Rhona Smith,. *Textbook on international human rights*. Oxford University Press, 2013, 348-353.

[724] See Will Kymlicka, "Liberalism and the Politicization of Ethnicity." *Can. JL & Jurisprudence* 4 (1991): 241-342.

[725] Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*. Princeton University Press, 25-36.

The challenges arising in relation to ethnic and cultural diversity in this setting, in countries like Canada, Belgium or Switzerland are quite different from the challenges arising in relation to ethnic and cultural diversity in impoverished countries that have little or no track record as liberal democracies. In consolidated liberal democracies like Canada or Belgium, the demands for recognition, autonomy and the group rights necessary for the preservation and promotion of one's culture, language and identity are made in contexts where such demands could be advanced through peaceful means without either side having to resort to violence. Given that individual rights and civil liberties are by and large respected and also taking in to account that the general level of affluence tempers the economic effects of the unfulfilled aspiration of any ethnic or cultural group, the political mobilization of ethno-cultural groups is unlikely to get out of control and turn into large scale violent clashes, civil war or genocide.

Furthermore, not only the risks associated with ethnic and cultural diversity, but also the nature, origin and demands arising out of ethno-cultural diversity are different from context to context. Although ethnic diversity is a common feature in many states, its political ramifications and salience are not the same in all societies. In some societies diversity is the result of a sizable and permanent recent migration of foreigners or the existence of indigenous peoples (in states formed by large settler communities) or the existence of national ethnic or linguistic minorities. In other states, particularly in post-colonial societies, ethnic diversity is a 'fact of life' that is inherent in the very formation

of the state. For instance, Eriksen distinguishes between urban ethnic minorities, indigenous peoples, proto nations and ethnic groups in plural societies.[726]

Given the various forms in which ethnic diversity is manifested in various contexts, the constitutional questions and issues it gives rise to are also different.[727] The claims of ethnic minorities in countries where there is a clear national majority or the claim of indigenous people against a settler majority population are not necessarily the same as the questions that arise with regard to diversity in a post-colonial context. For example, indigenous people might make claims against the settler majority compensation for historical injustices and the protection, autonomy and access to land or other natural resources needed to maintain their traditional way of life free from the intrusions of the majority.[728] On the other hand, national minorities might be more interested in securing not only autonomy or self-governance but also protection form discrimination, representation and inclusion in the national government as well as the state support and legal protection needed to ensure their cultural survival which might be threatened by the state sponsored majority culture.[729] In the post-colonial context where there is high degree of ethnic fragmentation and where the language and culture of the former colonial rulers serves as a neutral (i.e. from the perspective of competing local ethnic identities and languages) medium of administration and instruction, instead of cultural domination of one ethnic group by the other, exclusion from political power and economic resources

[726] Thomas Hylland Eriksen, *Ethnicity and Nationalism: Anthropological Perspectives: Third Edition (Anthropology, Culture and Society)*, 3 edition (Pluto Press, 2010), 15–17.

[727] Kymlicka, Will, and Magda Opalski, eds. *Can Liberal Pluralism be Exported?: Western Political Theory and Ethnic Relations in Eastern Europe: Western Political Theory and Ethnic Relations in Eastern Europe*. Oxford University Press, 2002, pp 22-48.

[728] Siegfried Wiessner, "Rights and status of indigenous peoples: a global comparative and international legal analysis." *Harv. Hum. Rts. J.* 12 (1999), 93.

[729] Hurst Hannum, *Autonomy, sovereignty, and self-determination: The accommodation of conflicting rights*. University of Pennsylvania Press, 2011, 50-74.

under the control of the state would be the most pressing concerns.[730] As one scholar has commented in relation to the African context: "the centrality of ethnically structured patron-client networks is reflected in popular political metaphors and a common reference to the African state 'as a cake', to 'politics as eating' and in popular demands that 'it's our turn to eat'".[731] This metaphor clearly shows the economic logic of the ethnic rivalry and politics which is prevalent in most African countries. Bearing this in mind, it would be fair to say that while there could be overlaps in the concerns and demands of be it national minorities, indigenous groups, ethnic groups in a postcolonial setting, the different demographic, historical and political realities of these groups would result in differences in the interests and claims these groups might pursue.

In addition, as has been mentioned already, we should not forget that the level of industrialization, urbanization and economic development in post-colonial states in Asia and Africa which is quite different from countries in the west. Poverty and the lack of opportunities for upward economic mobility in less developed parts of the world often has the effect of aggravating tensions between various religious, ethnic and cultural groups regarding the distribution of the scarce economic resources in the country.[732] Furthermore, in addition to the level of economic advancement, history and the settlement pattern of the various ethnic, religious or linguistic groups in a country also affect the constitutional issues that will arise in relation to diversity. Therefore, the issues regarding constitutions and diversity are very different from context to context. In other



[730] See Bruce J Berman, "Ethnicity, patronage and the African state: the politics of uncivil nationalism." *African affairs* 97, no. 388 (1998): 305-341.

[731] Gabrielle Lynch,*I say to you: ethnic politics and the Kalenjin in Kenya*. University of Chicago Press, 2011, 25.

[732] Demet Yalcin Mousseau, "Democratizing with Ethnic Divisions: A Source of Conflict?," *Journal of Peace Research* 38, no. 5 (September 1, 2001): 553.

words, the question of the appropriate constitutional framework for a multicultural society in the context of an economically advanced country with an established democracy such as Canada or Belgium on the one hand and on the other hand questions regarding the appropriate constitutional framework for divided societies in post-colonial setting in Africa and Asia are substantially different.

This difference in the context in which questions regarding the appropriate constitutional framework for handling ethnic diversity arise is important to appreciate the limitation of the discourse in the west concerning diversity. This discourse is couched in terms of multiculturalism or minority rights and has a limited utility when it comes to the post-colonial setting in Africa. Notable examples of the western discourse regarding ethnic diversity and multicultural citizenship include Will Kymlicka's attempt to reconcile liberalism with minority rights or Charles Taylor's arguments for the recognition of the distinct group identities of citizens by societies.[733] These discourses concerning recognition and minority rights have limited appeal in the African context as Kymlicka himself has acknowledged.[734] This limitation arises among others from the fact that in most African states, there are no majority ethnic groups to speak of.

Not everyone would agree with the claim that the minority rights framework is ill-suited to serve as the primary framework for addressing questions relating to ethnicity in the African context. For example, Jeremie Gilbert argues that adopting a minority rights framework as a means of accommodating ethnicity could be defensible in relation to

[733] See Charles Taylor and Amy Gutmann, *Multiculturalism and "The Politics of Recognition": An Essay* (Princeton University Press, 1992); Will Kymlicka, *Multicultural Citizenship:A Liberal Theory of Minority Rights: A Liberal Theory of Minority Rights* (Oxford University Press, 1996).

[734] See Will Kymlicka , "Nation Building and Minority Rights: Comparing Africa and the West," in *Ethnicity and Democracy in Africa* , BRUCE J. BERMAN, Dickson Eyoh, and Will Kymlicka, eds., (Ohio University Press, 2004), 64–69.

Rwanda or Burundi.[735] It should not be forgotten that the ethnic composition of these countries is rather exceptional in Africa and that in most African countries it is not easy to identify a majority or minority even in the sense that Gilbert used these terms. The ethnic composition of most African states is such that though some ethnic groups are significantly larger than others, it is rare to see one ethnic group constituting a clear numerical majority. For example, in none of the four African countries that have been discussed in the preceding case study chapter can we find a clear majority minority divide in terms of ethnicity.

The common pattern in these African countries is that two or three of the larger ethnic groups or coalitions of ethnic groups compete to capture the state and become politically dominant. These would be the Akan and the Ewe in Ghana, the Igbo, Youruba and Hausa-Fulani in Nigeria, the Kikuyu, the Luo and the Kalanjein in Kenya, the Amhara, Oromo and Tigre in Ethiopia. Besides these relatively bigger ethnic groups who contend for supremacy at the center, a large number of ethnic groups exist in all these states. Some of these smaller ethnic groups are consigned to the peripheries of state power and could be considered economically marginalized and socially vulnerable; thereby could be considered minority groups. Nevertheless, some of the smaller ethnic groups are economically and socially integrated at the center and have managed to leverage their strategic coalition with the larger ethnic groups to secure for themselves politically and economically favorable status. A very good example of these would be the Harari in Ethiopia who have managed to have their own city state in the Ethiopian federation



[735] Gilbert, Jeremie. "Constitutionalism, ethnicity and minority rights in Africa: A legal appraisal from the Great Lakes region." *International Journal of Constitutional Law* 11, no. 2 (2013): 414-437.

despite being one of the smallest ethnic groups in the country and constituting less than fifty percent of the population in their own National Regional State.[736]

When discussing the issue of ethnicity and the appropriate normative framework of addressing issues that arise in relation to ethnicity in Africa, it is important to remember that ethnic relations play out in a peculiar political matrix in the African context. As can be recalled from Chapter One of this dissertation, ethnic plurality is one of the factors constituting the African political matrix. The other factors constituting the matrix are, the a political economy in which state power is the primary means of accumulating wealth and the historical legacy of oppressive, extractive and violent regimes. The interplay of these factors increases the risk of violent conflicts and distinguishes the gravity and nature of questions that arise in relation to ethnicity in Africa as compared to the west. The challenge of ensuring the existence of an ethnically inclusive polity in which no ethnic group is marginalized by the state is a much more grave and consequential in the African political matrix.

The problem of applying the minority rights framework as the principal analytical perspective with regard to constitutional questions arising in relation to ethnicity in Africa is not just a function of numbers. It is important to remember that historically, the formation of virtually all African states through colonialism by the agency of external actors has preempted the imposition of the culture or language of one local ethnic group over the others (save for the exception of few African countries like Ethiopia or Sudan). Furthermore, even in Ethiopia where the cultural hegemony of one group over others was a serious problem, a very important problem related with ethnic diversity concerns the

[736] Alem Habtu,"Ethnic pluralism as an organizing principle of the Ethiopian Federation." *Dialectical Anthropology* 28, no. 2 (2004), 111.

allocation of economic resources and opportunities which directly or indirectly are at the disposal of the state.[737] This is true not simply in Ethiopia but also in most African countries.[738] The principal source of ethnic conflict and tension in most African states is not the non-recognition of one's distinct cultural identity or lack of accommodation for cultural differences but rather competition over scarce economic resources and opportunities that the state controls. Therefore, the political mobilization of ethnicity in the African context cannot really be captured by analysis and theories geared at reconciling liberalism with minority rights and recognition of differences. Rather than the literature of multiculturalism and minority rights, the more promising line of inquiry when it comes to ethnicity and constitutionalism in Africa is found in connection with "constitutional design for divided societies".[739] Therefore, the focus of the next section of this chapter will focus on the literature on constitutional design in divided societies.

### *6.2 Constitutional Design in Divided Societies*

Divided societies, are societies where ethnicity or other equivalent identity markings have considerable political salience.[740] In such societies, the intensity of ethnic rivalry and tension had proved to be very problematic and lead to violent conflicts, chaotic dismemberment of states and in the worst cases, full blown genocides. Therefore, the question of how such divided societies could be governed as stable, peaceful and

[737] Aalen, Lovise, ed. *The politics of ethnicity in Ethiopia: Actors, power and mobilisation under ethnic federalism*. Vol. 25. Brill, 2011, p. 187.

[738] Berman, Bruce J., Dickson Eyoh, and Will Kymlicka, eds. *Ethnicity & democracy in Africa*. James Currey Publishers, 2004, p.9.

[739] See for example, Sujit Choudhry, *Constitutional Design for Divided Societies: Integration Or Accommodation?* (Oxford University Press, 2008).

[740] Ian Lustick, "Stability in Deeply Divided Societies: Consociationalism versus Control," *World Politics* 31, no. 3 (April 1, 1979): 325; See also Sujit Choudhry, *Constitutional design for divided societies: integration or accommodation?* (Oxford University Press, 2008), 5 Choudhry describes divided societies as societies marked by ethnic, religious, cultural or linguistic differences which are politically salient.

democratic societies has been a pressing question for quite a while. Initially, this question was the subject of inquiry in the discipline of political science.[741] However, increasingly this question is also being addressed in the field of comparative constitutional law.[742]

In political science, the most influential scholars whose debate has framed the discourse on the best political arrangements and organization for divided societies are Arend Lijphart and Donald Horowitz.[743] In a debate that has spanned decades, these two scholars have debated the merits of their respective proposals. Arend Lijphart had been the chief proponent of consociational democracy as the most effective form of accommodating ethnic diversity in divided societies.[744] Though Arend Lijphart's conception of consociational democracy had evolved over time, at the center of his proposal are four elements. The first element of consociational democracy is proportional representation, the second element is a grand coalition, the third is segmental autonomy and the fourth is mutual veto.[745] From these four elements of consociational democracy, Lijphart considers grand coalition governments (executive power sharing across ethnic lines) and segmental autonomy to be of primary importance as compared with the other

[741] See Sujit Choudhry, "Integration, Accomodation and the Agenda for Comparative Constituional Law" in *Constitutional Design for Divided Societies: Integration or Accommodation?* Sujit Choudhry *(ed)* (Oxford University Press, USA, 2008).

[742] See for example Andrew Reynolds, , ed. *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy: Constitutional Design, Conflict Management, and Democracy*. Oxford University Press, 2002; See Sujit Choudhry, "Integration, Accomodation and the Agenda for Comparative Constituional Law" in *Constitutional Design for Divided Societies: Integration or Accommodation?* Sujit Choudhry (ed) (Oxford University Press, USA, 2008).

[743] See Sujit Choudhry, "Integration, Accomodation and the Agenda for Comparative Constituional Law" in *Constitutional Design for Divided Societies: Integration or Accommodation?* Sujit Choudhry *(ed)* (Oxford University Press, USA, 2008), 15.

[744] See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 1999); Arend Lijphart, *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice* (Taylor & Francis, 2008), for a concise summary of this debate See Sujit Choudhry, "Integration, Accomodation and the Agenda for Comparative Constituional Law" in *Constitutional Design for Divided Societies: Integration or Accommodation?* Sujit Choudhry *(ed)* (Oxford University Press, USA, 2008), 15-26.

[745] Arend Lijphart, *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice* (Taylor & Francis, 2008), 4.

two elements.[746] Donald Horowitz on the other hand proposes a centripetal democracy which is a democracy with an electoral system designed to encourage vote pooling and coalition building before (and not after) elections.[747] The instruments of accomplishing these are supposed to be the 'Alternative Vote' system for elections of legislative houses and a requirement of minimal support in a qualified majority of the electoral districts for Presidential elections.[748]

Both scholars have criticized each other's proposal in various ways. The main criticism of Lijphart against Horowitz's proposal is that the electoral engineering that is supposed to engender vote pooling is in reality unlikely to be adopted in divided societies.[749] Lijphart also contends that the Alternative Vote system is not really much better than a first past the post electoral system and results in harmful majoritarian politics.[750] Lijphart argues that consensus democracy requires a non-majoritarian electoral system and as such he prefers a proportional electoral system over the Alternative Vote system which he considers to be essentially majoritarian.[751] Horowitz had on the other hand concedes that his proposal might not be readily adopted but insists that once and if adopted his proposal is likely to transform conflictual relations in divided societies and bring more integration.[752] Horowitz contends that consociational democracy has the effect of freezing and aggravating divisions and where this does not happen, the smooth operation

[746] Ibid.; Arend Lijphart, "The Wave of Power-Sharing Democracy," in *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press, 2002), 39.
[747] See Donald L. Horowitz, "Electoral Systems: A Primer for Decision Makers," *Journal of Democracy* 14, no. 4 (2003): 115-127.
[748] Ibid., 18.
[749] Arend. Lijphart, "Constitutional Design for Divided Societies," *Journal of Democracy* 15, no. 2 (2004): 98.
[750] Arend Lijphart, *Thinking about democracy: power sharing and majority rule in theory and practice* (Taylor & Francis, 2008), 189.
[751] Ibid., 17.
[752] See Donald Horowitz, "Conciliatory Institutions and Constitutional Process in Post Conflict States," *William & Mary Law Review* 49, no. 4: 1216-1214.

of consociational democracy is the result and not the cause of a political environment in which ethnic conflicts have subsided.[753]

Proposals regarding how divided societies should respond to ethnicity are clearly not limited to centripetal democracy and consociational democracy advocated for by Horowitz and Lijphart. John McGarry, Brendan O'Leary and Richard Simeon identify a number of approaches in a continuum stretching from outright assimilation to various forms of integration and accommodation.[754] In this continuum, Horowitz's and Lijphart's proposals are presented as different forms of accommodation.[755]

The main difference between accommodationists and integrationists is that integrationists object to giving official recognition to ethnic identity in the public realm while providing space for such differences in the private sphere.[756] In the public sphere and in the political process, integrationists promote equal citizenship and a common civic identity distinct from ethnic and cultural identities.[757] In contrast to the integrationists, accomodationists recognize ethnic differences in the public and political sphere as well and try to promote the co-existence of the different identities instead of supplanting them with a common civic identity.[758] Both integrationists and accommodationists are to be distinguished from assimilationists in that they consider homogenization of cultures and identity in the private sphere to be unacceptable and undesirable.[759] John McGarry, Brendan Brendan O'Leary and Richard Simeon regard multiculturalism, centerpitalism, consociationalism

[753] Ibid., 1216-1217.
[754] See John McGarry, Brendan O'Leary, and Richard Simeon, "Integration or accommodation? The enduring debate in conflict regulation," in *Constitutional Design for Divided Societies Integration or Accommodation?*, ed. Sujit Choudhry (Oxford University Press, 2008).
[755] Ibid., 51-67.
[756] Ibid., 42.
[757] Ibid., 45-51.
[758] Ibid., 67-69.
[759] Ibid., 44.

and territorial pluralism as different forms of accommodation.[760] They also identify different forms of integrationist approaches which are republican, liberal and socialist.[761] The debate regarding the merit of consociation arrangements has been reignited as a result of the decision of the European Human Rights Courts which held that some of the central consociational arrangements of the Dayton Peace Accord constitute a violation of the obligation of the Bosnian state not to discriminate among its citizens on the basis of ethnicity.[762] This decision has been criticized as creating obstacles for the adoption of consociational arrangements which might be necessary to for the negotiated settlement of ethnic based conflicts.[763]

When we look in to the work of authors that specifically focused on the most suitable constitutional design to address the issue of ethnicity in the African context and which have already been addressed in Chapter One, we can see that some have adopted a mote integrationist line while others would fall in the accommodationist camp. Marina Ottaway, Francis Deng, Solomon Dersso prescribe the recognition and political empowerment of ethnic groups in African states and privilege the right to self-determination of these groups in such a way that they clearly fall in the accommodationist camp.[764] Mahmood Mamdani's on the other hand is highly critical of the accomodationist approach and contends that it forestalls the emergence and consolidation of a common citizenship in African states and is a vestige of colonialism.



[760] Ibid., 68.
[761] Ibid.
[762] See the *Sejdić and Finci v. Bosnia and Herzegovina (27996/06 and 34836/06)*
[763] See Christopher McCrudden and Brendan O'Leary. *Courts and consociations: human rights versus power-sharing*. Oxford University Press, 2013,
[764] See above Chapter One, Section Four (B).

Although there is a lot of comparative and theoretical literature that is emerging on institutional engineering in divided societies, there are very few comparative studies focusing on African countries. Very often, one would find a case study on the Nigerian experience in most anthologies on the topic of constitutional engineering and ethnicity.[765] The Ethiopian and South African experiences have also been subject to a number of independent studies and at times as part of a broader comparative project.[766] However, there are very few studies comparing the experience of African countries in using constitutional design as a means of managing the challenges that arise from competitive ethnic relations.

In the remaining parts of this chapter, the constitutional approaches that Kenya, Nigeria, Ethiopia and Ghana had adopted to deal with the issue of ethnicity and which have been described in Chapter Five will be examined with a view to draw lessons regarding the merit and shortcomings of the various approaches adopted in these countries. This will be done with a view to identify and analyze how African constitutions are responding to the challenges posed by ethnicity against democratization. The ultimate goal of the exercise will be to see how constitutionalism is being and could be contextualized in Africa in response to challenges that have not figured prominently in the comparative constitutional law literature.

[765] See for example Andrew Reynolds, *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy (Oxford Studies in Democratization)* (Oxford University Press, USA, 2002); See also Choudhry, *Constitutional Design for Divided Societies*.

[766] See Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Ashgate Publishing, Ltd., 2010); Solomon A. Dersso, *Taking Ethno-Cultural Diversity Seriously in Constitutional Design: A Theory of Minority Rights for Addressing Africa's Multiethnic Challenge* (Martinus Nijhoff Publishers, 2012); Lovise Aalen, *The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilisation Under Ethnic Federalism* (BRILL, 2011); Donald L. Horowitz, *A Democratic South Africa?: Constitutional Engineering in a Divided Society* (University of California Press, 1991); See Jessica Piombo, *Institutions, Ethnicity, and Political Mobilization in South Africa* (New York: Palgrave Macmillan, 2009).

### *6.3 Foci of Constitutional Approaches towards Ethnicity in Africa*

To the extent that constitutions are used as instruments of addressing the ethnic question, four aspects of constitutional design seem to emerge as the most important and relevant to address ethnicity through the structuring of the state and the contextualization of constitutionalism. These aspects of constitutional design and the positions taken in relation to them in African states could be considered as ways of contextualizing constitutionalism by restricting the state and its overall political system.

1. The first aspect is the constitutional devolution of power or the adoption of a federal form of state.
2. The second aspect is the combined use of the form of government and the electoral system to engender a national government that is inclusive and representative of all ethnic groups in the country.
3. The third aspect is the regulation of political parties to ensure that political parties do not become divisive along ethnic and regional lines and will instead promote political identities independent form ethnicity.
4. The fourth aspect is the adoption of affirmative action rules or ethnic quota systems to ensure that all ethnic groups have equitable access to public sector jobs and public resources.

Not all of these constitutional strategies are used in all four countries and even in the countries they are used they are used in different ways. In this section of the chapter, these four instruments of managing ethnicity through constitutional design and contextualization will be discussed by comparing the experience.

**A. Decentralization, Devolution and Federalism**

To begin with the decentralization and devolution of power as ways of managing diversity and contextualizing constitutionalism, Nigeria and Ethiopia have opted for federal systems.[767] In Ghana, although there has been a constitutional decentralization of power the extent and form of decentralization falls very much short of what is the norm in a classic federal system.[768] In Kenya, though there has been a quasi-federal constitution that lasted for a brief period after independence, for over forty years Kenya had been a unitary state.[769] This is so even after the resumption of multiparty politics in 1992. However, demands for some form of devolved government have persisted and with the adoption of the 2010 Constitution, Kenya has introduced county administrations that are constitutionally entrenched and enjoying significant powers.[770] Even in Nigeria and Ethiopia, both of which are federal states, the form and nature of federalism is different. In Nigeria, there has been a deliberate effort to have states that cross cut ethnicity and to make sure that particularly the major ethnic groups will not have regions which coincide with their ethnic boundaries.[771] In Ethiopia, the approach to federalism has been the exact opposite of the one in Nigeria and all the major ethnic groups have their own regional states that largely coincide with their ethnic boundary.[772]

Therefore, based on the experience of these four countries the following observations could be made regarding devolution/ decentralization/federalism as means of addressing

[767] See Suberu, Rotimi. "The Nigerian federal system: Performance, problems and prospects." *Journal of Contemporary African Studies* 28, no. 4 (2010): 459-477 and Fiseha, Assefa. *Federalism and the accommodation of diversity in Ethiopia: A comparative study*. Wolf Legal, 2006.

[768] Antwi-Boasiako, K. Badu. "Public administration: Local government and decentralization in Ghana." *Journal of African Studies and development* 2, no. 7 (2010): 166, pp 170-172.

[769] See Anderson, David M. "'Yours in Struggle for Majimbo'. Nationalism and the Party Politics of Decolonization in Kenya, 1955-64." *Journal of Contemporary History*40, no. 3 (2005): 547-564.

[770] See The Constitution of Kenya 2010, Articles174-200.

[771] Horowitz, Donald L. " The Many Uses of Federalism," *Drake L. Rev.* 55 (2006): 953, p. 109.

[772] Mengisteab, Kidane. "Ethiopia's ethnic-based federalism: 10 years after."*African Issues* 29, no. 1/2 (2001): 20-25.

political problems related with ethnicity and the contextualization of constitutionalism. The first and rather obvious observation is that the idea of a unitary and centralized state is becoming increasingly a thing of the past in the African constitutional landscape. Such a centralized unitary state that has existed in Kenya till recently and in Ethiopia before the 1990's, seems to have become unacceptable in the contemporary African constitutional landscape. In the past two decades, decentralization has become the norm. This is so for a number of reasons including, local discontents with centralization and external pressure from donors and international financial institutions which made decentralization a component of the political reforms they advocated for in Africa and the rest of the developing world.[773] The purported potential of decentralization to enhance equitable distribution of resources, diffuse destabilizing centrifugal forces as reduce the governability challenge that arises from areas that are remote from the center, particularly in countries with vast territories, have underpinned the growing popularity of decentralization in Africa.[774]

But as we have seen so far, the nature, extent and form of the decentralization is different from state to state.[775] We could conceptualize this difference as a continuum in which we have administrative decentralization at one end and at the other end we have full-fledged federations with state governments that have constitutionally entrenched legislative, executive and judicial autonomy from the federal government. Somewhere in between these two, there is also a system of devolved government which could be defined as

[773] Stephen N Ndegwa, *Decentralization in Africa: A stocktaking survey*. World Bank, Africa Region, 2002, 1-2.

[774] Jesse Craig Ribot, *African Decentralization: Local Actors, Powers and Accountability*. Geneva: United Nations Research Institute for Social Development, 2002, 7-14.

[775] As can be seen in the discussion in the next paragraph, most African constitution makers shy away from using the federalism because federalism seems to connote disunity and is considered to be a harbinger to disintegration in the minds of many African politicians.

political decentralization falling short of full-fledged federalism. Ghana's system of local governance is closer to administrative federalism in a unitary state and the 2010 Kenyan system of decentralization provides for a form of devolved governments. On the other hand, Nigeria and Ethiopia present a clear case of federalism.

This difference is important because in many parts of Africa, full-fledged federalism is seen as a dangerous and undesirable thing. Many fear that federalism reinforces centrifugal forces and exacerbates ethnic divisions.[776] This has been the case both in Kenya and Ghana and South Africa as well which have all shied away from adopting a classic federal constitution. Even in Nigeria where federalism has been a constant feature of all its Constitutions, after the Biafra civil war (1967-1970) and the ethnic problems that beset the first Republic, Nigerian constitutional designers have been careful to avoid coinciding state-ethnic boundaries for the major ethnic groups of Nigeria.[777] Therefore, with the exception of Ethiopia, the general pattern we see is that of constitutional decentralization of power and devolution as a means of enhancing self-governance and the points of access to government. Ethiopia is the exception in that federalism is adopted explicitly as a means of recognizing and empowering ethnic groups with in the country. In the other countries, even the system of devolved government is not designed as an instrument of integration (as in the case of Nigeria where federalism is more an

[776] Some notable instances of decentralization, devolution and federalism in Africa include the short lived federacy between Eritrea and Ethiopia (1952062) and the Union between Tanganyika and Zanzibar (1964 till the present time). In both cases, the arrangement that deviates from unitary government was tolerable only because that was the only way to absorb Eretria to Ethiopia and Zanzibar to Tanganyika. The Ethiopian government of the day was unhappy with the federacy imposed by the UN and worked assiduously to dissolve he federacy and turn Eretria in to the 14th province of the Empire till it secured its pyric victory in 1962 in the form of a resolution by the Eritrean legislative council to dissolve itself. See Killian, Bernadeta. "The state and identity politics in Zanzibar: challenges to democratic consolidation in Tanzania." *African Identities* 6, no. 2 (2008): 111; see also Semere.Haile, "The Origins and Demise of the Ethiopia-Eritrea Federation."*Issue: A Journal of Opinion* (1987): 9-17.

[777] Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999), 68.

instrument of accommodation than integration); it is designed in such a way that it will not facilitate the political mobilization of ethnicity at the national level. Underlying the strong resistance to federalism in the African continent "is the heightened sense of insecurity that afflicts the state in Africa given its relative newness, its shallow legitimacy in society, its capacity shortcomings, and the intense competition for its control".[778] Though the first Nigerian Republic and its disastrous federal system provide the only instance in African federalism *per se* could be said to have contributed to national disintegration, the fear that federalism along ethnic lines will undermine political stability and national integration is very strong in Africa.[779]

Another important point to observe is that despite the fact that both Ethiopia and Nigeria have adopted explicitly federal constitutions, if not in their design, in practice both the Nigerian and Ethiopian federations are centralized federations. Both federations were created from the center in a very top down approach and in both countries the center has a fiscal dominance which emanates from the allocation of the most lucrative revenue sources to the center which it uses to tilt the balance of power in its favor. In both countries, there is one dominant party and the party machinery is used, particularly in Ethiopia to aid the center prevails over the states. Therefore, even in these two countries where on paper there is a federal system, in reality the states enjoy less autonomy than one would expect them to exercise by looking at the text of the constitutional text.

### B. Form of Government and Electoral Systems

[778] Stephen N.Ndegwa, *Decentralization in Africa: A stocktaking survey*. World Bank, Africa Region, 2002, 25.
[779] Alemante G. Selassie, "Ethnic federalism: Its promise and pitfalls for Africa." *Yale J. Int'l L.* 28 (2003), 85-89.

As far as the form of government and rules regarding the electoral system, with the exception of Ethiopia which had adopted a parliamentary form of government,[780] the other countries in the study had opted for a presidential form of government. The geographic spread requirement in presidential elections pioneered in Nigeria has also been adopted in Kenya to ensure that successful presidential candidates will have support from different ethno-regional groups.[781] In the theoretical literature on the question of the form of government best suited for divided societies, there are those who consider the parliamentary form of government coupled with a proportional electoral system as more preferable.[782] The argument in favor of the parliamentary form of government with a proportional electoral system is that it is more likely to facilitate the representation of all ethnic groups both in the executive and in the legislature.[783]

Furthermore, it could also be argued that, when there is an ethnically fragmented society where no single group constitutes a majority by itself as is the case in most African countries, even minority ethnic group representatives will be significant players in politics because their support will be decisive in building coalition governments. However, at the same time there is a risk that such a system will freeze or even aggravate existing ethnic divisions and lead to further polarization. This is so because in parliamentary systems with a proportional electoral system, even small extremist ethnic parties with a very narrow support base might secure seats in parliament and wield

[780] FDRE Constitution Article 45.

[781] See Constitution of the Federal Republic of Nigeria 1999, Article 133, Bogaards, Matthijs. "Electoral Systems, Party Systems, and Ethnicity in Africa." *Votes, money and violence. Political parties and elections in Africa, Uppsala: Nordic Africa Institute* (2007): 168, p. 181; See the Constitution of Kenya Article 138(3).

[782] See Lijphart, Arend. "Constitutional design for divided societies."*Journal of democracy*15, no. 2 (2004): 96-109.

[783] Reilly, Ben. "Electoral systems for divided societies." *Journal of Democracy* 13, no. 2 (2002): 156, p.157.

influence during the building of coalition governments.[784] Such minority parties could become veto players even though they might not be in a position to set policy and legislative agenda by themselves. Therefore, most of the countries in the study have avoided adopting such a system. Even Ethiopia, the only country within the countries under the case study which currently has a parliamentary form of government, a proportional electoral system has not been adopted.

Nigeria, Kenya and Ghana have all started with a Westminster-type, majoritarian form of government upon independence but soon switched to a presidential form of government.[785] One of the major reasons forwarded for adopting a presidential form of government in these countries is the alleged advantage of presidentialism in fostering unity and national cohesion.[786] A president directly elected by the people in an electoral system that requires a successful presidential candidate to reach out for support to a broad geographic area was seen as more likely to give rise to a presidency transcending ethnic cleavages.

When we see the experience of the countries under study and compare how the presidential form of government in Kenya, Nigeria and Ghana had fared in comparison to the parliamentary form of government in Ethiopia, the picture we get is complicated. It does not seem as though the form of government in any of these countries has given them an advantage in overcoming divisive ethnic politics and has proved to be a better way of

[784] Reynolds, Andrew. "Constitutional Engineering in Southern Africa." *Journal of Democracy* 6, no. 2 (1995): 86, p. 92.

[785] The switch to Presidentialism was made in Nigeria more thoroughly and clearly. Ghana's 1992 Constitution provides for an executive president who is directly elected by the people. In Kenya, till very recently, though the President was supposed to be elected directly by the people, at the same time, s/he had to be a member of the parliament representing a constituency.

[786] Suberu, Rotimi T., and Larry Diamond. "Institutional design, ethnic conflict management and democracy in Nigeria." *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (2002): 400, pp411-412.

contextualizing constitutionalism in a decisive manner. The presidency in Kenya, Nigeria and even Ghana, has not really been able to become an office that fully transcends ethnic divisions. The ethnic origin of the President is still divisive and regional and ethnic voting patterns for presidential elections reflect that despite tweaks with electoral systems, the office of the president ends up being the prize of this or that ethnic group.[787] Even when cabinet positions are distributed among various ethno-regional groups in accordance with the requirement of a constitutional provision that requires such distributions as is the case of Nigeria, given that the prominence of the president when compared with members of his cabinet who serve at his pleasure, the presidency remains the main bone of contention among ethnic elites.[788] As has been discussed in the earlier chapters of this dissertation that focused on abuse of incumbency, in many African countries the unconstrained nature of presidential power gives rise to imperial presidencies. This makes the presidency the ultimate prize in the contest for power among ethnic elites and intensifies their competition to the presidency to a great extent.

With a more collegial leadership in the cabinet one might expect that in a country like Ethiopia where there is a parliamentary form of government, power could be shared by politicians from different ethnic groups and the zero-sum high stake competition for the presidency could be avoided. However, with a widely spread perception that even when a politician from another ethnic group is formally given an important ministerial portfolio,

[787] See Theuerkauf, Ulrike G. "Presidentialism and the risk of ethnic violence."*Ethnopolitics* 12, no. 1 (2013): 72-81

[788] See, V. Adefemi Isumonah, "Imperial Presidency and Democratic Consolidation in Nigeria," *Africa Today* 59, no. 1 (2012): 50–64. .See also Fawole, W. Alade. "Executive-Legislature Relationship." *Nigeria's Democratic Experience in the Fourth Republic Since 1999: Policies and Politics* (2012 Kunle Amuwo and A. Sat Obiyan eds.): 28 and . Eugene N. Nweke. "The Principles and Practice of Separation of Power in Nigeria: A Study of Olusegun Obasanjo's Civilian Regime" *Nigeria's Democratic Experience in the Fourth Republic Since 1999: Policies and Politics* (2012, Kunle Amuwo and A. Sat Obiyan eds.): 66-68.

that real power is within the hands of TPLF minders, the potential of the parliamentary form of government for inclusive, representative executive has been undermined. Though the composition of successive cabinets in Ethiopia has been fairly representative of the country's ethnic diversity, in popular perception, this is seen as a smoke screen meant to conceal the concentration of real power with the leaders of the TPLF.

### C. Regulation of Political Parties

When it comes to the regulation of political parties, rules that ban ethnic parties and meant to promote the formation of genuinely national parties have been adopted in a number of African countries as ways of tackling the politicization of ethnicity and contextualizing constitutionalism. One important reason why such a regulation might be deemed necessary in is because when ethnic parties are the major actors in the political arena, criticisms, political attacks or opposition or the defeat of a party could easily be seen as being tantamount to attacks on or defeats of the ethnic group the ethnic party supposedly represents. The competition and acrimony of political parties will then be quickly transformed in to a conflict between the ethnic groups the parties are supposed to represent. One can easily imagine how destabilizing this could be. It is taking this in to account that in many African countries ethnic parties are banned and there is an effort to foster the rise of national parties that are ethnically inclusive.

Ghana was the first African country to adopt such legislation with the adoption of the "Avoidance of Discrimination Act" in 1957 which among other things banned ethnic parties.[789] Nigeria also introduced a system of political party regulation that banned

[789] Moroff, Anika. "Party bans in Africa–an empirical overview." *Democratization* 17, no. 4 (2010): 618, p. 619.

ethnic parties and promoted the establishment of national political parties with the adoption of the Constitution for the second republic in 1979.[790] While Kenya adopted a ban on ethnic parties with its Political Parties Act of 2008, in Ethiopia there are no such bans at all and ethnic parties have become the norm.[791] In Nigeria, despite the regime of party regulation there are some parties that are still considered as being essentially ethno-regional parties. The Supreme Court's ruling which declared some of the stringent guidelines issued by the Independent National Electoral Commission for the registration of political parties unconstitutional had also made the regulation of political parties, particularly the rules requiring that parties should have a national character, difficult to enforce.[792] Nevertheless, the most important and dominant party, PDP could not really be considered as an ethnic party and its membership and leadership is very divers. Particularly when compared to the parties in the first Nigerian Republic, the PDP and also the other big parties in Nigeria have a more diversified and national composition.[793] However, the parties lack institutionalization, discipline and ideological identity.[794] Therefore, parties rather tend to be coalitions of powerful regional, ethnic and business elites who come to form the parties as joint ventures for the purpose of capturing the state. It should be underscored that the ideological void of the parties goes beyond being broad tent political parties that accommodate factions belonging to different political persuasion.

[790] Bogaards, Matthijs. "Ethnic party bans and institutional engineering in Nigeria."*Democratization* 17, no. 4 (2010): 730, p. 732.
[791] Moroff, Anika. "Ethnic party bans in East Africa from a comparative perspective." (2010), p.7.
[792] Nigeria: Independent National Electoral Commission and Another v Musa and Others (2003) AHRLR 192 (NgSC 2003)
[793] Bogaards, Matthijs. "Ethnic party bans and institutional engineering in Nigeria."*Democratization* 17, no. 4 (2010): 730, p. 742.
[794] Omotola, J. Shola. "Political parties and the quest for political stability in Nigeria." *Taiwan Journal of Democracy* 6, no. 2 (2010): 125, pp 38-142.

The regulation of political parties to suppress separatist political movements and preserve territorial integrity is not unique to African countries. On more than one occasion, the European Court of Human Rights had to assess the human rights implications of bans of ethnic parties in relatively new democracies in Eastern Europe.[795] While the European Court of Human Rights has been willing to consider party regulations that directly or indirectly restrict ethnic parties as being in pursuit of the legitimate aims of preserving the territorial integrity of states and protection of national security, it has decided in favor of the alleged ethnic parties or parties that have failed to meet the requirements of having a certain number of members and branch offices in a certain number of provinces.[796] While there is a similarity in the fears that such regulations address be it in emerging democracies be it in Eastern Europe or Africa, the differences lies in that unlike Poland, Bulgaria or Russia in the African setting there is no clear ethnic majority. The concern in many African countries is not just separatist sentiment of ethnic minorities which the national majority fears would jeopardize the territorial integrity of the state. The principal concern in the African setting was rather that the political competition between the big ethnic groups or a coalition of ethnic group would lead to instability and violent conflicts.

One way of measuring the success of a party regulation scheme in divided societies is the extent to which the party regulation regime had forced these coalitions to be formed across and not along ethnic and regional lines. That is if the pacts that underpin these pre-electoral coalitions might not have occurred had it not been for the party regulation



[795] See Mowbray, Alastair, *Cases, materials, and commentary on the European Convention on Human Rights*. Oxford University Press, 2012, 723-737.

[796] See *Case Of The United Macedonian Organisation Ilinden – Pirin And Others V. Bulgaria* (Application no. 59489/00), *Case Of Republican Party Of Russia V. Russia* (Application no. 12976/07), Case of Gorzelik and Others v. Poland (Application no. 59489/00).

regime. However, for example in Nigeria, this success is rather limited due to the dominance of the PDP which means that the intra-party ethnic rivalry for power, could easily spill outside the party and engulf the entire country. This competition had been managed till 2007 with the zoning formula of the PDP which is coming under strain because of the disruption of the rotation of offices occasioned by the death of President Yaradua in the middle of his first term in office.[797] Furthermore, little more than sharing the spoils of victory seems to unite the political barons and godfathers in the PDP as well as the other political parties in Nigeria. Therefore even if political party regulation regime had avoided a highly destabilizing national confrontation by parties established along ethnic lines representing the biggest Nigerian ethnic groups, this success is severely undermined by pervasive political corruption.

In Ghana, on the other hand, though the political party regulation is not as elaborate as is the case in Nigeria, Ghana seems to have had more success in institutionalizing a two party system that transcends ethnicity. Although the two major Ghanaian parties have their own ethno-regional base where they enjoy rock solid support, much else other than ethnicity is at play in Ghanaian politics. The 'political traditions' and ideological leanings of the two parties seem to play an important role in their competition and the institutionalization of political parties in Ghana.[798] The two parties enjoy a rather evenly balanced support in the country and the non-Akan and non-Ewe play the crucial role of swing voters. Depending on who wins the swing voters, both parties had their turn in

[797] Ben Agande And Gbenga Akinwunmi, "Nigeria: Zoning - Stop Jonathan, Cause Crisis, Says Northern G20", Vanguard, 30 JULY 2010; see also Awopeju, Ayo, Olufemi Adelusi, and Ajinde Oluwashakin. "Zoning Formula and the Party Politics in Nigerian Democracy: a Crossroad for PDP in 2015 Presidential Election." *Research on Humanities and Social Sciences* 2, no. 4 (2012): 11-19.

[798] Whitfield, Lindsay. "'Change for a Better Ghana': Party Competition, Institutionalization and Alternation in Ghana's 2008 Elections." *African Affairs*108, no. 433 (2009): 621, p. 630.

power since the resumption of multiparty politics and as a result there is less and less fear that one party will be permanently excluded from power.[799]

Therefore, even if the NNP is seen as a party dominated by the Akan, particularly the Ashanit and the NDC as a party dominated by the Ewe, the fact that both parties have to appeal to those other than their core ethnic base (since neither of these groups constitute a majority) as well as the historical traditions and ideological leanings that they have seem to had helped reduce the salience of ethnicity in their competition to some extent. Furthermore, the fact that there has been a hand over of power from one party to the other twice in the last twenty years (in 2000 and 2008) have reduced the fear of permanent domination and marginalization. The first past the post majoritarian electoral system seems to have been of crucial importance as well by making unattractive the prospect of forming smaller parties representing other ethnic groups. The dynamics of the exiting electoral system creates incentives for emergence of two big parties with a national appeal rather than the formation of multiple parties each representing many different ethnic groups which would have been likely had Ghana adopted a proportional electoral system.

In Kenya, even after the return to multiparty politics, a ban on regional or ethnic parties was not introduced until 2008.[800] This statutory rule has been elevated and attained constitutional status with the adoption of the 2010 Kenyan Constitution and its requirement that all political parties in Kenya "have a national character as prescribed by



[799] Morrison, Minion KC, and Jae Woo Hong. "Ghana's political parties: how ethno/regional variations sustain the national two-party system." *Journal of Modern African Studies* 44, no. 4 (2006): 623, pp 642-644.
[800] Moroff, Anika. "Ethnic party bans in East Africa from a comparative perspective." (2010), p.7.

an Act of Parliament".[801] Before the introduction of these statutory and constitutional rules, there was only a ban on religious parties and a prohibition of ethnic welfare organizations introduced in 1982.[802] Nevertheless, manifestly ethnic parties did not arise and all of the major political parties gave no overt indication of being ethnic parties. However, depending on who is the founder or leader of these political parties, most of these parties were perceived as parties championing the cause of this or that ethnic group.[803] Most of the parties lacked any permanence and were being formed just before elections and Kenyan politicians were switching from one party to the other.[804]

The creation of new parties, formation of new coalitions and splits was largely dictated by the calculation of the politicians regarding which party offers the best prospect for the actualization of their political ambition for high office. These politicians, who are mostly veterans from the single party days of Kenya or their sons who present themselves as the sole champions and representatives of their respective ethnic groups, form parties and coalitions just before elections. The parties are mainly driven by the personalities and their following and appeal tend to be ethnically restricted. This is despite the fact that in their membership requirement, mottos, symbols or name, the parties do not give an indication of being ethnic parties. It is difficult to imagine that the mere presence of an ethnic party ban would have made that much of a difference. However, even if many of the individual parties were formed around one big political personality who is considered as the ethnic baron for this or that group, since none of the Kenyan ethnic groups

[801] Constitution of Kenya 2010 , Article 91(1)(a).
[802] Branch, Daniel, and Nic Cheeseman. "Democratization, sequencing, and state failure in Africa: Lessons from Kenya." *African Affairs* 108, no. 430 (2009): 1, p. 11.
[803] Bosire, Richard M. "Institutionalization of Political Parties in Kenya 1991 to 2007." (2010), p. 9.
[804] Adrienne LeBas, *From protest to parties: party-building and democratization in Africa*. Oxford University Press, 2011, pp233-240.

constituted a majority by themselves, forming coalitions across ethnic lines was necessary. This was true in the 2013 Kenyan election was well.[805]

In Ethiopia, since the introduction of multi-party politics, ethnic politics has been the dominant form of political organization.[806] Since the constitution itself embraces ethnicity as the single most important political identity, this should of course come as no surprise. The framers of the constitution itself were ethnic political parties and armed fronts which took ethnicity as a legitimate and natural organizing basis of political parties.[807] There was a resistance to this idea from elites of the previous regimes who considered ethnicity as a divisive, dangerous and improper ground for political mobilization.[808] However, the surge of ethnic nationalism unleashed with the coming in to power of the new regime drowned opposition to the institutionalization of ethnic politics. This opposition has been channeled through various Ethiopian nationalist parties that but these parties are often depicted by their opponents as having an appeal only to the Amhara (the historically dominant ethno-cultural group). In reality their appeal extends to urban residents and others small ethnic groups, who are very mobile in search of economic opportunities, as well.[809]



[805] Nic Cheeseman, Gabrielle Lynch, and Justin Willis. "Democracy and its discontents: understanding Kenya's 2013 elections." *Journal of Eastern African Studies* ahead-of-print (2014), p.5.

[806] Joireman, Sandra Fullerton. "Opposition politics and ethnicity in Ethiopia: we will all go down together." *Journal of Modern African Studies* 35, no. 3 (1997): 387, pp392-396; see also Wondwosen Teshome, B. "Ethiopian opposition political parties and rebel fronts: past and present." *International Journal of Social Sciences* 4, no. 1 (2009): 60, p. 65.

[807] See Young, John. "Ethnicity and power in Ethiopia."*Review of African Political Economy* 23, no. 70 (1996): 531-542.

[808] See Haile, Minasse. "New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development, The." *Suffolk Transnat'l L. Rev.*20 (1996): 1, Engedayehu, Walle. "Ethiopia: democracy and the politics of ethnicity." *Africa Today* (1993): 29, p. 35.

[809] Gebrewold, Belachew. "Ethiopian Nationalism: an Ideology to Transcend All Odds." *Africa Spectrum* (2009): 79, p. 82.

The ruling front itself is a coalition of three ethnic and one regional party. A number of opposition parties are also explicitly ethnic parties which claim to represent members of one ethnic group only. It is very difficult to evaluate the effect of the openly, if not completely ethicized party system in Ethiopia because with the exception of a few months in 2005, the country has in reality remained an autocracy of one sort or the other. Even in 2005, it could only be characterized as a competitive authoritarian regime. The opposition parties both ethnic and non-ethnic ones were most of the time operating in a very restrictive environment. The ethnic parties in the ruling front and its affiliates as well are also tightly controlled by the centralized party hierarchy which scripts their tone and message. Therefore, the full implication of the ethicized party, good or bad, system had not been seen so far. However, some things could be gleaned from the relative freedom of 2005 and the eventful election of that year.

To remain competitive at the national level, forming coalitions was imperative even for the parties that were openly ethnic parties. The ethnic makeup of the country in which no single ethnic group constitutes a majority seems to have made this necessary. Furthermore, the first past the post single member district electoral system had also reinforced this tendency. Many aspects of the electoral system and form of government favor coalition building. To start with, even in constituencies where there is a concentration of one ethnic group, to optimize their chance of winning groups of opposition parties tried to form coalitions and not to compete against one another for fear of splitting the opposition vote in favor of the ruling party. Furthermore, since control of the executive at the center depends on controlling the largest number of seats in the parliament and since no ethnic party could manage this even if it was to win in all the

constituencies where its target ethnic group forms a majority, it was important for all major parties to have some appeal in ethnically diverse parts of the country and urban areas. In other words, even for the ethnic parties representing the largest ethnic groups, a complete sweep of the seats in their own regional states would not be enough to gain a majority in the House of Peoples' Representatives (HPR). In order to secure a majority in the HPR, parties had to present themselves as pan-Ethiopian national parties or as a coalition of ethnic parties. As a result, in the 2005 election, other than the ruling front there were only two major political parties in play.[810] One such party was a coalition of the pan-Ethiopian political parties (Coalition for Unity and Democracy, CUD) while the other was largely a coalition of ethnic opposition parties (United Ethiopian Democratic Forces, UEDF).[811] In short, despite the existence of numerous ethnic parties that had mushroomed in the early 1990s in Ethiopia, the form of government and electoral system favor the emergence of two or a maximum of three large parties or coalition of parties at the national level. This of course limits the proliferation of ethnic parties but might to some extent have an integrative effect.

Another important observation from the experience of the 2005 elections in relation to openly ethnicized political parties is the difficulty of distinguishing political attacks or propaganda against an ethnic party from an attack against the ethnic group the party supposedly represented. Frequently, opposition political parties vehemently attacked in their political speech the TPLF (Tigray Peoples' Liberation Front) which they consider to be the core of the EPRDF. The denunciations and attacks against the TPLF at times

[810] Harbeson, John W. "Ethiopia's extended transition." *Journal of Democracy* 16, no. 4 (2005): 144, p. 148.
[811] Ishiyama, John. "Ethnic Partisanship in Ethiopia." *Nationalism and Ethnic Politics* 16, no. 3-4 (2010): 290, pp 295-296.

create the impression that the opposition political parties are agitating against the Tigre as an ethnic group. The government had even gone to the extent of bringing charges of genocide (later amended to attempted genocide) against prominent leaders of the opposition before a Federal High Court. While these charges were hardly well founded, the fear, anxiety and tension created among those who perceived political attacks against a party that purportedly represents them as motivated by hatred against their ethnic group was very real. Therefore, the heated contest of the 2005 contributed to further ethnic polarization and since then it is increasingly becoming difficult to distinguish between political speech against TPLF and subtle incitements of ethnic hatred.[812]

### D. Affirmative Action and Ethnic Quotas

Another way of managing ethnic diversity and contextualization of constitutionalism that can be observed in the four countries under study is the adoption of measures of affirmative action or other practices akin to affirmative action. In Nigeria the principle of federal character and its enforcement through the Federal Character Commission and parliamentary committees has been a central component of Nigerians effort to address problems related with ethnicity.[813] The federal character principle as actualized by the rules set out by the Federal Characters Commission has become an elaborate quota system that entitles indigenes of the 36 states of Nigeria and the Federal Capital Territory a minimum of 2 .3% and a maximum of 3% of the positions available in the public



[812] Abbink, Jon. "Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath." *African Affairs* 105, no. 419 (2006): 173, pp. 194-195.

[813] Mustapha, Abdul Raufu. *Institutionalising ethnic representation: How effective is the Federal Character Commission in Nigeria?*. Centre for Research on Inequality, Human Security and Ethnicity, 2007, p.9; See also Order XVII Rule B. 26.?(1) of the House Standing Orders 2007 , excerpt available at http://www.nassnig.org/nass2/committees.php?id=64 , last accessed on July 24, 1013.

sector at the Federal level.[814] At the state level, 75% of the positions in each state are reserved for the indigenes and the remaining 25 % are reserved for those coming from the same geo-political zone as the state in question.[815] At the political level, the application of the Federal Character Principle constitutionally requires the President to appoint one cabinet member from each of the 36 states.[816]

In Ethiopia, though no such elaborate quota system exists legally, the Constitution provides within the National Policy Principles and Objectives chapter provisions which stipulate that the government should ensure an equitable allocation of wealth and equal opportunity to all Ethiopians and also provide special assistance to those ethnic groups that are economically and socially least advantaged.[817] In the allocation of federal subsidy to the regional states, the developmental expenditure of the Federal state for various projects as well, one can say the allocation is equitable.[818] Furthermore, "special assistance" in the form of additional federal grants to and affirmative action measures to benefit those who are indigenous to four regional states which are considered historically disadvantaged are also provided.[819]

[814] See Guiding Principles and Formulae for the Distribution of all Cadres of Posts, prescribed by the Federal Character Commission In exercise of the powers conferred on it by section 4 (1) (a) of the Federal Character Commission (Establishment, Etc.) Decree No. 34 1996, available at http://federalcharacter.gov.ng/server_article.php/GUIDING-PRINCIPLES , last accessed on July 24, 2013

[815] Ibid.

[816] Article 147(3) Constitution of the Federal Republic of Nigeria 1999.

[817] Article 89 (2) and (4).

[818] See Zimmermann-Steinhart, Petra, and Yakob Bekele. "The implications of federalism and decentralisation on socio-economic conditions in Ethiopia."*PER: Potchefstroomse Elektroniese Regsblad* 15, no. 2 (2012): 01-30.

[819] Egziabher, Tegegne Gebre. "The influences of decentralization on some aspects of local and regional development planning in Ethiopia." *Eastern Africa Social Science Research Review* 14 (1998): 33, p. 54 and Wondimu, Habtamu. "Gender and regional disparities in opportunities to higher education in Ethiopia: Challenges for the promotion of social justice." *The Ethiopian Journal of Higher Education* 1, no. 2 (2004): 1, p.7

In Nigeria, the "federal character principle" is criticized by many scholars for promoting mediocrity and the indigene *vs* settler divide undermining the significance of a uniform civic citizenship and identity.[820] But despite this criticisms and its imperfect application, it has addressed grievances of exclusion and marginalization in the public sector especially by those from the north who still lag behind in terms of educational attainment as well as to people coming from minority ethnic groups.[821] In Ethiopia, despite the significant and historically unprecedented allocation of public resources in various parts of the country, there is a still a perception of TPLF domination in the ruling coalition and also in the mid-level and high command of the military and security apparatus as well as in the national economy through the extensive business empire of the TPLF and the emergence of a new Tigrien business elite.[822]

It is interesting to ask, in light of the *Sejdić and Finci v. Bosnia and Herzegovina (27996/06 and 34836/06)* case decided by the ECHR, if the ethnic quotas and affirmative action measures that are used in Nigeria or Ethiopia amount to breaches of the principle of non-discrimination. This issue has not been brought either to Ethiopian or Nigerian Courts. In Nigeria while there have been some challenges of the statutory requirement of being an indigenous to a state to benefit from the federal character rule, the federal

[820] Mustapha, Abdul Raufu. "Institutionalising ethnic representation: How effective is affirmative action in Nigeria?." *Journal of International Development* 21, no. 4 (2009): 561, pp. 569-573; Ejobowah, John Boye. "Ethnic Conflict and Cooperation: Assessing Citizenship in Nigerian Federalism." *Publius: The Journal of Federalism* (2012), pp. 8-12; See also Bello, M. L. "Federal character as a recipe for National integration: The Nigerian paradox." *International Journal of Political and Good Governance* 3, no. 30 (2012): 1-17.

[821] Suberu, Rotimi. "The Nigerian federal system: Performance, problems and prospects." *Journal of Contemporary African Studies* 28, no. 4 (2010): 459, p. 465-466; Ugoh, Samuel C., and Wilfred I. Ukpere. "Policy of the federal character principle and conflict management in Nigerian federalism." *African Journal of Business Management* 6, no. 23 (2012): 6771, p6779.

[822] Aalen, Lovise, ed. *The politics of ethnicity in Ethiopia: Actors, power and mobilisation under ethnic federalism*. Vol. 25. Brill, 2011, p 4 and 34; see also Feyissa, Dereje. "The political economy of salt in the Afar Regional State in northeast Ethiopia." *Review of African Political Economy* 38, no. 127 (2011): 7-21.

character rule itself has not been challenged in court.[823] Attempts to amend the constitution and replace the requirement of indigeneity with that of residency have been thwarted for fear that this would allow more educated and mobile south eastern Nigerians (particularly the Igbo) dominate northern Nigerians (mainly the Hausa-Fulani).[824]

In Ghana, as far back as 1957 an anti-discrimination law was adopted but no legally sanctioned scheme of affirmative action or a quota system was adopted.[825] However, since independence, successive governments have made efforts to alleviate northern marginalization.[826] In their political appointments and by undertaking developmental projects in the north successive Ghanaian governments have tried to address the horizontal inequality between northern and Southern Ghanaians. Partially due to these measures and partially due to the rivalry with in the fragmented northern ethnic groups in Ghana which are at times in conflict with each other, the north south horizontal inequality in Ghana had not created serious political problems so far. Even though the efforts to alleviate the socio-economic inequality between the south and the north have not succeeded actually, these measures coupled with other symbolic gestures of national unity had contributed to reducing a north south political divide in Ghana. Generally, the approach in Ghana seems to emphasize non-discrimination and uniform civic identity. This approach had worked because the variance between the official policy of non-discrimination and actual practice was not that significant. Since independence,



[823] See "Women's Right Group Sues FG over Jombo-Ofo," *Premium Times Nigeria*, accessed December 13, 2013, http://premiumtimesng.com/news/107151-womens-right-group-sues-fg-over-jombo-ofo.html.
[824] John Boye Ejobowah, "Ethnic Conflict and Cooperation: Assessing Citizenship in Nigerian Federalism," *Publius: The Journal of Federalism* (November 11, 2012): 14.
[825] See note172 above.
[826] Asante, Richard, and Emmanuel Gyimah-Boadi. "Ethnic structure, inequality and governance of the public sector in Ghana." *United Nations Research Institute for Social Development* (2004), pp2-3.

particularly the first independence Government of Ghana had exhibited ethnic neutrality that promoted Ghanaian citizenship and refrained from ethnic favoritism.[827]

In Kenya, where ethnicity was officially underplayed and a uniform civic identity was promoted while in practice the two first presidents after independence engaged in ethnic favoritism situations had turned quite differently.[828] Ethnic favoritism of the successive Kenyan Presidents created ethnic antagonism and intense rivalry for power leading to violent conflicts and instability. After the 2007 election and the crises that ensued, as part of deal struck between the protagonists of the crises, a statutory organ called the National Cohesion and Integration Commission was established.[829] The Commission was established with a comprehensive mandate of promoting inter-ethnic harmony and fighting corruption.[830] To this end it has been given the power to investigate, make recommendations, engage in advocacy and receive complaints.[831] The 2010 Kenyan Constitution also provides a number of specific provisions which compels various organs to ensure that the composition of their personnel reflect the ethnic diversity of the Kenyan people. These provisions pertain to the composition of national executive, public service, defense force, police service and appointment to commissions and independent offices.[832]

### *6.4 Shades of Integration and Accommodation: Approaches towards Ethnicity in Africa*

In the first section of this chapter, the concepts of 'integration' and 'accommodation' have been discussed to analyze constitutional approaches for dealing with ethnicity. In

[827] Langer, Arnim. "Living with diversity: The peaceful management of horizontal inequalities in Ghana." *Journal of International Development* 21, no. 4 (2009): 534, p. 542.
[828] Joel D Barkan, "Kenya after Moi," *Foreign Affairs* 83 (2004): 88.
[829] See The *National Cohesion and Integration Act*. *2008*
[830] Id, Article 25.
[831] Ibid.
[832] Articles, 130(2), 232(1)(i), 241(4),246(4) and 250(4) The Constitution of Kenya 2010.

this section of the dissertation, this conceptual framework will be used to revisit the constitutional approaches of Ethiopia, Ghana, Kenya and Nigeria have adopted towards ethnicity. The purpose of this discussion is to further refine our understanding of the approaches of these countries from a theoretical point of view and facilitate the discussions concerning contextualization of constitutionalism in Africa as a means of enhancing inclusivity and avoiding ethnic marginalization. When we see the constitutional design of these four countries, we can say that both accommodationist and integrationist approaches, and at times a combination of both are employed in African constitutions. As has been discussed previously, the integrationist approach tries to avoid the politicization of ethnicity and tries to create one civic identity while cordoning ethnicity to the private and cultural sphere.[833] The accommodationist approach embraces ethnicity as a legitimate political identity and recognizes ethnicity in the political realm.[834] Both approaches are meant to minimize or avoid ethnic marginalization and exclusion. This is so because, the touchstone of constitutional engineering in the African context with regard to managing ethnic relations is the extent to which the constitutions have avoided the twin evils of *exclusion* from power and *marginalization* in the allocation of resources and opportunities controlled by the state.

The Ghanaian Constitution provides a clear and robust case of an integrationist model; the Nigerian Constitution could be considered as an ambivalent integrationist model; while the Ethiopian Constitution clearly falls in the accommodationist camp and to be more specific adopts an ethnic federalism underpinned in the principle of ethnic self-

[833] See John McGarry, Brendan O'Leary, and Richard Simeon. "Integration or accommodation? The enduring debate in conflict regulation." Constitutional Design for Divided Societies: Integration or Accommodation (2008): 41-52.
[834] Ibid.

determination. When it comes to Kenya, the previous Kenyan constitution, though not as robust as its Ghanaian counterpart, could be considered as an integrationist constitution. The 2010 Constitution of Kenya could be considered as a modulated integrationist constitution. In the paragraphs to follow, an attempt would be made to unpack the designation of these various constitutional models as integrationist, ambivalent integrationist, modulated integrationist and accommodationist. This task would be carried through a brief revision of the positions taken by the constitutional models *vis-a-vis* the four foci of constitutional strategies to that address ethnicity.

To begin with the Ghanaian integrationist constitution and its position on decentralization, Ghana eschewed federalism or even devolved government as an instrument of accommodating diversity and has opted for a unitary state with administrative decentralization. In terms of decentralization and the form of state, the Ghanaian constitution makes no concession to ethnicity. When we come to the form of government and electoral system, the Ghanaian Constitution does not provide any mechanisms meant to enhance the representation of various ethno-regional groups. It hardly takes ethnicity in to account and is blind to ethnic differences among the electorate. Furthermore, through the regulation of political parties and associational life outside the political sphere as well, the Ghanaian Constitution attempts to suppress political mobilization along ethnic lines which it deems illegitimate. Finally, other than prohibiting discrimination on ethnic grounds, the Ghanaian constitution does not provide for ethnic quota systems or affirmative action schemes. All in all, the Ghanaian Constitution tries to push out ethnicity from public life and consign it to the private

sphere. Therefore, clearly, the Ghanaian constitution is an example of a liberal and robust integrationist model.

When we come to Nigeria and its ambivalent integrationist approach, the ambivalence can be detected from the design of the federal arrangement. Though the federal arrangement has been designed in such a way that the big ethnic groups would not each have a single state of their own which could serve as a base and stronghold of a single major ethnic group, many of the 36 state boundaries roughly coincide with the ethnic boundary of the smaller ethnic groups. Therefore, while it denies the Igbo, the Yoruba and the Hausa=Fulani an obvious regional ethnic homeland, the Nigerian Constitution still empowers many of the smaller ethnic groups. With regard to the form of government and electoral system as well we can see the Nigerian constitution's ambivalence integrationist approach. The electoral system in Nigeria (i.e. for the presidency) is meant to enhance integration and tries to ensure an electoral process through which a unifying President with a broad ethnic appeal would emerge. However, this system is not blind to ethnic and religious diversity and it requires that a candidate should secure a fourth of the votes in at least two third of the states in addition to securing a majority of the votes cast nationally. Thereby the electoral system acknowledges and tries to accommodate ethno-regional diversity. When it comes to political parties the Nigerian constitution clearly takes an integrationist approach by banning ethnic political parties and requiring all political parties to have a national character. This is perhaps one of the unambiguously integrationist elements of the Nigerian constitution which expresses the integrationist zeal of the drafters of the constitution with a provision that requires the government to encourage inter-ethnic marriages. On the other hand, one of the most consequential

accommodationist elements of the Nigerian constitution is the quota system it introduces with the federal character principle. This principle substantially dilutes the integrationist credentials of the Nigerian Constitution. Therefore the Nigerian Constitution's approach of addressing the issue of ethnicity is best characterized as an ambivalent integrationist model.

When we consider Kenya it is important to consider both the old constitution which was in operation till as recently as 2010 and the new Constitution that was adopted in 2010. The previous constitution adopted a unitary form of state for most of its existence and did not provide any special mechanism in its electoral system meant to address the issue of ethnicity. Furthermore, it did not attempt regulate political parties from the point of view of ethnicity and did not provide for a system of affirmative action. Therefore, by default it might be characterized as following an integrationist approach to ethnicity. But other than the jettisoning *majimboism*/regionalism and the proscription against multiparty politics in, Kenya's constitutional history since independence had witnessed almost no attempt to address ethnicity.

Since the 2007 post-election conflict and crises in which ethnicity figured prominently, there has been some immediate statutory responses and even more importantly the 2010 Kenyan Constitution deliberately designed to address ethnicity. As a compromise between federalism and a unitary state, the 2010 Constitution has instituted devolved government. While meant to empower local communities through a constitutionally entrenched political as opposed to administrative decentralization, devolved government is not meant to empower ethnic groups. The electoral system adopted in Kenya for the presidency is similar to the Nigerian minimum vote distribution requirement and has both

integrationist and accommodationist elements. With regard to the regulation of political parties, the 2010 Kenyan Constitution has a clear integrationist thrust and bans the ethnic parties just like Nigeria and Ghana. With regard to affirmative action, the 2010 Kenyan Constitution provides a basis for the statutory adoption of measures meant to enhance the representativeness and inclusivity of state institutions. However, the Kenyan approach is unlikely to adopt the rigid quota system built on the basis of the Nigerian Constitution. Therefore, the Kenyan Constitution falls somewhere between the Nigerian and the Ghanaian constitution in the integrationist accomodationist spectrum and could be characterized as a modulated liberal integrationist model.

As opposed to Ghana, Nigeria and Kenya which could be considered as having a robust, ambivalent and modulated integrationist approach towards ethnicity the Ethiopian Constitution is clearly an accommodationist constitution. The Constitution puts in place an ethnic federalism, provides for an upper house of parliament in which ethnic groups in the country are to be represented and reserves 20 seats for minority ethnic groups in the lower house of parliament. Furthermore, it imposes no ban on ethnic parties and in fact assumes that ethnicity is a legitimate and natural basis for political mobilization. Though it does not introduce a quota system like the Nigerian Constitution, it endorses affirmative action for the benefit of historically disadvantaged ethnic groups. Therefore, the ethnic federalism of Ethiopia which is underpinned in the principle of ethnic self-determination could be characterized as an unalloyed accommodationist approach towards ethnicity.

***Conclusion***

The discussion so far demonstrates that in addition to limiting the power of government and facilitating democratic governance, constitutions are expected to serve as instruments of managing the intense ethnic based rivalry in the political sphere. While a constitution is not the only instruments and not even necessarily the most effective instrument in the peaceful management of ethnic rivalries, it still is an important means of addressing problematic issues arising in relation to ethnic diversity. This is especially the case in countries like Kenya, Ethiopia and Nigeria where at some point in their history the political mobilization of ethnicity had reached fever pitch and become violent. As compared to these countries, a country like Ghana where the genie of politicized ethnicity has not broken out of the bottle and has not lead to violent conflict and major national political crises could afford to have a constitution that is not very much concerned with the management of ethnic relations. However, countries like Kenya, Ethiopia and Nigeria must as of necessity use their constitutions as instruments of managing ethnic rivalry and conflict.

In their attempt to use their constitutions to manage ethnic relations, the countries in question have used various strategies or approaches the most important of which have been discussed in the previous section.

As has been noted by many scholars, the mere existence of ethnic diversity within a country does not in itself lead to conflict.[835] Conflicts arise and ethnic relations become problematic when diversity is coupled with other factors. In the context of most African

[835] See Fearon, James D., and David D. Laitin. "Ethnicity, insurgency, and civil war."*American political science review* 97, no. 1 (2003): 75-90; see also Collier, Paul, and Anke Hoeffler. "Greed and grievance in civil war." *Oxford economic papers* 56, no. 4 (2004): 563-595.

countries, ethnic relations become problematic and conflict arises due to the dominance of the elites of one or two ethnic groups to the exclusion of others and the relative economic deprivation that ensues as a result of political domination. In Kenya, the dominance of the Kikuyu during Kenyatta's rule (1963-1978) then of the Kalenjin in the era of Moi (1978-2002) and the again of the Kikuyu in the first Kibaki administration (2002-2013), in Nigeria the political dominance of the Northern elites in the first republic and successive military regimes, in Ethiopia the dominance of the Shoan Amhara elites and currently that of elites from Tigray have resulted in real and at times perceived advantage for these groups. The control of political power by these groups had translated in to economic privileges in various forms in both the public and private sector. Naturally, once in power, the beneficiaries of such privilege are hesitant to give up their privilege and attempt to hold on to political power as long as possible. This means that those ethnic groups which are not in power face the risk of very prolonged exclusion from power and marginalization in the distribution of the economic opportunities and benefits controlled by the state, which is of course the overwhelming chunk of the national GDP. And it is such exclusion and marginalization that results in ethnic tensions and conflicts. Therefore, in order to avoid a break down in the democratic order and violent conflicts, constitutionalism in most African countries will have to be contextualized and designed in such a way that it minimizes exclusion and marginalization.

Devolution or decentralization or federalism, the form of government and electoral system, party regulation and affirmative action or like measures are all various instruments ways of minimizing exclusion and marginalization and promoting

inclusiveness and fair distribution of resources. Their effectiveness or lack thereof should also be seen in this light. The contextualization of constitutionalism to address political problems related with ethnicity does not require the adoption of the same constitutional model in various African countries. There is no ideal or one right constitutional solution. Various historical and other contingent factors obviously make certain options nonstarters in some countries. For example, even if one could argue that devolved government instead of full-fledged federalism is more preferable ideally, it will be impossible to take this option in Nigeria where federalism has historically been an integral element of its constitutional history.

# Chapter Seven: Contextualizing Constitutionalism and Constitutions 4.0

### *Introduction*

In the preceding four chapters of this dissertation, the focus has been on how the constitutions of the four countries subject to this study address the problems of abuse of incumbency and antagonistic ethnic relations. Through a comparative study of the constitutions of these countries, we have identified various constitutional strategies and solutions that have been adopted with various degrees of success to address abuse of incumbency and the issue of ethnicity. The purpose of this present chapter is to reflect on the case study chapters from various angels and make some observations about the contextualization of constitutionalism in Africa. In the first section of this chapter, using the metaphor of constitution making waves, an attempt will be made to put in historical perspective the increasing popularity of constitutional solutions and ideas that have been identified in the case study chapters and which are used for the contextualization of constitutionalism in Africa more broadly. The second section of the chapter will be used to discuss the substantive qualities and distinguishing features of constitutions being made in the latest constitution making wave in Africa. Of particular interest in this regard would be the link between the constitutional ideas identified in the case study chapters and the latest constitution-making wave in Africa.[836] Given the fact that this latest constitution-making wave offers a unique opportunity to reflect on the migration of constitutional ideas in sub-Saharan Africa the third section of the chapter will discuss how the latest constitution-making waves in Africa differs in its pattern, extent and

[836] The idea of constitution-making waves and the various constitution making waves of Africa are discussed in Chapter One of this dissertation.

modalities of migration from previous constitution making waves. The fourth section of the chapter would be devoted to discussing the nature of constitutionalism that emerges from the latest constitution making waves. Building upon the insights from this discussion, the fifth section of the chapter will make the case for a pragmatic contextualization of constitutionalism in Africa. Finally, the last section of the chapter will explain and reflect upon the significant divergence of the Ethiopian constitutional approach in addressing abuse of incumbency and the issue of ethnicity.

### *7. 1 Constitutions 4.0: What sets them Apart?*

As has been indicated in the previous section of this chapter, constitutions 4.0 would be just a convenient term that would be used to refer to constitutions being made in the fourth constitution-making wave in Africa. Strictly speaking and from a temporal point of view, among the constitutions that are in force in Africa as of the beginning of 2014, only the 2010 Kenyan Constitution and the 2013 Zimbabwean Constitution could be considered as belonging to the fourth constitution-making wave in Africa. However, if we adopt a less temporal focus and opt for a more qualitative emphasis, the Constitution of South Africa and the 1992 Ghanaian Constitution (which have inspired the drafters of the 2010 Kenyan Constitution) could also be considered as prototypical constitutions 4.0. Furthermore, the comprehensive constitutional reform processes and the draft constitutions in Tanzania, Zambia, Ghana, Liberia, and Malawi and possibly in Nigeria could be considered as constitutions 4.0 in the making.

Having described the domain of constitutions 4.0, an important question that should be raised at this juncture will be: what, if any, are the substantive and qualitative differences of constitutions being made in the fourth wave of constitution-making in Africa (which

for the sake of convenience will be referred to as constitutions 4.0)? This question is important because it sheds light on the need and ongoing process of contextualizing constitutionalism which is the focal point of this research project. We could observe the following two differences between constitutionalism 4.0 and previous constitutional waves in the continent.

The first significant substantive distinguishing feature of constitutions 4.0 is the extent to which these constitutions are designed to reduce the power of the executive and abuse of incumbency.[837] Previous constitutional making waves saw constitutional designs that were indifferent to the aggrandizement of the executive or were quite deliberately designed to enhance the power of the presidency at the expense of other constitutional organs. Unlike the products of previous constitution-making waves, constitutions 4.0 are animated by an underlying agreement of the need to constrain the executive. Using many of the constitutional ideas discussed in the previous section of this chapter, constitutions 4.0 are crafted to minimize the recurrence of the problems that have beset multiparty politics in many of these countries. Drawing from their experience of unrestrained imperial presidencies that cowed the courts and enfeebled legislatures, constitutional drafters have tried and are still trying to tame the executive branch through constitutional engineering.

As a result, the constitutional ideas discussed earlier in Chapter Four of this dissertation and identified in the case studies are gaining more and more traction. Strict and well entrenched presidential term limits,[838] bright line and targeted proscriptions of various

[837] See Chapter Four above

[838] See Constitution of Kenya 2010, Article 143(2) and Article 255(1) (f), Constitution of Zimbabwe 2013, Article 91(2) and Article 328(7) &(8).See also Republic of Ghana, Report of the Constitution Review

forms of abuse of incumbency,[839] provisions requiring the impartiality and nonpartisanship of various arms of the state,[840] appointment/removal process and as well as provisions meant to ensure the independence of the judiciary[841] and also democracy supporting state institutions are becoming common features of the new constitutions.[842] These features distinguish constitutions 4.0 substantively from many constitutions that have come out of previous constitution-making waves.

Another important departure of constitutions 4.0 is the more nuanced position these constitutions reflect in relation to decentralization and ethnicity.[843] Previous constitutional waves were dominated with the view that a centralized form of authority is preferable and necessary to guarantee the unity of territorial integrity of states. Regional autonomy and federalism were seen with suspicion. Furthermore, ethno-cultural differences were ignored and given little or no constitutional recognition. Although independence era constitutions attempted to address the issue of ethnic diversity through constitutionally entrenched regionalism, these constitutional provisions were quickly dismantled after independence.[844]

In constitutions 4.0, we see a shift in the constitutional approach to these issues. First of all, devolved government and constitutional decentralization (albeit weak at times) are becoming more and more the norm. This is done so that the understanding that such

Commission, 2011, available at http://www.ghana.gov.gh/images/documents/crc_report.pdf, pp 94-99.

[839] See Constitution of Kenya 2010, Article 34(4), 232 (1) (c) and Constitution of Zimbabwe 2013 Article 61(4), 200(3, 4 &5) and 208 (2 & 3).

[840] Ibid.

[841] See Constitution of Kenya 2010, Article 159-173 and Constitution of Zimbabwe 2013 Article 164, 177-191.

[842] See the Constitution of Kenya 2010, Chapter 15(Articles 248-254) and Constitution of Zimbabwe 2013 Chapter 12(Articles 232-253).

[843] See Chapter Six above

[844] Robert B. Seidman, "Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form and Legitimacy," *Wisconsin Law Review* 1969 (1969), p.111.

developments will facilitate a more participatory and responsive governance at the local level as well as a more fair distribution of national resources.

Furthermore, some degree of (at times only symbolic) recognition is given to ethno-cultural diversity. The constitutional affirmation of ethnic differences, however, is only in cultural terms. Political mobilization along ethnic lines is still discouraged and constitutions 4.0, just like previous constitutions, are set to combat the politicization of ethnicity. The endorsement of positive measures to ensure a fair distribution of resources means that the constitutional arrangement in place is not in denial regarding the existence and salience of ethnicity as well as the historical injustices and imbalances in the relationship of various ethnic groups and the state. At this point, one might ask why the constitutional ideas that are becoming the norm in constitutions 4.0 were not put in practice in the early 1990's. There are a number of explanations that we need to take into account in answering this question.

To begin with, when various actors, both internal and external were putting pressure on autocratic regimes throughout Africa to democratize, these demands largely focused on the reintroduction of multiparty democracy.[845] As long as a country lifted a ban on multiparty politics, started holding elections and ratified the major international human rights treaties or reproduced them in its constitution, not much else was expected. [846] Multiparty electoral contest and formal recognition of human rights were the issues

[845] See Oda van Cranenburgh, "Democracy Promotion in Africa: The Institutional Context," *Democratization* 18, no. 2 (2011): 443–461, doi:10.1080/13510347.2011.553364; Archie Mafeje, "Democracy, Civil Society and Governance in Africa" (Addis Ababa, 1999), 4, http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN008409.pdf.

[846] Kwasi Prempeh, "Africa's 'constitutionalism revival': False start or new dawn?," *International Journal of Constitutional Law* 5, no. 3 (July 1, 2007): 495; Prempeh, "Presidents Untamed," *Journal of Democracy* 19, no. 2 (2008): 11; Prempeh, "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa," *Tulane Law Review* 80, no. 4 (2006): 1293- 1295

regarding which those in power were pressed for the most both by internal and external actors.[847] As long as those in power made such minimal reforms they could successfully resist wider and deeper reforms. Especially during the 1990's, these minimal reforms were very often sufficient to mollify external donors and nascent opposition groups. A very good example of this is Kenya where President Moi managed to stem off the initial wave of pressure for political reform in the early 1990's by reintroducing multiparty politics while avoiding wider and deeper constitutional reform.[848] As a result, the power of the imperial presidency and the centralization of power which were important features of post-colonial African states were retained.

Furthermore, as has been pointed out earlier given the limited experience of many of these countries with multiparty democracy, their understanding of the challenges that will later arise was also limited. Even to the extent that problems of abuse of incumbency and the politicization of ethnicity could be foreseen, there were no readily available, tested and tried constitutional solutions from which to draw up on. However, the experience of most African countries with multiparty democracy in the past twenty years, which has been rather turbulent and troublesome have necessitated the contextualization of constitutionalism and insights and lessons as to how this could be done. This could be seen by the demand of political parties, candidates and even civic groups that have called for the constitutional reform processes in all the countries subject to this study as well as in other African countries. However, constitutions 4.0, which have been discussed in

[847] The focus of international actors on human rights provisions of constitutions as opposed to the structural and institutional aspects of a constitution is something that still persists, See Kevin L. Cope, "The Intermestic Constitution: Lessons from the World's Newest Nation." *Virginia Journal of International Law* 53, no. 3 (2013).

[848] See Stephen Brown, "Authoritarian leaders and multiparty elections in Africa: How foreign donors help to keep Kenya's Daniel arap Moi in power." *Third World Quarterly* 22, no. 5 (2001): 725-739.

Chapter One could be said to have begun the process of contextualization for certain African countries like Kenya.

### *7.2 Cross Country Learning and Influences: The Migration of Constitutional Ideas in Africa*

One of the distinguishing features of constitutions 4.0 relates to the pattern, extent and modalities of migration of constitutional ideas we see in relation to their making. According to the proponents of the migration of constitutional ideas as an apt metaphor, it signifies "all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos."[849] Prior constitution-making waves in Africa have also been occasions for the migration of constitutional ideas. But the pattern, extent and modalities of migration of the current constitution making wave are different from previous constitution-making waves. Before discussing the difference between constitutions 4.0 and constitutions made in prior constitution-making waves in Africa in terms of the migration of constitutional ideas, it would be advisable to provide a brief discussion of the theoretical literature on cross constitutional learning and influence.

One of the first things that stand out in the theoretical discourse concerning cross-constitutional learning and influences is the diversity of metaphors proposed as explanations or ways of understanding the phenomena of one constitutional system influencing another constitutional system. This debate regarding terminologies and metaphors is important because, "only a sufficiently transparent and capacious lens can

[849] Sujit Choudhry, ed. *The migration of constitutional ideas*. Cambridge University Press, 2006, p.21.

capture the complexity of cross-constitutional interactions".[850]In the battle of "metaphors" as some have called this controversy, it seems that the metaphor of migration seems to have won the day as the as being more reflective of the full range of and the overall complexity of the process of cross constitutional learning and influences as opposed to other metaphors such as "borrowing".[851]

The study of the migration of constitutional ideas has both a descriptive/analytical component and a normative aspect as well. The descriptive and analytical focus of those who study the migration of constitutional ideas revolves around the object, timing, motivations and patterns of the migration of constitutional ideas.[852] Those who analyze the effects and preconditions of the migration of constitutional ideas also contribute to the descriptive/analytical wing of the literature on cross constitutional influences and learning.[853] In analyzing and describing cross constitutional influences and learning, some scholars have reiterated that the focus should not be only on instances in which a constitutional idea from one constitutional system was accepted or adopted in to another system.[854]

Further refining this insight, Kim Scheppele has developed the twin notions of aspirational and aversive constitutionalism.[855] The former leads to the acceptance and

[850] Vlad Perju, "Constitutional Transplants, Borrowing, and Migrations." *Oxford Handbook of Comparative Constitutional Law, Eds. M. Rosenfeld & A. Sajo* (2012), p. 1311.
[851] Ibid.
[852] Vlad Perju, "Constitutional Transplants, Borrowing, and Migrations." *Oxford Handbook of Comparative Constitutional Law, Eds. M. Rosenfeld & A. Sajo* (2012), p. 1324-42.
[853] For example, see Yasou Hasebe, "Constitutional borrowing and political theory." *Int'l J. Const. L.* 1 (2003): 224. Hasebe, based on the Japan's experience argues that "constitutional borrowing show the extent to which the functions of imported constitutional institutions and doctrines depend on political theories embraced or presupposed by the importers."
[854] See Lee Epstein and Jack Knight. "Constitutional borrowing and no borrowing." Int'l J. Const. L. 1 (2003): 196.
[855] See Kim Lane Scheppele, "Aspirational and aversive constitutionalism: The case for studying cross-

adoption of constitutional ideas and models which are in tune with one's constitutional aspirations, while the later leads to the deliberate and well-considered rejection of constitutional models and ideas as negative and undesirable.[856] In another analytical stream concerning the migration of constitutional ideas, Frankenberg tries to explain the process of the transfer of constitutional ideas through an analogy of the process of buying and assembling furniture from an Ikea store.[857] The main thesis of the "Ikea Theory" is that there is a global constitution which is:

> created by the or rather emanates from processes of transfer and functions as a reservoir or for that matter, a supermarket, where standardized constitutional items-grand designs as well as elementary particles of information-are stored and available, pret-a-porter, for purchase and reassemble by constitution makers around the world.[858]

Frankenberg observes that there could be oddities or clauses in constitutions that resist decontextualization and standardization and that are not suited to being in stock in the IKEA store.[859] In relation to such clauses Frankenberg further notes that:

> Odd details disrupt the generally accepted or, at least, imitated standards and routines of constitution making. In that sense, they function as subversive elements that evade the reach and rules of the global grammar of constitutionalism and introduce a local accent informed by a particular national history, religion, or tradition, or by specific political experiences, power constellations, and, more often than not, unresolved conflicts.

From the normative perspective, the debate concerning the migration of constitutional ideas largely focuses on the merit of cross-constitutional influences and learning. This normative debate about the migration of constitutional ideas also



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constitutional influence through negative models." *International Journal of Constitutional Law* 1, no. 2 (2003): 296-324.

[856] Ibid., pp299-300.

[857] Günter Frankenberg, "Constitutional transfer: The IKEA theory revisited." *International journal of constitutional law* 8, no. 3 (2010): 563-579.

[858] Ibid., 565.

[859] Ibid., 573.

relates to what some have perceived to be the universalization of western constitutionalism which happens to be hegemonic in the comparative constitutional law discourse.[860] For instance, using the Argentinian experience as an example, Carlos Rosenkrantz argues against constitutional borrowing and cites the "heterogeneity of constitutional law and the difficulties in the democratic validation of the decision to adopt a foreign law" as some of the reasons which make the migration of constitutional ideas undesirable.[861] Rosenkrantz's objection to the migration of constitutional ideas seems to be rather unusual in that he objects to the migration of constitutional ideas even for the purpose of constitutional design.[862] In the normative debate concerning the migration of constitutional ideas, most of the time what is at issue is the use of comparative law in constitutional adjudication and not in constitutional design.[863]

Having reviewed the theoretical literature concerning the migration of constitutional ideas, we now turn our attention to the migration of constitutional ideas during the different constitution-making waves in Africa. What stands out most about constitutions adopted in the first constitution making wave in Africa with regard to the migration of constitutional ideas is that, as has been noted earlier, those constitutions adopted just prior to independence closely followed the constitutional model of the departing colonial rulers. Hence the pattern of migration to be observed

[860] Michel Rosenfeld and Andras Sajo, ed. *The Oxford Handbook of Comparative Constitutional Law*. Oxford University Press, 2012, 15.
[861] Carlos F. Rosenkrantz, "Against borrowings and other nonauthoritative uses of foreign law." *Int'l J. Const. L.* 1 (2003), p.269.
[862] Ibid., 285.
[863] See Norman Dorsen, "The relevance of foreign legal materials in US constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer." *International Journal of Constitutional Law* 3, no. 4 (2005): 519-541.

in the first wave of constitution making wave in Africa is a great deal of mechanical borrowing and with little contextualization. In fact, considering the manner in which they were adopted and the fact that accepting these constitutions was required for gaining independence, the constitutions adopted in this first wave of constitution making in Africa could be considered as "imposed constitutions".[864]

The second constitution-making wave in Africa which was mainly inward looking and was by and large embedded in local political contingencies and peopled by the desire of the incumbents to monopolize and centralize power. Therefore, there was little need, incidence and opportunity for cross constitutional learning and influences.

One of the notable exceptions in this regard might be the short lived 1979 Nigerian Constitution which was meant to reintroduce constitutional democracy in Nigeria after a deadly civil war and more than a decade of military rule. This constitution provided the first and till very recently a rare instance of an African country that molded its system of government on the US Presidential form of government.[865] Another instance of a significant migration of constitutional ideas in the 1979 Nigerian Constitution is the inclusion of state policy principles and directives inspired by the Indian Constitution which in turn has taken the notion of state policy principles and directives from the 1922 Constitution of Ireland.[866] But till the onset

[864] Frederick Schauer,"On the Migration of Constitutional ideas." *Conn. L. Rev.* 37 (2004), p. 916. ". Schauer's identifies four typologies of constitutions, namely, the imposed constitution, the transplanted constitution, the indigenous constitution and the transnational constitution but concludes at the end of the day that especially in the contemporary world notions of a truly indigenous or imposed constitution are "quaint".

[865] See J. S. Read, (1979). The New Constitution of Nigeria, 1979:'The Washington Model'?. *Journal of African Law*, *23*(2), 131-174.

[866] See B. Obinna Okere, "Fundamental Objectives and Directive Principles of State Policy under the

of the third constitution making wave in Africa in the early 1990's, what has been typical in most African states in the 1970's and 80's was the adoption of homemade and assembled one-party autocracies which had little room for constitutional borrowing. However, it could be contended that there was an aversive constitutional migration in the sense that these countries rejected multiparty democracy.

When we come to the 1990's and the third constitution-making wave in Africa, the most notable development is the importance international human rights instruments had assumed as avenues of the migration of constitutional ideas. A number of contemporary African constitutions have either directly or by reference incorporated international human rights instruments. As Charles Fombad notes "in almost all modern African constitutions, many of the provisions especially those recognizing and protecting human rights, have been substantially influenced by international human rights instruments and standards".[867] Underlying this trend is a view of international human rights instruments as a touchstone for human rights protection and a desire to legitimize domestic constitutional orders by aligning them with international human rights norms. This exercise of bolstering the legitimacy of constitutions through association with international human rights treaties has as its audience both internal and external actors.[868]

With Constitutions 4.0, we can observe a number of interesting developments in relation to the migration of constitutional ideas. One such trend is the fact that constitutional drafters in various African countries are expanding the scope of their search for



Nigerian Constitution." *International and Comparative Law Quarterly* 32, no. 1 (1983): 214214.

[867] Charles Manga Fombad, "Internationalization of constitutional law and constitutionalism in Africa." *American Journal of Comparative Law* 60, no. 2 (2012),p.445.

[868] See for example Kevin L. Cope, "The Intermestic Constitution: Lessons from the World's Newest Nation." *Virginia Journal of International Law* 53, no. 3 (2013).

constitutional ideas and solutions that could be incorporated in their constitutions. The widening scope of comparative constitutional learning among African constitutional framers could be easily demonstrated by the references they make to the experiences of various constitutional systems around the world. For instance Zambia, the 2005 Constitutional Review Commission, given that task of drafting a new constitution for Zambia conducted "comparative study tours" to South Africa, Uganda, Kenya, Ethiopia, Nigeria, Sweden, Denmark, Norway and India with funding from the UNDP.[869] In addition to these countries, the Commission in its report makes reference to the Constitution of the United States, the Constitution of the State of California and the 1992 Constitution of Ghana.[870] The Ghanaian Constitutional Review Commission, which had been entrusted with undertaking a comprehensive review of the Ghanaian constitution with a view to reform the 1992 Constitution of Ghana, has made a reference to thirty five foreign constitutions.[871] The reference to foreign constitution ranged from the usual suspects such as the United States, Germany and South Africa to the Constitution of the more exotic 1979 Constitution Republic of Palau.[872] The Kenyan Constitution Review Commission of 2005 has made reference to 17 different foreign constitutions.[873]

[869] See Republic of Zambia Report of the Constitution Review Commission, Secretariat Constitution Review Commission, Lusaka, 29th December 2005, available at http://www.ncczambia.org/media/final_report_of_the_constitution_review_commission.pdf, page XiV.

[870] Ibid. p. XX.

[871] Republic of Ghana, Report of the Constitution Review Commission, 2011, available at http://www.ghana.gov.gh/images/documents/crc_report.pdf, pp 818-819.

[872] Ibid.

[873] The Final Report Of The Constitution Of Kenya Review Commission 2005, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=http%3A%2F%2Fwww.mlgi.org.za%2Fresources%2Flocal-government-database%2Fby-country%2Fkenya%2Fcommission-reports%2FMain%2520report%2520CKRC%25202005.pdf%2Fdownload&ei=JBQsU7LIJPOu7AbzsYCIAQ&usg=AFQjCNG2xetS2yDs970syMSR8GHsZeKxDA&sig2=Aagte9gEYCaBYWtMuprimQ&bvm=bv.62922401,d.ZGU , p. 706.

Another interesting trend is in relation to the migration of constitutional ideas in Africa and constitutions 4.0 is the extent to which cross-constitutional influence and learning among African countries is increasing and becoming more and more the norm. For example, in some of the most recent constitution-making exercise in Africa such as that of Kenya and Zambia, constitutional experts from other African countries have been formally given high profile roles as consultants and drafters.[874] Considering the similarity of the political context prevalent in many sub-Saharan African countries, it is not surprising that there is significant and an increasing level in the migration of political ideas among these countries. For example, in relation to the management of ethnicity, the Nigeria's regulation of political parties as well as its requirement that the winner of a presidential election must secure a certain portion of the votes at least in two third of the states have inspired similar rules in other African countries.[875]

Furthermore, the success of some of the constitutional solutions and designs in some of the countries, discussed in chapters four and six of this dissertation, has also been augmented due to the inclusion of the ideas in the South African Constitution which is a constitution that could be considered as a touchstone in contemporary constitutional design in Africa and beyond.[876] Particularly, the array of independent democracy supporting institutions as well as allied institutions of which the Constitutional Court is

[874] Republic of Zambia First Draft Report of the Technical Committee on Drafting the Zambian Constitution, The Secretariat Technical Committee on Drafting the Zambian Constitution Government Complex Conference Centre Kamwala LUSAKA June, 2012, available at http://zambianconstitution.org/images/downloads/draft%20report%20%20of%20the%20technical%20committee.pdf , pp. 6-7. See also Final Report of the Committee of Experts on Constitutional Review, 11TH OCTOBER, 2010 Committee of Experts on Constitutional Review, available at http://www.mlgi.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE_final_report.pdf , p. 157.

[875] See Basedau, *Supra* note 66.

[876] See David S. Law and Mila Versteeg, "The Declining Influence of the United States Constitution," *New York University Law Review* 87, no. 3 (2012): 826–829., http://works.bepress.com/david_law/28.

the most prominent have demonstrated the importance of such institutions in maintaining a democracy in the context of overwhelming one party dominance. The South Africa's Constitution, which provided recognition of various ethno-cultural communities without politically empowering such groups have also provided an alternative approach to constitutional decentralization short of federalism.

As has been indicated in the case study chapters, one of the newest constitutions in the continent and the archetypal constitution 4.0, namely the new Kenyan Constitution, seems to have drawn from the South African experience and the relatively successful experience of Ghana and incorporated many of these constitutional ideas. The extents to which these ideas are finding their way to the latest and ongoing constitution-making projects also attest to the fact that these ideas and practices are gaining traction.[877] Furthermore, some of these ideas, particularly those ideas which help in reducing abuse of incumbency are also reflected in the *African Charter on Democracy, Elections and Governance.*[878]

### *7.3 Constitutions 4.0: What Sort of Constitutionalism?*

In the preceding sections of this chapter, an attempt has been made to distinguish constitutions 4.0 from constitution made in earlier constitution-making waves in Africa.

[877] See for example Draft Constitution of Zimbabwe, Chapter 12, Articles 155,(2) (c, d), 161 and 259. (available at http://www.copac.org.zw/index.php?option=com_content&view=category&layout=blog&id=74&Itemid=337 , last accessed on February 28, 2013).

[878] See Articles *15,17 of the African Charter* on *Democracy, Elections and Governance. Article 15 of the charter provides that "State Parties shall establish public institutions that promote and support democracy and constitutional order" and then goes on to stipulate that these institutions should be autonomous, independent and adequately funded. Article 17 imposes on state parties an obligation to; regularly hold transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa, to Establish and strengthen independent and impartial electoral management bodies and to ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.*

That discussion has identified some of the substantive distinguishing qualities of constitutions 4.0 and also how the pattern and extent of the migration of constitutional ideas with regard to constitutions 4.0 differs from constitutional migration in earlier constitution-making waves in Africa. In this section of the chapter the question to be addressed is whether or not there is an emerging, distinct model of African constitutionalism. A related question that will be addressed concerns the philosophical tilt of constitutionalism in sub-Saharan Africa.

Given the discussion of constitutions 4.0 in the earlier sections of this chapter, it might be tempting to think of the constitutional ideas and practices discussed as solutions for abuse of incumbency and ethnic conflicts as forming or belonging to a unique African constitutional model of sorts. However, it is not really possible to do so. In this regard, from the very outset, it is important to state that constitutions 4.0 do not offer a new constitutional paradigm for Africa or otherwise. What makes them stand out is that they address structural political-social problems which characterize the African matrix through particular constitutional solutions (constitutional design) in order to ensure peace and stability The ideas and practices which we find in constitutions 4.0 do not constitute a coherent and comprehensive regional model of constitutionalism: putting these ideas together, we hardly get a complete and distinct regional constitutional blue print. Furthermore, the specific application, shape and form these ideas and practices exhibit a great deal of variation at the national level (i.e. from one country to the other). Moreover, none of these constitutional ideas and the problems they address are uniquely African. Similar problems had arisen and similar solutions have been adopted in different parts of

the world.[879] The ideal homogenous nation state has become anachronistic and ethnic pluralism is becoming an issue that constitutional law needs to address not just in Africa or Asia but in the west as well.[880] As far as the various constitutional approaches to dealing with abuse of incumbency are concerned, we can see that solutions similar to the ones discussed above (such as term limits and state institutions supporting democracy/ intuitions of horizontal accountability) have been adopted in Latin America as well as Eastern and Central Europe where emerging democracies had to contend with the legacy of long years of authoritarian rule.[881]

Therefore, it would clearly be inappropriate to speak of a unique African constitutional model of which the above listed constitutional ideas are part of. However it is plausible to argue that there is an emerging consensus regarding the need to adopt constitutional solutions to address the problems of abuse of incumbency and ethnic conflicts within the political context of African states. This consensus seems to be more widespread and deeper in relation to constitutional ideas that serve as antidotes against abuse of incumbency. Though not necessarily as robust as the consensus regarding constitutional solutions to abuse of incumbency, there is also some degree of consensus with regard to the way constitutions address ethnic diversity. So taking into account this consensus with regard to the need to tackle and different approaches of addressing abuse of incumbency and ethnic diversity through constitutional design it, it is possible to ask what sort of

[879] See Ulrich K. Preuss, "Constitutionalism in Fragmented Socities: The Integrative Function," in *Critical Theory and Democracy: Civil Society, Dictatorship, and Constitutionalism in Andrew Arato's Democratic Theory* (Routledge, 2012), 50. .

[880] See Stephen Tierney, *Constitutional Law And National Pluralism* (Oxford University Press, 2006).

[881] See Gideon Maltz, "The Case for Presidential Term Limits," *Journal of Democracy* 18, no. 1 (2007): 128–142; See also Guillermo A. O'Donnell, "Horizontal Accountability in New Democracies," in *The Self Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler, Larry Diamond, and Marc F. Plattner (Lynne Rienner Publishers, 1999), 29–52.

constitutionalism is prevalent in Africa in terms of the philosophical predispositions of African constitutions.

Considering the fact that many of these constitutions have been adopted at a time of political turmoil or arguably in the course of democratization, one might be tempted to ask if the transitional constitutionalism would be a more fitting paradigm for constitutions 4.0.[882] However, the preoccupation of African polities with issues of ethnic diversity and the propensity of incumbents to illicitly entrench themselves in power are challenges arising from a rather enduring political matrix. Therefore, the transitional paradigm will not be an apt framework for understanding the challenges and responses of constitutionalism in sub-Saharan Africa.

Having ruled out the transitional paradigm, the next question would be if constitutions 4.0 could be considered as forming part of the classic liberal democratic constitutional model. But before we answer this question, we need to consider the various philosophical approaches or conceptions of constitutionalism. Justice Dieter Grimm, formerly of the Federal Constitutional Court of Germany identifies five types of constitutions depending on the political principles and ideals to "which they give legal expression".[883] With regard to the contemporary constitutional landscape in Africa and constitutions 4.0, only two, i.e. the liberal-democratic constitutions, and non-liberal democratic constitutions, would be relevant.[884]



[882] See Wojciech Sadurski,"„Transitional Constitutionalism: Simplistic and Fancy Theories". Adam Czarnota, Martin Krygier, Wojciech Sadurski (ed), *Rethinking the Rule of Law after Communism* (2005): 9-25.,

[883] Dieter Grimm, "Types of Constituions." *Oxford Handbook of Comparative Constitutional Law, Eds. M. Rosenfeld & A. Sajo* (2012), p. 116.

[884] Ibd., pp 116-129. These five types of constitutions are the liberal-democratic constitutions, liberal non-democratic constitutions, non-liberal democratic constitutions, the social or welfare state constitution and

Because of their normative commitment to *individual rights* and *democracy*, constitutions based on the western liberal constitutionalism mold could be characterized as liberal-democratic constitutions. These two elements of liberal-democratic constitutions could be in tension with each other in some instances and the way constitutions deal with this tension has been the basis for classifying actual constitutional systems and a major bone of contention in constitutional theory. However, this tension has not been a big theme in constitutional thought and discourse in Africa.[885] As will be discussed below such classifications and the tension of the liberal and the democratic are not the focus of the contextualization of constitutionalism in Africa.

Some have put the emphasis on the liberal in the liberal-democratic constitutions and this emphasis has been operationalized with judicially enforceable bill of rights which put legally binding limits on the power of elected representatives of the people.[886] Others have given primacy to the democratic element in the liberal-democratic constitutional model and denied courts from having a say as to whether or not the acts of the democratically elected political office holders are constitutional or not.[887] As a compromise between these two approaches, there is also a variant of the liberal-democratic constitutional model, called that commonwealth constitutional model that gives courts a say as to whether or not the political branches of government are in breach



socialist constitutions.

[885] See section 1.B of Chapter Two of this dissertation

[886] See for example, Ronald Dworkin. "Constitutionalism and Democracy1." *European Journal of Philosophy* 3, no. 1 (1995): 2-11.

[887] See Jeremy Waldron, "The core of the case against judicial review." *The Yale Law Journal* (2006): 1346-1406; see also Richard Bellamy. "The democratic constitution: why Europeans should avoid American style constitutional judicial review." *European Political Science* 7, no. 1 (2008): 9-20.

of fundamental individual rights while retaining for parliament a final say on the matter or the option of proceeding as it chooses notwithstanding the opinion of the judiciary.[888]

Closely linked with this debate, a distinction is made between legal and political constitutionalism as contending theoretical alternatives and also actual constitutional models. Roughly, it can be said that political constitutionalism privileges the democratic in the liberal democratic constitutional model and resists judicially enforceable bill of rights while legal constitutionalism considers judicial constitutional review as a necessary component of liberal-democratic constitutionalism.[889] The compromise option that is gaining more traction is referred in the literature as the commonwealth constitutionalism. [890]Some have observed that the deferential disposition of East Asian courts and their reluctance to enforce constitutionally entrenched bill of rights could be considered as distinct regional variant of constitutionalism. [891]

After having discussed the above distinction between various forms of liberal democratic constitutions, our focus should then turn to constitutionalism in subs-Saharan Africa. But from the outset, it must be pointed out that the above distinction which focuses on the role of courts in reinforcing constitutional rights and their relationship with the other branches of government would fail to capture the defining elements and challenges of constitutionalism in Africa. With the exception of the Ethiopian 1995 Constitution, almost all African constitutions adopted since the 1990's have extensive bill of rights that

[888] See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice*. No. 5. Cambridge University Press, 2013.
[889]Paul Blokker, New *Democracies in Crisis?: A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. Vol. 99. Routledge, 2013, pp 14-15.
[890] Gardbaum, Stephen. "The new commonwealth model of constitutionalism." *The American Journal of Comparative Law* (2001): 707-760.
[891] See Jiunn-Rong Yeh and Wen-Chen Chang, "The emergence of East Asian constitutionalism: Features in comparison." *American Journal of Comparative Law* 59, no. 3 (2011): 805-839.

are supposed to be judicially enforceable. This is not a new phenomenon in Africa and even the independence constitutions had bill of rights that were supposed to be judicially enforced.[892] Even the francophone African countries, which closely follow the French constitutional model, have opted to retain and tailor their own constitutional courts.[893] Therefore, on paper, these constitutions might give the appearance that the liberal-democratic constitutional model with an emphasis on the liberal element and the legal nature of constitutions defines African constitutionalism. However, this will not be an accurate description of the reality in most African countries.

The liberal-democratic constitutional model is principally concerned with the relationship of the individual and the state, the public-private divide and protecting the autonomous space the individual needs for self-development and self-fulfillment.[894] This model takes for granted the stability of the polity and assumes a certain level of societal governability. In the African political context, stability and societal governability are much more fragile and constitutions are in a way expected to play a great role in boosting if not generating the level of stability and governability required for a liberal-democratic constitution to function. This is so because of the dynamics of the political matrix that has been discussed extensively in earlier chapters.

The challenges arising from this political matrix make it imperative for constitutional framers in Africa to think long and hard as to how the constitution could minimize abuse of incumbency, prevent ethnic conflict and manage diversity. The highest courts in most

[892] Robert B. Seidman, "Constitutions in Independent, Anglophonic, Sub-Saharan Africa: Form an Legitimacy," *Wisconsin Law Review* 1969 (1969), p.94

[893] Yuhniwo Ngenge, "International Influences and the Design of Judicial Review Institutions in Francophone Africa." *American Journal of Comparative Law* 61, no. 2 (2013): 433-460.

[894] Viktor J. Vanberg, "Liberal constitutionalism, constitutional liberalism and democracy." *Constitutional political economy* 22, no. 1 (2011): 1-20.

of the countries covered in the case studies had as their highest profile cases electoral disputes between presidential candidates.[895] In all the countries covered in the case study and many more African countries, the worst nightmare of constitutional framers is not just the breach of individual rights by a democratic majority. The defining fears animating constitution making in most African countries are autocracy and ethnic conflict which unfortunately occur far too often. Furthermore, the history of most African judiciaries which rarely inspire much confidence in their ability to protect individual rights from legislative and executive excesses also makes it difficult to think of judicially enforced, individual right centered constitutionalism as the dominant constitutional paradigm in the African context.[896]

Therefore, while it would be possible to think of constitutions 4.0 and more broadly constitutions that have been adopted even earlier in Africa would not be best described through the conventional political-legal dichotomy in constitutional theory which is centered on western constitutional experience. Our reading of African constitutions would be more revealing if we bear in mind the role these constitutions are supposed to play in containing ethnic conflicts and maintaining electoral democracy in a context where it could not be taken for granted that the political actors would respect even the minimal rules of the democratic process.

[895] See for example Buhari v. Yar'Adua,(2005) Supreme Court of Nigeria, available at http://www.yusufali.net/reports/buhari_v_inec.pdf, See also Nana Addo Dankwa Akufo-Addo & 2 Others V John Dramani Mahama & 2 Others, (2013) Supreme Court of Ghana, available at http://kenyalaw.org/kenyalaw-forum/discussion/552/supreme-court-of-ghana-dismisses-presidential-election-petition/p1 , see also Raila Odinga and others v. the Independent Electoral and Boundaries Commission and others, Supreme Court of Kenya (2013), available at http://www.judiciary.go.ke/portal/order-of-the-court-in-the-supreme-court-of-kenya-presidential-election-petition.html .

[896] See Kwasi Prempeh, "Marbury in Africa: judicial review and the challenge of constitutionalism in contemporary Africa." *Tulane Law Review* 80 (2005): 1239.

As a result, the answer to the question, what sort of constitutionalism is prevalent and also emerging in Africa cannot simply be 'political' or legal constitutionalism. Furthermore, we need to bear in mind that it is too early to tell whether the political-legal constitutionalism distinction makes sense of constitutions 4.0 as most of them are in the making or recently adopted. What we can observe is that even in their making there is a strong emphasis on the 'legal' in the sense of confidence in constitutional design. Therefore, the more helpful way of reading the latest and also previous constitutional making processes in Africa might be as attempts to contextualize constitutionalism and foster democratic governability. The desire to ensure democratic governability in turn necessitates the contextualization of constitutionalism. In an earlier chapter the various proposed approaches of contextualization has been discussed at some length. In the next section of this chapter, that debate will be revisited and attempt will be made to make the case for a pragmatic approach of contextualizing constitutionalism.

### *7.4 The Case for a Pragmatic Contextualization of Constitutionalism*

In the first chapter, we have discussed four different perspectives on the contextualization of constitutionalism in Africa. These perspectives point towards different approaches to constitutional reform and contextualization in Africa. One such perspective focused on cultural autochthony and contextualization, another on economic contextualization of constitutionalism, while the two other perspectives focused on contextualization of constitutionalism with regard to ethnicity and executive hegemony. At this stage it would be appropriate to see how the case study chapters and the emerging consensus discussed in the previous section tally with these perspectives. The case studies show that

constitutional designs that take into account the challenges to multiparty politics in the African political matrix could be successful in reducing abuse of incumbency and addressing problematic ethnic relations. This finding lends support to the perspectives on constitutional contextualization that emphasized the need to tame imperial presidencies and overcome ethnic conflicts. We could consider these two approaches towards contextualization of constitutionalism to be *pragmatic* approaches towards contextualization and calling for the adaptation of and add-ons on traditional or western constitutionalism.

These approaches could be considered as pragmatic for the following reasons. First of all these approaches are not too ambitious and do not overestimate what constitutional law can achieve in the social and economic realm and the potential of constitutions to remedy the legitimacy deficit of states. The approaches in question are pragmatic in the sense that they do not overstep the inherent and also situational limits on the capacity of constitutional law either to reflect societal values or bring about economic transformation. The approaches in question are concerned with regulating behavior, which is the principal function of law as opposed to the other approaches which are concerned with rather fanciful functions of law.

Furthermore, these approaches could be considered pragmatic since they focus on what has worked and what has not worked empirically. Pragmatic approaches take stock of previous constitution-making waves in Africa, particularly the first and third constitution making waves. Such approaches are predicated on the view that that one of the major reasons for the collapse of constitutions made in the first constitution making wave in Africa and a major short coming of many constitutions made in the third constitution

making wave is the lack of contextualization. More specifically, the failure to provide for and sufficiently entrenched provisions and institutions for curbing abuse of executive power have contributed greatly for the collapse of Africa's first generation constitutions and the lackluster performance of third generation constitutions.[897] Taking this into account, the pragmatic approach of contextualization constitutionalism would be focused on addressing these problems.

In other words, it could be said that the pragmatic approach towards contextualization of constitutionalism calls for a limited agenda of constitutional reforms. This approach views the necessary constitutional reform in African countries as being largely a response to lived experiences of ethnic conflicts and electoral autocracies in the African political matrix. Constitutions made in this spirit will be "creatures of fear" that are animated by fear of tyranny and ethnic exclusion and marginalization and the ensuing instability and conflict.[898] The extent to which constitutions are drafted in such a way that they respond to the evils and shortcomings of past regimes; is an aspect of constitutional drafting that has been noted by a number of scholars. For instance, based on the experience of various European countries and the United States, Kim Scheppele contends that, "constitution drafters ultimately understand and react most of all to what they take to be the crucial histories of their own countries".[899] Andras Sajo also argues, principally based on the constitution-making experience of 18th century France and America, that "fear creates a focus in problem-setting and motivates the constitution makers to find solutions that will

[897] See the case study chapters above (Chapter Three and Chapter Five)
[898] András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999), 1–4.
[899] Kim Lane Scheppele, "Constitution between Past and Future, A." *Wm. & Mary L. Rev.* 49 (2007), p.1380.

diminish fear".[900] The pragmatic approach towards contextualization of constitutionalism is one that is premised on a similar view and underscores the importance of making fear of the recurrence of negative experiences, such as ethnic favoritism, marginalization, conflict and abuse of incumbency, the driving inspiration for constitutional design in African countries. Of course the flip side of this fear is the strong desire and aspiration to live in democratic and stable societies where ethnic strife, marginalization, autocracy and abuse of power are a thing of the past.

The pragmatic approach to contextualizing constitutionalism therefore requires responding to these problems by adopting constitutional solutions that are gleaned from other African constitutional systems as well as from the 'global constitutional warehouse'.[901] It is not an approach that questions the basic premises and assumptions of liberal constitutionalism. More or less in line with this approach, the constitutional designs that have worked, as we can see from the case studies provide examples of '*add ons*'[902] to the tool kit of classical or western constitutionalism which are deemed to be necessary for the proper functioning of a constitutional democracy in the political context of the countries in question.

The pragmatic approach towards the contextualization of constitutionalism and its relationship with constitutions 4.0 in Africa could perhaps be explained with the computer metaphor that has been alluded to earlier. In this metaphor we could think of the constitutions in the earlier constitutions making waves as software that have

[900] András Sajó, *Constitutional sentiments*. Yale University Press, 2011, p. 135.
[901] Günter Frankenberg, "Constitutional Transfer: The IKEA Theory Revisited," *International Journal of Constitutional Law* 8, no. 3 (July 1, 2010): 571.
[902] The term add on is borrowed from computer science. An add on in computer science lingo means an added "component installed in or connected to a computer that expands the capabilities of the entire system". http://www.100bestwebhosts.com/glossary/terma.html , last accessed on March 29,2013.

persistently malfunctioned or crashed due to pervasive abuse or misuse. To the extent that they were expected to provide the framework for limited and democratic government, many African constitutions have malfunctioned. These crashes occurred at least partially because of constitutional designs that were not sufficiently fortified against these dangers. Each computer program is designed so that a computer would receive a set of instructions and perform certain tasks or operations. Therefore, whether or not a computer program has malfunctioned is to be determined by taking into account the process it was meant to perform or the operations it was supposed to direct. The pragmatic approach towards contextualizing constitutionalism is an approach in which the 'software engineer', in this case the constitutional framer tweaks and comes up with add-ons to the program so that the programs will work properly and run smoothly.

Constitutions 4.0 could be thought of as the programs with the latest updates and add-ons. The add-ons are not designed out of the blue and just because the engineer fancies them but having seen how and why the programs have crashed or malfunctioned previously and how similar problems could be avoided in the future. A software designer would have to take into account the compatibility of the program s/he writes with the hardware, the operating system of the machine in which the program would be used as well as other applications in the computer. In the same manner, those who write constitutions also have to be mindful of the compatibility issues that might arise with constitution they write and a host of factors that form the political matrix of the country in which the constitution is supposed to apply.

Contextualization of constitutionalism is a process of ensuring the compatibility of a constitution with the political circumstances of a country so that the constitution could

optimize the survival and consolidation of constitutional democracy. Given the checkered track record of African democracies, such an exercise is indispensable. The comparative case studies in the earlier chapters were attempts along this lines and demonstrated the need for constitutional contextualization in order to foster constitutional democracy in a the context of a political matrix that is rife with challenges to the consolidation of democracy. Examples of add-ons to the conventional constitutional templates which characterize constitutions 4.0 include, well entrenched presidential term limits, various specialized democracy supporting institutions, territorial decentralization cross cutting ethnic boundaries of the biggest ethnic groups, symbolic recognition of ethnic diversity, provisions for ethnic inclusion and integration as discussed in the case study chapters. These features, which are becoming more and more common in African constitutions, could be taken as results of pragmatic constitutional contextualization.

The point of departure of pragmatic approaches towards contextualizing constitutionalism are the problems such as abuse of incumbency and antagonistic ethnic relations which have often coincided and have at times resulted in very dramatic crises and conflicts in Africa. Even when such dramatic crisis has not occurred, the pitfalls of the political order in many of the countries under study have been too obvious to ignore. When elections have not ended with violence and strife, serious irregularities cast a shadow on the legitimacy of the purported winners to rule. Elections either become events to dread for fear that they will turn violent, or become farcical affairs in which the outcome is a far gone conclusion. As has been discussed in the first chapter, the high premium of power at the center has also antagonized ethnic groups led by competing elites who see political contest as a zero sum game. While prior to 1990's military rule or

one party rule was seen as legitimate solutions for these problems, that is not the case anymore. Both at a popular level and among elites there is an agreement that going back to the autocratic hey days of post-colonial Africa is not an option.[903] Despite coup d'états and other forms of break down in the democratic process that we still witness such as union governments forced by incumbents who are not willing to concede defeat in elections, at a normative level the unrepentant and unapologetic proponent of autocracy in contemporary Africa is a rare thing.

Bearing this in mind, the pragmatic approach towards constitutional contextualization in Africa calls for proper constitutional design attentive to the challenges that arise in the African political matrix and providing appropriate remedy for the recurrent problems that have arisen in relation to multiparty politics. Underlying a pragmatic approaches towards constitutional contextualization is desire to fix the shortcomings of the very imperfect transitions of the 1990's.

While less glamorous and exciting than a grand and original process of reinventing constitutionalism in a way that might reflect widely shared cultural ethos and provide for radical socio-economic transformation, the pragmatic approach to contextualizing constitutionalism which is focused on addressing the issue of ethnicity as well as abuse of incumbency has its own merits. It is an approach that is premised on an understanding that constitutions cannot be used to accomplish everything that is desirable and might be good.[904] It is an approach that acknowledges that constitutions have a limited ability to



[903] Gabrielle Lynch and Gordon Crawford, "Democratization in Africa 1990–2010: An Assessment," *Democratization* 18, no. 2 (2011): 278, doi:10.1080/13510347.2011.554175; Michael Bratton, "Formal Versus Informal Institutions in Africa," *Journal of Democracy* 18, no. 3 (2007): 99–101., doi:10.1353/jod.2007.0041.

[904] For a discussion of the limits of law see Erik Claes, Wouter Devroe, and Bert Keirsbilck, *Facing the*

capture much less to sufficiently reflect the identity of multicultural states or determining a country's economic destiny. It is rooted in the understanding that a "constitution is primarily effective when and if it is binding" and that "As creations of modern states, constitutions assume prevalence in the legal sphere".[905] This pragmatic approach towards contextualizing constitutionalism puts the focus on what constitutions do best (which is regulate the behavior of those holding and seeking public power) and does not detract much from the classic and liberal understanding of the function of constitutionalism.[906]

In light of the above discussion and the contentions that constitutionalism and democracy should have an economic and developmental agenda in Africa (discussed in the first chapter of the paper), it will be interesting to see the report of the Constitution Review Commission of Ghana. The Commission, which delivered its report in 2011 made a bold proposal that the focus of constitutionalism in Ghana should shift from the political to the developmental.[907] This proposal seems to be in some ways in accordance with some of the critiques of liberal constitutionalism that have been discussed in Chapter One of this dissertation. The Commission proposed the inclusion of an entrenched, comprehensive, long-term, strategic, multi-year, and binding national development plan which should be judicially enforced."[908] This proposal has been rejected, by the Government of Ghana

*Limits of the Law* (Springer, 2009) the authors argue that" ….framed as a societal sphere surrounded by other spheres, law falls short in accomplishing its functions to the extent that it is shown to be structurally inadequate to permeate and guide other societal spheres. These spheres often have a distinct logic, and entail concepts and structures which often resist being shaped by legal rules, principles, and procedures. As a result, attempts to regulate these spheres by law are often seen to be ineffective, producing disorder instead of generating order". p. 12.

[905] András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999), 39.

[906] Elkins, Zachary, Tom Ginsburg, and James Melton. *The endurance of national constitutions*. Cambridge: Cambridge University Press, 2009, pp-52-53.

[907] See Republic of Ghana, Report of the Constitution Review Commission, 2011, available at http://www.ghana.gov.gh/images/documents/crc_report.pdf,

[908] Ibid., 39.

which observed that implementing such proposals will amount to instituting "a command model of development planning and, tie the hands of successive governments to the ideological interests and policies of a particular political party".[909] The above proposal is an example of a non-pragmatic proposal for ambitious constitutional reform. It was not directed at fixing the glitches in the already existing constitutional order of Ghana but it demanded a considerable and dramatic departure. The argument in this section of the dissertation is that instead of such ambitious and grand attempts at economic or cultural contextualization, the focus should be on modest fine tuning of constitutions to foster stabile constitutional democracies.

It is important to note that, although the focus of this dissertation is on African countries and the discussion is about the contextualization of constitutionalism in the African political matrix, it would be a mistake to simply assume that the need to undergo a process of contextualization is unique to African countries. A good example of the need to contextualize constitutionalism would be post-WWII Germany. The adoption of the Basic Law of the German Federal Republic could be considered as a contextualization of the idea of constitutionalism. The Basic Law of 1949 is in a way an upgraded version of the Weimar constitution which has been improved up on with various add-ons. The add-ons such as constructive vote of no confidence, a strong constitutional court, the inclusion of eternal clauses, and civilian minister of defense and so on could be read as the ways through which the framers of the basic law contextualized constitutionalism in



[909] White Paper On The Report Of The Constitution Review Commission Presented To The President, available at http://www.ghana.gov.gh/images/documents/crc_report_white_paper.pdf , p. 4.

Germany.[910] Therefore, the argument about the need to contextualize constitutionalism is not an argument that is based on an assumption that such need is uniquely African.

We should also understand that contextualization is not an exercise that starts and ends with the making of a constitution.

The process of contextualization is a process that involves many actors and is not limited to the actual making or amendment of a constitution. Scholarly and judicial interpretation of constitutions, the interpretation and application of constitutions by the various branches of government contribute to the process which is not necessarily controlled and directed by a single body. The process of contextualization could be, depending on the need and circumstances the country in which it is undertaken, a complete overhaul of the constitutional order of a country, or comprehensive constitutional reform and review, occasional constitutional amendments or piecemeal and barely discernible developments of the constitutional system through interpretation. Regardless of the magnitude of the exercise, at the end of the day, constitutionalism is not recreated or radically transformed through the process of contextualization in a single country. Rather, in the process of contextualization, the universal or global notion of constitutionalism is made to fit local needs and conditions better by the use of constitutional ideas and principles we could conceive of as add-ons to the basic program of constitutionalism.

At this point, it would be interesting to reflect on the relationship of contextualization in this sense and the debate on legal transplantation. Obviously, the idea of contextualization of constitutionalism rejects the possibility and efficacy of legal

[910] Donald P. Kommers," The Basic Law: A Fifty Year Assessment," *SMUL Review* 53 (2000): 477.

transplantation by the adoption of a set of legal rules from one jurisdiction to the other.[911] This is so since it emphasizes the importance of the political matrix of a country when it comes to the performance of constitutionalism. As a result the contextualization of constitutionalism is more compatible with the notion of the "migration of ideas" which is more amenable to the "possibility of adaptation and adjustment".[912]

### *7.5 The Road Less Travelled: An Ethiopian Exceptionalism?*

One of the points that stands out in the case study chapters is the fact that even though there is an emerging consensus that has been discussed in an earlier section of this chapter, the Ethiopian Constitution seem to be the most incongruent with the emerging consensus of constitutions 4.0. By embracing ethnicity as a principal basis for decentralization and political mobilization the Ethiopian constitutional system significantly diverges from the approach towards ethnicity that is followed by the constitutions of most African countries.[913] The lack of term limit for the head of the executive as well as the paucity of clear rules prohibiting various forms of abuse of incumbency and the relatively insignificant attention paid to institutions of horizontal accountability in the absence of a term limit to the head of the executive in the Ethiopian constitution sets at odds with the emerging consensus.

This section will explore why this is the case and also try to draw lessons from the Ethiopian experience that might be relevant for other African countries as well. A number of reasons could be cited as having contributed to the divergence of the Ethiopian

[911] Legrand, Pierre. "Impossibility of Legal Transplants, The." *Maastricht J. Eur. & Comp. L.* 4 (1997): 111.
[912] Choudhry, Sujit.*The migration of constitutional ideas*. Cambridge Univ Press, 2006, p. 21.
[913] The Constitution of Burundi which provides for consociation ethnic power sharing also seems to stand out in the African constitutional landscape just as the Ethiopian Constitution. See Stef Vandeginste,"Governing ethnicity after genocide: ethnic amnesia in Rwanda versus ethnic power-sharing in Burundi." *Journal of Eastern African Studies* ahead-of-print (2014): 1-15.

constitutional approach. The divergence with regard to the consensus on term limit seems to be partially the result of the classic parliamentary system of government adopted in the Ethiopian constitution.[914] This might prompt the question why they opted for a parliamentary form of government in the first place given how rare such system is in contemporary Africa where hybrid or presidential forms of government are typical.

The adoption of the parliamentary system could be explained by taking in to account two factors. The first and probably the most important is the fact that the most decisive political player in the adoption of the Constitution, TPLF was a political party which had a cohesive and strong collective leadership.[915] For this group, a parliamentary system of government might have been more appealing because it corresponded with the then existing style of leadership in the party where the chairperson was hardly the political supreme he later evolved into. Furthermore, the TPLF which had secured power through a bitter armed struggle would have hardly wanted to risk its prize in a presidential election where its narrow ethnic base would be a clear disadvantage particularly given the explicitly ethnic politics it practiced.[916]

Whatever the political consideration behind the adoption of the parliamentary form of government, once such system of government was adopted, the fact that the head of the executive is not normally subject to term limits in parliamentary systems was the justification relied upon the principal actors in the Constitution making.[917] This meant

[914] በሸዋምየለህ ኃይለመስቀል, ነጥቦች ጥቂት መለስ አፆ ስለ, ቅፅ ፍትህ5 ጥርቁ174 የካቲት አርብ2 2004 ዓ.ም, ገፅ10 '[Hailemesqel Beshewamyeleh, A Few Points About Meles Zenawi, Fitihi Volume 5 No 174, Yekawtiti 2, 2004, p. 10] available at http://ethiopiazare.files.wordpress.com/2012/02/174.pdf and last accessed on June 12, 2013.

[915] Medhane Tadesse and John Young, "TPLF: Reform or Decline?," *Review of African Political Economy* 30, no. 97 (September 1, 2003): 395.

[916] Walle Engedayehu, "Ethiopia: Democracy and the politics of ethnicity." *Africa Today* (1993): 29-52.

[917] See Amber Tunnell , *Ethiopian PM takes to the podium,* September 23 2010 , Columbia Spectator ,

that the first Prime Minister under the FDRE Constitution, Meles Zenawi (who was already the President of the Transitional Government when the constitution was adopted in 1995) stayed in office till his death in 2012. Over these twenty years, he personalized power, successfully managing to sideline even the most powerful politicians in his own party.[918]

This experience is an interesting example of the adoption of a constitutional model without contextualization. While it is true that usually term limits are not provided for prime ministers in parliamentary forms of government, a constitutional design attentive to the political context of a country like Ethiopia would have counseled against sticking to this tradition of parliamentary systems and provided for term limits. South Africa, which has also adopted a parliamentary form of government with a term limit to the head of government, provides an excellent example in this regard.

The lack of term limit for the head of the executive as well as the paucity of rules prohibiting various forms of abuse of incumbency and the relatively insignificant attention paid to institutions of horizontal accountability is also another deviation from the emerging consensus that needs some explanation. One of the reasons for this deviation is the fact that the constitution-making process in Ethiopia was dominated by a single political party. [919] Though there were grassroots public consultation forums held

available at http://www.columbiaspectator.com/2010/09/23/ethiopian-pm-takes-podium , last accessed on June 12, 2013.

[918] Jean-Nicolas Bach, "Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia," *Journal of Eastern African Studies* 5, no. 4 (2011): 643.

[919] MA Wolde "A critical assessment of institutions, roles and leverage in public policymaking: Ethiopia, 1974–2004" (PhD thesis, University of Stellenbosch, 2005), available at: <http://ir1.sun.ac.za/handle/10019.1/1452?show=full> (last accessed 8 March 2012), at 142–48; See also TM Vestal "An analysis of the new constitution of Ethiopia and the process of its adoption" (1996) 3/2 *Northeast African Studies* 21, 26.

throughout the country during the making of the constitution, there was virtually no organized political group which had a meaningful participation in the process.[920] The exclusive and absolute dominance of the EPRDF precluded the careful consideration of constitutional design options which would have been important to reduce the problem of abuse of incumbency. It clearly was not in the self-interest of the EPRDF to adopt a constitution that had robust normative and institutional framework designed to limit abuse of incumbency.

Another important explanation could also be the fact that the FDRE is the first constitution of the Ethiopian state which adopted multiparty democracy. Neither the Ethiopian empire, nor the first Ethiopian Republic provided any experience of peaceful multiparty contest for power.[921] Unlike the other African countries which had some, even if rather limited and abortive experiences with multiparty democracy, Ethiopia was experimenting with multiparty democracy for the first time in the 1990s. As a result, compared with constitutional drafters in Ghana in 1992 or Kenya in 2010 or even Nigeria in 1999, Ethiopian constitutional drafters were operating under an informational disadvantage due to lack of experience with and historical antecedents of making democratic constitutions. This is so since they could not draw from prior Ethiopian experiences with multiparty democracy. The possibility of drawing from the comparative

[920] Mulugeta Abebe Wolde, "A Critical Assessment of Institutions, Roles and Leverage in Public Policymaking: Ethiopia, 1974-2004," Thesis, n.d., 142-148, http://ir1.sun.ac.za/handle/10019.1/1452?show=full (last accessed on March 8, 2012); For a rather unconvincing account of the process that downplays the dominance of the EPRDF despite admitting its preeminent role, see Andreas Eshete, "The Protagonists in 'constitution-making in Ethiopia," in Constitution-making and democratization in Africa, ed. Göran Hydén (Pretoria South Africa: Africa Institute of South Africa, 2001), 69-71.

[921] See Robert L Hess, and Gerhard Loewenberg. "The Ethiopian no-party state: a note on the functions of political parties in developing states." *American Political Science Review* 58, no. 04 (1964): 947-950; see also Christopher Clapham, "The state and revolution in Ethiopia." *Review of African Political Economy* 16, no. 44 (1989),8.

experiences of other African countries or Latin American or Asian countries was also practically limited.[922]

A combination of these factors resulted in a constitution in Ethiopia which was not contextualized so as to serve as a bulwark against rampant and systemic abuse of incumbency. When the FDRE Constitution was being drafted and debated from 1993-1995, there were no constitutional democracies in sub-Saharan Africa, perhaps with the exception of Botswana from which lessons in contextualizing constitutionalism could be gleaned from. Linguistic barriers, the sheer inaccessibility of readily available information also restricted the possibility of comparative learning from Asian and Latin American democracies. Furthermore, at that point in time there were only a handful of Ethiopian lawyers with any advanced training and expertise relevant to the task of constructing a democratic constitutional order suited to the needs of Ethiopia. To fill the gap in expertise and information, western academics were invited to conferences on different topic that were of interest for the members of the constitution drafting commission.

With regard to the form of federalism Ethiopia had adopted and also its embrace of ethnic parties which is unusual among African countries, it is important to take into account the interpretive fault lines in the political landscape of Ethiopia in relation to the formation of modern Ethiopia.[923] One the one hand, Ethiopian nationalists interpret the events leading

[922] Most of the experts involved in the drafting process were trained either locally or in the US limiting the information and constitutional ideas that were available to them. The involvement of foreign experts was also limited to a few conferences hosted by a US funded NGO. See Woubshet, Dagmawi. "An Interview with Andreas Eshete." *Callaloo* 33, no. 1 (2010), p.112; See also Wodajo, Kifle. "The Making of the Ethiopian Constitution." *Constitution-Making and Constitutionalism in Africa. Pretoria: Africa Institute of South Africa* (2001), p. 137.

[923] Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism: 'constitution-making in South Africa and Ethiopia* (Ashgate Publishing, Ltd., 2010), 162.

to the formation of modern Ethiopia in the second half of the nineteenth century as a reunification and consolidation of territories and peoples who have always belonged to a nation that traces its history to the ancient Axumite Empire. On the other extreme various ethno-nationalist ideologues interpret the same events as the forceful subjugation of hitherto autonomous polities and nations that is tantamount to colonialism.

Those who wrote the FDRE Constitution held views closer to the later point of view.[924] They deemed ethnic federalism and politics as a necessity so that these subjugated nations could exercise their right to self-determination and rid themselves from the cultural, political oppression and economic exploitation of the elites of the old establishment who were identified with one ethnic group in particular.[925] This history of the making of modern Ethiopia and the contending myths and interpretations of history set Ethiopia apart from other African countries where the formation of the state cannot for better or worse be attributed to any local actor. The hegemonic ethnic relationships in Ethiopia had a cultural dimension in a way and to an extent exceptional in most other African counties for Sudan or arguably Malawi. These factors could partially explain why the form of ethnic federalism that is considered unacceptable in most part of the continent was instituted in Ethiopia.

At this point it is worth asking 'what are the lessons to be drawn from the Ethiopian incongruence with the points of consensus listed in an earlier section of this chapter?' The first lesson is that contextualization of constitutionalism cannot be undertaken where the veto-players during a constitution-making process are dead set against the

[924] Minutes of the Ethiopian Constitutional Assembly, Volume 3, p.39, Hidar 8-13, Addis Ababa.
[925] Solomon A. Dersso, *Taking Ethno-Cultural Diversity Seriously in Constitutional Design: A Theory of Minority Rights for Addressing Africa's Multi-Ethnic Challenge* (Martinus Nijhoff Publishers, 2012), 194.

contextualization of constitutionalism which would result in the effective limitation of political power they expect to wield under a new constitution. The support of the most important political players is crucial for the contextualization of constitutionalism. Some of the constitutional ideas which were not incorporated in the Ethiopian constitution failed to be included in the constitution because the EPRDF did not want to have its power effectively restrained by the constitutional order it was instituting.

The other lesson to be learned is that contextualization seems to require some prior experience with the problems of multiparty democracy which are to be tackled though contextualization. When Ethiopia was adopting the 1995 Constitution, even to the extent that there would have been a willingness to contextualize (for example it is unlikely that the other senior leaders of TPLF wanted the Prime Minister to evolve in to the Imperial Premier he became later on), the lack of prior or comparative experience to draw from limited the possibility of contextualization. At that time not only did Ethiopia have almost zero experience with multiparty democracy but also the comparative experience of other African countries was not readily accessible. So, the major point of reference for comparative purposes was the United States.

An additional lesson that we can draw from the Ethiopian experience is that the constitutional ideas regarding which there is an emerging consensus could take different forms in specific countries depending on the peculiarities and context of each country. We can see this in particular in relation to the issue of constitutional decentralization. Though there is an emerging consensus regarding the necessity of decentralization in most African countries, the constitutional form that this decentralization has taken differs from country to country. The historical context and other factors such as territorial size

and population in Nigeria and Ethiopia make it imperative to adopt a federal form of state while full-fledged federalism is not considered necessary or even desirable in Kenya and Ghana. Even though both Nigeria and Ethiopia have adopted federalism, the historical path that has led to the adoption of their respective form of federalism has meant that ethnicity and culture is emphasized in the Ethiopian federal set up while ethnicity and culture are sidelined in the Nigerian federal structure. This shows the path dependency that is inherent in any political process, including the process of contextualizing constitutionalism. The process of contextualization cannot be undertaken in the abstract at a continental level. Even, the application of constitutional ideas encapsulating an emerging consensus or best practices in Africa cannot be implemented in a specific country without being adjusted to suit local needs and political realities.

***Conclusion***

The making of a new constitution or the substantial revision of an existing constitution is not a rare occurrence in Africa. In fact, we have identified four constitution-making waves in a span of half a century. While the first wave was a result of independence from colonialism and the second wave associated with the erosion and collapse of the independence constitutions, the third wave of  was a result of the third global democratic wave and the end of the Cold War. The latest i.e. the fourth wave is already underway.

Though the constitutions being made in the fourth wave are in a manner of speaking, moving targets, we can see that these constitutions are adopting the best practices from constitutions made in previous constitution making waves and their framers are making an attempt to contextualize these constitutions. This is to be seen in how

they try to curb abuse of incumbency and address the issue of ethnicity. Such pragmatic contextualization is essential to fortify constitutional democracy from the many challenges it faces in the African political matrix. The aim of the contextualization is to build robust constitutional democracies that will overcome the prevalence of ethnic competition and a tendency particularly among those who lead the executive to abuse ones powers to entrench oneself in office. The constitutional ideas and solutions which identified in the case study chapter are incorporated on the conventional western liberal constitutional model as add-ons to for the purpose of pragmatic contextualization.

# Conclusion

In this section of the dissertation, it would be a useful exercise to briefly summarize the contents of the preceding chapters of the dissertation and also provide some observations by way of conclusion. In Chapter One, the author has identified four constitution making waves in Africa. While the first wave was a result of independence from colonialism and the second wave was associated with the erosion and collapse of the independence constitutions, the third wave of was a result of the third global democratic wave and the end of the Cold War. The latest i.e. the fourth wave is already underway. Furthermore, in Chapter One, the author has also identified a web of factors including the legacy of the colonial and post-colonial states; ethnic diversity and the political economy of Africa which constitute a political matrix that is prevalent in most African states. The interaction of these factors creates a very challenging environment for constitutionalism and democracy to take root. In this environment, neo-patrimonial form of rule with an overwhelming dominance of the executive branch of government thrives. Ethnic competition for resources and power become very intense and not so infrequently result in violence along ethnic lines. The political matrix creates the opportunity, incentives, historical antecedents and instruments for antagonistic ethnic politics, political violence and abuse of power. If constitutional multi-party democracy is to become a reality, there is a need to address these multiple challenges.

In Chapter Two, the author has argued in support the normative validity of the liberal democratic model in Africa. Furthermore, the author has also pointed out that for liberal democracy to take root in Africa, there is a need to contextualize constitutionalism and that the contextualization of constitutionalism should focus on issues like ethnicity and

abuse of incumbency. It should also be noted that a proper constitutional design is crucial for democratic stability and therefore, the role of those who frame the constitution in contextualizing constitutionalism is essential.

In order to show the need for the contextualization of constitutionalism, Chapter Three and Four have focused on the problem of abuse of incumbency. Chapter Three has provided a comparative study of the prevalence of abuse of incumbency in Nigeria, Kenya, Ethiopia and Ghana. This study has shown that the problem is prevalent to varying degrees in all four countries under investigation in this dissertation. The discussion of the experience of the four countries in Chapter Three also shows that abuse of incumbency could take various forms. The most common forms of abuse of incumbency include, the use of state owned media outlets for the partisan propaganda of the incumbent, the use of media regulatory state organs to harass private media outlets that are critical to the incumbent, the use of state funds, facilities, properties and administrative structures for partisan ends and the subversion and manipulation of electoral management bodies. Furthermore, the use of the national security apparatus, the police and the public prosecutor's office to harass, intimidate and punish opponents is also another form of abuse of incumbency that has been observed in some of the countries discussed above.

The prevalence of abuse of incumbency in many African political systems is very much related to the political matrix that has been discussed in Chapter Two of this dissertation. One way in which the political matrix is related with abuse of incumbency is in its tendency to reinforce and accentuate the natural inclination of all most all incumbents to hold on to power as long as possible. In any political system, most politicians who are in

power dread the prospect of relinquishing power and will go to a great length to stay at the helm if it is possible to do so. This is not a uniquely African phenomenon. The African political matrix that has been described in the preceding chapter reinforces this tendency. The political matrix of African countries raises the premium on political power so high and the stakes are simply too great for the incumbents to let their fate be decided by free and fair elections. It will seem almost irrational for them to subject their political future on which their economic interest and political survival depends to a process that they cannot control and manipulate. Therefore, there is a very strong motivation to abuse incumbency that arises out of the political matrix or environment of most African countries.

In addition to providing such a strong motivation to stay in power, the political matrix of most African countries is related with abuse of incumbency in that it provides historical precedents of abuse of power. The political economy African states which is an integral component of the political matrix discussed in Chapter Two, and which is largely state dominated, as well as the autocratic legacy of past regimes provide great instruments of abuse of incumbency. A combination of these factors creats a political environment that is ill suited for constitutionalism.

Therefore, if constitutionalism is to succeed in this political context, as has been shown in Chapter Four, the conventional approaches of minimizing abuse of incumbency have to be reinforced. This should be done particularly by adopting clear, detailed and specific rules that prohibit various forms of abuse of incumbency. It is also important to complement the checks and balances among the three traditional branches of government with independent institutions of horizontal accountability or ‘democracy supporting

institutions'. Such are measures that are needed to enhance the prospects of success of constitutionalism in the African political context. Therefore, they could be considered as essential requirements of contextualizing constitutionalism in African states.

When it comes to the issue of ethnicity, as has been shown in Chapter Five that the competition for power among the elites of various ethnic groups has been and still is a common phenomenon. The case studies of the four countries amply demonstrate the destabilizing effect of such competition and also how it could have a detrimental effect on what are already fragile experiments with democracy. We have also seen that to varying degrees there has been an effort in these countries to use constitutional design as a way of managing ethnic relations and avoiding and reducing ethnic conflicts.

The discussion in Chapter Five of the dissertation demonstrates that in addition to limiting the power of government and facilitating democratic governance, constitutions are expected to serve as instruments of managing the intense ethnic based rivalry in the political sphere. While a constitution is not the only instruments and not even necessarily the most effective instrument in the peaceful management of ethnic rivalries, it still is an important means of addressing problematic issues arising in relation to ethnic diversity. This is especially the case in countries like Kenya, Ethiopia and Nigeria where at some point in their history the political mobilization of ethnicity had reached fever pitch and became violent. As compared to these countries, a country like Ghana where the genie of politicized ethnicity has not broken out of the bottle and has not lead to violent conflict and major national political crises could afford to have a constitution that is not very much concerned with the management of ethnic relations. However, countries like

Kenya, Ethiopia and Nigeria must as of necessity use their constitutions as instruments of managing ethnic rivalry and conflict.

In their attempt to use their constitutions to manage ethnic relations, the countries in question have used various strategies or approaches. In Chapter Six, it has been argued that the touchstone of constitutional engineering in the African context with regard to managing ethnic relations is the extent to which the constitutions have avoided the twin evils of exclusion from power and marginalization in the allocation of resources and opportunities controlled by the state.

As has been noted by many scholars, the mere existence of ethnic diversity within a country does not in itself lead to conflict. Conflicts arise and ethnic relations become problematic when diversity is coupled with other factors. In the context of most African countries, ethnic relations become problematic and conflict arises due to the dominance of the elites of one or two ethnic groups to the exclusion of others and the relative economic deprivation that ensues as a result of political domination. Naturally, once in power, the beneficiaries of such privilege are hesitant to give up their privilege and attempt to hold on to political power as long as possible. This means that those ethnic groups which are not in power face the risk of very prolonged exclusion from power and marginalization in the distribution of the economic opportunities and benefits controlled by the state, which is of course the overwhelming chunk of the national GDP. And it is such exclusion and marginalization that results in ethnic tensions and conflicts. Therefore, in order to avoid a break down in the democratic order and violent conflicts, constitutionalism in most African countries will have to be contextualized and designed in such a way that it minimizes exclusion and marginalization.

Devolution or decentralization or federalism, the form of government and electoral system, party regulation and affirmative action or like measures are all various instruments ways of minimizing exclusion and marginalization and promoting inclusiveness and fair distribution of resources. Their effectiveness or lack thereof should also be seen in this light. The contextualization of constitutionalism to address political problems related with ethnicity does not require the adoption of the same constitutional model in various African countries. There is no ideal or one right constitutional solution. Various historical and other contingent factors obviously make certain options nonstarters in some countries.

Chapter Seven focused on contextualization of constitutionalism and constitutions being made in the fourth constitution making wave of Africa. The constitutions being made in the fourth constitution making wave are adopting the best practices from constitutions made in previous constitution making waves and their framers are making an attempt to contextualize these constitutions. This is to be seen in how they try to curb abuse of incumbency and address the issue of ethnicity. Such pragmatic contextualization is essential to fortify constitutional democracy from the many challenges it faces in the African political matrix. The aim of the contextualization is to build robust constitutional democracies that will overcome the prevalence of ethnic competition and a tendency particularly among those who lead the executive to abuse ones powers to entrench oneself in office. The constitutional ideas and solutions which identified in the case study chapter are incorporated on the conventional western liberal constitutional model as add-ons to for the purpose of contextualization.

In concluding this dissertation, the following observations can be made. The experiences of the four countries under study show that constitutional design affects the incidence and magnitude of the problem of abuse of incumbency and antagonistic and conflict prone ethnic relations. A constitutional design that is made taking in to account the potential and previous occurrences of these problems is helpful in managing or minimizing these problems. However, obviously there are contingent factors at play other than constitutional design that could be decisive in minimizing the problems at hand. For example, Ghana's good fortune in having as its first president Kwame Nkrumah a president who eschewed the temptation to engage in tribal favoritism and who was more ideologically inclined than his counterparts in other African countries has been a helpful contingent factor that has lessened ethnic tensions in Ghana compared to the other countries in the study. Furthermore the case study also reveals that, in the process of contextualization and constitutional design, the possibilities are limited by the will of the most decisive political actors in the process. Whether or not those who are happen to be veto players genuinely desire to usher in democratic rule and also the constitutional traditions and history of a country could constrain the process of contextualization and constitutional design. For example, while ideally a more integration oriented approach towards addressing the issue of ethnicity or a term limit for the head of the executive might have been preferable to contextualize constitutionalism in Ethiopia, there requisite political will was not there among the most decisive political actors when the 1995 Ethiopian Constitution was adopted. With regard to constitutional history and tradition, the prevalence of a tradition of having an executive head of state which seems to be shared by most African countries seems to limit the option of constitutional design

contextualization in Africa. For example, regardless of the merits of a parliamentary system might have be it to reduce abuse of incumbency or ethnic rivalry, the constitutional tradition of presidentialism in Nigeria is a barrier towards its adoption.

Within these limits which constrain most constitutional designers, the contextualization of constitutionalism is possible and necessary. The political economy, history and ethnic demography of most African countries gives rise to a political matrix that militates against multiparty politics in Africa and necessitates designing constitutions takes in to account this context. Designing such constitutions (or even interpreting and applying constitutions with such a mentality) and contextualizing constitutionalism is crucial in sustaining multi-party democracy in Africa. In this process of contextualization, not only introspection, but comparisons and cross constitutional learning, particularly among African countries, is very useful and something that needs to be encouraged. Fortunately, with constitutions 4.0 which are products of the latest constitution making waves in Africa there is a growing migration of constitutional ideas among African countries.

The constitutions of these countries have also been used to address these problems with different levels of success. Comparing the constitutional strategies of these four countries in dealing with abuse of incumbency and ethnicity, we can see that contextualizing constitutionalism indeed makes a difference in sustaining multiparty democracy and enhancing its quality. Specifically, clear and detailed rules prohibiting abuse of incumbency, well entrenched term limit provisions for the head of the executive, reinforcing separation of powers and checks and balances, establishing independent bodies to support constitutional democracy and enhance horizontal accountability are useful ways of minimizing abuse of incumbency. When it comes to abuse of incumbency,

using territorial decentralization, the electoral system, the form of government, affirmative action, party regulation to foster recognition of ethnic groups and national integration seems to be necessary to address the issue of ethnicity. These instruments should be carefully calibrated in such a way that the balances will tilt towards integration without denying recognition to ethnic diversity and the need to address historical injustices. Such a careful mix of integration and accommodation is likely to avoid instability and the collapse of the democratic order.

Another positive development with the latest round of constitutional making in Africa and constitutions 4.0 is that these constitutions seems to be more likely to incorporate the constitutional ideas that are useful in minimizing abuse of incumbency and ethnic conflict when compared to constitutions made in earlier constitution making waves. Finally, it should be observed that while contextualization of constitutionalism has been considered as primarily the activity of those engaged with designing and making a constitution, it is possible to think of the constitutionalism in Africa in the process of implementing a constitution as well. However, this is not something that has been covered that much with in this study and is perhaps a topic that could be and needs to be explored in subsequent research projects.

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