



**CONSTITUTIONALISM IN MULTI- ETHNIC
COUNTRIES: LAND AND NATURAL
RESOURCES AS THE CYNOSURE OF
CONFLICT AND HARMONY**

NIGERIA, KENYA AND ETHIOPIA

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ABSTRACT

Many African countries have a culturally, religiously and linguistically diversified population. In many instances this diversity is woven not only to individual relations but also to the public spectrum. As a result, the continent frequently experienced political upheaval and bloody conflicts which erupted because of ethnic tensions. Economic reasons such as access to land are one of the major causes of tensions, if not the sole. Amidst such events constitutionalism gained the momentum in the political leadership matrix. This thesis looks at the challenge ethnicity poses on constitutionalism in general and in relation to access to land and natural resources. It also examines available solutions of constitutionalism for ethnic economic inequalities.

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Introduction

2016 was as a year of popular protests in Ethiopia which several medias and groups referred to as ethnic protest. For some it is the “Oromo people’s protest” and “Amhara people’s protest” against the Tigre dominated government, while for others it is a protest against the corrupt and undemocratic political leadership.¹ The protests in central, eastern and western parts of the country were instigated by the federal government’s proposal to expand the master plan of the federal capital pushing in to the boundaries of the state of Oromia.² In addition, there were a repeated incident of the eviction of farmers from the surrounding area of the capital for the purpose of development projects.³ The protests further extended to the northern regions, in protest of the inclusion of the Welkiyte people and their land to the Tigray regional state under the ethnic federal arrangement.⁴ At the same time, in the district of Gedeo of Southern Nations, Nationalities and Peoples state, individuals and families from other ethnic groups who settled in the area lost their life and property because of a hostile attack by the locals who alleged them as aliens and invaders of the land.⁵

The occurrence of such events is not peculiar to Ethiopia. Popular resistance surround other tight relations between whites and Hispanics, native Americans, and blacks in the US; Chinese and Filipinos in Philippines, the Roma people and the rest of the population in Europe.⁶

Diversity as much as it is a natural and social phenomena with aesthetic value, can also be the

¹ What is behind Ethiopia’s wave of protest? BBC News, Africa, 22 August 2016; Such a Brutal Crackdown, Human Rights Watch, June 16, 2016; The Oromo protest have changed Ethiopia, Aljazeera News, Africa, 21 November 2016; Awol K. Allo, Oromo prtoests: Why US must stop enabling Ethiopia, CNN, Africa, August 9, 2016; Ethiopia: Ethnic Nationalism and the Gondar protests, Aljazeera News, Ethiopia, 11 January 2017

² Ibid

³ Ibid

⁴ Ibid

⁵ On phone interview from a member of victim family

⁶ James D. Fearon & David D. Latin, Ethnicity, Insurgency, and Civil War, The American Political Science Review, Vol.97, No.1 February 2003, pp. 75-90

agency of tension and conflict.⁷ The diversity per se is not the cause but its marriage with other factors such as abusive and corrupt leadership or the imbalanced magnification of difference over communality.⁸ Many African countries have a population that is culturally, religiously and linguistically diversified. In many instances this diversity is woven not only into individual relations but also to the public spectrum.⁹ As a result, the continent frequently experienced political upheaval and bloody conflicts.¹⁰ Economic reasons are one of the major causes of tensions, if not the sole.¹¹ Closely seen access to land and natural resources are at the center of the turmoil.¹²

Amidst such events, the ideal of constitutionalism and democracy gained the momentum for state governance in the continent.¹³ Traditionally constitutionalism is understood as one of the many relations of a state in which the political process distributes “coercive power and legitimate authority” in order to limit government power.¹⁴ However, this traditional notion was not self-sufficient to achieve the sought level of liberty and justice. The emergence of rapidly changing political, social, and economic phenomenon, groups and claims of equality called for evolving understanding.¹⁵ Hence, with the advent of the notion of human rights,

⁷Eghosa E. Osaghae, *Ethnicity, the State and Constitutionalism in Africa: Preliminary Observations* in Okon Akiba (ed.) *Constitutionalism and Society in Africa, Contemporary Perspectives on Developing Societies*, ASHGATE 2004, pp. 95-101

⁸ William Easterly and Ross Levine, *Africa's Growth Tragedy*, *Quarterly Journal of Economics*, November 1997 pp. 1203-1250

⁹ Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

¹⁰ Anke Weber, *Ethnic Diversity, Clientelistic Resource Distribution, and Politicization: The Impact of Ethnicity on Education in Africa*, PhD Thesis, Faculty of Arts, University of Zurich, 2010, pp.11-17, 58-82

¹¹ Robert D. Cairns, *Natural Resources and Canadian Federalism: Decentralization, recurring conflict and resolution*, *Publius*, Vol 22, No. 1 (Winter, 1992), pp. 55-70

¹² Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp. 1-14

¹³ Ben Nwabueze, *Constitutional Democracy in Africa*, Spectrum Books, Vol. 1, 2003, pp.1-35; Francis M. Deng, *Identity, Diversity and Constitutionalism*, United States Institute of Peace Press, 2008, pp. 17-38

¹⁴ Daniel S. Lev in N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, (West Academic Publishing, 3rd edition, 2016), pp. 35-37

¹⁵ Daniel S. Lev in N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, (West Academic Publishing, 3rd edition, 2016), pp. 35-37

democracy and rule of law, its meaning broadened. In contemporary discourse it covers a wide array of issues that aims at respect of human rights, peace and justice.¹⁶

Ethnic diversity is one of flexibility and sensitivity demanding phenomena.¹⁷ According to Yash Ghai the challenge of ethnicity for constitutionalism is the consciousness it creates towards one's ethnic community as opposed to the one politico-economic community constitutions aspire to establish.¹⁸ In addition, ethnic differences can be made politically significant to justify special treatment or defection from the bigger community.¹⁹ The stimulus for the consciousness can be socio-economic disparity when compared with other ethnic groups or politico-historical injustices towards the ethnic community.²⁰ The injustices could be government acts like the one mentioned above in the case of Ethiopia which takes away the means of livelihood of the community and economically deponent on the resource.

Constitutionalism provided for principles that aims at limiting government power and bestowing individuals with unrestrained exercise of rights.²¹ This is based on the assumption that societal relations such as ethnicity does not surface on the public domain.²² However,

¹⁶Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301; Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, West Academic Publishing, 3rd edition, 2016, pp. 33-35

¹⁷ United Nations Development Program, *Human Development Report on Cultural Liberty in Today's Diverse World*, 2004

¹⁸ Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman *et al.* (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

¹⁹ Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman *et al.* (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

²⁰Ibid; Osita A. Agbu, *Ethnicity and Democratization In Africa Challenges for Politics and Development*, Discussion Paper 62, Nordiska Afrikainstitutet, Uppsala, 2011;

²¹ N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, (West Academic Publishing, 3rd edition, 2016), pp. 35-37

²²Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman *et al.* (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301; Amy Chua, *World on Fire, How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, (DOUBLEDAY, 2003)

studies and reports on conflicts indicates that ethnic relations are not limited only to private life but also makes part and parcel of the public fabric. Constitutionalism propose solution for this challenge by drawing the theories of political scientists such as Donald Horwitz and Arend Lijphart for the recognition of ethnic diversity in the constitution and political representation.²³ The two scholars have divergent view on how ethnicity should be reflected in the constitutional and political process.

However, while the magnitude may vary, countries experience ethnic rival even after adopting the proposal of either of the two proposals. For example, in post-apartheid South Africa and post-military regime Nigeria, the constitution recognizing the ethnic diversity in the country without making the diversity a basis of political mantra while Ethiopia opted for ethnic diversity to be the marker of its federal arrangement.²⁴ Yet ethnic tensions and upheavals from these countries still hit the headlines of news from the continent. The answer why this is the case is a puzzle which is not solved.

But as highlighted earlier, one area ethnic ties play a great role is in the distribution of natural resources mainly access to land.²⁵ Thus this thesis makes the assumption that manner land or a benefit from it is distributed ,can either create stability or erupt conflict that may wipe out the foundation of constitutionalism i.e the people.²⁶ With this background, the thesis overviews how constitutionalism is challenged in multi-ethnic countries in relation to the distribution of

²³Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.9-23; Sujit Choudhry (edr.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, Oxford University Press, 2008, pp.3-88

²⁴ Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.9-23; Sebastine Tar. Hon, *Constitutional Law and Jurisprudence in Nigeria*, Pearl Publishers, 2004, pp.13-22

²⁵ Robert D. Cairns, *Natural Resources and Canadian Federalism: Decentralization, recurring conflict and resolution*, , Publius, Vol 22, No. 1 (Winter, 1992), pp. 55-70

²⁶ Although it can be controversial the situation in Libya, Afghanistan, Northern Nigeria, Rwanda, etc. can be an example.

natural resources in general the right to land and what solutions it can offer. For this purpose Nigeria, Kenya and Ethiopia are selected as a case study. These countries have ethnically, religiously and linguistically diversified population with a commitment to promote constitutionalism. In addition, all the three experienced ethnic conflict linked with access to land and natural resources after the adoption of a constitutional order that recognize ethnic diversity .

Henceforth, the first chapter is dedicated to make an overview of constitutionalism vis-à-vis ethnic tensions. Extending on identified challenges of ethnicity for constitutionalism, the second chapter examines the relation of constitutionalism and ethnic economic disparity and constitutional tools available to create economic equality referring to experiences of the case study countries and others. The third chapter is devoted to look on how the constitutional mechanism discussed in the second chapter are incorporated in the constitutions of the three countries followed by a conclusion on lessons learned.

The discussions are made mainly based on academic literatures. The scholarly works engaged are not only from constitutional law but also from discourses in political science, economics and international relation. This is because a wider range of sources are available in the other disciplines than in constitutional law. Additionally, constitutional texts of the case study countries, decisions of international bodies and national courts are consulted to identify guiding principles and in drawing conclusions.

Chapter 1. Creating One Politico-Economic Community and Maintaining Diversity: Constitutionalism vis-à-vis Ethnicity -

Constitutionalism as a norm developed over an expanded period shaped by varying historically specific situations.²⁷ It was developed with the assumption of creating a homogenous society excluding certain matters such as ethnic ties from being regulated in the public domain.²⁸ But its migration to other societies with different social structure from those it was initially developed, challenged its assumption that ethnic relation is a matter in the private domain but not of a public. One of the areas where ethnic ties circumvent the public domain is on accessing land and natural resources.²⁹ Studies on ethnic conflicts and peace-negotiations in various parts of the world shows that conflicts related to access to land and natural resources relapse twice as quickly than others.³⁰ It is also established that regulating how land and natural resources are accessible to ethnic groups in post-ethnic conflict situations yields a better effect in relaxing tensions.³¹ With such context, this chapter explores how ethnic ties surface in the public domain and be a possible challenge to constitutionalism by making a general overview. Then it makes a contextualized discussion of the issue in relation to accessing land and natural resources.

²⁷N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, (West Academic Publishing, 3rd edition, 2016), pp. 35-37

²⁸Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301; Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, (Cambridge University Press, 2012) 15-46

²⁹ Jon Unruh and Rhodri C. Williams, *Lessons Learned in land tenure and natural resources management in post-conflict societies* in Jon Unruh and Rhodri C. Williams (eds.) *Land and Post-Conflict Peacebuilding*, Environmental Law Institute and United Nations Environment Programme, (Earthscan, 2013), pp 533-69

³⁰ Jon Unruh and Rhodri C. Williams, *Lessons Learned in land tenure and natural resources management in post-conflict societies* in Jon Unruh and Rhodri C. Williams (eds.) *Land and Post-Conflict Peacebuilding*, Environmental Law Institute and United Nations Environment Programme, (Earthscan, 2013), pp 533-69

³¹ Jon Unruh and Rhodri C. Williams, *Lessons Learned in land tenure and natural resources management in post-conflict societies* in Jon Unruh and Rhodri C. Williams (eds.) *Land and Post-Conflict Peacebuilding*, Environmental Law Institute and United Nations Environment Programme, (Earthscan, 2013), pp 533-69

1.1. Connecting the Dots; An Overview of How Ethnicity Crosses Paths with Constitutionalism

Although there is no consensus among scholars as to its precise definition, in contemporary scholarship, constitutionalism is understood as a legal and political process ³² that operates on the principles of popular sovereignty, separation of power, rule of law, democracy, and respect for human rights.³³ In summary, it is the recognition of these principles in a constitutional document and in a functioning, political, economic and social system. Despite its aspiration for enjoyment of equality and freedom for the people, there is a continuing and increasing discontent by different groups on not being treated equally. Ethnic groups are among those who alleges unequal treatment based on their ethnicity and the rectification of it again based on their ethnicity. While the rhetoric on what amounts to equal treatment is contestable, for this thesis it is sufficient to see it as a claim of fair distribution and access to means of basic subsistence.

Similarly, ethnicity too does not have a universal definition. However, this thesis adopts it both as “a consciousness among people with shared cultural and linguistic roots that get utilized for political affiliation and mobilization to compete with other groups for scarce resources”³⁴ and a social structure in which society existed from time immemorial and thus is unavoidable in certain circumstances. Ethnicity as a social state can be understood as having passive and active elements. The passive component creates a sense of belongingness through a shared language, tradition, belief system, history, etc. Whereas the active component makes an ethnic group to

³² Daniel S. Lev, in N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, (West Academic Publishing, 3rd edition, 2016), pp.33

³³ Louis Henkin, in N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, (West Academic Publishing, 3rd edition, 2016), pp.36

³⁴ Muigai, Githu, *Ethnicity and the renewal of competing politics in Kenya* in Glickman H. (eds.) *Ethnic conflicts and Democratization in Africa*, (The African Studies Association Press, 1995)

put itself in contrast with other ethnic groups on accessing economic resources and power sharing.³⁵

Showing a clear connection and contrast between constitutionalism and ethnicity is difficult as both concepts are vague and complex by themselves and one is more legal while the other a social concept. However, they are not always eternally parallel opposites. Constitutionalism with its corroborative ideal of democracy determines who gets access to power, resources and rights. In explaining the notion of democracy, Donald Horwitz states that democracy is “neither universal nor uniform in places where it existed. It is about inclusion and exclusion, access to power, privileges with inclusion and penalties with exclusion”.³⁶ The same is true for constitutionalism. The group excluded from power will be more conscious of differences with the included group. The consciousness could be either on political inequality or economic inequality or social and cultural inequality. The manipulation (politicization) of such perceptions results in questioning the legitimacy of state authority and the constitutional order in place³⁷ bringing ethnicity and constitutionalism facing each other.³⁸

³⁵ Paul Mbatia, Kennedy Bikuru & Peter Nderitu, The Challenges of Ethnicity, Multiparty Democracy and State Building in Multiethnic States in Africa, 1. <https://thefutureofafrica.wordpress.com/2009/10/17/the-challenges-of-ethnicity-multiparty-democracy-and-state-building-in-multiethnic-states-in-africa/> accessed on 12 February 2017

³⁶ Osita A. Agbu, Ethnicity and Democratization in Africa: Challenges for Politics and Development, Discussion Paper,(Nordiska Afrikainstitutet, Uppsala 2011), 2. <https://www.files.ethz.ch/isn/134803/FULLTEXT01-11.pdf> Accessed on 12 February 2017

³⁷ The Odu’a people’s congress protesting the marginalization of the Yourba and the question for the sovereignty of Biafra in Nigeria can be one example.

³⁸ Osita A. Agbu, Ethnicity and Democratization in Africa: Challenges for Politics and Development, Discussion Paper,(Nordiska Afrikainstitutet, Uppsala 2011), 2. <https://www.files.ethz.ch/isn/134803/FULLTEXT01-11.pdf> accessed on 12 February 2017

Mark R. Beissinger argues that ethnicity is not the major and immediate cause of unstable democracy referring to countries that are heterogeneous and yet have stable democracy.³⁹ But still in many other heterogeneous countries particularly in sub-Saharan Africa where the major ethnically diversified countries of the world are found, ethnicity affects politics and economic growth.⁴⁰ In contexts where one group dominates factors of economic and political power, the proliferation of ethnic rivalries is inevitable.⁴¹ It is undeniable that ethnic consciousness has the potential to grow into hatred and violence.⁴² And this can be attributed to the fact that ethnicity can easily be manipulated by the ruling elite. The incidents in Europe preceding World War II that aimed at purifying one ethnic line declaring the superiority of the other can be an evidence for this.

On the other hand, it can be argued that ethnicity instead makes individuals and groups take risk even to their lives, engaging in popular protests and revolutions that leads to democracy.⁴³ The case of many eastern Europe countries that succeed from the Soviet Union can be an one evidence.⁴⁴ However, this can be reargued with the fact that a similar act claimed the lives of many in the dissolution of the former Yugoslavia and the civil war that followed it.

On another account Yash Ghai argues that constitutionalism as a notion was developed in Western legal tradition which assumes the homogenous societies without giving much attention

³⁹ Mark R. Beissinger, A New Look at Ethnicity and Democratization, Journal of Democracy, Vol. 19, No. 3, National Endowment for Democracy and The Johns Hopkins University Press, July 2008, pp.85-97

⁴⁰ William Easterly and Ross Levine, Africa's Growth Tragedy, Quarterly Journal of Economics 112 (November 1997) pp. 1203-50

⁴¹ Mark R. Beissinger, A New Look at Ethnicity and Democratization, Journal of Democracy, Vol. 19, No. 3, National Endowment for Democracy and The Johns Hopkins University Press, July 2008, pp.85-97

⁴² The incidents that took place in Burundi, Democratic Republic of Congo (DRC) and Rwanda in the 1990's and even still ongoing in DRC can be another example.

⁴³ Mark R. Beissinger, A New Look at Ethnicity and Democratization, Journal of Democracy Volume 19, Number 3 (National Endowment for Democracy and The Johns Hopkins University Press, July 2008)

⁴⁴ Mark R. Beissinger, A New Look at Ethnicity and Democratization, Journal of Democracy Volume 19, Number 3 (National Endowment for Democracy and The Johns Hopkins University Press, July 2008)

to ethnical differences. In its further development constitutionalism was fertilized with in the conception of the liberal state that marks a line between private domain and public domain. Accordingly, the issue of ethnical bond is to be reserved for individuals to decide on in the private domain while the state functions in the public domain characterized again by an ideal homogeneous society. However, this challenged constitutionalism in current discourses in multi-ethnic countries as groups such as indigenous peoples or religious minorities that demands for recognition of their distinctiveness from others emerged. In other words, such developments pushed what previously has been a matter of private domain into the public sphere even in Western societies where the notion developed.⁴⁵

In general, there are different views held by scholars on how ethnicity pushed from the private domain to the public. According to primordialists, ethnicity is an in born threat of an individual due to common culture, language common ancestor and the like.⁴⁶ Therefore, its emergence is natural and its non-occurrence in the past is due to suppression of diversity from the public domain. Instrumentalists hold that ethnic conflicts are the result of mobilizations to pursue political ambitions thus propose for ethnic blindness in public affairs⁴⁷ The theory of modernizationists, stipulates that ethnicity emerges due to competition to take hold of scarce resources. The modern state being the distributor of resources and usually not purely neutral, results in having national interests that foster the interest of the dominant ethnic group compared with the other.⁴⁸

⁴⁵ Yash Ghai, Constitutionalism and the Challenge of Ethnic Diversity, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

⁴⁶ Geertz, Clifford, *Primordial Ties* in John Hutchinson and Anthony D. Smith (eds), *Ethnicity* (Oxford University Press, Oxford, 1966), pp 40-55

⁴⁷ Berman, Bruce, *Ethnicity: Patronage and the African State: The Politics of Uncivil Nationalism*, (African Affairs, 1998), pp. 305-341.

⁴⁸ Hettne Bjorn, *Ethnicity and Development: An Elusive Relationship* in Dennis Dwyer and David D. Smith (eds) *Ethnicity and development: Geographical Perspectives* (New York: John Wiley and Sons, 1996), pp. 15-44

Even though all the theories have been criticized for not sufficiently explaining ethnicity, the claims of all the three are relevant for the main discussion of this thesis. Ethnic diversity poses challenge on constitutionalism because it can influence the public domain as opposed to the earlier notion of constitutionalism that its influence is limited to private life. One area such influence can be seen is on the distribution of benefit or actual access to natural resources such as land. The following section succinctly shows on how ethnicity and constitutionalism can further be linked.

1.2. Constitutionalism in Ethnic Tensions

Studies indicate that the drawing of borders in creating a new or revised state structure following a constitutional reform are one of the cause of ethnic conflict over land.⁴⁹ In Nigeria there was a war between the Umuleri and the Aguleri, the Kuteb and the Chamba groups on land along their borders;⁵⁰ in Kenya between the Kikuyu and the Massai, the Kissi with the Luo;⁵¹ in Ethiopia between the Anyuua and Nuer⁵², between the Oloytok-Seka and Maheisara, the Ebeedo and the Dabito, the Afar and the Issa-Somali⁵³. Moreover, in Nigeria following the constitutional reformation and creating local governments under the federal arrangement, there has been more than five redrawing of the units that activated conflict of the Ngbo clan with the

⁴⁹ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111

⁵⁰ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111

⁵¹ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111

⁵² Abraham Sewonet, *Breaking the Cycle of Conflict in Gambella Region*, UN-Emergency Unit for Ethiopia, Assessment Mission Report, 23- 29 December 2002, <https://apps.who.int/disasters/repo/8684.pdf>

⁵³ Simone Rettberg, University of Bayreuth, Germany, power point presentation 21 March 2011, <https://www.future-agricultures.org/search-documents/future-of-pastoralism/presentations/1156-multiple-dimesnions-of-pastoral-conflict-over-land-and-territory-within-the-afar-region-of-ethiopia/file>, accessed on February 12, 2017

Agilla.⁵⁴ In Ethiopia, the recent uprising of the Welkayites against their inclusion in the state of Tigray instead of in Amhara⁵⁵ or the clash between the Gabbra of Soamli state with the Boranna of the Oromia States over access to land can be linked with the redrawing of former administrative units into the Ethnic federal units⁵⁶.

Such ethnic conflicts created by drawing of borders and over resource would further be fueled by the political and government structure set in place. In Kenya during the presidency of Jomo Kenyatta, his ethnic group the Kikuyu was seen to be in advantage of land ownership.⁵⁷ This was reverted to the Kalenjin and the Masai during the tenure of President Moi.⁵⁸ With the current president Uhuru Kenyatta the son of former president Jomo Kenyatta there is agitation that the vicious circle continues. In Ethiopia, opposition sources allege that during the term of the late Prime Minister Meles Zenawi from Tigray, urban land grabbing was systematically made by Tigre officials.⁵⁹ This is another challenge on constitutionalism where by the complexities that personal or group affiliation of those in power would influence the just political and legal system it sought to create.

⁵⁴ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111

University of Rochester Press, 2007

⁵⁵ What is behind Ethiopia's wave of protest? BBC News, Africa, 22 August 2016, <https://www.hrw.org/report/2016/06/16/such-brutal-crackdown/killings-and-arrests-response-ethiopias-oromo-protests>

⁵⁶ Inter regional Conflicts: Somali Region, Book Chapter, <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13839/chapter%20eight.pdf?sequence=7> accessed on March 15, 2017

⁵⁷ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111

⁵⁸ Berita Musau, *Ethnic Conflicts and Transition to Democracy in Africa: Recurrence of Ethnic Conflicts in Kenya (1991-2008)*, MA Thesis, University of Vienna & University of Leipzig, 2008, pp.8-85

⁵⁹ Ermias Legesse, *Yemelese Terufatoch: Balebet Alba Ketema*, Netsanet Publishing Agency, (Written in Amharic)

In addition, the theory of clientelism stipulates that conflict over allocation of resources can be caused by over-provision of resources to a specific group at the cost of other groups.⁶⁰ This happens when revenue from tax on natural resources is at the hand of a strong central government.⁶¹ In the context of multi-ethnic countries, as has been illustrated above, there is a likelihood for the balance of benefit to shift towards to the dominant group within the government. For Yash Ghai, this is the case because ethnic consciousness can easily be manipulated by political parties in campaigning for election making promise for better provision of resources to the ethnic group.⁶² As a result, he stipulates, voters in giving their votes expect the party to do as such once is in power.⁶³ This gives ethnicity to be determinant in accessing economic resources. Nevertheless, others such as Yonatan Tesfaye argues that this would not be the case so long as ethnicity is not “politicized” in designing the state structure.⁶⁴ However, it is noteworthy to mention that even in countries where ethnicity is not politicized, the risk of dominance of one group on economic meanness due to historical and other factors in play.⁶⁵

The discourse on how ethnicity can be a challenge to constitutionalism is still ongoing and controversial. However, for the purpose of this thesis, it can be concluded that the challenge of ethnicity for constitutionalism is because first the specific historical setting constitutionalism

⁶⁰ Anke Weber, *Ethnic Diversity, Clientelistic Resource Distribution, and Politicization: The Impact of Ethnicity on Education in Africa*, PhD Thesis, Faculty of Arts, University of Zurich, 2010, pp.11-17, 58-82

⁶¹ Anke Weber, *Ethnic Diversity, Clientelistic Resource Distribution, and Politicization: The Impact of Ethnicity on Education in Africa*, PhD Thesis, Faculty of Arts, University of Zurich, 2010, pp.11-17, 58-82

⁶² Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

⁶³ Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

⁶⁴ Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.207, 235

⁶⁵ Anke Weber, *Ethnic Diversity, Clientelistic Resource Distribution, and Politicization: The Impact of Ethnicity on Education in Africa*, PhD Thesis, Faculty of Arts, University of Zurich, 2010, pp.11-17, 58-82; Kanchan Chandra, *Why Ethnic Parties Succeed - Patronage and Ethnic Head Counts in India*, Cambridge University Press, 2004, pp. 47-81

developed did not take into account ethnic ties can be a matter that can be regulated in the public domain. Secondly, because of the role ethnic relations can play in accessing economic resources, it creates economic inequality between groups.⁶⁶ Hence, calling for broader understanding of economic rights not only as individual rights but also as group rights. Thirdly, translating some principles of constitutionalism for state structure can itself be a cause of ethnic tensions.

Building on the forgoing discussion, the next chapter further discusses the link between economic inequality of ethnic groups and the shift made in recognizing ethnic diversity in the public domain. Moreover, it explores how ethnical economic inequalities can be addressed through state favoritism on setting fiscal rules and the enforcement of economic rights.

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⁶⁶ Anke Weber, *Ethnic Diversity, Clientelistic Resource Distribution, and Politicization: The Impact of Ethnicity on Education in Africa*, PhD Thesis, Faculty of Arts, University of Zurich, 2010, pp.11-17, 58-82

Chapter 2. Addressing Ethnical Economic Inequalities on Accessing Land and Natural Resources

One of the challenges for political leaders in the post-cold war era is striking a balance between international commitments and domestic social structure.⁶⁷ Rule of law, democracy and constitutionalism became to be the most internationally celebrated ideals for public governance. Almost universally states made international and national commitments to penetrate these ideals into public governance.⁶⁸ However, the task is not as easy as the ideal as society is structured in groups-mainly of ethnic groups. More than ninety-five percent of the world population lives in multi-ethnic societies.⁶⁹ The main challenge in these societies as far as political leadership is concerned includes the issue of how the social structure of ethnic diversity be reflected in the supreme of the land and in the power structure created thereof.

It is not uncommon for modern constitutions to have the articulation “ We the people...to ensure the unity....” in their preamble stating the purpose of the constitution.⁷⁰ Such aspiration is derived from the philosophical foundation of constitutional law as a social contract between individuals based on the assumption “equal individuals enjoying equal rights”. Nonetheless, this assumption disregards the very fact that individuals independent of the position of the

⁶⁷ Thomas Fleiner & Lidija R. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalized World*, Springer, 2009, pp. 511-515

⁶⁸ More than 150 countries are parties to ICCPR, and the ICESCR, instruments that reinforce the principles of constitutionalism.

⁶⁹ United Nations Development Program, *Human Development Report on Cultural Liberty in Today's Diverse World*, 2004

⁷⁰ The preambles of the constitutions of India, South Africa, Ethiopia, Fiji, Malaysia can be an example.

constitutions, identify themselves to a certain group based on cultural, historical, and linguistic feature to the exclusion of others.⁷¹

2.1. Ethnic Economic Inequalities

Economic inequality in general is measured by household income inequality and wealth inequality.⁷² Income inequality refers to the asymmetrical distribution of income from employment or other sources while wealth inequality is the unequal distribution of asset including physical asset such as natural resources and land. For Amartya Sen, entitlement relations connect one set of entitlement with another set under the application of rules of legitimacy.⁷³ The rules of legitimacy operate through a chain of economic relations that's is tied and defined in reference to the earlier entitlement.⁷⁴ This means a person's income generation activity of producing and selling corn crops is legitimate because s/he has a legitimate entitlement over the land he produces crops.⁷⁵ In other words, indicators of economic inequality are interrelated and interdependent.

Although economic inequality in general is always relative and does not necessarily mean the same as poverty, it is closely linked with poverty.⁷⁶ Moreover, there is consensus among

⁷¹ Thomas Fleiner & Lidija R. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalized World*, Springer, 2009, p. 515

⁷² Drew Desilver, *The Many Ways to Measure Economic Inequality*, Pew Research Center, News in the Numbers, September, 2015; *How is Economic Inequality Defined*, Publication of The Equality Trust, <https://www.equalitytrust.org.uk/how-economic-inequality-defined> accessed on March 15, 2017

⁷³ Amartya Sen, *Poverty and Famines: An essay on entitlement and deprivation*, Oxford Scholarship Online, November 2003, <https://www.oxfordscholarship.com/view/10.1093/0198284632.001.0001/acprof-9780198284635-chapter-1>, accessed on March 15, 2017

⁷⁴ Amartya Sen, *Poverty and Famines: An essay on entitlement and deprivation*, Oxford Scholarship Online, November 2003, <https://www.oxfordscholarship.com/view/10.1093/0198284632.001.0001/acprof-9780198284635-chapter-1>, accessed on March 15, 2017

⁷⁵ Amartya Sen, *Poverty and Famines: An essay on entitlement and deprivation*, Oxford Scholarship Online, November 2003, <https://www.oxfordscholarship.com/view/10.1093/0198284632.001.0001/acprof-9780198284635-chapter-1>, accessed on March 15, 2017

⁷⁶ Amartya Sen, *Poverty and Famines: An essay on entitlement and deprivation*, Oxford Scholarship Online, November 2003, <https://www.oxfordscholarship.com/view/10.1093/0198284632.001.0001/acprof-9780198284635-chapter-1>, accessed on March 15, 2017

scholars that the system of distribution has effect in alleviating people from poverty.⁷⁷ Taking into account this presupposition and also the economic situation of the three countries examined, in this section economic inequality is discussed not in its relative terms but in its association with poverty. The World Bank defines poverty as the “pronounced deprivation in well-being” and which can be improved among others if “people have a greater command over resources”.⁷⁸ Therefore ethnic economic inequality can be understood as the inequality of ethnic groups in a manner that would put the group in poverty due to lack of/ poor command over resources.⁷⁹

James Fearon and David Laitin suggest that it is those who are economically disfavored by lack of access to resources who are usually used as an instrument for ethnic-political mobilization and violence by politicians.⁸⁰ The suggestion is backed with the example of the “weekend warriors” in Bosnia and steelworkers who are anti-Kremlin in Ukraine.⁸¹ In Rwanda prior to the genocide the Hutu’s experienced economic inequality in which farmers lost their land and were forced to join low wage work.⁸² This situation was later used by the leaders of

⁷⁷ Amartya Sen, *Poverty and Famines: An essay on entitlement and deprivation*, Oxford Scholarship Online, November 2003, <https://www.oxfordscholarship.com/view/10.1093/0198284632.001.0001/acprof-9780198284635-chapter-1>, accessed on March 15, 2017

⁷⁸ Jonathan Haughton and Shahidur R. Khandker, *Handbook on Poverty and Inequality*, The World Bank, 2009, 1-7

⁷⁹ Studies in relation to race and minorities shows that race and ethnicity are one of the factors in being above or below the line of wealth and poverty. For instance, findings of the American Psychological Association, shows that American Indians, Hispanics are more prone to live in poverty than other ethnic and African-Americans and Latinos receive high-cost mortgage than others. Further poverty is found to be one of the driving force to ethnic conflicts; Patricia Justino, *War and Poverty*, IDS Working Paper volume 2012 No. 391, Institute of Development Studies, April 2012

⁸⁰ James D. Fearon and David D. Latin, *Violence and the Social Construction of Ethnic Identity*, *International Organizations*, Vol 54, No. 4 , Autumn 2000, pp. 845-877

⁸¹ James D. Fearon and David D. Latin, *Violence and the Social Construction of Ethnic Identity*, *International Organizations*, Vol 54, No. 4 , Autumn 2000, pp. 845-877

⁸² Philip Verwimp, *An Economic Profile of Peasant Perpetrators of Genocide: Micro-level Evidence from Rwanda*, *Journal of Development Economics*, Vol.77, Issue 2, August, 2005, pp.297-323

the group in flaming hatred against the Tutsis.⁸³ Furthermore, the “ethnic cleansing” propaganda was motivated with the assumption of gaining the properties of the other group.⁸⁴

In addition, according to Alfred Stepan and Juan Linz, there is a correlation between economic inequality and the number of “veto players” in the law-making process.⁸⁵ For Edward Glaeser, Jose Scheinkman & Andrei Shleifer inequality in any of its forms is a fertilizer of “institutional subversion”.⁸⁶ because those with possession of economic resources would redistribute resources to their benefit using the legal, political and regulatory institutions for their advantage or violence.⁸⁷ Strengthening this view, K. Sabeel Rahman stipulates that inequality is more than income disparity but the outcome of the problem of “domination” which is also the claim of ethnic activists. He then forwards, the solution of granting the dominated the liberty to make their own choice, to voice their own view among others in economic decisions.⁸⁸ Supporting this, I argue that a constitutional system that recognizes various ethnic groups under its rule and where there is a history of domination of one group over the other shall give a more economic autonomy for these groups as one way of granting the group a freedom.

Based on this assertion the following sections inquire what solutions constitutionalism can offer to address ethnical economic inequalities.

⁸³ Philip Verwimp, An Economic Profile of Peasant Perpetrators of Genocide: Micro-level Evidence from Rwanda, *Journal of Development Economics*, Vol.77, Issue 2, August, 2005, pp.297-323

⁸⁴ Philip Verwimp, An Economic Profile of Peasant Perpetrators of Genocide: Micro-level Evidence from Rwanda, *Journal of Development Economics*, Vol.77, Issue 2, August, 2005, pp.297-323,

⁸⁵ Michael C. Dorf, Economic Libertarian Constitutionalism Never Died, Legal Analysis and commentary from Justia, <https://verdict.justia.com/2015/03/25/economic-liberitarian-constitutionalism-never-really-died>, accessed on March 15, 2017

⁸⁶ Edward Glaeser, Jose Scheinkman & Andrei Shleifer, The Injustice of Inequality, *Journal of Monetary Economics*, 50, 2003, pp.199-222

⁸⁷ Edward Glaeser, Jose Scheinkman & Andrei Shleifer, The Injustice of Inequality, *Journal of Monetary Economics*, 50, 2003, pp.199-222

⁸⁸ K. Sabeel Rahman, From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age, *Yale Law and Policy Review*, Vol. 35, Issue 1, November 2016, pp.321-366

2.2. Institutional Setups for Ethnic Equality

Constitutions have regulative and constitutive feature.⁸⁹ The regulative feature creates an enabling and disabling means in decision making by which government is established, power allocated, and rules of procedures set for interaction while the disabling means set procedural blocking requirements and bill of rights as substantive limits.⁹⁰ The constitutive role on the other hand creates the subjects either as the demos or the ethnos. This can be better achieved through the creation of a common decision making platform for the different ethnic groups that is characterized by an open debate and negotiation.⁹¹

For long time the proposed constitutional design of legal scholarship for multi-ethnic societies has been one that focus on incorporation of bill of rights to the constitution and judicial enforcement of the rights would guarantee equality.⁹² However, such designs faced the constraint of a manipulation of judicial appointment which is the guardian for the implementation of rights.⁹³ Because the appointment of the judiciary is often made by the political bodies of the government, there is always a risk for the manipulation of the independence and impartiality of the judiciary.⁹⁴ In addition, fundamental rights of the constitution are enforceable after the fact and prone to under-enforcement if there is a weak judicial activism in the interpretation and application of constitutional provisions.⁹⁵

⁸⁹ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

⁹⁰ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

⁹¹ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

⁹² Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

⁹³ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

⁹⁴ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

⁹⁵ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

Further, the bill of rights is founded on the liberal notion of State neutrality which is impossible to achieve in all aspects.⁹⁶ For example, the State cannot avoid the choice of pronouncing one or few set of languages as its working language compromising its neutrality and bill of rights as they stand now are incapable of solving such issues.⁹⁷ Thus it can be concluded that, “it is difficult to fully comprehend the constitutional politics of rights-protection in divided societies without reference to other features of constitutional design with which it may be in deep tension”.⁹⁸

In order to fill such loopholes of constitutionalism for multi-ethnic countries, scholars found it imperative to marry the discipline with a comparative politics approach that was well developed.⁹⁹ The crafting of constitutional design for multi-ethnic societies in comparative politics is mainly on the theories of Arend Lijphart and Donald Horowitz.¹⁰⁰ For Lijphart the constitutional system in multi-ethnic societies needs to be established on ‘consociational democracy’ where power is shared with the participation of the major ethnic groups in political decision making in form of grand coalition cabinet and policy issues such as education and culture are left under the autonomy of ethnic groups.¹⁰¹ Hence, the preferred form of government for Lijphart would be parliamentary as it is open for ethnic inclusion and avoids

⁹⁶ Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, Routledge/ Taylor & Francis Group-Glass House Book, 2010, pp. 279-301; Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, Cambridge University Press, 2012, pp. 15-46

⁹⁷ Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301; Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, Cambridge University Press, 2012, pp. 15-46

⁹⁸ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

⁹⁹ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* Oxford University Press, 2008, pp.3-88

¹⁰⁰ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* Oxford University Press, 2008, pp.38

¹⁰¹ Arend Lijphart, *Patterns of Democracy- Government Forms and Performances in Thirty-Six Countries*, Yale University Press, 1999, pp.31-47, 185-215

majoritarian rule and the election of a president from a single ethnic group.¹⁰² This theory is criticized for failing short of incentive that motivate the various ethnic based political parties to cooperate and form coalition.¹⁰³ And the alternative of an ethnic moderation that operates on ‘alternative voting electoral system is proposed.¹⁰⁴ Under this system preference is given for presidential form of government in order to give opportunity for vote pooling across ethnic cleavages and as a result a president who obtain legitimacy from more than a single ethnic group.¹⁰⁵

Despite their differences in the approach to form a government, both Donald Horwitz and Arend Lijphart agree on not resolving ethnic tension in exclusion of ethnic diversity.¹⁰⁶ The justification for this is because the exclusion of ethnic recognition would create “segmental cohesion than national cohesion”¹⁰⁷ Both scholars and others too agree that political organization based on ethnicity is inevitable.¹⁰⁸ Nevertheless, there is no consensus on how the

¹⁰²Sujit Choudhry (edr.), *Constitutional Design for Divided Societies-Integration or Accommodation?* Oxford University Press, 2008, pp.3-88

¹⁰³ Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60

¹⁰⁴ Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60

¹⁰⁵ Sujit Choudhry (edr.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008), pp.3-88

¹⁰⁶Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008),3-88

¹⁰⁷ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008, p. 26

¹⁰⁸Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, Routledge/ Taylor & Francis Group-Glass House Book, 2010, pp. 279-301; Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, (Oxford University Press, 2008),3-88; Osita A. Agbu, *Ethnicity and Democratization In Africa Challenges for Politics and Development*, Discussion Paper 62, Nordiska Afrikainstitutet, Uppsala, 2011; Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford University Press, 2007, pp.61-85

issue of ethnic diversity shall be reflected in the constitutional text as well as in the power structure.¹⁰⁹

Thus, the constitutional design of multi-ethnic countries is made either accommodating diversity to the public domain or integrating it.¹¹⁰ In the accommodation model, ethnic diversity is boldened in the state affairs whereas the integration model opts to disregard ethnic difference.¹¹¹ The proponents of accommodation justify their preposition on the premise that ethnic conflicts in many parts of the world arose in opposition to the process of creating a common national identity disregarding differences.¹¹² Thus argues that the alternative of giving every group the public space to express its identity and to make its own decisions is important for stable politics and economy.¹¹³ Contrary to this alternative, the proponents of integration suggest for the option of creating either a fusion or acculturation of ethnical difference. In

¹⁰⁹ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford University Press, 2007, pp.61-85; Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, (Oxford University Press, 2008),3-88

¹¹⁰Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, (Oxford University Press, 2008),3-88; Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, (Cambridge University Press, 2012) 15-46

¹¹¹Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, (Oxford University Press, 2008),3-88; Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, (Cambridge University Press, 2012) 15-46

¹¹² Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford University Press, 2007, pp.61-85;Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301; Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, (Oxford University Press, 2008),3-88

¹¹³ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, Oxford University Press, 2007, pp.61-85;Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301; Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Sujit Choudhry (ed.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, (Oxford University Press, 2008),3-88;.

fusion, two or more groups get mixed to create something new while in acculturation one community adopts the culture of the other and becomes absorbed by it.¹¹⁴

However, comparing and contrasting the proposal of either sides with ethnic conflicts that happen frequently in many parts of the world¹¹⁵, it can be said that eliminating ethnic conflicts through accommodation or integration of it in the constitution and political representation is just easier said than done. The majority subjects of the constitution i.e. the ordinary people are more exposed to practical matters on the ground such as access to means of earning livelihood than theoretical explanations and even the constitutional document itself. While not contesting the fact that politicians could play a role in manipulating public dissatisfaction into ethnic tension to advance their own political agenda¹¹⁶, I argue that ethnic tension increases its magnitude when it gets a substantial popular support.

As observed from growing tension in Ethiopia where the writer of this thesis is from, ethnic consciousness of the “lay man” increases when ethnicity plays a role in accessing means of livelihood such as land. Such consciousness accumulated over time, can easily be directed to burst into uncontrollable violence.¹¹⁷ To address such kinds of root causes, economists and experts on conflict resolution proposes a broad understanding of land and natural resources

¹¹⁴ Sujit Choudhry (edr.), *Constitutional Design for Divided Societies-Integration or Accommodation?* (Oxford University Press, 2008),3-88.

¹¹⁵ Ethnic conflicts that took place in the past two decades or still happening in Northern Ireland, Spain, Rwanda, India and Pakistan, in West Bank, and South Sudan can be an example.

¹¹⁶Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism*, University of the Western Cape, ASHGATE, 2010, pp.1-60; Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

¹¹⁷¹¹⁷ Ethnic conflicts in relation to political power, or economic, social and cultural reasons continue to occur even countries that adopted either one of the theoretical approaches for constitutional designs in multi-ethnic countries triggered by realities that take place on the ground. The problem persists not only in emerging constitutional systems but also in those that are historically exposed to the system of constitutionalism; Philip Verwimp, *An Economic Profile of Peasant Perpetrators of Genocide: Micro-level Evidence from Rwanda*, *Journal of Development Economics*, Vol.77, Issue 2, August, 2005, pp.297-323

taking into account customary rules.¹¹⁸ The understanding of right on land in comparative constitutionalism has been interpreted in its private value than its meaning for a group.¹¹⁹ In addition to this, as discussed in the preceding parts of this thesis, constitutionalism initially developed in distance of ethnicity and its current approach to the matter is an outcome of interdisciplinary approach with political science.¹²⁰

In approaching ethnicity, as mentioned earlier the focus has been much on reflection of ethnicity on political representation corroborated with institutional set ups.¹²¹ But I argue that, although the relevance of institutional set ups is undoubted, political representation and institutional set ups cannot be the only solution in relaxing ethnic tension. Hence, the enforcement of economic and social needs of ethnic groups shall also be given equal weight. Again this is based on the assumption that the “political consciousness” usually formed in the mind of the “intellectuals and individuals who has political ambition”.¹²² Whereas ethnic

¹¹⁸ Philip Verwimp, An Economic Profile of Peasant Perpetrators of Genocide: Micro-level Evidence from Rwanda, *Journal of Development Economics*, Vol.77, Issue 2, August , 2005, pp.297-323; Jon Unruh and Rhodri C. Williams, Lessons Learned in land tenure and natural resources management in post-conflict societies in Jon Unruh and Rhodri C. Williams (eds.) *Land and Post-Conflict Peacebuilding*, Environmental Law Institute and United Nations Environment Programme, (Earthscan, 2013), pp 533-69; Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111; *Land and Human Rights, Standards and Applications*, United Nations Human Rights Office of the High Commissioner HR/PUB/15/5/Add.1, 2015

University of Rochester Press, 2007, pp. 1-14, 63-111, 242-275

¹¹⁹ N. Dorsen et. al., *Comparative Constitutionalism Cases and Materials*, American Case Book Series, West Academic Publishing, 3rd edition, 2016, pp.1358-1359

¹²⁰; Sujit Choudhry (edr.), *Constitutional Design for Divided Societies-Integration or Accommodation?*, (Oxford University Press, 2008),3-88; Hanna Lerner, *Making Constitutions in Deeply Divided Societies*, (Cambridge University Press, 2012) 15-46

¹²¹ In the process of writing this thesis, I found that constitutional law materials in relation to the challenges ethnicity poses for the political and legal process mainly deal with political rights while the rhetoric in political science is more broad and covers a wide range of issues such as natural resource management and governance. Whereas for traditional constitutional law this issues, are approached more from the perspective of the structure of the state. This again can be linked to constitutional law development in context of nation state building which was not welcomed by all groups. But since constitutionalism attained an almost universal acceptance at least at theoretical level, it should spread its wings to other disciplines such as developmental justice and economics in providing solutions for the dynamic and constantly changing contemporary state affairs to gain popular support too.

¹²² Yash Ghai, *Constitutionalism and the Challenge of Ethnic Diversity*, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

tensions that gradually becomes violent conflicts are due to is the everyday hassle to access public goods & services as well as natural resources such as land that strike the average group of individuals off their balance.¹²³ The otherwise effect of this would be the understanding of constitutionalism as a means to advance the interest of few individuals in politics and the economy.¹²⁴ Thus the incorporation of group interests on economic rights can be an alternative approach of constitutionalism for diversified societies to address the root causes of ethnic tensions. Moreover, the availability of constitutional solutions for groups can contribute to relaxing further the resistance against constitutionalism from communities whose social structure gives weight to group rights as much as to individuals.¹²⁵

¹²³ As can be witnessed from how Arab uprising started in Tunisia and then spread to other countries with its transboundary crisis effect, the grievous act of one individual not to mention an ethnic group can change the whole situation of a country. A population with accumulated dissatisfaction which is further frustrated by the formal political and legal process may go to the extreme of throwing that order even without thinking twice the possible chaotic consequences of its act.; William Easterly and Ross Levine, Africa's Growth Tragedy, *The Quarterly Journal of Economics*, Vol. 112, No. 4 November 1997 1203-50; Paul Mbatia, Kennedy Bikuru & Peter Nderitu, The Challenges of Ethnicity, Multiparty Democracy and State Building in Multiethnic States in Africa, <https://thefutureofafrica.wordpress.com/2009/10/17/the-challenges-of-ethnicity-multiparty-democracy-and-state-building-in-multiethnic-states-in-africa/> accessed on February 12, 2017; Yash Ghai, Constitutionalism and the Challenge of Ethnic Diversity, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

¹²⁴ Amy Chua, *World on Fire, How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, (DOUBLEDAY, 2003), pp. 1-25; Yash Ghai, Constitutionalism and the Challenge of Ethnic Diversity, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

¹²⁵ J. Oloka-Onyango (ed.), *Constitutionalism in Africa Creating Opportunities, Facing Challenges* (Fountain Publishers, 2001) 1-14, 66-80, 103-122; Francis M. Deng, *Identity, Diversity and Constitutionalism*, United States Institute of Peace Press, 2008, pp. 17-38; Yash Ghai, Constitutionalism and the Challenge of Ethnic Diversity, in James J. Heckman et al. (eds.), *Global Perspectives on the Rule of Law*, (Routledge/ Taylor & Francis Group-Glass House Book, 2010), pp. 279-301

2.3. Fiscal Rules on Natural Resources Vis-à-vis Economic Autonomy of Ethnic Groups

“ [I]t takes five minutes to understand federalism but a lifetime to understand its dynamic on the ground”¹²⁶

The fiscal federalism dimension of natural resources in general is not much studied.¹²⁷ But usually discussed based on general economic policy principles.¹²⁸ And powers sharing arrangements is the essential part of natural resource management in federations.¹²⁹ In major federal systems, natural resources are owned and managed by the regional government on behalf of the citizens of the state while the federal government will have the role of setting general rules and standards on the use of natural resources. Revenue from the use of the resource is to be collected by the states and shared with the federal government.¹³⁰

In other federations the arrangement can be a place based collaboration whereby the decision-making power is given depending on the location and nature of the most important resource.¹³¹

This arrangement is recommended for its flexibility and relaxes the “ command and control”

¹²⁶Robert L. Fischman & Angela M. King, Savings Clauses and Trends in Natural Resources Federalism, William and Mary Environmental Law and Policy Review, Vol. 32, Issue 1, (2007). Articles by Maurer, Faculty. Paper 198, <http://www.repository.law.indiana.edu/facpub/198> accessed on February 22, 2017, p. 129

¹²⁷Robin Boadway & Anwar Shah, Fiscal Federalism; Principles and Practice of Multi-order Governance, Cambridge University Press, 2009, pp.207-241

¹²⁸ Robin Boadway & Anwar Shah, Fiscal Federalism; Principles and Practice of Multi-order Governance, Cambridge University Press, 2009, pp.207-241

¹²⁹ Fischman, Robert L. and King Angela, "Savings Clauses and Trends in Natural Resources Federalism" (2007). Articles by Maurer, Faculty. Paper 198, <http://www.repository.law.indiana.edu/facpub/198>

¹³⁰ Robert D. Cairns, Natural Resources and Canadian Federalism: Decentralization, recurring conflict and resolution, McGill University de Montreal, https://www.jstor.org/stable/3330233?seq=1#page_scan_tab_contents; Richard Cullen, The Encounter between Natural Resources and Federalism in Canada and Australia, (1990) 24 University of British Columbia Law Review, p. 275; Robin Boadway, Anwar Shah, Fiscal Federalism; Principles and Practice of Multi-order Governance, Cambridge University Press, 2009, pp.207- 241

¹³¹ Fischman, Robert L. and King Angela, "Savings Clauses and Trends in Natural Resources Federalism, Articles by Maurer, Faculty. Paper 198, 2007, <http://www.repository.law.indiana.edu/facpub/198>

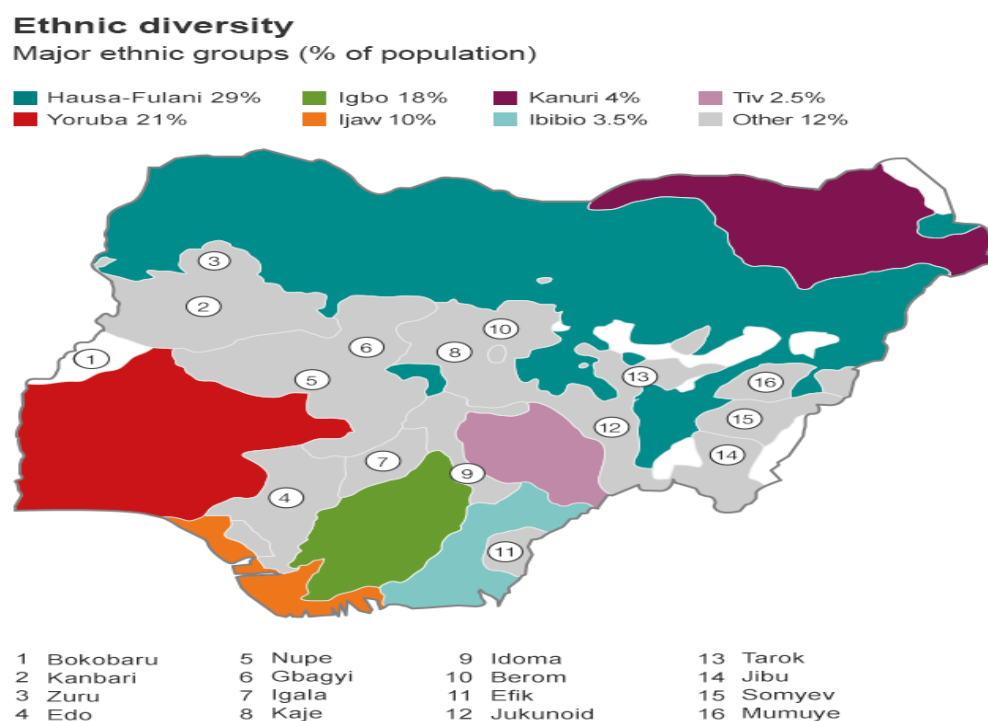
relation that may exist between the federal government and states.¹³² Nevertheless it has the downside of frustrating coordinated management. The alternative approach to this are state favoritism or federal deference to state process. In the former case states are given a broad margin than the federal government giving states the power to take in hand their development process. But if there is no standard to review the acts of the state it would create arbitrariness and even undermine the federal system. In federal deference to state process, the federal government will have the authority on natural resources but the standard it applies is developed by states. This ensures the incorporation of state's interest in national decisions and restrains federal government while reserving federal authority. However, it also has the downside of frustrating coordinated management.¹³³

In either of the instances, tension among states or between the states and the federal government occurs if there is the feeling that the share of benefit is not fair. However, I argue that state favoritism in management of natural resources would be a better option to address ethnic economic inequality. State favoritism holds that natural resources are fixed and location specific and thus it would be effective if the management and ownership is given to states. This is because the effect of such arrangement would make states to be active in their development and raising revenue. Consequently, this would create a sense of being beneficiary of ones resource and autonomous while the federation is still intact. The implication of this can be interpreted to yield a similar effect for ethnic groups too. This is because in multi-ethnic countries there is a trend for at least one ethnic groups be to densely settle in a specific region that makes an administrative unit.

¹³² Fischman, Robert L. and King, Angela, Savings Clauses and Trends in Natural Resources Federalism,. Articles by Maurer, Faculty. Paper 198, 2007, <http://www.repository.law.indiana.edu/facpub/198>

¹³³ Fischman, Robert L. and King, Angela, "Savings Clauses and Trends in Natural Resources Federalism" (2007). Articles by Maurer, Faculty. Paper 198, <http://www.repository.law.indiana.edu/facpub/198>

It can be counter argued that state favoritism would be relevant only if ethnicity is determinantal if the territory of administrative regions. Moreover, it can be said that this would make the federation weak. Nevertheless, the arrangement can still be relevant even if the federation is not ethnical. But the population demography is still ethnically diversified. It is rarely that ethnic groups would settle dispersedly. For example, as can be seen below, the settlement of ethnic groups is dense in a specific region.



Source: Ulrich Lamm

Figure1.Ethnic settlement in Nigeria

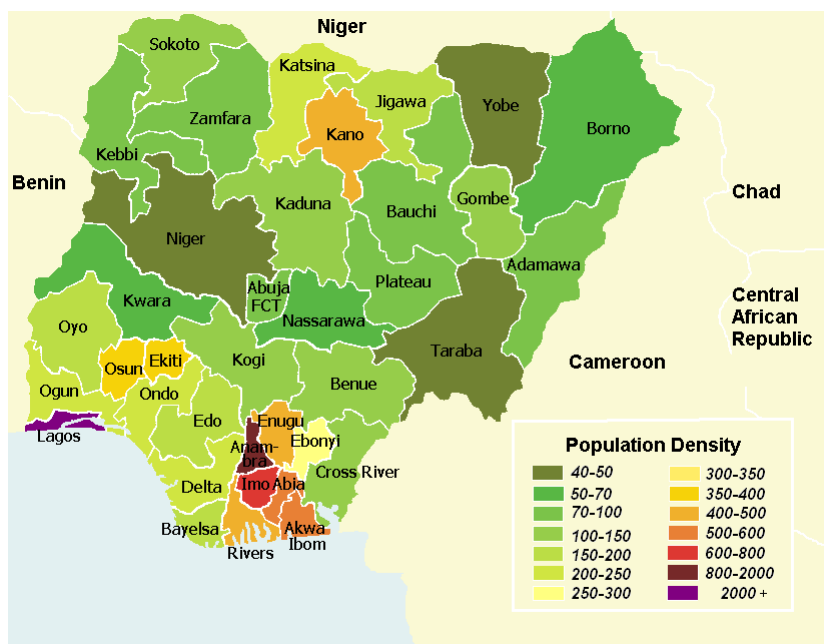


Figure 2: States structure in Nigeria

As can be seen from the figures, for instance, the Hausa-Fulani ethnic group covers a great majority area extending from west to east in northern Nigeria i.e. in the state of Kebbi, Zamfara, Sokoto, Katsina and Kano although the Nigerian federalism is not ethnic federalism for instance Contrasting the geographical settlement of ethnic groups with administrative territories, both in Nigeria and Kenya, one can make the assertion that giving more power to states in management and raising revenue from natural resources can also serve the purpose of bestowing ethnic groups the exercise of group autonomy in their respective states .

Secondly, strong federal government is desirable when the federation is made by the voluntary yield of power by the constituent units.¹³⁴ For example both in Nigeria and Ethiopia the federation is created by decentralizing a centralized power to the states.¹³⁵ Thus maintaining

¹³⁴ Kehinde M. Mowoe, Constitutional Law in Nigeria, (Malthouse Law Books, 2008), pp. 49-92, 511-521

¹³⁵ Sebastine Tar. Hon, Constitutional Law and Jurisprudence in Nigeria, Pearl Publishers, 2004, pp.13-22; Kehinde M. Mowoe, Constitutional Law in Nigeria, (Malthouse Law Books, 2008), pp. 49-92, 511-52; Fasil Nahum, Constitution for a Nation of Nations, The Ethiopian Perspective, The Red Sea Press, 1997, pp. 33-52, 65-75

strong fiscal central power would be defeating the purpose the federation has been established i.e. the autonomy of the states. In addition, it would also be defeating the economic self-determination of the people.¹³⁶

On the other hand, the preposition can again be challenged for its downside of creating interstate fiscal disparity.¹³⁷ The more revenue power on natural resources is taken from the federal government, the difficult the harmonization of tax transfer to all states, in developing national infrastructure plan and strengthening the economic union.¹³⁸ Yet, the alternative of giving broad power to the federal government would paralyze states from developing in their domain utilizing revenue from resources available in their territory.¹³⁹ For historical and other contributing factors, in multi-ethnic countries the central power can be dominated by a group that was historically in advantage.¹⁴⁰ Achieving an actual relative symmetrical power share by the various ethnic groups in the central government takes a long process.¹⁴¹

Until such a stage, fiscal rules can be designed giving more economic power to states on natural resources with aim of addressing ethnic economic inequalities.¹⁴² The more tax power the states are given the more accountable they would be in spending because it is their own

¹³⁶ The right to self-determination, a recognized right under international instruments includes the economic self-determination of the people. In the jurisprudence of the African Commission on Humans and Peoples' Rights, its interpreted to be a group right and includes groups autonomy to determine its economic fate.

¹³⁷ Robin Boadway & Anwar Shah, *Fiscal Federalism; Principles and Practice of Multi-order Governance*, Cambridge University Press, 2009, pp. 157-241

¹³⁸ Robin Boadway & Anwar Shah, *Fiscal Federalism; Principles and Practice of Multi-order Governance*, Cambridge University Press, 2009, pp. 157-241

¹³⁹ Robin Boadway & Anwar Shah, *Fiscal Federalism; Principles and Practice of Multi-order Governance*, Cambridge University Press, 2009, pp. 157-241

¹⁴⁰ Stephen Tierney, *Constitutional Law and National Pluralism*, Oxford University Press, 2004, pp. 183-190, 234; Amy Chua, *World on Fire, How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, DOUBLEDAY, 2003, pp.1-14

¹⁴¹ Stephen Tierney, *Constitutional Law and National Pluralism*, Oxford University Press, 2004, pp. 183-190, 234; Amy Chua, *World on Fire, How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, DOUBLEDAY, 2003, pp.1-14

¹⁴² Robin Boadway & Anwar Shah, *Fiscal Federalism; Principles and Practice of Multi-order Governance*, Cambridge University Press, 2009, pp.157-240

revenue.¹⁴³ Furthermore, the more states are autonomous economically, the more the influence of the federal government on state decision making process through the transfer it makes.¹⁴⁴ Here again, the argument on accountability can be countered for failing to substantiate why states would be accountable on spending revenue from their own sources than they receive from the federal.¹⁴⁵

But considering the ethnic factor under review, I would say that the more states are given power on raising revenue from their own resources, the more the ethnic groups in that state would exercise decision making power on the expenditure either directly or indirectly through their representatives. This can also contribute in relaxing the consciousness of being dominated by a specific ethnic group strongly present at the center and in creating a better sense of exercising the right to political and economic self-determination.

The issue of the domination of the majority over the minority ethnic groups could also be another encounter for the approach of state favoritism. However, this gap can be addressed by other constitutional tools mainly the enforcement of economic rights.

¹⁴³ Teresa Ter-Minassian (ed.), *Fiscal Federalism in Theory and Practice*, International Monetary Fund, Washington, 1997, pp.3-23; Robin Boadway & Anwar Shah, *Fiscal Federalism; Principles and Practice of Multi-order Governance*, Cambridge University Press, 2009, pp.242-265

¹⁴⁴ Teresa Ter-Minassian (ed.), *Fiscal Federalism in Theory and Practice*, International Monetary Fund, (Washington, 1997), pp.3-23

¹⁴⁵ Robin Boadway & Anwar Shah, *Fiscal Federalism; Principles and Practice of Multi-order Governance*, Cambridge University Press, 2009, pp.242-265

2.4. Enforcing Ethnic Groups Economic Right Over Land

Land is one of the most important natural resources with an implication on state affairs.¹⁴⁶ In recent years, there has been an increase of conflict over land and natural resources.¹⁴⁷ It is the economic, social and political significance it holds that makes land at the center of conflicts.¹⁴⁸

Land conflicts are as old as human history and studies show that ethnicity is behind most conflicts.¹⁴⁹ In Kenya for instance land both in rural and urban areas is alleged to be highly occupied by the Kikuyu ethnic group who are the main actor in the political domain.¹⁵⁰ And the bloody conflict that happened after the 2008 election is reported to be due to ethnically biased distribution of land.¹⁵¹ Ethnic rivalry over land may take the form of blocking one group from marketing land or through the instrumentality of institutional setups influencing the process of the enforcement of property rights.¹⁵² A study conducted in Kenya to show the role of corruption and ethnicity in land conflicts, shows that ethnic networks would be used in selling private land excluding other competing ethnic groups.¹⁵³ The exclusion of other ethnic groups group in the transaction is said to be to ensure the seller ethnic group would remain to be the

¹⁴⁶146 Judith Rees, *Natural Resources: Allocation, Economics and Policy*, London, Routledge, 1994, p.14

¹⁴⁷ Jon Unruh and Rhodri C. Williams, *Lessons Learned in land tenure and natural resources management in post-conflict societies* in Jon Unruh and Rhodri C. Williams (eds.) *Land and Post-Conflict Peacebuilding*, Environmental Law Institute and United Nations Environment Programme, Earthscan, 2013, pp 533-569

¹⁴⁸ Jon Unruh and Rhodri C. Williams, *Lessons Learned in land tenure and natural resources management in post-conflict societies* in Jon Unruh and Rhodri C. Williams (eds.) *Land and Post-Conflict Peacebuilding*, Environmental Law Institute and United Nations Environment Programme, Earthscan, 2013, pp 533-569; *Land and Human Rights, Standards and Applications*, United Nations Human Rights Office of the High Commissioner HR/PUB/15/5/Add.1, 2015

¹⁴⁹ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111

¹⁵⁰ Karuti Kanyinga, *Governance, Institutions and Inequalities in Kenya* in Society for International Development (ed.) *Readings on Inequality in Kenya, Sectoral Dynamics and Perspectives*, Nairobi Society for International Development, Vol. 1, 2006, pp. 345-398; Paul M. Syagga *Land Ownership and Use in Kenya: Policy prescriptions from an Inequality Perspective* in Society for International Development (ed.) *Readings on Inequality in Kenya, Sectoral Dynamics and Perspectives*, Nairobi Society for International Development, pp. 289-343

¹⁵¹ Luke M Obala & Michael Mattingly, *Ethnicity, Corruption and violence in Urban Land Conflict in Kenya*, *Urban Studies Journal*, Vol 51, No. 13, 2014, pp. 2735-2751

¹⁵² Edward Glaeser, Jose Scheinkman & Andrei Shleifer, *The Injustice of Inequality*, *Journal of Monetary Economics*, 50, 2003, pp.199-222

¹⁵³ Luke M Obala & Michael Mattingly, *Ethnicity, Corruption and violence in Urban Land Conflict in Kenya*, *Urban Studies Journal*, Vol 51, No. 13, 2014, pp. 2735-2751

dominant occupant of the area.¹⁵⁴ Because information is transferred through the groups network and loyalty to one's group is strong, the study reports that even the formal legal system could not easily cut through the transactions.¹⁵⁵ But later on the government introduced a regulation to sell lands through agents. This regulation is esteemed to create a space for members of other ethnic groups to be involved in the market.¹⁵⁶

Nonetheless, as pointed out earlier, first government's institutional set up can be subverted by those in power.¹⁵⁷ Secondly the formal legal system may not have the trust of the governed.¹⁵⁸ This is so because in the context of multi-ethnic African countries, it is not only the society that is plural but also the legal system. In these countries land rights can be established under customary rules, formal legal system, and religious law.¹⁵⁹ The customary land management is dominated by absence of formal registration but preservation of land within a certain tribe or ethnic group and patriarchal ownership of land.¹⁶⁰ Whereas the formal legal system requires registration of land, individual ownership or possession of land without discrimination on any ground.¹⁶¹ Under religious law, land governance which is operational in countries with Islamic law, ownership is individual but with specific rules on transfer and inheritance.¹⁶²

¹⁵⁴ Luke M Obala & Michael Mattingly, Ethnicity, Corruption and violence in Urban Land Conflict in Kenya, *Urban Studies Journal*, Vol 51, No. 13, 2014, pp. 2735-2751

¹⁵⁵ Luke M Obala & Michael Mattingly, Ethnicity, Corruption and violence in Urban Land Conflict in Kenya, *Urban Studies Journal*, Vol 51, No. 13, 2014, pp. 2735-2751

¹⁵⁶ Luke M Obala & Michael Mattingly, Ethnicity, Corruption and violence in Urban Land Conflict in Kenya, *Urban Studies Journal*, Vol 51, No. 13, 2014, pp. 2735-2751

¹⁵⁷ Edward Glaeser, Jose Scheinkman & Andrei Shleifer, The Injustice of Inequality, *Journal of Monetary Economics*, 50, 2003, pp.199-222

¹⁵⁸ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.63-111

¹⁵⁹ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.63-111; Land and Human Rights, Standards and Applications, United Nations Human Rights Office of the High Commissioner HR/PUB/15/5/Add.1, 2015

¹⁶⁰ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.63-111

¹⁶¹ Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.63-111

¹⁶² Abiodun Alao, *Natural Resources and Conflict in Africa The Tragedy of Endowment*, University of Rochester Press, 2007, pp.11-111

In the presence of such pluralistic legal system it is not uncommon for the formal legal system to lose the trust of the parties especially when the formal legal system including the constitution is deemed as “foreign” to the tradition and values¹⁶³ of the governed and the independence and impartiality of the judiciary it created is evidently questionable. In such cases although in principle the formal legal system takes precedence over the religious and customary legal system, in practice communities prefer to settle disputes and enforce in traditional institutions over the decision of regular courts.¹⁶⁴ In other words, a party may have a title right declared in court but not the “social right” to use the land. In this regard, the relevant issue for constitutional law would be on how a right constitutionally but not of a “social” worth be enforced.¹⁶⁵ And this is another area where constitutionalism developed in the absence of plural legal system would be challenged in multi-ethnic countries.

Apart from such intricacies, constitutionalism recognizes governments power to adopt economic policies that restrict economic rights and expropriation/taking of land when the interest of the public requires as such.¹⁶⁶ But what constitutes a “public interest” is vague and requires an active and independent judiciary that review the legitimacy of government acts made with such justifications. As can be referred from the jurisprudence of court’s decision with an established practice of constitutionalism, government’s act of restricting economic

¹⁶³ Professor Markus Böckenförde and Professor Gedion T. Hassebon, Lecture Note of the Course on Constitution Building in Africa; Traditional Authorities, Cultural Values and Constitutionalism, 8 February 2017, MB 203, CEU

¹⁶⁴ Professor Markus Böckenförde and Professor Gedion T. Hassebon, Lecture Note of the Course on Constitution Building in Africa; Traditional Authorities, Cultural Values and Constitutionalism, 8 February 2017, MB 203, CEU

¹⁶⁵ Jon Unruh and Rhodri C. Williams, Lessons Learned in land tenure and natural resources management in post-conflict societies in Jon Unruh and Rhodri C. Williams (eds.) Land and Post-Conflict Peacebuilding, Environmental Law Institute and United Nations Environment Programme, Earthscan, 2013, pp 533-569; Land and Human Rights, Standards and Applications, United Nations Human Rights Office of the High Commissioner HR/PUB/15/5/Add.1, 2015

¹⁶⁶ N. Dorsen et. al., Comparative Constitutionalism Cases and Materials, American Case Book Series, Chapter 11, Rights and Economic Social Life, (West Academic Publishing, 3rd edition, 2016), 1389

right over land can be legitimate if the measure is not undue interference on personal autonomy over property.¹⁶⁷ Moreover, there has to be a legitimate relation between the aim pursued and the measures taken.¹⁶⁸ Whereas under customary rule because of the consideration of the social and cultural value of land, measures of the government to preserve the groups preemptive beneficiary right over others.¹⁶⁹

On the other hand, while national courts enforcement of right on land and review of government's intervention has been made as guarantee of individual's private autonomy, various international human rights bodies incorporated and interpreted it broadly as a human right applicable to groups too.¹⁷⁰ The African Commission on Human's and Peoples' Rights, recognized the right to land as part of indigenous groups right of customary connection with ancestral land and cultural right.¹⁷¹ The European Committee of Social Rights found the restriction of the Roma group to access land as a violation of their cultural rights and right to adequate housing.¹⁷² The Inter-American Commission on Human Rights also interpreted the right to land to extend beyond the right to property and recognized groups customary relationship to land and traditional use of land as ancestral land.¹⁷³ The UN Special Rapporteur

¹⁶⁷ Abahlali BaseMjondolo Movement SA and Others v. Premier of the Province of Kwazulu-Natal and Others, Constitutional Court of South Africa, CCT 12/09 [2009] ZACC 31 (14 October 2009); Haver v. Land Rheinland-pfalz, E.C.R. 3727, 3746-47; N. Dorsen et. al., Comparative Constitutionalism Cases and Materials, American Case Book Series, West Academic Publishing, 3rd edition, 2016, pp. 1358-1366

¹⁶⁸ Abahlali BaseMjondolo Movement SA and Others v. Premier of the Province of Kwazulu-Natal and Others, Constitutional Court of South Africa, CCT 12/09 [2009] ZACC 31 (14 October 2009); Haver v. Land Rheinland-pfalz, E.C.R. 3727, 3746-47; N. Dorsen et. al., Comparative Constitutionalism Cases and Materials, American Case Book Series, West Academic Publishing, 3rd edition, 2016, pp. 1358-1366

¹⁶⁹ Abiodun Alao, Natural Resources and Conflict in Africa The Tragedy of Endowment, University of Rochester Press, 2007, pp.63-111

¹⁷⁰ Land and Human Rights, Standards and Applications, United Nations Human Rights Office of the High Commissioner HR/PUB/15/5/Add.1, 2015

¹⁷¹ The Social and Economics Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication No. 155/96, 27 May 2002; Center for Minority Rights in Development and Minority Groups international on behalf of the Endoris Welfare Council v. Kenya, Communication No. 276/2003, 4 February 2010

¹⁷² European Roma Rights Center v. Italy, Communication No. 27/2004, 7 December 2005

¹⁷³ Brazil, Comunidad Yanomami, Case No. 7615, Report No. 12/85 (5 March 1985); Mary and Carrie Dann v. United States, Case No. 11.140, Report No. 75/02 (27 December 2002)

on the rights of indigenous peoples alluded that securing the right to land is crucial for the self-determination of for groups to exist as a “distinct people”.¹⁷⁴

Thus, drawing from the conclusion of the international bodies and the significance of customary rules in conflict resolution, it can be said that enforcing economic right over land in broader sense is crucial in ensuring the rights of ethnic groups. Furthermore, such application could be a guarantee of not only economic right but also other rights.

¹⁷⁴ Report on the situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, The UN Special Rapporteur on the rights of indigenous peoples (A/HRC/18/35/Add.2), para. 79

Chapter 3. Encapsulating the Constitutions of Nigeria, Kenya and Ethiopia

Nigeria, Ethiopia and Kenya are among highly ethnically diversified countries in sub-Saharan Africa. It is estimated that there are around 250¹⁷⁵ ethnic groups in Nigeria and over 70 both in Kenya and Ethiopia.¹⁷⁶ The ethnic diversity of each of the countries has played and still plays a significant role in shaping the political and legal histories of the countries.¹⁷⁷ In their less than half a century history of constitutional law, all the three countries, experienced ethnic conflicts and has gone through more than one constitutional reformation.

The constitutional approach adopted by each of the countries towards ethnicity varies from one another. The 1999 Nigerian Constitution establishes federal state with a parliamentary form of government and without going further than requiring the political structure to reflect the ethnic composition of the country.¹⁷⁸ The 2010 Kenyan constitution shares a communality with the Nigerian constitution in its approach to ethnicity is just a recognition of the ethnic diversity of the country and the need for reflection of it in the political structure. However, although the trend in multi-ethnic countries is a parliamentary government, Kenya opted for unitary and presidential form of government.¹⁷⁹ The main distinct feature of the 1991 Ethiopian

¹⁷⁵ Nigeria Facts, National Geographic Traveler, <https://travel.nationalgeographic.com/travel/countires/nigeria-facts/>, accessed on March 26, 2017

¹⁷⁶ East Africa Living Encyclopedia, African Studies Center, University of Pennsylvania, <https://www.africa.upenn.edu/NEH/kethni.htm>; Ethnic groups, Nations Encyclopedia, <https://www.nationsencyclopedia.com/Africa/Ethhiopia-ETHNIC-GROUPS.html>, accessed on March 26, 2017

¹⁷⁷ Sebastine Tar. Hon, Constitutional Law and Jurisprudence in Nigeria, Pearl Publishers, 2004, pp.13-22; Kehinde M. Mowoe, Constitutional Law in Nigeria, (Malthouse Law Books, 2008), pp. 49-92, 511-52; Morris Kiwinda Mbondenyei and John Osogo Ambani, The New Constitutional Law of Kenya, Principles, Government and Human Rights, African Books Collective, 2012, pp.13-22, 65-76, 87-140 Fasil Nahum, Constitution for a Nation of Nations, The Ethiopian Perspective, The Red Sea Press, 1997, pp. 33-52, 65-75;

¹⁷⁸ Kehinde M. Mowoe, Constitutional Law in Nigeria, (Malthouse Law Books, 2008), pp. 1-10, 49-92, 511-521

¹⁷⁹ Morris Kiwinda Mbondenyei and John Osogo Ambani, The New Constitutional Law of Kenya, Principles, Government and Human Rights, African Books Collective, 2012, pp.13-22, 65-76, 87-140

constitution from the two is its creation of an ethnic federal state and parliamentary system in which constituent units are formed based on ethnicity.¹⁸⁰

Guided by the discussions and conclusions in the second chapter, this chapter makes a brief overview the constitutional law approach of the of the countries towards ethnic diversity, fiscal rules on natural resources and enforcement of economic rights.

3.1. Nigeria

The current constitution of Nigeria was adopted in 1999 following the overthrow of a military regime.¹⁸¹ It is drawn on the aspiration of creating an indivisible and indissoluble federal, democratic and social state of Nigeria.¹⁸² The constitution outsets the precedence of national loyalty over sectional loyalty and prohibits the dominance of few ethnic or religious groups in government.¹⁸³ This is made to address the problem ethnic loyalty would create in state affairs.¹⁸⁴ The social order for such society is deemed to be established on the freedom, equality and justice for all irrespective of ethnic origin or religious affiliation and the exploitation of resources for the exclusive good of the community at large.¹⁸⁵

In relation to power sharing and fiscal regulation, ownership of natural resources of minerals and natural gas is reserved to the federal government¹⁸⁶ while states assume the responsibility

¹⁸⁰ Fasil Nahum, *Constitution for a Nation of Nations, The Ethiopian Perspective*, The Red Sea Press, 1997, pp. 33-52, 65-75

¹⁸¹ Sebastine Tar. Hon, *Constitutional Law and Jurisprudence in Nigeria*, Pearl Publishers, 2004, pp.13-22; Kehinde M. Mowoe, *Constitutional Law in Nigeria*, (Malthouse Law Books, 2008), pp. 49-92, 511-52; Morris Kiwinda Mbondenyei and John Osogo Ambani, *The New Constitutional Law of Kenya, Principles, Government and Human Rights*, African Books Collective, 2012, pp.13-22, 65-76, 87-140

¹⁸² Section 1; Section 14, *Constitution of the Federal Republic of Nigeria*, 1999

¹⁸³ Section 14 (3) and 15 (4), *ibid*

¹⁸⁴ Kehinde M. Mowoe, *Constitutional Law in Nigeria*, (Malthouse Law Books, 2008), pp. 1-20, 49-92, 511-52

¹⁸⁵ Section 17 and (2, b), *Constitution of the Federal Republic of Nigeria*, 1999

¹⁸⁶ Section 44 (3), *ibid*

to safeguard the water, air, land, forest and wildlife¹⁸⁷. The National Assembly, which is the federal legislature, has the exclusive legislative power on natural resources. Local governments in the states have the power to develop natural resources. Other than rules on natural resources, the National Assembly is given the power to enact laws on acquisition and tenure of land¹⁸⁸, on the distribution of revenue between the federal government and states, among the states and between states and local governments¹⁸⁹. The federal government also has the ownership of the land in the federal capital Abuja.¹⁹⁰ On top of this, the constitution provides that the constitutional provisions does not invalidate the Land Use Act.¹⁹¹

In relation to public revenue, the constitution established an account for the federation which deposit taxes collected by the Federal government except for income to be derived from federal military, police and residents of the federal capital. The allocation of the revenue from the federal account is to be made by the National Assembly based on the equality of states and considering population size, revenue generating capacity and geographical size.¹⁹² In addition, any revenue derived from natural resources to the federal account and to be made in accordance with the principle of derivation shall not be made of less than thirteen percent. On the other hand, states, too shall create a state joint local government account from which revenue will be distributed to local governments in the state. Then distribution for local governments in the state is to be made on the principle of proportionality of its total revenue. The judiciary includes federal and state regular courts alongside with the establishment of federal and state Sheria and customary courts of appeal.¹⁹³

¹⁸⁷ Section 20, *ibid*

¹⁸⁸ Schedule II, Part III, section 2, Constitution of the Federal Republic of Nigeria, 1999

¹⁸⁹ Schedule II, Part II, (1, a), *ibid*

¹⁹⁰ Section 297 (2), *ibid*

¹⁹¹ Section 315 (5, d), *ibid*

¹⁹² Section 162, *ibid*

¹⁹³ Section 260-269, 275-282, *ibid*

Kehinde M. Mowoe, argues that fiscal rules in general made the power balance to tilt towards the central government and pushes to the bound of states autonomy.¹⁹⁴ This can be seen under the power of the federal government in revenue raising and the appointment and removal of the head of the fiscal commission. This would undermine the independence and autonomy of the state because among other things the commission headed by federally appointed person among others is given the power to review the revenue sharing formula and determines the amount of remuneration to political officials.¹⁹⁵

With regard to the right over land, the constitution does not make a distinct recognition of the right to land to ethnic groups but as part of every Nigerian right to acquire and own immovable property¹⁹⁶.

3.2. Kenya

The Republic of Kenya is a multi-party democratic unitary state in which government is structured in national government, provinces and counties that operate on the principle of cooperation and consultation.¹⁹⁷ The Republic is governed on the fundamental values of patriotism, national unity, power sharing, the rule of law and democracy, human dignity, equity and equality, social justice, human rights, non-discrimination and protection of the marginalized, good governance and sustainable development.¹⁹⁸ The constitution recognizes the significance role of the various cultures of the people in the affairs of the state. It further requires state officials to treat equally all persons irrespective of any discriminatory ground

¹⁹⁴ Kehinde M. Mowoe, *Constitutional Law in Nigeria*, (Malthouse Law Books, 2008), pp. 1-20, 49-92, 511-52

¹⁹⁵ Kehinde M. Mowoe, *Constitutional Law in Nigeria*, (Malthouse Law Books, 2008), pp. 1-20, 49-92, 511-52

¹⁹⁶ Section 43

¹⁹⁷ Morris Kiwinda Mbondenyei and John Osogo Ambani, *The New Constitutional Law of Kenya, Principles, Government and Human Rights*, African Books Collective, 2012, pp.13-22; Section 5, *The Constitution of Kenya*, 2010

¹⁹⁸ Section 11, *ibid*

including ethnicity.¹⁹⁹ Ethnicity would play a role in establishing the national government because of the constitutional requirement for the national executive including the command of the military to reflect the regional and ethnic diversity in the country.²⁰⁰

Individual and collective right of property is recognized and the government is prohibited from arbitrarily depriving such right. Interference on the exercise of the right is allowed only when public purpose or public interest demands so.²⁰¹ The ownership of land is given to the public at large, to communities and individuals. Shortly putted public land is any and that is owned neither by communities nor by individuals. Whereas community land refers to a land lawfully registered in the name of group representatives; land lawfully transferred to a specific community; a land declared to be community land by an Act of Parliament; a lawfully held, managed or used land by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments. In general community land is owned by communities based on ethnicity, culture or other similar group interest.

The constitutional guarantee for private land is given to any person who acquires land legally and individuals who are not citizens too can have a lease holding of private land. Although, the state is unitary and power sharing cannot be expected, the constitution provided the power for the parliament to enacts laws on the acquisition, management and use of land while the administration of is to be made by National Land Commission. For settlement of disputes the constitution recognizes the settlement of land disputes through a “recognized community initiative” with the guiding principles for juridical acts over land are equity, efficiency,

¹⁹⁹ Section 21 (3), 27 (4), The Constitution of Kenya, 2010.

²⁰⁰ Section 130 (2), 241 (4), *ibid*

²⁰¹ Section 40, *ibid*

productivity, and sustainability. Apart from this the constitution establishes regular federal courts and lower religious Kadhi courts and magistrates.²⁰²

3.3. Ethiopia

The fourth Ethiopian constitution adopted following the change of a socialist military government, creates a federal democratic republic for the nations, nationalities and peoples' of Ethiopia.²⁰³ The fundamental principles to be respected are the sovereignty of the people, supremacy of the constitution, respect for human and democratic rights, and transparency and accountability of the government.²⁰⁴

The rights of individuals to own and transfer private property is constitutionally guaranteed.²⁰⁵ However, private ownership right cannot be made over rural and urban land as well as on natural resources. The ownership of land is stipulated to be to that of the Nations, Nationalities and Peoples of Ethiopia. The Nations, Nationalities and Peoples are defined to be a group of people who have a wider common culture, language, belief, identity, psychological make up and who lives in identifiable contiguous territory. This is one of the instances ethnicity is given a major role shaping the public domain under the Ethiopian constitution. As land is owned by the people, it therefore cannot be subject to transaction. Nevertheless, citizens and private investors can have ownership entitlement for property over the land. Besides to this, farmers and pastoralists have the constitutional right to acquire land and free access to grazing and cultivation. Although the constitution in general set forth a general protection from eviction

²⁰² Section 60-68, The Constitution of Kenya, 2010

²⁰³ Fasil Nahum, Constitution for a Nation of Nations, The Ethiopian Perspective, The Red Sea Press, 1997, pp. 33-52, 65-75

²⁰⁴ Section 1, 8-12, The 1995 Federal Democratic Republic of Ethiopia Constitution

²⁰⁵ Section 40, *ibid*

and displacement, the specific conditions of the protection is left to be enacted by the legislature.²⁰⁶

On the other hand, the constitution lay down that expropriation of private property can be made for public purpose in lieu of advance compensation that is equivalent of the value of the property.²⁰⁷ One of the ambiguity of the constitution here is whether the application of this provision extends to the case of eviction of farmers and displacement of pastoralists. In the absence of a functional judicial review system, this would leave the subjects which are much of the population, at the mercy of the legislature without any means of legal remedy in case of violation.

The power to make laws on the use of land and other natural resources is given to the federal legislature whereas states are given the power to administer land and natural resources pursuant to federal laws. Here it is noteworthy to mention the unique feature of the federal legislature that comprises the upper House of Federation and the House of Representatives. The former consists representatives of the various ethnic groups in proportion to the population size of the group while the latter is of representatives from constituencies drawn based on population size of the country and special representatives of minority groups which should be identified by the House of Federation.²⁰⁸

With regard to fiscal regulation, states are empowered to levy and collect fees and tax on land use right and income tax of private and cooperative farmers. The power to collect tax from extraction of large-scale mining, oil and gas as well as on land rentals is a concurrent power

²⁰⁶ Section 40, The 1995 Federal Democratic Republic of Ethiopia Constitution

²⁰⁷ Section 40, 39, *ibid*

²⁰⁸ Section 55, 51-52, *ibid*,

between the federal government and states. While giving the power to determine the division of revenue from concurrent taxation power to the House of Federation, the constitution remains to be silent on the manner revenue is to be distributed between the federal government and states.²⁰⁹

²⁰⁹ Section 97 (2-3), 98 (3), The 1995 Federal Democratic Republic of Ethiopia Constitution

Conclusion-

“....[C]onstitutionalism is not the obvious solution to many of the most serious, compelling problems that humanity has to deal with. It does not eliminate economic poverty, or social discrimination, or political abuse or the incompetence, greed or stupidity of political leadership.”²¹⁰

Constitutionalism is not a solution for all the complexities political or social ethnicity creates. As a concept developed in a specific historical context and society, unless modified to local contexts, its migration to a different community, may create more complexity than desired. It shall therefore be understood as an ideal subject to moderation. It can be more flexible through interdisciplinary approach to address emerging issues such as ethnicity. Yet, this is not to say that constitutionalism does not have any solutions at hand for emerging situations. As discussed in this thesis, in situations where there are visible ethnic economic inequalities, constitutionalism can play a role in bringing harmony. Constitutional documents provide the general frame work for ownership and management of resources. Constitution designing or reformation process can serve as platforms for recognition, negotiation and reconciliation of the concerns of aggrieved ethnic groups.

The recognition of customary rules on land in the constitutional documents and constitutional adjudication would have the positive effect of marrying the formal legal system with the customary. This would be a manifestation of respect and recognition of ethnic diversity. Not only this but the constitutional guarantee of a wider local governance power on natural resources can play role in creating a balanced vertical relation. This can be a platform for

²¹⁰ Daniel S. Lev, in N. Dorsen et. al., Comparative Constitutionalism Cases and Materials, American Case Book Series, (West Academic Publishing, 3rd edition, 2016)

ethnic groups to exercise autonomy in their respective regions. In addition, the recognition of groups economic right to access land can also produce a positive result in relaxing ethnic rigidity.

All three countries studied in this thesis adopted have constitutions that incorporate the proposals made above. Although the approaches differ, their constitutions recognize the ethnic diversity in their community. Additionally, the constitutions incorporate fundamental principles and human rights enshrined in international bill of rights. However, there is a gap in the implementation of the adopted principles in conducting state affairs. Rather, advancing personal want at the expense of the needs of the governed outweighs. Although constitutionalism cannot provide an absolute solution to tackle this problem, a functional and effective judiciary can still contribute in achieving a relatively better justice and equality.

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