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# Large-scale agricultural land acquisitions and Ethiopia's ethnic minorities: A test for the rule of law

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## Summary

*The Ethiopian Constitution provides for the exercise of the right to self-determination of ethnic groups. This right entitles each group to be in control of its local affairs, through its own autonomous arrangements, particularly regarding matters of land administration and utilisation. The right to self-determination also allows ethnic communities the right to directly participate in decisions affecting the utilisation of land resources. However, the enforcement of the legal rhetoric of self-determination in the administration and utilisation of land has been weak. This article analyses the challenges facing the enforcement of constitutionally-enshrined rights of ethnic minorities to administer and exploit their own land resources, by taking as a case study the Ethiopian government's measures regarding large-scale land dispossessions of local communities in the Gambella and Benishangul-Gumuz regions. The article suggests that, given the challenges of seeking a remedy from domestic forums, remedies from regional institutions can partly be a way forward. It contends that rulings from regional bodies, including the African Commission, at least can serve as discursive tools through which the actions of government officials are challenged and delegitimised. This, in turn, will provide the affected communities with more tools in their struggle against land dispossession.*

**Key words:** Constitution; Ethiopia; land dispossession; minorities; rule of law; self-determination

## 1 Introduction

According to the Constitution of the Federal Democratic Republic of Ethiopia (Ethiopian Constitution), sub-national groups, in general,

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and ethnic minorities, in particular, are granted several constitutional rights, including the right to self-determination, in relation to the administration and utilisation of land and other natural resources. However, the implementation of these constitutional rights has been dismal, particularly in the lowlands, places that host many ethnic minorities. This is largely due to the government's interest to transfer land into the hands of private and public actors with little or no compensation to and consultation with local communities. This interest often trumps the constitutional rights of the ethnic minorities to administer land and be consulted in development projects, thus posing serious challenges to the rule of law. By focusing on ethnic minorities in the lowlands of Ethiopia (particularly in the Gambella and Benisgangul-Gumuz regions), the purpose of this article is to analyse the challenges facing the enforcement of constitutionally-enshrined rights of ethnic minorities.

The article is structured as follows: Section 2 briefly discusses the notion of the rule of law. Section 3 examines the constitutional rights of ethnic minorities to self-administer their land resources through their own autonomous regional states, and analyses how such constitutionally-entrenched rights have been neglected. This section also discusses another aspect of the right to self-determination, namely, the right of ethnic minorities to directly participate in decisions affecting the utilisation of their land resources, and analyses the challenges in ensuring their rights. The last section provides concluding remarks.

## 2 The notion of the rule of law

Etymologically, the term 'rule of law' is derived from the Latin phrase *imperium legume*, literally meaning 'the empire of laws and not of men'.<sup>1</sup> The phrase 'the empire of laws and not of men' refers to 'the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is the public good (*res publica*) of the community as a whole'.<sup>2</sup> This means that the rule of law requires that, in addition to acting based on prescribed law, the law should serve as a tool to advance the public good instead of being an instrument to justify the capricious acts of persons and institutions.

The rule of law should be distinguished from 'rule by law' or mere legalism – a tool which can be deployed to justify arbitrary actions of public officials.<sup>3</sup> As Harman notes, 'the creation and enforcement of laws does not, of itself, constitute or enable a society to be governed

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1 M Sellers 'What is the rule of law and why is it so important?' in J Silkenat et al (eds) *The legal doctrines of the rule of law and the legal state (Rechtsstaat)* (2014) 4.

2 As above.

3 As above.

by the rule of law'.<sup>4</sup> Governance of society by laws 'without consideration and embrace of the rule of law as a guiding and underlying principle, has the potential to lead to a tyrannical or "police" state'.<sup>5</sup> This is often the case in many authoritarian states that deploy laws as instruments of repression.<sup>6</sup>

There is no universally-accepted definition of the term 'rule of law'. As Fombad notes in the overview in this issue of the *African Human Rights Law Journal*, the term can refer to many concepts or principles.<sup>7</sup> The analysis in the article focuses on a mix of largely the following principles of the rule of law: governance based on publicly-promulgated laws; the avoidance of arbitrariness; separation of powers; the adjudication of laws by independent institutions; access to enforce laws, and participation in decision making.

### **3 Constitutional rights of ethnic minorities to self-determination**

The Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the party that has maintained state power in Ethiopia since 1991, introduced a new Constitution that in principle fundamentally altered the political and legal landscape of the country. With the adoption of the Ethiopian Constitution in 1994, a federation was formed.<sup>8</sup> The federation is organised largely based on the ethnicity of different communities.<sup>9</sup>

The establishment of a federal system was designed to decentralise power and resources and resolve the age-old questions for greater inclusion of different communities in the economic and political affairs of state institutions in Ethiopia.<sup>10</sup> This decentralisation of power, it was thought, would empower ethnic communities to freely determine their destiny through their right to self-determination. This appears to

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4 J Harman 'The rule of law – Law as an instrument of justice and a tool of oppression' Paper presented at the Legal Studies Teachers Conference, 15 March 2014 <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2014/speech-harman-rule-of-law> (accessed 11 May 2017).

5 As above.

6 See, eg, A Allo & B Tesfaye 'Spectacles of illegality: Mapping Ethiopia's show trials' (2015) 13 *African Identities* 279; T Moustafa 'Law and courts in authoritarian regimes' (2014) 10 *The Annual Review of Law and Social Sciences* 281.

7 C Fombad 'An overview of the rule of law crisis in Africa' (2018) 18 *African Human Rights Law Journal* 213.

8 Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation 1/1995, *Federal Negarit Gazeta*, 1st Year No 1.

9 Ethiopia's population is highly diverse, consisting of over 70 ethnic communities. Only some of these communities are conferred an autonomous regional status. In some cases, particularly in the Southern Nations, Nationalities and Peoples (SNNP) regional state, only one region was formed while the number of these ethnic communities total more than 45.

10 A Fiseha 'Ethiopia's experiment in accommodating diversity: 20 years balance sheet' (2012) 22 *Regional and Federal Studies* 435 446.

be the reason why the right to self-determination, to borrow words from Dersso, 'is the super norm on the basis of which the new constitutional system ... is premised'.<sup>11</sup> The right of minorities to self-determination, particularly in the administration and utilisation of land resources, may find concrete expression through autonomous regional state arrangements and through direct participation by the ethnic communities.<sup>12</sup>

In exercising the right to self-determination, regional states were organised, supposedly representing and acting on behalf of different ethnic communities. The Ethiopian Constitution provides that the federal government may not interfere in the powers vested in the regional states, and *vice versa*.<sup>13</sup> Regional states have the power to 'formulate and execute economic, social and development policies, strategies and plans of the state'.<sup>14</sup> This implies that the federal government may not override the powers of the regional states in respect of matters of economic, social and development, which can be formulated and implemented at regional level. Regional states are constitutionally empowered to administer land and natural resources, albeit with the requirement that such administration should take place in conformity with federal laws.<sup>15</sup> In general, as Fiseha observes, the regional states in Ethiopia enjoy wide constitutional power of self-rule on many issues, including the administration and utilisation of land and other natural resources.<sup>16</sup>

Furthermore, the constitutional right of the ethnic communities to be heard and to be consulted in projects affecting the utilisation of their land can also be seen as an integral part of the right of ethnic minorities to self-determination.<sup>17</sup> The Ethiopian Constitution

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11 S Dersso 'Institutional options of the right to self-determination as a human rights solution to problems of ethnic pluralism in Africa: The case of Ethiopia and South Africa' (2002) 8 *Human Rights in Development Online* 335 364.

12 Arts 8(1) & (3) Ethiopian Constitution. The Ethiopian Constitution uses the terms nations, nationalities and people to refer to the different ethnic groups in the country. A different definition for each term is not provided in the Constitution. Rather, it provides the same definition in art 39(5) of the Constitution which stipulates: 'Nation, nationality or people', for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable predominantly contiguous territory.'

13 Art 50(8) Ethiopian Constitution.

14 Art 52(2)(c) Ethiopian Constitution.

15 Art 52(2)(d) Ethiopian Constitution.

16 Fiseha (n 10 above) 446.

17 The right to self-determination, particularly in the context of indigenous communities, often entails the right to be consulted in decisions affecting the utilisation of land resources. As will be noted later, given that most of the local communities affected by land dispossession in the regions under discussion are indigenous communities, their right to be consulted may be seen as an integral part of their right to self-determination. For further details on the link between the

provides that communities have the right to directly participate and be consulted in the implementation of projects affecting them.<sup>18</sup>

However, as will be discussed in the next section, the enforcement of the legal rhetoric of self-determination, particularly in the administration and utilisation of land resources, has been dismal.

### 3.1 Challenges to self-administration through own regional state

The global demand for farm land increased following the 2008 world food price crisis.<sup>19</sup> With the rise of interest in farm land, the Ethiopian government was actively engaged in facilitating the transfer of huge tracts of land to investors, both domestic and foreign, with a view to attracting capital in large-scale commercial farming. As a result, huge tracts of land were transferred into the hands of investors, particularly in the Gambella and Benishangul-Gumuz regions. While there is no accurate data on the extent of land transferred, different sources estimate that between hundreds of thousands and millions of hectares of land were transferred to investors.<sup>20</sup>

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right to participation or consultation and self-determination, see Human Rights Committee (HRC) 'Concluding Observations: Mexico' UN Doc CCPR/C/MEX/CO/5 (2010) para 22; HRC 'Concluding Observations: Chile' UN Doc CCPR/C/CHL/CO/5 (May 2007) para 19; Committee on Economic Social and Cultural Rights (ESCR Committee) 'Concluding Observations: Colombia' UN Doc E/C.12/COL/CO/5, (2010) para 9; ESCR Committee 'Concluding Observations: Democratic Republic of Congo' UN Doc E.C.12/COD/CO/4 (2009) para 14.

<sup>18</sup> Arts 43(2) & 92(3) Ethiopian Constitution.

<sup>19</sup> From 2006 to 2008 food prices worldwide sky-rocketed, roughly doubling, to levels not seen in nearly three decades. In an attempt to partly stabilise domestic food markets, some food exporting countries banned the exportation of staple food, such as rice. This exacerbated the food price spikes. The dramatic food price spikes in this period came to be recognised as the world food price crisis. The factors that led to the sky-rocketing of food prices during this period are diverse and difficult to disaggregate as each impact on the other. Some of the factors include the less than expected production of food items in some areas due to weather-related events. Moreover, the high cost of energy for the production of food and freight prevented the ability of producers to respond to the demand. The increase in the prices of oil also affected the price of food items and production as energy and agricultural prices have become inextricably linked. The high oil prices led to a corresponding increase in the cost of production of food as the energy needs of fertilisers, transportation and packaging increased, thereby widening the gap between farm gate price and prices on the international market. In addition, the rising demand for biofuels increased the prices of biofuel crops such as maize. Restrictions on the exportation of some food crops, such as rice, also played a role in the price rise of food items. With such price rises, expectations of returns from agricultural investment increased, in turn contributing to a rise in the demand for farmland globally. See K Baltzer et al 'A note on the causes and consequences of the rapidly increasing international food prices' Institute of Food and Resource Economics, University of Copenhagen, May 2008 2-3; International Food Policy Research Institute 'High food prices: The what, who and how of proposed policy action' Policy Brief, May 2008 2-6.

<sup>20</sup> There is no accurate figure on the amount of land transferred to investors. In 2014, the International Institute for Environment and Development (IIED) noted that 1 million hectares of land have been awarded to investors. Furthermore, Cotula et al note that more than 1 million hectares of land area have been leased.

Before 2009, the role of the federal government in agricultural investment was limited to issuing investment permits to foreign investors, while all other issues related to the allocation and administration of land were left in the hands of regional states.<sup>21</sup> However, the role of the federal government in processes governing agricultural land acquisitions drastically changed after the global rise of interest in farm land in 2008. The federal government floated the idea of delegation to allow it to directly allocate and control land in regional states, taking away the power of regional states enshrined under the Ethiopian Constitution in the name of delegation. This delegation empowered the federal government to administer lands received from regional governments in a federal land bank, with regional states only having a supporting role.<sup>22</sup>

In 2009 the federal government established a new agency, the Agricultural Investment Support Directorate (AISD), renamed the Agricultural Investment Land Administration Agency (AILAA) in 2013. This organ was responsible for overseeing the allocation of large-scale agricultural lands from the federal land bank.<sup>23</sup> Following this, millions of hectares of land located in the Gambella and Benishangul-Gumuz regions came under the direct control and administration of the federal government.<sup>24</sup> However, as noted earlier, the Ethiopian Constitution explicitly confers this power on regional states as opposed to the federal government. The question then arises as to whether a power granted to regional states under the Ethiopian Constitution can be taken away by the federal government in the name of delegation.

Some scholars have questioned the constitutionality of the delegation of land administration power from regional governments to the federal government. They argue that such upward delegation is unconstitutional as the Ethiopian Constitution does not explicitly

On the other hand, in 2015, the director of the Agricultural Investment Land Administration Agency (AILAA) noted that approximately 500 000 hectares of land had been transferred by the federal government alone. This suggests that obtaining accurate data on the extent of land transfer is difficult. However, all sources show that a significant measure of land was handed over to investors. J Keeley et al *Large-scale land deals in Ethiopia: Scales, features and outcomes to date* (2014) 23; L Cotula et al 'Testing claims about large land deals in Africa: Findings from a multi-country study' (2014) 50 *Journal of Development Studies* 903 907; interview with the director of the AILAA, Addis Ababa, Ethiopia, 16 November 2015; interview with a senior official at the AILAA, Addis Ababa, Ethiopia, 17 November 2015.

- 21 Ethiopia's Investment Commission, a federal institution, was responsible for issuing investment licences, including agricultural investment licences, to foreign investors before the establishment of the AILAA.
- 22 D Rahmato 'The perils of development from above: Land deals in Ethiopia' (2014) 12 *African Identities* 26 29.
- 23 Art 3 of the Council of Ministers Regulation to Establish the Ethiopian Agricultural Investment Land Administration Agency, Regulation 283/2013, *Federal Negarit Gaette*, 19th Year No 32 (2013).
- 24 Cotula et al (n 20 above); Keeley et al (n 20 above); interview with the director of the AILAA (Addis Ababa, 16 November 2015); interviews (n 20 above).

allow this type of delegation.<sup>25</sup> One of these scholars, Fiseha, further argues that the drafting history does not support the interpretation that upward delegation is allowed under the Ethiopian Constitution.<sup>26</sup>

It may be argued that a mere upward delegation is not contrary to the Ethiopian Constitution. That said, to have any validity, any delegation of power needs to be made in accordance with a prescribed law, and the will and consent of the communities concerned, which can be expressed through direct or indirect participation.<sup>27</sup>

Seen from this perspective, the delegation to the federal government was made neither in accordance with any promulgated law nor consistent with the letter and spirit of the Ethiopian Constitution. The people of the regions did not consent to the upward delegation, either through their direct participation or that of their elected representatives in Parliament. Instead, it was the executive organ of the regional states and, in the case of the Gambella region, only the president of the region (apparently without deliberations even with the regional cabinet), who delegated the power to the federal government.<sup>28</sup> There was no prescribed law on the basis of which the executive organs of the Gambella and Benishangul-Gumuz regions could have delegated such power. Furthermore, the parliament of each region, the highest authority in each region,<sup>29</sup> did not approve the delegation of power to the federal government.

In the absence of explicit power empowering the executive organ of each regional state to delegate power to the federal government, one would have expected that such delegation should be made, or at least be approved, by the highest organ in each region, namely,

25 Eg, Tamrat and Fiseha argue that the upward delegation stands on shaky constitutional ground as this type of delegation is not explicitly provided for in the Ethiopian Constitution. See, eg, I Tamrat 'Governance of large-scale agricultural land investments in Africa: The case of Ethiopia' Paper presented at the World Bank conference on land policy and administration, Washington DC, World Bank, 2010; Fiseha (n 10 above) 447. The views of Tamrat and Fiseha are contested by Stebek, who is of the view that federal government can allocate land for various purposes without even obtaining any delegation from the regions. See E Stebek 'Between "land grabs" and agricultural investment: Land rent contracts with foreign investors and Ethiopia's normative setting in focus' (2011) 5 *Mizan Law Review* 175 178.

26 Fiseha (n 10 above) 447.

27 Direct participation refers to the participation of the people themselves. Indirect participation refers to participation through their elected representatives.

28 Interview with a former advisor to the Office of the President of the Gambella's Regional State, Addis Ababa, Ethiopia, 27 January 2016; OM Ujulu 'Large-scale land acquisitions and minorities/indigenous peoples' rights under ethnic federalism in Ethiopia: A case study of Gambella Regional State' unpublished PhD thesis, University of Bradford, 2013 189.

29 In each region, Parliament is the highest authority. The executive organs of regional states are accountable to Parliament. See art 48(1) of the Gambella Regional State Constitution and art 46(1) of the Benishangul-Gumuz Regional State Constitution.

parliament. However, regional executive officials did not consult parliament, much less seek its approval. By so doing, the executive officials apparently exceeded their limits set under the regional state constitutions and the Ethiopian Constitution.

The apparent unconstitutional delegation seems to have been made against the backdrop of power that the federal government wields over regional states. The federal government in practice has an overriding power over regional governments.<sup>30</sup> As will be explained below, this is because of the top-down approaches of the EPRDF in formulating and implementing matters of economic, social and other development, depriving regional states of their constitutionally-enshrined powers.

Clapham notes that the EPRDF's ethnic based federalism has provided less than it promised, and the contradictions between local autonomy and central power are usually settled in favour of the latter.<sup>31</sup> There is a huge presence and influence of the federal government through the ruling party – the EPRDF – making it appear more as a unitary state than a federation, apparently against the spirit of the Constitution.<sup>32</sup> The EPRDF continues to undermine and, at times, thwart the federal arrangement as it retains all real power at the centre, limiting local participation on numerous policies.<sup>33</sup>

The EPRDF is a strongly-centralised dominant party that predetermines decisions from the centre to even the lowest administrative unit, the *kebele*, in Ethiopia.<sup>34</sup> This is based largely on the party's ideology of democratic centralism where party officials at all levels are accountable to the level above.<sup>35</sup> This means that party officials at the regional level are accountable to party officials who lead the federal government at the centre. This promotes the formulation of top-down policies which are often implemented through a 'tendency of ruling by coercion and imposed solutions'.<sup>36</sup> The ramification of the party's structure, which overshadows federal and regional government institutions, is that regional states play a minor role in the design of policies as these are formulated at the centre with little or no involvement from below.<sup>37</sup>

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30 C Clapham 'Post-war Ethiopia: The trajectories of crisis' (2009) 36 *Review of African Political Economy* 181 187.

31 As above.

32 J Abbink 'Ethnic-based federalism and ethnicity in Ethiopia: Reassessing the experiment after twenty years' (2011) 5 *Journal of Eastern African Studies* 596 602.

33 Abbink (n 32 above) 604.

34 International Crisis Group 'Ethiopia: Ethnic federalism and its discontents' Africa Report No 153, 2009 15.

35 L Aalen 'Ethnic federalism and self-determination for nationalities in a semi-authoritarian state: The case of Ethiopia' (2006) 13 *International Journal on Minority and Group Rights* 243 250.

36 Abbink (n 32 above) 608.

37 Fiseha (n 10 above) 458.

Furthermore, there is a blurred border between state and the EPRDF, contributing to undermining the division of power.<sup>38</sup> As Markakis observes, the party-state merger gives the regime effective control to impose its policies throughout the country with little or no variation.<sup>39</sup> The overwhelming control of the EPRDF and its affiliate parties in both federal and regional states apparently contributes to the state-party merger. In 2015, the EPRDF and its affiliate parties controlled 100 per cent of the seats in the federal parliament.

The affiliate parties, which control some regions, including the Gambella and Benishangul-Gumuz regions, are also overshadowed by the EPRDF. Vaughen and Tronvoll note that the EPRDF influences the internal politics of regional states controlled by affiliate parties through different mechanisms, including removing members of the affiliate parties from their political positions.<sup>40</sup> The presidents of regional states, controlled by the affiliate parties, are tacitly hand-picked by the federal government.<sup>41</sup> Thus, in practice, regional authorities derive their authority from the centre, and are only marginally accountable to the local population.<sup>42</sup>

Against this background, the federal government apparently exerted pressure on regional states to transfer land to the federal land bank.<sup>43</sup> As Abbink remarks, '[t]he chief agents in the land leasing at present are not the governments of the, in name autonomous, regional states of Ethiopia, but the federal government'.<sup>44</sup> The top-down approach of the EPRDF has been actively pursued, particularly following the government's recent emphasis on 'development' in the 'sense of grand infrastructure investments and commercial agriculture ventures by investors being given large tracts of land'.<sup>45</sup>

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38 Aalen (n 35 above) 251.

39 J Markakis *Ethiopia: The last two frontiers* (2011) 246. Markakis states that it is no wonder Ethiopians see no difference between party and state as policy directives come from the centre to be discussed by party committees before being taken up by the elected bodies that endorse such policies virtually without opposition.

40 S Vaughan & K Tronvoll *The culture of power in contemporary Ethiopian political life* (2003) 134.

41 Eg, regional presidents of the Somali region in some cases have tacitly been picked or removed when this is deemed necessary by the federal government. Other heads of regional states were also selected by the federal government even though the regional parliament was responsible to do so. See A Ismail 'Ethiopian federalism: Autonomy versus control in the Somali region' (2004) 25 *Third World Quarterly* 1131–1142–1143.

42 Ismail (n 41 above) 1147.

43 Fiseha (n 10 above) 447.

44 J Abbink 'Land to the foreigners: Economic, legal, and socio-cultural aspects of new land acquisition schemes in Ethiopia' (2011) 29 *Journal of Contemporary African Studies* 515–517.

45 Abbink (n 32 above) 609.

At the end of 2016, the federal government relinquished its 'delegated power' of directly administering and allocating land.<sup>46</sup> This decision was made by the Prime Minister of Ethiopia following an investigation into large-scale commercial farming in the Gambella region, which reportedly found the overall performance of large-scale farming in the region very poor.<sup>47</sup> As the delegation was made without any legal procedures, so was the power to relinquish the delegated power.

In general, the transfer of power in the name of 'delegation of power', albeit without prescribed laws and procedures, can be seen as an instrument to camouflage the arbitrary ways in which the government officials acted. In other words, the 'delegation' was an instrument of legitimising the actions of government officials. Therefore, the process through which the delegation of power and the subsequent relinquishment was made illustrates how the executive government officials at both regional and federal government are more powerful than the law-making organs, on paper the highest authorities.

In principle, the actions of the regional state and federal officials could have been challenged before the House of the Federation, the organ responsible for settling constitutional disputes in Ethiopia.<sup>48</sup> However, there have been no reported complaints challenging the excessive powers of the executive officials before the House of the Federation.

Admittedly, as Haile points out, mechanisms to limit the power of government officials, be it in terms of the separation of powers or acting within the confines of the law, 'make sense only if there is an independent body to decide whether the government has exceeded the limits to its power set by the Constitution'.<sup>49</sup> The independence of the House of the Federation is questionable.<sup>50</sup> Seen in this light, the prospects of bringing a successful legal action contesting that the actions of executive officials exceeded the powers set by the Ethiopian Constitution would have been challenging.

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46 'በጀትና የተተዘገበው የጊዜበት የሚሰራ እንዲሸጠውንት' ('Gambella's agricultural investment entangled with problems') *Reporter* 21 December 2016; T Hindyea 'An analysis of how large-scale agricultural land acquisitions in Ethiopia have been justified, implemented and opposed' (2018) 16 *African Identities* 18.

47 As above.

48 Art 83(1) Ethiopian Constitution.

49 M Haile 'The new Ethiopian Constitution: Its impact upon unity, human rights and development' (1996) 20 *Suffolk Transnational Law Review* 1 53.

50 A Kefale *Federalism and ethnic conflict in Ethiopia: A comparative regional study* (2013) 152.

### **3.2 Right of ethnic minorities to participate in decisions affecting the utilisation of their land resources as an integral part of their rights to self-determination**

As noted earlier, the right of ethnic minorities to participate or be consulted in decisions affecting the utilisation of their land resources may be seen as an integral part of their right to self-determination.<sup>51</sup> According to the Ethiopian Constitution, communities have the right to be consulted on the initiation and approval of projects affecting their physical, cultural and socio-economic livelihoods.<sup>52</sup>

The environmental policy of Ethiopia also seeks to empower and ensure the participation of local communities at all levels in environment management activities.<sup>53</sup> It specifically provides that all phases of environmental and resource development management, 'from project conception to planning and implementation to monitoring and evaluation, are undertaken based on the decisions of the resource users'.<sup>54</sup> The policy even envisages granting power to communities to make decisions on matters affecting their livelihoods and the environment. It provides that this needs to be done as sustainable environmental and economic production systems are unthinkable in the absence of power to make decisions on matters impacting on one's livelihood.<sup>55</sup>

#### **3.2.1 Challenges in ensuring the participatory rights of ethnic minorities**

The practice surrounding large-scale land acquisitions contrasts sharply with the rights of local communities to participate in decisions affecting the utilisation of their land resources. Communities in the Gambella and Benishangul-Gumuz regions have been marginalised in the process of large-scale land transfers. In some instances, 'investment lands' were identified based on the spatial analysis of satellite images and aerial photographs without verifying the data through community-level socio-economic field research.<sup>56</sup> Important aspects, such as local land use practices and patterns, were not taken into account in the land allocations, causing problems for the communities' livelihoods as well as the environment.<sup>57</sup> For example, the Gambella Investment Agency has helped investors to identify land that suited their interests without taking the conflicting land uses into

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51 See n 17 above.

52 Art 43(2) Ethiopian Constitution.

53 Sec 2(2)(g) Environmental Policy of Ethiopia.

54 Sec 4(2)(a) Environmental Policy of Ethiopia.

55 Sec 2(3)(b) Environmental Policy of Ethiopia.

56 T Moreda 'Postponed local concerns? Implications of land acquisitions for indigenous local communities in Benishangul-Gumuz Regional State, Ethiopia' Land Deal Politics Initiative (LDPI) Working Paper, February 2013 20.

57 As above.

account,<sup>58</sup> mainly land used by pastoralists and shifting cultivators.

Furthermore, negotiations leading to the conclusion of land deals for the appropriation of land in Ethiopia occur behind closed doors. Land contracts are concluded by the government and investors without the knowledge of the local communities. For instance, many local communities in Gambella became aware of the transfer of their traditional land to investors only after investors started to clear the land for farm operations.<sup>59</sup>

The effort to contact local communities is often made only after the land transfer has been made on paper. Even so, in many cases representatives of the local communities who were invited for consultation were hand-picked by local administrators instead of the local communities.<sup>60</sup> Often local officials were instructed to convince the local communities to accept the transfer of their traditional land to investors. Even when local communities resisted the transfer of their land to investors, the land appropriation in any event took place through assaults, threats and, in some cases, arrests.<sup>61</sup>

Little effort has been made to challenge the marginalisation of these communities in the utilisation of their land resources before domestic courts. Apparently this is due to the local communities' poor image of the judicial organs. The limited power that Ethiopia's land laws give to judicial organs to review the administrative decisions of government officials may also explain why there has been little or no recourse to domestic courts.<sup>62</sup> Fiseha notes that the judiciary in Ethiopia has abandoned its main function of reviewing the acts and decisions of the executive branch of the government, paving the way for arbitrary and unchecked government.<sup>63</sup> Even though the judiciary is constitutionally independent of both the executive and Parliament, this autonomy has been constrained because of the considerable influence of the executive branch. According to the World Bank, 'a long history of centralised governmental authority and a judiciary

- 58 G Schoneveld 'The challenges of governing Africa's new agricultural investment landscapes: An analysis of policy arrangements and sustainability outcomes in Ethiopia and Nigeria' (2015) 6 *Forests* 88 102.
- 59 D Rahmato 'Land to investors: Large-scale land transfers in Ethiopia' Forum for Social Studies (2011) 21.
- 60 Interview with expert 1 at the AILAA, Addis Ababa, Ethiopia, 19 November 2015.
- 61 Human Rights Watch "'Waiting here for death": Forced displacement and "villagisation" in Ethiopia's Gambella region' Human Rights Watch (2012) 26.
- 62 See art 11(1) of the Proclamation to Provide for the Expropriation of Land Holdings for Public Purposes and Payment of Compensation, Proclamation 455/2005, *Federal Negarit Gazeta*, 11th Year No 43. This provision stipulates that the decision of the relevant body can be challenged in a court having jurisdiction when the dispute relates to the amount of compensation, suggesting that other government official decisions in relation to the transfer of land cannot be challenged in a court of law. See also MA Srur 'State policy and law in relation to land alienation in Ethiopia' unpublished PhD thesis, University of Warwick, 2014 161.
- 63 A Fiseha 'Separation of powers and its implications for the judiciary in Ethiopia' (2011) 5 *Journal of Eastern African Studies* 702.

subjugated to the executive branch has fostered a weak judicial branch with reduced capacity to exercise genuine independence'.<sup>64</sup> The judicial system has also been highly politicised with little regard to the rule of law.<sup>65</sup> Furthermore, the judicial system has a poor public image: Many people perceive it as serving the interests of the ruling party instead of the larger public.<sup>66</sup> Ironically, because of the public's perception of the judiciary as lacking independence and impartiality, many citizens are increasingly seeking justice from the executive branch as opposed to the courts by petitioning to higher government officials.<sup>67</sup>

This also apparently occurred in the case of some local communities affected by large-scale land transfers in the Gambella region, who brought their complaints against land dispossessions to government executive officials instead of the courts, albeit unsuccessfully.<sup>68</sup> While most of these complaints were made at the *woreda* (local administrative unit in Ethiopia) level, one of the complaints by local communities in the Majang zone proceeded to higher government levels (both regional and federal). The land lease was for the transfer of 3 012 hectares to an Indian company in the Majang zone of the Gambella region. The large-scale land transfer involved the allocation of land to the investor, where the transferred land consisted of natural forests that are vital for the local communities' livelihoods as well as places considered sacred by the local communities.<sup>69</sup>

The complaint by the Majang zone local communities and the responses of different government officials at both federal and regional level are significant to the rule of law issues under discussion, and the case as researched by Ujulu is discussed below.<sup>70</sup> The contract for the transfer of the land in the Gambella region, Majang zone (more specifically in Gumare and Kabu villages) was concluded by the federal government and Verdanta Harvests Plc. When the local communities became aware of the transfer of the land, they approached the *woreda* and higher regional state officials to enquire about the deal. They were informed that the contract had been

<sup>64</sup> The World Bank 'Ethiopia: Legal and judicial sector assessment' Washington DC, Legal Vice-Presidency, World Bank (2004) 18.

<sup>65</sup> HG Gabisa 'Justice system reform programme in Ethiopia: Is rule of law lost in translation?' (2015) 23 *African Journal of International and Comparative Law* 291 312-313; Allo & Tesfaye (n 6 above).

<sup>66</sup> For further details, see Fiseha (n 63 above) 709; M Rheault 'Few Ethiopians confident in their institutions' GALLUP, January 2008 <http://www.gallup.com/poll/104029/few-ethiopians-confident-their-institutions.aspx> (accessed 24 September 2015); Federal Democratic Republic of Ethiopia Ministry of Capacity Building *Comprehensive justice system reform programme: Baseline study report* (2005) 14.

<sup>67</sup> K Micheal & T Melaku 'Petitioning the executive in Ethiopia: Trends, implications, and propriety of institutionalising petitioning' in P Toggia et al (eds) *Access to justice in Ethiopia: Towards inventory of issues* (2014) 87.

<sup>68</sup> Ujulu (n 28 above) 5.

<sup>69</sup> Stebek (n 25 above) 200.

<sup>70</sup> Ujulu (n 28 above) 1-3.

signed, but that the regional state could do nothing about it as the federal government had concluded it. This prompted the local communities to send representatives to the federal government to discuss their concerns about the transfer of the land to Verdanta Harvests Plc. While the relevant ministries were not willing to discuss their concerns, the representatives finally managed to get access to Mr Girma Wolde-Giorgis, the then President of Ethiopia (whose position nonetheless is more that of a figurehead). The President subsequently wrote a letter to the Environmental Protection Authority (EPA), demanding that action be taken which addresses the concerns of the local communities. Following this, the EPA wrote a letter to the Ministry of Agriculture and Rural Development (MoARD) (copying it to the Gambella regional state council and the Godere *woreda* administration council) to reconsider its decision of transferring the particular land under discussion. Nonetheless, the request was not accepted. Instead, the governor of Gambella regional state wrote a letter to *woreda* officials instructing them to hand over the land to Verdanta Harvests Plc.<sup>71</sup>

As their complaints were not addressed by the regional state government and the MoARD (now the Ministry of Agriculture and Natural Resources), the representative of the villagers wrote another letter to the President, who then 'wrote a direct letter to the MOARD literally telling them to suspend the project on environmental grounds, echoing the previous letter written by the EPA'.<sup>72</sup> However, the MoARD did not respond to the President's letter. Instead, the head of one of the village councils who spearheaded the resistance against the land dispossessions was dismissed by the *woreda* administrator.

This case demonstrates that higher government executive officials at both regional and federal government – 'arbitrating' in their own case – decided against the complaints of the local communities. The interventions by the EPA and the President of Ethiopia (a figurehead of the state who has little power under the Ethiopian Constitution)<sup>73</sup> were not successful. This illustrates how the MoARD and higher Gambella regional state officials persisted in their actions despite being challenged on the consistency of their actions within the law. The MoARD's disregard of the request from the EPA, an organ responsible to monitor and regulate projects that could affect the environment, illustrates how an organ that is created to check the actions of government officials and institutions may not be able to

71 As above.

72 Ujulu (n 28 above) 4.

73 In Ethiopia, the Prime Minister is the commander-in-chief and leads the executive branch of the government. The President, on the other hand, has only ceremonial powers and functions according to art 71 of the Ethiopian Constitution. The MoARD, now the Ministry of Agriculture and Natural Resources, is directly responsible to the Prime Minister.

discharge its responsibility in the face of government officials whose powers in practice apparently are unchallengeable.

With the absence of an independent judicial organ or any other independent organ that checks the actions of the MoARD and Gambella regional authorities, the local communities affected by the allocation of their land to investors did not have appropriate domestic forums from which they could seek justice. Thus, they were denied both access to justice and the subsequent remedy they might have received.

### **3.2.2 Possibilities for addressing the challenges related to the participatory rights of ethnic minorities**

Land dispossessions and the subsequent lack of access to justice are not problems occurring only in Ethiopia. Many ethnic minorities have been dispossessed of their land for both commercial and non-commercial purposes in many parts of the world, including in Africa. Some of these communities have not been successful in getting a remedy from domestic forums. However, some experiences show that they have successfully lodged their complaints to regional institutions. In the context of Africa, the complaints filed by the Endorois communities in Kenya<sup>74</sup> and the Ogoni people in Nigeria<sup>75</sup> before the African Commission on Human and Peoples' Rights (African Commission) and the subsequent decisions rendered can be cited as instances where regional institutions played an important role in terms of providing access to justice and remedies to communities that have not been able to obtain justice from domestic forums. Similarly, local communities in Ethiopia affected by the large-scale land acquisitions can resort to regional institutions, including the African Commission, to seek a remedy against their land dispossessions. As will be noted below, in addition to regional judicial institutions, individuals and civil society organisations can assist these communities in their pursuit of justice.

In the *Endorois* case, the complainants alleged that the government of Kenya forcefully had removed them from their ancestral land to make way for a game reserve 'without proper prior consultations, adequate and effective compensation'.<sup>76</sup> This eviction prevented them from accessing vital resources for their survival. The complainants alleged that the Kenyan government's measures violated the Kenyan Constitution, the African Charter on Human and Peoples' Rights (African Charter) and international law.<sup>77</sup> The complains were lodged by two advocacy organisations, namely, the

74 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

75 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case).

76 *Endorois* case (n 74 above) para 2.

77 As above.

Centre for Minority Rights Development (CMRD), an organisation based in Kenya, and the Minority Rights Group International (MRGI) on behalf of the Endorois community.

It is beyond the scope of this article to discuss the details of the case. However, briefly stated, on the facts of the case the African Commission found that the Endorois community had been arbitrarily dispossessed of their land. The Commission noted that no effective consultations had been undertaken.<sup>78</sup> It further noted that 'no collective land of equal value was ever accorded'.<sup>79</sup> The Endorois rather were 'relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the lake area's medicinal salt licks or traditional water sources'.<sup>80</sup> Finally, the African Commission ruled that the Kenyan state should implement the following relief, among others: to restitute the Endorois land; to pay adequate compensation to the community for the loss suffered; and to allow unrestricted access in the appropriated land for the community's cultural activities and for the grazing of their cattle.

In the SERAC case, the complainants alleged violations by the Nigerian government of the rights of the Ogoni people as a result of irresponsible oil development practices in their territories. One of the violations cited by the complainants was the right of the Ogoni people to freely dispose of their land resources under article 21 of the African Charter. On the facts, the African Commission ruled that 'contrary to its Charter obligations and despite such internationally established principles, the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis', and it found the government to be in violation of a number of rights, including article 21 of the African Charter.<sup>81</sup> The legal recourse of the Ogoni people to the African Commission was assisted by two non-governmental organisations (NGOs). These were the Social and Economic Rights Action Centre (SERAC), based in Nigeria, and the Centre for Economic and Social Rights (CESR), based in New York, United States.

Important lessons may be drawn from these cases. The cases demonstrate the important role regional institutions, in this case the African Commission, can play in becoming a forum for communities to access justice, especially when efforts to seek a remedy at national level are unsuccessful. Local communities in the Gambella and Benishangul-Gumuz regions (affected by the large-scale land dispossession discussed earlier) can lodge complaints before the African Commission to obtain a ruling in their favour. That said, domestic legal remedies, particularly from the House of the

78 *Endorois* case (n 74 above) paras 290 & 297.

79 *Endorois* case paras 286 & 268.

80 *Endorois* case para 286.

81 SERAC case (n 75 above) para 58.

Federation, should be sought before lodging complaints before the African Commission.

Furthermore, many communities in the Gambella and Benishangul-Gumuz regions qualify to be indigenous peoples.<sup>82</sup> They can thus lodge their complaints as indigenous peoples, as the Endorois community did, to benefit from the rights of peoples enshrined under the African Charter. The legal concept of indigenous peoples can have some strategic use to draw attention to the necessity of maintaining access and ties to, and control over, their traditional land, thereby contributing towards a successful legal challenge against the dispossession of their land.<sup>83</sup>

This is not to suggest that the African Commission can force the Ethiopian government to change its behaviour on how it acts in relation to the utilisation of ethnic minorities' land resources. Admittedly, the Commission's rulings may not be implemented by the government. However, rulings by regional institutions can have far-reaching implications in deterring the arbitrary actions of government officials in the future. Regional institutions, including the African Commission, in the context of ethnic minorities in Ethiopia, can be used as forums where communities can increase their visibility in their resistance against the violation of their rights. Such forums can also be used to produce, to borrow words from Allo, 'knowledge and counter-narrative for peoples who can use that narrative to challenge the government in terms of their engagement with various institutions'.<sup>84</sup> Thus, regional institutions, including the African Commission, can serve as institutions that produce discursive tools through which the actions of government officials are challenged and delegitimised. This is likely to contribute towards pressurising the government to change its behaviour, at least in the longer term.

Furthermore, these cases demonstrate that individuals and civil society organisations can play an important role in assisting communities in their effort to challenge land dispossession. Apparently it is difficult for communities in the lowlands of Ethiopia to have easy access to regional institutions, given their financial constraints and limited legal and technical expertise. In the *Endorois* and *SERAC* cases, such constraints apparently were overcome through the assistance of civil societies based at home and elsewhere.

Such experience can be particularly relevant to challenge land dispossessions of local communities in Ethiopia. The role of organisations in voicing the concerns of vulnerable groups in Ethiopia

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82 See, eg, African Commission & IWGIA *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, adopted at the 34th session of the African Commission (2003) 18.

83 See, eg, F Viljoen *International human rights law in Africa* (2012) 233.

84 A Allo, London School of Economics Africa summit, 2017.

is limited.<sup>85</sup> This is particularly the case following the enactment of the Charities and Societies Proclamation,<sup>86</sup> which restricted the financial sources of civil society organisations engaged in advocacy and human rights issues.<sup>87</sup> With the limited capacity of domestic civil society organisations in Ethiopia, co-operation between individuals or civil society organisations based in Ethiopia and international organisations or individuals abroad may prove to be useful in assisting to bring a successful legal challenge before the African Commission.

This is not to suggest that regional institutions, including the African Commission, can be a panacea for all rule of law challenges ethnic minorities in the lowlands of Ethiopia face in controlling and exploiting their land resources. It is rather to suggest that this can partly contribute towards redressing the injustices related to large-scale land dispossession.

#### 4 Conclusion

This article illustrates the challenges facing the rule of law with regard to the constitutional rights of Ethiopia's ethnic minorities, by taking as a case study the government's measures in large-scale agricultural land acquisitions in the Gambella and Benishangul-Gumuz regions. The Ethiopian Constitution confers extensive rights on ethnic communities, including the right of self-determination and the corollary right of participation in projects affecting the utilisation of land resources. However, the enforcement of the legal rhetoric of self-determination and participation of ethnic minorities in decisions affecting the utilisation of their land resources, especially in the Gambella and Benishangul-Gumuz regions, where most of the current large-scale land acquisitions have been taking place, has been dismal.

The article discussed some of the challenges to the rule of law in Ethiopia by focusing on the transfer of constitutionally-enshrined power from regional states to the federal government in the name of delegation and the challenges in the participation of ethnic minorities in decisions affecting the utilisation of their land resources. Government officials at both federal and regional levels transferred power from regional states to the federal government, apparently against the letter and the spirit of the Ethiopian Constitution. There was also no prescribed law on the basis of which such delegation

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85 For further details see D Rahmato 'Civil society organisations in Ethiopia' in B Zewde & S Pauswangs (eds) *Ethiopia: The challenge of democracy from below* (2002) 103-119; K Berhanu 'The role of NGOs in protecting democratic values: The Ethiopian experience' in Zewde & Pauswangs (above) 120-129.

86 Proclamation to Provide for the Registration and Regulation of Charities and Societies, Proclamation 621/2009, *Federal Negarit Gazeta*, 15th Year No 25 (Charities and Societies Proclamation).

87 According to art 2(2) of the Charities and Societies Proclamation, a minimum of 90% of the income of any advocacy and human rights organisation in Ethiopia has to come from a domestic source.

could have been made. Furthermore, communities in the Gambella and Benishangl-Gumuz regions have been significantly marginalised from directly participating in decisions affecting the utilisation of their land resources. Efforts to seek justice from domestic institutions have been unsuccessful.

The article contends that, given the limited role that domestic forums in Ethiopia can play in addressing the challenges discussed in the article, resorting to sub-regional and regional institutions, including the African Commission, is important in the pursuit of justice against land dispossession. For this to happen, the role of civil society, including the assistance of individuals and NGOs, to ethnic minorities' efforts to challenge arbitrary actions of the Ethiopian government is critical. This is not to suggest that the African Commission can force the Ethiopian government to change its behaviour. However, rulings by regional institutions can have far-reaching implications in deterring the arbitrary actions of government officials in the future. More importantly, such rulings serve as discursive tools for affected communities to challenge and delegitimise the arbitrary actions of government officials. This, in turn, will provide these communities with more tools in their struggle against land dispossession.