

# The Power to Administer Land in Ethiopia: Scrutinizing Federal Legislative Interventions

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## Abstract

*This article examines the legislative interventions of the Federal Government against States' power to administer land in Ethiopia. The Ethiopian federal system prohibits interventions against the functions assigned to one level of government. Nonetheless, when the Federal Government enacted the Urban Lands Registration Proclamation No. 818/2014 and it took the power to allocate land parcels above 5000hrs to investors from States by delegation, the process results for legislative intervention as it is contrary to what the federal system requires. Being qualitative methodologically, the article assessed the FDRE Constitution and relevant federal and regional rural land laws; reviewed related literature and conducted interviews. Following detailed analysis on the issues, the article recommends that the transferred land allocation power for investors shall be returned to States. Also, enacting urban land registration law should have been left to States by virtue of residual power under the Constitution.*

**Keywords:** Federalism, Federal Government, Intervention, Land Administration, Regional Governments

## 1. Introduction

There is no universally agreed and single definition for the term federalism despite a number of efforts to define it based on different perspectives. Federalism is a form of government where the component units of a political organization participate in sharing powers and functions in a cooperative manner.<sup>1</sup> It demands cooperation between each level of government in order to promote the welfare of the people through their combined powers and involves, *inter alia*, the following elements: separateness and independence of

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<sup>1</sup> Oruware N, Fiscal Federalism and Resource Control Agitations: Implications for Nigeria's Socio-Economic Development *Research on Humanities and Social Sciences* ISSN (Paper) 2224-5766 ISSN (Online) 2225-0484 (Online) Vol. 5, No. 18, 2015, p. 7.

each government; mutual non-interference of inter-government immunities; the question of equality between the state governments; the number of state governments whom a federal government can meaningfully exist; techniques for division of powers and a supreme constitution.<sup>2</sup> As well, it is a system which holds that the ideal organization of human affairs is best reflected in the celebration of diversity through unity.<sup>3</sup> It also refers to the doctrine which advocates and promotes the form of organization of a State in which power is dispersed or decentralized by contract as a means of safeguarding local identities and individual liberties.<sup>4</sup>

Constitutional arrangements in federations help to enable the sub-national entities to take part in the decisions of important matters that affect them at the national level.<sup>5</sup> In federations, land shall be administered with legal and policy frameworks and the policy shall usually be reflected and implemented through legislations enacted by organs authorized to do so.<sup>6</sup> As well, administering land requires activities to be done by various stakeholders including setting the legal framework that the administration process shall operate; establishing institutions working on it among many other activities.

Ethiopia has adopted a federal system of government *de facto* since 1991 and *de jure* dating 1995 with a view to decentralize power and resources from the center and to accommodate the diverse ethno-linguistic groups that exist in the country.<sup>7</sup> The federal constitution makes this quite explicit by establishing a Federal and Democratic state structure with autonomous state members to it.<sup>8</sup> Following this arrangement, powers and functions of the government are

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<sup>2</sup> Nwabueze, B., Constitutional History of Nigeria, *the Journal of Modern African Studies*, Vol. 23, Issue 1, (March 1985) p. 172-174. & Lagos Longman in Joseph C. Ebegbulem, Federalism and the Politics of Resource Control in Nigeria: A Critical Analysis of the Niger Delta Crisis, *International Journal of Humanities and Social Science*, Vol. 1 No. 12; (2011), p. 224.

<sup>3</sup> Getachew Assefa, *Ethiopian Constitutional Law with Comparative Notes and Materials: A Text Book*, 1<sup>st</sup> edition, School of law, Addis Ababa University, Addis Ababa, (2012), p. 372.

<sup>4</sup> Babawale T, The impact of the Military on Nigerian Federalism in Ngozi N and Adewale K, Fiscal Federalism and Resource Control in Nigeria, *IOSR Journal of Economics and Finance (IOSR-JEF)* e-ISSN: 2321-5933, p-ISSN: 2321-5925. Vol. 6, No. 4, (2015), p. 22.

<sup>5</sup> Ostrom V, *The meaning of American federalism: Constituting Self-governing Society*, 1<sup>st</sup> edition, San Francisco, California: A publication of the Center for Self-Governance, (1991), p. 7.

<sup>6</sup> Samuel Gebreselassie, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios, (2006) available at [www.future-agricultures.org](http://www.future-agricultures.org), last accessed on December 2015.

<sup>7</sup> Assefa Fiseha. 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)' *Mizan Law Review*, Vol. 1, No. 1, (2007), p. 1.

<sup>8</sup> See Federal Democratic Republic of Ethiopia Constitution, Proclamation No.1/1995, Fed. Neg. Gaz. 1st year No. 1 (Hereinafter FDRE Constitution), According to Art, 1, Ethiopia is a federal democratic and republic state. Also, pursuant to its Article 47, the federation

devolved in between the Federal Government and the federating States. While the Federal Government has the exclusive authority on those powers and functions that are listed under Article 51 and some other provisions in the constitution,<sup>9</sup> the States exercise residual powers, functions that are not exclusively given to the Federal and State Governments or concurrently to both.<sup>10</sup> Specific to land related powers, Regional States have the power to administer land in their territories while legislative powers concerning the utilization and conservation of land belongs to the Federal Government.<sup>11</sup>

While a federal constitution serves as a base in setting a federal system regulating the powers of the federating members, there is no room for a certain Federal Government to alter the power of the units without amending the constitution and the vice versa.<sup>12</sup> Similarly, in a federation, the self-governing status of the component states is constitutionally entrenched and may not be altered by a unilateral decision of the Central Government.<sup>13</sup> In a federal context, intervention of one level of government against the powers and functions of the other is a serious violation of constitutional principles, basically constitutional supremacy and non-interference in the powers and functions assigned to one level of government. This fact, added to the nature of the political system and the culture of democracy in Ethiopia, forces one to doubt the implementation of constitutionally stipulated principles including the power sharing scheme. The federal principle of constitutionally enshrined and guaranteed division of power implies that federalism is rigid and needs the participation of not only both levels of governments but also the citizens

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constitutes the State of Tigray, the State of Afar, the State of Amhara, the State of Oromia, the State of Somalia, the State of Benshangul Gumuz, the State of the Southern Nations, Nationalities and Peoples, the State of the Gambela Peoples, the State of the Harari People are member states of the federation; and the Addis Ababa City Administration and the Dire Dawa City Administration which are accountable to the federal administration.

<sup>9</sup> Federal Government powers that are not mentioned under Article 51 but indicated elsewhere include the power to enact a labour code, commercial code, penal code, approval of federal appointments submitted by the executive, and the establishment of federal institutions (see FDRE constitution, *supra* notes 8, Arts 55(3), 55(4), 55(5), and 55(13)).

<sup>10</sup> *Ibid*, Art, 52 (1).

<sup>11</sup> *Ibid*, Arts 52(2, e) and 51(5).

<sup>12</sup> Abate Nikodimos, 'Ethnic Federalism in Ethiopia: Challenges and Opportunities' (Master thesis, University of Lund, 2004).

<sup>13</sup> Bin H, *Distribution of Powers between Central Governments and Sub-National Governments*, Conference paper presented to Committee of Experts on Public Administration Eleventh session New York, 16-20 April 2011, p. 1 (hereinafter, Bin H, *Distribution of Powers between Central Governments and Sub-National Governments*).

to amend it.<sup>14</sup> Legally speaking, in Ethiopia, it is a must to first amend the constitution before taking the power/s that is/are expressly or impliedly assigned to one level of government.<sup>15</sup>

However, there are incidents where the Federal Government has intervened against Regional States' power to administer land over the past few years without formally amending the constitution. When the Federal Government enacted the Federal Urban Lands Registration Proclamation No. 818/2014,<sup>16</sup> in effect, this level of government is involving itself in administering land which is constitutionally assigned to the States.<sup>17</sup> Similarly, the Federal Government took the power to allocate rural land parcels above 5000hrs to investors from States and assigned the Federal Ministry of Agriculture and Rural Development to lead the allocation of the land to investors.<sup>18</sup> The federal government defended the transfer due to upward delegation<sup>19</sup> though this delegation is not addressed in the constitution and the constitutional minute has clearly prohibited the delegation of State functions to the Federal Government.

The main thesis in this article is to examine the legislative interventions of the Federal Government against States' power to administer land in Ethiopia. Also, the constitutionality of the interventions in light with the nature of the federal approach in the country is explored. The types of data used in this piece are both primary and secondary where extensive library and web search along with interviews with individuals who are informed to the issues is made. With the motive to systematically scrutinize the legislative interventions of the Federal Government against States' power to administer land with a test

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<sup>14</sup> Assefa Fiseha, Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet (2012) available at <http://dx.doi.org/10.1080/13597566.2012.709502> last accessed 25 January 2016, p. 446 (hereinafter, Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet').

<sup>15</sup> One exception, however, is the issue of delegation; by which transfer of power from one level of government to the other is possible without a need to go through constitutional amendments so long as this possibility is provided by the constitution in advance.

<sup>16</sup> Proclamation No. 818/2014, a Proclamation to Provide for Registration of Urban Landholding, Federal Negarit Gazette No 25, 21st February 2014 (hereinafter FDRE Urban Land Registration Proc No 818/2014).

<sup>17</sup> It was presented to the House of Federation (HOF) contesting the constitutionality of the proclamation during its draft stage. [See <http://www.ethiopianreporter.com/index.php/news/item/4660>].

<sup>18</sup> Sefanit Mekonnen, Rights of Citizens and Foreign Investors to Agricultural Land under the Land Policy and Laws of Ethiopia, *Haramaya Law Review*, Vol.1, No.1, (2012), p. 34.

<sup>19</sup> In this context, by upward delegation, I am referring to the delegation of power from regional states to the federal government.

against the Ethiopian federal system and the federal Constitution, the author assessed the FDRE Constitution and its minutes and other relevant laws; extensively reviewed literatures and conducted interviews.

The article is organized into five sections. The first section introduces the whole essence of the article in brief. Section two conceptualizes land administration while section three briefly examines power sharing on land matters in some federal states having some affiliations with the Ethiopian system. In this section, the power sharing scheme on land matters in Nigeria, India, United States of America (USA) and Russian federations is briefly reviewed. Section four examines federal interventions against States' land administration power in Ethiopia with a test for their constitutionality. This section identifies two legislative interventions and extensively examined their constitutionality in connection to the Ethiopian federal system. The last section concludes the main themes in the article with possible recommendations.

## 2. Conceptualizing Land Administration

Land administration has no commonly accepted and single definition. Since the term reflects the socio-cultural contexts in which it is being operated, its contents may vary from country to country and even within a country from time to time based on the changes in government land policy.<sup>20</sup> Despite this, there are attempts to define the term. For instance, the Food and Agricultural Organization (FAO) dealt on the basic components of land administration while defining the term as “*the way in which the rules of land tenure are applied and made operational; and it includes an element of enforcement to ensure that people comply with the rules of land tenure.*”<sup>21</sup> Also, the term is defined as:

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<sup>20</sup> Abebe Mulatu, 2009, *Compatibility between Rural Land Tenure and Administration Policies and Implementing Laws in Ethiopia*, in Muradu Abdo (ed), *Land Law and Policy in Ethiopia since 1991: Continuities and Changes*, Ethiopian Business Law Series Vol. III, Addis Ababa University, Faculty of Law, p. 5.

<sup>21</sup> FAO, *Access to Rural Land and Land Administration after Violent Conflicts*, Land Tenure Studies 8, Rome, (2005), p. 23. The elements and activities in land administration under this definition include: **Land rights** (including activities like the allocation of rights in land; the delimitation of boundaries of parcels for which the rights are allocated; the transfer from one party to another through sale, lease, loan, gift or inheritance; and the adjudication of doubts and disputes regarding rights and parcel boundaries); **Land use regulations** (including land use planning and enforcement, and the adjudication of land use conflicts); **Land valuation and taxation**, (the determination of values of land and buildings; the gathering of tax revenues on land and buildings, and the adjudication of disputes over land valuation and taxation).

*"The processes of recording and disseminating information about the ownership, value and use of land and its associated resources...the processes include the determination or adjudication of rights and other attributes of the land, the survey and description of these, their detailed documentation and the provision of relevant information in support of land markets."*<sup>22</sup>

In the above quoted definition, within the overall context of land resource management, land administration is concerned with three commodities; i.e. the ownership, value and use of land.<sup>23</sup> Also, the term encompasses, *inter alia*, institutional arrangements where land allocation and determination will be controlled and managed. Furthermore, it includes determination, allocation, administration as well as keeping information related to land, not diminishing the role of regulatory frameworks that will give effect for any of the above activities.<sup>24</sup> Moreover, for Nichols and McLaughlin, land administration is the operational component and part of land management that is concerned with the management and control of the tenure system. In distinguishing land administration from land management, they defined the latter as:

*"The formulation of land policy, the preparation of land development and land use plans, and the administration of a variety of land related programmes. Land administration according to this definition includes the functions involved in regulating the development and use of land, gathering revenue from the land and resolving conflicts concerning ownership and use of the land."*<sup>25</sup>

For whatever level of government and organ land administration power is conferred in a country, land administration usually involves providing legal frameworks by entrusted organs in a constitution. The overall process in land administration must operate within a legislative framework that shall normally cover, *inter alia*, the following basic elements: basic land laws defining what rights and tenures exist including easements and overriding interests, and how these rights are transferred through sale, gift, inheritance or any other

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<sup>22</sup> Economic Commission for Europe (ECE), Land Administration guidelines, With Special Reference to Countries in Transition, UNITED NATIONS, New York and Geneva, (1996), (hereinafter, ECE land administration guidelines).

<sup>23</sup> *Id.*

<sup>24</sup> Samira Lindner et al, 'Ethiopia: Overview of corruption in land administration', (2014), available at, [http://www.transparency.org/whatwedo/answer/ethiopia overview of corruption in land administration](http://www.transparency.org/whatwedo/answer/ethiopia%20overview%20of%20corruption%20in%20land%20administration) last accessed December 2015.

<sup>25</sup> Dale, F. and McLaughlin, D. *Land Administration, Spatial Information Systems and Geostatics Series*: Oxford University Press, (1999).

manner; land registration; procedures for the initial creation and determination of rights in land; the use of land including controls stemming from physical planning; the status of evidence produced by electronic media and data protection.<sup>26</sup>

Taking the above lists that a legislative framework in land administration has to include, the laws would encompass various issues from establishing the very rights and duties of landholders to data protection and evidencing same through the electronic media. Hence, land administration issues, in addition to the different procedural aspects they need to establish, should be supported by proper legislative framework that shall incorporate the above elements.

In Ethiopian context, land administration [in the perspective of rural land] is defined under the FDRE Rural Land Proclamation No. 456/2005. The definition is made by the Federal Government and it shall be questioned whether this level of government can define land administration issues in a federal country where power is constitutionally shared. The issue here is not whether the Federal Government cannot enact rural land legislations at all as the constitution clearly vested this power to the Federal Government under Article 51. However, nowhere in the constitution the Central Government is entrusted to define the contents of land administration. While the constitution itself has to determine what shall land administration refers and what it has to constitute, it remained silent than simply granting this right to the States. Since apportioning powers and functions of both governments shall be the task of federal constitutions and the FDRE Constitution already made power assignments, one level of government shall not have any legal or practical justification to define the powers and functions of the other level of government. While the constitution gives the power to administer land to States, it failed to determine the elements that shall constitute land administration.

Looking over the provisions in the constitution, what constitutes the matter of land administration is not well addressed. The constitution is not as to what activities States need to undertake while they are administering land. Since the constitution does not specifically empower the Federal Government to enact laws that deal on land administration, this power shall fall in the residual power that is already left to the States. And this author wants to argue from the very beginning that enacting laws relating to land administration shall belong to States by virtue of residual power under the constitution.

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<sup>26</sup> ECE Land Administration Guidelines, *supra* notes, 22.

The Federal Government breaks the silence in the constitution and determined the components of land administration in Ethiopian perspective. However, allowing this level of government to determine the issue through a proclamation might result the diminishing of this power to the extent this level of government requires. In any case, the definition given to land administration is reproduced below since we are now using the definition in understanding the essence of land administration. One shall note that the federal government has restricted the scope that States shall have in relation to the power to administer land. The definition reads that:

*“land administration is a process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural landholder are enforced, and information on farm plots and grazing landholders are gathered, analyzed and supplied to users.”<sup>27</sup>*

Based on this definition, States shall determine on landholding security, implementing land use planning, resolving disputes between rural landholders on the use of land, enforcing the rights and obligations of any rural landholder and gathering, analyzing and supplying information on farm plots in the context of rural land. The lists in the definition are exhaustive and no reason to add other elements. In fact, in the reading of the above provision, it is not clear as to what types of information on plots and farm lands have to be gathered, analyzed and distributed to users.

Similarly, the Benshangul Gumuz Rural Land Proclamation defined rural land administration as: *“rules and procedures on rural land and this proclamation by which agreements between land users and any rights and duties of them, system of land distribution by the proper procedure, protection of land, giving guarantee on possession of land, land use plan implementation and conflict resolution among users is executed”*.<sup>28</sup> More or less a similar meaning is given in this particular State to that of the definition held under the federal proclamation to land administration.

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<sup>27</sup> FDRE Rural Land Administration and Land Use Proclamation No. 456/2005, Fed. Neg. Gaz. Year 11, No. 44 (hereinafter FDRE Rural Land Proc No 456/2005), Article 2(2), and a similar definition for rural land administration is adopted by the Amhara National Regional State [See ANRS, The Revised Amhara National Regional State Rural Land Administration and Use Proclamation, Proclamation No. 133/2006, Zikre Hig, 11th Year No. 18, Article 2(23)].

<sup>28</sup> The Benishangul Gummuz National Regional State Rural Land Administration and Use Proclamation, 2010, Proclamation No. 85 /2010, Article 2(2).



According to the definition given by the FAO (which, in this author's opinion, is relatively comprehensive compared with the other definitions above), land administration in a broad manner constitutes land rights, land use regulations and land valuation and taxation and each element has specific and detailed activities on it. More or less, the above definitions in Ethiopia incorporate the elements and attributes of land administration as defined by the FAO less they do not clearly address each element in specific and detailed manner compared to what the latter did. However, the above proclamations in Ethiopia do not tell us whether States are entitled to enact land administration laws.

There is also another definition given by the Federal Government for land administration in the context of 'agricultural investment' to mean "*an act of identification of agricultural investment lands on the basis of study and demarcating, entrusting, transferring, supervising and controlling same*".<sup>29</sup> While this definition simply provides identifying agricultural lands in respect of investment purpose and demarcate, entrust, transfer, supervise and control on the land as aspects of land administration, it failed to incorporate the other major elements in land administration like planning, land valuation as well as taxation issues.

In conclusion, the power to define land administration and the possible elements that should be included in it shall not be left to the Federal Government (this shall be the task of federal constitution). And the later definition for land administration in Ethiopian case highly narrowed the elements that should have been included in land administration. Of course, taking the purpose of the document (it is there to implement the transferred power to allocate land parcels above 5000hrs to the Federal Government from the States), one may not rely on this definition to grasp the elements/essence of land administration in Ethiopia.

### 3. Assignment of Power on Land Matters in Federal States

#### 3.1. Experiences from Other Federal States

Unlike unitary form of government, in federations, power is shared between the central and constitutional state members. In this part, the article deals on how power, specific to land matters, is shared in some federal countries. Even if the intention here is not to compare the different federal systems to the Ethiopian one on assignment of power land matters, the author believes that

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<sup>29</sup> Ethiopian Agriculture Investment Land Administration Agency Establishment Council of Ministers Regulation, Reg. No. 283/2013, 19<sup>th</sup> year No. 32 Addis Ababa 4<sup>th</sup> March 2013 (hereinafter, Reg. No. 283/2013).

the experiences in these countries will help to clarify the trend of power sharing in Ethiopia concerning land. The Nigerian, Indian, USA and Russian federations will be considered in the following paragraphs.

The Nigerian federal system, known for its effective governance, depends on an appropriate division of responsibilities and resources between the different level of authorities (federal, regional and local).<sup>30</sup> As a result of major reform of the land regime in the 1970s which sought to consolidate and simplify the previous mixture of customary and statute law, nearly all land is vested in the Governor of each state to be held on trust for the citizens of Nigeria. The State Governors have power to grant rights of occupancy over the land, to consent the alienation of such rights and to override them in the public interest.<sup>31</sup>

In the federation, any alienation or transfer of a statutory right of occupancy requires the consent of the State Governor. Although both alienation and transfer of a customary right of occupancy only requires the consent of the local government, if the transaction is a sale or the property is subject to the order of a court, the state governor's consent must be obtained. Also, the designation of the urban and non-urban areas of a state is the exclusive prerogative of the States.<sup>32</sup> This arrangement shows how much states are authorized to rule on important decisions concerning land in the federation. The Federal Government has authority to exercise exclusive powers, while both the Federal and State Governments are authorized to exercise concurrent powers to the extent prescribed in the constitution. However, States have exclusive legislative authority in residual matters.<sup>33</sup> Among the many powers (both exclusive to the Center and concurrent to both), the powers relating to land have not been mentioned in the constitution. Thus, as residual powers shall belong to Regional States, matters on land shall be the residual power of Regional States.

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<sup>30</sup> Joel D, State and Local Governance in Nigeria, *Public Sector and Capacity Building Program in Africa Region*, the World Bank August 2, 2001.

<sup>31</sup> Land Use Act 1978. See Nwabuzor E, Real Property Security Interests in Nigeria: Constraints of the Land Use Act, *Journal of African Law* Vol. 38, No.1, (1994).

<sup>32</sup> Fajemirokun B., land and resource rights: issues of public participation and access to land in Nigeria, paper presented at the First Workshop of the Pan-African Programme on Land and Resource Rights (PAPLRR) held at Cairo, Egypt, March 25-26, (2002), p.3 (hereinafter, Fajemirokun B., Land and Resource Rights: Issues of Public Participation and Access to Land in Nigeria).

<sup>33</sup> Ignatius A. and Dakas J, Federal Republic of Nigeria, *International Associations of Centers for Federal Studies* available at <http://www.thomasfleiner.ch/files/categories/IntensivkursII/nigeriag1.pdf> last accessed on 25 January 2017.

The 1978 Nigerian Land Use Act places all lands in the territory of each state under the exclusive authority of the state governor.<sup>34</sup> The Federal Government do not involve itself in administering state lands since this power is already assigned to Regional Governments.<sup>35</sup> However, in relation to federal lands, which are under the ownership of the Federal Government, regional governments can exercise administration power. Federal land comprises landholdings vested to the Central Government prior to the commencement of the land use act and which it retains free of the requirements of the land use act.<sup>36</sup> Here also a duality of land tenure practice exists, since customary authorities also set standards, even if it is true that they intervene more in land management.<sup>37</sup>

In India, power is shared as Union, State and Concurrent where the Central Government shall have a superseding authority in matters of items contained in concurrent lists. The residual powers are given to the Center.<sup>38</sup> States have powers relating to maintaining law and order, police forces, healthcare, transport, *land policies* and others. The State legislature has exclusive power to make laws on these subjects. Consequently, enacting laws relating to land policies shall be the prerogative of constituting state members.<sup>39</sup> But in certain circumstances, the parliament can also make laws on subjects mentioned in the State list. The parliament has to pass a resolution with two-third majority that it is expedient to legislate on State powers in the national interest.<sup>40</sup>

The USA Constitution makes provisions that the Federal Government has certain enumerated powers, which are spelled out in the constitution, including the right to levy taxes, declare war, and regulate interstate and foreign commerce. In addition, the constitution gives the Federal

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<sup>34</sup> This arrangement, however, does not include those lands allocated to the federal government or its agencies as these lands are out of the jurisdiction of regional states.

<sup>35</sup> Africa Union, African Development Bank and Economic Commission for Africa, Land Policy in Africa: West Africa Regional Assessment, 2011, p.51 (hereinafter, AU, ADP and ECA, 2011).

<sup>36</sup> Fajemirokun B, land and resource rights: issues of public participation and access to land in Nigeria, First Workshop of the Pan-African Programme, Cairo, Egypt, (2002), p. 3.

<sup>37</sup> AU, ADP and ECA, 2011, *supra* notes 35, p.51.

<sup>38</sup> Kumar C, Federalism in India: A Critical Appraisal, *Journal of Business Management & Social Sciences Research (JBM&SSR)* ISSN No: 2319-5614 Vol. 3, No.9, (2014), p. 32.

<sup>39</sup> *Ibid.*

<sup>40</sup> *State politics in India*, 1<sup>st</sup> edition, Radiant publishers, New Delhi, pp. 92–122,

[https://en.wikipedia.org/wiki/Federalism\\_in\\_India](https://en.wikipedia.org/wiki/Federalism_in_India), Wikipedia, the free encyclopedia, last accessed on December 2015.

Government the implied power to pass any law "necessary and proper" for the execution of its express powers.<sup>41</sup> State Governments are responsible, *inter alia*, for property law, **land use laws**, water and mineral resource laws and others.<sup>42</sup> Hence, save for "necessary and proper" clauses in the constitution, States have primary legislative power on land use laws. Also in the constitution, exclusive powers are expressed for the Federal Government and the residual powers are reserved to the States. On this basis, since the power to administer land is not an exclusive power left to the Federal Government, States will exercise this power in their residual powers.

The Russian constitution rules that the Federal Government has exclusive jurisdiction over those powers specified in the constitution. The federal and local governments share jurisdiction over a number of items one of which is *use and disposal of land*, subsoil, water and other natural resources.<sup>43</sup> Thus, unlike the other federal states above, the Russian federation makes use and disposal of land as a power that shall be exercised by the two levels of government jointly.

### 3.2. Power Sharing on Land Matters in Ethiopia

In Ethiopia, the FDRE constitution rules that "*all powers not given expressly to the Federal Government alone or concurrently to the Federal Government and the States are reserved to the States.*"<sup>44</sup> This provision reserves a number of powers, not specifically expressed in the constitution either to the Federal Government or the two levels of government in concurrent, to States. Article 51 listed out federal functions though it does not incorporate all of the comprehensively. In effect, what is not listed under Article 51 is not automatically a residual power that falls under the exclusive competences of the States. One has to first deduct all of the functional competences of the Federal Government scattered throughout the other provisions in order to determine the residual powers of the States.

Specific to power sharing concerning land related matters, the constitution empowered the Center with primary legislative power on the utilization and conservation of land and other natural resources.<sup>45</sup> As the phrases "land utilization" and "land conservation" are not defined in the constitution, the

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<sup>41</sup> Bin H, *Distribution of Powers between Central Governments and Sub-National Governments*, supra notes, 12, p.2.

<sup>42</sup> *Ibid*, p.3.

<sup>43</sup> *Id*.

<sup>44</sup> FDRE Constitution, supra notes 8, Art, 52(1).

<sup>45</sup> *Ibid*, Arts. 51(5) and 55(2-a).

extent to which the Federal Government shall have legislative power in this regard is not clear.<sup>46</sup> It is even unclear where the legislative power of the Federal Government ends and the administrative power of the States begin with respect to land and other natural resources. The issue is whether the power of the States to administer federal laws relating to the use of land involves law making power including the issuance of secondary legislative power and, to that effect, whether the federal law should be limited to providing a general framework.<sup>47</sup>

As Brightman argued, the Central Government is constitutionally empowered to define the possible land rights of landholders, how such rights are acquired, what they consist of, how they operate in the holding, transfer and inheritance of land; and how land rights may be extinguished in accordance with the general guidance provided in the Constitution.<sup>48</sup> With the general guidance that is provided under the constitution, the Federal Government is responsible to determine issues on land tenure of landholders across the country. This is in line with the overall economic ambition of the country i.e. establishing a common economic community throughout the country as provided in the preamble of the constitution.<sup>49</sup> Using this power, the Central Government enacted various rural and urban land laws and determined the rights, responsibilities and obligations of landholders.

However, beyond determination of land tenure issues in the country, other land related issues are regional powers since all functions not given expressly to the Federal Government alone or concurrently to both are reserved for the

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<sup>46</sup> But, one may look on the provisions of Article 40 of the constitution that define the land rights of landholders to which the federal government, in its legislative power regarding land utilization and conservation, shall respect at all. Hence, in any case, the content of the federal legislations shall not be in contrary to the land policy statements under the constitution though the concern in this piece is the extent to which the federal laws shall go in detail to govern the land rights of the people is not made clear.

<sup>47</sup> Assefa F. and Zemelak A. 'Concurrent Powers in the Ethiopian Federal System' in: *Concurrent powers in federal systems meaning, making, and managing*, eds. Palermo, F. and Marko, J, (2017) Koninklijke Brill Nv, Leiden, The Netherlands, pp. 241-260.

<sup>48</sup> Brightman G/Michael, 'The Role of Ethiopian Rural Land policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis' *LLM thesis, Bahir Dar University, School of Law*, (2013) (hereinafter, Brightman G/Michael, 'The Role of Ethiopian Rural Land policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis').

<sup>49</sup> See FDRE Constitution, *supra* notes, 8, paragraph six of the preamble which states that the NNP are Convinced to live as one economic community is necessary in order to create sustainable and mutually supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests.

States.<sup>50</sup> On this basis, any land related power that is not expressly given to the Federal Government exclusively or concurrently to both is the issue of enacting land administration laws. Thus, enacting legislations related to land administration (that is not clearly given to the Central Government in the constitution); to administer land in their territory will be the task of States. The argument is, after enacting framework laws concerning the utilization and conservation of land, other legislations that are relevant to administer land shall be left to the States in their constitutionally reserved residual powers.

#### 4. Legislative Interventions of the Federal Government Against Regional States' Power to Administer Land in Ethiopia

Federalism allows the various government levels work on their own spheres. Though the constituting member states are not totally disintegrated in their relations with the Central Government, interventions against the powers and functions of either level of governments is not allowed. Since the powers and functions of both governments are shared by a constitution, any violation of it will amount to a trespass to the constitution and the adhered federal system.<sup>51</sup>

Under the FDRE Constitution, in principle, States are left autonomous in their own spheres and the Federal Government will not intervene on their powers and functions. However, there are legally stipulated possibilities where the Federal Government may intervene on States' internal affairs. One instance is when there is a state of emergency that cannot be controlled by the regular law enforcement agencies and personnel and the emergency is a kind that will endanger the constitutional order.<sup>52</sup> In here, wherever region a situation called a state of emergency occurred; the Federal Government shall intervene to avert the situation before the disorder is get out of control and it results serious damages to human life and property. This intervention cannot be claimed as unjustified so long as the elements under Article 93, which justify the declaration of state of emergency by the Federal Government, are complied with. Interventions of any kind, less declaration of state of emergency and any kind of cooperation (technical as well as financial assistance) means a violation to the constitution and the federal system in general.

Since power has been divided between the State and the Federal governments, interference on one's powers and functions is not possible according to the

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<sup>50</sup> *Ibid*, Art. 52(1).

<sup>51</sup> Joseph, Federalism and the Politics of Resource Control in Nigeria: a critical analysis of the Niger Delta crisis

<sup>52</sup> FDRE Constitution, *supra* notes, 8, Art. 93(1, a).

words and spirits of the constitution since interventions (when not founded constitutionally) might erode the federal setup. In this section, the intention is to explore the legislative interventions that the Federal Government has made in relation to Regional States' power to administer land mainly on two basic areas. Hence, the constitutionality of the transferred power to allocate land parcels above 5000hrs to investors for the Federal Government from States by delegation and the Urban Lands Registration Proclamation No. 818/2014 will be tested in the coming sections.

#### 4.1. The Power to Allocate Rural Lands above 5000 hrs to Investors

Constitutions determine which power belongs to which level of government. As well, recent developments indicate that delegation is also employed when one level of government 'wishes' to transfer its power, albeit temporarily, to the other level of government.<sup>53</sup> Using this arrangement, therefore, one level of government may transfer some of its powers to the other level of government. In Ethiopian case, federal powers can be delegated to States.<sup>54</sup> However, delegating state powers to the federal government is not allowed. The constitution does not clearly provide for the possibility of delegating regional functions to the Center and the drafting material of the constitution explicitly prohibited delegation of regional powers to the Federal Government.

Even if the Federal Government has the right to expropriate land for public purposes,<sup>55</sup> including allocating land to those who may be able to use land more productively such as investors, cooperatives and other entities, it also has effectively centralized the management of large-scale land investments for blocks of land over 5000hrs and appointed the Federal Ministry of Agriculture as lead agency.<sup>56</sup> States' power to administer land, one expression of their economic self-determination, particularly control and regulatory authority over land and other natural resources, is being eroded following this transfer particularly to the Agricultural Investment Support Directorate in the

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<sup>53</sup> Assefa Fiseha, Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet, *supra* notes 14, p. 446

<sup>54</sup> FDRE Constitution, *supra* notes, 8, Art. 50(9).

<sup>55</sup> *Ibid*, Art. 40(8). According to this provision, "Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property".

<sup>56</sup> IS academy, Ethiopia: food security and land governance fact sheets.

Ministry of Agricultural and Rural Development (now changed to Ministry of Agriculture and Natural Resources).<sup>57</sup>

To properly run this business, “land bank” is set up at the federal level which can be accessed by investors through the Ministry of Agriculture. Using this arrangement, by the year 2010, about 3.5 million ha of land was transferred by the States to the federal land bank.<sup>58</sup> Furthermore, the data few years back signify that Regional States save Somalia and Tigray were required and made to transfer a total of around 6 million ha of land to the Federal Land Bank to be administered and transferred to large scale agricultural investors under the authority of the Federal Government.<sup>59</sup> Also the government, by virtue of the First Growth and Transformation Plan (GTPI), 2011-2015, planned to transfer around 7 million ha of land to investors.<sup>60</sup> It was argued that providing investment land to investors will help the country and its people through, *inter alia*, technology transfer, ensuring food security, infrastructural delivery, creating employment opportunities, the inflow of foreign income, technical expertise, capital and many others.<sup>61</sup>

In the year 2010, the Federal Government enacted a directive<sup>62</sup> aimed to administer lands that this level of government took from States through delegation. As can be seen in the preamble of the directive, its overall objective is to provide adjacent and vast lands for agricultural investment and to administer thereof. In here, States are authorized to directly collect the lease price that the land is leased for investors.<sup>63</sup> In all above cases, it is evident that the Federal Government is now administering lands above 5000hrs by taking it from the States. Those lands that exceed 5000hrs and lie concentrated in one area (i.e. one next to the other) will be administered

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<sup>57</sup> Dessalegn Rahmato, ‘Land to investors: Large-Scale Land Transfers in Ethiopia’ Forum of Social Studies, (2011), p. 10 (hereinafter Dessalegn Rahmato, Land to investors: Large-Scale Land Transfers in Ethiopia’).

<sup>58</sup> IS academy, Ethiopia: food security and land governance fact sheets available at, <https://www.humanitarianlibrary.org/sites/default/files/2013/07/Ethiopia%20Factsheet%20-%202012.pdf> last accessed on 7 March 2016.

<sup>59</sup> Dessalegn Rahmato, Land to investors: Large-Scale Land Transfers in Ethiopia’, *supra* notes, 57, p. 11.

<sup>60</sup> *Ibid*, p.12.

<sup>61</sup> Elias Nur, Between ‘Land Grabs’ and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia’s Normative Setting in Focus, *Mizan Law Review* Vol. 5, NO.2, (2011), p. 181.

<sup>62</sup> Council of Minster Directive to Administer Agricultural Investment Land, March 2010.

<sup>63</sup> *Ibid*, Art. 6(3).



through the Ministry of Agriculture and Rural Development;<sup>64</sup> whereas pockets of lands that are less than 5000hrs and lie dispersed will be administered by relevant regional offices.<sup>65</sup>

Pursuant to the power to administer land, States have been providing land through lease to investors in their legally defined jurisdictions. Despite this fact, however, as some argue, the Federal Government claimed States have not been efficient in providing land to investors and complained about widespread corrupt practices across States and, therefore, the need for upward delegation.<sup>66</sup> In consequence, inefficiency and corrupt practices of States were taken as prime reasons for the delegation.<sup>67</sup> Interestingly, such widespread corrupt practice is also common at the federal level, as openly presented to the public through government-owned Ethiopian television and other Media on various occasions.<sup>68</sup> Thus, some doubt the credibility of the federal government's argument in justifying the transfer since this level of government has been accused of corrupt practices in relation to allocating land parcels to investors.<sup>69</sup>

The Federal Government did not take empirical evidences that prove the inefficiency of the States as some regions have proved their potential and commitment to administer land in their territory including allocating land parcels to investors.<sup>70</sup> For instance, States including Amhara, Oromia, SNNP and Tigray proved they can administer lands by registering and providing certificates to the landholders in their respective regions and providing lands for investors and controlling the overall procedures thereof. These are among

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<sup>64</sup> Federal Democratic Republic of Ethiopia, 2010. Federal Ministry of Agriculture and Rural Development Agricultural Investment and Land Lease Implementation Directive, Art. 4(1) (hereinafter, FDRE MOARD Directive)

<sup>65</sup> *Ibid*, Art. 4(2).

<sup>66</sup> Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet *supra* notes 14, p. 446.

<sup>67</sup> Fasil Zewdie, 'Right to Self-determination and land right in Ethiopia: Analysis of the Adequacy of the legal Framework to address Dispossession', (2013), (LGD) available at <http://www.go.warwick.ac.uk/elj/lgd/2013/zewdie> last accessed on 7 March 2016 (hereinafter Fasil Zewde, Right to Self-determination and land right in Ethiopia: Analysis of the Adequacy of the legal Framework to address Dispossession).

<sup>68</sup> <https://www.ethiopianreporter.com/content/የጋምቤላ-የአርሻ-ኢንቨስትመንት-የገጠሙት-ፈተናዎች-ምን-ይስተምሩናል> last accessed on 1<sup>st</sup> January, 2017.

<sup>69</sup> Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet *supra* notes 14, p. 446

<sup>70</sup> Fasil Zewde, Right to Self-determination and land right in Ethiopia: Analysis of the Adequacy of the legal Framework to address Dispossession, *supra* note 67.

the evidences by which one can judge the competency of the States that they can properly handle land administration in their territories. While the real potentials of States in allocating land to investors have to be considered, in reality, the justification seems unfounded empirically. Despite the federal Government took the power to deliver land parcels above 5000ha to investors, it is criticized that this level of government has not been effective and the desired results in agricultural land investment are not achieved. In this regard, in recent study conducted particularly in Gambella National Regional State by the support of the ruling government concerning the status of large scale agricultural investment, it was concluded that the area has been tempted by rent-seeking behaviors and failed to achieve the desired results.<sup>71</sup>

An important point worth consideration at this juncture is on whose initiation shall the delegation be made? Shall it be when States take the initiation by themselves or when the Federal Government takes the chance to initiate the delegation? Here, even if this author will argue in the coming sections that delegating state functions to the federal government, even at their wish, is not possible in the constitution, from the very beginning, the transfer process shall be a point of discussion. Legally speaking, delegation shall be upon the wish of the delegator and what the delegate can do is performing the acts covered in the delegation based on the instruments of delegation. The delegation to transfer lands above 5000ha to investors is not one initiated by the States; it is the Federal Government who took the initiative to make the delegation effective. And this author holds that the delegation is not in line with the rule of delegation where it is the delegator

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<sup>71</sup> As the Reporter Magazine (the Amharic version) reported, the study was conducted under the order of Prime Minister Hailemariam Dessalegn where 14 professionals from the office of the Prime Minister, the office Agricultural and Natural Resource and from the Development and Commercial Banks of Ethiopia were participated. The study reflected that, from the year 2001 E.C onwards, 630,518 hectares of land was transferred to around 623 local and foreign investors. From this figure, 409,706 hectares is transferred from the Gambella region while the remaining 220,812 hectares was transferred by the Federal Agricultural, Investment and Land Administration Agency from the land the federal government took from regional states through delegation. The study further showed that the Developmental Bank of Ethiopia has been providing loan to the investors for different purposes though the bank is not able either to follow up whether the loan is utilized for the purpose intended or the loan is returned on time. Since the overall process in the transfer of land to the investors and the loan provided by the development bank were not effective in the years passed, the study recommended that strict supervision need to be made on the banks and other financial institutions during delivery of loan for the investors and the lands taken by the federal government from regional states through delegation should be returned to the latter as the role of the federal government shall be supporting regional states to capacitate themselves in this regard [for more detail, See <https://www.ethiopianreporter.com/content/የጋምቤላ-የአርሻ-ኢንዱስትሪውን-የገቢው-ት-ፈተናዎች-ምን-ያስተምሩናል>]

that shall in any case initiate the question for delegation. Thus, even the manner of delegation of regional powers to administer land has to be questioned as it is contrary to the rules to delegate once powers and functions.

#### 4.1.1. Arguments For and Against the Delegation

The central issue in this sub-section is as to whether the delegation is really constitutional taking what is provided in the FDRE constitution and the nature of the federal system adopted in the country. In this regard, two extreme arguments, for and against this delegation, are considered.

##### 4.1.1.1. Arguments Favoring the Delegation

One line of argument may be that the transfer does not contradict the FDRE Constitution and the Ethiopian federal system. The following scenarios will help to brace the existing transferred power to allocate land parcels above 5000hrs to investors in favour of the federal government: On one hand, despite there are no clear indications on the possibility of delegating States' powers to the Central Government, the constitution does not prohibit the delegation explicitly. In particular to land administration, nothing is expressed in the constitution whether delegating this power to the Federal Government is possible or not. Had the prohibition been inferred from an express stipulation under the constitution, it would have been unconstitutional for States to delegate their land allocation power to the federal government. In the absence of clear provision in the constitution that prohibits States to delegate this power, possible arguments considering the transfer in this respect as unconstitutional will not hold water.

On the other hand, though States already transferred their land allocation power to the Federal Government, this does not mean they have totally lost their power to administer the lands so delegated forever. On this basis:

- ▶ Administering land may not only mean the organ that is entrusted to administer it shall do the administration lonely. States can exercise their land allocation power indirectly through the federal Government being the delegatee to exercise the land allocation on their behalf.<sup>72</sup>
- ▶ Delegation is not a permanent deal; it is rather revocable.<sup>73</sup> The delegator can take the delegation back when it needs the power again or

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<sup>72</sup> Interview with Muradu Abdo (PhD).

<sup>73</sup> For instance, in business transactions that involve the relationships of agent and principal, the agency given to the agent can be revoked on certain incidents authorized by the law. According to article 2226 of the 1960 Ethiopian civil code, the principal may revoke the agency at his discretion and, where appropriate, compel the agent to restore to him the

the time specified in the delegation instrument is over or the delegation is not respected as per its instrument. The effect is States can revoke the delegation when the time for it expires or when the delegatee does not comply with the obligations attached with the transferred power.

- ▶ States can precisely determine the amount of land subjected for delegation and will take the benefits derived from the land. Under the Council of Ministers Directive to Administer Agricultural Investment Land, it is provided that States can directly collect the lease price that is allocated for the land while it is transferred to investors<sup>74</sup> even if the contract will directly be concluded by the Federal Government, representing the States and investors.
- ▶ The delegation does not totally take away States' power to allocate land in their territory to investors. In other words, they do not totally lose their land allocation power; rather to the extent openly delegated to the Federal Government. As said, the delegation is for lands above 5000hrsfound stretched. But, below this hectare of land, regional sates are still allocating it to investors. That is why the above directive states thatpockets of lands that are less than 5000hrsand lie dispersed will be administered by relevant regional offices.<sup>75</sup>
- ▶ During delegation, it is usually the delegator that shall determine the range of rights to be delegated and the manner of exercising the rights thereof. In this regard, it is regional sates that will determine and instruct on how the federal government has to allocate the lands given in delegation. If this is the case, even if States have delegated their land administration powers to the Federal Government, this does not mean they have totally lost their rights over the lands so delegated.

Generally, the arguments in this regard shall be considered in line with a client and principal relationship<sup>76</sup> where all acts done by the client (delegatee) are considered performed by the principal (delegator). Supporting the above arguments, however, need to be evidenced by empirical data on whether the

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written instrument evidencing his authority. By this nature of agent-principal relationship, the land administration power that has been transferred to the federal government can be revoked by the regional states following the procedures in revoking agency delegation.

<sup>74</sup> FDRE MOARD Directive, *supra* notes 64, Art. 6(3).

<sup>75</sup> *Ibid*, Art. 4(2).

<sup>76</sup> As it has been dealt in the 1960 Civil Code of the Empire of Ethiopia, agency is a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts [see article 2199 of the code]. The conclusion is that, in the nature of delegation that we have at hand, the federal government, the delegatee, will administer lands on behalf of the States, the delegator.

delegation now is being implemented in line with the arguments above. If the benefits obtained from the delegation are utilized for the advantage of the Federal Government; if it is only this level of government that will determine every procedure in allocating the parcels to investors; if the Federal Government is administering the lands without participating the local community and violated the overall delegation given to it, therefore, the delegation is said to be abused. While the federal government took this delegated power, it has promised to distribute the income collected to each respective State.<sup>77</sup>

The arguments above may probably be raised by the Federal Government to justify its action in taking the land administration power of States for the amount of land stated in the above sections. However, this line of argument may not be relied specifically seen from the power sharing scheme in the constitution and the nature of the federal system adopted in Ethiopia and this author further developed arguments that are against this transferred power which are explored in the coming paragraphs below.

#### 4.1.1.2. Arguments Against the Delegation

The second line of argument, which this author takes position on it, is against the existing transferred power to allocate land parcels above 5000hrs to the Federal Government. The constitution provides for upward delegation only. There is no express clause permitting the States to delegate their powers to the Federal Government. An express clause included during the draft stage of the constitution permitting the States to delegate some of their powers was rejected on the basis of protecting the powers and functions of the States.<sup>78</sup> The draft prohibited, at least, the expressed permission of upward delegation.

The issue of delegating State powers to the Federal Government was one of the debatable issues during the draft stages of the constitution. As the constitutional minute clearly provides, the first draft of the constitution allowed for the delegation of regional functions to the Federal Government. The makers of the constitution agreed to leave out the sub-article that allowed the delegation of State powers to the Federal Government. The fact that the Federal Government is allowed to transfer some of its powers to States through delegation was seen as a proper move so long as it can facilitate governmental functions. However, when it comes to delegating State powers, it was argued that the delegation may create a burden against regions in

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<sup>77</sup> Interview with Dr Muradu Abdo (PhD).

<sup>78</sup> Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet supra notes 14, p. 447.

capacitating themselves to undertake their functions and even it may have psychological impact on their day to day activities. Furthermore, since States got their power from the people, it may not be proper to pass this power to the Federal government even by will; rather the latter, than taking state functions through delegation, should create forums to strength and help States to better undertake their functions.<sup>79</sup>

Furthermore, the prohibition has to do with the historically power imbalance between the central government and member states in the country. In the past, most of the constituting states were not strong enough, as a result, they were suppressed by the Center. Dating the introduction of the FDRE constitution, this imbalance is attempted to be resolved, at least in legislations, when the constitution declared all constituting state members of the federation are equal.<sup>80</sup> In addition, one of the basic reasons to introduce the constitution is due to the Ethiopian people are fully cognizant that their common destiny can best be served through rectifying historically unjust relationships and by further promoting our shared interests.<sup>81</sup> These reasons, coupled with other legal and practical scenarios, can justify the prohibition for upward delegation of power in the country.

Instead of allowing upward delegation, it is better if States are protected and even prohibited from delegating their powers to the federal government as concentration of power to the center may be the ultimate consequence. This aspect of delegation usually raises the central issue of whether it is possible to change by legislation the basic tenet of the federal compact. While the minutes of the constitutional assembly clearly hinted at the fear that the Federal Government may take away State powers and, hence, agreed only on downward delegation, States have now given up this power without any contest in favour of the Center.<sup>82</sup> It is hardly possible to do this in a context of political pluralism and where one or more of the States were under the control of the opposition political parties.<sup>83</sup>

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<sup>79</sup> For detail information, see the Minute of Ethiopian Constitution, Volume IV, 24-30, November, 1995, p. 28-30 on Volume 000109-000112.

<sup>80</sup> FDRE constitution, *supra* notes, 8, Art. 47(4).

<sup>81</sup> *Ibid*, Preamble Paragraph four; Even if this statement may be understood that there have been historically unjust relationships between and among the various regional states in the country, it can also reflect the imbalanced power relationships between the central government and the member states so that they were not equal as power has been concentrated to the center.

<sup>82</sup> Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet *supra* notes 14, p. 447.

<sup>83</sup> *Id.*

Furthermore, allowing upward delegation means that powers and functions that are now vested to States may be accumulated to the Center. This, in fact, implies the federal approach will face a danger of centralism.<sup>84</sup> By taking possible justifications, the Federal Government may work aggressively to further snatch state powers and this hinders states to have active participation in the basic decisions on land matters.

The constitutionality of this delegation is a doubt since an open clause authorizing delegation will contradict the federal principle enshrined in the constitution. This is against the rigid procedure of amendment prescribed in Articles 104 and 105 of the constitution. The constitutional guaranteed division of power is likely to be endangered if both governments have the right to change this distribution at will. In such a context, it is normally expected that the regional state-based political party will try to defend its constitutionally guaranteed autonomy. Yet, in Ethiopia, the transfer was achieved without any contest from any of the Regional States as if it was a unitary decentralized system where the center can take away what it gave by law.<sup>85</sup>

In the preceding paragraphs, it is argued that upward delegation is not possible under the constitution. Supporting this argument, principally, all powers of the Federal Government are delegated from States. The Nations Nationalities and Peoples are holders of power<sup>86</sup> and the Federal Government's powers assigned in the constitution are derived from the delegation of the member States as ultimate power belongs to the States. In this regard, Mehari noted that:

*...the most important characteristic is that, in federalism, power is not delegated to regional states from the center, as in the case of a unitary system. Rather, the central government is delegated by, and obtains its power from, the regions .... the central (federal) government is not the author of its own power, for the ultimate power rests in the constituent units, in the Ethiopian case, the ethno-cultural communities.*<sup>87</sup>

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<sup>84</sup> Interview with Muradu Abdo (PhD).

<sup>85</sup> Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet supra notes 14, p. 445.

<sup>86</sup> FDRE constitution, supra notes, 8, Art 8 that rules all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia and the constitution is the expression of their sovereignty.

<sup>87</sup> Mehari Taddele, *Federalism and Conflicts in Ethiopia*, (18 June, 2015), available at <http://hornaffairs.com/en/2015/06/18/paper-federalism-conflicts-ethiopia/> last accessed on 8 January 2016.

Unlike the unitary system of government, where all powers and functions emanate from the Center thereby power is highly centralized and the Center remains a source of all powers to constituting members, in federalism, the main source of power belongs to States. In Ethiopia, power in its inherent nature belongs to nations, nationalities and peoples. The Central Government got its overall powers from the States since ultimate power belongs to the latter.

In general, once all the powers that the Federal Government now has in the constitution are delegated from the States; there shall not be other mechanisms for upward delegation again after the constitution is adopted. Taking the powers vested to States by virtue of delegation appears out of the spirit and tenet of the federal system except through amending the constitutional power sharing to allow this delegation which, in fact, requires rigorous and cumbersome procedures.<sup>88</sup>

#### 4.2. Evaluating the Constitutionality of Proc. No 818/2014 and its Implication for Land Administration

In urban areas, the most easily and immediately approached source of revenue is the tax on real property (land & house), which can be better assessed and maximized by knowing the particulars of the occupants of land parcels.<sup>89</sup> The particular details include the rights, responsibilities and obligations that a landholder shall have on the parcels, the size and purpose of the land, the location where and the materials from which the houses are built, the encumbrances, if any, on the houses and many others. For this, registering the whole parcels in urban areas and precisely determining the rights, restrictions and responsibilities of landholders on their possessions will become essential. The introduction of the current Urban Lands Registration Proclamation in Ethiopia is there to facilitate the total registration of parcels in urban areas. In this section, an attempt is made to evaluate the Urban Lands Registration

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<sup>88</sup> See FDRE Constitution, *supra* notes, 8, Arts. 104 and 105 that requires cumbersome procedures to amend the provisions (including the provisions dealing on power sharing as between the federal government and regional states) in the constitution. Hence, at least in the face, the federal government cannot amend the constitution in contrary to what is prescribed in the constitution unless the procedures to amend a provision in the constitution are fully complied with.

<sup>89</sup> Daniel Tadesse 'Reflections on the Situation of Urban Cadastre in Ethiopia' (2006), available at [http://download.nust.na/pub2/dmm-presentations/Session%20%20-%20Uganda-Ethiopia-Rwanda/DOC\\_Alemu\\_AA\\_Ethiopia\\_ReflectOnUrbanLandAdmin.doc](http://download.nust.na/pub2/dmm-presentations/Session%20%20-%20Uganda-Ethiopia-Rwanda/DOC_Alemu_AA_Ethiopia_ReflectOnUrbanLandAdmin.doc) last accessed 10 January 2016 (hereinafter, Daniel Tadesse 'Reflections on the Situation of Urban Cadastre in Ethiopia').



Proclamation in light of the power sharing scheme under the FDRE constitution and the nature of the Ethiopian federal arrangement.

#### 4.2.1. The Nature and Objectives of the Proclamation

The proclamation aims to realize the real property rights of individuals, provide reliable land information to the public at large, minimize land related disputes and modernize the country's real property registration system.<sup>90</sup> As well, the proclamation's scope of application is to all urban centers all over the country with regard to urban land<sup>91</sup> which renders the proclamation to have a nation-wide application where all States and City Administrations are duty bound to closely follow its implementation.

The proclamation regulates, *inter alia*, the registration of urban lands by federal and regional cities. It in detail defines the urban land registration procedures and the legal effects that emanate from such registration or the consequences flowing from failing to register urban land. It also provides for the creation of urban land 'registering institutions' at regional level and defines the powers and responsibilities of these institutions and makes them directly accountable to a federal agency called the Federal Urban Real Property Registration Information Authority. Since land registration laws of the country are not comprehensive and the country has experienced poor urban land registration system due to lack of capacity and established systems to record urban land use rights, transactions over these rights and possible restrictions;<sup>92</sup> the present proclamation is important as it comprises the fundamental rules on urban land registration.

#### 4.2.2. Evaluating the Proclamation against Regional States' Power to Administer Land

It is doubtful as to whether the federal legislator can enact land administration related laws; just like the above Federal Urban Lands Registration Proclamation, having nation-wide application. Since registering lands is one basic element in land administration that States are expected to perform according to the FAO and other definitions given for the term; the fact that the proclamation is enacted by the Federal Government directly contradicts the States' land administration power.

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<sup>90</sup> FDRE Urban Land Registration Proc No 818/2014, *supra* notes 16, Preamble.

<sup>91</sup> *Ibid*, Art. 3.

<sup>92</sup> Daniel Tadesse 'Reflections on the Situation of Urban Cadastre in Ethiopia, *supra* notes, 89.

The Central Government cannot address all details in its land laws and it will be States' task to adopt feasible subsidiary land legislations to implement federal laws considering the prevailing facts in the respective regions. In this regard, it is States that shall determine on how they have to register land; the manner of registration; institutional setups relevant to registration of lands and other similar tasks. If every detail is provided by the Federal Government, the process will leave States to assume only implementation role which, according to the opinion of this author, is not perceived in the constitution. The power of land administration is an exclusive power of the States and we cannot come across with legal or practical reasons to assert otherwise.<sup>93</sup> While federal laws on utilization and conservation of land have to define land use rights, manners of use of land and restrictions on land use rights, land administration laws set rules on enforcement and realization of the laws on land utilization and conservation.<sup>94</sup>

Once the Federal Government enacted various substantive land laws to regulate the creation, transfer, modification, restriction and termination of rights over immovable properties, is it not then up to the States to administer such rights once they are regulated through substantive laws? If the Federal Government can order the regions to administer land in a particular way, where is the significance of the constitutional power of the regions to administer land?<sup>95</sup> In any case, is registering urban land an area that the Federal Government shall perform within its law enactment power to determine the utilization and conservation of land in the country or shall it be a concern for land administration that States shall perform? These and similar issues shall raise a critical investigation on the existing urban lands registration proclamation to test its constitutionality and its relation with the existing federal system in Ethiopia.

In the draft stage of the proclamation, the House of Peoples' Representatives (HPR), receiving the draft, was not sure whether the draft was really consistent with the constitution while deliberating on it. This house transferred the draft to the HoF. This later house was requested to determine whether the draft

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<sup>93</sup> Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights', *Jimma University Journal of Law*, Vol. 6, No.1, (2014), p. 118 (hereinafter, Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights').

<sup>94</sup> Brightman G/Michael, 'The Role of Ethiopian Rural Land policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis', *supra* notes, 48, p. 131.

<sup>95</sup> Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights', *supra* notes 93, p.118.

proclamation has violated the States' power to administer land as it was contested that the Federal Government passed its power to enact legislations that have nationwide application. The argument was the federal government shall not put itself into administering land that is originally vested to the States. However, the HPR was confused whether the federal government can enact laws having a nature of land administration. Also, it was claimed that some of the provisions in the draft allow the Federal Government to play administrative role with respect to urban land registration and thereby encroaches into the powers of the States. During the transfer of the draft to the HoF, some members of the parliament objected such transfer arguing that this house is not given any legislative role under the constitution<sup>96</sup> and, therefore, comments shall not be requested from the second chamber as a precondition to pass draft laws.<sup>97</sup>

Despite this objection, the draft was transferred to the HoF, and this house decided that the draft legislation is consistent with the constitution and underlined the importance of the proclamation to build common economic community in the country as desired in the constitution. The argument was the HPR has the power to enact laws on civil matters whenever the upper house deems indispensable to bring about economic union and this proclamation does not violate the constitution in this regard. This is reflected under the constitution which reads "*the House of Peoples Representatives shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community.*"<sup>98</sup> However, focusing on the decision of this house, the reason was not because the proclamation does not actually compromise the power of the States to administer the use of land. The house

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<sup>96</sup> It should be noted that the FDRE Constitution is criticized for it has established a one-cameral legislature to promulgate laws. In the current law-making scheme, it is the HPR that has power to enact laws in the federal level, while the House of Federation's role in this regard is highly minimal (almost scant).

<sup>97</sup> Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights, *supra* notes 93, p. 119.

<sup>98</sup> See the FDRE Constitution, *supra* notes, 8, Art. 55(6). As it is shown above, the request for the approval of this proclamation came from the HPR so that the HoF shall consider on the nature of the law. In fact, according to the spirit of the constitution, the HoF will allow the HPR enact civil laws for which the house considers necessary to establish and sustain one economic society in the country not when the claim is presented by the HPR. In this arrangement, the HPR will enact a law having civil nature only after the demand comes from the HoF and it is not after the HPR has already initiated the draft that it seeks the HoF on matters like above. It should be questioned as to whether the HPR can initiate and request the HoF so that the proclamation shall be approved by this later house. Looking on the whole procedures during the enactment of the proclamation, even the procedural issue is another debatable area though the aim of the paper is not to deal with this issue.

admitted some of the provisions in the proclamation actually encroach into the competences of the States to administer land. It, however, reasoned the encroachment into the competences of the States as necessary for sustaining the economic union of the country as envisaged under Article 55 (6) of the Constitution.<sup>99</sup>

Some argue that since the proclamation could help in creating common economic community that the country is pursuing, it shall not be criticized; rather the Federal Government's effort to bring uniformity concerning urban land registration in the country shall be appreciated. For instance, Legesse wrote the following in support of the enactment of the proclamation arguing that the proclamation does not actually contradict the power sharing scheme in the constitution:

*"...one could uphold the constitutionality of the Ethiopian Urban Landholding Registration Proclamation No. 818/2014 considering this particular provision (Article 55/6) under the constitution. Among the major objectives of the proclamation, one is building one economic community and this goes in line with art 55(6) of the constitution... Given the fact that the country didn't have uniform and well-functioning real property registration law previously, the adoption of the urban landholding registration proclamation should be appreciated and even the same trend could be suggested when it comes to the rural real property registration system".*<sup>100</sup>

Even if the above quoted argument holds water and the Federal Government enacted the proclamation on the basis of the possible outcomes that registering urban lands may bring to the country (this can be inferred from the decision of the HoF that rule in favour of the legality of the proclamation), seen constitutionally (especially, from the principles of self-autonomy and non-interference), the proclamation overrides States' power to administer land. At this point, this author argues that the end result shall not matter; the means and the procedures shall. Hence, though the proclamation may have positive impacts in making registration of urban lands a bit uniform in the country, since from the outset it violated the constitutional power sharing, its constitutionality has to be questioned.<sup>101</sup>

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<sup>99</sup> Federal Democratic Republic of Ethiopia, *House of Federation First Emergency Meeting*, January 2014.

<sup>100</sup> Legesse Tigabu, "The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights, *supra* notes 93, pp. 119-120.

<sup>101</sup> According to Article 9(1) of the FDRE Constitution, "the Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official

Furthermore, the Federal Government by virtue of this proclamation defined the powers and responsibilities of States in relation to registration of urban lands. Defining the powers as well as responsibilities of the two levels of government is reserved to the federal constitution. Assignment of power in between the two is completed when the constitution was adopted in 1995. No working scenario is provided in the constitution concerning the possibility of defining State powers and functions in relation to administering land by the Federal Government. It is an uphold principle in federalism that the two level of governments are in equal footing; no one is above the others. On this basis, the Federal Government shall not be empowered by any law except the constitution with the power to give or take away any power to States. Even when the constitution allows for this possibility, the federal system might be in danger of letting States to be subordinate to the Federal Government. Hence, taking the existing framework of the constitution, the proclamation's approach in defining the powers and functions of federating states is unconstitutional; the Federal Government cannot give power to States and vice versa by a proclamation unless it is implicated in the constitution.

## 5. Concluding Remarks

In a federal structure where division of power between the central, states and local governments is its peculiar feature, adequate authority is given to each level of government to enable them perform assigned responsibilities without, of course, interferences. As this article revealed, despite the Ethiopian federal system does not allow for interventions of one level of government against the powers and functions of the other, it has been practically witnessed that the Central Government is stretching its hands against States' land administration power. In this regard, the paper argued that when the Federal Government enacted the Urban Lands Registration Proclamation No. 818/2014 and took away the power to allocate land parcels above 5000hrs to investors from States; in effect, this level of government is working contrary to the power sharing scheme in the constitution and the federal system in the country.

The above two intervention areas, contradicting the FDRE constitution and the Ethiopian federal system, helped the Federal Government to substantially accumulate much power in its hands. And this trend might lead the country to accustom the tendency of centralism, a threat to the existing federal system. Based on these surrounding facts, the article recommends that since upward

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which contravenes this Constitution shall be of no effect". And the validity of this proclamation shall be tested by this provision and in this author's argument; it is directly against the constitution.

delegation of power is not allowed in the federal constitution, the transferred land allocation power for investors has to be returned to the States. Also, since registering urban lands is one area of concern that States shall undertake in their constitutional duty to administer land, enacting the urban land registration proclamation should have been given to them.