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Experimenting with Non-Territorial Autonomy: Indigenous Councils in Ethiopia

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Abstract

After daringly adopting federalism based on ethnicity, Ethiopia has, since 1991, been empowering minority communities within ethnically designated territories. With the clear advantages of territorial solutions, the management of extreme ethnic pluralities through territorial approaches alone has proved a daunting task. Complementing territorial autonomy, the region of Benishangul Gumuz has opted to inculcate elements of non-territorial features in order to manage its regional diversity. This paper investigates the pros and cons of these measures and what it means for a federal arrangement that heavily relies on the matching of ethnicity with territory. It concludes that, even though non-territorial measures being undertaken are steps in the right direction, their full-fledged implementation has severely been curtailed by legal inadequacies and the political practice.

Key words: Non-territorial autonomy, territorial autonomy, ethno-national federalism, indigenous councils, minorities.

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When it comes to the management of ethnic diversity, non-territorial autonomy (NTA) – at least in its explicit and normative sense – remains a concept much more valued and employed in Europe than in Africa.¹ In Europe,² NTA has been functional in various contexts to deal with issues of, *inter alia*, desecuritization of conflicts, empowerment of ethnic minority groups³ and building inclusive democratic policies (Nootens, 2015: 34). In contrast, in much of Africa including Ethiopia, territorial autonomy (TA) has been the only overwhelming option in the accommodation of ethnic diversity (Kymlicka, 2006: 49–53).

To be sure, many African countries pursued the notion of liberal democracy after gaining independence and focused primarily on individual rights (Selassie, 1992: 19) rather than on issues of minorities, ethnic diversity and most importantly the recognition of group rights, both through TA and/or NTA. It is only recently that such attitudes are changing in many African countries (Dersso, 2012a: 32–40).⁴ In the same vein, Ethiopia, until 1991, followed a similar path before it started to come to terms with its enormous ethnic diversity.

Ethiopia's ethno-national federalism – or, as many prefer to call it, 'ethnic federalism' – presents both territorial and, to an extent, (unclear and ambiguous) non-territorial solutions regarding the accommodation of diversity. In particular, the federal constitution seems to provide for some sort of normative pluralism regarding the accommodation of the interests of ethnic groups: (1) through the acknowledgement of their customary and religious rights and (2) via the subnational constitutional space available to the regions, which, arguably, can be utilized to underpin state constitutionalism in order to provide for greater protection to minorities. In operational terms, however, the federal arrangement heavily relies on solutions for ethnically based demands primarily through TA (Van der Beken, 2009: 226).

This paper, through a case study of the region of Benishangul Gumuz (BG), normatively identifies and describes the less explored aspect of Ethiopia's ethno-national federalism from the perspective of non-territorial features and investigates whether adequate progress has been made so far. Of course, the territorial approach of addressing the TA demands of different ethnic groups, arguably, has managed the quest of some ethnic groups, especially in where there exists a relative match between ethnic identity and territorial entity. Yet, regional states are ethnically so diverse that an intersection between ethnic identity and territorial presence has been impossible to accomplish. Moreover, as a result of the trending political atmosphere, minority ethno-national groups are largely deprived of various aspects of the right to self-determination, as these rights, in most cases,

are extended only to the dominant group/s, which exercise operational control of territory and its government institutions (Fiseha, 2016: 40–41).

Despite the obsession with TA,⁵ the region of BG has deviated from the legal and political norm in establishing non-territorial indigenous councils. The BG region for which these councils have been founded has tried to combine TA and NTA in the accommodation of its regional ethnic diversity. The points of departure this paper tries to investigate, especially for the non-territorial approach, is: what is the nature, scope and institutional design of the councils? To what extent are minorities for which the councils have been established empowered? How is membership of these councils determined and how is genuine and effective participation of the beneficiaries to these councils ensured? Is the necessary legal and political commitment available to implement autonomy for the indigenous councils?

Following this introduction, the paper addresses three major themes: the background and context of the ethno-national federalism, and the shortcomings of the resulting TA arrangements, in Ethiopia, a substantive description of the non-territorial features of the indigenous councils in BG and a discussion on what would be needed in order to make the existing forms of NTA arrangements more effective. The paper concludes by stressing that the continued heavy reliance on TA, in terms of being considered both a legal and political solution to ethno-linguistic diversity, has severely undermined the development of NTA as a complimentary form of governance in ethnic diversity management in Ethiopia.

The background and context of ethno-national federalism

After 1991, the Ethiopian People's Revolutionary Democratic Front (EPRDF),⁶ in an attempt to respond to the long overdue 'question of nationalities', reconstituted the state into an 'ethnic federation'.⁷ With the recognizable changes the federal re-arrangement has brought, aimed at finding a resolution, mainly to the ethnic problems, the dispensation has also led to the changing of arenas of conflicts, mainly by creating a new set of majority-minority relations (Kefale, 2009: 4).

The core idea behind the federal bargain is the empowerment of ethnic groups (which in most circumstances are politically mobilized)⁸ in ethnically carved territorial homelands where they are entitled to various economic, social, cultural and political rights resulting from recognition as distinct ethnic groups or, in the words of the Federal Democratic Republic of Ethiopia (FDRE) constitution, 'Nations, Nationalities, and Peoples' (NNPs).⁹ For the purpose of implementing this

idea, the ethnic territorial units are established in the form of (ethnic) regions and sub-regional administrations.¹⁰ Kefale (2009: 6) in describing the new arrangement states:

Ethnic federalism in Ethiopia, by placing ‘sovereignty’ over ethnic groups introduced a new system of entitlement. Accordingly, those who live in their designated ethnic homelands became titular, whereas those who for different reasons find themselves out of their designated ethnic homelands became non-titular. The narrowing of regional and local citizenship to the level of primordial ethnicity reduced, not only new migrants, but also people who lived out of their officially proclaimed ethnic homelands into new minorities.

In practical terms, politically recognized ethnic groups, which in almost all circumstances are counted as ‘owners’ of a particular territory (be it the region as a whole or selected sub-regional administration/s) has resulted in the dichotomization of ethnic groups as ‘indigenous’ and ‘non-indigenous’ (Van der Beken, 2012: 246). While the former (mostly ‘minorities turned majorities’ in the newly formed ethnic units) exercise exclusive ownership of territory and control of its public institutions, the latter (including those with official political recognition, but outside of their ethnic homelands) are left on the margins, with little or no hope of political, cultural, linguistic and economic self-determination.

At this point, it is important to further elaborate on the terms ‘indigenous’ and ‘non-indigenous’. A developed jurisprudence on the concept of indigenous peoples in the Ethiopian context, as understood under international human rights norms, barely exists. Despite this, a number of works on minority issues in Ethiopia use the term ‘indigenous’ and ‘non-indigenous’ to describe or differentiate the various groups (Van der Beken, 2007; Fessha and Van der Beken, 2013). Legally speaking, in Ethiopia, no separate normative or institutional recognition is given to the existence of indigenous peoples, except what is provided in the subnational Constitutions of BG and Gambella.¹¹ Hurst Hannum (1988: 649), in examining the status of indigenous peoples in domestic legislations argues that:

The status of indigenous groups and the particular policies affecting them are set forth in constitutional provisions, statutes and relevant judicial decisions. In many cases, general provisions concerning equality and non-discrimination are supplemented by exceptions for measures intended to promote ‘backward’, ‘tribal’, or ‘aboriginal’ peoples. Other provisions impose a general legal obligation on the state to assist or promote the economic and social development of indigenous groups.¹²

As Hannum maintains, the domestic treatment of indigenous peoples could be examined from two perspectives. First, the state accords a special status to indigenous inhabitants, which is intended to protect and free them from certain civil obligations, but which also limits their enjoyment of certain rights (Hannum, 1988: 649). This could be in the form of general laws outlining the rights and duties of recognized indigenous peoples. Second, recognizing that indigenous inhabitants possess all of the rights and obligations of other nationals of the state, but also accounting for the special needs of indigenous populations as is done for other ‘disadvantaged’ groups (Hannum, 1988: 649). This duly recognizes the need for substantive equality and non-discrimination against indigenous peoples and the need to make them on par with the status of the larger society.

In light of such criteria, the two regions’ constitutions, despite labelling some portions of their population as indigenous, did not provide justification or give additional (separate) rights to the identified indigenous nationalities.¹³ The general understanding at the international level is that international law documents containing rights specifically dealing with indigenous peoples are by far stronger and more detailed than those of the rights of minorities (Hannikainen, 1995: 79, 89).

However, the Ethiopian approach of designating groups as indigenous and non-indigenous makes more sense when one considers the federal structure and the political context rather than substantive international standards relating to indigenous peoples. In particular, the indigenous/non-indigenous dichotomy becomes more visible when one considers how the regions are politically organized and how this has translated into privileging certain ethnic (indigenous) groups, thereby giving them a politically dominant position, while relegating other (non-indigenous) groups to permanent minority status. As aptly argued by Van der Beken (2012: 246)

...inside the regions a difference is made between two categories of ethnic minorities: the indigenous and the non-indigenous. Indigenous minorities are those ethnic groups that have traditionally lived in the territory of the region; hence they are indigenous to the region. The non-indigenous groups are considered to be those groups that have migrated to the region in a more recent past and that are indigenous to another region. We could also call them internal migrants. Indigenous minorities have a right to their own sub-regional territorial administration and to representation in the regional institutions. However, non-indigenous minorities do not enjoy such specific protection in the region and can merely claim individual rights.

Some regions have, however, extended the constitutional privileges attached to being indigenous to groups that are found occupying a non-dominant position in the regions. For instance, the Afar constitution calls the Argoba ‘indigenous’. The Amhara constitution contains specific group rights for the Agew Himra, Awi and Oromo, which seems to suggest that these groups are considered indigenous to the region (Van der Beken, 2012: 294–296). It has also established a specific nationality *Woreda* (district) for the Argoba minority through a separate proclamation (Van der Beken, 2012: 241–242). Recently, the Amhara region has extended some of the privileges of indigenous groups to the Kemant people and accorded them some sort of TA.¹⁴

Similarly, the region of Tigray recognizes the Irob and Kunama as indigenous, and the protective mechanisms apply to them (Van der Beken, 2012: 246). In contrast, the protective mechanisms in the Oromia and Somali constitutions are limited to the Oromo and Somali ethnic groups. This is because the other ethnic groups in the region are all considered to be non-indigenous (Van der Beken, 2012: 246). From these premises, one can argue that the selection of certain ethnic groups, and privileging them with special rights, despite the existence of other ethnic groups which are also on par to these groups, is more of a political decision than a legitimate practice with roots in international human rights. Therefore, all regions of Ethiopia adopt the same approach towards the protection and recognition of ethnic diversity. ‘The constitutional accommodation of ethnic rights is limited to the indigenous groups’ (Van der Beken, 2012: 246–247) and, in some circumstances, to carefully selected minorities.

The limits of the territorial approach and the trending political practice

Ethiopia’s federal design is based on the logic of creating ethnic territorial units for minorities so that they are able to reap the benefits of the federal dispensation. The TA for minority accommodation in Ethiopia follows two approaches: First, the federal constitution creates nine regions, largely, if not solely, drawn along ethno-linguistic lines, empowering selected ethnic groups and ensuring their self-government rights.¹⁵ Second, it designs ethnicity-based local governments (sub-regional administrations) within the constituent units, again trying to ensure self-rule for the remaining major ethno-national groups who are unable to establish a region of their own.

This seems to have been undertaken by assuming that territorial (political) boundaries coincide, at least to some extent, with ethno-national groups (Fiseha, 2007: 253). Yet, this stands as one of the major structural limitations of the Ethiopian setup. Among others, this ignores the shared political history that resulted in heterogeneous territories, people of mixed ethnic background or those unsure of which ethnic group they belong to or wish to identify with (Fiseha, 2007: 256 citing

Clapham, 2002). Furthermore, it has downplayed the crosscutting elements of other factors giving rise to varied identities besides ethnicity (Fiseha, 2007: 256). Obviously, the recognition of 77 ethno-national groups but only nine constituent units explains the level of discrepancy between ethnic groups and the demand for TA. Even for the ethnic local governments, their application is only to select ethnic groups, which replicates the same majority-minority dilemma at the local level (Fiseha, 2016: 58).¹⁶

In practical terms, however, many agree that the understanding of Ethiopian federalism is not complete unless one contextualizes the links between constitutional architecture and political practice, in particular, the operation of the party system (Fiseha, 2006; Gudina, 2011; Fiseha, 2012; Aalen, 2002). Since 1991, EPRDF has remained the dominant party of the state, and its grip on power continues to be absolute in many respects.

Electorally, it continues to enjoy absolute legislative majorities and full control over the executive. Governmentally, it has had monopoly over policymaking, reform and change processes as well as public discourse. As to its bargaining position, both its vertical and horizontal interactions with societal, state and political actors have been characterized by highly asymmetrical relationships skewed in favour of the party (Tedla 2011: 47).

This has a number of serious repercussions with respect to the empowerment and participation of minorities in general, and regional minorities in particular. First and foremost is its impact on the autonomy of the regions. Since key political decisions as well as nomination, election and appointment of crucial political figures are made through EPRDF's party channels from the centre, the promised autonomy to ethnic minorities through the ethnic federalism experiment is undermined. Consequently, the legitimacy, representativeness and accountability of the decision makers to the respective ethnic communities are further thwarted (Fiseha, 2007: 261–262).

Second, after the 2005 election crisis, EPRDF seems to have taken an even stronger position on its dominance and, noticeably, there is no room for the political participation of opposition parties; even the previous concessions of allowing their nominal mirror representation in the federal as well as regional legislative bodies has been scrapped (Fiseha, 2015: 35–36). With the absence of alternative options, this stance of exclusive ownership of the political space has largely disenfranchised regional minorities to the extent that they are not even able to participate through the apparatus of the EPRDF.

Arguably, recent developments seem to indicate a growing change in the power balance tilting in favour of the regions in influencing the centre (Fiseha, 2015: 36–37). However, even under the current circumstances, it is highly doubtful that the regions will use this influence to bring about a different scenario with respect to the accommodation of their regional diversities.

The indigenous councils in BG: New paradigms for NTA?

The region of BG is one of the nine subnational units of the Ethiopian federation. It has a unique set of political, demographic and ethnic portfolios delineating it from other regions of the country (James, 2002). One of the major defining elements in this regard is the existence of constitutionally recognized indigenous ethnic groups,¹⁷ which by implication make other ethnic groups of the region non-indigenous. This constitutional dichotomy is followed by political practice, which has politically empowered the former while the latter have restricted participation and self-rule rights.

In the last century, because the region has been a geographic and political periphery, it has witnessed more marginalization than other parts of Ethiopia (Young, 1999: 321–346). This probably explains the region's straightforward privileging of the five indigenous ethnic groups (the Berta, Gumuz, Shinasha, Mao and Como) that are the jointly (politically) dominant groups.¹⁸ As a result, there are two sets of competing interests (Dessalegn, 2015: 31–51). One relates to the challenge of ensuring TA for the indigenous ethnic groups below the regional level.¹⁹ In this respect,²⁰ establishing institutions of self-rule in the form of ethnic local governments is an outstanding task. This is understood to respond to the anxiety on the part of the indigenous nationalities that being numerically outnumbered (Yintso, 2003; 53)²¹ leads to an eventual domination of the political apparatus by the non-indigenous groups.

On the other hand, however, the substantial non-indigenous groups (nearly accounting for half of the regional population) that have settled in the region not only demand TA and equitable political participation within the region, but also have a strong desire to ensure their very existence (Dessalegn, 2016: 162–177). Despite this, there is a tendency by the indigenous ethnic groups to legally and practically limit the role of the non-indigenous groups from adequate and effective participation. It is in the midst of these contending interests that the indigenous councils were established.

Institutional design, powers and achievements of the indigenous councils

The 2002 constitution of the BG region provides for a four-tier administrative structure: the region, the Administration of Nationalities (AN), the *Woreda* (district) and the *Kebele* (the smallest

administrative unit found below the *Woreda*). Despite this constitutional guarantee, the five indigenous ethnic groups (Berta, Gumuz, Shinasha, Mao and Como), even though they are legally and politically recognized as the owners of the region, do not have an on-the-ground fully functioning AN.²² Unlike that of the AN, which is solely entrusted with the task of ethnic minority accommodation,²³ the *Woreda* and *Kebele* structures of the region are established only as means of decentralizing power to the lowest administrative units,²⁴ with little or no intention of minority accommodation. Therefore, what is happening at the moment is, the region has simply administratively compartmentalized itself into three zones: Assosa for the Berta, Kamashi for the Gumuz and Metekel for the Gumuz and Shinasha; there is also one special district of Mao-Como (Wodisha, 2010: 64–65).

Normatively, the AN is intended to accomplish the task of minority accommodation, both through TA and NTA. Because the AN is an administrative structure replacing the zones and the special district, its establishment entails a territorial administration in favour of an ethnic group with defined boundaries.²⁵ While this ethnic territorial administration carries out duties on matters related to territory on a territorial basis, its NTA component is intended to carry out activities outside of one's designated AN. For instance, this could be a case where Shinasha AN carries out activities in a Gumuz AN in matters relating to the culture and language of Shinashas living inside a Gumuz AN.

Constitutionally, the AN, being accountable to the regional parliament,²⁶ is vested with legislative, executive and judicial powers.²⁷ Accordingly, it has the following three institutions: the Council of Nationalities (legislative: referred to as the indigenous councils throughout this paper), the Nationalities Administration Council (executive) and the Nationalities Administration Judicial organ (Judiciary). Based on this constitutional permission, a separate legislation has been enacted to determine the organization, powers, functions and internal working procedures of the indigenous councils and their offices.²⁸ This proclamation establishes five legislative non-territorial indigenous councils, which have been operational since May 2014 – one for each of the five indigenous ethnic groups (Van der Beken, 2009: 5).²⁹

The indigenous councils have, *inter alia*, the following important powers: the right to determine the working language of the AN,³⁰ the power to protect the rights of the nationalities to speak and write, to develop, preserve, express, promote and expand its language as well as to preserve their historical heritage.³¹ Importantly, Proclamation No. 73/2008 under Article 3(4) explains their non-territorial nature thus: ‘The hierarchy of the Administration of the Council shall

have its own boundary limits to perform regular governmental functions and administrative functions; however, it is established boundaryless regarding the protection and preservation of the rights and privileges of nationality cases under Article 39 of the constitution'. From this, it is clear that it is the entire AN that has been recognized as having territorial as well as non-territorial powers. Yet, in practice, it is only the legislative arm (indigenous councils) of the AN that has become operational on a non-territorial basis.

As Van der Beken notes, the proclamation differentiates between two categories of powers for the AN: 'regular governmental and administrative functions' and 'nationality cases' (Van der Beken, 2012: 263). It seems the regular governmental and administrative functions relate to territorial competences whereas nationality cases defined as 'cases that include the rights of the nation and the nationalities and the rights to speak and write, to develop, preserve, express, promote and expand their historical heritage under the federal system and federal and regional constitutions'³² relate to the non-territorial aspects. As such, even though the extra-territorial powers relate to the protection and preservation of the language and cultural rights of the indigenous ethnic group outside of its de facto designated territory, the councils are yet to establish, for instance, school facilities functioning on a non-territorial basis.³³

Nevertheless, the AN – and in particular the indigenous councils – do not seem to have been given adequate legislative powers. First of all, the councils are made directly accountable to the regional parliament.³⁴ Second, the regional constitution merely provides that the councils issue directives, which have to be in conformity with regional laws.³⁵ Regarding the establishment of the council, made operational through an implementation directive detailing their working procedures, each of the five indigenous ethnic groups has established councils comprising 75 members per council.³⁶

The 75 members of the indigenous councils are elected for a term of five years.³⁷ Article 75(1) of the region's constitution stipulates that: 'Each nationality council shall be established comprising members elected from among members of the *Woreda* Council under special condition including members of the Regional Council'.³⁸ Based on this provision, members of the regional council (parliament) representing an indigenous group are also the automatic members of the indigenous councils. It is for the remaining unfilled seats that members are elected from the *Woreda* council.³⁹ The election from the *Woreda* council is based on 'special consideration'.⁴⁰ It is not clear though what is meant by special consideration and whether this follows a special voting procedure or the setting up of different electoral constituencies. Nor is it clear if non-members have the right

to participate in the activities of the indigenous councils without, however, having the right to vote (Suksi, 2015:105).

The fact on the ground, however, shows that the region's ruling party (an affiliate of EPRDF) chooses (handpicks) members from the *Woreda* council, making them again automatic members of the respective indigenous councils. To this effect, no separate elections have been held nor electoral constituencies established. This seriously puts in question the level of participation and accountability of the members of the indigenous councils to their respective indigenous ethnic groups. In particular, this further blurs how the indigenous councils relate to their constituencies.

On the other hand, even though indigenous councils are empowered to have a say on their budget, it is contingent on the budget approved by the regional parliament.⁴¹ This seriously puts in question the institutional autonomy of the AN and the non-territorial legislative councils, and the extent to which they can discharge their duties in circumstances where they are dependent on the regional parliament for financial issues. Furthermore, no clear legislation exists on whether the AN can raise funds from other means besides the grant it receives from the regional government.

Towards developing an effective NTA arrangement

No other subnational unit in Ethiopia has gone to the extent of providing non-territorial powers like that of the BG region, even if, functionally, the indigenous councils largely remain symbolic.⁴² In fact, all the other regions exclusively rely on TA in the management of their regional ethnic diversity. Under this section, general and specific discussions are made with a view to tackling the query on what would be needed to make an NTA arrangement more effective, both from the specific perspective of BG and from the wider angle of the federal arrangement.

In considering the specific case of the indigenous councils, a thorny question will be how membership to the councils is determined. An understanding of how membership is determined has to be examined from the perspective of how groups are considered as forming distinct ethnic entities in the Ethiopian context. From the standard expression of the federal and regional constitutions and the trending understanding of ethnicity in Ethiopia, determination as a distinct ethnic group is, largely, if not solely, based on primordial attributes (Aalen, 2006:246–247; Abbink, 1997:169). From the definition of NNPs under Article 39(5),⁴³ one can discern that to be regarded as an NNP (ethnic group) both subjective and objective criteria should be met.⁴⁴ The subjective criteria are belief in a common or related identity and psychological makeup, while the objective ones are language, culture and territory.⁴⁵

Importantly, the federal constitution's definition of ethnic groups also signifies that it primarily subscribes to the primordial ideas of ethnicity. Since the whole population of the country is seen as composed of NNPs, it means that every citizen either belongs to an ethnic group or defines themselves along ethnic contours (Aalen, 2006: 247). This is vital for ethnic groups to exercise the various group-specific (ethnic) rights enshrined under the federal and regional constitutions. This is because each individual of the state is regarded not simply as a citizen, but also as a member of an ethnic group, and hence their rights depend in part, if not entirely, on their ethnic membership.⁴⁶ This seems to presuppose that ethnic groups are homogenous and have the same interest that can be equated with political units, even though these assertions are not in conformity with the reality of Ethiopian society (Aalen, 2006: 247).

Arguably, the decision regarding membership of the indigenous councils cannot deviate from this norm. The fact that no mention is made of self-identification in the laws establishing the indigenous councils indicates that individuals are not at liberty to choose membership of the relevant indigenous councils. Accordingly, in lieu of self-identification, membership to the councils seems to depend on the data provided by the national population census, which officially does the census of ethnic groups in the country, and not by a list of persons declaring membership.

There are additional challenges relating to both design and functionality of the indigenous councils. At the forefront is the fact that the titular groups benefit from NTA. What does this mean when NTA is designed for groups in control of the political process? Several speculations could be made here. First, it could be the case that the region has found it impossible to realize the TA demands of the five indigenous groups, since it is very difficult to carve out territorial units where each ethnic group will be transformed into a majority in its own entity. In order to mitigate this, NTA is being used to deflect political attention away from the demand for TA.

On top of this, the partial implementation of the AN has evoked serious disagreements even within the indigenous ethnic groups. Among others, the establishment of the non-territorial mechanism before some form of TA does not seem to be a justification comfortably accepted (Dessalegn, 2016: 191–199). Some contend that the reasons for doing so are attributable to pragmatic considerations. The five indigenous ethnic groups, especially the Gumuz, are territorially dispersed, which makes it impossible to carve out a homogenous territory.

Second, it is contended that the establishment, functionality and operation of the indigenous councils were achieved through a top down approach. As stated earlier, NTA was adopted before exhaustively and effectively utilizing TA. It is not also clear whether the establishment of NTA in

the region has achieved the purpose of regulating state-minority conflicts and boosting minority participation in public life (Smith, 2015: 176). In this respect, it is possible to mention the tensions that exist between the indigenous and non-indigenous communities and competitive demands within the beneficiaries themselves (Dessalegn, 2015: 32–33). Moreover, since Proclamation 73/2008 only details the rights of the indigenous nationalities, be it NTA or TA, the absence of necessary guarantees that non-indigenous communities will not face further exclusion from such undertakings remains worrying.⁴⁷

Especially, looking at the fact that these councils have not been meaningfully empowered to participate and influence decision-making processes at the regional level, it is really questionable what accrues from the non-territoriality of the indigenous councils. Importantly, no (subsequent) legislation has set forth a way for the councils to have a say, even in circumstances where a decision at the regional level goes against one of the indigenous ethnic groups. Nor is it clear how they can intervene in circumstances where an ethnic group claims to be marginalized in areas where they are functionally non-dominant.

Another very pressing challenge is the fact that the indigenous councils do not operate autonomously from the trending political practice. The dominance of the region's ruling party, which is an affiliate of EPRDF, dictates the terms and conditions including elections and appointment of the members of the councils. Under the party rule of centralized decision-making, which EPRDF and its affiliates follow, it is highly unlikely that the councils can act contrary to the wishes of the EPRDF, (Dessalegn, 2016: 197).

In spite of the awkward nature of the introduction of NTA to the titular groups of the region, it should be admitted that NTA helps and has helped these groups, for instance, in promoting the development of their culture and use of their language at the local level (since the working language of the region and the language of the five groups do not coincide). In particular, the publication of dictionaries in the native identities' languages has brought some momentum for further studies. In the education sector, since the establishment of the indigenous council, it has been possible to prepare textbooks for primary schools in the five indigenous languages. This has been made possible by the initiative taken by each council.

Taking this example of BG as a very important point of departure, it would be logical to make an overall projection and ask: what will be needed to make the existing NTA arrangement more effective? For this, it is best to analyse the matter from a wider perspective. Even though an

explicit recognition of NTA is almost non-existent, some form of non-territorial accommodation is, nevertheless, discernible from some aspects of the federal constitution.

Primary in this regard is the accommodation of the interests of communities through the acknowledgement of their customary and religious rights. This is based on the constitutional recognition given for the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws.⁴⁸ A typically functioning NTA in this regard is the recognition and establishment of *Sharia* courts and law for Muslims throughout the country in relation to marriage, succession and personal affairs (Fiseha, 2016: 63). Despite a similar constitutional recognition of customary laws, for lack of further enabling legislations, non-territorial adjudication on the basis of customary laws via customary courts is not yet operational.

With respect to the *Sharia* courts, further enabling legislations based on constitutional permission have established federal and regional *Sharia* courts.⁴⁹ While federal *Sharia* courts exercise jurisdiction in federal territories, regional *Sharia* courts function in the respective regions. The core point behind these *Sharia* courts is that the courts shall have jurisdiction over marriage, succession and personal affairs where the parties have expressly consented to be adjudicated under Islamic law.⁵⁰ Accordingly, so long as there is consent by the parties, irrespective of the principle of territoriality, they can have their cases examined by *Sharia* courts. This offers a possible autonomy for religious communities wishing to be adjudicated on the basis of the *Sharia* law, irrespective of their territorial presence, so long as there is consent to be arbitrated by it.

Second, NTA could be implemented via the federal constitution Article 50(5), which provides for dual constitutionalism. Under the doctrine of 'greater protection', state constitutionalism can be oriented towards providing better protection to ethno-national groups by stipulating NTA. Despite this, none of the nine regions have adequately used the available subnational constitutional space⁵¹ to deviate from the norm and provide for NTA.

Yet, two perspectives can be debated as possible competitive demands in pushing for the realization of NTA. First, since the purpose of forming the regional states under the Ethiopian federation is aimed at empowering minorities within a particular territory with some sort of TA (regional, zonal or special district) and because no explicit recognition of NTA is made, one can safely conclude that the issue of TA's non-inclusiveness was simply accepted from the very outset. Second, in some cases, like the regions of BG and Gambella, because any form of recognition of the rights of the non-titular groups is considered a threat to the autonomy and dominance of the

titular (indigenous) groups, measures are intentionally taken to make sure that the former remain non-accommodated.⁵²

Normatively speaking though, Article 39(3) of the federal constitution provides protection for NNPs that do not have TA. According to this provision, NNPs have the right to a full measure of self-government in the territory they inhabit outside the framework of their own regions. They also have the constitutional right to adequate and equitable representation in the state governments in which they are currently residing. As clearly stated under Article 39(3), this does not require ethnic groups to be present in their own regional states only (nor in a particular territory to which they are considered indigenous), for the exercise of the right. It also extends to ethnic groups (considered indigenous to a particular territory) that do not have a state of their own, but where they are inhabiting a given territory.

As Van der Beken elaborates, even though the right to TA within a region can be reserved for groups considered indigenous, the fact that regional states do not give recognition to non-indigenous regional minorities, which are supposed to be protected irrespective of territorial considerations, contradicts Article 39(3) (2010: 26). He contends that giving recognition to the latter approach helps the dominant (indigenous) group remain in control of their territory/regional state, while at the same time protects the non-dominant (non-indigenous) groups' right to participate in the regional government's decision-making and policymaking activities (Van der Beken 2010: 26).⁵³ However, the political atmosphere, which somehow seems to link the implementation of these rights to TA, makes the effective implementation of the right 'dependent on the goodwill of the regional and sub-regional authorities' (Van der Beken 2010: 27).

With this in place, considering a full-fledged NTA for Ethiopia would at least require a consideration of the following points: First, the establishment/recognition of NTA should be done in a way that does not negate the already functioning territory-based approach of granting autonomy. Second, establishing non-territorial arrangements, especially if it is intended to meaningfully increase the participation of minorities, has to be accompanied by institutional and legal modifications, described below.

Concerning the participation of minorities at the federal level, an amendment is required to the provisions of the FDRE constitution pertaining to the election of members of the House of Federation (HoF);⁵⁴ this task would need to be entrusted to cultural communities (non-territorial ethnic councils) of each ethnic group, as opposed to the region or the regional parliament (Van der Beken 2010: 29). With respect to their participation in the House of People's Representatives

(HoPR), NTA institutions could be set up with separate electoral districts to elect representatives of regional minorities.⁵⁵

In practical terms, however, there are additional outstanding challenges for a full-blown NTA in Ethiopia. There is an emerging consensus that TA is a viable option in circumstances where the group in question is numerically large and territorially concentrated (Nootens, 2015: 46), whereas NTA options best suit geographically dispersed ethno-national groups that are politically mobilized and express an interest in self-government (Nootens, 2015: 35–37, 39, 41, 46). Importantly, as Kymlicka (2005:118) argues, it is only after settling territorial issues that some aspects of NTA will help to ensure the protection of the rights of smaller and/or more dispersed minorities. The vexing question here is whether territorial self-government has been exhaustively utilized in Ethiopia in order to consider other non-territorial options (Kymlicka, 2005: 118).⁵⁶ It seems, with official recognition of 77 ethnic groups and only nine regions (among which 55 ethnic groups share a single region of the south), it is difficult to convincingly argue that territorial solutions have been exhaustively utilized in order for them to be supplemented by non-territorial alternatives.

Conclusion

The aim of this paper was to demonstrate how an NTA arrangement fared in circumstances of extreme reliance on TA. The Ethiopian approach of managing ethnic diversity through the territorial approach has not brought an all-round solution. Nevertheless, the experience of BG, which tried to mitigate this limitation through a murky NTA arrangement, even though is a step in the right direction, still does not seem to address the overall quest of the indigenous ethnic groups.

While the indigenous councils have demonstrated that they can work towards giving indigenous groups control over the rights of education, language and culture, a number of issues relating to their institutional powers and effectiveness, without mentioning their genuine empowerment, could be mentioned as having undermined their possible positive influence. Moreover, applying an NTA solution without exhausting territorial remedies has severely emasculated their use. The discrepancy between the limited power given to the councils and the practice on the ground also continues to stand as an outstanding challenge.

NTA arrangements could be a key instrument for addressing the concerns of several regional minorities with respect to language and culture – an important component of the right to self-rule.

NTA could also be used to protect linguistic rights and, in particular, claims of mother tongue education for regional minorities.

The region of BG established the ANs, which, through a subsequent legislation, have also included non-territorial powers in the interest of accommodating the region's ethnic diversity. This has, to an extent, demonstrated how legal pluralism can be used as a basis for advancing NTA to complement the territorial approach in Ethiopia. Yet, two important steps should be taken if this is to have any meaningful impact in bringing an overall increase in choices of ethnic diversity management – a clear formulation of NTA in both federal and regional legal frameworks and a political commitment to implement it.

Notes

¹ To the author's knowledge, a comprehensive study on NTA arrangements in Africa is almost non-existent. Yet, in Europe, there are a number of scientific case studies relating to the use and application of NTA arrangements. See for instance, (Malloy and Palermo, 2015); (Smith and Hiden, 2012)

² For a discussion on European case studies see (Maloy, Osipov and Vizi, 2015).

³ The term 'ethnic minority' is loosely used in this paper to refer to minority groups both at state and sub-state levels. However, in the Ethiopian context, ethnic minority groups, especially at sub-state levels, can further be understood as indigenous and non-indigenous ethnic minorities.

⁴ This change in attitude can also be gleaned from the recognition of peoples' rights in the African Charter on Human and Peoples' Rights. In particular, its inclusion of the largely controversial peoples' rights adds to its peculiarity and reach the needs of African societies to group-based demands, at least, in their normative aspect. Although the African Charter does not specifically refer to minorities as a legal category of people to protect, the unique normative content of the Charter, containing both individual and collective rights, arguably enables the application of such rights to minorities as well. (Dersso, 2012b: 42–69).

⁵ Ethiopia currently has nine regions established under Article 47 of the federal constitution, namely; Tigray, Afar, Amhara, Oromia, Somali, BG, Gambella, Harari and the Southern Nations, Nationalities and Peoples' Region (SNNPR). Apart from this, various sub-regional administrations are again responding to TA demands within the nine established regions.

⁶ The Ethiopian People's Revolutionary Democratic Front (EPRDF) was established in 1989 as a coalition of four ethnicity-based organizations: the Tigray People's Liberation Front (TPLF), the Amhara National Democratic Movement (ANDM), the Oromo People's Democratic Organization (OPDO) and the Southern Ethiopian People's Democratic Movement (SEPDM). While there are four members of the ruling party that control power in the four major regional states, and five parties affiliated to the EPRDF that do the same in the remaining five regional states, ideologically speaking, the coalition member parties and their affiliates are one and the same.

⁷ The provisions of the FDRE constitution exemplify this on three accounts. First, the organization of the nine regions based on ethno-linguistic criteria, second and third, self-determination rights and the exercise of sovereign power by the people of the country, which are exclusively vested in ethnic groups or 'Nations, Nationalities, and Peoples', in the words of the Constitution. These features markedly identify the arrangement as an ethnic federation. Kymlicka (2006: 55) aptly distinguishes between the multination federalism of the west and the ethnic federalism of Ethiopian states: 'in no Western country is there a general statement that all ethno-national groups have a right of self-determination, or that multination federalism has been adopted in order to recognize such a right, let alone that all sovereign power resides in the Nations, Nationalities and Peoples of the country'. Additionally, and most importantly, the fact that ethnicity is the chief instrument of state ideology, organization and mobilization in Ethiopia, which literally makes each and every state

activity run along ethnic dimensions, makes Ethiopian federalism ethnic rather than multinational. See (Kefale, 2009: 29).

⁸ However, it has long been claimed that the Ethiopian federal arrangement imposed self-determination rights on groups who hadn't sought it (Kymlicka, 2006: 55–56 citing (Donham, 2002).

⁹ See for instance the preamble and Articles 8 and 39 of the federal constitution.

¹⁰ For instance, the region of Oromia does not have ethnic local governments designed to accommodate ethnic minorities below the regional level.

¹¹ See Article 2 of the BG Constitution and Article 46 of the Gambella Constitution.

¹² Hannum mentions the examples of the constitutions of India and Pakistan which contain elaborate provisions regarding 'scheduled tribes' and 'tribal areas' respectively, which establish semi-autonomous areas under the direct administration of the central government.

¹³ Of course, the constitutions of Gambella and BG have explicitly extended the most important right of their respective constitutions – the right to self-determination – to the indigenous nationalities alone. However, since the indigenous nationalities already enjoy the privileges of the two regions established exclusively in their favour, extending the right to self-determination to them alone can only be a restriction on the rights of other ethnic groups within the region, rather than an additional right to the indigenous nationalities.

¹⁴ Proclamation 229/2015, The Kimant Nationality Special Woreda of the Amhara National Regional State Establishment Proclamation, Zikre Hig, 21th Year No. 20 BahirDar, October 11, 2015. See also the decision by the House of Federation on the Kemant Case, 17 June 2007 E.C, document on file.

¹⁵ In the regions of Tigray, Afar, Amhara, Oromia and Somali, not only is the region named after the titular group but the territory and its government institutions are controlled by it. The remaining regions also establish joint titular groups that control the region to the exclusion of others.

¹⁶ Minorities turned majorities have no incentive to include regional minorities. Furthermore, necessary safeguards to limit local tyranny have not been put in place in the constitutional and institutional design.

¹⁷ Article 2 of the BG constitution.

¹⁸ Based on the 2007 population census, the indigenous communities together account for 57.46%, while the non-indigenous groups account for 42.54% of the regional state's population.

¹⁹ Constitutionally speaking, the region's constitution provides for five administrations of nationalities (ethnicity-based local governments) for the five indigenous ethnic groups. In practical terms, however, these ethnicity-based local governments have not been established. For more, see the discussion below under institutional design, powers and achievements of the indigenous councils.

²⁰ For example, the revised BG Constitution Article 34 only ensures the right to be elected to public office to the indigenous ethnic groups. TA below the regional level is also reserved for the indigenous groups under Article 39.

²¹ This emanates from the historic villagization and resettlement program undertaken by previous regimes and the unique inward migration faced by the region, as the region is the target of large development projects that attract thousands of migrant workers from other parts of the country.

²² This is because the AN, which was entrusted with the power of ethnic minority accommodation, despite the constitutional provisions, was not made fully operational.

²³ See Articles 45(1) and 74 of the BG constitution.

²⁴ See Articles 87 and 103 of the BG constitution

²⁵ This in practice means a Berta AN, Gumuz AN, Shinasha AN, Mao AN and Como AN.

²⁶ Article 75(3) of the BG constitution.

²⁷ Article 74(2) of the BG constitution.

²⁸ Proclamation No. 73/2008, BG regional state proclamation enacted to determine the organization, powers, functions and internal working procedures of nationalities councils and their offices, No.4 Year 13, Nov. 1, 2008 Assosa.

²⁹ Proclamation 73/2008, Article 2. Accordingly, AN for Berta, Gumuz, Shinasha, Mao and Como are established.

³⁰ Art. 75(3(a) of the BG constitution.

³¹ Art. 75(3(b) of the BG constitution.

³² Proclamation No. 73/2008, Article 2(11).

³³ Most of the data for this paper was collected during the author's field visit to the region on May 2016. The research has, however, verified that no major developments have altered, hampered or improved the indigenous councils function since then.

³⁴ Proclamation 73/2008, Article 2(2).

³⁵ Article 75(3)(c) of the BG constitution.

³⁶ Proclamation 73/2008, Article 8(2) states that the members of each council shall not exceed 75.

³⁷ Article 77(1) of the BG constitution.

³⁸ Article 8 of Proclamation No. 73/2008 states that the each indigenous council shall comprise members of the regional council representing the nationality and members of the *Woreda* Councils elected under special consideration.

³⁹ For instance, Bertas have 40 seats in the regional parliament, which means these 40 members of the regional parliament are also automatic members of the Berta indigenous council. The remaining 35 seats for the Berta indigenous council will be filled by election from the *Woreda* council.

⁴⁰ Proclamation 73/2008, Article 8(1)

⁴¹ Art. 75(3)(d) of the BG constitution. ^[L]_{SEP}

⁴² This argument fundamentally stems from two points. First, the indigenous councils, which are the legislative arm of the AN, are the ones that have become operational. The whole AN, intended to function both in territorial and non-territorial attributes, is yet to come into effect. As argued further down, the political context simply wants to use the indigenous councils so that the five indigenous groups do not push for a full-blown implementation of the ANs. Second, the indigenous councils that have become operational and achieved tasks like the preparation of school text books, are challenged by financial and infrastructural challenges, making one skeptical as to the will on the part of the regional government to provide adequate resources.

⁴³ Article 39(5) of the federal constitution states the following: A ‘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.

⁴⁴ Generally speaking, Article 39(5) simply lumps many factors together in designating Nations, Nationalities and Peoples. But a closer look at the requirements reveals that some of them need factual determination while some simply are to be deduced subjectively upon the wishes of the specific group. In addition, such identification excludes groups who wish to be identified outside ethnicity but still wish to be part and parcel of the state. As sovereign power, according to Article 8(1) of the FDRE Constitution, only resides in NNPs, those unable to identify themselves as ethnic groups are simply outside the state (Abbink, 1997: 166).

⁴⁵ It is possible to notice from here some similarities between the definition of NNPs and the definition of minorities.

⁴⁶ In this regard, apart from the primordial ideas of ethnicity the FDRE constitution seems to endorse, on a pragmatic level, the government has tried to compartmentalize each individual into ethnic groups by will or by force. A typical example has been the issue of awarding *Kebele* (the lowest unit of government administrative structure) identification cards by which an individual will be asked (forced) to identify himself/herself to a single ethnic group. This has disenfranchised those who would like to identify themselves as a mix of ethnic groups (people born from parents with different ethnic origin) or those who do not wish to identify with a sole ethnic group. In addition, for election registration, for example, people have to state their ethnic identity (Abbink, 1997: 169).

⁴⁷ Article 3(7) of the Proclamation 73/2008 guarantees the representation rights of the non-indigenous communities. Practically speaking, they are not represented in any of the five indigenous councils.

⁴⁸ See Article 34(5) of the federal constitution.

⁴⁹ See for instance Proclamation No. 188/1999, A Proclamation to Consolidate Federal Courts of Sharia, 6th Year No. 10, Addis Ababa, 7th December 1999 and Proclamation No. 55/2003, The Southern Nations, Nationalities and Peoples’ Regional State Courts of Sharia Consolidation Proclamation, Debube Negarit Gazeta, Awassa, 8th Year No. 4 1st March 2003.

⁵⁰ Proclamation No. 188/1999, Article 4.

⁵¹ On the details of subnational constitutional space in the Ethiopian context see (Van der Beken, 2016)

⁵² The constitutions of the Gambella and BG regions only allow the right to self-determination to be exercised by the indigenous ethnic groups. Apart from this, subsequent legislation establishing local government structures has only permitted it to be exercised by the indigenous communities alone.

⁵³ Van der Beken further contends that such an approach protects the non-indigenous groups from attempts at assimilation and suppression directed from the indigenous groups, and simultaneously promotes inter-ethnic integration.

⁵⁴ The HoF is the second chamber of parliament with unique powers; as per Article 62(1) of the federal constitution, interpreting the constitution is the most prominent one.

⁵⁵ However, this will only ensure a simple majority winner and whatever mechanism of setting up electoral districts for minorities is used, there will always be minorities within these minorities disenfranchised by the electoral arrangement unless a proportional representation system is setup along with NTA arrangements.

⁵⁶ Kymlicka argues that NTA should be understood not as an alternative to the territorial accommodation of sub-state nationalisms, but rather as a potential supplement to it.

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