

Book Review

Tadesse Melaku, *Ethiopian Constitutional Law: Past and Present*, Vol. II (Alpha Printers, Addis Ababa 2017; number of pages: xv + 268, Price: 100 ETB)

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Ethiopian Constitutional law, Volume II is one of the new publications on law published in 2017. It is a follow up of similar work by the same author five years ago under the title “Introduction to constitutional law”, volume I. The book is a good contribution, given the acute shortage of reading materials, on constitutional law. It is perhaps the third textbook written on Ethiopian constitutional law¹ and the second textbook dealing principally on the current FDRE Constitution. Hence, the significance of the book under consideration cannot be overstated.

The author has done a commendable job in continuing with the second volume. It is hoped that the book would be valuable not only to students but to general readers/audience interested to have greater understanding of the FDRE Constitution.

A notable significant strength and development in this volume is the use of as many Ethiopian constitutional cases as possible and as available. Despite the inaccessibility problem, the author has attempted to include Ethiopian constitutional cases and present them in the pertinent sections. The other strength of the book is its attempt to include cases from jurisdictions which are more or less similar to the Ethiopian context. With the increasing constitutional cases disposed by the House of Federation (HF) and their accessibility, there is a chance in the

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¹ The first constitutional textbook was authored fifty years ago by Paul and Clapham in two volumes, under the title “Ethiopian constitutional development”. There has not been any other publication since then until 2012. In 2012 the second textbook on Ethiopian constitutional law and the first on the current constitution was published by Getachew Assefa entitled “Ethiopian Constitutional Law with Comparative Notes and Materials”.

future that the book can be truly a textbook on Ethiopian constitutional cases with its further refinement and thorough review.

A general major drawback of the book, in my view, is that the author did not continue with some of the valuable features of the previous volume that would make the book truly a textbook. Unlike the previous volume, this volume does not contain learning objectives. Nor does the book provide conclusion/summary and review questions, and further reading references in each chapter. This can give the book more of an attribute of a reference book than a textbook. The ambivalence is obvious from the introduction of the book, where in a sentence the author also seems not to be sure how to refer to the book. It simply states, not assertively, that “the book may be taken as a textbook”. Another slight inconvenience is that the book makes greater sense if read in tandem with the previous one.

The notable absence of reference to, at least in the bibliography, the two previous works on constitutional law, Paul’s and Clapham’s books in two volumes on Ethiopian constitutional development and the recently published Getachew Assefa’s book on Ethiopian constitutional law, is unbecoming of a writer on Ethiopian constitutional law and would be a surprise for constitutional lawyers.

Having these observations on the books general strengths and drawbacks, in what follows, I present my specific comment, observations and some of the limitations that result from oversight or misrepresentation in each chapter.

Organized into six chapters, the book attempts to exhaustively deal with almost every aspect of the Federal Democratic Republic of Ethiopia (FDRE) Constitution. It begins, in chapter one, by introducing the past constitutional system until the 1991 Transitional charter. The Ethiopian constitutional development may roughly be divided into two, taking the year 1931 as a watershed in which the first codified constitution was introduced. The first is the pre-1931 era. The second is the post-1931 period.

The pre-1931 period, the era of the ‘unwritten’ constitution, is the longest, extending, at least, as far back as 2000 years ago. It is very hard to give a detailed account of that era, not least because there is little or no written material, because the book’s principal purpose is expounding the current constitution. It only gives a snapshot of the traditional constitution in Ethiopia.

While the author’s attempt to give a background is appreciable, there are noticeable limitations. For one thing, apart from a general claim that the present cannot be understood without understanding the past, the book does not make a strong case on why and how the past constitutional experiment is relevant to the present. What one witnesses in the Ethiopian constitutional history is discontinuity and lack of a deep constitutional culture. In setting the scene for the readers, this was an important opportunity to bring to the fore one of the biggest problems of the country — the vicious circle of changing one constitution after another. In other words, the failure to establish and sustain constitutionalism in Ethiopia.

Second, it cites the traditional sources of legitimacy during the monarchical period. One of these is that one had to belong to the Solomonic dynasty to be a ruler. The second was that one had to belong to and profess the Ethiopian Orthodox teaching. The third, the book says, was “the underrepresentation of women in leadership positions”. This is more of an evaluation of the system in hindsight than a description of the third feature of the traditional sources of legitimacy.

Third, the chapter is very sketchy on other relevant traditional constitutional issues such as the nature and scope of the powers and rights of the kings and of other officials of the kingdom, their titles, their hierarchy etc.

Fourth, there is a mismatch between the title and the content of Section 1.3 of the first chapter. The title is modern constitution in Ethiopia. But the paragraphs discuss on the difficulty, if not the impossibility of comparing quality of one

constitution with a replaced one with particular instance of the institution of parliament.

Moreover, the section fails to discuss which the modern ones are. Why are they modern? What is the standard? It seems to have an implicit judgment that the unwritten constitutional era is traditional and the written era is modern. But it is very difficult to take the state of *writtenness* as a criterion to determine modernity.

Fifth, section 1.4.1 of the same chapter seems to reduce the reason why the 1931 constitution was adopted due to the elites' pressure to adopt the constitution. Nevertheless, critiques have a variety of views what could have motivated the emperor to adopt the first written constitution including the desire to confine the line of succession to his blood line. There is also consensus that the turning down of Ethiopia's application to the League of Nations was part of the reason for its adoption. It is equally important to include the emperor's reason why he wanted to adopt the constitution, which he made explicit in his speech and the preamble of the constitution.

Sixth, there is no discussion on the debate and controversy with regard to the fate of the regional landlords and various traditional officers (*mesafint* and *mekuannint*) with regard to their positions and privileges. Now there are increasingly available materials on this issue with the publication of, for instance, Ambassador Zewde Reta's book², which extensively provides on the surrounding debate and controversy.

Seventh, the author claims that ".....while the constitution succeeded in concentrating power, it failed to prevent foreign aggression". This seems to assume that was the purpose, at least one of the purposes of the constitution.³ But it is

² አምባሳደር ደዳረ ረታ የቀዳማዊ ኃይለስላሴ መንግሥት ሻማ ቡክስ፣ አዲስ አበባ፣ 2005።

³ Tadesse Melaku, *Ethiopian Constitutional Law: Past and Present* (2017), p. 13.

questionable if that was its purpose. Even if the reason for its adoption is to secure independence, can the success /failure be attributed to the constitution?

Eighth, strange enough one of the discussions overlooked is the manner of the revision of the 1931 constitution. There is no discussion of the process of revision, the organs in charge and its composition.

Ninth, there is a disconnect under section 1.5.1, Human Rights under the 1955 Constitution, between the first paragraph and the remaining ones. The first, consistent with the title, discusses on human rights. The second however deals features and problems of constitution in a hierarchical society. Still the third paragraph talks about the growing discontent and the variety of measures undertaken by the emperor. The fourth talks about the downfall of the emperor. The fifth deals with the last efforts to draft a new constitution.

Tenth, little is said on the causes or the variety of views on the causes of the revolution, which have had huge political consequence reverberating still today.

Eleventh, no mention or any discussion is made about proclamation No. 1/1975 which established and defined the powers of Provisional Military Administrative Council (PMAC). It was based on this proclamation that the Dergue declared the deposition of Haile Selassie from power, the dissolution of the parliaments and the suspension of the 1955 Revised Constitution. The proclamation was one of the most important legal instruments which almost amounted to being the constitution for the regime until it adopted a formal constitution in 1987.

Chapter 2 and 3 discuss at length the features of the FDRE Constitution and bill of rights respectively. Both chapters provide a fair discussion of all the relevant issues. Chapter three particularly is valuable in making a robust discussion on human rights meaning, classification, and the propriety of the classification in the constitution. The author's efforts to ground exposition of some of the rights by

bringing judicial decisions from other jurisdictions is laudable as it enables readers to understand judicial application of similar rights in other jurisdictions.

Nonetheless, the author should have made an in-depth discussion and make the connection of the issues raised in chapter two on the idea of republicanism. Though there are efforts to explain the idea, there is little attempt to make a connection with the current constitution and expound which of its parts exhibit its republican feature. Despite a fair treatment of the fundamental principles of the constitution — secularism, sovereignty and constitutional supremacy — there is no discussion on the other fundamental principles of the constitution — transparency and accountability.

Chapters 4 and 5 deal with the allocation of powers both vertically and horizontally. Chapter four is devoted for a discussion of federal structure and division of power. Chapter 5 focuses on horizontal allocation of power. Both chapters address every conceivable issue that needs to be expounded in the context of the FDRE Constitution. It attempts to introduce and explain a variety of concepts associated with division of powers such as exclusive, shared, concurrent, framework, parallel etc. powers. There is an appreciable effort to contextualize these concepts with the FDRE Constitution as well.

There is also an in-depth treatment of the nature, scope of separation of the powers of the various federal principal organs of government — the legislatures, the executive and the judiciary — and the variety of checks and balances put in place in the constitution.

One of the difficulties, which currently is not a serious problem largely because now the same party controls the center and the periphery, is to exactly define the powers of each respective government, the federal government and the regional states. There are provisions in the constitution which even a literal reading does not

make clear what power belongs to which level of government.⁴ Like other researches on the division of powers in the FDRE constitution, this book attempts to put in context the discussion of the division of power from other jurisdictions. But it seems to invite more trouble in understanding and defining exactly the powers of the federal government and the regional states in Ethiopia.

First, it introduces general concepts such as shared, parallel, framework etc. on which there does not seem to exist a universal consensus on their meaning. Second, nor is their difference clearly articulated. Third attempts to bring these concepts and contextualize them in the constitution are creating more confusion than clarity. The constitution does not use the term framework and parallel powers, for example. It is entirely unclear whether this is appropriate and relevant to expound the division of power under Ethiopian constitution. Such broad concepts compound the problem and care has to be taken in bringing and contextualizing concepts used in other jurisdictions not provided in the constitution.

The author claims that the constitution is silent on whether executive power is coextensive with legislative power.⁵ But a reading of article 50(2) makes abundantly clear that it is. It provides that on matters assigned to the federal government under the constitution, the federal government has legislative, executive and judicial power. This means executive power is coextensive with legislative power.

On the question of supremacy of federal laws over regional laws, the author argues that this is provided in proclamation No. 25/96. But it is questionable on the propriety of citing the proclamation to state the positions of the constitution. This is a fundamental matter in a federal constitution that has to be gleaned from the constitution via interpretation. It is illogical to cite the proclamation to fill in a gap

⁴ See Arts 51(2)(3) and 52 of the Constitution.

⁵ See, note 4, p. 156

in the constitution. That piece of legislation, in the first place, is made by the federal government. Second, it is lower in hierarchy to the constitution. Third, its purpose is to define the structure and jurisdiction of federal courts. Fourth, that provision of the proclamation which declares the paramountcy of federal laws is itself unconstitutional.

In order to make easier for readers to understand the division of the power under the constitution, the author comes up with his own classification of the powers of the federal government.⁶ The propriety and relevance of the classification of the powers of the federal government is questionable. It lists, for instance, constitution, patent and copyright etc. within the category of law enforcement. It seems to send the message that on those matters federal government power is law enforcement. But, what about law and policy making on these subjects? What about adjudication? It is in the first place not entirely clear what law enforcement is and how it is to be distinguished from the other categories.

On the composition of the House of Peoples Representatives (HPR), it mentions, but does not discuss, who the minorities the 20 seats are reserved for. There is little discussion on parliamentary immunity and the issue of quorum and decision-making procedure.

In one place, the author mentions that the House of Federation (HF) “assigns new tax base”⁷. This seems to send the wrong message implying it is its exclusive authority. It has to be qualified that it jointly exercises this power with the HPR.

The author also states that “to be a Prime Minister (PM) one must win a seat in the lower house... and be the leader of the party.... that control a majority in the HPR.”⁸ But there is no constitutional requirement that he/she should be also the

⁶ See note 4, Table 4.1 pp. 162-163.

⁷ See note 4, p. 184.

⁸ See note 4, p. 196.

leader of the political party that has majority seat. What the constitution says is that he/she is elected from the party that has a majority seat.

Regarding the judiciary, there is no discussion on the nature and scope of delegation of federal courts jurisdiction to state courts. There has to be a discussion also on what exactly is the role of the PM on the appointment of the judges, other than the president and vice-president of the supreme court. The constitution provides that the PM submits a list to the HPR provided to it by the Federal Judicial Administration Commission. What submission of a list entails needs to be explored — does the PM act as a go-between the judiciary and the HPR or does s/he have a say on who gets appointed.

The last chapter is on constitutional interpretation. Well-written and exhaustive, the chapter provides readers the core current issues on constitutional interpretation in Ethiopia. But the example it provides to explain when and under what circumstance judges may invoke the constitution and therefore engage in constitutional interpretation is likely to generate misunderstanding. The book gives example of a certain broadcaster being warned of revocation of license because of an alleged content deemed to be defamatory and inciting violence. It seems to mislead that the Ethiopian Broadcasting Authority has this power. But the example rather has the unintended consequence of presenting an ultra-virus act, therefore, an administrative adjudication issue, which is not controversial that the courts have jurisdiction, than really a freedom of speech constitutional challenge. It would have been better to cite the other proper authority in charge of licensing. Or alternatively, it would have been good if the example is given in the context of broadcast media.

Despite these limitations and oversight, the author should be applauded for not stopping just in volume I, in the face of several adverse environments which discourage publication of this sort. The effort to exhaustively deal with the current

constitution is very good and the second and consequent edition of the book need to include the issues overlooked or deliberately left out. The attempt to include Ethiopian constitutional cases, both foreign and Ethiopian, is commendable and should continue. But when the next editions are contemplated, it is good to provide an excerpt translation of constitutional decisions whenever available. Rather than reporting the cases, the book should be able to create opportunity for readers/students to be able to see the variety of arguments and stand points in the disposition of constitutional cases.