



THE ETHIOPIAN CONSTITUTION: FOR EXPORT ONLY?

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A. Introduction

1. Generally

The 1995 Ethiopian Constitution (hereinafter referred to as “EC”) is an impressive forward-looking document. For example, the EC incorporates as an interpretive guide the Universal Declaration of Human Rights and the International Covenants on Human Rights.¹ The EC enumeration of human rights provisions could be more inclusive than that of the United States Constitution. It is doubtful that the United States would agree to be governed by the International Declaration and Covenants of Human Rights mentioned above. For the first time in Ethiopian history, the EC adopts the federal form of government. The executive, legislature, and the judiciary are bifurcated with federal and state components.²

2. EC Problem Areas Addressed

This article will discuss four problem areas of the EC. First, while drafters of the EC may have intended to authorize governmental institutions to recognize and legitimate customary and religious courts, it appears they failed to do so, as set out in Section B.³ Secondly, the article discusses the Mengistu period in Section C.⁴ Thirdly, customary law is discussed in Section D.⁵ In Section E, the article reviews the history of Constitutions in Ethiopia and refers to the fact that those Constitutions were aspirational. It is concluded that the EC may be the same, at best. Recommendations are made for the amendment to the EC, and selective recognition of customary and religious law, in Section F.⁶

¹See EC, Article 13.

²See EC, Articles 45-81.

³*Infra*.

⁴Page 2, *infra*.

⁵Page 4, *infra*.

⁶Page 6, *infra*.

B. Is Customary Dispute Resolution Constitutional?

1. Background

a. The Emperor Haile Selassie Era, 1930-1974

Haile Selassie became Emperor of Ethiopia in 1930.⁷ Not until the 1950's and 1960's did Emperor Haile Selassie and an Ethiopian elite seek to Westernize Ethiopian law by adopting codes largely based on European law.⁸ This law reflected European values,⁹ and French Professor Rene David drafted a Civil Code for Ethiopia.¹⁰ He was faced with a body of indigenous law administered by customary and religious tribunals that lacked compatibility with Western law. The Customary Dispute Resolution (CDR) process consisted of village elders settling civil and criminal disputes.¹¹ Professor David assumed, the "enlightened" Civil Code would replace CDR and religious courts. The Civil Code repealed and nullified any customary law, or religious law for that matter, that conflicted with matters contained in the Civil Code of 1960.¹² Even customary rules that dealt with matters codified were repealed whether consistent or not.¹³ The drafters of the EC make no specific reference to this nullification of customary and religious law. Accordingly, the Ethiopian nation state has never officially recognized customary or religious law. At best, such recognition is uncertain and at worst, it is close to zero. Accordingly, as pointed out in Section C¹⁴, all customary and religious laws may not be valid.

C. Monarchy Overthrown by Mengistu; EPRDF Replaces Mengistu; Customary Law Retains Vitality

In 1974, Mengistu, instituted a coup which overthrew Emperor Haile Selassie.¹⁵ CDR continued to be applied during the Mengistu era.¹⁶ Accordingly, the Civil Code provision for repeal of CDR and religious tribunal adjudication was ignored and the codification effort

⁷Dolores A. Donovan and GetachewAssefa, Homicide in Ethiopia: Human Rights, Federalism and Legal Pluralism, 51 Am. J. Com. Law 505, 513 (2003) (hereinafter referred to as "Homicide").

⁸Girma W. Selassie, Sometimes the Law is "a Ass," 23 J. of Ethiopian Law 220 (2009) (hereinafter referred to as "Sometimes").

⁹*Id.* at 220.

¹⁰See Grass-Roots Justice in Ethiopia, The Contribution of Customary Dispute Resolution, Alula Pankhurst and GetachewAssefa, Eds., 4 (2008) (hereinafter referred to as "Grass-Roots").

¹¹ See John Van Doren, Positivism and the Rule of Law, Formal System or Concealed Values: A Case Study of the Ethiopian Legal System, 3 J. Transnat'l L. & Pol'y 165 (1994) (hereinafter referred to as "Positivism and the Rule of Law").

¹²Civil Code §3347; "Sometimes" at 221.

¹³ "Grass-Roots" at 4, 5 (all laws written or customary consistent or not with the Code are repealed by Article 3347 Civil Code).

¹⁴*Infra.*

¹⁵"Homicide" at 513.

¹⁶"Positivism and the Rule of Law" at 174.

was, or may have been, a failure.¹⁷ Yet the Mengistu regime did not officially recognize customary and religious courts, nor did any other regime before the EC. In 1991, the Ethiopian Peoples' Revolutionary Democratic Front (EPDRF) overthrew the Mengistu Derg and in 1995 enacted the Constitution which is the subject of this article.¹⁸

The drafters of the EC may have intended to remedy the problem that religious and customary law was the de facto legal system. But was that intention effective? The EC empowered legal institutions to reinstate customary and religious law.¹⁹ One of the relevant provisions, Article 34(5), states: "This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law." Article 78(5) provides: "Pursuant to Sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious courts and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution." (Emphasis added).

First, the House of Peoples' Representatives and State Councils have not acted to "establish or give official recognition to customary courts."²⁰ Secondly, as stated above, arguably no customary or religious law that is inconsistent or not with the Civil Code had "state recognition" after the Civil Code of 1960.²¹ Admittedly, the Constitution is supreme.²² Arguably, failure of the state organs to recognize customary and religious law negates the legitimacy of customary and religious law and therefore, is void.

Commentators have argued that Article 34(5), cited above, may at least imply that religious courts and maybe even customary courts have the right to adjudge matters of personal and family law nature.²³ Article 34(5) provides "that the Constitution shall not preclude the adjudication of personal and family laws in accordance with religious and customary laws." But this provision appears not to be self-executing.²⁴ Commentators have

¹⁷See Book Review, MuraduAbdo, 23 J. of Ethiopian Law, 228 (2009)(divergence between imported law and practices.)(hereinafter referred to as "Book Review"); "Grass-roots" at 5(50 years later customary law active and vibrant, so the Civil Code may be wrong or require rethinking).

¹⁸"Grass-roots" at 6(no mention of acceptance of customary law as Derg Constitution promotes secular values).

¹⁹See EC, Article 78(5).

²⁰Statement of Professor GetachewAssefa in an email to the author, January 12, 2010.

²¹ See note 14, *supra*.

²²See EC, Article 9.

²³See Grass-roots at 7.

²⁴*Id.* at 8(thus indicating it is not "legally recognized" at present).

argued that some aspects of CDR should be legally recognized.²⁵If Article 34(5) were self-executing, there would be no need for the “Pursuant to Article 34(5)” language in Article 78(5). Indeed, if Article 34(5) were self-executing, Article 78(5) would be TOTALLY UNNECESSARY. The House and State Councils have chosen not to act to legitimate customary and religious courts with one exception discussed in the paragraph after next. But any attempt to do so is void.²⁶

Finally it may even be argued that even without Civil Code §3347, the EC does not permit recognition of religious and customary law. There was no express state recognition of customary and religious courts prior to the EC. Where is there a constitutional provision in the EC, statutes, or decrees prior to 1995 that provides such recognition?

However, it is true that there has been a “Proclamation” that recognizes the authority of the Kadi (Islamic-based) religious courts.²⁷The President of Ethiopia signed a government Proclamation creating Federal Kadi Courts and stating that it is legitimating whatever religious Kadi Courts are existent at the time of the Proclamation. This enactment is very carefully drafted and refers to Article 78(5) as allowing the action pursuant to Article 34(5). This Kadi Court Proclamation does indicate that the House of Peoples’ Representatives has enacted legislation. But, Article 78(5) cannot be a legitimating source even though the Proclamation refers to it. The Proclamation also refers to Article 34(5). It could be argued that Article 34(5) is self-executing. When Article 34(5) provides that the “...Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious and customary laws,” the government could argue that Article 78(5) is unnecessary. But if Article 34(5) is self-executing, why refer to Article 78(5) as further justification?²⁸And as stated above, there was no state recognition of Kadi Courts prior to 1995. On the contrary, the Civil Code of 1960 repealed customary and religious law inconsistent or consistent or related to the Civil Code.

But arguendo, if the Government Presidential decree is valid, further difficulties arise. Having recognized and validated religious Kadi Courts, the Government has shown an intention not to recognize Christian Religious Courts and CDR. After all, *expressio unius exclusio alterius*. Having expressed one result, it can be inferred that other possible legitimations (Christian Courts) have been rejected.

²⁵*Ibid.*

²⁶*Ibid.*

²⁷Federal NageritGazeta dated December 7, 1999.

²⁸As stated *infra*.

Further, if *arguendo* Article 34(5) is self-executing,²⁹ it is self-executing only with respect to religious and customary law relating to personal and family laws. This still ignores the anomaly of the heavy involvement of CDR in criminal matters. Personal and family law does not clearly include criminal law. Therefore, the heavy involvement of CDR in determining criminal matters appears unjustified by the EC.³⁰ The state criminal system is complicit in the exercise of this jurisdiction.³¹ Commentators have suggested constitutional reform to recognize this lacuna and facilitate integration of the best of both systems.³² Where, as here, alleged rules of law do not reveal the actual norms applied in Ethiopia and such practices appear to be extra-constitutional, this is an unfortunate conflict with the EC's averment of adherence to the "rule of law."³³

D. Customary Law

What is this customary law that prevails in fact over federal law and state law? Why did the 1995 Constitution attempt to provide *de jure* acknowledgement of the *de facto* situation? Customary law is passed down by word of mouth from generation to generation. Codification of customary law is the exception and is not usually available.³⁴ Recent Ethiopian commentators have suggested that the federal government institute a codification of customary law and that CDR decisions should be published.³⁵ This codification project would be a good beginning. Elders who administer the customary law may be expected to resist this project. Unwritten rule regimes have a "flexibility" or discretionary element that decision makers may prefer. One can note by analogy the resistance in England to movements calling for a written constitution or bill of rights.

In any event, Ethiopian commentators have recently criticized the CDR as discriminatory against women, children, and minorities within the tribal areas.³⁶ With respect to minorities within the nine states, a commentator has observed that even the State Constitutions have not dared to include a clause protecting those minority rights.³⁷ The

²⁹Would it not be easier to have said: This Constitution hereby recognizes religious and customary courts, and this Constitution cannot and shall not preclude the exercise of such jurisdiction.

³⁰See "Grass-roots" at 8 (criminal customary law and dispute resolution (CDR) is "not allowed any formal space of operation" under the EC).

³¹*Id.* (state criminal system sometimes refers minor cases to CDR).

³²*Id.* at 8, 271-272.

³³See EC Preamble.

³⁴See "Grass-roots" at 271.

³⁵See "Grass-roots" at 269-271.

³⁶"Grass-roots" at 7, 270-271, 273.

³⁷See Tsegaye Regassa, *Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level*, Vol. 3, No. 1 *Mizan L. Rev.* 33, 39-40 (2009) (hereinafter referred to as "Sub-National Constitutions").

commentator surmises that States may take a generally reactionary position on minority rights.³⁸

Customary law discriminates against women. Women cannot bring their grievances directly to the elders.³⁹ A male relative must institute the complaint in most cases.⁴⁰ Moreover, women are seldom decision makers in the CDR system.⁴¹ Ethiopian commentators have also criticized the subjection of young women to the barbaric practice of genital mutilation. While this practice is now illegal, a commentator has observed that judges and prosecutors find themselves in a dilemma.⁴² The illegality is not known by most Ethiopians. Are all parents who cause such a practice to occur to be prosecuted even if they do not know that female genital mutilation is criminal? Conceding that this custom is abhorrent, the commentator argues that it is also abhorrent for the law to assume that a populace which may often be illiterate knows its content.⁴³ Where, he asks, is the criminal intent, considering that the custom is time honored and even thought by some to be sanctioned or ordained by revered religious books?⁴⁴

E. Constitution Context

Ethiopia has had several constitutions and the rights contained in them have received scant attention in practice. Emperor Haile Selassie instituted the first constitution in Ethiopia in 1931. The Haile Selassie instituted 1931 Constitution was superseded later in his regime in 1955. The 1931 Constitution used the Japanese Constitution as a model, and the 1955 Constitution was drafted by United States constitution advisors. A major purpose of the 1931 Constitution was to consolidate imperial power.⁴⁵ The major purpose of the 1955 Constitution was presumably twofold. First, the aim was to project an image of Ethiopia as progressive and leave the “primitive” image in the dust. Secondly, the 1955 Constitution had a political purpose: to subject Eritrea to the aegis of Addis Ababa with respect to its legal and judicial structures.⁴⁶ A related intention was to make the Ethiopian Constitution on a par with the Eritrean Constitution with regard to the latter’s advanced position on human rights.⁴⁷ So the

³⁸Id.

³⁹“Book Review” at 227.

⁴⁰“Grass-roots” at 264.

⁴¹Id.

⁴²“Sometimes” at 220.

⁴³Id. at 222-223.

⁴⁴Id. at 222.

⁴⁵“Positivism and the Rule of Law” at 184.

⁴⁶Id.

⁴⁷Id.

1955 Constitution was a showpiece not intended to be effective. By and large, traditional norms of CDR and of church administered origin prevailed. Courts were reluctant to take the Constitution seriously.⁴⁸ The Emperor and the Church were united in retaining an essentially feudal structure.

Basically, Western norms and democratic institutions incorporated in the 1955 Constitution were incompatible with the feudal power base.⁴⁹ Land ownership, usually the key to understanding power relations in a feudal society, was lodged in the feudal nobility and the Church. Emperor Selassie was not willing or not able to break this hold. Then, as mentioned above, Mengistu generated a successful coup against Emperor Selassie. Mengistu seized power and incorporated a Marxist flavor. So the 1987 Constitution of the Derg reflected a Marxist-Leninist orientation based on the Soviet Union and other Communist regimes.⁵⁰ The State divested the Church and nobility of much of their land. This result Mengistu achieved, but at considerable cost with the imposition of an authoritarian oppressive regime.

Mengistu sought to impose secular values from the unitary state he controlled.⁵¹ As observed previously above, in 1991, the Mengistu regime was taken over by the Ethiopian Peoples' Revolutionary Democratic Front (EPDRF). The 1995 Constitution is the product of the EPDRF. As mentioned above, human rights have been set out in previous Constitutions, but implementation has left something to be desired. Is the EC predominantly aspirational? There are reasons for something less than optimism. The problem is that since the reign of Emperor Selassie, there has been a fundamental contradiction between inherited traditional CDR and religious inspired norms and Western norms.⁵² This contradiction persisted during the Mengistu era. There has been no fundamental change in that contradiction since the fall of Mengistu. CDR and religious norms still trump the Western imported norms in the 1995 Constitution and the various inherited Codes.⁵³

⁴⁸*Id.*, at 185-186.

⁴⁹*Ibid.*

⁵⁰“Grass-roots” at 6.

⁵¹*Id.*

⁵²“Sometimes” at 220.

⁵³ “Grass-roots” at 5 (uniformity not achieved and even today codes do not successfully supplant CDR which is active and vibrant).

F. Conclusion

The EC is an impressive forward-looking document where human rights protections abound. When the United States Constitution was enacted, it was an aspirational writing, in spite of the references to the abhorrent practice of slavery, the lack of women's ability to vote, and the fact that only white men of property could vote. The aspirational view contained in the preamble that all persons are created equal gained a foothold and much of that aspiration has been achieved, although there is room for more improvement. As an aspiration, the EC is progressive and notable.

CDR is based predominantly on oral tradition passed down from generation to generation. Some codification of customary law exists and this process should be funded and implemented.⁵⁴ Customary law has flaws. It is discriminatory against women, children, and minorities within the states. Customary law has advantages. Many people prefer it, giving it a democratic aspect, and despite the fact it is oral, people seem to know what is expected of them. However, women experience social pressures that deflect them from taking their cases to the state legal system.⁵⁵ Religious courts may prevent them from doing so.⁵⁶ Criminal processes include complex customs where offenders are invited back into community membership, rather than placed in jails where they become isolated and increasingly embittered. But be all this as it may, the EC and the Codes show a major conflict between indigenous norms and imported Western norms.⁵⁷ Thus, the EC does not differ from previous constitutions which import Western norms that are in extreme tension with customary laws which are enforced by CDR.

Finally, this article has referred to the anomaly that efforts to provide for formal legitimacy and recognition by the EC inadvertently may have been unsuccessful. The Civil Code requires that customary and religious law be voided if inconsistent with, or in conflict with the various Ethiopian codes. Thus, customary and religious laws inconsistent with the codes did not have state recognition prior to the EC. Accordingly, such customary and religious laws cannot be validated by EC procedures. The EC is supreme and controlling. But what does it say about the extent to which customary and religious law may supersede it? Unfortunately, the answer is unclear. In creating and recognizing Kadi (Islamic) Religious Courts, the Government appears to have acted without constitutional authority. Perhaps an

⁵⁴“Grass-roots” at 269-273.

⁵⁵*Id.* at 7.

⁵⁶*Id.*

⁵⁷See “Book Review” at 227(divergence and conflict both rural and urban).

amendment is in order to rectify this intrusion into the rule of law aspiration of the EC Preamble. The EC acknowledges the existence of religious and customary courts, unlike previous Ethiopian constitutions. The EC provides an executive and legislative procedure for the recognition of religious and customary courts. The blatant fact is that CDR and religious courts are the backbone of the justice system, the major players in the current legal dispensation.

In summary, while commentators have suggested that the EC human rights guarantees may have been included partially to obtain foreign aid,⁵⁸ it is hoped that the political will exists actually to implement the human rights provisions of the EC. Massive efforts are required for education of a predominantly illiterate citizenry so they may know and assert their rights. But no text, constitutional or otherwise, is sufficient to insure that ruling elites will consider themselves bound by preexisting rules.⁵⁹ An independent judiciary may be a helpful beginning. Conditions might be attached to foreign aid. Accordingly, there is a fear that like the superb Ethiopian Sidamo coffee, it is for export only. Is the Constitution too good for local “consumption,” and window dressing for foreign consumption only? Whatever the Constitution is intended to do, acculturation to human rights norms should be implemented. Somehow, some way, ruling elites must be encouraged to implement human rights such as those enumerated in the EC. Now is the time to begin.

⁵⁸“Homicide” at 538.

⁵⁹ “Positivism and the Rule of Law” at 201-202.