***Gebeye, Berihun Adugna*: A Theory of African Constitutionalism.** Oxford/New York: Oxford University Press, 2021. ISBN 978-0-19-289392-5. 272 pp. £ 80.-

The book reviewed here takes a refreshing new look at African constitutionalism. Starting from the insight that there still is no uniform account of constitutions and constitutionalism in Africa, the first chapter embarks on a thorough review of the conceptual frameworks which have been used in the past to come to grips with the peculiarities of the unique African constitutional experience. The author identifies two such main general frameworks: legal centralism and legal pluralism. While both conceptual approaches are relevant to the understanding of constitutionalism in Africa, they also miss essential features of the postcolonial African state.

Legal centralism acknowledges that the state and its projection of state law as universal and supreme legal order do exist in Africa but underestimates the limited scope of these claims in the African context. Postcolonial African states are weak internationally, depending on handouts from Western governments and donor agencies, and are often unable or unwilling to perform basic state functions, like the provision of welfare and the enforcement of law and order throughout their territories. As a result, African governments frequently do not rely on the will of the population but use extra-constitutional mechanisms, such as their control of the government bureaucracy and the powers of patronage, to stay in office (p. 26).

Legal pluralism, on the other hand, takes into account the genuine plurality of sources of law in African legal systems in which indigenous customary laws as well as Islamic law have a direct impact on the everyday life of many Africans, especially those living outside the urban areas. But this approach tends to ignore or in any case underestimate the persistent attachment of postcolonial states to central tenets of Western style liberal constitutionalism, among them the centrality of state law and the supremacy of the constitution (p. 27).

In view of the failure of both legal centralism and legal pluralism to fully account for central features of constitutional design and practice in Africa, the author introduces legal syncretism as an alternative theoretical framework for African constitutionalism. The concept draws heavily on the insights of religious studies and anthropology into the potential as well as the limits of the concept in reconciling competing social and normative claims. In the author's view, the main advantage of syncretism lies in the fact that it is well attuned to the paradoxes and contradictions likely to arise in a dynamic cultural matrix where multiple and diverse cultural, political, or religious ideas and practices within a specific social field at a specific time not only coexist, but necessarily and unavoidably also enter into contact. Depending on the balance of powers between the diverse ideas and practices, their encounter may give rise to different forms of reconfiguration, including their symbiotic relationship, fusion, adaptation and assimilation, metamorphosis or transformation, isolation or dissolution. Thus acceptance and resistance, integration and accommodation, unity and diversity are all inherent

DOI 10.17104/0044-2348-2022-1-261 

elements of the resulting process, which may be set in motion from above as well as from below, by conscious and reflective action or by naïve and spontaneous engagement (p. 31). Syncretism then, defined as the process and the result of adoption, rejection, invention, and transformation of diverse and seemingly opposite legal rules, principles, and practices into a constitutional state with imperial or colonial legacies is seen as a meta and foundational theory of African constitutional law that can serve as a basis for wider constitutional studies and practice in Africa (p. 33).

In the subsequent chapters the author demonstrates the benefits of the theory for a better understanding both of the process that has shaped constitutionalism in Africa from its beginnings in precolonial times up to the modern postcolonial state and of its results in the form of the designs and practices of contemporary constitutionalism. With regard to the former, the author distinguishes three main stages, the precolonial, the colonial and the post-colonial period (pp. 35-71). While in his account the pre-colonial period already witnessed the emergence of centralised political systems, often based on traditional concepts of royal power and hereditary succession, political power even in the centralised systems was usually dispersed both horizontally and vertically, with the ruler being obliged to share its exercise with other sources of authority, e. g. the Council of Elders, the village heads, or ritual functionaries. Some of these powers of traditional chiefs and kings survived and were even increased under the colonial systems established throughout Africa following the Berlin Conference on Africa in 1884/85, but they were now always subject to colonial oversight. The recognition of traditional forms of government by the colonial powers invariably involved substantial changes to their precolonial structures and normative bases, enabling the traditional rulers in particular to exercise their power without or with little control by their own people as long as they enjoyed the support of the colonial authorities (p. 54).

The lasting legacy of the colonial period for African constitutionalism has therefore been the reformulation of traditional forms of government by the colonial powers in line with their interests and purposes. Thus postcolonial African governments could claim, with some justification, that the ideas of limited government and multi-party democracy featuring in the independence constitutions that had been negotiated with the European colonial powers on their departure were alien to Africa and a colonial imposition. They were indeed contrary not so much to pre-colonial forms of African government, but to the form of government which had been practiced by the European powers in Africa during their colonial rule (p. 160). Even though African constitutions of the post-Cold War period have been more successful in preventing and limiting instances of unfettered and arbitrary personal power, the reforms have not been sufficient to eliminate completely concepts and practices of authoritarian and arbitrary government rooted in the colonial and early independence period, thus denying Africans the full benefit of the liberal constitutional promises and commitments (p. 62).

 DOI 10.17104/0044-2348-2022-1-261

The historical analysis forms the basis for an in-depth discussion of the way legal syncretism has shaped essential parts of the institutional architecture and constitutional practice of the postcolonial state in Africa. Its impact is examined both with regard to the vertical and horizontal organisation of state power and to human rights, in particular women's constitutional rights. After an overview of the general trends in these three areas they are discussed in greater detail in the form of case studies, comparing for each of the three main topics the constitutional designs and experiences in Nigeria, Ethiopia, and South Africa.

Among the three countries, South Africa is the only one in which the concept of government codified in the 1994 Constitution was from the beginning of the constitutional negotiating and drafting process an integral part of a broader constitutional agenda tied to the ideals of democratic values, social justice, and human rights – principles which then also guided its implementation and operation in constitutional practice. Whereas in Nigeria and Ethiopia, as in many other African countries, the notion of separation of powers has often been undermined through the relentless accumulation of power in the office and the person of the chief executive, may he (very rarely she) serve as Prime Minister (Ethiopia) or (as in the vast majority of cases) as President, in South Africa executive power is conceived as an integral part of an institutional architecture designed to protect human rights and advance good governance. Consequently, the Constitution vests the executive power not exclusively in the President, but obliges the President to share executive functions and powers with the Cabinet, but also with various independent constitutional institutions like the Electoral Commission or the Auditor General. South Africa has in other words built its executive on the power-limiting aspects of both the liberal and indigenous notions of political power, while most other African countries, including Nigeria and Ethiopia, have often focused on the power-enabling aspects of illiberal concepts of government, like military rule in Nigeria or one-party rule in Ethiopia (p. 170).

But legal syncretism has also shaped the design and practice of constitutional rights, as the author demonstrates with regard to women's rights. Although most African countries have subscribed to the international and regional codification of women's rights in the Convention on the Elimination of all Forms of Discrimination against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, this modern regulation of women's rights in the African context has to be balanced with more traditional sources of law affecting the status and rights of women, namely with Islamic and customary law. Judicial practice in all three countries has found ways to mediate the different rights regulations, although in characteristically different ways. Judicial bodies in Nigeria and, although to a lesser extent, in Ethiopia, have been prepared to confront the customary regulation of women's rights head on and to invalidate customary rules that unduly restrict women's rights to marriage and inheritance, while they have been much more circumspect with regard to Islamic law, avoiding any pronouncements on the substance of Islamic law even in cases where its

application is clearly problematic from a liberal perspective (p. 192). In South Africa, on the other hand, the courts have not only been prepared to uphold the supremacy of the constitution against customary rules which they found to be in conflict with the constitutional principles of equal rights and non-discrimination, but also to stress the evolutionary character of customary law which must be given the space to develop. By moving beyond a statist view of customary law, they have succeeded in reconceiving the relationship between customary rules on the one hand and constitutional rights and principles on the other in terms of convergence rather than open conflict (p. 199).

The book succeeds amply in demonstrating the usefulness of the concept of legal syncretism for a better understanding of African constitutional development, design, and practice. Only on rare occasions does the author succumb to the temptation to overestimate its explanatory force. One example is the introduction of Sharia into the criminal law of the Northern states in Nigeria in recent years, which is seen by him as a good example of the potential of what he calls constitutional jurisgenesis, i. e. the creation of constitutional law through a syncretic practice committed to both liberal constitutional values and cultural diversity. But it is difficult to see how the constitutional reforms in the Northern states extending the scope of application of Sharia unilaterally, i. e. without prior amendment of the federal constitution which allows such extension, could have created new (federal) constitutional law. The author concedes that the constitutionality of the attempts to broaden the scope of application of Sharia in the Northern states is a contentious matter in Nigerian political and public life, and that the Supreme Court of Nigeria has been silent so far, because the federal government has not asked the Court to rule on the constitutionality of the measures (pp. 232-233). This tacit agreement by both sides (the Northern states and the federal government) to not escalate the tensions within the Federation further and therefore to avoid a full-blown judicial controversy – which at the end could bring legal clarity, but at the price of fully exposing the rifts which exist between the Northern and the other states as well as the federal government on the matter – might well be politically sound and expedient, but can hardly create by itself any new constitutional law.

These remarks should not distract from the fact that Berihun Gebeye's book offers fundamentally new insights into the genesis and operation of African constitutionalism. It also offers a promising research perspective for comparative constitutional law beyond Africa, as a number of countries especially in the Near East, Asia, and Latin America have undertaken major efforts in recent decades to integrate non-state laws and rules – religious law as well as indigenous customary law – more fully into their constitutional systems. Above all, for anybody seriously interested in a deeper understanding of the development, character, and predicaments of African constitutionalism, this book is not only essential but indispensable reading.

*Rainer Grote*, Heidelberg

 DOI 10.17104/0044-2348-2022-1-261