Introductory Note on the Constitution of Eritrea

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I. Origins and Historical Development of the Constitution

A clear understanding of constitutional law in Eritrea requires some insight into the prevailing politico-legal situation of the country, including a short account of the modern history of Eritrea. Like many other African countries, the modern-day map of Eritrea is a product of European (in the Eritrean case, Italian) colonialism. Eritrea gained formal independence in 1993, after successive colonial and other sorts of occupations by different foreign actors.

It should be noted at the outset that Eritrea is a classic example of a country in a crisis of constitutional law.[2] This is so because it is ruled without any form of constitution (written or unwritten), and when viewed against emerging constitutional trends at regional and international levels, Eritrea's predicament is indeed highly exceptional. According to the United Nations (UN) Monitoring Group on Eritrea and Somalia, the only country in Africa that offers a greater contrast with Eritrea is the once 'failed' state of Somalia.[3] That is why Eritrea is often said to indeed be a bizarre example of 'statehood' in the modern history of nation-states. This Introductory Note will provide a broader context for a general discourse on constitutionalism in Eritrea.

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[2] For various views on this, see generally, Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectics of Process and Substance* (Trenton, NJ: Red Sea Press, 2003); Bereket Habte Selassie, *Wounded Nation: How a Once Promising Eritrea was Betrayed and its Future Compromised*, (Trenton, NJ: Red Sea Press Inc, 2011); Simon M Weldehaimanot, 'The Status and Fate of the Eritrean Constitution' (2008) 8 African Human Rights Law Journal 108-137; Testafion Medhanie, *Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia* (Aalborg: Institut for Historie, Internationale Studier og Samfundsforhold, Aalborg Universitet, 2008); Daniel Mekonnen and Simon Weldehaimanot, 'Transitional Constitutionalism: Comparing the Eritrean and South African Experience', paper presented at the African Network of Constitutional Lawyers (ANCL) Annual Conference, Rabat, Morocco, 2-5 February 2011; Joseph Magnet, 'Constitution Making in Eritrea: Back (First) To the Future', unpublished paper 2014 (copy on file with author); Joseph Magnet and Tolga Yalkin, 'Governance and Development of Eritrea and its Regional Context', 25 February 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569636 (report of the 2014 Ottawa Colloquium on Eritrea).

[3] Report of the Monitoring Group on Somalia and Eritrea, Pursuant to UN Security Council Resolutions 751 (1992) and 1907 (2009), 18 July 2011, p. 11.

Eritrea adopted its first post-independence constitution in 1997, but the document has never been implemented. The Eritrean President declared it 'a dead document' in a public pronouncement on 30 December 2014.[4] Nonetheless, as it is the most recent Eritrean document bearing the title of a constitution, the 1997 Constitution is still the only one that qualifies for a through discussion of contemporary constitutional law challenges in an Eritrean context. However, the value of such an analysis does not go further than mere academic discourse, for the simple reason that the promises made in the 1997 Constitution are hollow words and bare ink on paper that have remained unachievable due to its 'non-implemented' status (the reasons for the non-implementation are discussed in Section 1.3 below). In order to understand this clearly, one needs to take a closer look at the general politico-legal crisis in the country, with a clear understanding that the temporal focus of this Note is on the post-independence experience of constitutionalism in Eritrea.

1.1. A stifling politico-legal crisis

Eritrea is ruled by one of the most repressive regimes in the world. It finds itself stifled by deeply entrenched structural problems that are unique to its history. In addition to the absence of a working constitution or an effective constitutional framework, several other factors make the case of Eritrea so distinctive from many other countries. Eritrea does not have an opposition political party and has not seen free and fair elections since its *de facto* independence in 1991. It has had no functioning parliament since February 2002. No forms of civil society or free press are allowed. To the knowledge of many, no other country shows all of these peculiar structural problems at the one time, thus making Eritrea's predicament unique, even when compared with the many other countries ruled by notoriously repressive governments.[5] As noted in a recent report of the UN-mandated Commission of Inquiry on Human Rights in Eritrea (COIE), '[i]t is not law that rules Eritreans, but fear.'[6]

Eritrea's first post-independence constitution, adopted in 1997, has remained unimplemented due to sad developments often blamed by the Eritrean government on a 1998-2000 border

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[4] Interview of President Isaias Afwerki with the Eritrean TV, 30 December 2014, copy available at https://www.youtube.com/watch?v=keehnnPFoDk.

[5] Joint Submission of Eritrean Legal Professionals to the United Nations-mandated Commission of Inquiry on Human Rights in Eritrea (COIE), February 2015 (copy on file with author) (hereinafter 'Joint Submission').

[6] Report of the United Nations-mandated Commission of Inquiry on Human Rights in Eritrea (COIE), A/HRC/29/42, 4 June 2015 (hereafter 'COIE Report'), para 38.

conflict with Ethiopia. In fact, it is not the border conflict *per se* that has led to the prevailing politico-legal crisis in Eritrea, but the extremely repressive political stance that has become deeply rooted since then. This has persisted for the last seventeen years, forcing the country to breaking point, as confirmed by numerous credible reports by different sources, including the latest report of the COIE.

Indeed, as far as the protection of fundamental rights and freedoms, including the promotion of orderly constitutional governance, are concerned, the 1997 Constitution has little practical relevance. For the purposes of academic discussion, however, two important stages in the history of post-independence Eritrea should inform our understanding of constitutional law in the country. During the first stage, the country had a semblance of transitional constitutional order that was based on a number of proclamations promulgated between 1991 and 1997. This stage can be described as the 'transitional constitutional arrangement' of the early 1990s. In the second stage, after 1997, the country suffered from a great absence of constitutional order that ultimately led to a well-documented situation of grave human rights violations, for which some high-ranking government officials risk prosecution before the International Criminal Court (ICC), as implied in the COIE report. These two different stages of Eritrea's 'constitutional' experience warrant systematic analysis in separate sections, which follow below.

First, however, it is worth noting that different external political forces have ruled Eritrea at various times. The question then arises as to whether the incumbent government in Eritrea is operating under some form of 'old' constitutional principles inherited from previous rulers, particularly the last two Ethiopian regimes that ruled the country until 1991. The quick answer is no, but this needs to be substantiated by delving into Eritrea's colonial history.

1.2. Traces of constitutional legacy from previous rulers

Despite the current lack of a functioning constitutional order, it is important to note that the Eritrean legal system takes the form of a quite reasonable jurisprudential environment that derives its influence from multiple legal traditions.[7] Eritrea has been ruled by ancient

[7] Thus, Eritrea is a typical example of a mixed legal system or jurisdiction, understood for the purpose of this Introductory Note as a political unit influenced by more than one legal tradition. See in general Daniel Mekonnen, 'Patterns of Legal Mixing in Eritrea: Examining the Impact of Customary Law, Islamic Law,

Abyssinian rulers, the Ottoman Turks, the Egyptians, the Italians, the British, and the Ethiopians. Its long and successive colonial history means that the country blends certain elements from each entity that has left its imprint through its colonial legacy, including the authoritarian revolutionary dogma of the incumbent government.[8]

As far as the establishment of a modern legal system is concerned, the furthest one can go back is to Italian colonialism between 1890 and 1941, when Eritrea as a nation-state gained its present geo-political shape. The Italians did not formally introduce constitutional law to Eritrea. Nonetheless, without forgetting the far-reaching negative implications of their colonial policies, the Italians are credited with having laid the foundations of the modern Eritrean state by establishing Eritrea as a single political entity or unit, introducing a formal judicial system with a robust bureaucracy, and bringing a relatively longer period of political stability to the country.

The British replaced the Italians for a brief ten years, from 1941 to 1952. Constitutional law was only formally introduced into Eritrea in 1952, when the UN federated Eritrea with Ethiopia. However, due to the short-lived nature of this arrangement, the 1952 Eritrean Constitution did not have any significant impact on the political life of Eritrea. From 1962 until 1991, two successive Ethiopian governments ruled Eritrea: the feudal regime of Emperor Haile Selassie and the military junta of Mengistu Hailemariam (widely known as the *Derg* regime). Eritrea was subjected to the constitutional arrangements that reigned in Ethiopia under both governments, and as is generally known, the constitutions proclaimed by these regimes were not democratic in form or substance. Thus they have had little to no impact on the Eritrean polity as it exists today. Most importantly, nothing from these old constitutional principles has been retained in Eritrea.

At independence in 1991, Eritrea only inherited from Ethiopia the six major codes: the Civil Code, the Penal Code, the Commercial Code, the Maritime Code, the Civil Procedure Code, and the Criminal Procedure Code. These have remained operational until recently, with minor

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Colonial Law, Socialist Law and Authoritarian Revolutionary Dogma', in Vernon Palmer et al (eds.), *Mixed Legal Systems, East and West* (Surrey: Ashgate Publishing, 2015) 151-166.

[8] Whether 'authoritarian revolutionary dogma' stands by its own right as a distinct 'legal system' might be subject to controversy. Nonetheless, it is the prevailing politico-legal order in Eritrea.

amendments. New laws promulgated in May 2015 replaced some of the Codes.[9] Together with a diverse set of customary laws, they make up the basic fabric of the Eritrean legal system. Statutory law, defined as 'law found in legislation other than civil codes',[10] is also a very common feature of the Eritrean legal system. The Eritrean government has promulgated hundreds of proclamations and legal notices since independence, resulting in an unwieldy body of statutory law.[11]

For example, according to a previous study, up to 2004 the government had proclaimed more than 225 statutory laws (proclamations and legal notices) intended to govern diverse societal affairs.[12] A *proclamation* is the same as what is known as an act or a statute in other jurisdictions. Legislation issued in furtherance of a proclamation is called a *legal notice* and is equivalent to a regulation or subordinate legislation. However, none of these statutory laws formally derives its source from a constitution, highlighting the great lacuna of constitutional law in Eritrea.

Finally, new laws promulgated in May 2015 replaced some transitional codes (the Civil Code, the Penal Code, the Civil Procedure Code, and the Criminal Procedure Code). The UN Special Rapporteur on the Situation on Human Rights in Eritrea (Shaila Kheetharuth) noted that 'these crucial laws have come into force in a context of constitutional void, since the 1997 Constitution, publicized as the supreme law of the land, remains unimplemented and is now subject to a constitutional review process, the modalities of which remain unclear.'[13]

Now, attention will return to the two separate stages of Eritrea's unique 'constitutional' experience, in the next two sections.

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[9] 'Government Puts into Effect Civil and Penal Codes and Associated Procedures', 11 May 2015, available at http://shabait.com/news/local-news/19792-goe-puts-into-effect-civil-and-penal-codes-and-associated-procedures.

[10] William Tetley, 'Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada)' (2003) 78(1-2) Tulane Law Review 179.

[11] See Simon Weldehaimanot and Daniel Mekonnen, 'The Nebulous Lawmaking Process in Eritrea' (2009) 53(2) Journal of African Law 180–81; Mekonnen, 'Patterns of Legal Mixing' (n7) 151.

[12] Weldehanimanot and Mekonnen, 'The Nebulous Lawmaking Process' (n11). In an updated list of statutory laws prepared by the Eritrean Ministry of Justice in 2011, the total number of statutory laws proclaimed up to the same year is said to be 278. The source of this information is a Tigrinya document titled 'Drafting and Consolidating of Laws, Symposium of the Ministry of Justice, Keren, May 2015', available at http://www.ecss-online.com/data/pdfs/Drafting&Consolidation-EritreanLaws.pdf. The original Tigrinya title reads: ምንዳፍን ምውህሃድን ሕግታት፡ ሲምፖዝየም ሚኒስትሪ ፍትሒ፥ ከረን፡ ግንቦት 2011.

[13] Report of the UN Special Rapporteur on the Situation on Human Rights in Eritrea, A/HRC/29/41, 19 June 2015, para. 19.

1.3. The failed attempt of transitional constitutionalism

The incumbent government in Eritrea came to power in 1991 as a liberation movement under its popular name, the Eritrean People's Liberation Front (EPLF). In 1994, it changed its name to the People's Front for Democracy and Justice (PFDJ). Since then it has been the only political partly in Eritrea. The EPLF won Eritrea's *de facto* independence from Ethiopia by defeating the Ethiopian *Derg* regime, which, according to some accounts, then had the strongest army in sub-Saharan Africa. Due to its long history of armed conflict, Eritrea was bound to face some of the most daunting challenges that are common to all post-conflict societies. The country is yet to recover fully from its unique post-independence crisis.

The period of the 'transitional constitutional arrangement' refers to the first seven years after Eritrea's *de facto* independence in 1991. During this period, Eritrea was actively engaged in a politico-legal experiment known as 'transitional constitutionalism'. Applied in the context of countries emerging from conflict or repression, transitional constitutionalism is understood to denote a social contract between transitional governments and their subjects. Its main objective is to limit the scope of government power during the transitional period and inculcate this democratic culture into an impending conventional constitutional order.[14]

In a paper that compares the experience of the respective transitions to democracy in Eritrea and South Africa, Mekonnen and Weldehaimanot[15] argue that Eritrea tried to engage itself in transitional constitutionalism by establishing, among other things, a transitional parliament and a constitution-drafting commission.[16] In all transitional experiences, constitutionalism is seen as a major facet of the transition to democracy, and is understood not only as a legal matter but also as a complicated political process.[17] According to Ruti Teitel, in periods of radical political change, constitutions both shape the transition and are shaped by it. Thus constitutions in transitions are often definitively seen as provisional rather than permanent, so they are not necessarily foundational; hence the term 'transitional constitutionalism'.[18]

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[14] Robert Sharlet, 'Transitional Constitutionalism: Politics and Law in the Second Russian Republic' (1996) 14(3) Wisconsin International Law Journal 495-521.

[15] Mekonnen and Weldehaimanot, 'Transitional Constitutionalism' (n2).

[16] The commission was established by Proclamation No. 55/1994.

[17] Sharlet, 'Transitional Constitutionalism' (n14), 495.

[18] Ruti Teitel, 'The Constitutional Canon: The Challenge Posed by a Transitional Constitutionalism' (2000) 17 Constitutional Commentary 237. Teitel's comment on transitional constitutionalism is based on her acclaimed work *Transitional Justice* (2002).

One of the first things the EPLF (later the PFJD) did after liberating Eritrea was to establish itself as a provisional government through a number of essential laws that it promulgated itself, unilaterally. The EPLF formally established itself as 'provisional government' on 22 May 1992, by Proclamation No. 23/1992: 'Proclamation to Provide for the Establishment, Powers and Functions of the Provisional Government of Eritrea'. Seven months before this, about four months after the *de facto* liberation of Eritrea, the EPLF had proclaimed several other laws (Proclamations 1, 2, 3, 4, 5, 6, 7, and 8 of 1991) which came into force on 15 September 1991. These laws set in motion Eritrea's major transitional codes, inherited from Ethiopia with superficial amendments. The most important laws regarding the establishment and legitimacy of the newly formed provisional government were promulgated a year after the EPLF liberated Eritrea. The essential laws that provided for the establishment and 'legitimacy' of the provisional government are discussed below.

Proclamation No. 23/1992 established the EPLF as the Provisional Government of Eritrea (PGE) and laid a roadmap for the envisaged provisional period. According to its Preamble, these provisional measures were to serve until the country could conduct a national referendum on the issue of independence from Ethiopia, draft and ratify its first post-independence constitution, conduct free and fair elections, and accordingly establish a democratically elected government. For all intents and purposes, and judging from its content, Proclamation No. 23/1992 (later repealed and replaced by Proclamation No. 37/1993) can rightly be described as forming the 'interim constitution' or the 'interim constitutional framework' of Eritrea. According to Mekonnen,

> This Proclamation, albeit concise and full of shortcomings, can be plausibly referred to as the Interim Constitution of Eritrea. The act was promulgated as a Proclamation and not as a constitution. However, in the absence of a more detailed and enforceable constitution, current legal and academic exposition can only refer to the provisions of this act, the nature and content of which bear several similarities with other interim constitutions. This act briefly defines the powers and functions of the principal organs of the transitional government and outlines the general guiding principles of the transitional period.[19]

Although the document was never officially recognized as an interim constitution, Eritrean government officials have described it as such on rare occasions. The former Minister of Foreign Affairs of Eritrea (Mr. Haile Derue), who has remained in detention without trial since September 2001, referred to Proclamation No. 37/1993 as the transitional constitution

[19] Daniel Mekonnen, 'The Reply of the Eritrean Government to ACHPR's Landmark Ruling on Eritrea: A Critical Appraisal' (2006) 31(2) Journal for Juridical Science 41-42.

of Eritrea in an interview with Dan Connell. [20] Another Eritrean writer, Yohannes Gebremedhin, noted that although formal constitutional law was completely absent in the transitional period, there was a weak and incomplete constitutional framework, which 'has immense drawbacks, in terms of public participation ... easy accessibility to the public, protection of civil rights, government accountability, and entrenchment of constitutional principles.'[21] In sum, Proclamation No. 23/1992 and Proclamation No. 37/1993, together with other basic laws promulgated at around the same time, can accurately be described as forming the core of Eritrea's transitional constitutional order.[22]

The background that led to the launch of transitional constitutionalism in Eritrea is very important. It started with the establishment of the EPLF as the provisional government of Eritrea. The EPLF's motivation to establish itself as a provisional government, without popular consultation with the Eritrean people, is implicit from the last part of the Preamble of Proclamation No. 23/1992:

> Recognising that in this transitional period, the Eritrean People's Liberation Front (EPLF) continues to shoulder the duty it assumed to achieve the liberation of Eritrea, and that having achieved the liberation, it is inevitable that the EPLF proclaims the establishment of a provisional government,
>
> The establishment of the Provisional Government of Eritrea (PGE) is hereby promulgated.[23]

It is therefore clear that the provisional government traced its legitimacy from its historic role and mandate in achieving Eritrea's liberation from Ethiopia. At that time, pragmatically speaking, the EPLF was the only viable political force that could have led the nation to its intended transition to democracy on a provisional basis, as envisaged by the Preamble of Proclamation No. 23/1992. In fact, the EPLF liberated Eritrea with unparalleled military

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[20] Dan Connell, *Conversations with Eritrean Political Prisoners* (New Jersey: African World Press, 2005) 113.

[21] See Yohannes Gebremedhin, *The Challenges of a Society in Transition: Legal Development in Eritrea* (New Jersey: Red Sea Press, 2014) 131-32. See also generally Weldehaimanot, 'The Status and Fate of the Eritrean Constitution' (n2).

[22] Strangely, a 2011 document prepared by the Eritrean Ministry of Justice does not consider Proclamation No. 23/1992 and Proclamation No. 37/1993 as making the transitional constitution of Eritrea. Instead, these laws are listed in the same document under a section titled 'executive and ministerial organization'. See 'Drafting and Consolidating of Laws' (n12).

[23] The proclamation appears only in Tigrinya and Arabic. The original Tigrinya version of Preamble cited above reads as follows:

> ኣብዚ ማሰጋገሪ መድረኽ፡ ህዝባዊ ግንባር ሓርነት ኤርትራ (ህ.ግ.ሓ.ኤ.) ንሓርነታዊ ቃልሲ ኤርትራ ብዓወት ንምምዛዝም ዝተሰከሞ ሓላፍነት ብምቕጻል፡ ድሕሪ ሓርነት ግዝያዊ መንግስቲ ኤርትራ ክእወጅን ከቕውምን ግድን ምንባሩ ብምርግጋጽ፣
> ናይ ግዝያዊ መንግስቲ ኤርትራ (ግ.ሚ.ኤ.) ኣቓዋማ ስልጣንን ዕማማትን ብኸምዚ ዝስዕብ ይእወጅ ኣሎ፦

success and glory, including a virtually untainted national reputation as the foremost liberation front of the nation. At the time, the entire country was intoxicated by the elation of national liberation that was made possible by the gallant freedom fighters of the EPLF.[24]

Against this background, there may not have been any better option for testing the legitimacy of the EPLF to lead the nation to the envisaged transition to democracy. One thing, however, is clear. Whatever the source of the legitimacy at that time, a government cannot rule a nation indefinitely without confirming its access to power via democratic and popular consultation, which usually occurs in the form of free and fair general elections. Almost a quarter of a century after Eritrea's independence, such elections are yet to take place. Moreover, the popularity with which the government prided itself during the early years of independence has diminished significantly with the government's increasing repression, particularly after September 2001. In reality, liberation struggle credentials (regardless of former fame and glory) cannot serve as a source of legitimacy for an indefinite period.

Nonetheless, and defying conventional yardsticks of legitimacy, the Eritrean government lives in a sort of 'ideological illusion that the state and society live in seamless harmony.'[25] This self-deception emanates from the government's conscious choice of 'serenading in the past', as noted eloquently by Ambassador Andebrhan Welde Giorgis in the following quotation:

> Lacking concrete achievements to show for the present in terms of a higher standards of living and a better quality of life for the people, the regime endeavours to live off past glories. It conducts elaborate commemoration ceremonies of yesteryear's events while banishing the values that made the feats possible and condemning many of the chief architects, engineers and makers of the very same glorious events to languish behind prison bars in its hidden *Gulags*.[26]

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[24] This author, for one, was a staunch admirer of the freedom fighters of EPLF, including its senior leadership, until such time when some of these leaders revealed their truest despotic features in the aftermath of the 1998-2000 border conflict with Ethiopia.

[25] Andebrhan Welde Giorgis, *Eritrea at Crossroads: A Narrative of Triumph, Betrayal and Hope* (Houston, Texas: Strategic Book Publishing and Rights Co., 2014) 626.

[26] Ibid. Himself one of the makers of EPLF's glorious events, Welde Giorgis now leads a diaspora-based initiative known as the Eritrean Forum for National Dialogue. On the same page (626), he goes on to say:
'Even if that were the case, serenading in the past, as the regime orchestrates in a constant exhibition of bouts of vanity, cynicism, and extravagance does Eritrea and the Eritrean people no good. Instead of clinging to the laurels of the past to divert attention from the misery of the present and the desperation of the future, the regime should have directed its attention to facing the challenges of today and striving to build for a better tomorrow.'
For similar observations on the legitimacy crisis of the PFDJ, see Tekle Woldemikael, 'Pitfalls of Nationalism in Eritrea', in David O'Kane and Tricia R. Hepner (eds.), *Biopolitics, Militarism and Development: Eritrea in the Twenty-First Century* (New York, NY: Bergan Books, 1995) 2, 7; Eric Garcetti and Jane Gruber, 'The Post-War Nation: Rethinking the Triple Transition in Eritrea', in Michael Pugh (ed.), *Regeneration of War-Torn Societies* (London: Macmillan, 2002) 233, 236.

Proclamation No. 23/1992 did not clearly spell out the time span the EPLF envisaged for its provisional governance. This shortcoming was rectified a year later by Proclamation No. 37/1993, which also repealed Proclamation No. 23/1992. The national referendum for independence – one of the major objectives envisaged in Proclamation No. 23/1992 – was held in April 1993. The Eritrean people voted overwhelmingly for independence from Ethiopia [27] and Eritrea was immediately recognised as an independent state by the international community.

It seems that the main purpose of Proclamation No. 37/1993 was to adjust the status of the provisional government in line with the political realities that transpired with the achievement of the national referendum. However, the new law did not alter the provisional/transitional status and nature of the government. There was no major difference between the aims of Proclamation No. 23/1992 and Proclamation No. 37/1993. The core building blocks of Proclamation No. 23/1992 were retained verbatim in Proclamation No. 37/1993 and in subsequent legal notices that were issued in furtherance of the broader objectives defined by Proclamation No. 37/1993. Even the very title of Proclamation No. 37/1993 copied that of Proclamation No. 23/1992. The official title of the new law changed only 'Provisional Government of Eritrea' to 'Government of Eritrea', dropping the term 'provisional'. In the body of the new law, however, the essential features of the government as a 'transitional government' remained intact.

The new Proclamation No. 37/1993 used the term 'transitional' rather than 'provisional'. Aside from this superficial change of terminology, the government envisaged by Proclamation No. 37/1993 was undoubtedly transitional. This is particularly clear from its fifth preambular paragraph, which stated that 'pending the establishment of a constitutional government, there is a need for a transitional government which respects fundamental rights and freedoms.'[28] According to Article 3(1) of the same law, '[t]he name of the *transitional government*[29] of Eritrea shall be "Government of Eritrea" …'[30] Despite the seemingly confusing nature of the terminology, the government envisaged by Proclamation No. 37/1993

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[27] For a critical account on the referendum, see for example Kjetil Tronvol, 'The Process of Nation-Building in Post-War Eritrea: Created from Below or Directed from Above?' (1998) 36 Journal of Modern African Studies 461-482.
[28] The Tigrinya version reads: 'ክሳብ ቅዋማዊ መንግስቲ ዝቖውም መሰረታዊ መሰላትን ናጽነታትን ዘኽብር ናይ መሰጋገሪ እዋንን ናይ መሰጋገሪ እዋን መንግስትን ስለዘድሊ …'.
[29] Emphasis added.
[30] The Tigrinya version reads: 'ናይ መሰጋገሪ እዋን መንግስቲ ኤርትራ ስም "መንግስቲ ኤርትራ" ኮይኑ …'.

was transitional by nature and temporary by tenure. The last two paragraphs of the Preamble of Proclamation No. 37/1993 specifically concerned the legitimacy of the transitional government, and the language used was the same as that of the Preamble of Proclamation No. 23/1992, cited above. The new law stated that by virtue of the duty it assumed in achieving Eritrea's independence, the EPLF inevitably became a major role-player in the formation of the transitional government.

There was, however, one very important element in Proclamation No. 37/1993 that was absent in Proclamation No. 23/1992. Article 3(2) of Proclamation No. 37/1993 placed a limit of a maximum of four years to the tenure of the transitional government. It stated that '[t]he tenure of the Eritrean Government should be for a maximum of four years.'[31] Read in conjunction with the Preamble of Proclamation No. 37/1993, the law clearly obliged the transitional government to draft and ratify a constitution and conduct national elections pursuant to such a constitution at the very latest by the end of the four years. Accordingly, the tenure of the transitional government effectively ended in May 1997, exactly four years after the promulgation of Proclamation No. 37/1993. The transitional government finalised one of the core tasks envisaged by Proclamation No. 37/1993 in May 1997: drafting and ratifying the first post-independence constitution.

For some obscure reasons that have resulted in a plethora of academic and non-academic literature, the government did not put the constitution into effect immediately after its ratification. Nor did it conduct free and fair general elections as envisaged by Proclamation No. 37/1993. A year after the ratification of the 1997 Constitution, the country was plunged into a devastating two-year border conflict with Ethiopia. Following the outbreak of the war, the government ruled the country under a *de facto* state of emergency. It is clear that the government did not have a legitimate mandate to rule the country when it went to war with Ethiopia in 1998, and nor has it had any legal authority to rule the country since 1997. It has been ruling the country for the last eighteen years without any legal mandate. For seventeen of the eighteen years of its illegitimate hold on power, the government has been ruling the country under a *de facto* state of emergency. However, there is no state of emergency in Eritrea, on a strict legal understanding of that term (as to which, see below).

[31] The Tigrinya version reads: 'ዕድመ መንግስቲ ኤርትራ እንተነ ውሑ ኣርባዕተ ዓመት ይኸውን። '.

Before moving to the next section, which discusses the unique status of the 1997 Constitution, it is important to pause briefly and assess the impact of the National Charter of the PFDJ, adopted in 1994, on the Eritrean experience of transitional constitutionalism. At least on a theoretical level, the content of the National Charter indicates that it was adopted with a view to shaping meaningfully Eritrea's future constitutional order. The National Charter was not formally presented in the form of a transitional constitution, like other documents discussed above. However, it set outs the main principles and objectives that were meant to guide the PFDJ through the transitional period and beyond. In particular, the strong desire to establish a constitutional order is set out in unequivocal terms, as follows:

> In independent Eritrea, it is our basic desire to build a stable political system which respects law and order, safeguards unity and peace, enables all Eritreans to lead happy and peaceful lives, guarantees basic human rights, and is free from fear and oppression. Because such objectives can only be guaranteed through laws and duly constituted institutions, we must establish a constitutional political system in Eritrea.[32]

However, as in all the other cases, the incumbent government did not keep the popular promises made in the National Charter. In neighbouring Ethiopia, the provisional government of the day, led by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), adopted a similar document, known as the Transitional Character. Unlike in Eritrea, the different warring factions that together overthrew the *Derg* military junta agreed upon the Ethiopian Transitional Character. It served as a transitional constitution in Ethiopia until the adoption of the final constitution in 1995.[33] The PFDJ in Eritrea unilaterally adopted the National Charter.

1.4. The unique status of the 1997 Constitution

The status of the 1997 Constitution is one of the most contentious issues in Eritrea. Despite its formal 'ratification', it has remained 'unimplemented'. At procedural and formal levels, the non-implementation of the Constitution is also blamed on the lack of a clause on its 'entry into force', which is peculiar to the Eritrean Constitution. Practically, however, the Constitution has remained unimplemented due to the lack of requisite political will on the part of the incumbent government. As mentioned above, the Eritrean President declared it 'a dead document' in an official interview on Eritrean television on 30 December 2014.

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[32] National Charter of the PFDJ, adopted at the Third Congress of the EPLF/PFDJ, 10-16 February 1994, available at http://ecss-online.com/data/pdfs/PFDJ-national-charter.pdf.

[33] See Adem Kassie Abebe, 'The Federal Democratic Republic of Ethiopia: Introductory Note', in Charles Fombad et al (eds.), *Oxford Constitutions of the World* (Oxford University Press, 2011).

The controversy around the 1997 Constitution starts from the manner in which it was drafted and ratified. Eritrean political forces (mainly diaspora-based), who believe they were not represented in the drafting process, do not accept the Constitution on the ground of its apparent lack of legitimacy. They have rejected the document since its inception.

For some, the Constitution is an illegitimate pact that came into being as a result of an orchestrated strategy of domination and exclusion tactfully practiced by the ruling party for many years. The members of the Constitutional Commission of Eritrea, which drafted the Constitution, and the Constituent Assembly of Eritrea, which ratified it, were not democratically elected by the people but appointed by the ruling party, according to its political priorities. Although 'a popular participation' of the Eritrean people inside and outside of the country was involved in the process, the issue of the Constitution's legitimacy remains a focal point of contention among major Eritrean political forces and others in the academic circle. One of the most critical voices in this regard is the following:

> The constitution-making process was launched and carried out in the total absence of the necessary democratic environment … The process of making the constitution was … bereft of the procedural aspects of the international constraints of constitution-making. It did not have the procedural qualities demanded by the principle of internal self-determination, which qualities are a prerequisite for its legitimacy in the polity.[34]

The fact that the Constitution was drafted and adopted through an undemocratic process is no longer controversial, and has even been admitted (in some ways) by the person who served as the chairperson of the drafting commission.[35]

Until recently, the Eritrean government maintained a position that officially considered the 1997 Constitution a duly adopted document, but in December 2014 the Eritrean President made a public utterance that took many by surprise. He said:

> There is nothing [no constitution]; everybody knows this, so I do not want to say there was a constitution, it died, it resurrected. However, regarding the obstacles of the last fifteen years, related to our existence, sovereignty, progress and development, I do not want to discuss them as excuses. Most of our political progress has been obstructed by these kinds of floods [crises], external interventions, sometimes cyclones, sometimes waves, and at other times barbed fences. As a result, the document [the constitution] has died before it was even promulgated. Ten or more years ago, there were those who were calling for the promulgation of a state of emergency,

[34] Medhanie, 'Constitution-Making' (n2), 20.

[35] See the lengthy quotations of Bereket Habte Selassie, as cited by Magnet, 'Constitution Making in Eritrea' (n2).

> and what these people are saying now is another issue. Nonetheless, practically speaking, the document has died before it was even promulgated … Accordingly, there is now a newly established government organ [committee] entrusted with that task [drafting a constitution]. Whether this is officially proclaimed or not is another issue. The main thing is the task.[36]

Although the President announced a new constitution-drafting process, his government is yet to provide specific details, including commencement and completion dates. The promise is full of uncertainties, not to mention the controversial notion of drafting an instrument afresh when a constitution, adopted in 1997 but never implemented, already exists. This has further exposed the government to serious criticism and cast doubts on the President's hollow promises. The most representative of such criticism came from the UN Special Rapporteur on the Situation of Human Rights Eritrea, who stated:

> The Special Rapporteur holds the view that the 1997 Constitution came out of a widely participative process; the immediate implementation of the Constitution would not exclude a drafting process to align it with current international human rights standards, which may take several years, but would, in the meantime, give constitutional protection to all Eritrean citizens, eliminating the pervasive element of arbitrariness in the enjoyment of fundamental rights and freedoms.[37]

Similarly, the COIE has declared that the Constitution should be implemented without further delay and 'any amendments to the Constitution should be made in a transparent and participatory manner and take into account the State's obligations under international human rights law.'[38]

The President's latest pronouncement is also in stark contrast with previous comments by other senior government officials and State Party reports to UN human rights monitoring organs. For example, the Eritrean Ambassador to the United Kingdom, in an interview given to the Voice of America (VOA) in August 2013, said '[e]ven though the constitution is not implemented in its entirety, it should be noted that it is only the provisions relating to national elections which are not implemented.' The Ambassador opined that 'the country is being ruled by the outlines, the guiding principles and the framework of the Constitution', and thus it 'cannot be said that the 1997 Constitution was unimplemented'.[39] The Eritrean government repeated that same line during Eritrea's Universal Periodic Review (UPR) in June 2014, and

[36] Interview of Isaias Afwerki, 30 December 2014.
[37] Report of the UN Special Rapporteur (n5), para. 19.
[38] COIE Report (n6), para. 85.
[39] VOA Tigrinya, Interview with Ambassador Tesfamicael Gerahtu, 16 August 2013, available at https://www.youtube.com/watch?feature=player_embedded&v=jeoFEKKOJPc#at=648.

in two other recent human rights monitoring exercises before the UN committees on women's rights and children's rights.

In May 2013, Yemane Gebreab, the President's advisor and the head of the ruling party's department of political affairs, made similar remarks in Washington DC to the following effect: the only provisions of the Constitution that have not been implemented relate to national elections, due to the state of 'no-peace-no-war' with Ethiopia. According to him, other provisions of the Constitution, namely the general guiding principles and those relating to fundamental rights and freedoms, were already in force in Eritrea.[40] At another public event in Atlanta in May 2013, Yemane Gebreab said:

> First of all, what I want to say is there is a constitution in Eritrea. It is not correct to say there is no constitution. There is constitution in Eritrea. This constitution, passed through a drafting process that started in 1993-1994, and formally adopted in 1997, is a constitution of Eritrea. This constitution, adopted in 1997, is a published constitution. It is a document, official document. We need to read, study and understand this document. Therefore, it is not correct to speak in a manner which may mean that there is no constitution in Eritrea.[41]

In practical terms, the most important of these assertions is that made by the Eritrean President on 30 December 2014. The State President remains the most powerful person in the nation, whose whims and wishes are above the law. There is a plethora of academic literature in the various fields of human rights, political science, sociology, anthropology, and other related fields supporting this claim.[42] In the next section we will examine some sample provisions of the 1997 Constitution, without forgetting that apart from the benefit to academic discourse, this analysis may not have any practical relevance for real-life cases in Eritrea.

II. Fundamental Principles of the Constitution

[40] Yemane Gebreab's Account (audio), available at http://www.wust1120.com/Audio/Voice%20of%20Eritrea.mp3.

[41] Yemane GebreAb Visit to Atlanta Part 1, available at https://www.youtube.com/watch?v=4nBPc0PprgI (around 16:00 to 17: 43 minutes of the video).

[42] Nicol Hirt and S Mohammad Abdulkader, 'Dreams Don't Come True in Eritrea: Anomie and Family Disintegration due to the Structural Militarization of Society' (2013) 51(1) Journal of Modern African Studies 139-168; Petros Ogbazghi, 'Personal Rule in Africa: The Case of Eritrea' (2011) 12(2) African Studies Quarterly 1-25; Martin Plaut, 'The Birth of the Eritrean Reform Movement' (2002) 29 Review of African Political Economy 119-124.

The fundamental principles of the Constitution are enshrined in the first three parts of the document: the Preamble, Chapter One (General Principles), and Chapter Two (National Objectives and Directive Principles).

2.1. The Preamble

Like many other constitutions, the Preamble of the 1997 Constitution of Eritrea starts with the word 'we', representing the 'people of Eritrea', who are said to be 'united in a common struggle for … rights and common destiny.' The Preamble has a strong revolutionary tenor, owing to the long and bitter armed struggle that preceded Eritrea's *de facto* independence in 1991 and its *de jure* independence in 1993. As a result, the Preamble places great emphasis on the need to accord 'Eternal Gratitude' to the scores of thousands of martyrs who sacrificed their lives for the independence of the country, and to the courage and steadfastness of surviving patriots.

The Preamble cherishes freedom, unity, peace, stability, security, equality, love for truth and justice, self-reliance, hard work, traditional community-based assistance and fraternity, love for family, respect for elders, and mutual respect and consideration as societal values that need to be preserved and developed by all Eritreans. The Preamble acknowledges the above values not only as virtues nurtured during the revolutionary struggle for independence but also as factors that have helped in winning the struggle for national liberation, and legacies that must become the core of national values. The Preamble also underscores that these values are important for the development and health of Eritrean society.

According to the Preamble, the establishment of democratic order is dependent on the participation of citizens, which guarantees the recognition and protection of the rights of citizens, human dignity, equality, balanced development and the satisfaction of the material and spiritual needs of citizens, which are seen as the foundation of economic growth, social harmony, and progress. Envisaging a society founded on the equality of men and women, the Preamble honours Eritrean women's heroic participation in the struggle for independence. This is regarded as important for laying an unshakable foundation that promotes commitment to creating a society in which women and men shall interact on the bases of mutual respect, solidarity, and equality. In addition, the Preamble envisages the Constitution as a tool to serve

as a means for governing current and future generations in harmony and to bring about justice and peace, founded on democracy, national unity, and the rule of law.

The rule of law (as also enshrined in Article 29 of the Constitution) is one of the most important vantage points from which the politico-legal situation in Eritrean has to be examined. A joint submission of the Eritrean legal profession to the COIE noted that as a matter of jurisprudential practice, the rule of law is non-existent in Eritrea.[43] The concept is understood as a principle of governance in which all persons and institutions are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.[44]

Contrary to the requirements of the principle of the rule of law, the whims and actions of the Eritrean President and his close political and military aides are above the law. Thus universally embraced principles of justice, such as supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency are alien to the prevailing politico-legal reality in Eritrea. Although the 1997 Constitution formally embraces many of these principles, they do not actually have any meaningful bearing.

The Special Court of the country, which flouts the right to legal counsel and the right to appeal, is another flagrant affront to conventionally accepted principles of justice, including those embraced by the Constitution. The government's utter disregard of the guarantees of fundament rights and freedoms as enshrined in the country's different codes (such as the Civil Code, the Penal Code, the Civil Procedure Code, the Criminal Procedure Code, and others) is quite problematic. All of these problems have completely frustrated the popular promise of rule of law in the country, as also promulgated by the Constitution.

2.2. General provisions, national objectives and directive principles

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[43] Joint Submission.

[44] Report of the UN Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, para. 6.

Article 1 of the Constitution vests sovereign power in the people. This power is to be exercised pursuant to the provisions of the Constitution, which aspires to establish a state founded on the principles of democracy, social justice, and the rule of law. The Constitution prescribes that the government is to be established through democratic procedures to represent the people's sovereignty (Article 1). The Constitution explicitly recognizes itself as the legal expression of the sovereignty of the Eritrean people. In addition to being 'the source of government legitimacy and the basis for the protection of the rights, freedoms and dignity of citizens and of just administration' (Article 2), the Constitution aspires to determine the organization and operation of government.

In declaring the supremacy of the Constitution, Article 2 states as follows: 'This Constitution is the supreme law of the country and the source of all laws of the State, and all laws, orders and acts contrary to its letter and spirit shall be null and void.' Article 3 guarantees the right to citizenship to any person born of an Eritrean father or mother, including the possibility for foreigners to acquire Eritrean citizenship pursuant to law.

Article 4(3) guarantees the equality of all Eritrean languages. In practice, Tigrinya remains the most dominant language in the country, as the language of the largest ethnic groups that constitute nearly half of Eritrean society. As Eritrea is a multi-ethnic, multi-lingual, and multi-religions society, the issue of language rights deserves further elucidation. Eritrea has at least nine officially recognised languages, belonging to each of the officially recognised ethnic groups. The Eritrean government subscribes to the equality of all Eritrean languages in its official documents and pronouncements. In practice, however, the issue of language rights has remained one of the thorniest political issues in Eritrea.

The same is true about the issue of the mother tongue versus Arabic as a language of instruction in primary education. The problem has worsened in the aftermath of the political crackdown of September 2001. Since then, the Eritrean government has persistently violated the right to freedom of expression, the most important fundamental right intrinsically linked with language rights.

Power is exercised in Eritrea through the most dominant language of Tigrinya, which is now increasingly seen by other Eritrean ethnic groups as an instrument of repression or as something 'representing' the ruling elite. In its simplest formulation, the relationship between language and power is best exemplified through decision-making processes, which are core components of political power. Since politics is mainly concerned with power, such as the power to make decisions, control resources, and control other people's behaviour or values, these processes are inherently shaped by language policies and practice. Everything that has to be done in these areas must ultimately be communicated through a language as a medium of communication and participation. In multi-lingual societies, such as Eritrea, the design of language policies and practices is essential for our understanding of the political dynamics and power relations in such societies. The Eritrean system has serious shortcomings in overcoming the challenges of equality of languages.

Without resorting to a policy of having an official language, the Eritrean government maintains a position that recognizes Tigrinya and Arabic as 'the working languages of the state', as opposed to 'official languages'. In practice, however, the real or perceived preferential treatment of the Tigrinya language (at the expense of other languages) has become one of the major grounds for grievance by other ethnic groups.

A very similar issue is gender equality, which is guaranteed by Articles 5 and 7 of the Constitution. Eritrea is renowned for the distinctive role that female freedom fighters played in the liberation of the country. Thus the Eritrean struggle for gender equality is as old as the underlying ideological transformations of the two major liberation fronts – the Eritrean Liberation Front (ELF) and the Eritrean People's Liberation Front (EPLF). Historical accounts pertaining to the EPLF show that during the liberation struggle, female freedom fighters constituted one third of the liberation forces in active combat within the same liberation front.[45] The high level of mobilisation of women in the armed struggle has created an attitude of equality between men and women, marking the beginning of greater awareness in this particular area.[46]

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[45] See Statement of Ms. Luul Gebreab, Head of the Eritrean Government Delegation to the 34th Session of the CEDAW Committee (24 January 2006), available at http://www.un.org/womenwatch/daw/cedaw/cedaw34/statements/intstatements/eri.pdf (accessed 6 June 2007); see also Rachel Odede and Eden Asghedom, 'The Continuum of Violence against Women in Eritrea' (2001) 43 Development 69-70.

[46] Odede and Asghedom, 'The Continum' (n47), 69-70. See also the National Charter of the PFDJ, the successor to the EPLF, as adopted in 1994. This document can also be considered as having considerable inpact in

Nonetheless, post-independence Eritrea has not nurtured a favourable atmosphere in terms of empowering women meaningfully and enabling them to play a role both in the political life of the nation and in post-conflict transformation. In the aftermath of the 2001 political crisis, Eritrea has been critically challenged by a pervasive problem of gender-based violence that is part of a generalized climate of impunity in the country. Some of these violations were the main reasons that prompted the UN Committee on the Elimination of Discrimination Against Women (CEDAW) to adopt stringent concluding observations on Eritrea at the end of its Sixtieth Session, held in February-March 2015.[47]

One of the most controversial provisions in Chapter II of the Constitution is Article 7(6), which deals with the right to freedom of assembly. The language used in this provision is 'associations and movements', which some see as a narrow terminological approach compared to the broader term 'organizations'. In some circles, this is regarded as a restrictive approach that casts serious doubts on the transitional government's willingness to allow the establishment of competitive political organizations.

With 59 Articles, the Eritrean Constitution is one of the shortest. Some provisions that ought to be among the 'General Principles' or in Chapter I are included in other sections of the Constitution. For example, Article 23(2) on land rights is included in Chapter III. Land is a very scarce commodity in Eritrea, but as Eritrean society is predominantly agrarian, land has peculiar importance to everyday life in Eritrea, as noted in 1946 by Siegfried Nadel:

> It has been said of the African that he does not possess his land but is possessed by it. The attitude of the Eritrean peasant towards his land cannot be more aptly described. Indeed, his preoccupation with his landed possessions shows a depth and passion not often paralleled among African races.[48]

Article 23(2) declares land the exclusive property of the state, disregarding centuries-old customary forms of land tenure that allow both individual and communal ownership of land. This has effectively abolished any form of private ownership of land. This measure was one

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Eritrea's 'transitional constitutionalism' in that it set outs the main guiding principles and objectives of the ruling of that party by which the PFJD was meant to be guided throughout the transitional era and the period beyond. As in all other cases, the popular promises made in this document were also betrayed.

[47] CEDAW Committee Concluding Observations on the Fourth and Fifth Periodic Reports of Eritrea, CEDAW/C/ERI/CO/5, 6 March 2015.

[48] Siegfried Nadel, 'Land Tenure on the Eritrean Plateau' (1946) 16(1) Africa: Journal of the African International Institute 1.

of the most drastic the Eritrean government has taken since its advent to power. With roots in the controversial Land Proclamation (Proclamation No. 58/1994), it is also a classic example of a top-down approach to governance of natural resources, carried out without any form of democratic consultation. Its historical roots can be traced to the liberation struggle era, when aspects of Marxist ideology that emphasised egalitarianism were introduced to the highly segregated and hierarchical Eritrean society.[49]

III. Fundamental Rights Protection

Chapter III of the Constitution is Eritrea's 'Bill of Rights'. It recognizes the following as fundamental rights and freedoms (Articles 14 to 25):

- equality under the law
- the right to life and liberty
- the right to human dignity
- rights related to arrest, detention, and fair trial
- the right to privacy
- the rights to freedom of conscience, religion, expression of opinion, movement, assembly and organisation
- the right to vote and to be a candidate to an elective office
- economic, social, and cultural rights and responsibilities
- rights related to the family
- the right to property
- administrative redress

Some rights and freedoms widely recognized in other jurisdictions are not explicitly enshrined in the Constitution. However, it appears that the list of rights enumerated in Chapter III is not exhaustive. This is clear from Article 29 (Residual rights), which is forward-looking in its nature. It reads: 'The rights enumerated in this Chapter shall not preclude other rights which ensue from the spirit of this Constitution and the principles of a society based on social justice, democracy and the rule of law.' Similarly, Article 14(2), titled

[49] Kjetil Tronvoll and Daniel Mekonnen, *The African Garrison State: Human Rights and Political Development in Eritrea* (Oxford: James Curey, 2014) 24.

'Equality under the law', provides that '[n]o person may be discriminated against on account of race, ethnic origin, language, colour, gender, religion, disability, age, political view, or social or economic status *or any other improper factors*' [emphasis added]. It follows that aggrieved individuals may have the right to appeal to a competent court of law in furtherance of a specific human right that is not explicitly recognized by the Constitution.

The Eritrean Bill of Rights has one unique characteristic feature. In Article 25, it enjoins every citizen to adhere to the duty to:

1. owe allegiance to Eritrea, strive for its development, and promote its prosperity;
2. be ready to defend the country;
3. complete one's duty in national service;
4. advance national unity;
5. respect and defend the Constitution;
6. respect the rights of others; and
7. comply with the requirements of the law.

The inclusion in the Constitution of a duty-orientated provision owes its *raison d'être* to the history of the liberation struggle of the EPLF or the PFDJ. As a liberation movement formed under extremely harsh circumstances, the EPLF placed more emphasis on duties than on rights as fundamental entitlements belonging to individual citizens. In fact, senior officials of the ruling party and their staunch supporters are well-known for their oft-cited maxim that traces its inspiration from John F. Kennedy's famous statement: 'ask not what your country can do for you; ask what you can do for your country'. The problem in Eritrea is that this adage has been stretched beyond the comprehension of the average Eritrean citizen to such an extent that claiming one's fundamental rights and entitlements has now become tantamount to treason.

Article 28 addresses the enforcement of fundamental rights and freedoms. The Constitution accords entitlement to any aggrieved person to petition a competent court for redress. Article 26, which must be read in conjunction with Article 27 (mainly concerning a state of emergency), discusses the limitation of fundamental rights and freedoms. Certain rights are described as being non-derogable. These include equality before the law (Article 14(1) and (2)), the right to life and liberty (Article 15), the right to human dignity (Article 16), some

rights related to arrest, detention, and trial (Article 17), and the right to freedom of thought, conscience, and belief (Article 19(1)).

One peculiar situation that allows for derogation (in a limited manner) of fundamental rights and freedoms is that of a state of emergency as envisaged by Article 27. Although the Constitution has never been put into effect in its entirety, as noted above, it is important to recall that Eritrea has remained under a *de facto* state of emergency that was unilaterally imposed by the government in power ever since the 1998-2000 border conflict with Ethiopia. This situation has caused immense damage to the politico-legal life of Eritrea and is characterized by a dire state of human rights, comparable with only a few other countries. In light of this, it is appropriate to ask here whether, if the 1997 Constitution were in force, the prevailing situation in Eritrea would amount to a state of emergency.

The answer is no. Since the 1998-2000 border conflict with Ethiopia, the Eritrean government has never promulgated a state of emergency in a formal way (for instance, by convening a special meeting of the National Assembly as envisaged in Article 27 of the Constitution). There are also arguments that question the applicability of the provisions of the 1997 Constitution to circumstances emanating from the 1998-2000 border conflict. Since the Constitution remained unimplemented during the entire period of the border conflict, perhaps the most appropriate legal framework to apply is the pre-1997 'transitional constitutional order', with all its shortcomings. This issue is one of the major reasons for the non-implementation of the 1997 Constitution. Thus it deserves special treatment in a separate section, below.

IV. The 'No War, No Peace' Situation as State of Emergency

Eritrea and Ethiopia fought a devastating border conflict between May 1998 and May 2000. The conflict ended formally when the two governments signed a ceasefire agreement in June 2000, followed by a comprehensive peace agreement signed in December 2000. Since then, there have been no further major active hostilities between the countries, except for minor and sporadic skirmishes in border areas.

The peace agreement of December 2000 established two independent commissions that decided on a number of issues related to the causes and consequences of the conflict. Due to the intransigence of both governments, peace between the two countries remains elusive. Compared to Ethiopia, the political situation ensuing from the stalemate has proved more costly to Eritrea, because the country has been ruled for the last seventeen years under a *de facto* state of emergency. This means that the Constitution duly ratified in 1997 remains unimplemented, and elections and other symbolic measures envisaged by Proclamations No. 23/1992 and No. 37/1993 (the transitional constitutional framework) are still resolutely ignored. The inevitable outcome is an unprecedented level of human rights violations comparable to only very few instances in the world. In defence of its egregious record of human rights violations and the indefinite postponement of free and fair general elections, the Eritrean government frequently invokes a state of emergency as a legitimate excuse.

With the non-implemented status of the 1997 Constitution, no clearly defined statutory or institutional procedures allow for the promulgation of a state of emergency in Eritrea. A state of emergency is broadly understood in terms of its direct impact on the enjoyment of fundamental rights and freedoms, so it is easier to analyse the issue from that prism. The most relevant law pertaining to the limitation of fundamental rights and freedoms is the Transitional Civil Code of Eritrea. The only situation where fundamental rights and freedoms can be limited is set out in the amended Article 9(2) of the Civil Code, according to which rights may be limited on the grounds of 'valid social reasons'.

A state of emergency (a situation necessitated by war, invasion, or other emergencies) can be one such 'valid social reason' to justify the suspension of fundament rights and freedoms. It is plausible to assume that such a situation may not only entail the limitation of fundamental rights and freedoms but may also include the deferral of other processes, such as scheduled elections, which are intrinsically linked with the enjoyment of fundamental rights and freedoms. As a matter of common practice, in most democratic legal systems a state of emergency is declared for a specific period of time only, and when there is real and imminent threat to the life of the nation or the public at large. It is also accepted state practice that a state of emergency passes through special procedures and mechanisms before it is formally promulgated (as also envisaged in the 1997 Constitution). In most cases, a duly elected representative body or a legislative branch of government declares a state of emergency. Again, it is arguable that in the Eritrean case the state organ most qualified to declare a state

of emergency was the now-defunct National Assembly, an organ of the state which was defined by Article 4(4) of Proclamation No. 37/1993 as the highest legal authority of the nation during the four-year transitional period.

Proclamation No. 37/1993 does not explicitly mention a state of emergency. Some provisions of this law that come closest to the notion of a state of emergency are Articles 4(5)(b), 4(5)(f), 5(4)(a), 5(4)(b), and 5(4)(c). In these provisions, major issues of national security, such as defending the territorial integrity and sovereignty of the nation, are defined as responsibilities pertaining to the National Assembly and the Cabinet of Ministers. This is a classic example where typical legislative powers seem to be shared nebulously with the executive branch of government, resulting in seemingly competing interests. However, it is important to recall that Article 4(4) of Proclamation No. 37/1993 defined the National Assembly as the highest legal authority of the nation during the four-year transitional period. As a result, any overlap of power that may have existed between the National Assembly and the Cabinet of Ministers was understandably to be resolved in favour of the former.

As a matter of fact, at no point during the entire period of the conflict with Ethiopia has the government officially proclaimed a state of emergency (either through its National Assembly or Cabinet of Ministers). Throughout the conflict, all matters of war and peace were handled under circumstances that included opaque executive decrees, orders, and edicts that were unchallenged by the then nominal parliament. The most important aspect, however, is that fifteen years after the official resolution of the border conflict with Ethiopia, the government cannot continue to invoke a state of emergency as an excuse for its failure to respect fundamental rights and freedoms and to transition the nation to a democratic system of governance (including implementation of the 1997 Constitution).

Moreover, the frequent invocation by the Eritrean government of the excuse of a state of emergency is not in compliance with its obligations arising from Article 4 of the International Covenant on Civil and Political Rights (ICCPR). The concomitant procedure emanating from this treaty is that states can only declare a state of emergency on a temporary basis and must immediately communicate the decision to the international community through the UN Secretary-General. Eritrea never did this, strengthening the claim that the government's continued invocation of a state of emergency has no legal basis. Moreover, some rights are

non-derograble by nature, even in situations where the formal requirements of the promulgation of a state of emergency are fulfilled.

The COIE set the record straight in this regard on two occasions. In the first instance, on 16 March 2015, it said:

> The dominant dimension of the situation in Eritrea appears to us to be the so-called state of 'no war, no peace' often referred to by the government of Eritrea. This has become the pretext for almost all the State's actions that generate and perpetuate human rights violations in the country. We are consciously using the word 'pretext': the so called 'no war, no peace' situation is indeed not a status recognized under international law. It is an expression abusively used by the Eritrean authorities to disregard international human rights law as if Eritrea was in a legal limbo, while other countries have experienced the uncertainty linked to international conflicts without resorting to such drastic curtailing of freedoms and violations of rights.[50]

In the second instance, on 5 June 2015, it emphasized:

> It rejects the argument frequently raised by Eritrean authorities that the so-called 'no war, no peace' status of the country and the 'continued occupation of Sovereign Eritrean Territories' by some of its neighbours justifies some derogations and restrictions of the human rights to be enjoyed by the persons under its sovereignty. Under public international law, derogations and restrictions to human rights in exceptional situations are strictly regulated by the human rights treaties themselves.[51]

It is clear that there is no state of emergency in Eritrea recognisable as such under national and international law.

V. Separation of Powers

The Constitution adopts a presidential system of governance. Separation of powers is a prominent feature, as promoted in the three separate chapters dealing with each of the three major state organs. One controversial aspect is the overlap that may occur when a member of the National Assembly is elected simultaneously for the positions of Chairperson of the Assembly and Head of State.

Pursuant to Article 41, 'the President shall be elected from amongst the members of the National Assembly by an absolute majority vote of its members.' Article 34(1) also states

[50] Interim Report of the COIE [Oral Update by the Chair of the Commission to the UN Human Rights Council], 16 March 2015, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15699&LangID=E [emphasis added].
[51] COIE Report, longer version, para. 55 [footnote removed].

that 'during the first meeting of its first session, the National Assembly shall elect, by an absolute majority vote of all its members, a Chairperson who shall serve for five years.' The Constitution is silent on whether the same person can be elected for both positions at the same time. An ideal situation would have been for the Constitution to clearly specify that a person who has been elected as President shall have his membership in the National Assembly cease immediately. This lack of such fundamental clarity casts serious doubts on the theory of separation of powers envisaged in the Constitution.

In practice, Eritrea has not had a functional parliament since February 2002. The Eritrean President unilaterally froze the transitional parliament in the aftermath of the political crisis of 2001. This crisis was related to a popular reform movement that was initiated by more than a dozen high-ranking government officials who have remained in detention without trial since September 2001. The reformers were arrested for 'daring' to criticize the President openly and calling for an immediate transition to constitutional order.

Added to this is that Eritrea does not have an independent judiciary. As far as checks and balances are concerned, the Eritrean judiciary is the most enfeebled of all state institutions in the country. With the arbitrary dismissal of Judge Teame Beyene in August 2001, the Eritrean judicial system has suffered irreparable damage, particularly as regards its major function of safeguarding fundamental rights and freedoms, as well as restraining government authority.

At the time of his dismissal, Judge Beyene was President of the High Court of Eritrea, the highest court of the nation (equivalent to a Supreme Court in many other jurisdictions). Judge Beyene was dismissed after openly criticising the undue interference into the domain of the judicial branch by the executive branch of government. Judge Beyene's dismissal is the most symbolic example, among many other attacks against the Eritrean judicial system, of why the judiciary has suffered devastating institutional and reputational harm. A joint submission by the Eritrean legal profession to the COIE highlighted the predicament of Judge Beyene as follows:

> The punishment meted out against Judge Beneye is also known as freezing (*midskal* in Tigrinya). It is a well-known punishment, spearheaded by the Eritrean State President himself, most of the time directly imposed by him, or under instructions received from him. According

to another victim of freezing (the former Governor of the Bank of Eritrea),[52] the practice involves suspension from active public service in the form of formally imposed idleness in which context the victim continues to receive salary without performing any official duty. In addition to it being wasteful, freezing is demeaning. Although slightly milder than other forms of punishment, such as detention without trial, freezing is inherently humiliating, meant to punish dissident or disloyal public officials.[53]

VI. Federalism/Decentralization and Regional Integration

The Eritrean Constitution has typical centralizing features. Article 1(5) of the Constitution declares that Eritrea is a unitary state. By virtue of its multi-ethnic, multi-lingual, and multi-religions nature, the most appropriate model for Eritrea would have been federalism. The principle of the unitary state is seen by some advocates of minority rights as one of the major shortcomings of the Constitution, as it is regarded as unfavourable to the protection of minority rights. One such critic is Joseph Magnet of the University of Ottawa, who describes the failure to provide for federalism as 'somewhat egregious, given that by 1997 the minority rights movement was well underway around the globe.'[54] Indeed, this was later admitted by Bereket Habte Selassie, the former chairperson of the Constitution Drafting Commission, who opined: 'I don't think we went to sufficient length to consider the possibility that our framework might not work for the minorities and that made hubris possible, hubris from dominant groups like highlanders.'[55]

As in may other issues of governance, the incumbent government's worldview is strongly influenced by its political culture of the liberation struggle that emphasises on the need to "dilute" ethnic and other social tensions – so-called "sub-national sentiments"[56] in the government's common parlance. In view of this, federalism has never been seen by the incumbent government (the main sponsor of the 1997 Constitution) as a viable governance option for Eritrea.

The Constitution does not have provisions dealing with the transfer of sovereign powers to regional bodies for integration purposes. The most relevant provision that comes closer to issues of regional integration is Article 13 (Foreign Policy) which states: 'The foreign policy

[52] Welde Giorgis, *Eritrea at Crossroads* (n25), 639.
[53] Joint Submission.
[54] Magnet, 'Constitution Making in Eritrea' (n2).
[55] See Bereket Habte Selassie, Discussion on 1997 Constitution, Part Two (21:50 – 24:00), YouTube video of a roundtable discussion at the University of Ottawa, http://www.youtube.com/watch?v=z-g-YPz_olc.
[56] In Tigrinya, the equivalent phrase is ትሕተ-ሃገራዊ ስምዒታት.

of Eritrea is based on respect for state sovereignty and independence and on promoting the interest of regional and international peace, cooperation, stability and development.'

VII. Constitutional Adjudication

Related to the above problem is the underdevelopment of the practice of constitutional adjudication. Modern litigation, characterised by the use and development of case law or precedent, is virtually non-existent in Eritrea. Cases are not well argued in courtrooms; judgments are not well reasoned or articulated. Legal development is further hindered by the complete disempowerment of the Eritrean judiciary. Access to laws and official documentation is a critical challenge, as there is no publicly available depository of laws or official documents, making legal research extremely difficult. Furthermore, with no official research permits granted to independent researchers, it is difficult to undertake independent and critical legal research in Eritrea.

VIII. International Law

The final issue that needs to be addressed is the status of international law under the Constitution. Eritrea follows a dualist approach to domestication of international law. The power to 'ratify international agreements by law' is vested in the National Assembly, according to Article 32(4) of the Constitution. Article 42(6) also gives the President the power to 'negotiate and sign international agreements and delegate such power'. Eritrea has signed nine of eighteen core international human rights treaties.[57] As a matter of general practice, international law has little to no relevance in the domestic affairs of Eritrea. Eritrean courts do not make reference to international human rights treaties, and no important human rights cases have been handled by the judiciary since the country's independence in 1991.

IX. Concluding Remarks

[57] For a complete list see: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ERI&Lang=EN.

This Introductory Note is written in the context of an alarming situation of human rights violations in Eritrea, characterized by a general climate of impunity. The COIE has stated that 'systematic, widespread and gross human rights violations have been and are being committed in Eritrea under the authority of the Government.' Based on first-hand information collected from 550 interviews and 160 written submissions, the COIE has concluded that some of the violations that are taking place in Eritrea 'may constitute crimes against humanity'.[58] This is an allegation of the gravest nature. With regard to the non-implemented status of the 1997 Constitution, the following observation aptly summarises this predicament:

> The non-implementation of the Constitution of 1997, including the provisions relating to individual rights, has had a profound impact on the rule of law in Eritrea. Indeed, with no parliament meeting and the court system controlled by the executive, it could even be affirmed that there is no rule of law in Eritrea. Information gathered through the pervasive control system is used in absolute arbitrariness to keep the population in a state of permanent anxiety. It is not law that rules Eritreans, but fear.[59]

As is now widely known, Eritrea has become the first African country to be a subject of investigations by a UN-mandated inquiry commission. The only exception in this regard is the International Commission of Inquiry on Libya, which can be treated as a special case on the ground that it was established during the height of the civil war in Libya, before the ousting of the regime of Muamar Gadafi. According to the established practice of UN fact-finding missions, inquiry commissions are normally established in a situation that involves armed conflict. There was no armed conflict in Eritrea when the COIE on Eritrea was established. The fact that the COIE was set up under such unique circumstances tells volumes about the gravity of the situation in Eritrea, including the deep level of its constitutional crisis.

It is important to recall that on different occasions, the Eritrean government has been found to be in violation of its own laws and relevant provisions of international law by committing grave human rights violations that may amount to internationally condemned crimes. Prior to the COIE report, the African Commission on Human and Peoples' Rights (ACHPR) gave at least two landmark rulings, in 2003 and 2004,[60] in which it unequivocally expressed deep concern about the dire state of human rights in Eritrea. Numerous other findings by judicial

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[58] COIE Report, Summary.
[59] COIE Report, para 38.
[60] *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea*, ACHPR, Communication No 250/2002, 19th Activity Report of the ACHPR; *Article 19 v Eritrea*, Communication No 275/2003, 22nd Activity Report of the ACHPR, Annex II.

and semi-judicial organs from different countries and inter-governmental organizations throughout the world have also showed a pervasive culture of impunity in Eritrea.[61] Many of the violations addressed by these different sources are abuses so heinous that they are unambiguously condemned in various international treaties.

By way of concluding remarks, the following observations need to be underlined. The incumbent government in Eritrea is transitional by nature and temporary by tenure. As seen from the discussion pertaining to Proclamation No. 37/1993 (the interim constitution), the tenure of the provisional government had already expired in 1997. Nonetheless, betraying its own popular promises, the regime (which first established itself as a 'provisional', and then as a 'transitional' government) has obstinately refused to hand over power to its legitimate source: the people of Eritrea.

With the outbreak of the 1998-2000 border conflict with Ethiopia, the government found a convenient 'pretext' to prolong its iron grip on power indefinitely (as also highlighted in the latest report of the COIE). The incumbent government has neither a legitimate mandate nor a moral high ground to govern the nation, be it in peace or wartime. The *de facto* state of emergency imposed on Eritrea since 1998 is also illegal, not only because of the expired legal mandate of the transitional government but also because of the absence of a situation that genuinely merits the declaration of a state of emergency. The deep-seated constitutional crisis and the dire state of egregious human rights violations in Eritrea have to be understood within this broader framework.

Almost a quarter of a century after Eritrea's *de facto* independence, the virtues of liberty, equality, and justice are yet to be revealed to the average Eritrean in a meaningful way. The forgotten promises of Eritrean independence can only be achieved by the establishment of a solid democratic order guided by genuine constitutional rule. As highlighted by a very powerful pastoral letter by four Eritrean Catholic bishops, this requires a bold admission on the part of the Eritrean government that Eritrea was established for its people, and it is not the people that were made for the country.[62]

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[61] Many of these findings are extensively cited in Daniel Mekonnen, *Transitional Justice: Framing a Model for Eritrea* (Saarbricken: VDM Publishing, 2009).
[62] Catholic Bishops of Eritrea, 'Where is Your Brother?', Pastoral Letter of 25 May 2014. The Tigrinya version of the letter is available ate http://asmarino.com/alewuna/2093-the-most-daring-message-to-come-out-of-eritrea-,

Eritrea needs to enter immediately into a new constitutional order that brings to an end the current level of human suffering. The experience of the last few years tells us that unless regional and international actors exert meaningful pressure, the Eritrean government will never take the first step in this regard. The prospects for constitutional governance will depend on such concerted efforts, including the active involvement of Eritrea's vibrant diaspora communities.

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