

The Status of the Constitution of Eritrea and the Transitional Government

“Today, 23 May 1997, on this historic date, after active popular participation, approve and solemnly ratify, through the Constituent Assembly, this Constitution as the fundamental law of our Sovereign and Independent State of Eritrea”. – Preamble, The Eritrean Constitution

Drafted by a Constitutional Commission established under the auspices of the Transitional Government of Eritrea in 1993 and ratified by a duly established Constituent Assembly in May 1997, the Constitution of Eritrea entered into force upon its ratification on 23 May 1997. The Constitution thus remains legally in effect as of that date. The regime’s failure to implement, that is, to respect, adhere to and apply the Constitution upon its ratification is a calculated and deliberate political decision to pursue its own agenda of self-preservation and plunder.

The Constitution was consecrated ‘*as the fundamental law of our Sovereign and Independent State of Eritrea*’ on 23 May 1997. In the opinion of legal scholars and constitutional lawyers, the Constitution has been legally in force and its provisions have a lawfully binding effect ever since its ratification in May 1997, irrespective of the status of its formal implementation. This character of the Constitution is explicitly stated in its Preamble. Yet, there has been widespread misunderstanding concerning this fundamental legal status of the Eritrean Constitution. The prevailing confusion in the public debate regarding its ‘non-implementation’ has operated to the benefit of the regime.

The general confusion in the public debate emanates from three factors: (1) the regime’s failure to respect, adhere to and abide by the Constitution; (2) the meaning of ‘non-implementation’ of the Constitution; and (3) the claims of non-inclusion, by certain groups, in the exercise of constitution making. These dimensions of the confusion are: First and foremost, the regime’s illegal side-lining of the Constitution which gives the wrong impression of its real legal status, as if it were mere ink on paper devoid of any significance. Second, wittingly or unwittingly blurring the meaning of ‘non-implementation’ of the Constitution (i.e., the failure to put in place the required institutions to apply and enforce it) with having no valid legal status. And third, the stance among some elements in the Eritrean Diaspora political opposition that rejects or disowns the Constitution on the basis of claims that they were not represented in its making or have issues with some of its provisions or omissions.

In the grand scheme of things, the interplay of these dimensions of the confusion in the public domain has obstructed effective advocacy for the enforcement of the Constitution as the foundation of the rule of law and democratic governance in Eritrea.

It must be readily acknowledged that the Constitution of Eritrea ratified in 1997 has several fundamental flaws and defects. The glaring lack of adequate checks and balances in the separation of powers among the three main branches of government, in general, and the near draconian powers it grants the Presidency, in particular, represent its most troubling and dangerous flaws. Otherwise, history makes it abundantly clear that no constitution is perfect on adoption, and that it can be enhanced through constant amendment. Hence it would be infinitely better and preferable to have a government that operates under the restraint of the rule of law based on a flawed and defective but amendable Constitution rather than a government that operates on the erratic whims and greedy impulses of men without any legal, institutional or

moral restraint. After all, the ratified Constitution, as a dynamic and living document, contains a mechanism and a provision for the rectification of its flaws and defects through consensual amendments by a duly constituted national legislative organ.

In the face of a blatant lack of political will and manifest reluctance on the part of the regime, *political organisations, civil society and the people are the fundamental forces that can demand and push for respect of and adherence to the Constitution and the institution of democratic governance.*

Now, why has the Constitution of Eritrea ratified in 1997 not formally entered into force ‘*as the fundamental law of our Sovereign and Independent State of Eritrea*’ to date? The historical and political circumstances surrounding the non-implementation of the Constitution for over twenty-one (21) years are key to understanding the overall downward trajectory leading to the present dismal situation in the country – a state of economic ruin, political paralysis and severe societal disruption.¹ This brief commentary seeks to shed light on:

- The making of the Constitution of Eritrea;
- Why the Constitution remains ‘un-implemented’; and
- The expired mandate of the current (Transitional) Government of Eritrea.

In view of the array of scholarly research and legal analyses undertaken regarding the case or the status of the Constitution of Eritrea ratified in 1997, this commentary focuses on the key issues outlined above. At the same time, it provides references and links to the relevant primary and secondary material on this important subject to avail interested readers easier access to browse selected writings for a more comprehensive historical context and in-depth analyses of the issue in question.

1. The Making of the Constitution of Eritrea

The thirty-year war of national liberation culminated in the *de facto* independence of Eritrea in May 1991. The then triumphant Eritrean People’s Liberation Front (EPLF)² established the Provisional Government of Eritrea under its exclusive auspices. The Front commenced the process of nation-building and state construction by issuing a series of Proclamations. Of the measures undertaken, Proclamation No. 23/1992 established the Provisional Government of Eritrea, formalised its structure and provided the general framework and guiding principles for governing the country pending the conduct of a national referendum in exercise of the right to self-determination within two years. The referendum would enable the Eritrean people to determine their future and decide the international status of Eritrea.

The referendum was conducted over three days, during 23-25 April 1993. In exercising the right to self-determination as a nation, a right earned through hard armed struggle and immense sacrifices, the Eritrean people, almost unanimously (99.8% with a turnout of 98.5 %)³, voted for independence from Ethiopia. With the announcement and subsequent international endorsement of the results of the referendum, Eritrea became a sovereign state as of 27 April 1993, and formally declared its independence as the State of Eritrea on 24 May 1993.

¹ Welde Giorgis, (2014).

² The EPLF was later renamed the People’s Front for Democracy and Justice (PFDJ) after its third and last congress in 1994.

³ The United Nations and the Independence of Eritrea, (1996).

Following the referendum, Proclamation No. 37/1993 repealed Proclamation No. 23/1992. It replaced the *Provisional* Government of Eritrea by the *Transitional* Government of Eritrea and created the transitional executive, legislative and judiciary organs of the government with specified powers.⁴ The Proclamation delimited the tenure or duration of rule of the Transitional Government to four years pending the adoption of a constitution. To this end, it mandated the Transitional Government to (1) make a constitution and (2) organise national elections.

Accordingly, the Provisional Government of Eritrea established a Constitutional Commission with the mandate to draw up a constitution through a participatory process and submit a draft Constitution within four years. The Commission was composed of fifty members reflecting the cross-section of Eritrean society in terms of diversity and inclusiveness, comprising of people whose ages ranged from 24 to 82, representatives of all ethnic groups and religious communities (Christian, Muslim, Animist).⁵ Furthermore, the Constitution Commission included veterans from the EPLF, former senior leaders of the ELF (Eritrean Liberation Front) and members of mass organisations.⁶ Nearly half of the Commissioners were women.

Following an extensive process of public education, consultation and debate, a final draft Constitution was submitted to the unicameral Transitional National Assembly. A Constituent Assembly made up of the Transitional Eritrean National Assembly, delegates of the Regional Assemblies and elected representatives of Eritrean's abroad convened to review, deliberate on and ratify the draft Constitution. The Constitution of Eritrea was ratified on 23 May 1997.

The ratification of the Constitution of Eritrea heralded the end of the legally sanctioned tenure of the Transitional Government and ushered in the prospects of establishing a democratic government in Eritrea. The process of independent Eritrea's transition to a democratic system of government was envisioned to unfold in three phases: (1) the making of a constitution, (2) the holding of national elections, and (3) the establishment of a democratically elected Government to govern in accordance with the Constitution and in adherence of the rule of law. However, the process of Eritrea's democratic transition was rudely interrupted, stalling at the second phase. Elections were not allowed to happen!

2. The Constitution Remains 'Un-implemented'

Proclamation No. 37/1993 stipulated the holding of national elections following the ratification of the Constitution, thereby ending the four-year legal tenure of the Transitional Government.

Article 3(2) of the Proclamation specifically limits the mandate of the transitional government until a Constitution is adopted. Moreover, the Preamble of the ratified constitution states:

"Today, 23 May 1997, on this historic date, after active popular participation, approve and solemnly ratify, through the Constituent Assembly, this Constitution as the fundamental law of our Sovereign and Independent State of Eritrea".

Viewed through the clearer lens of hindsight, the decisions taken and the events that happened between 1997 and 2001, which have persisted to this day, demonstrate a deliberate policy to keep the Constitution of Eritrea 'un-implemented'.

⁴ A/HRC/29/CRP.1, (2015), Chapter V.

⁵ Rosen, (1999): See pages 284 to 311 on Eritrean public participation in the drafting of the Constitution; Mekonnen, (2015). Weldehaimanot, (2015).

⁶ Ibid.,

The government's initial disposition towards organising the legally required elections was tentative and hesitant. Elections were eventually planned to take place in 1998, one year after the ratification of the Constitution. In 1998, however, Eritrea entered into a sudden two year-long border war with Ethiopia (May 1998-June 2000), with the prevailing circumstances effectively shelving the organisation of elections as initially planned. The President used the wartime *de facto* state of emergency to concentrate power in his hands, impose an increasingly authoritarian rule and continue his hold on power beyond the specified four-year tenure of the Transitional Government. Having marginalised the main organs of the government, the Front and his most senior colleagues, he set out to rule without any institutional restraint or consultation with his cabinet of ministers and the Eritrean National Assembly.

The lack of regular meetings of and consultations with the executive and legislative organs of both the ruling Front and the government during the war and in its aftermath caused considerable consternation among the Eritrean body politic. There emerged growing discontent with and criticism of the President's growing autocratic rule and frustration with the lack of mechanisms to interrogate or challenge his unilateral decisions and actions. Several prominent members of the Central Council of the Front, who were also senior cabinet ministers, army generals and members of the Transitional Eritrean National Assembly, first pleaded with, then urged and eventually petitioned the president to convene a meeting of the Central Council of the Front to allow broader participation, transparency and accountability in policy and decision making, especially on crucial issues of national defence and security. Furthermore, there were demands for reforms and the implementation of the Constitution.

Following the end of the war and the signing of a Comprehensive Peace Agreement with Ethiopia on 12 December 2000, preparations to hold elections had started in mid-2001 with the drawing up of a draft Proclamation on the Formation of Political Parties and Political Organizations and a draft Electoral Law as well as the establishment of an Electoral Commission. Progress was, however, brutally interrupted with the arbitrary arrest of prominent dissident members of the Central Council, senior ministers, members of the Transitional National Assembly and army generals who advocated for reform.

The former Front leaders and senior government officials have since been held incommunicado under indefinite detention, never to be seen or heard of or heard from again. Having sidelined his most senior colleagues, marginalised the principal Front and government organs and systematically personalised power, the current President of Eritrea has imposed a police state that rules through brutal repression and continues to quash all dissent and crush his critics.

It is quite evident that the 'un-implemented' status of the Eritrean Constitution has blocked all steps needed to realise the process of democratic development. The suspension of the Transitional Eritrean National Assembly disabled the legislative body from adopting the relevant electoral laws and enabling legislation, including the creation of independent electoral management bodies to hold and oversee the conduct of credible national elections.

Successful completion of the electoral process was intended to install and empower democratically elected representatives of the people in the Eritrean National Assembly which, in turn, would duly elect a legitimate President. In compliance with the provisions of the Constitution, the Presidency and the Eritrean National Assembly would exercise their respective mandates in the implementation of the necessary measures and the formation of the remaining State institutions to accomplish the transition of Eritrea into and democratic State founded on a constitution.

3. The Mandate of the Current Government of Eritrea to Rule

It is crystal clear that the mandate of the incumbent Transitional Government expired with the ratification of the Constitution in May 1997. Its legal mandate to rule Eritrea terminated right there and then. The regime's *de facto* rule lacks *de jure* legitimacy.

As reiterated above, Proclamation No. 37/1993 delimited the legal tenure of the Transitional Government to four years (1993-1997) and defined its mandate to draft, ratify and implement a Constitution and organise national elections. The Constitution of Eritrea remains formally unimplemented or unapplied. National elections, an essential element of a democratic process, have been indefinitely postponed. Clearly, the Transitional Government has failed to carry out its mandate and lost its initial revolutionary legitimacy to rule the country.

The tenure of the current Transitional Government ended with the ratification of the Constitution of Eritrea in May 1997. Ever since, the President has illegally usurped power and arbitrarily extended his rule and the tenure of the Transitional Government. The regime has seized and continues to retain the reins of power not with the consent of the people but solely through its monopoly of the possession and use of the means of violence embedded in the state security apparatus. The restoration of power to the people and the establishment of a legitimate government has thus become imperative. Effective challenge of the incumbent regime's illegitimate monopoly of the possession and use of the means of violence requires organised democratic resistance that rallies the defence and security forces to defend the Constitution and the rule of law.

In the year following the ratification of the Constitution of Eritrea in 1997 and the beginning of the 1998 border war with Ethiopia, delay in launching preparations for national elections indicated political reluctance or hesitation to move on. Unlike Ethiopia, Eritrea did not declare war; it simply joined in. The war, which was unnecessary and avoidable, diverted national focus, resources and energy away from democratic development and forestalled the crucial elections. In the aftermath of the war, the regime sought to externalise the cause of Eritrea's worsening political and economic situation. It invoked the state of 'no war, no peace' with Ethiopia as a pretext to rule under a formally undeclared state of emergency, securitise the State, impose a brutal dictatorship, and commit 'systematic, widespread and gross violations of human rights' against the Eritrean people.⁷

The Transitional Government of Eritrea issued no formal declaration of war or state of emergency either at the beginning of the war or in its aftermath of 'no war, no peace'. Yet, it used the war and the 'no war, no peace' situation to impose a *de facto* 'state of emergency' to prosecute the war, put Eritrea on a virtual war footing, respectively, and securitise the country.⁸ Imposition of a 'state of emergency' requires a declared reason and applies only to a specific and defined time period (start and end date). Furthermore, it must be promulgated by a representative body (the legislature) before it is put into effect by an elected government body (the Executive). Moreover, the near two-decade long *de facto* state of emergency in Eritrea is in direct contravention to Article 4 of the International Covenant on Civil and Political Rights (ICCPR), to which Eritrea is a State party, which:

- (1) requires the reason be communicated to the international community via the UN Secretary General (which was never done in the case of Eritrea), and;

⁷ Eri-Platform, (2018c), Securitisation of Eritrea: Holding a Nation Hostage!

⁸ Ibid.,

(2) guarantees the protection of *non-derogable rights (cannot be violated, limited or suspended under any circumstances)*⁹: the right to life, the rights to freedom from arbitrary deprivation of liberty, freedom of slavery and to freedom from torture and/or ill-treatment.

The Eritrean Constitution clearly stipulates that:

Article 1(3): *‘In the State of Eritrea, sovereign power is vested in the people, and shall be exercised pursuant to the provisions of this Constitution’.*

Article 1(4): *‘The government of Eritrea shall be established through democratic procedures to represent people’s sovereignty and shall have strong institutions, accommodating popular participation and serving as foundation of a viable democratic political order.’*

‘Sovereign power’ is vested in the people of Eritrea, and it is the Eritrean people who, through informed and active participation in elections, give the Government its mandate; electing their representatives to the National Assembly which, in turn, elects the Executive (President). The Transitional Government had a clearly defined obligation and responsibility to hold elections by the end of its legal tenure. In effect, the current regime has continued to rule illegitimately beyond its legal mandate. It has been ruling without the consent of the Eritrean people.

In 2014 the President of Eritrea stated that the Constitution ‘was dead before it was declared’.¹⁰ At the same time, he announced a new process to draft a constitution. Although consistent with the regime’s strategy of mis-information, this conflicts with the claims by certain officials that ‘Eritrea has a Constitution officially ratified in 1997’.¹¹ Moreover, the Eritrean regime defended itself against the African Commission on Human and People’s Rights in the case *Article 19 v Eritrea*¹² by heavily citing the Eritrean Constitution; a terrible irony, defending itself with the very Constitution it claims has no effect in the country.

The regime’s recent announcement of a new constitution-drafting process merely deepens Eritrea’s current constitutional crisis. The regime has no mandate or legitimacy derived from the will or consent of the Eritrean people or a representative body to proceed with a new process of constitution-drafting. Moreover, the regime’s flagrant abuse of human rights, democratic principles and rule of law will not be addressed or solved with the drafting of a ‘new constitution’. The regime has been making conscious decisions to commit brutal and atrocious acts daily for over 20 years under a valid and ratified Constitution. The President’s declaration that the Constitution of Eritrea is dead exposes the extent of his contempt for the people of Eritrea, in general, and the Constituent Assembly, in particular and his claim of the need for a new constitution is farcical, at best. It begs what logic a new constitution-drafting exercise would achieve other than the pretence of seeming active to its blind supporters. It is but another futile exercise that bears no fruit as with all of the current regime’s endeavours.

Conclusion

The four-year mandate of the Transitional Government of Eritrea expired upon the ratification of the Eritrean Constitution in 1997 as per Proclamation No. 37/1993. The expiry of its mandate

⁹ The International Covenant on Civil and Political Rights (ICCPR), (1966) adopted by the UNGA.

¹⁰ Interview of President Isaias Afwerki with the Eritrean TV, 30 December 2014 (from [00.00 to 00.54](#)).

¹¹ Yemane Gebreab (known as Monkey) speaking a conference (from [3.09 – 3.55](#))

¹² The African Commission on Human and Peoples Rights (ACHPR), Case: *Article 19 v. Eritrea* (2007).

and the absence of any legal basis for the President's unilateral extension of its tenure render the current regime illegitimate. Worse still, the President has imposed a brutal dictatorship whose policies and practices have been gravely injurious to Eritrea and its people. Beyond the state of economic devastation, political paralysis and societal disruption that afflicts Eritrea and the Eritrean people today, the President's web of recent unilateral, secretive and legitimacy-deficit diplomatic dealings, especially with Ethiopia, may be sowing the seeds of future conflict, wars and conflagration.¹³ Recent history proffers that the peoples of Eritrea and Ethiopia should beware of deals hatched at the top by self-styled leaders behind their backs.

Despite its fundamental flaws and defects, the Constitution of Eritrea is an organic document that has remained *valid in its entirety* ever since its ratification on 23 May 1997. Article 1.3 vests sovereign power in the people to be exercised in accordance with the provisions of the Constitution while Article 39.3 obliges the President to “ensure respect of the Constitution; the integrity and dignity of the State; the efficient management of the public service; and the interests and safety of all citizens, including the enjoyment of their fundamental rights and freedoms” enshrined in the Constitution. The President's brutal dictatorship, flagrant disregard for the Constitution and his regime's *systematic, widespread and gross violations* of the human rights of the Eritrean people are in direct contravention to the letter and spirit of these constitutional provisions. The President has usurped, personalised and abused power to the detriment of the State of Eritrea and the Eritrean people.

It is time to restore the jubilation that filled the Eritrean people upon gaining their hard-won independence and the radiation of enormous energy, great hope and profound aspirations for a free, democratic and prosperous Eritrea that was manifest in their jubilation. Legitimate power lies only with the people of Eritrea. Political organisations and civil society can demand and drive the application of and adherence to the Constitution, endeavour to ensure the respect of its fundamental provisions and crystallise a transition to democratic governance in Eritrea.

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