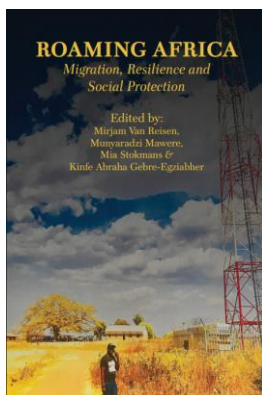


Peace, but no Progress: Eritrea, an Unconstitutional State

Bereket Selassie & Mirjam Van Reisen

Chapter in: Roaming Africa: Migration, Resilience and Social Protection

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Connected and Mobile: Migration and Human Trafficking in
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Peace, but no Progress: Eritrea, an Unconstitutional State

Bereket Selassie & Mirjam Van Reisen¹

Introduction

In 2019, the Nobel Peace Prize was awarded to Prime Minister Abiy Ahmed Ali of Ethiopia following the signing of the Eritrea and Ethiopia Peace agreement in September 2018. When Abiy accepted the post of Prime Minister in April 2018, he immediately announced that Ethiopia would accept the conclusions of the Boundary Commission in relation to the territorial conflict, which both countries must implement. A series of high-level appointments of the State of Eritrea in international organisations followed. One month after the signing of the agreement,

Although the signing of the peace agreement between Ethiopia and Eritrea in 2018 was heralded as a new beginning, the Eritrean people have not been able to reap the dividends of peace, as they are still living in a totalitarian dictatorship. This chapter investigates the relationship between peace, progress, and the Constitution of Eritrea, which has never been implemented. Although much awaited, the peace process must be accompanied by implementation of the Constitution, the rule of law, and mechanisms for the protection of human rights, so that the Eritrean people can benefit from peace, move towards rehabilitation and once again live in dignity.

Eritrea was elected to the General Assembly of the United Nations Human Rights Council (UNHRC), a body promoting and protecting human rights. More recently, Eritrea has taken over the chair of the

¹ Lucie Delecolle and Marco Paron Trivellato provided valuable research support for this chapter.

European-led Khartoum Process, which aims to stop human trafficking (Plaut, 2019). All of these developments have created an expectation that the peace process may lead to an easing of the situation in Eritrea for the Eritrean people. The Peace Agreement has formed the basis for a policy of normalisation of relations with Eritrea, at least for the time being, in the hope that the dividends of peace will materialise by the way of an improvement in the internal situation in Eritrea as well as the regional situation with its neighbours. But meanwhile serious doubts have arisen as to whether Eritrea is able to live up to these expectations, and the absence of progress must explain why President Isaias was not recognized by the Nobel Prize Committee.

The decision by the Nobel Prize Committee to award the Peace Prize to Prime Minister Abiy alone, speaks to the concern that hope of improvements in Eritrea is, as yet, unfounded. This chapter considers the apprehension over the lack of tangible improvements in Eritrea from the perspective of the lack of constitutionality and the absence of any signs that it may return to a constitutional state governed by the rule of law. Plaut calls Eritrea a 'Mafia State' (2017), Tronvoll and Mekonnen (2014) refer to it as the 'Garrison State' and Riggan (2016) calls it the 'Struggling State'. The debate on whether or not Eritrea is in fact a constitutional state matters, because if Eritrea is not a constitutional state, then this entirely changes expectations about the dividends that peace may bring.

The existence of a constitutional state is regarded as a sensitive question in Africa, not in the least because the modern African state overlays a rich, functional and meaningful set of governance structures that were overruled and ignored by European colonial rulers and other invaders. The scramble for Africa in Berlin in 1884 redrew the map of Africa without any regard for African realities (Van Reisen, Mawere, Stokmans, Nakazibwe, Van Stam & Ong'ayo, 2019). As a result, it is sometimes suggested that there is tension between constitutionality and African leadership.

Hence, this chapter investigates constitution making in Africa, within the context of peace and stability, taking into account historical and contextual realities. It discusses certain constitutional principles that are included in most constitutions. It then considers some core issues, relevant to constitutionality in Eritrea, in the context of the peace-making process with its neighbour Ethiopia, before drawing some conclusions. The main research question is: *How does the lack of an operable constitution in Eritrea affect the dividends reaped by the people of Eritrea from the 2018 peace agreement between Eritrea with Ethiopia?*

The constitution and the rule of law

To understand the fundamental linkages between the rule of law, respect for human rights, and an effective and functioning constitutional system, it is necessary to consider the evolution and definition of the term ‘constitution’. Generally, a constitution is considered to be a set of legal texts defining the role of the various state institutions; it organises their relations, in other words, it defines the powers, rights and duties of bodies in the country. According to Henkin (1994), the constitution of a state specifies the sources of sovereignty, checks and balances, division of power between institutions, judicial control and, above all, individual rights and freedoms. Constitutions also usually include a charter of fundamental rights, as is the case in France,² or these may be contained in a single text in the form of core democratic values (Civitas, 1991), like in the American Constitution. The constitution is considered to be the highest law in each country (Kelsen & Wilson, 1934); hence, its rights and freedoms are guaranteed and have specific judicial protection (Denoix de Saint Marc, 2009).

Consider South Africa’s constitution: at the end of apartheid, respect for human rights, dignity, freedom and equality were considered essential. Thus, the country’s supreme legal document, which was enacted in 1996, provided legal protection for citizen’s rights and the possibility to hold politicians accountable. It outlined democratic

²The Declaration of the Rights of Men and Citizens (1789) is attached to the French Constitution.

values and principles. The state, thus, became a constitutional democracy (Civic Academy, n.d.).

Every constitution in the modern era must contain some core values in order to be considered worthy of the name constitution (McWhinney, 1981). And if we accept the words of a South African scholar that the constitution is the soul of a nation, any constitution without such core values may be likened to a body without a soul (McWhinney, 1981). In our view, a more accurate statement would be: a constitution is a vital requirement of a nation, and constitutionalism is the soul of a constitution, for there have been constitutions without constitutionalism (Elshtain, 1996). The concept of constitutionalism is based on the: “perception of constitution as specific guarantees and on the idea that the political order is subject to a stable and independent of various (first of all political) changes ‘higher law’” (Bieliauskaitė, Šlapkauskas, Vainiutė & Beinoravičius, 2016, p. 378).

It is worth pointing out the connection between constitutional engineering and statecraft. In recent years, state actors, supported by scholars and practitioners, have been increasingly relying on constitutional engineering to create bridges of understanding among different segments in divided societies. In nation building and state construction, particularly in post-colonial African states, defined by colonially-imposed artificial borders, it is better to build bridges than walls, especially in nations divided along ethnic, racial or class lines (Hamilton, Jay & Madison, 1818).

The constitutionality – and, hence, legitimacy – of a state authority can be determined by a set of criteria, which also make common sense, and which ensure that the powers of the authority are used within the boundaries set to protect the citizens. The checklist for the rule of law (or *Rechtsstaat*) can be identified using the following broad criteria (Venice Mission of the Council of Europe, n.d.):

- The principle of legality
- Legal certainty
- Prohibition on arbitrariness

- Access to an independent and impartial judge
- Non-discrimination and equality of the law
- Separation of powers and checks and balances
- Respect for human rights in a broad sense

The constitutional foundation of a state aims to provide the basic mechanisms for the rule of law to function, within broad respect for human rights.

Models of constitution making

Historically, we can discern three main methods of constitution making. The first is the classical method, the Philadelphia model (Selassie, 2003). The American constitutional convention held in Philadelphia in 1787 comprised representatives of the then 13 states and combined the function of a drafting commission and constituent assembly. The constituent character of the Convention was partial, in that the draft coming out of the Philadelphia Convention had to be ratified by the legislature of each of the 13 states.

The second example, which may be called the Westminster model (Harding, 2004), is the one followed by countries with established democratic systems. Under this model the drafting is left to the parliament, or a committee of the parliament, and the ratification done by a large majority (e.g., two-thirds) of the next parliament or by popular referendum. The assumption is that the parliament represents all the constituent members of the political community in the country concerned, which may not be necessarily the case. In fact, there may be instances in which the parliament is simply what James Tully calls “an imperial center” (Selassie, 2010). A recent example of this is the attempt by the Scottish nationalists to obtain sovereignty for Scotland through the Scottish Parliament, which was defeated by the Parliament in Westminster (the imperial parliament), a defeat which the Scottish nationalists still hope to reverse (Spiers, 2015).

The third example is the use of a constitutional commission (Ghai, 2016), which has gained ground in recent years. In this model a

specially mandated drafting commission submits a draft constitution to an elected constituent assembly to ratify it. Many African countries have adopted this model, including Ethiopia, Ghana, South Africa and Uganda. In Namibia, the elected parliament turned itself into a constituent assembly. The common feature of this new type of constitution making in Africa is that it marks a break with the past, when constitutions used to be drafted by experts in the capitals of the metropolis (London, Paris or Brussels), where the debate was limited to among the ruling elite. This is what I (first author) have called in some of my writings the Lancaster House model (Selassie, 2003).

The case of Eritrea

The significance of the constitutional commission model, exemplified by the Eritrean case, is the participation of the public in making the constitution. The law establishing the Constitutional Commission of Eritrea charged the Commission with organising and managing “a wide-ranging and all-embracing national debate and education through public seminars and lecture series on constitutional principles and practices” (Proclamation No. 55/1994 establishing the Constitutional Commission in Eritrea, 1994, Article 4[4]; see State of Eritrea, 1994). The law also provided that, following the public debate on a constitutional draft, the Commission must submit the draft to the National Assembly, having taken the views of the public into account, and that the approved draft must then be submitted to a Constituent Assembly for ratification (State of Eritrea, 1994).

The establishment of the Commission was envisaged in the law that reorganised the Government of Eritrea in the post-referendum period of 1993. That law charged the government, inter alia, with “...preparing the ground and laying the foundation for a democratic system of government” (State of Eritrea, 1994). The National Assembly established the Constitutional Commission in fulfilment of that goal. The Commission, which was accountable to the National Assembly, was composed of a Council of 50 members and an Executive Committee of 10 members drawn from the Council. The Chairman of the Commission presided over both the Council and the

Executive Committee. In Eritrea, there was general agreement among the members of the Commission that the process of making the constitution, including the drafting, is as important as the product of the process, namely, the final text of the constitution (Selassie, 2010).

Relevant questions

Constitution makers start by asking two related questions: First, what should be included in the constitution and, second, how long should the constitution be? These questions logically raise a third question one: How does one determine what should or should not be included in the constitution? In other words, is there a set of universally applicable principles, or is each country's choice determined by its specific (historical) conditions? In answer to the last question, both are true (Pacific Islands Legal Information Institute, n.d.). From the writing of the American Constitution onward, modern constitutions have been based on preceding models or experience, modified to suit the conditions of the particular country. How much such modification affects the universal principles differs from case to case. Nonetheless, the point of departure must be the historical, socio-political situation in the country concerned. Let us note that not everything in the American Constitution was a novel invention, owing nothing to other ideas and experiences. In crafting what later became a model, the American Constitution makers borrowed ideas like separation of powers from the French Enlightenment (Potofsky, 2002) and the federal system of government from the confederacy of the Iroquois nation (Feathers & Feathers, 2007).

As to the length of the constitution, some scholars have attempted to provide general rules for good constitution writing. For example, British scholar and statesman, Lord Bryce, affirms the rule of brevity in writing a constitution, adding simplicity of language and precision as essential requirements. In this respect, he ranks the American Constitution above all other written constitutions:

... for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in detail. (Bryce cited in Krieger, 2001)

The last phrase is worth emphasising: a judicious mixture of definiteness in principle with *elasticity* in detail. This pithy statement suggests that drafting a constitution can be likened to both a work of art and an engineering project. As such, it can test the writing skills of the best draftsman in terms of choice of language, precision and clarity, while at the same time requiring craftsmanship to build the edifice of state institutions. An edifice should be built to last and, in the case of a constitutional edifice, it has to be built to weather the storms brought about by changing political fortunes.

Another counsel of the wise comes from Abbé Sieyès, who insists that a constitution must be neutral. Sieyès, who influenced the constitution making in post-revolutionary France, counselled that the constitution must be kept neutral or at least open-ended in political and ideological terms, particularly in relation to the bill of rights, otherwise they might be too closely identified with the “transient fortunes of a particular party or pressure group, and rise and fall with them” (Selassie, 2010). Neutrality is arguably a pivotal concept in this respect; even a partisan of a ruling group can see the rationale behind Sieyès’ counsel, assuming that such partisan is clearheaded and can see the perils of being wrapped only in the present or in parochial concerns.

The foregoing introductory remarks will hopefully prepare the ground for our discussion on the challenges of constitution making in Africa, focused on one particular country, Eritrea. We will also make reference to other African countries as need be. Let us start with a discussion of some constitutional principles.

Constitutional principles

Rule of law

The rule of law is a mechanism, practice, or norm that maintains the equality of all citizens before the law (Choi, n.d.) – meaning that the law is superior to any political power and all persons are subject to the law. In accordance with this definition, the power – or government – should favour principles of law and condemn any attempt by judicial or other authorities to subvert the law. This system became popularised towards the end of the 19th Century in Great Britain and Germany, as ‘*Rechtsstaat*’ (Advisory Council on International Affairs, 2017a; 2017b), to counter the power of the absolute monarchy (Jean, 2018). According to the German theory, *Rechtsstaat* guarantees the state and citizens’ freedoms: the sovereign is limited by the principle of legality, which places the law above public authorities. The concept of ‘*Rechtsstaat*’ or ‘rule of law’ was imported into France by Léon Duguit in 1907 under the name ‘Etat de droit’.

This concept has transcended time and borders: the rule of law is the cornerstone of the European Union (EU), embodying one of the EU's fundamental values (European Union, 2008, Article 2). Indeed, the EU is filled with the spirit of the rule of law, as reflected in the rule of law checklist of the Venice Commission, also known as the European Commission for Democracy through Law, which was adopted on 12 March 2016 (Council of Europe, 2016). In addition, the EU Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, in a Press Conference on 28 May 2018 for the 2018 EU Justice Scoreboard, stated that “Democracy, civic rights and due management of EU funds are under threat without the rule of law” (European Commission, 2018; see also Brzozowski, 2018). However, the implementation of the rule of law by the EU has been called into question recently, as illustrated by the case of the Foundation of Human Rights for Eritreans, which summoned the European Commission alleging that it was violating EU law by funding projects in Eritrea, thereby contributing to the implementation of programmes executed with forced labour (The Guardian, 2019).

An important question is to consider whether or not, and, if so, how, the definition and understanding of the rule of law differs on the

African continent? Writing for the International Journal on Human Rights, Makau Mutua said that the rule of law is often seen as a:

...panacea for ensuring a successful, fair and modern democracy which enables sustainable development. [But no] African country has [ever] truly thrown off the shackles of colonial rule and emerged as a truly just nation state – even though many have the rule of law at the heart of their constitutions [...] the concept must be adapted accordingly to take into account the cultural, geographic and economic peculiarities of each state. (Mutua, 2016)

So, what should an African adaptation of the rule of law be based on? Mawere (2009) proposes an African conception. Writing on the specifically thorny issue of euthanasia and the right to choose death, as analysed in Shona culture in Zimbabwe, Mawere notes:

The Shona people have a tradition rich with knowledge, culture and wisdom that enriched and inspired our ancestors. Tsumo (proverbs), madimikira (idioms), ngano (folklore) and popular sayings are traditionally used to inculcate traditional values, customary laws and the general rules of conduct in Shona society, hence it is in these sociological models that the position (against euthanasia) by the Shona people on euthanasia is drawn. (Mawere, 2009)

Drawing on both African and European notions of the basis of the law in a society as a moral community, Mawere concludes that the aim is to protect the wholeness of society:

In the Western tradition, there are also some scholars who like the Shonas argue that euthanasia is morally wrong for the simple reason that everything naturally loves itself. Besides, every part belongs to the whole and so death injures the whole society. Thomas Aquinas for example, argues that “everything naturally loves itself and, every part as such belongs to the whole. Every man is part of the community. As such man belongs to the community. By having his life terminated, he injures himself and the community to which he belongs”. (Mawere, 2009, p. 105)

According to Mawere, the sanctity of life is central to the protection of the community as one:

Thus, the Shonas hold the same view, as this is captured in the idiom, Kufa izuva rimwe, kuora igore (Death is one day, corruption is a year). This idiom warns people to beware of what may harm a person and have long-lasting consequences to oneself and society [...]. Thus, in Shona society choosing death in whatever circumstances is considered harmful, destructive and a loss not only to the bearer of life but to family, friends and the community to which the one whose life is terminated is a member. (Mawere, 2009, p. 105)

The rule of law and its constitutional framework can also be looked at using Mawere's analysis, based on deep foundational ethical norms and beliefs, which may change over time, but are also are rooted in a deeply religiously embedded understanding of the dignity of life:

It seems clear that though this view is contentious, it has gained wide acceptance and veneration through the ages, especially in the African cultures because of a respect for the sanctity of life and conformity to the biblical ethics of "Do not kill" (Deuteronomy 20) which is commonly taken as the foundation for ethical concern by the Shona culture and African cultures in general. (Mawere, 2009, p. 105)

In this sense, the rule of law, or *Rechtsstaat*, is not a relative idea at the disposition of rulers, but ultimately belongs to the community. The task of the constitution is to protect this process.

This idea – which is more than 2,000 years old – lived through antiquity, the Middle Ages, the Enlightenment and the modern era. The rule of law appeared in Christian, Jewish and Muslim texts, Classical Greek philosophical essays, and political and legal trials. More recently this notion has been upheld in international and European treaties and national constitutions. The theory that political power cannot be the supreme power was actually present in the Bible: according to Hebrew kings in the Old Testament, God's law – equivalent to justice – was the supreme norm and humans were not

allowed to betray it (Bible Gateway, n.d.-a).³ This is reiterated in the New Testament, when Peter and the Apostles, who were brought to the high priest because they were standing in the temple courts, answered: “We must obey God rather than human authority” (Bible Gateway, n.d.-b).

The superiority of the law over civil and political power is also developed by several Classical Greek authors. Plato, in his book *Statesman* (Berges, 2010) and Aristotle in *Politics* (Cleary & Gurtler, 2000), argued that it is more appropriate for the law to govern, than any citizen. Cicero stated in his book *The Republic and the Law* that:

The law can't be countermanded, nor can it be in any way amended, nor can it be totally rescinded. [...] There won't be one such law in Rome and another in Athens, one now and another in the future, but all people at all times will be embraced by a single and eternal and unchangeable law; and there will be, as it were, one lord and master of us all [...]. (Cicero, Rudd & Powell, 1998, p. 83).

Titus Livius added a nuance to Cicero's definition: “Imperia legum potentiora quam hominum” (Nemo, 2018), which Algernon Sidney and James Harrington translated as “the government of laws not of men” (Houston, 1991).

Democracy

The first author teaches comparative constitutional law in the United States and has been involved in drafting constitutions, including the Constitution of Eritrea, as well as comparative studies of constitutions and constitution making. In this duty, the first author has noticed that comparative constitution making has become a popular subject among scholars, policymakers and practitioners. This development can be traced back to the experience of Eastern Europe in the post-Soviet era, which essentially involved a democratic transition from autocracy. The collapse of the Soviet Union in 1989

³“And you, Ezra, in accordance with the wisdom of your God, which you possess, appoint magistrates and judges to administer justice to all the people of Trans-Euphrates – all who know the laws of your God. And you are to teach any who do not know them” (Bible Gateway, n.d.-a).

coincided with popular movements demanding democratic transition in much of Africa, and constitution making became the principal method of achieving democracy, with constitutionalism as a prime element of that objective. Constitution making and constitutionalism, which had been consigned by reductionist ideology to a mere superstructure, have attained a higher status in the current discourse. There has been a paradigm shift.

In constitution making in this modern era, more emphasis is given to process than in earlier times. This emphasis is related to the democratic imperative as the governing principle. For example, in a long-running comparative constitutional study in which I (first author) was involved, cosponsored by the US Institute of Peace and the United Nations Development Programme, the study focused on the process of constitution making more than the content of the constitution (Hart, 2003). The rationale behind this focus is the conviction that process-driven constitution making is better than previous approaches, which depended on the decisions of a select group of people, be they distinguished statesmen, as were the framers of the American Constitution, or a select committee of the government of the day and its expert legal draftsmen, as was the case with the independence constitutions of many African countries.

The process involved in drafting the constitutions of African countries on the eve of their independence excluded African populations from participating in the making of the basic law by which they were to be governed (Selassie, 2010). Indeed, preventing people from being properly involved in the making of their constitution sharpens the risk they will not support the constitution, which can lead to instability, or even revolution, especially in countries undergoing a post-conflict transition. However, no analysis devoted to process can avoid reference to substance. Process and product are dialectically linked: the end prescribes the means and the means impinges on the end. To put it differently, the democratic imperative demands the involvement of the public – the process empowers the public, giving its members a sense of ownership of the constitution and allowing them to air their views on a range of critical

issues that affect their lives. And, public participation in the making of a constitution necessarily raises questions of substance.

Let us probe a little further; so what is democracy? An important part of the contemporary debate on the meaning of democracy concerns the criteria applied to evaluate progress in a democratic transition. A proper debate on the meaning of democracy must first of all focus on its substantive aspects – that is, its source and purpose. Then it can focus on procedure. The classical approach defines democracy in terms of its source and purpose, with the will of the people its source and the common good its purpose. However, in recent times, emphasis has shifted to the procedural aspect as the central feature of democracy, namely, the selection of leaders through competitive elections by the people. Implicit in this concept of electoral democracy is the conviction that popular participation and competition are crucial components of a democratic government.

But the question remains: do elections equal democracy? Certainly, elections are a critical part of it, to the extent that elected bodies, as representative institutions, are the primary national institutions accountable to the citizens of a country. But once the representatives are elected, their responsibilities do not end when the election is over. In other words, an election is a means to an end – the end being the proper functioning of representative institutions, which constitute the substantive aspect of democracy. The procedural imperative, although essential, must be analysed in relation to the role of representative institutions in the totality of the constitutional order. Commenting on the undue emphasis placed on process, Jean Bethke Elshtain of Chicago University wrote:

Democracy is not and has never been primarily a means whereby popular will is tabulated and carried out but, rather, a political world within which citizens negotiate, compromise, engage and hold themselves and those they choose to represent them accountable for action taken. Have we lost this deliberative dimension of democracy? Democracy's enduring promise is that citizens can come to know a good in common that they cannot know alone. (Elshtain, 1996)

It is hard to disagree with this statement. Indeed, the other core objectives that we will consider later are shaped, or at least influenced, by the process in which “citizens negotiate, compromise and engage” (Soyinka *et al.*, 2015) in the daily business of the government and in social interactions. To sum up, democracy is the keystone of the entire edifice of the political system of countries in the modern era.

Stability

In the life of a nation, stability, as a core value, often goes together with national unity – and the two are essential conditions for social and economic progress. Indeed, the continued existence of the nation depends on them, and the other core values – democracy, sustainable development, social justice and stability – are dependent on them. Only people who have not experienced the dislocating effects of turbulence caused by lack of stability and unity, or who have a dim memory of such effects, can ever question this simple fact.

But what are the conditions that sustain stability? Well, first of all, stability is not simply the absence of conflict, just as peace is not simply the absence of war. True stability cannot be imposed by force. Rather, for stability, citizens must be secure under the rule of law, as opposed to arbitrary personal rule; the government must be subject to the law, just as individual citizens are; no one can be above the law; and everyone must be equal under the law. In a democratic society, citizens know this to be a fundamental constitutional principle.

One of the favourite American founding fathers, Benjamin Franklin, who was a member of the Constitutional Convention in Philadelphia in 1787, was asked by a citizen as he came out of the final meeting of the convention what the convention had done. His quick response was:

*“We have given you a republic, if you can keep it”*⁴ (Farrand, 1911). Franklin died the following year aged 84, but the constitution has survived for over 200 years. It has helped the republic to become the wonder that we know today, even with the

⁴Quote attributed to Benjamin Franklin in the words of James McHenry.

state of virtual dysfunction that assails it from time to time due to polarized politics. Another gem among Ben Franklin's sayings is one that is the basis of stability and that should be posted on every citizen's door: "The price of liberty is eternal vigilance". (Burger, 1991)

Whenever the rule of law is violated for any reason, even for reasons of state security, a clash of values occurs, which can lead to serious conflict. In such a situation, a well-informed citizen who knows his/her rights, would invoke another equally basic value, i.e., human rights.

Human rights

We will begin the discussion of human rights with a quote from Alexander Hamilton, one of America's founding fathers. It is remarkable, not least because it comes from a man who was better known for being the father of the American banking system:

The sacred rights of mankind are not to be rampaged for among old parchments, or musty records. They are written, as with a sun beam in the whole value of human nature, by the hand of divinity itself; and can never be erased or obscured by mortal power. (Hamilton *et al.*, 1818)

It is hard to believe that a banker penned these words. Such eloquent, poetic expression of human rights reflects the spirit of the 'Age of Reason', couched in the language of natural law philosophy. Written in 1775, Hamilton's statement presaged that most eloquent of historic documents, the American Declaration of Independence (Selassie, 2003), which came one year later. Hamilton's language reflects the mood of the Enlightenment, linking reason with God. The attribution of the writing of the "sacred rights of mankind" suggests a reference to the Ten Commandments, in the authorship of which Moses was (to believers) merely an agent, a divinely chosen medium (as Mohammed was of the Holy Qur'an). That the Ten Commandments impose more duties than they confer rights does not diminish their power in Judeo-Christian theology (Sicker, 2003).

Concerning the source of human rights, there has been an ongoing debate between the proponents of natural law and those of the Realist school. In its contemporary phase, the debate boils down to whether human rights are absolute or relative values. On first reading, Jefferson and the framers of the American Constitution seem to subscribe to the view that human rights are absolute values. But Jefferson's Declaration of Independence and the American Constitution proclaim that all men are created equal as a 'self-evident' truth at a time when slavery was an accepted institution, and Jefferson himself a slave owner and known to dally with pretty black girls (Greene Bowmand, 2016). We should also remember that women had no right to vote until a century and a half later.

The conclusion is that absolute may be relative in response to the complexities of the world. Hannah Ahrendt solved this problem by identifying human rights at the core as the right to have rights, the right to have a place in the world. These rights are undeniable, even in the absence of a state or if a state does not award any rights. Ahrendt strongly argues that those who are stateless and cannot access rights through the system of states still have rights and that this is an absolute. What is relative is that the implementation of human rights depends on the human rights culture (Rorty, 1993). This recognition of the location of human rights within the living culture was discussed by the founders of the Universal Declaration of Human Rights (UN General Assembly, 1948), the basis of the human rights system (Borgman, Plessius & Van Reisen, 2012), and one of the achievements of post-World War II period. Since then, human rights have seen incremental growth and universal acceptance in all their varied forms. The Universal Declaration of Human Rights provided the basic framework for the development of human rights and influenced the writing of national constitutions in this respect. Human rights and democracy, as the paramount political values of our epoch, reinforce each other. A climax in the evolution of human rights was reached in 1966 with the adoption by the United Nations of the International Covenant on Civil and Political Rights (UN General Assembly, 1966a), the International Covenant on Economic, Social and Cultural Rights (UN General Assembly, 1966b) and the

declaration of their interdependence in 1993 (UN General Assembly, 1993) for the full realisation of human rights. But the struggle continues in terms of their application, all the time and in all places – in some places more than others (Makei, 2012).

Today, even dictatorial regimes pay lip service to human rights as enshrined in these international legal instruments. And the majority of governments have ratified them and included their essential elements in their national constitutions (Elkins, Ginsburg & Simmons, 2013). Some of these rights have such a high level of acceptance that they are not under dispute – whether or not the government has ratified the relevant treaties or made reference to them in their constitution or national legislation. Among these is the right to be free from torture and enslavement.

Sustainable development

Sustainable development is defined in the Brundtland Report as development that meets the needs of the present without compromising the ability of future generations to meet their own needs (Brundtland & World Commission on Environment and Development, 1987). This definition reconciles two seemingly contradictory goals – environmental conservation and economic growth. And it offers a solution to today's global crisis: the crisis of mass poverty and the excessive consumption by the minority. In terms of the global political economy, the two issues of excessive consumption by the minority and mass poverty have been the driving forces behind environmental degradation. This is why the environmental movement is perhaps humanity's most important movement in the contemporary world. It is also the reason why sustainable development, properly understood and applied, is one of the core values that must be considered in the constitution making of a country.

As indicated above, a distinction can be drawn between economic growth and sustainable development. Economic growth is measured in terms of the quantity of goods and services provided over a given time frame, usually a year (tonnes of steel, bushels of wheat, bales of

cotton or coffee, kilowatts of electricity, etc.). Thus, the gross national product of a country is the amount of goods and services produced in a year. On the other hand, the definition of sustainable development includes something qualitative in addition to growth, including due care taken in the protection and preservation of the environment and the ecosystem, such that economic growth does not adversely affect the interests of future generations, and does not involve hazards to the health and wellbeing of present generations. Is it any wonder that it is considered a core value and essential subject to be included in a constitutional provision?

This idea of sustainable development must be read together with what has been called the new generation of human rights: the right to clean air, clean water, food and employment (Ruppel, n.d.). As already noted, these core values are interconnected and interdependent, but their pursuit can also lead to clashes between or among them, as conflicting demands are made by different segments of society. A growth-oriented state and allied business interests may demand economic growth that does not take into account the environmental damage involved in such growth. In terms of economic growth, there is the advantage of adding more acreage to agricultural development, with the related increase in goods, services and employment. The best example of this is development in the Amazon region of South America, in which agribusiness companies aim to undertake the wholesale destruction of forest areas, clearing the forest for agriculture and timber. Opposed to such schemes are environmental groups and their allies in the government (Gonzales, 2019). This represents a clash of values, with the government and its business associates claiming that such economic growth would generate revenue and jobs for the poor, and environmental groups and their allies claiming that the destruction of the forest will cause permanent damage to the ecosystem and give rise to climate change and related hazards. That this is an unresolved issue is borne out by the failure of the international conference on climate change in Copenhagen (BBC, 2009). Important work is now being carried out to reconcile the Sustainable Development Goals and the existing human rights framework, so that the framework is conducive to sustainability and

to ensure that the goals are strengthened by the human rights framework, which has been built by the international community since 1948 (Advisory Council on International Affairs, 2019).

Social justice

Often confused with socialism, the concept of social justice is of recent origin in terms of its inclusion as a constitutional principle. Its application dovetails with human rights principles; indeed, scholars of human rights include aspects of social justice in what they call second generation human rights (Mubangizi, 2004). The success of the application of the other values discussed in the preceding section can also depend on whether or not, and to what extent, they contribute to the attainment of social justice. Human rights may be partly judged by the achievement of human security, measured in terms of the provision, or lack of provision, of some services to citizens.

To this end, the United Nations has created a system of measurement called the Human Development Index (HDI). This is a useful measure of human wellbeing that goes beyond gross domestic product (GDP), and beyond the production of goods and the building of roads and bridges and other infrastructure, important as these are. Poor people throughout the world do not have the ability to attain wellbeing, or even to “picture what wellbeing means”, as one poor Indonesian woman said to some Oxford University researchers (Oxford Poverty and Human Development Initiative, n.d.). The HDI embraces different dimensions of human development, including the availability of affordable and adequate nutrition, affordable education, access to good health services, and affordable housing in safe neighbourhoods (Krieger, 2001).

A memorable statement written in an Alabama jail by the late Martin Luther King Jr speaks to this: “Injustice anywhere is a threat to justice everywhere” (King, 1963). It is an incisive statement articulating in simple language the idea of social justice. It was written in an attempt to persuade America of the injustice of racial discrimination. The statement postulates that justice, like peace, is indivisible. Why?

Because the breakout of conflict in one area will impact on neighbouring areas. Peace is indivisible. By the same token, a wounded segment of society, wounded by benign neglect like the inner city of a prosperous town, or by the malignant hostility of an errant leader of a country, will affect the rest. Justice is indivisible; the denial of justice anywhere is a threat to justice everywhere. It took a prophetic voice and long struggle to cause America to address the wounds of its history.

How do you constitutionalise social justice? With all due humility, as an example, we cite a provision concerning social justice from a constitution, the first author had a hand in drafting. The aim is to make concrete in constitutional terms an abstract idea like social justice. Under the heading ‘Economic, Social and Cultural Right and Responsibilities’, Article 21 of the Constitution of Eritrea in 1997 provides as follows (State of Eritrea, 1997):

1. *Every citizen has the right of equal access to publicly funded social services. The state shall endeavor, within the limits of its resources, to make available to all citizens, health, education, cultural and other social services.*
2. *The state shall secure, within available means, the social welfare of all citizens and particularly those disadvantaged.*
3. *Every citizen shall have the right to participate freely in any economic activity and to engage in any lawful business.*

Furthermore, the last clause of Article 21 (sub-article 5) enjoins the National Assembly to enact laws guaranteeing and securing the social welfare of citizens, including the rights and conditions of labour and other rights and responsibilities listed in Article 21.

So, what has social justice to do with constitution making? We trust that the foregoing discussion has explained how social justice as a core value or objective has everything to do with the constitution.

The constitutionality of the State of Eritrea

Constitution of Eritrea

After independence from Ethiopia in 1991, Eritrea formed a Constitutional Commission to draft a constitution for the new state (State of Eritrea, 1994). In due course, this constitution was written and promulgated (State of Eritrea, 1997). In September 1997, President Isaias Afwerki of Eritrea delivered an address at a conference in West Sussex, England on the constitutional process of Eritrea. He keenly set out that the building of a society should expand to include the traditional and historically evolved principles relevant to an African context in a modern society. He listed six fundamental principles (Afwerki, 1998):

- the right to a fair share of national resources
- equal opportunity
- the right to full respect and protection of one's dignity
- the right to unhindered movement and freedom of expression
- institutional guarantees (a constitution and a judiciary)
- and responsible, transparent and non-corrupt government

Afwerki also listed the causes of the problems with the democratisation process in post-colonial Africa. Unfortunately, as history will tell, he backed away from the idea of democracy. Hence, the Constitution of Eritrea has never been implemented (Zere, 2018), and none of the six points listed by Afwerki have been realised for the majority of Eritrean people.

Rule of law in Eritrea

The British Parliament, by implementing the rule of law in the 17th and 18th centuries (under the Bill of Rights in 1689 and later the Acts of Settlement in 1701 and 1703) – to balance the royal power – developed three constitutive aspects related to the rule of law. First, the equality of all before the law; second, the subjection of political power (including the monarchy) to the laws of the country; and, finally, the idea that even a government democratically elected cannot act in a discretionary manner (Dicey, 1885). Since the Parliament

represents the legislative power, i.e., the source of the law, this institution is, therefore, the supreme one.

While the Eritrean state institutions are built on a similar logic, the rule of law is absent in Eritrea. As power is concentrated in the President and his advisors, they have full control over the government and the judiciary without any checks and balances. The Parliament has not met in 20 years and holds no power independent from the President's office. The execution of policy and the implementation of the law is arbitrary and dependent on favour, lacking equality before the law. The President exercises a firm control over the executive, legislative, and judicial branches, breaching the division of power, a fundamental principle of the rule of law.

In Eritrea, divergence of opinion is not tolerated. According to a report by the Centre for Human Rights, University of Pretoria, “the rule of law affirms that the people have a right to know what their government does and how the arms and institutions of state relate with each other. In this way, the people can exercise their duty to elect governments” (Centre for Human Rights, 2015, p. 6). In Eritrea, no elections have ever taken place and freedom of opinion and of speech is severely lacking. Since the 2001 ‘crackdown’⁵ (Plaut, 2017), information and freedoms have been censored. Since then, the situation has worsened: media outlets have been shut down, private press outlawed, journalists detained, and some religions banned. In 2018, Freedom House scored Eritrea as ‘Not Free’ (Freedom House, 2018).

While the Eritrean people have traditionally placed trust in the government of President Afwerki – and have been expected to perform their duties and obey the law – those in power have broken this trust by ignoring the most basic principles of the rule of law

⁵ In September 2001, Eritrean President Isaias Afwerki banned independent newspapers, arrested and imprisoned senior government officials, leading to insecurity and arbitrary arrests.

within the country and outside its borders. Plaut refers to Eritrea as a mafia state:

Eritrea is no ordinary state; rather it resembles a criminal organisation designed to keep its citizens in perpetual servitude. It behaves like a mafia organisation: with covert finances but without a constitution, legislature or elections, run by the country's president and his closest associates. (Plaut, 2017)

The last two decades have brought Eritrea closer to the law of the jungle, which according to Rudyard Kipling in his work *Jungle Book* is a “place devoid of ethics where brutality and self-interest reign” (1894), meaning that people do whatever is necessary to survive or succeed (Ammer, 2003) and live a life in fear (UN Human Rights Commission, 2015, 2016).

In any democratic system, people place trust in their government, expecting it to perform duties according to the promises it made and by virtue of the law. In actual fact, promises and laws are frequently broken, which raises the issue of responsibility. This is exactly why accountability and transparency need to be legally and constitutionally required (Selassie, 2011).

The Eritrean 2% diaspora tax

The result of the lack of constitutionality in Eritrea is well illustrated by the 2% diaspora tax levied by the Eritrean regime on members of the diaspora. According to a report by DSP-Groep & Tilburg School of Humanities (Buisse, Van Reisen & Van Soomeren, 2017) presented to the Dutch Parliament, *The 2% Tax for Eritreans in the Diaspora*, the 2% tax is an income tax based on two Eritrean proclamations: Proclamation to Provide for the Collection of Rehabilitation Tax (State of Eritrea, 1991) and Proclamation to Provide for the Collection of Tax from Eritreans who Earn Income while Living Abroad (State of Eritrea, 1995) – although neither law clearly applies in this situation. In addition, under the 1997 Constitution, which was ratified, but never implemented, the National Assembly is the only competent institution entitled to levy taxes, but the National Assembly has not met since 2002, and the tax

is currently collected by embassies and ‘representatives’ of the government, without any (paper) trail or financial accountability mechanisms. Hence, the 2% diaspora tax has an uncertain legal basis (Buysse *et al.*, 2017).

The 2% tax is a perfect illustration of what Laub (2016) calls the ‘rule of fear’ and has been described by the UN Commission of Inquiry on Human Rights in Eritrea as a: “pervasive control system [that] is used in absolute arbitrariness to keep the population in a state of permanent anxiety. It is not law that rules Eritreans – but fear” (UN Human Rights Council, 2015). The report by Buysse *et al.* (2017) describes the 2% tax as ‘protection money’, which is levied through intimidation, extortion, coercion and social pressure over its citizens, extending the control of the government to diaspora communities outside the country, including children of Eritrean citizens who were born abroad and hold foreign citizenship. Although many officials of the Eritrea government describe the tax as voluntary, “the 2% Tax is perceived as mandatory by Eritreans in the diaspora and [...] non-compliance may result in a range of consequences”, such as refusal of consular services to members of the diaspora and threats to relatives in Eritrea, to name a few (Buysse *et al.*, 2017, p. 10). As well as a mechanism to control the diaspora, the tax has been recognised “as a form of intelligence gathering” (Buysse *et al.*, 2017, p. 14) and a way of proving allegiance to the government.

The research also found that “the tax is potentially illegal in its application in practice, and concluded, inter alia, that it is collected using coercion and intimidation” (Buysse *et al.*, 2017, p. 10). Reacting to the research results, the International Bureau of Fiscal Documentation (IBFD), an organisation expert on international taxation, concluded the following:

There are significant problems if, in the absence of international agreements of mutual assistance in the collection of taxes, people formally or informally representing the interest of Eritrea undertake actions on the territory of another State to force people to pay an Eritrean tax. We consider this as unprecedented in international tax law

and as a violation of the sovereignty of the Netherlands [or another European country] from a public international law perspective. (Buysse et al., 2017)

In an opinion on the legality of the tax raised by the Eritrean authorities on its diaspora, Nollkaemper stated:

International law draws boundaries regarding the way the levy and particularly the collection of a diaspora tax can take place. [...] The answer as to whether or not the Netherlands can prohibit the levying and/or collection of the 2% tax depends to a large extent on how this levying and collection takes place. (Buysse et al., 2017, p. 9)

Therefore, it can be concluded that the lack of rule of law not only extends to citizens within the country, but also to those in the diaspora. This causes undue strain in the country itself, as well as abroad, while also undermining the rule of law in foreign countries through interference over their citizens (of Eritrean descent) through control exercised by the ‘long arm’ of the Eritrean government.

The rise of totalitarianism

The lack of implementation of the Eritrean constitution has contributed to the lack of checks and balances, which has enabled Eritrea’s authoritarian regime, which has been accused of ongoing crimes against humanity by the United Nations Commission of Inquiry on Eritrea (UN Human Rights Council, 2016). This constitutional vacuum enabled the delay and eventual abandonment of (presidential) elections, allowing President Afwerki’s totalitarianism to emerge, as well as grave and systematic human rights violations, resulting in the mass exodus of Eritreans. This and other measures have created what the UN Commission of Inquiry into Human Rights in Eritrea refers to as a ‘culture of fear’ and Laub (2016) refers to as the ‘rule of fear’.

According to Jennifer Riggan (2012), many Eritreans see their country as a prison. Indeed, those who have been able to flee the country, describe the terrible conditions in National Service and the inhumane treatment inflicted on those serving, referring to Eritrea an open-air

prison (Riggan, 2012; see also Mary, 2013 and Teckle, 2018). Van Reisen and Mawere (2017) describe the state of ‘deliberate poverty’ in the country as a mechanism used to encourage young people to flee the country, putting them in a desperate situation, from which those in power in Eritrea benefit in multiple ways (Van Reisen & Mawere, 2017).

In various ways, the quality of rule of law within a constitutional framework is also relevant for the legitimacy and constitutionality of the policies of the regime. In that respect, a constitution (written or unwritten) represents a democratic prerogative with core values and a guarantee of citizen rights. However, this privilege is not always granted. A country without a constitution cannot codify the rule of law and, therefore, does not have any legal or efficient way to limit the state or government’s power and, thus, cannot ensure legal protection for its citizens.

Peace, but no progress

Notwithstanding the reconciliation between Eritrea and Ethiopia, and the high expectations of Eritreans and the international community, nothing has changed to allow the Eritrean people to access their rights or implement the Constitution. This is reflected in the continuation of indefinite National Service, despite the signing of the peace agreement with Ethiopia in 2018, causing the UN Deputy High Commissioner for Human Rights, Kate Gilmore, to state: “Conscripts continue to confront open-ended duration of service, far beyond the 18 months stipulated in law and often under abusive conditions, which may include the use of torture, sexual violence and forced labour” (UN Human Rights Council, 2019). Similar calls have been made by the UN Human Rights Committee, which has recommended that Eritrea end its National Service and expressed concern about its continued use under severely exploitative circumstances. Lopatka (1980) states that we cannot completely consider a peace process in a society in which human rights and fundamental freedoms are violated on mass. Moreover, the peace process has not included the Eritrean people or its National Assembly. In addition to a lack of participation by the Eritrean people

in the peace process, there is little evidence of an improvement in any real sense for the people in Eritrea. Hence, despite the hope that peace always gives, at the moment of writing, every day hundreds of Eritreans are leaving the country due to these conditions, often lured into the arms of human smugglers and traffickers, facing an uncertain and dangerous future (Van Reisen & Mawere, 2017).

Conclusion

Peace is a vital element in building a society in which people can live in dignity. Peace means accepting the unity of the world at large, recognising neighbours and valuing those who are part of our community. Peace has to be built within the moral framework given to us by our forefathers and leaders. African tradition and philosophy is clear and unequivocal in recognising the communal imperative of peace.

The link between a peace process and the rule of law, legal and judicial system, and democratic system of a country has been supported by several scholars (e.g., Tronvoll & Mekonnen, 2017). The Eritrean peace process cannot be considered complete if it is not accompanied by the implementation of the Constitution and the rule of law, as well as mechanisms for the protection of human rights. The Eritrean Constitution is an inclusive framework that offers the mechanisms to advance the wellbeing of society, while upholding the rule of law, respect for human rights, and the need to advance social justice and sustainable development. But, unfortunately, it has never been implemented, arguably because of the war between Eritrea and Ethiopia. The conflict between Ethiopia and Eritrea, and the political opportunism of the Afwerki regime, which used this conflict as an excuse not to implement the constitution, shattered the democratic promise of Eritrea (Patterson, n.d.), heightening its isolation and allowed a dictatorship to emerge.

Prima facie, the peace agreement appears to be the long-awaited remedy, ending the 50-year conflict and providing an opportunity to redesign Afwerki's rule. At least this should be the starting point of

any effort towards rebuilding peace. Indeed, the peace process marks a diplomatic, military and democratic shift, reinforced by Eritrea's appointment as Chair of the Khartoum Process in 2019 and member of the General Assembly of the Human Rights Council in late 2018.

However, stability is conditional upon the existence of the other core values or fundamental principles underpinning a democratic and human-centred order (such as rule of law and human rights), which are non-existent in Eritrea. Although the peace agreement is a step forward, it has not involved the participation of the people, or included steps towards the implementation of basic conditions for constitutionality, such as the rule of law, democracy, stability, human rights, sustainable development and social justice. While people have welcomed the peace agreement, they are yearning for a country in which they can live with a little dignity.

References

- Advisory Council on International Affairs. (June 2017a). *The will of the people? The erosion of the democracy under the rule of law in Europe*. Report No. 104. The Hague. Available from: <https://aiv-advies.nl/download/efa5b666-1301-45ef-8702-360939cb4b6a.pdf> (accessed 26 August).
- Advisory Council on International Affairs. (October 2017b). *De toekomst van de NAVO en de veiligheid van Europa*. Report No. 106. The Hague. Available from: <https://aiv-advies.nl/download/9ffd9f72-cd72-479d-a83b-f9542d1cc9aa> (accessed 26 August).
- Advisory Council on International Affairs. (2 July 2019). *AIV: Geef mensenrechten een centrale plaats in duurzame ontwikkeling*. Available from: <https://aiv-advice.nl/9z8/publicaties/aiv-geef-mensenrechten-een-centrale-plaats-in> (accessed 26 August).
- Afwerki, I. (1998). Democracy in Africa: An African view. *Eritrean Studies Review*, 2(2), 133–141 .
- Ammer, C. (2003). Law of the jungle. In: *The American Heritage Dictionary of Idioms*. Boston, MA: Houghton Mifflin Harcourt.
- BBC. (22 December 2009). Why did Copenhagen fail to deliver a climate deal? Available from: <http://news.bbc.co.uk/2/hi/8426835.stm> (accessed 26 August).
- Berges, S. (2010). *Understanding the role of the laws in Plato's Statesman*. Ankara, Turkey: Bilkent University.

- Bible Gateway. (n.d.-a). *Ezra 7:25*. New International Version. Available from: <https://www.biblegateway.com/verse/en/Ezra%207%3A25> (accessed 27 August).
- Bible Gateway. (n.d.-b). *Acts 5: 29–32*. New International Version. Available from: <https://www.biblegateway.com/passage/?search=Acts+5%3A29-32&version=NIV> (accessed 26 August).
- Bieliauskaitė J., Šlapkauskas V., Vainiūtė M., & Beinoravičius D. (March 2016). Constitutionalism as the instrument of security and sustainability in European Union Law. *Journal of Security and Sustainability Issues*, 5(3), 378–379.
- Borgman, E., Plessius, I., & Van Reisen, M. (eds). (2012). *In Liefde en Rechtvaardigheid. Het dagboek van Marga Klompé 1948–1949*. Hilversum: Verloren.
- Brundtland, G. H., & World Commission on Environment and Development. (1987). *Report of the World Commission on Environment and Development: 'Our common future'*. New York, NY: United Nations.
- Bryce, J. (1995). *The American Commonwealth*. Volume 1, p. 20. Available from: <https://oll.libertyfund.org/titles/bryce-the-american-commonwealth-vol-1> (accessed 17 September 2019).
- Brzozowski, A. (2018). EU rule of law generally good but clouds on the horizon. EURACTIV. <https://www.euractiv.com/section/justice-home-affairs/news/eu-rule-of-law-generally-good-but-clouds-on-the-horizon/> (accessed 30 April 2019).
- Burger, W. (1991). America's Bill of Rights at 200 years. *Presidential Studies Quarterly*, 21(3), 453–457.
- Buysse, W., Van Reisen, M., & Van Soomeren, P. (2017). *The 2% tax for Eritreans in the diaspora: Study on the levying and collection of the tax in seven European countries*. Brussels: DSP-Groep & Tilburg University, p. 1–14. Available from: <https://www.dsp-groep.eu/projecten/the-2-pct-tax-for-eritreans-in-the-diaspora/> (accessed 6 August 2019).
- Centre for Human Rights. (2015). *The erosion of the rule of law in Eritrea: Silencing freedom of expression*. Centre for Human Rights, University of Pretoria. Pretoria: University of Pretoria Press; Costa Rica: University for Peace, p. 6.
- Choi, N. (n.d.). Rule of law, political philosophy. In: *Encyclopaedia Britannica*. London: Encyclopaedia Britannica.
- Cicero, M. T., Rudd, N., & Powell, J. G. F. (1998). *The republic and the laws*. Translated from Latin to English by Niall Rudd, Oxford World's Classics. Oxford, UK: Oxford University Press, p. 83.
- Civic Academy. (n.d.). *Why do we have a constitution?* [Video], Johannesburg.
- Civitas. (1991). A framework for civic education. *National Council for the Social Studies Bulletin*, No. 86, Center for Civic Education.
- Cleary, J. J., & Gurtler G. M. (2000). *Proceedings of the Boston Area Colloquium in Ancient Philosophy*. Vol. XVI. Leiden: Brill.

- Council of Europe. (2016). *Rule of law checklist*. Adopted by Venice Commission at the 106th Plenary Session, No. CDL-AD(2016)007.
- Denoix de Saint Marc, R. (2 February 2009). *Les garanties constitutionnelles des droits et libertés politiques en France*. Conseil Constitutionnel.
- Dicey, A. V. (1985). *Introduction to the study of the law of the constitution*. London: Macmillan.
- Elkins, Z., Ginsburg, T., & Simmons, B. (2013). Getting to rights: Treaty ratification, constitutional convergence, and human rights practice. *Harvard International Law Journal*, 54.
- Elshtain, J. B. (1996). Democracy at century's end. Keynote address delivered at the National Humanities Center's third annual American Issues Forum. *IDEAS*, 4(2), 26–33.
- European Union. (2007). *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*. 13 December 2007, 2007/C 306/01. Available from: <https://www.refworld.org/docid/476258d32.html> (accessed 14 September 2019)
- Farrand, M. (1911). *The records of the Federal Convention of 1787*. Volume 3. New Haven: Yale University Press, p. 85.
- Feathers C., & Feathers S. (2007). Franklin and the Iroquois Foundations of the Constitution. *The Pennsylvania Gazette*.
- Freedom House. (2018). *Freedom in the world. Democracy in crisis. Eritrea profile*. Available from: <https://freedomhouse.org/report/freedom-world/2018/eritrea> (accessed 26 August 2019).
- Ghai, Y. (2016). *The role of constituent assemblies in constitution making*. Hong Kong: University of Hong Kong.
- Gonzales, J. (21 February 2019). *Brazil wants to legalize agribusiness leasing of indigenous lands*. Mongabay: News & Inspiration from Nature's Frontline.
- Greene Bowmand, L. (2016). *The paradox of the declaration of independence*. The Aspen Institute.
- Guardian, The. (2 April 2019). Europe accused of financing Eritrean project based on 'forced labour'. Available from: <https://www.theguardian.com/global-development/2019/apr/02/europe-accused-financing-eritrea-project-based-on-forced-labour> (accessed 26 August 2019).
- Hamilton, A., Jay, J., & Madison, J. (1818). *The federalist, on the new constitution*. Philadelphia, PA: Warren Benjamin, p. 53.
- Harding, A. (2004). The 'Westminster Model' constitution overseas: Transplantation, adaptation and development in Commonwealth States. *Oxford University Commonwealth Law Journal*, 4(2), 143–166.
- Hart, V. (July 2003). *Democratic constitution making*. Special Report No.107. Washington, DC: United States Institute of Peace.
- Henkin, L. (1994). *Elements of constitutionalism*. Occasional Series. New York, NY: Center for the Study of Human Rights, Columbia University.

- Houston, A. C. (1991). *Algernon Sidney and the Republican heritage in England and America*. Princeton, NJ: Princeton University Press.
- Jean, M. (23 April 2018). *Existe-t-il un Etat de droit International? Colloque du cercle étudiant, le blogue*. Société Québécoise de Droit International.
- Kelsen, H., & Wilson, C. H. (1934). Pure theory of law: Its method and fundamental concepts. *Law Quarterly Review*.
- King, M. L. (1963). *Letter from the Birmingham Jail*. Tempe, AZ: Scholargy.
- Kiplin, R. (1895). *The jungle book*. Ebook. Available from: <https://www.planetebook.com/free-ebooks/the-jungle-book.pdf> (accessed 26 August 2019).
- Krieger, J. (2001). *The Oxford companion to the politics of the world. Sustainable development*. New York, NY: Oxford University Press, p. 813.
- Laub, Z. (16 September 2016). *Eritrea and the migrant crisis*. Council on Foreign Relations.
- Lopatka, A. (1980). The right to live in peace as a human right. *Security Dialogue*, 11, 361–67.
- Makei, V. (2012). *Human rights violations in certain countries in 2012*. Ministry of Foreign Affairs of the Republic of Belarus.
- Mary, O. (10 May 2013). L'Erythrée, une prison à ciel ouvert. *Le Monde Afrique*.
- Mawere, M. (2009). The Shona conception of euthanasia: A quest to depart from Zimbabwe tradition. *Journal of Pan African Studies*, 3(4), 101.
- McWhinney, E. (1981). *Constitution-making: Principles, process, practice*. Toronto: University of Toronto Press, p. 122.
- Mubangizi, J. C. (2004). Towards a new approach to the classification of human rights with specific reference to the African context. *African Human Rights Law Journal*, 4(1), 93–107.
- Mutua, M. (July 2016). Africa and the rule of law: The problematic rebirth of liberalism in Africa and why the rule of law must be reconsidered to achieve sustainable development. *SUR International Journal on Human Rights*.
- Nemo, P. (2018). *Histoire des idées politiques aux temps modernes et contemporains*. Paris: Quadrige.
- Oxford Poverty and Human Development Initiative. (n.d.). *Jiyem, Indonesia, multidimensional poverty index profile*. Global MPI Case Studies from the Ground. Oxford, UK: Oxford University Press.
- Pacific Islands Legal Information Institute. (n.d.). *Toward a united future. The constitution purposes and underlying values*.
- Patterson, S. (n.d.). *Analysis of the current situation in Eritrea: Situation overview, pillars of support and possible outcomes*. Report submitted to Center for Applied Nonviolent Action and Strategies, 2016.
- Plaut, M. (2017). Eritrea: A mafia state? *Review of African Political Economy*, 44, 154, 662–672.

- Plaut, M. (13 March 2019). Eritrea chairs key African – European committee. *Eritrea Hub*. Available from: <https://eritreahub.org/eritrea-chairs-key-african-european-committee> (accessed 26 August).
- Potofsky, A. (2002). French Lumières and American Enlightenment during the Atlantic Revolution. *Revue française d'études américaines*, 92, 47–67.
- Riggan, J. (2012). *Escaping Eritrea: An autoethnographic tale of fertility, friendship and the intimate politics of the Eritrean state*. Presentation at '(En)countering Authoritarianism in Eritrea and Exile: New Frontiers of Freedom', 55th Annual Meeting of the African Studies Association, Philadelphia.
- Riggan, J. (2016). *The struggling state: Nationalism, mass militarization, and the education of Eritrea*. Temple University Press.
- Rorty, R. (1993). Human rights, rationality and sentimentality. *On Human Rights: the Oxford Amnesty Lectures 1993*, p. 115. Available from: http://ieas.unideb.hu/admin/file_6249.pdf (accessed 26 August).
- Ruppel, O. C. (n.d.). Third-generation human rights and the protection of the environment in Namibia. *Human Rights and the Rule of Law in Namibia*, 101–119.
- Selassie, B. H. (2003). *The making of the Eritrean Constitution: The dialectic of process and substance*. Lawrenceville, NJ: Red Sea Press.
- Selassie, B. H. (2010). Constitution making in Eritrea: A process-driven approach. In: Miller, L., & Aucoin, L. (ed.), *Framing the state in times of transition: Case studies in constitution making*. Washington, DC: United States Institute of Peace Press, pp. 57–80.
- Selassie, B. H. (2011). Wounded nation: How a once promising Eritrea was betrayed and its future compromised. In: *The Crown and the Pen: The Memoirs of a Lawyer Turned Rebel*, Vol. 2. Trenton, NJ: Red Sea Press.
- Sicker, M. (2003). *The orthocratic State*. Westport, CT: Praeger, p. 52.
- Soyinka, W., Amin, S., Selassie, B. H., Mūgo, M. G., Mkandawire, T., & Shivji, I. (2015). *Reimagining Pan-Africanism: Distinguished Mwalimu Nyerere lecture*. Mkuki na Nyota Publishers, p. 143.
- Spiers, P. (2015). *Scotland's challenge to parliamentary sovereignty: Can abolish the Scottish Parliament unilaterally?* LLM(R) thesis, University of Glasgow.
- State of Eritrea. (1991). *Proclamation No. 17/1991 to provide for the collection of rehabilitation tax*. (10 December 1991). National Assembly of Eritrea.
- State of Eritrea. (1994). *Proclamation No. 55/1994 to provide for the establishment of the Constitutional Commission in Eritrea*. (1 March 1994). Erilaws.
- State of Eritrea. (1995). *Proclamation No. 67/1995 to provide for the collection of tax from Eritreans who earn income while living abroad*. (10 February 1995). National Assembly of Eritrea.
- State of Eritrea. (1997). *Constitution of Eritrea*. Ratified by the Constituent Assembly of Eritrea.
- Teckle, F. (30 July 2018). *Érythrée: Plus d'excuse pour maintenir le service national à durée indéterminée*. Amnesty International.

- Tronvoll, K., & Mekonnen, D. R. (2014). *The African garrison state: Human rights and political development in Eritrea*. Woodbridge, Suffolk: James Currey.
- UN General Assembly. (1948). *Universal Declaration of Human Rights*. Adopted by General Assembly Resolution 217 A(III) of 10 December 1948. Available from: <https://www.refworld.org/docid/3ae6b3712c.html> (accessed 27 February 2019).
- UN General Assembly. (1966a). *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations, Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant. Available <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 17 January 2019).
- UN General Assembly. (1966b) *International Covenant on Economic, Social and Cultural Rights*. Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, implemented 3 January 1976, in accordance with Article 27 of the covenant. Available form: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed 24 April 2019).
- UN General Assembly. (1993). *Vienna Declaration and Programme of Action*. 12 July 1993. A/CONF.157/23. Available from: <https://www.refworld.org/docid/3ae6b39ec.html> (accessed 17 September 2019).
- UN Human Rights Council. (2015). *Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea*. Human Rights Council. Twenty-ninth session. Agenda item 4. Human rights situations that require the Council's attention, A/HRC/29/CRP.1, 5 June 2015. Available from: http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIEritrea/A_HRC_29_CRP-1.pdf (accessed 4 March 2019).
- UN Human Rights Council. (2016). *Detailed findings of the Commission of Inquiry on Human Rights in Eritrea*. Human Rights Council, Thirty-second session, Agenda item 4, Human rights situations that require the Council's attention, A/HRC/32/44:2016, 8 June 2016. Geneva: OHCHR. Available from: https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIEritrea/A_HRC_32_CRP.1_read-only.pdf (accessed 11 May 2018).
- UN Human Rights Council. (11 March 2019). *Human Rights Council holds interactive dialogue on the situation of human rights in Eritrea*. OHCHR. Available from: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24306&LangID=E> (accessed 26 August).

- Van Reisen, M., & Mawere, M. (eds). (2017). *Human trafficking and trauma in the digital era: The ongoing tragedy of the trade in refugees from Eritrea*. Bamenda, Cameroon: Langaa RPCIG.
- Van Reisen, M., Mawere, M., Stokmans, M., Nakazibwe, P., Van Stam, G., & Ong'ayo, A. (2019). Black holes in the global digital landscape: The fuelling of human trafficking on the African continent. In: Van Reisen, M., Mawere, M., Kinfé, A. & Stokmans, M. (eds), *Mobile Africa: Human Trafficking and the Digital Divide*. Bamenda, Cameroon: Langaa RPCIG
- Venice Mission of the Council of Europe. (n.d.). Profile. Available from: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)
- Zere, A. T. (24 May 2018). Democracy according to Eritrea's Afwerki, then and now. *Al Jazeera*. Available from: <https://www.aljazeera.com/indepth/opinion/democracy-eritrea-afwerki-180522132939764.html> (accessed 1 May 2019)