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The Nebulous Lawmaking Process in Eritrea

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Abstract

This article contrasts the lawmaking process in the Eritrean transitional legal framework with experience in South Africa, which offers insightful lessons for future improvement in Eritrea. Indeed, the Eritrean lawmaking process retains many imperfections in terms of the design of the interim constitution and ensuing practice. On paper, the competence of the executive and the legislature is not clearly demarcated. Rather, it is nebulously shared between both branches, resulting inevitably in competing interests. The lawmaking process lacks democratic characteristics and defies the requirements of accountability and good governance. The practice that has followed is worse. In a country with a protracted history of executive dominance, the lawmaking competence conferred upon the executive has inexorably contributed to entrenched dictatorship. The article offers suggestions for improvement.

INTRODUCTION

Lawmaking as an exercise of government authority

Lawmaking, or the legislative process, is one aspect of the exercise of government authority by the relevant organ of the state, in this context the legislature. Rautenbach and Malherbe define lawmaking as:

> "[T]he series of actions by which a proposal for law is formulated and considered, refined, and approved according to prescribed procedures by competent government institutions and functionaries in order for it to have the force of law. [It includes] the way in which a law is created or initiated, its consideration by parliament, and the actions to be performed after its approval by parliament in order to confer on it the force of law."[1]

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1 IM Rautenbach and EFJ Malherbe *Constitutional Law* (4th ed, 2004, Butterworths) at 149.

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In a modern democratic order, government authority emanates from the sovereignty of the people. People confer sovereign authority on their governments which exercise that authority on their behalf and under their supervision. According to Rautenbach and Malherbe, this intention is expressed in either the preambles or the provisions of most democratic constitutions, which usually declare that the people confer sovereign authority on their government through the ordainment and adoption of constitutions.[2]

In most modern states, the conferral of government authority is also manifested through the exercise of legislative powers by parliament, the primary role player in lawmaking. Rautenbach and Malherbe identify two principal reasons for this.[3] First, parliament is the government body that represents the voters and hence is the most competent body to make decisions on behalf of the people. This is the essential element of representative democracy and embodies the ideal of government of the people, by the people and for the people. It presupposes "a system in which government authority is exercised by bodies and persons who are representative of the people".[4] It holds that those who participate in parliament must be representative of the people and be elected by them. Secondly, parliament is the arena in which the legislative function is performed visibly, despite the fact that it is largely the executive which initiates legislation. In some countries, assert Rautenbach and Malherbe, even the electorate may be involved in the exercise of legislative authority, as for example in the form of a referendum.[5]

Distribution of government authority

Government authority cannot be effectively exercised by a single government body. This means that authority should be distributed among various government bodies. This can, for example, be by way of devolution or decentralization, or by way of the assignment of the authority of a higher government body to subordinate bodies or officials who exercise that authority within the parameters given to them by the higher authority. The most important manifestation of the distribution of government authority is that which takes place among the three major organs of the state, namely the legislative, executive and judiciary, which should have the power of checks and balances among themselves. Such distribution of government authority emanates from the doctrine of separation of powers, the *trias politica*. This provides that "the freedom of the citizens of a state can be ensured only if a concentration of power, which can

2 One of the best examples provided by Rautenbach and Malherbe is sec 1(2) of the Namibian Constitution which reads: "All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State". However, in some other counties, such as Britain which does not have a written constitution, "the sovereignty of parliament is always justified in terms of the fact that the whole population is represented in parliament": id at 74–75.

3 Id at 108. See also G Devenish *The South African Constitution* (2005, Butterworths) at 20–21.

4 Rautenbach and Malherbe *Constitutional Law*, above at note 1 at 108.

5 Ibid, citing art V of the US Constitution and sec 140 of the Swiss Constitution.

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lead to abuse, is prevented by a division of government authority" into the three major government bodies, which exercise that power prudently.[6]

Widely associated with Montesquieu,[7] the doctrine of separation of powers influenced tremendously the development of democratic and constitutional orders around the world. Government power which lacks effective control is, indeed, destructive of the values it is intended to promote. The doctrine of separation of powers brings government under control and places limits on the exercise of its powers.[8]

In a way that squarely explains the prevailing practice in Eritrea, Rautenbach and Malherbe note that the motivation of separation of powers prevents the over-concentration of government authority in a single government body.[9] Similarly, Ville asserts that the "diffusion of authority among different centres of decision-making is the antithesis of totalitarianism or absolutism".[10] This is a major safeguard against a monopoly of power by authoritarian regimes, which most of the time begin their reign of dictatorship by suspending the constitution and centralizing legislative, executive and judicial authority.[11] It is generally understood that no democratic system has an absolute separation of powers or an absolute lack of separation of powers.[12] However, all democratic systems of the world formally recognize governmental frameworks established along the lines of the doctrine of separation of powers.[13] It is the combination of the doctrine of separation of powers with other political ideals, such as the rule of law, that provides the basis for a modern democratic political system.[14]

Lawmaking by delegation

A matter of practical importance in the lawmaking process is that what is needed for an effective modern government cannot be adequately provided

6 Id at 78.

7 See generally, the classical work of Baron de Montesquieu *L'Esprit de Lois* [The Spirit of the Laws] (1748) book XI, ch VI. The English philosopher and political thinker John Locke is, however, credited with propounding the concept of the distribution of government authority in an earlier time.

8 MJC Vile *Constitutionalism and the Separation of Powers* (1967, Oxford Clarendon Press) at 1–2.

9 Rautenbach and Malherbe *Constitutional Law*, above at note 1 at 83.

10 Vile *Constitutionalism and the Separation of Powers*, above at note 8 at 2–3 and 13. See also generally G Marshall *Constitutional Theory* (1971, Oxford Clarendon Press) at 97.

11 Rautenbach and Malherbe *Constitutional Law*, above at note 1 at 83.

12 See, for example, Marshall *Constitutional Theory*, above at note 10 at 97; DW Kmiec "Debating separation of powers" (1991) 53/2 *The Review of Politics* 391 at 391–96. In contrast, Vile *Constitutionalism and the Separation of Powers*, above at note 8 at 13, argues that: "It is true, of course, that the doctrine has rarely been held in [the] extreme form, and even more rarely been put into practice, but it does represent a 'bench-mark', or an 'ideal-type' which will enable us to observe the changing development of the historical doctrine, with all its ramifications and modifications".

13 Rautenbach and Malherbe *Constitutional Law*, above at note 1 at 78.

14 Vile *Constitutionalism and the Separation of Powers*, above at note 8 at 2.

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by parliamentary legislation. As Rienow put it, due to the complex and constantly growing needs of modern life, lawmaking bodies have become excessively burdened by a rising tide of legislative function, policy formulation and supervision of the executive branch of government. The result of such an inundating phenomenon is the frequent authorization by the legislature of the executive branch to enact subordinate or delegated legislation aimed at fostering good governance and efficient public service delivery.[15] Accordingly, it has become acceptable for democratic parliaments to delegate subordinate regulatory authority to other government bodies for the purpose of efficient planning and implementation. The urgency is implicit in the inability of parliaments to address every need of modern and complex societies.[16]

The outcomes of delegated or subordinate legislation are usually rules, regulations, directives, orders, circulars, guidelines, pronouncements, etc which may or may not have the force of law but which most of the time have general applicability. In terms of the hierarchy of laws, subordinate legislation is lower than parliamentary legislation. The process of adopting subordinate legislation is also sometimes called administrative rulemaking.[17] It is generally believed that delegation empowers government officials to fill the gaps in regulatory statutes through the adoption of subordinate legislation.[18] The acts of executive bodies are normally adopted in a quick and informal manner, thereby offering pragmatic solutions to ever-changing challenges. Yet, they are always subject to relevant mechanisms of control by the legislative and judicial branches of government. For example, in the experience of the United States of America, departure from the defining parameters of the delegating power would inherently nullify the delegated act as arbitrary, capricious or ultra vires.[19]

LAWMAKING IN POST-APARTHEID SOUTH AFRICA

Having achieved one of the latest and most successful democratic transitions, post-apartheid South Africa offers lessons of paramount relevance to the democratic lawmaking process. According to section 43 of the South African Constitution, legislative authority of the national government is vested in parliament, which consists of a National Assembly and a National Council of Provinces.[20] There are two major stages in the South African lawmaking

15 R Rienow *Introduction to Government* (1967, Knopf) at 237–38.

16 See, for example, *In re: Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) para 51 (commonly referred to as the *First Certification* judgment).

17 M Asimow "Delegated legislation: United States and United Kingdom" (1983) 3/1 *Oxford Journal of Legal Studies* 253 at 253–59.

18 Ibid.

19 Id at 259.

20 Devenish *The South African Constitution*, above at note 3 at 219.

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process: the initiation of a bill; and public involvement through parliamentary committees.

The initiation of a bill

In South Africa, the lawmaking process starts from the initiation of a bill which is "a detailed proposal by a competent institution or functionary for the enactment of a law of which parliament has taken official notice".[21] The initiation of a bill involves several steps, including the determination of the issue on which legislation is needed, the formulation of draft legislation, consultation with interested people, and finalization of a legislative proposal with a view to its introduction in parliament.[22] All such processes are more or less identical to the legislative processes in other democratic systems.

By providing for the explicit classification of bills, the South African legislative process offers an apt illustration of various aspects of the lawmaking process. Procedurally, the initiation of a bill is thoroughly supervised by a classification committee consisting of the speaker and deputy speaker of the National Assembly and the chairperson and permanent deputy chairperson of the National Council of Provinces. The committee classifies all bills introduced in parliament and determines the procedure for their consideration. A wrong procedure in the adoption of a given law may result in the invalidation of that law by the committee. The committee is also entrusted with assuring the constitutional procedural order of every bill, as well as monitoring and classifying all amendments. Although bills can be initiated by members of parliament, initiation is mostly done by the executive authority because of the latter's better position in terms of expertise and infrastructure.[23]

Parliamentary committees

As is true with other modern parliaments, parliamentary committees play a prominent role in the South African lawmaking process. A most important aspect of the South African lawmaking process is that parliament is constitutionally bound, by sections 59(1)(a) and 72(1)(a) of the constitution, to facilitate public involvement in the legislative process. As a result, the lawmaking process involves extensive consultation with the people concerned, by means of the submission of evidence before different parliamentary committees. This

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21 Rautenbach and Malherbe *Constitutional Law*, above at note 1 at 150.

22 Id at 149–51; see also Devenish *The South African Constitution*, above at note 3 at 221. On latest developments in the jurisprudence of the South African Constitutional Court, see generally *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC). This case concerns the legislature's obligation to facilitate public involvement and deliberation in a proposed legislative process which affects the general public. The particular legislative process involved the re-drawing of provincial boundaries in the KwaZulu-Natal Province which, according to the Constitutional Court, was inconsistent with the constitution as it failed to meet the requirements of public involvement and deliberation. See paras 75–86 of the case.

23 Rautenbach and Malherbe *Constitutional Law*, above at note 1 at 149–54.

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consultation takes place through parliamentary ad hoc and standing committees. Each of these committees consists of a group of members of parliament chosen to perform a particular task and aims to facilitate the effective performance of parliamentary functions. By the time they reach parliament, most bills are so refined "that often their content is accepted as a foregone conclusion".[24]

The final act in respect of a bill is always carried out by the president, who either assents to it or refers it back to the National Assembly if he or she has reservations about its constitutionality. This is according to section 79(1) of the South African Constitution. If, after the resubmission of a bill, the president again finds it unconstitutional, he must refer the bill to the Constitutional Court for a final decision.[25] If a bill is assented to by the president, it automatically becomes an act of parliament and the law of the land, but takes effect after prompt publication at a later date.[26]

A very important aspect of the South African experience is the support accorded to the doctrine of separation of powers by a progressive judicial branch characterized by genuine independence and integrity. The historical development of case law on the application and interpretation of the doctrine of separation of powers, as related to lawmaking, judicial review and checks and balances, is generally traced back to the famous US case, *Marbury v Madison*.[27] Yet, South African courts are also well known for a number of milestone judgments on the application and interpretation of the doctrine of separation of powers in the daily activities of the government.[28]

LAWMAKING IN ERITREA: A NEBULOUS PROCESS

Distribution of lawmaking powers under the transitional laws

When in May 1991 Eritrea, led by the Eritrean People's Liberation Front (EPLF), ended the more than 30 year long struggle against Ethiopian colonization, the EPLF forthwith assumed the task of governing the country and acted as a de facto government. The transitional government, officially called the

24 Ibid.

25 See, for example, the *First Certification* judgment, above at note 16 at paras 11–20.

26 Sec 81 of the South African Constitution.

27 (5 US) 137 (1803). In one of its latest cases, *Browsher v Synar* 106 S Ct 3181 (1986), the US Supreme Court again emphasized the enduring prominence of the doctrine of separation of powers. According to Sargentich, this is a continuation of the significant development which reiterated the fundamental importance of the separation of powers to American constitutional law and practice; see TO Sargentich "The contemporary debate about legislative-executive separation of powers" (1987) 72 *Cornell Law Review* 430 at 430–87.

28 The leading cases are: the *First Certification* judgment, above at note 16; *Executive Council of the Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC); *Bernstein v Bester NO* 1996 2 SA 751 (CC) at para 105; *De Lange v Smuts NO* 1998 3 SA 785 (CC) at paras 60–61; *South African Association of Personal Injury Lawyers v Health* 2001 1 SA 883 (CC) at paras 38, 45 and 46; *S v Dodo* 2001 3 SA 382 (CC) at paras 22–25.

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Provisional Government of Eritrea (PGE),[29] was established on 22 May 1992 by Proclamation No 23/1992. This law, which was replaced by Proclamation No 37/1993 and later amended by Proclamation No 52/1994, can be described as the interim constitution of Eritrea.[30]

When the PGE was formed, although theoretically separate from the EPLF, it relied heavily on the personnel and institutions of the EPLF, which was later renamed the People's Front for Democracy and Justice (PFDJ). Structurally, the EPLF/PFDJ has the following essential organs: a Congress which is a deliberative or legislative organ, supposed to be convened periodically; a Central Council which is a smaller representative body than the Congress; and the Politburo or executive committee. The executive head is the secretary general, a position renamed chairman after 1994. The present Central Council was elected in 1994 and has 75 members.[31]

According to article 2 of Proclamation No 23/1992, the PGE is composed of three bodies: the legislative body, executive body and judicial body. Pending the establishment of a constitutional government, the Central Council of the EPLF was made the supreme legislative body of the PGE.[32] The Central Council was expressly given the power to enact laws.[33]

The Council of Ministers is the supreme executive organ of the PGE.[34] The Council of Ministers is composed of many departments which later changed their names to ministries.[35] The secretary general of the EPLF, who was made secretary general of the PGE, chairs the Council of Ministers.[36] The council, in addition to its executive powers, was also given legislative powers to enact laws as necessary.[37]

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29 Art 1 of Proc No 23/1992. In Eritrea, a statute is called a proclamation. It is the equivalent of what is commonly called an act in many jurisdictions. Legislation issued in furtherance of a proclamation is called a legal notice and is equivalent to what in other jurisdictions is commonly known as a regulation.

30 DR Mekonnen "The reply of the Eritrean government to ACHPR's landmark ruling on Eritrea: A critical appraisal" (2006) 31/2 *Journal for Judicial Science* 26 at 35, referring to Proc No 37/1993 as the interim constitution. The Eritrean president also at times refers to the same proclamation as the "basic law" of Eritrea. See also para 3 of the preamble to Proc No 57/1994. On this issue, Gebremedhin notes that, although formal constitutional law was completely absent in the transitional period, there was a weak and incomplete constitutional framework which "has immense drawbacks, in terms of public participation … easy accessibility to the public, protection of civil rights, government accountability, and entrenchment of constitutional principles". See Y Gebremedhin *The Challenges of a Society in Transition: Legal Development in Eritrea* (2004, Red Sea Press) at 131–32. See also generally SM Weldehaimanot "The status and fate of the Eritrean Constitution" (2008) 8/1 *African Human Rights Law Journal* 108.

31 Transitional constitution of the PFDJ, chap 5, sec A-2.

32 Art 3(1) of Proc No 23/1992.

33 Id, art 3(2)(10).

34 Id, art 4(3).

35 Id, art 4(1).

36 Id, arts 4(1) and 5(1).

37 Id, art 4(4)(5).

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In addition to the two bodies noted above, the secretary general of the PGE acting alone was also, although unclearly, given legislative powers. Article 5(4)(6) of Proclamation No 23/1992[38] states: "The Secretary General of the PGE … shall have the following additional powers: … [t]o publish on the Eritrea Gazette of Laws[39] proclamations that he passes and those passed by the Central Council and the Council of Ministers and oversee their implementation".

On 19 May 1993, Proclamation No 23/1992 was replaced by Proclamation No 37/1993. One of the changes introduced by the latter proclamation was to change the name of the PGE to the Government of Eritrea (GOE).[40] Nevertheless, the proclamation introduced no substantive change to the law-making powers shared between the three bodies mentioned above. The three government organs continued to exist, albeit with different names and slightly different organizations.

The Central Council of the EPLF together with 60 representatives of the Eritrean public were supposed to form the legislative body called the National Assembly.[41] 30 of the 60 were to be drawn from the regional assemblies of Eritrea's then ten administrative regions. They included the chairperson and the secretary of each regional assembly as well as a female member of each regional assembly selected by it.[42] The other 30, of whom ten must be women, were to be selected by the EPLF Central Council.[43] A year later, however, this part of Proclamation No 37/1993 was repealed by Proclamation No 52/1994.

Relevant parts of Proclamation No 52/1994 provided that the National Assembly be composed of 150 members. The 75 members of the National Assembly were all members of the Central Council of the EPLF (at this time renamed PFDJ) and the rest were to be popularly elected by the Eritrean public. However, the same proclamation added that, pending the election of the 75, the National Assembly be composed of the 75 Central Council members and 30 others drawn from the regional assemblies.[44] The National Assembly assumed its composition as provided under Proclamation 52/1994 in May 1997, with the establishment of another body called the constituent assembly,[45] which was constituted to consider the ratification of the 1997 Eritrean Constitution.[46] The 75 members envisaged by Proclamation 52/1994 (who

38 There is no official English version of this proclamation.
39 Proc No 9/1991 provides for the establishment of the *Eritrean Gazette of Laws* in which proclamations and legal notices shall be officially published.
40 Art 3(1) of Proc No 37/1993.
41 Id, art 4(2).
42 Ibid.
43 Ibid.
44 Art 2(3) of Proc No 52/1994.
45 See Proc No 92/1996.
46 RA Rosen and BH Selassie "The Eritrean constitutional process: An interview with Dr Bereket Habte Selassie" (1999) 3 *Eritrean Studies Review* 139 at 172.

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were to be popularly elected) were instead appointed by the constituent assembly and 15 more representatives of the Eritrean Diaspora were also appointed, although the law does not provide for this.[47]

Pending the establishment of a constitutional government within four years, the National Assembly was again made the supreme legislative organ of the GOE.[48] The position of the secretary general of the PGE was changed to one of the president in the GOE.[49] An important change was that the president had to be elected by the National Assembly from its members, although he continued to chair the National Assembly after election as president.[50] The names of the offices of which the Council of Ministers was composed were also changed to ministries by Proclamation 37/1993 and later the name of the Council of Ministers was changed to the Cabinet of Ministers.[51]

Both the president and the Cabinet of Ministers were given lawmaking powers under article 6(4)(e) of Proclamation 37/1993. Therefore, under both proclamations, legislative powers were shared between three bodies in which the president was present in different capacities.

Flaws in the unspecified legislative competence of the lawmakers

One potential source of conflict, and indeed an undesirable feature of the lawmaking process as envisaged by Proclamations No 23/1992 and No 37/1993, is the fact that the sphere of legislative competence of each body is not clearly demarcated. The confusion and potential for conflict in this context is apparent. One can easily identify a thematic and hierarchal lack of demarcation.

Thematic lack of demarcation concerns the main theme or field on which the three bodies have competence to legislate. The second concern is the hierarchical relationship between the laws issued by the three bodies: whose law prevails over the others' in the event the three bodies pass conflicting laws? Equally important is whether a law passed by one of the three bodies can be repealed by a law passed by one of the other bodies. The only helpful indication contained in both proclamations is that both the Central Council and the National Assembly are the supreme lawmakers.[52] Thus, it is clear that laws passed by the Central Council and the National Assembly are supreme over the laws passed by the other two bodies, namely the president and Cabinet of Ministers. The corollary of this is that laws passed by the Central Council and the National Assembly cannot be repealed by a law passed by the president or the Cabinet of Ministers. Apart from this implicit allusion, which at any rate is inconclusive, any conflict between laws passed by the secretary general/president and by the Council of Ministers/Cabinet of Ministers is

47 Ibid.
48 Arts 4(4) and 4(5)(g) of Proc No 37/1993.
49 Id, art 6.
50 Id, art 4(3).
51 Art 2(2) of Proc No 52/1994.
52 Art 3(1) of Proc No 23/1992; art 4(4) of Proc No 37/1993.

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left with no arbiter. The practice over the years offers no assistance. On the contrary, it hides a harsh reality highlighted in the subsequent sections of this article.

Survey of the laws enacted before 22 May 1992

At present, statutes in Eritrea include the main transitional codes (including the Civil Code, the Penal Code, the Civil Procedure Code, the Criminal Procedure Code, the Commercial Code and the Maritime Code) and the various proclamations and legal notices enacted after 24 May 1991. The main codes are inherited from Ethiopia, whose legal system was modernized in the 1960s with the introduction of codes comparable to the French and other European codes. In 1991, the EPLF adopted these codes by law with minor changes to serve for the transitional period until Eritrea proclaimed its own laws.

The proclamations that adopted the Ethiopian codes were enacted by the EPLF, although it has never been clear which organ of the EPLF did so. The first law issued after May 1991 was Proclamation No 1/1991. In article 1.2 it states that the PGE is empowered to enact laws at the national level. However, the EPLF did not establish the PGE until 22 May 1992. Nevertheless, the EPLF began to call itself the PGE immediately after Independence Day (24 May 1991) and thus the laws enacted before the PGE was formally established were invariably proclaimed "in the name of"[53] the PGE.[54]

Survey of the laws enacted after 22 May 1992

A survey of the proclamations and legal notices passed after 22 May 1992 depicts the bewilderment and ambiguity chronic in the transitional legal framework. It also shows the ambiguity covering the complete emasculation and relegation of the National Assembly from lawmaking.

The conclusion of a typical proclamation or legal notice includes information on when, where and by whom it was promulgated. Based on this, a survey of the proclamations and legal notices shows four categories of lawmakers: the state president;[55] the National Assembly;[56] heads of executive bodies (ministers); and the PGE or later the GOE.[57]

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53 Proclamations and legal notices invariably contain, at the very end, a clause that states where, when and by whom the legislation or legal notice was promulgated.

54 See all proclamations issued before 22 May 1992, the date on which the PGE was formally established.

55 The following are examples of laws promulgated by the state president: Proc No 76/1995; Proc No 33/1993; Proc No 56/1994; Proc No 57/1994; Proc No 70/1995; and Proc No 78/1995.

56 The following are examples of regulations promulgated by the National Assembly: Legal Notice No 11/1993; and Legal Notice No 12/1993.

57 Of the over 225 proclamations and legal notices promulgated after 24 May 1991, more than 62% were issued in the name of the PGE and the GOE, and around 29%

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The majority of legislation is proclaimed in the name of the PGE and later the GOE. The assumption of legislative authority by the PGE or GOE is astounding. To begin with, both the PGE and GOE were composed of three main branches, one of which is the judiciary which is not a lawmaker in the formal sense.[58] Thus, to issue laws in the name of the PGE or GOE is nebulous and confusing. Importantly, this has contributed to the diminished visibility of the National Assembly as an important state institution. It has also served as a cover for the state president to enact laws himself.

Although it is possible that all members of the cabinet could be members of the National Assembly, and indeed the president is also the chairperson of the National Assembly,[59] the chairperson is distinct from both the president and the Cabinet of Ministers. The National Assembly is also distinct from the GOE because it is part of the GOE and not the GOE per se. The interim constitutions do not provide for joint sessions of the president, the cabinet and the National Assembly for the purpose of enacting laws, as is the case with upper and lower houses of bicameral legislatures. Thus, laws enacted by the National Assembly must have been promulgated in the name of the National Assembly only.

There is, however, a more astounding fact. If the president can enact and publish laws in his name and if the National Assembly and the delegated bodies, often ministers, can do so too, who must have been passing laws in the name of the PGE and later the GOE? If the National Assembly can pass laws in its name, which it has done in a few instances,[60] this leads to the conclusion that the laws passed in the name of the PGE or latterly the GOE are not enacted by the National Assembly. There is no logic why the National Assembly could promulgate laws at one time under its name and at another time under the name of the GOE.

The secrecy within the lawmaking process

Considering the contemporary structure of government organs and the requirements of democracy and accountability, one may expect that the lawmaking process in a certain country would be known and clear at least to the community of lawyers in that country. As such, tracing the lawmaker may not be a researchable theme. One may be astounded how a lawmaker in a certain country could be so nebulous. As perplexing as it may, it is a fact in post-independence Eritrea that the identity of the lawmaker is not common

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contd
in the name of ministers and other government officials such as the National Bank of Eritrea.

58 See arts 2 and 3 of Proc No 23/1992 and Proc No 37/1993, respectively.

59 There is no express provision in the relevant proclamation that excludes members of cabinet from becoming members of the legislature. Practice shows that the majority of cabinet ministers are members of the Central Council of the EPLF/PFDJ and the National Assembly.

60 These instances are the promulgation of Legal Notice No 11/1993 and Legal Notice No 12/1993.

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knowledge to the ordinary citizen. More intriguing is the fact that even judges sitting in the highest judicature of Eritrea do not know the author of the laws passed in the name of the PGE and later the GOE, neither do law graduates of the only university, practising lawyers in the country or other members of the legal profession.

In Eritrea, the judiciary and the legislature do not stand as equal government branches to the executive (the office of the president). The National Assembly has never been visible, nor has it exercised the powers given to it by law.[61] Its deliberations have never been open to the public by any means. The National Assembly has never been seen debating a bill and eventually passing or rejecting it.[62] Instead laws which have been passed are suddenly seen for sale on the streets of the capital. As noted by Gebremedhin, there is no clearly defined legislative theory befitting the post-independence era. On the contrary, the Eritrean government, true to its monolithic nature, placed more emphasis on political measures than formal law. The result was that political and military expediency took precedence over the rule of law.[63]

Tracing the lawmaker behind the curtain

There are, however, clear indications that show that laws issued in the name of the PGE and later the GOE were actually passed by the state president. In many instances, the term GOE is used although it clearly refers to the state president himself. A few examples suffice. Articles 5(3)(3) and 6(2)(1) of Proclamation No 1/1991 state, respectively, that both the civil and military high courts are composed of judges appointed by the PGE. Article 3(3) of the same proclamation also states that the Ministry of Justice is responsible for providing the PGE with nominees for judges for the highest courts.

The process for appointing judges, particularly for the highest courts, varies from jurisdiction to jurisdiction. Nevertheless, the process is commonly shared between the three classical government branches: the judiciary (often a judicial service commission) makes nominations; and either the head of the executive or the legislature or both make the actual appointment.

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61 See D Connell *Conversations with Eritrean Political Prisoners* (2005, Red Sea Press) at 171–98, quoting the letter of the G-15 (the Group of 15) addressed to President Isaias Afwerki, dated 20 March 2001. G-15 denotes a groups of high-ranking government officials who initiated a movement of democratic reform in 2001. Most of them were eventually arrested in September 2001 and have since remained in solitary confinement. See G-15 "An open letter to all members of the PFDJ: A call for peaceful and democratic dialogue" (English version), available at: <http://news.asmarino.com/PFDJ_Membership/Introduction.asp> (last accessed 18 August 2006). See also P Tesfagiorgis "In search of a normal Eritrea", available at: <http://eritreaone.com/pipermail/opinion_eritreaone.com/2003q4.txt?ABCDEFGH> (last accessed 2 December 2005).

62 Writing in May 2001, some members of the National Assembly mentioned that they debated and approved only a few draft laws; these include the Land Proclamation and the Press Proclamation. See Connell, id at 180.

63 Gebremedhin *The Challenges of a Society in Transition*, above at note 30 at 104 and 110.

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It is worth repeating that both the PGE and the GOE did and do represent these three branches. It is therefore unclear which one of these three bodies appoints judges of the high court. It is also not specified to which of these three bodies the Ministry of Justice submit its nominees. Yet, in practice, judges of the high courts are appointed by the state president.

A similar example can be found in Proclamation No 16/1991. This proclamation was enacted, among other reasons, to establish a commission to ascertain the ownership of houses and other movable or immovable properties, and to confer title on the owners.[64] Article 2(2) states that the commissioner and his or her assistants shall be appointed by the PGE. More surprisingly, article 7(1) of the same proclamation states that any party dissatisfied with the final decision of the commission can, within one month, appeal in writing to the PGE. In this regard, one is left to wonder which organ of the PGE hears the appeal. Similarly worded provisions are common in many proclamations and legal notices. The practice, however, shows that the explicit reference to the PGE actually refers to the state president.

There is further concrete evidence which proves conclusively that proclamations passed in the name of the PGE or later the GOE are actually passed by the president. There was a long time when the National Assembly was effectively in hibernation. It conducted no meetings for over a year and half because the president refused to call it to session.[65] By law, the National Assembly must meet every six months.[66] However, the assembly did not meet between the end of September 2000 and February 2002.[67] During this time, several proclamations were issued in the name of the GOE.[68]

There is another striking fact that illuminates this point. In the summer of 2000, the National Assembly appointed a committee to draft a law related to the formation of political parties. Article 22 of the draft law stated that "only the National Assembly has the right to amend this Proclamation". The language, which was very atypical of the National Assembly, can be seen as a belated attempt to reassert itself. This clause is indeed peculiar and one can hardly find anything similar in the more than 200 proclamations and legal notices issued hitherto. It is of serious interest why the drafters were so keen to include this clause. Considering the nebulous distribution of lawmaking powers between the president, the cabinet and the National Assembly, this attests to the glaring fact that one of these lawmakers had already arrogated to itself the powers of the others, and so the drafters were attempting to rectify the weaknesses of the interim

64 This proclamation aimed to rectify the nationalization of private property carried out after 1974 by the communist junta that took power in Ethiopia and Eritrea at that time.

65 G-15 "An open letter", above at note 61; Awate Team "The chronology of the reform movement", available at: <http://www.awate.com/artman/publish/article_3629.shtml> (last accessed 5 December 2005).

66 Art 4(3) of Proc No 37/1993.

67 Mekonnen "The reply of the Eritrean government", above at note 30 at 28.

68 Proc No 118/2001, Proc No 112/2000, Proc No 115/2001, Proc No 114/2001, Proc No 116 /2001 and Proc No 117/2001 are some examples.

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constitutions and subsequent practice. This argument appears sounder when one also considers that it is the president who interfered, again outside his powers,[69] to stop the progress of the committee.[70] The draft appeared at a time when many parliamentarians, cabinet ministers and high-ranking figures, in both the PFDJ and the military, were already voicing their dissent on the increasing monopolization of power by the president.[71]

More than 60 per cent of the laws passed until now were promulgated by the PGE or GOE; of the two legal notices passed by the National Assembly, one[72] was repealed by another passed by the GOE (the president). Considering the hierarchy of laws in any legal system, it is again astounding that the National Assembly, although in law the supreme lawmaking body, has only passed two legal notices, which are subsidiary to proclamations and are not legislation in the real sense. The unspecified distribution of the lawmaking powers and the shrouded secrecy within the lawmaking process has resulted in a situation where the overwhelming majority of laws have been enacted by the GOE. One conclusion is apparent from this: the president, not the National Assembly, has been enacting laws.[73]

Looking at the practices of some African countries[74]

The most similar practice to that prevailing in Eritrea is the Ethiopian practice of publishing a law. Laws passed by the Ethiopian House of Peoples' Representatives on matters assigned by the Ethiopian Constitution (at federal jurisdiction) are called proclamations.[75] These proclamations are published or sent to publication by the president of the federal government who invariably appends to each proclamation a preamble and then signs his or her name either immediately after the preamble or at the end of the proclamation.

Article 55(1) of the constitution states that the House of Peoples' Representatives shall have the power to legislate in all matters assigned by the constitution to federal jurisdiction. The preamble of any federal proclamation therefore invariably contains a standard clause which indicates that a particular

69 Under art 4(6)(c) of Proc No 37/1993 the National Assembly is given the sole power to establish a committee that drafts laws related to the formation of political parties.

70 Awate Team "The chronology of the reform movement", above at note 65.

71 For the political development that was sparked in 2000 and 2001, widely known as a reform movement, see generally Connell *Conversations with Eritrean Political Prisoners*, above at note 61; Mekonnen "The reply of the Eritrean government", above at note 30; and Awate Team "The chronology of the reform movement", above at note 65.

72 Legal Notice 11/1993, which was passed by the National Assembly, was repealed by Legal Notice 16/1994 which was passed in the name of the GOE.

73 For a similar exposition, see Gebremedhin *The Challenges of a Society in Transition*, above at note 30 at 135–42.

74 There is variation in the constitutions of the countries mentioned in this article, notably regarding the issue of assent by the head of the executive and the government organ which finally publishes the enacted laws. The point in the comparison is to show that the experience of those countries demonstrates that the law is passed by the legislature.

75 See any *Federal Negarit Gazeta*.

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proclamation has been passed in accordance with article 55(1) of the constitution.[76] When the president publishes a proclamation, it is therefore very clear that the proclamation is enacted by the House of Peoples' Representatives. The front page of each *Federal Negarit Gazeta* also contains a statement that clearly indicates that proclamations are published under the supervision of the federal legislature. Furthermore, according to article 2(1) of Proclamation No 3/1995, the *Federal Negarit Gazeta* is a federal law gazette published under the umbrella of the House of Peoples' Representatives. Similarly, the laws passed by the Council of Ministers are prefaced by a preamble which, at the end, bears the name of the prime minister of Ethiopia. In this way, the government organ which passes the particular regulation is clearly indicated.[77]

Typically, the assent of the president of Malawi appears on the first page of any Malawian act.[78] Following the title of the act is a standard enactment clause which says "enacted by the Parliament of Malawi as follows".[79] At the very end of every act is a standard statement of the clerk of parliament which says "passed in parliament".[80] The name of the clerk of the parliament follows below this statement.[81] From the first and last page of any Malawian act, it is therefore clear that the act has been passed by the parliament of Malawi.

Any act of Sierra Leone contains, often on its first page, an enactment clause that reads: "enacted by the President and members of Parliament in the present parliament assembled".[82] As in Malawi, any act of Sierra Leone also contains, at its very end, a standard clause of enactment that reads: "passed in Parliament" followed by the date on which the law is enacted.[83] Similarly, in the preamble, subsidiary legislation referred to as "statutory regulations" clearly indicates the issuing authority.[84]

Any act of Uganda contains, often on its first page, words of enactment saying: "be it enacted by parliament as follows".[85] The words of enactment appear immediately below the title of the act and are immediately followed by a presidential assent.[86]

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76 Proc No 3/1995: a proclamation to provide for the establishment of the *Federal Negarit Gazeta*.

77 See, for example, Council of Ministers reg no 80/2002.

78 See, for example, the act to provide for the safe management of biotechnological activities and to provide for connected and incidental matters. See *Gazette Extraordinary: The Malawi Gazette Supplement* (18 December 2002) at 1 and 3.

79 Ibid.

80 Ibid.

81 Ibid.

82 See *Act: Supplement to the Sierra Leone Gazette* (10 March 2005) vol CXXXVI, no 11 at 1.

83 The Local Government Act 2004.

84 See *Statutory Instrument: Supplement to the Sierra Leone Gazette* (11 November 2004) vol CXXXV, no 61.

85 See, for example, the Ugandan act which provided for the form and commencement of acts of parliament, the procedure following the passing of bills and other related matters.

86 Note that, under art 91(3) of the 1995 Ugandan Constitution, the clerk of the parliament can declare law a bill to which the president has refused to assent.

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The cover page of any *Gazette of Eritrean Laws* contains a standard clause "*Gazette of Eritrean Laws*, published by the Government of Eritrea". This is followed by a section that shows the volume and number of the legislation together with the place where the legislation was passed.[87] When compared with the practice in the countries noted above, the enacting body in Eritrea is vaguely stated only at the end of a proclamation or legal notice as follows: "Done at Asmara … Government of Eritrea".[88] This might appear to be a minor omission. It has, however, served to disguise the actual lawmaker. Moreover, if the National Assembly had been enacting laws by itself, the publication of those laws in the name of the GOE must not be condoned. The National Assembly must assert itself as a visible government branch, equal to the executive. The publication of laws in its own name, among other factors, would make a positive contribution in this regard. On the contrary, perpetuating the present practice would contribute to the diminished visibility of the legislature within the presumably tripartite government structure.

RATIFICATION OF INTERNATIONAL TREATIES AS LAWMAKING PROCESS

A study of how Eritrea becomes party to international treaties can help shed light on the confusion in the transitional legal framework related to the unsteady lawmaking process. The very vague wording of article 2(3)(7) of Proclamation No 23/1992 gives the EPLF Central Council the power to ratify international treaties on behalf of Eritrea. A reasonable reading of this provision could be that the Central Council is empowered to ratify, on behalf of Eritrea, essential economic, political and defence-related international treaties. Similarly, article 4(4)(7) of the same proclamation gives the Council of Ministers the power to enter into agreements. Article 5(4)(4) of the same proclamation also gives the PGE secretary general the power to enter into international treaties.

Proclamation No 37/1993 introduced some changes to the relevant provisions relating to the adoption of international treaties. The National Assembly was given the same powers as the powers of the Central Council, except that the word *mfqad*, which means "to authorize" was added; this word introduced additional ambiguity.[89] The successor to the Council of Ministers, which is the Cabinet of Ministers, has powers identical to those of its predecessor.[90] The secretary general, who later became the president of the GOE, had greater powers than those of his predecessor. The president was not only empowered to enter into international treaties,[91] but also to "authorize and ratify".[92]

87 See, for example, *Gazette of Eritrean Laws* (2001) 10/5 (issued on November 15/2001).
88 Id at 202.
89 Compare art 4(5)(f) of Proc No 37/1993 with art 3(2)(7) of Proc No 23/1992.
90 Compare art 5(4)(h) of Proc No 37/1993 with art 4(4)(7) of Proc No 23/1992.
91 This was the power given to the secretary general under art 5(4)(4) of Proc No 23/1992.
92 Compare art 6(4)(c) of Proc No 37/1993 with art 5(4)(4) of Proc No 23/1992.

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The powers given to the secretary general and the Council of Ministers are not thematically restricted, whereas the powers of the Central Council are restricted to essential economic, political and defence-related international treaties.[93] Although article 4(5)(f) attempted to identify thematically the kind of international treaties that the National Assembly is empowered to ratify, the wording of the article is very broad, in that every kind of treaty requires ratification by the National Assembly.

Although it is not clear, a reasonable reading of the relevant provisions of Proclamation No 23/1992 would be that international treaties only bind Eritrea if they are ratified by the supreme legislator, the Central Council. It also appears that the powers of both the secretary general and the Council of Ministers are limited to negotiating and signing treaties. Signed treaties then have to be ratified by the Central Council to be binding upon Eritrea. As noted above, however, Proclamation No 37/1993 has brought further confusion. It gives the president and the National Assembly the power to ratify international treaties.[94] There is no clear demarcation that helps to separate the kind of treaties each of these two state organs can ratify.

A survey of the proclamations issued to ratify international treaties offers no help to clarify the ambiguity. One example suffices. The Ethiopian government and the International Development Association signed a credit agreement on 7 April 1993. It stipulated that the latter provide credit to the government of Ethiopia in various convertible currencies, to assist exclusively in financing certain programmes in Eritrea.[95] A subsidiary loan agreement between the PGE and the Ethiopian government for irrevocably re-lending all the proceeds of the credit agreement to the PGE was also signed on same date.[96] The preamble of Proclamation No 33/1993 states that the subsidiary loan agreement was ratified by the secretary general of the PGE.[97] This was an example of the president acting outside his powers. Under Proclamation No 23/1992, the president was not given the power to ratify international treaties.[98]

Paragraph 5 of the preamble to Proclamation No 33/1993 gives sufficient indication as to how signed international treaties should be ratified. It is indicative enough that, in order for international treaties signed by the executive to bind Eritrea, they need to be ratified by the passing of a law (a proclamation). Indeed, paragraph 3 of the preamble to Proclamation No 57/1994 clearly spells out this point.

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93 Compare art 4(5)(f) of Proc No 37/1993 with art 3(2)(7) of Proc No 23/1992; art 5(4)(h) of Proc No 37/1993 with art 4(4)(7) of Proc No 23/1992; and art 6(4)(c) of Proc No 37/1993 with art 5(4)(4) of Proc No 23/1992.

94 Art 6(4)(c).

95 See Proc No 33/1993.

96 Ibid.

97 Para 4 of the preamble to Proc No 23/1992.

98 See art 5(4)(4) of Proc No 23/1992.

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This procedure for adopting (ratifying) an international treaty is not objectionable. What is not correct is that the procedure, according to Proclamations No 33/1993 and No 57/1994, was required by article 5(4)(4) and 5(4)(6) of Proclamation No 23/1992. Article 5(4)(4) gives the secretary general the power only to negotiate and sign treaties. Article 5(4)(6) also gives the secretary general the power to publish laws that he passes or are passed by the Council of Ministers and the Central Council. Because the secretary general was not empowered to ratify treaties, under the same article, he cannot pass a proclamation to ratify international treaties. What the secretary general could do is to publish a proclamation which the Central Council then passes to ratify a particular treaty.

The key term under article 5(4)(4) of Proclamation No 23/1992 is *mw-e'-al* which means to enter into an agreement or contract. In the context of international agreements, the closest Tigrinya word equivalent to the English word "ratify" is *mtsdaq*. The word *mtsdaq* is mentioned under article 3(2)(7) of Proclamation No 23/1992 which empowers the Central Council to ratify international treaties. Proclamation No 33/1993, which was passed by the president to ratify the treaty related to the loan, is therefore void.

Nevertheless, under Proclamation No 37/1993, the president is given the same powers as those of the National Assembly, so far as ratifying international treaties is concerned.[99] The demarcation of the sphere of competence of the two bodies is unclear. After Proclamation No 37/1993 was passed (on 19 May 1993), the president has issued many proclamations to ratify international treaties.[100] The Central Council, later named the National Assembly, has never been presented with regional or international treaties for ratification.[101] All these proclamations are passed by the president. The ratification process has therefore been illegal in certain cases,[102] as well as lacking democratic features. After Proclamation No 37/1993 was enacted, the Eritrean approach shows a scenario where the executive signs a treaty and also ratifies it by enacting a proclamation.

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99 See arts 4(5)(f) and 6(4)(c), respectively.

100 Examples include: Proc No 56/1994; Proc No 57/1994; Proc No 70/1995; Proc No 78/1995; Proc No 79/1995; Proc No 80/1995; Proc No 81/1995; Proc No 87/1996; Proc No 97/1997; Proc No 98/1997; Proc No 99/1997; and Proc No 100/1997.

101 See Connell *Conversations with Eritrean Political Prisoners*, above at note 61 at 181.

102 As far as Proc No 33/1993 is concerned. Moreover, the following information (narrated to the authors in confidence) clearly illustrates the inconsistent practice of the ratification of international treaties in Eritrea. At one time, a national committee was established to study some conventions of the International Labour Organization (ILO) that Eritrea wanted to ratify. While the national committee was still working on this issue, the state president happened to be at an event in Europe, where some ILO staff members approached his delegation and lobbied in favour of ratification of those treaties. The state president ratified seven major ILO conventions on the spot. The national committee was taken by surprise when the ILO sent a congratulatory letter to the state of Eritrea on account of the sudden ratification. See also DR Mekonnen *Transitional Justice: Framing a Model for Eritrea* (unpublished LLD thesis, University of the Free State, 2009).

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What should have happened is that an executive body should have signed a treaty and should then have brought it to the attention of the Central Council or the National Assembly, which ought to have accepted or rejected the signature of the executive.[103] If the Central Council or the National Assembly accepts the signature, it should pass a law (proclamation) signifying the ratification of the treaty, after which the executive can deposit an instrument in the depository to signify that Eritrea has ratified the treaty.

Another point that needs consideration is that all the proclamations passed by the secretary general and the president ostensibly in accordance to article 5 (4)(6) of Proclamation 23/1992 and article 6(4)(e) of Proclamation No 37/1993 are related to government borrowing.[104] Apart from treaties related to government borrowing, Eritrea is a party to many other international treaties such as the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Covenant on the Rights of the Child and the Covenant for the Elimination of all forms of Discrimination Against Women, among others.[105] No proclamation was issued to ratify these treaties.[106] Yet, many sources indicate that Eritrea is a party to these treaties.[107]

Why international treaties related to government borrowing are ratified, albeit by the president, and others are not, remains an important question that needs investigation. In this regard, the Ethiopian approach to ratifying treaties is illuminative. In Ethiopia, a signed treaty needs ratification by the House of Peoples' Representatives. The Ethiopian Constitution clearly states that the House of Peoples' Representatives "shall ratify international agreements concluded by the executive".[108] The practice in Ethiopia is that the house passes a proclamation in order to ratify international treaties.[109] The exact ratification procedure, if done without reservation, is a simple declaration to the effect that a particular signed treaty is ratified accordingly.[110]

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103 Connell *Conversations with Eritrean Political Prisoners*, above at note 61 at 181.

104 Indeed, in its effort to consolidate an electronic database of all proclamations and legal notices, the Eritrean Ministry of Justice classified those proclamations passed by the president under the section of "government borrowing". See Ministry of Justice "Consolidated electronic database of Eritrean proclamations and legal notices" (unpublished; copy on file with the authors).

105 See the status of ratification by Eritrea of international treaties at: <http://www.ohchr.org> and <http://www.achpr.org>.

106 MB Hagos "Eritrea" in C Heyns (ed) *Human Rights Law in Africa* (2004, PUPL) 1060 at 1064.

107 Ibid. See also sec 39 of the list of international agreements in the Ministry of Justice "Consolidated electronic database", above at note 104. See also the status of Eritrean ratification at note 105 above.

108 See art 12.

109 See, for example, Proc No 347/2003.

110 See, for example, art 2 of Proc No 347/2003.

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THE WEAKNESSES OF THE NATIONAL LEGISLATOR

Many informed writers have accurately described the weakness of the Eritrean national legislator. Gebremedhin laments that the Eritrean National Assembly "offers [a] … worse experience in that [it] does not even have the 'luxury of rubberstamping'".[111] Connell, as a close observer of the EPLF / PFDJ, attributes the undemocratic feature of the transitional government of Eritrea to the nature of the front during the struggle days, a look at the soil out of which the tree grew.[112] According to Connell, it is not merely that an armed movement, such as the EPLF, had difficulties adapting to the exigencies of post-war civilian governance, as has often been the case with such transitions, but rather it is that the secret "vanguard" of the same liberation movement clung to the patterns and perquisites of its unaccountable power and could not act otherwise.[113]

According to Connell, in post-1991 Eritrea it has been obvious that the formal structures of power of the GOE (the Council of Ministers/Cabinet of Ministers, the National Assembly and the judiciary) are all window-dressing for a system of carefully circumscribed one-man rule.[114] All important decisions in Eritrea today are made behind closed doors.[115] The appearance of separation of powers displayed by the government is an illusion.[116] The cabinet did not provide a forum for serious debate or decision-making but served mainly as a clearing house to determine how policies hammered out elsewhere would be put into practice.[117] The same is true of the National Assembly.[118] In this regard, Tesfagiorgis has called the National Assembly "an abnormal institution".[119]

The National Assembly has no committees or internal rules and guidelines, and it does not convene every six months as is required by law.[120] With the exception of the first Cabinet of Ministers,[121] the National Assembly has never confirmed, nor been consulted about, any ministerial changes.[122] It has never been presented with regional or international treaties for its consideration.[123] One of its main oversight functions over the executive branch

111 Gebremedhin *The Challenges of a Society in Transition*, above at note 30 at 136.
112 Connell *Conversations with Eritrean Political Prisoners*, above at note 61 at 2.
113 Ibid.
114 Ibid.
115 Ibid.
116 Id at 6; G-15 "An open letter", above at note 61.
117 Connell *Conversations with Eritrean Political Prisoners*, above at note 61 at 6; Gebremedhin *The Challenges of a Society in Transition*, above at note 30 at 136.
118 Connell id at 11. See also DR Mekonnen "The abolition of female circumcision in Eritrea: Inadequacies of new legislation" (2007) 7/2 *African Human Rights Law Journal* 389 at 405.
119 Tesfagiorgis "In search of a normal Eritrea", above at note 61.
120 Connell *Conversations with Eritrean Political Prisoners*, above at note 61 at 181; G-15 "An open letter", above at note 61.
121 This was confirmed by the National Assembly in its fourth meeting, held on 2–4 March 1994.
122 Connell *Conversations with Eritrean Political Prisoners*, above at note 61 at 181.
123 Ibid.

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is to review and approve national budgets. Nevertheless, it has never been presented with any national budget.[124] The president found it unacceptable when attempts were made to have these state institutions work properly.[125] The initiative to reform the political and legal setting of Eritrea was met with brutal actions and complete defiance.[126]

In fact, in recent years, the president has unilaterally replaced the National Assembly with a sort of tripartite joint body, comprising the Cabinet of Ministers, regional administrators and army commanders. The terms of reference and procedures of this body are not clear to the public. In the last few years, it has become the only and highest "deliberative body", which frequently passes resolutions regarding major national issues and policies, with the president as its sole convener, chairperson and controller. As asserted by a former member of the National Assembly, this new tripartite joint body convenes not to deliberate issues but "to listen to the president's lectures".[127]

The GOE completed its term in 1997.[128] Although the border conflict with Ethiopia that continued from 1998 to 2000 might have necessitated the continuation of the transitional government until the end of 2000, the legitimacy of the transitional government had lapsed. So too has the National Assembly. The constitution prepared by May 1997 remains unimplemented.

CONCLUSION

The lawmaking process under the transitional legal framework has retained many imperfections. The flaws are in both the design of the interim constitutions and the ensuing practice. The interim constitutions have not clearly demarcated the competence of the executive and the legislature as far as lawmaking is concerned. Instead, lawmaking is vaguely made a competence of various government bodies. It is clear that the lawmaking process is short of democratic input and largely defies the principle of separation of powers.

The ambiguity exhibited in the distribution of lawmaking powers, together with the history of the EPLF, has resulted in the usurpation of lawmaking

124 Ibid. Up to now, there has been no budgetary law and so the government has operated without any budgetary constraints.

125 Connell *Conversations with Eritrean Political Prisoners*, above at note 61 at 182.

126 See generally Connell *Conversations with Eritrean Political Prisoners*, above at note 61; *Liesbeth Zegveld v Eritrea* (2003) AHRLR 84, comm no 250/2002 *Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights (African Commission)* (2003–04, African Commission) annex VI, 116, available at: <http://www.achpr.org/english/activity_reports/activity17_en.pdf> (last accessed 18 June 2009).

127 Interview with Mesfin Hagos, the former chairperson of the Eritrean Democratic Party, for his party's website, available at: <http://www.selfi-democracy.com/?read=articles/editorials/1186507322Interview_Eng_P1_PDF_e.pdf> (last accessed 24 August 2007). See also "Joint meeting of Cabinet of Ministers and regional administrators concludes", available at: <http://www.shabait.com/staging/publish/article_006894.html> (last accessed 12 July 2007).

128 See art 3(2) of Proc No 37/1993. See also G-15 "An open letter", above at note 61.

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powers by the president at the expense of the National Assembly. The president has been the supreme lawmaker and still continues with such unfettered powers. The vagueness and the generous distribution of the lawmaking powers between the three government bodies must be corrected. This also applies to the ratification of international treaties. The legislative powers conferred upon the president and the Cabinet of Ministers need to be ceded back to the legislature. Implementation of the 1997 constitution in which the lawmaking process is clearly designated could be a cure.

Considering the rampant imperfections in many of the proclamations and legal notices which have been passed, one cannot but recommend that the Eritrean legislature be equipped with several committees specializing in different areas. At the very least, the legislature needs to have a permanent legal committee. The role of such a committee must be limited to offering its expertise; it may be composed of practising lawyers, retired judges, public prosecutors and legal academics including law students (perhaps on an internship basis). The task of a legal committee must primarily be to assist in drafting bills, checking their compatibility with the constitution and international treaties and other laws. In short, the committee must deal with all the technical legal matters of the relevant bill.[129]

Moreover, for thematic matters, the legislature needs to rely on ad hoc committees established in an appropriate manner. The legislature could also establish from its members a committee to which it can entrust the article by article examination of any bill. Such a committee could examine the bill together with or after the legal committee or any other ad hoc committee. A bill, once reduced into a draft, must, so far as circumstances permit, be made public for debate before the legislature considers it. There need to be stages in the development of any bill to allow for public debate. In the case of delegated lawmaking, clearly defined powers must be given to the delegated authorities; such authorities must accurately record the source of their competence, preferably in the preamble or the first article of the legislation. In this regard, the practice of ministers and other executive heads has mostly been compliant.

It is important to indicate the date and place the particular legislation was passed. The current practice which invariably provides the date, place and issuing authority must therefore be maintained. It is also imperative to specify when the legislation enters into force, as is required by the principle of legality.[130] When laws are issued to amend or repeal existing laws, this must be clearly indicated. The law-issuing authority must clearly identify itself in published laws. Laws passed by the National Assembly must appear in the name of

129 Some of the proclamations and legal notices issued apparently suffer from a lack of legal expertise in their drafting. See, for example, Proc No 1/1991.

130 See Proc No 67/1995 and Proc No 143/2004. The entry into force of the first is pre-dated while the latter is post-dated.

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the National Assembly and not in the name of GOE. Commendably, almost all proclamations and legal notices include a clause specifying how the particular legislation can be cited. Nevertheless, the main purpose of doing so is often missed. Whereas a full title of the legislation that is descriptive of the contents could be provided, the name by which the legislation should be cited needs to be very short and convenient.[131]

131 A good example in this regard is Proc No 58/1994.

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