

PART II

AFRICA



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Constitution Making in Eritrea

A Process-Driven Approach

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Comparative constitution making has become a favored area of academic study in recent years, principally due to Eastern Europe's experience following the fall of the Soviet Union.¹ Once consigned by reductionist ideology to being mere superstructure, constitution making and constitutionalism have achieved the status of paradigms in scholarly discourse, or at least are now regarded as bases for paradigm shifts. In the realm of statecraft, constitutional engineering is increasingly relied upon as a promising enterprise in the search for bridges of understanding among factions in divided societies as well as between civil society and the state, based upon a foundation of consensus. It is assumed that constitution making, with extensive public participation, can be crucial to building such consensus. It is also assumed that constitution making can provide a framework for ongoing conflict resolution in post-conflict situations.

The present essay approaches this subject with a focus on the process of constitution

making in Eritrea, a new African country. The emphasis on process, with public participation as the primary element, is based on the belief that a participatory process creates an enabling environment, helping the public to gain a sense of ownership of their country's constitution. This sense of ownership, it is assumed, increases the likelihood that the public seeks to control its government.² There is growing agreement on the importance of public participation as a factor in successfully implementing a constitution, as borne out by the literature resulting from several international meetings.³ Whether such a participatory process can create a proper and effective framework for conflict resolution is a challenging question; this chapter attempts some tentative answers.

The transitional government of Eritrea, which was based on an armed political organization—the Eritrean People's Liberation Front (EPLF)—that had come out of a protracted liberation war, expressed a commitment to democratic transition and con-

stitutional government. Two years after liberating the country from Ethiopian military occupation in 1991, the government decided to hold an internationally observed referendum, in which the Eritrean people were asked whether they wanted independence or some form of association with Ethiopia. The government took this step to dispel any lingering doubt that the liberation war enjoyed the support of the Eritrean people, contrary to Ethiopian propaganda. The referendum consummated the military victory and was also the basis for the government to express its commitment to democracy and the active participation of the public in writing the constitution, which it formalized with Proclamation 37/1993. The Constitutional Commission of Eritrea was established under Proclamation 55/1994, fulfilling the government's commitment.

The commission, which was accountable to the National Assembly, was comprised of a fifty-member council and a ten-member executive committee drawn from the council. It was charged with the duty of organizing and managing "a wide-ranging and all-embracing national debate and education through public seminars and lecture series on constitutional principles and practices."⁴ Following public debate, the commission was required to submit a draft of the new constitution to the National Assembly that took into account the views of the public. The approved draft would then be submitted to a constituent assembly for ratification. The public consultation took over two years, and, following a public debate on the draft and approval by the National Assembly, the draft was submitted to the constituent assembly three years to the day after the commission was established. The constituent assembly ratified the constitution on May 23, 1997.

However, this ratified constitution has not been implemented, and this fact has become the most important political issue in the country. As will be discussed below, it has

given rise to a serious political crisis that still awaits resolution.

The Relationship Between Process and Substance

In a previous essay on Eritrea's constitution-making experience, I attempted to examine the dialectical relationship between process and substance.⁵ This paper focuses on the process of constitution making. The rationale behind this focus is the conviction that the recent approaches to process-driven constitution making are better than previous approaches were. The latter tended to depend on the decisions of a select group of people, be they distinguished statesmen, as were the framers of the U.S. Constitution, or a select committee of the government of the day and its expert legal draftsmen, as was the case for the independence constitutions of much of Africa. The process involved in drafting the constitutions of African countries on the eve of their independence, which I call the Lancaster House model, excluded the public—the African populations—from participating in the making of the basic law by which they would be governed.⁶

However, no analysis devoted to process can avoid reference to substance. The process and product are dialectically linked: The ends prescribe the means and the means impinge on the ends. Involving the public in 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. Thus, public participation in the making of a constitution necessarily raises questions of substance. The contemporary debate on the meaning of democracy underscores this point. The debate has largely focused on two aspects of democracy: its substantive aspect—that is, its source and purpose—and its procedural elements.⁷

The classical approach defined democracy in terms of its source (the will of the people) and purpose (the common good).⁸ According to current prevailing thought, however, the central feature of democracy is procedural, concerning the selection of leaders through competitive popular elections. Pioneered by Joseph Schumpeter, procedural democracy, or what may be called the democratic method, is the “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for people’s vote.”⁹ Democracy is thus defined in terms of method, according to which a political system is democratic “to the extent that its most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible.”¹⁰ Two critical elements are posited in this definition: popular participation and the competition of candidates representing different interests or ideologies. Adding another dimension to the debate is Robert Dahl’s concept of polyarchy, which underscores the importance of the freedoms of speech and of the press for meaningful pluralist politics.¹¹ Dahl defines polyarchies as “regimes that have been substantially popularized and liberalized, that is, regimes that are highly inclusive and extensively open to public contestation.”¹²

Does the above minimalist procedural conception of democracy embrace other critical requirements for meaningful democratic government? Do elections, per se, constitute the only core element of democracy? Certainly they are a critical part of it, to the extent that national assemblies or parliaments, as representative institutions, are the primary national institutions accountable to the citizens of a country. In theory, these institutions are the principal mediators in the relationship between the governors and the governed. Electoral laws and politics can thus be re-

garded as prerequisites of democratic (representative) government. But once parliaments are elected, their responsibilities do not end when the election is over. In short, election is a means to an end—the functioning of representative institutions—which constitutes the substantive aspect of democracy. The procedural imperative, though essential, must be analyzed in relation to the role of representative institutions in the totality of a constitutional order. As Jean Bethke Elshtain has put it:

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 to democracy? Democracy’s enduring promise is that citizens can come to know a good in common that they cannot know alone.¹³

The above general comments about democracy apply with equal force to constitution making, which engages, or should engage, citizens to negotiate and compromise in framing the issues concerning their rights and duties as well as the powers and responsibilities of government defined in the constitution. That process cannot be entirely divorced from substance and must inform any analysis of a constitution-making process, such as the one that occurred in Eritrea.

Background

Eritrea’s Constitution Making in Historical Perspective

The present Eritrean constitution was ratified by an elected constituent assembly in May 1997, on the eve of the sixth anniversary of the country’s liberation from Ethiopian occupation. The constitution was the first of its kind in Eritrea, as it was created with the participation of the people as citizens of a free and sovereign nation. A very

brief historical review offers some perspective on this constitution-making process.

Having been an Italian colony (1890–1941), Eritrea was occupied by the British for a decade (1942–52), pending a disposition of its status by the United Nations. In 1950, a U.S.-sponsored UN resolution joined Eritrea with Ethiopia in a lopsided federation, under which Eritrea was granted local autonomy but not full independence. Ethiopia's emperor, Haile Selassie, gradually destroyed even this limited autonomy. In November 1962, he abolished the federation, declared Eritrea to be simply a province of his empire, and sent an army to occupy the territory. A year earlier, the Eritrean Liberation Front (ELF)¹⁴ had begun an armed struggle that was to last thirty years. During much of its latter phase, the liberation war encompassed a sweeping social revolution that would turn out to be perhaps its most important legacy, with notable achievements in such areas as women's equality, human rights, social justice, and democracy. These values, acquired during the long war of liberation, critically influenced the constitution-making process. As public debates later made clear, Eritreans saw the constitution as fulfilling the goals of the liberation war, thus helping to vindicate their enormous sacrifice.

The Context of Democratic Transition

Following liberation in May 1991, the EPLF, then an armed guerilla organization, declared itself to be a provisional government. To be sure, the EPLF had been exercising quasi-governmental power in the last years of the struggle and had created impressive administrative and technical infrastructure behind enemy lines in its Sahel base area. Formal independence, however, did not arrive until two years later. The delay was due to the EPLF leadership's insistence that an internationally observed referendum be held. The leadership believed that the people would freely

choose independence, showing a hitherto skeptical or indifferent world—and especially Africa—that the independence struggle had popular backing. The result of the referendum of April 23–25, 1993, fully justified this confidence. In voting that a UN-observer mission certified as fair, a 99.8 percent majority opted for full independence.¹⁵ Soon after the referendum, Eritrea became a member of the United Nations. Thus began a transition process that culminated in the ratification of the Eritrean constitution, capping three years of intensive and extensive public debate and consultation.

As the EPLF had chosen itself to be the government, it was not elected by the general population. The provisional government was composed of the EPLF's central leadership, which had been elected in the front's organizational congress. That congress elected a thirty-seven-member central committee, which in turn elected a political bureau with a secretary general as the leading figure. At the post-liberation congress held in February 1994 (the Third Congress), the EPLF changed its name to the Peoples Front for Democracy and Justice (PFDJ), the name of the central committee to the Central Council, and the political bureau to the Executive Committee. The chairman of the Executive Committee became the key figure, with a secretary general tasked to administrative matters.

The PFDJ laid down the rules governing the government's actions, as well as newly formulated laws and regulations. The central committee acted as a legislative body until the Third Congress, after which a transitional parliament was formed, composed of the members of the Central Council and an equal number of members chosen by the PFDJ to represent the various regions of the country. The chairman of the PFDJ presided over the transitional parliament and a cabinet of ministers whom he appointed. The provisional government established a constitutional commission in 1994, and three

members of the transitional parliament—all members of the PFDJ's Central Council—were among the commission's fifty members. All three also became members of the commission's Executive Committee; two of them had legal training.

The provisional government of Eritrea passed several laws that expressed a commitment to democracy. One such law, adopted in 1993, charged the government, *inter alia*, with the responsibility of preparing and laying the foundation for a democratic system of government.¹⁶ The Constitutional Commission of Eritrea was established a year later in fulfillment of that duty.¹⁷ In addition, at its Third Congress, the governing party adopted a national charter expressing the vision of the governing party for the future of the country, setting forth democracy, human rights, and social justice as the guiding principles and objectives, together with stability, national unity, and economic development. The commission used this charter as the point of departure for the national debate that followed.

The Constitution-Making Process

Public Participation: The Litmus Test

As is noted above, with some justification, one can use public participation or the lack of it to distinguish between newer and older modes of constitution making. The Canadian scholar James Tully has framed the question of public inclusion in constitution making in a larger historical perspective:

The question of our age . . . is whether a constitution can give recognition to the legitimate demands of the members of diverse cultures in a manner that renders everyone their due, so that all would freely consent to this form of constitutional association. Let us call this first step towards a solution "mutual recognition" and ask what it entails.¹⁸

Tully argues that there should be a radical paradigm shift in the manner of constitu-

tion making and constitutionalism. Backed by a historical and critical survey of over three hundred years of European and non-European constitutionalism, his approach seriously challenges the prevailing school of modern western constitutionalism. Sometimes called a postimperial approach to organizing political community, it calls for the conciliation of different claims for recognition over time through constitutional dialogue, in which citizens reach agreement on appropriate forms of accommodation of their cultural differences, guided by constitutional rules.¹⁹

When the Constitutional Commission of Eritrea embarked on its constitution-making mission in April 1994, none of its members was aware of the new paradigm, which was only then developing. But the commission regarded popular participation in constitution making as a strategic point of reference; it was a point that no one disputed. The commission's understanding of the purpose of popular participation had to do, first and foremost, with the issue of public ownership of the constitution, an issue described above. Moreover, following the revolutionary armed struggle, the Eritrean political and social context was marked by an anti-imperialist and antifeudal bourgeois ideology that was suspicious of any event or process controlled by elites. Such ideology, justifiable in view of Eritrean history and the temper of the times, was actually twisted to serve purposes contrary to the popular interest, as is discussed below. Despite differences in the language, the approach followed in Eritrea's constitution making approximates Tully's post-imperial prescription—and aligns with an emergent global postimperial consciousness, according to which the creation of a country's constitutional system must be grounded in popular consent that accommodates all of the component elements of a society.²⁰

The members of diverse cultures to which Tully refers, with their complaints, claims of

rights, or demands for inclusion, could have no better opportunity to have their day in court than during a constitution-making process. Public consultation or participation should facilitate the airing of grievances or registering of specific claims or demands. The Eritrean experience demonstrates that better understanding among members of different cultural groups can best be achieved when they are exposed to each other in a common effort. Of course, in the Eritrean case, the common purpose was the fight for independence, which brought common bonds to the surface and subordinated group demands or grievances. The experience of armed struggle brought together young men and women from all of Eritrea's ethnic groups, and their experiences fighting alongside one another became a building block for a sense of nationhood.

But nationhood and national unity cannot be taken for granted. Mutual recognition, to use Tully's phrase, above all entails attentiveness to local customary laws and cultures. The national government needs to help groups preserve all of the good parts of their customs, laws, and cultures, while dealing delicately with their harmful aspects with a view to changing them over time. Eritreans' mutual exposure to one another's customs and ways of life has made them receptive to suggestions for change, such as in matters concerning women's rights and the practice of female genital mutilation. One of the provisions of the law establishing the Constitutional Commission of Eritrea aimed to facilitate such a process of gradual change by enabling the commission to appoint advisory boards. Under this provision, the commission established two such boards, one on Eritrean customary laws and the other on the constitutional experiences of other countries. The board of Eritrean customary-law experts advised the commission on the board members' respective customs. There were no grievances regarding the treatment of customary prac-

tices in the constitutional process expressed to this writer or, to his knowledge, to other members of the commission by any member of the advisory board of customary law experts. At the initiative of its chair, Owen Fiss, a professor at Yale University, the board of constitutional experts convened two symposia, to which the members of the commission's executive committee were invited. Contacts continued between individual experts and members of the commission, all to good effect.

The Role of the Constitutional Commission

The period after liberation was a time of transition for Eritrea, from a devastating war and its consequences to peaceful reconstruction and rehabilitation. It was also a transition from a government of military provenance to one of democratic constitutionalism. It is worth reiterating that the EPLF was an armed political organization with the principal aim of freeing the country from foreign occupation. That task having been accomplished, the foundation was laid under Proclamation No. 1 to organize a society that would be ruled by a democratically elected government. To that end, the Eritrean government established a constitutional commission, to both "draft a constitution on the basis of which a democratic order would be established and . . . [which] would be the ultimate point of reference of all the laws of the country," and organize national debate on constitutional principles and practices.²¹ As the commission was thus central to the constitution-making process, it is necessary to consider its work and contribution to process-driven constitution making—how and why it was formed, its composition, its structure and organization, and some of the methods it utilized to achieve optimum results.

The law establishing the Constitutional Commission of Eritrea, Proclamation 55/

1994, charged the commission with organizing and managing “a wide-ranging and all-embracing national debate and education through public seminars and lecture series on constitutional principles and practices.”²² The law also provided that following public debate on a constitutional draft and having accounted for the views of the public, the commission would then submit a draft constitution to the National Assembly. The National Assembly-approved draft would then be submitted to a constituent assembly for ratification.²³ Proclamation 55/1994 required that the members of the commission comprise “experts and other citizens with proven ability to make a contribution to the process of constitution making.”²⁴ That the commission was appointed by the National Assembly could be said to have lent it presumptive legitimacy, but the diversity and divisions within Eritrean society had to be accounted for as well, as it contained many ethnic groups and a population more or less equally divided between Christians and Muslims. Wisely, the assembly created a well-balanced, representative commission. Its fifty members included twenty-one women, the majority of whom were veteran liberation fighters. Each of Eritrea’s nine ethnic groups was represented, as were the business and professional communities. A ten-member executive committee drawn from the commission’s larger membership guided its work.

The commission’s mandate ran for three years, and its work followed a four-stage process, at a cost of approximately \$4.3 million. First was a logistical phase, which ran through the end of 1994 and involved organizing the commission, raising funds, educating the public, and initial drafting work. The second phase focused on public education regarding the commission’s role and basic constitutional concepts, as well as preparation of a full draft and taking public opinion into account where deemed necessary. The third phase involved broad public debate of the commission’s draft

and submission of the draft to the National Assembly for its consideration. The fourth phase was designated for public debate and submitting the draft for ratification to the constituent assembly.²⁵

The commission’s task of organizing wide-ranging public debates and soliciting expert opinion placed an unusually heavy emphasis on direct and active involvement of people outside of government during the drafting phase. Article 12(4) of the proclamation enjoined the chairman of the commission to encourage the participation and contribution of Eritrean and foreign experts and to organize ad hoc committees and advisory boards to help expedite the process of preparing the draft constitution. A fourteen-member board of foreign advisers was established to advise the commission on the experience of other countries in constitution making and provide a multidisciplinary perspective on the debate and analysis of the commission’s work. As previously noted, the chair was Professor Owen Fiss of Yale Law School. Other members were scholars and practitioners from the United States, Europe, Africa, and Asia. The majority were lawyers, but there were also two historians, three political scientists, and one anthropologist in limited advisory roles. The international community supported the commission’s work primarily through financial aid from the United Nations, the United States, and some European countries, as well as several non-governmental organizations.

Historically, the drafting phase of a new constitution has been dominated by a constitutional convention or conference, often held under conditions of secrecy or quasi-secrecy, or else by a specially appointed committee of the legislature, as were the cases in the 1787 convention that drafted the U.S. constitution and the Westminster model, respectively. Constitution making through a commission thus marks a significant stage in the development of democracy. For this new approach to succeed, however, three principal prerequi-

sites must be satisfied. First, the government must be committed to the ideal of constitutional democracy. Second, the public must be aware of this ideal and willing to play a role in its attainment. Third, there must be a body with a clear legal mandate to freely solicit public views through widely held debates and other forms of political consultation; it must then seriously consider these views when drafting the constitution. Needless to say, the members of this body must be selected not only on grounds of regional, ethnic, and religious representativeness but also on those of professional competence.²⁶ In Eritrea's case, these requirements were in place, as will be seen below.

Regarding the first requirement, the Eritrean government's earlier commitment to constitutional democracy, which included pluralist politics, has been frustrated. The delay in implementing Eritrea's constitution has provoked such public outcry that in September 2000, the National Assembly passed a resolution calling for elections to be held by the end of 2001. To that end, the assembly appointed a committee to draft a law on political-party formation and another committee to draft an electoral law. The fate of the law on party formation and the proper manner of implementing it has been the subject of bitter controversy between the country's president and some of his colleagues in the government and party, including the chairman of the committee that drafted the law.²⁷

As noted above, a key issue related to both the principles and politics of constitution making concerns the choice of the entity to be tasked with organizing and managing the drafting process. The choice of entity is a matter of principle in that the entity needs to be representative of the stakeholders—the various interest groups comprising a nation. The choice is also political in that the leaders of a country have the right to decide on the nature of the entity and the appointment of its members only inasmuch as their

own power is legitimate. Where the leaders' power is illegitimate, there is bound to be contestation.²⁸ Assuming legitimate political authority, a political leadership can appoint a commission or committee and assign it the task of drafting a constitution, but based on Eritrea's experience, public participation in its making, through wide-ranging public debate or consultation, is imperative if such a constitution is to be widely supported.

Who should determine the mandate, timetable, and rules of a constitutional commission? The temporal mandate may be determined either by the appointing authority, or left flexible for the commission to determine. The advantage of the latter, which was the case in Eritrea, is that the commission can shorten or lengthen the timetable as circumstances dictate. The Constitutional Commission of Eritrea reported to the National Assembly, both administratively by periodically reporting on the progress of its activities and substantively by submitting the final product of its process, but it alone determined all its rules and operational programs. At the start of its work, the Eritrean constitutional commission had planned to complete its work in two years. This proved impossible, however, and so the commission extended its timetable by another year—a crucial aspect of the commission's autonomy that the government undertook to honor, and did honor, until the commission's mission was accomplished.

In some cases, the question of what type of body should lead the consultation and drafting process has involved some stakeholders in disputes with their governments. In Kenya, there was contestation between the government of President Daniel Arap Moi and organized members of civil society as to whether Kenya's constitution should be reformed through the appointment of a constitutional commission, as several other African countries had done. The government preferred to use a commission, whereas representatives of civil society demanded that a

constitutional conference be held embracing all stakeholders. In the end, even though there was agreement in principle in Kenya on the need for public participation, there was disagreement on the modalities of consultation: Though Kenya's parliament had tabled a proposal for constitutional review in 1998, it took several years for the government's position of appointing a commission—under the chairmanship of Professor Yash Ghai and with representatives from civil society—to prevail.

The Kenyan case demonstrates that the means chosen to manage a constitution-making process, including a consultation process, must suit the peculiarities of the politics of individual nations. Such peculiarities determine the nature of consultation, rather than generalizations based on the experience of other countries. That said, the latter can be useful guides; one can insist on certain principles, and perhaps use such principles to help contesting parties, both governments and organized members of civil society, arrive at a suitable compromise.²⁹

What principles may be invoked to apply to the commission approach, enabling it to commend itself and be acceptable to both sides of a dispute over the architecture of a constitution-making process? The first principle concerns its independence. If one can guarantee that once appointed, a commission will be permitted to act independently without any pressure from any source, it should be acceptable to all concerned. On its own initiative or at the request of the government, a commission may consult with appropriate government ministers or party leaders to gather information on specific matters or gain insight into them. But this is different from pressure or influence. A commission's independence ensures the integrity of the process and consequent public confidence in the process and its outcome, that is, the constitution itself. The second principle is related to composition. Obviously, a com-

mission's composition is a matter of great interest; on this question, too, each nation's own peculiarities must determine the result. The most that can be said, in principle, is that it must be inclusive, as widely representative of society as possible.

In sum, there are two defining features of the commission mode of constitution making or constitutional reform, the importance of which cannot be overstated. First, a commission must represent a society's stakeholders. Second, once appointed, the commission must be independent. Principles and politics are involved, the former having to do with the integrity of the process and professional competence, and the latter pertaining to the representation of interested parties.

It must be remembered, however, that a commission is not the final deciding authority in a constitution-making process. For the principle of legitimacy to be complete, a commission must submit the draft constitution that it has prepared to an elected body, such as a constituent assembly or national legislature, or alternatively—and sometimes additionally—to the public in a referendum.³⁰ In many of the recent cases of constitution making in Africa, such as Eritrea, Ethiopia, Namibia, South Africa, and Uganda, final ratification was all done by constituent assemblies.³¹

Question and Answer Method of the Constitutional Commission

Organizing debate on the most fundamental political questions facing a nation is far more than a technical or logistical matter. It involves substantive issues concerning both the most appropriate literature to be translated and distributed and the best way to communicate essential ideas about democracy and constitutional rule. The participation of Eritreans in making their constitution relied on the inherent wisdom of encouraging and organizing people to be involved

in decisions affecting their lives. This made sense theoretically and conforms to universal principles of democracy. It also accords with the historically evolved system of village democracy in much of Eritrea, in which village communities govern themselves democratically through periodically elected assemblies. This village democracy forms a central part of Eritrean customary law and was preserved and utilized during the long period of armed struggle.³²

The constitutional commission in Eritrea strategized and organized research and public consultation based on the conviction that the process was as important as the product. A great deal of attention was paid to preparing the public to contribute as fully and well informed as possible. Equal emphasis was placed on the need to record, collate, and eventually analyze the views that emerged during public debate. This step had twofold importance, for not only might such views be used to draft the constitution, but the very fact of keeping track of them gave people a sense of ownership of the constitution.

The commission began its work by posing a series of questions that it had to answer before launching the public debate and drafting the constitution. The essence of the major questions may be summed up as follows:

1. What lessons, if any, do the historical experiences of other countries offer?
2. Do such experiences yield helpful models or guidelines?
3. Is it desirable or practicable to use models? Are they transferable, like some technology is?
4. What, after all, are the values and goals that a nation needs most emphatically to promote, nurture, and protect? How should these be incorporated in a constitution?
5. Should such values and goals be incorporated into the constitution or should they be determined in the crucible of political

and social interaction, in the daily discourse of culture?

6. What form of government would be best suited for Eritrea?
7. What degree of decentralization should there be? Is federalism appropriate for a small and comparatively cohesive nation?
8. Should there be an official language or languages? If so, which ones should be selected and why?

It was apparent from the outset that some subjects could be left out of the constitution while others could not, making the question of what to include susceptible to debate. There were questions of detail, including some pertaining to technicalities, such as the constitution's size. Should the document be long or short? How detailed should the chapter on the bill of rights be? Should the constitution incorporate international covenants on human rights by reference or by detailed inclusion? In all, the commission listed twenty-three questions for consideration at its earliest meeting.³³ The proposals that were ultimately submitted to the public for debate were based partly on these questions, but also were enriched by research and expert consultation.

From the outset, there was consensus within the commission not to rely on ready-made models, whatever their source or merit. Rather, it was thought better to take stock of the reality and paramount needs of the country. The commission's research and consultation activities were designed with that objective in mind.

The Civic Education and Consultation Process

In July 1994, the commission held a small international conference in Asmara that focused on the eight key questions identified above. Before this meeting, the commission had established four ad hoc research com-

mittees—later combined into a single committee—and a standing committee on civic education and public debate, all acting under the guidance of the executive committee. The four ad hoc committees were concerned with government institutions and human rights, economic issues, social and cultural questions, and governance and related issues, respectively. Each committee was authorized to appoint subcommittees and solicit views and research assistance from both Eritrean and foreign experts. At the conference, the four ad hoc committees submitted papers, and commission members heard and discussed presentations by Namibian and Swiss ambassadors to Ethiopia and by the chairman of the constitutional committee of Ethiopia.³⁴

The substantive phase of the commission's work continued with a well-attended international symposium in Asmara in January 1995, at which two hundred Eritreans and forty-two invited experts from around the world participated in discussions.³⁵ The issue-by-issue discussion with which the commission launched its work was now replaced by an approach that aggregated the relevant questions into four themes, focusing on the constitution's relationship to government, human rights, social and economic rights, and democracy. Commission members were assigned to draft issue papers on these themes, including analysis and recommendations. Specific topics addressed in the issue papers included legislative, executive, and judicial powers; electoral systems; decentralization; fundamental rights and freedoms; social, economic, and cultural rights; and equality guarantees. After the January 1995 conference, the commission and its members transformed these issue papers into a series of eight position papers.³⁶ Among the goals of these efforts, which would prove crucial to the success of the public debate that ensued, was to distill these vital issues

to their essences and, ultimately, frame them as proposals in a way that the average citizen could readily grasp. The proposals prepared for public discussion thus reflected not only the research committee's sophisticated and careful work but also the larger commission's overall focus on concision and accessibility.

The January 1995 conference was followed by an extensive civic education campaign that proved integral to actively engaging the Eritrean population in the constitutional process. Commission members and more than four hundred specially trained instructors conducted public seminars in village and town meetings on constitutional issues and related political and social questions. The commission also established seven provincial offices and seventy-three locally based committees to assist in public education.³⁷ To this end, the commission prepared pamphlets and translated into Arabic and Tigrinya several international legal instruments, including the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the international covenants on civil and political rights as well as social, economic, and cultural rights.³⁸

A central obstacle to the civic-education campaign was the country's low literacy rate, approximately 20 percent. The commission sought to address this problem using non-printed means of communication, including songs, poetry, short stories, and plays delivered orally in the various vernaculars. Artists and writers were invited to submit proposals for these projects, which were chosen on a competitive basis. Mobile theater groups and concerts dealing with constitutional themes were designed, and a cartoon comic book entitled *Elements of a Constitution* was published.³⁹ Special efforts were also made to involve students in the process. Radio was a huge help in this regard, as the commission sponsored contests and debates, many of which were broadcast on radio and televi-

sion, in schools throughout the country, and at Eritrea's national university.

In all, a great deal of money, skill, and other resources went toward the civic-education campaign, which reached more than five hundred thousand people out of a population of four-and-a-half million, and proved crucial to rallying public opinion behind the constitution-making process.⁴⁰ The civic-education efforts also were crucial in preparing people to participate in the public debates on the constitution that were to follow. Civic education not only equipped members of the public with relevant knowledge but also empowered them and made them more confident participants. The public's diffidence was palpable at the start, but by the time full-scale debate on the commission's proposals had begun, people were asking probing questions and making suggestions with great confidence, such as the importance of harnessing the government to the concept of *lugam*, or accountability.

By the summer of 1995, the commission was ready to disseminate a set of proposals to focus attention on and clarify the most important issues to the ensuing public debates. These proposals were divided into two parts. In the first part, the commission outlined principles that related to the basic constitutional framework, stressing the organic link between the people and the government as well as the importance of democracy, diversity, and national unity.⁴¹ The second part proposed specifics to the constitutional order, including a unicameral legislature (the National Assembly) with members elected for five-year terms. The assembly would choose the chief executive—the president—who would be commander-in-chief of the armed forces and limited to two five-year terms. There would be an independent judiciary, with a supreme court having the power of judicial review. Federalism was rejected in favor of a unitary governmental structure, and the commission proposed not to designate

an official language. The proposals offered a guarantee of the right to vote, but without specifying an electoral system. Fundamental rights—including life, privacy, and freedom of belief, expression, and organization—were included, with special emphasis on the equality of women.⁴²

From September to December 1995, there were extensive public debates about the proposals, which had been distributed to the public and broadcast over the national radio starting in the last week of August. Before the public debates began, the commission reorganized its implementation machinery, dividing the country into four regions and creating a fifth to include those countries abroad in which Eritreans (about half a million) resided. One member of the commission was put in charge of each region; the rest of the commission's members were assigned to manage and coordinate the discussions and debates. The debates were launched in the regions by members of the Executive Committee, who introduced the subject and explained the salient features of the proposals. Debate sessions included exchanges of questions and answers with the audience.

Extensive efforts were made to record the debates, using note takers and, when possible, tape recorders.⁴³ The Standing Committee on Civic Education and Public Debates oversaw the documentation and collation of the questions and points raised in all meetings and submitted summary reports to the Executive Committee for consideration at the final drafting stage. The questions raised were analyzed statistically, based on variables including region, age, and gender, to gauge public opinion for drafting purposes and for future reference; the commission's duty was to produce a draft that reflected public opinion as much as possible.⁴⁴ The records show that most of what may be called new points not covered by the proposals were in the nature of details that the draft constitution would address; answers were given to that effect.

The points of detail raised at public meetings and the countless questions raised about the issues covered in the proposals demonstrated the seriousness with which Eritreans viewed the process and the time and other resources that people were willing to spend. All in all, public meetings, each lasting about three hours, were held in 157 different places inside Eritrea, involving over 110,000 Eritreans; 11,000 additional Eritreans participated in 16 locations abroad.⁴⁵

As will be explained below, at the end of the year, the commission collected and analyzed the questions raised and opinions expressed during the public debates, and sat down to write the first draft of the constitution, which was released in July 1996. The National Assembly approved the commission's draft with a few amendments, and further public debate ensued in late 1996 and early 1997. The commission then met again to finalize the draft constitution. The final step of the process involved presenting the draft to the constituent assembly for ratification. The assembly discussed the final draft in the city hall of Asmara for three days in May 1997, and after making several minor changes, it unanimously ratified the constitution on May 24, 1997.

It is beyond dispute that the public consultation and debates throughout the constitution-making process were important in instilling a sense of public ownership in the constitution. Whether and to what extent public input actually influenced the text of the constitution is more difficult to discern. The constitutional commission began its work presuming that public debate would influence the draft. When the Executive Committee—which became the drafting committee—reviewed the voluminous materials collected during the debates, its members were clearly inspired by the depth and extent of public comment. Some members were astonished by the clarity, precision, and wisdom of some of the collected sentiments

and views. Age-old constitutional concepts had been encapsulated in proverbs and rhyming couplets, expressing a high sense of public commitment to responsible government, as conveyed by the term *lugam*. The spirit of such public input is reflected in the constitution. Nevertheless, as inspiring and profound as some of the ideas that the public put forward were, they were not susceptible to being explicitly translated into the language of a modern constitution.

That said, the commission accepted and included in the constitution some opinions or proposals offered during the public consultation. One example concerns the concept of secular government. As Eritrea is a society evenly divided between Christians and Muslims, the commission was encouraged to soften its stance in declaring the state to be secular. Another example concerns the oath of office. The commission's original draft contained language requiring office holders to swear in the name of the martyrs of the independence struggle. The objections of religious people, ably expressed by a young Muslim man, compelled the commission to change this to give office holders a choice in forming their own oaths.⁴⁶ However, the commission did not accept the view or proposal of a minority in the public and a couple of its own members concerning capital punishment. Despite the impassioned arguments of two members, the commission's text reflected widespread public opinion in favor of capital punishment.

In sum, the commission's initial hypothesis that public participation would influence the text of the constitution crucially cannot be said to have been proven. However, the value of the sense of ownership created by the public participation process is certain. It is the view of this author and other observers that during the tragic Ethiopian-Eritrean War of 1998–2000, the constitution became an important rallying point, causing the Eritrean people to close ranks behind their gov-

ernment. Equally certain is that the public was profoundly disappointed when the government went back on its word and refused to implement the constitution.

Constitution Making and Conflict Resolution

If the contention is accepted that public participation in constitution making creates, among the general public, a sense of ownership of a constitution, it follows that such a participatory process could also be used to facilitate conflict resolution. Such a process can create auspicious conditions for parties in conflict to bury the hatchet. What makes this plausible is an engaged public seeking to redefine its basic charter, a public that, conceivably, could pressure contesting elite leaders to compose their differences for the sake of a higher purpose. But how should those involved in the constitution-making process determine the issues that are appropriate for resolution through the process rather than through political negotiation? Some issues are hard to avoid by their very nature, as they force themselves on any entity mandated to organize and manage a constitution-making exercise; examples include grievances of certain sectors of societies, such as ethnic and religious minorities; the distribution of power between the national government and regions making up a country; the distribution of resources; electoral systems; the place of religion and language in the constitutional scheme; and the role of defense and security services.

The principle of inclusion requires that serious grievances must be heard during the constitution-making process. To begin with, minorities must be represented in constitutional commissions. Moreover, organized groups of such minorities should be given a chance to air their views in structured meetings and have their views debated, recorded, and submitted as part of the data that the drafting entity takes into account. This exer-

cise in itself opens avenues to resolve conflicts related to such issues. In the Eritrean experience, there were no ethnic- or religious-based grievances expressed or complaints submitted to the commission, although the issue of language was debated extensively, as will be further explained below. The question of whether certain sectors of society and institutions, such as churches, mosques, and the military, should be formally represented in or excluded from the official process of constitution making is a subject that different countries have answered in different ways. In Eritrea's case, the constitution makers meticulously separated religious institutions and the state, due to their desire to establish a secular state in a country evenly divided between Christians and Muslims. But members of different churches and Muslim clerics participated in the debate in their individual capacities. They made significant contributions, being among the better educated in their respective communities.⁴⁷

As for the military, at the time of constitution making, the members of the Eritrean armed forces occupied (and still occupy) a special place in Eritrea's history of armed struggle, having been crucial to the country's liberation. At that time, the military was composed almost entirely of former guerilla fighters who saw the constitution-making process as both a continuation of the liberation struggle and its consummation. Some military leaders expressed this sentiment repeatedly. The commission thus considered members of the military to be crucial to the process in their own right, as well as being a base of support for constitutional government in the future. Accordingly, the commission paid special attention to military figures in terms of their representation in organized seminars and debates, and they were receptive to the military's views on a range of issues. The commission sent some of its members to conduct seminars in many units of the armed forces, as well as in the national service train-

ing camp at Sawa, to record the proceedings of those meetings.

Among the questions listed above with which the Eritrean commission started its work, there was no controversy over the fundamental values that should be incorporated in the constitution, such as democracy, the rule of law, and social justice. There were, however, debates as to whether Eritrea should have an official language and how much power the national government should delegate to the country's various regions. The controlling principle in finding solutions to contentious issues through the constitution-making process should be respect for the will of the public and the strength of the feelings expressed regarding the issue concerned. This principle was applied in Eritrea.

The two issues of language and decentralization of power provide useful examples of the commission's approach to handling controversial issues. Language is one of those sensitive issues that interest groups can politicize easily, particularly in countries in which language is associated with national identity or religious sentiments. A constitution-making process, however, provides an opportunity to bring people together for mutual education on their differing perspectives and sentiments. Such an exercise can go a long way, as it did in Eritrea, toward minimizing politically motivated manipulation. In Eritrea's experience, the different views expressed on the language question may be grouped into four camps. The first camp was composed of people who insisted that Arabic and Tigrinya should be declared official languages. The second argued that Arabic, Tigrinya, and Tigre should be made official languages. The third argued that Tigrinya and Tigre should be official languages, as they were spoken by over 80 percent of the Eritrean population. The fourth camp accepted the commission's position, which simply declared the equality of all Eritrean languages—a principle espoused and practiced during the armed

struggle, supported by the PFDJ, and generally accepted by the public.

The majority of Eritreans who participated in the public debates during the process of constitution making were persuaded by the argument that it was better to leave the question of official language open and instead declare the equality of languages, and the commission felt justified in writing the essence of that argument into the draft constitution.⁴⁸ When the principle of equality became the controlling factor, instead of providing for one or more official languages, what should have been given constitutional backing was what had already been a government policy, that of developing all languages. The commission's proposals expressed it thusly:

We must handle the issue of language in a way that serves and strengthens our basic goal of building a unified and strong nation. The equality of all Eritrean languages, the cultural and psychological importance of starting education with the mother tongue, the need for a common medium of instruction from the middle to higher levels of education, the right of every citizen to use in government activities any language he/she chooses, are important considerations.⁴⁹

However, the commission duly noted the continued use of Arabic and Tigrinya as working languages, a practice that had started during the armed struggle, while leaving the matter open for possible future amendment in the event of demands to adopt a different language policy.⁵⁰ Ultimately, the commission's approach in this regard was adopted in the constitution's final text, an outcome that was largely due to the views expressed by a majority of the public.

As for the other main issue of contention, the division of power between the national government and the regional governments, the experiences of many African countries show that this subject must be handled carefully and has to be among the principal issues considered in the constitution-making process. The Constitutional Commission of

Eritrea decided to recommend the adoption of a unitary structure, with details on the degree of devolution of power to the regions to be settled by legislation. The commission offered the subject for public debate, indicating the small size of the country, the resource endowment of the various regions, the history of national unity, and the country's ethnic makeup as the major factors favoring a unitary rather than federal system.

Another issue related to conflict resolution and constitution making concerned traditional methods of conflict resolution. In much of Africa, traditionally evolved mechanisms resolve conflict through the mediation of elders; traditional African societies extolled the virtue of harmony and encouraged "out of court" settlement of disputes. Eritrea is no exception in this respect, and the constitutional commission constantly referred to this tradition and to the role of elders in conflict resolution, eventually incorporating the spirit of the tradition in the preamble to the constitution as follows: "Appreciating the fact that for the development and health of our society, it is necessary that we inherit and improve upon the traditional community-based assistance and fraternity, love for family, respect for elders, mutual respect and consideration."

The Commission's Approach to the Drafting Process

Constitution makers must address two principal and related questions: What should be included in a constitution and how long should it be? These questions logically raise another one: How does one determine what should or should not be included in a constitution? Is there a set of universally applicable criteria, or is each country's choice determined by specific historical conditions?

The answer to the last question must be both. From the writing of the U.S. constitution onward, modern constitutions have been

based on preceding models or experiences. At the same time, the historical conditions of a given country—its culture, social structure, and government policies—inevitably modify the outcome. How much this modification affects the universal principles differs from case to case. Scholars and statesmen have wrestled with the question and some have attempted to provide general rules for good constitution writing. Lord Brice, the British scholar, affirms the rule of brevity in writing a constitution, adding simplicity of language and precision as essential requirements. He ranks the U.S. constitution above all other hitherto 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 details."⁵¹

Drafting a constitution can thus be likened to both a work of art and an engineering exercise. It can test the writing skill of the best draftsman in choice of language, precision, and clarity, while at the same time requiring craftsmanship in building the edifice of state institutions. An edifice is built to last, and in the case of a constitutional edifice, it has to be built to weather the storms of changing political fortunes. Abbe Sieyes, who influenced constitution making in post-revolutionary France, counseled to "keep the constitution neutral," or at least open-ended in political and ideological terms—particularly for the bill of rights provisions, one might add, as otherwise, they may be too closely identified with "the transient fortunes of a particular party or pressure group, and rise and fall with them."⁵² This counsel justifies and explains the need for a core of professional legal personnel to lead the drafting of a constitution. Neutrality may be disputed as a controlling concept in this respect, but not objectivity. Even a partisan of a ruling party or group can see objectively the rationale behind Sieyes' counsel if the partisan is

forward-looking and also can see the perils of being wrapped in only present or parochial concerns.

In Eritrea's constitution-making experience, the commission met the above questions head-on. It insisted that the contents of the constitution "must reflect present realities as well as be mindful of future developments of the society." As the concluding paragraph of Part 1 of the commission's proposals states,

Our constitution has to be concise, clear and forward-looking; it has to be written in a general way rather than in detail, such that it will be amenable for future developments through a process of interpretation in response to future events. Its detailed implementation should be left to ordinary legislation.⁵³

With these general considerations in mind, the commission's Executive Committee reviewed the mass of documents that were the product of over two years of research, seminars, conferences, and public debate before writing the first draft. The draft that came out of the committee's discussions and was submitted for the commission's approval reflected the outcome of the previous two years' debate and the thinking of commission members.

Approval and Ratification of the Constitution

Approval

There were three steps in approving the draft constitution. The first concerned approval by the entire membership of the constitutional commission of the draft prepared by the Executive Committee. The latter was designated as a drafting committee at the commission's fifth regular meeting in August 1995. The second step in the process was approval by the National Assembly, which met July 2–4, 1996, and approved the draft with a few amendments.⁵⁴ The law establishing the commission provided that following the

National Assembly's approval of the draft constitution, the commission would distribute it to and receive comments from regional assemblies, localities, and members of professional, business, and civic organizations, as well as individual citizens.⁵⁵

Accordingly, the public debate on the approved draft was launched in mid-August 1996. The draft was published in Tigrinya, Arabic, and English, and widely distributed throughout Eritrea and shipped abroad for distribution among Eritrea's diaspora communities before debates began. The draft was also published in the weekly newspapers in the three languages and broadcast on the radio. As with the commission's proposals, the introductory meetings were launched by members of the Executive Committee in Eritrea's main urban centers.

It is out of the purview of this paper to discuss in detail the substance of the questions raised and changes introduced, but suffice it to say that several points were taken into account as a result of the debates. Moreover, the commission members who took part in the conduct of the public meetings were invited to introduce any suggestions for change on the basis of their experience in conducting the meetings. Similarly, the Executive Committee thoroughly reviewed the opinions of the External Panel of Advisors; several points were found to be helpful.

Ratification

The concept of ratification is not new to any people with a long history of organized life. What may be new is the form of ratification and the type of ratifying entity. In Eritrea, prescribing the ratifying entity meant providing for a constituent assembly.⁵⁶

The constituent assembly was composed of the seventy-five members of the National Assembly from the PFDJ, seventy-five members of the six regional assemblies, and seventy-five representatives of Eritreans liv-

ing abroad, elected by their respective communities.⁵⁷ Seen in comparative perspective with the practice of other countries, the composition of the constituent assembly was an interesting combination of national representatives. In Namibia, the first parliament, elected on the eve of independence, turned itself into a constituent assembly. In Ethiopia and Uganda, the respective constituent assemblies were formed by special national elections.

The Eritrean case had two novel features. The first was the representation of Eritreans living abroad, who were included in the process of constitution making through their participation in both the debates and the constituent assembly. These Eritreans were included in the process because of the critical role they played during the armed struggle in providing intellectual, diplomatic, and financial resources.⁵⁸ The second novel feature was the inclusion of elected members of the six regional assemblies along with the members of the National Assembly.

Why was it seen as necessary to have a constituent assembly approve the draft after the National Assembly approved it? This question is connected to the issue of legitimacy, with its theoretical and practical significance. The underlying assumption of the concept of legitimacy is that government is established by and on behalf of the people. Thus, the nation as a whole must be represented in the approval of its fundamental charter, and the election of an entity—a constituent assembly—to perform this supreme act of legitimization is a common practice, which the National Assembly adopted. In the Eritrean case, only the seventy-five representatives from abroad were elected specifically to ratify the constitution, thus arguably weakening the constituent assembly's value as a body in representing the public's interests in constitution making. Nevertheless, the law establishing the constituent assembly gave it power to ratify the draft con-

stitution “having conducted debates thereon and making all necessary amendments,”⁵⁹ and it did make a few useful amendments. It was not a mere ritual. The unusual use of two elected bodies to approve the constitution was related to political realities as well. The governing party, the PFDJ, wanted to maximize its control over the constitution-making process. As the PFDJ had complete political control of the National Assembly but not the constituent assembly, it envisioned the former as a filtering entity.

Problems of Promulgation and Implementation

Eritrean constitution makers chose to develop a concise constitution with built-in flexibility to facilitate constitutional development. This approach gave enormous power to the principal institutions of the state, especially the judiciary. The constitution also made no reference to transitional provisions, a regrettable omission, as it turned out. There are two ways to effect a transition in the practice of constitution making. One way is to write relevant requirements into the constitution itself, invariably under a section entitled “transitional provisions,” with details providing for the manner or timing of the transfer of power from the old to the newly elected government. The other way is to enact an enabling law that facilitates a transfer of power.⁶⁰ In the Eritrean case, the decision not to address the transition in the constitution was based on trust that the governing party would do what was necessary to fulfill the constitution's requirements and live up to popular expectations in implementing the document speedily and electing a new government based on the constitution. The decision was made because it was thought to allow flexibility.

Certain legal steps are required, however, to ensure the smooth transfer of power and help avoid confusion or conflicts in the law. Consequently, the constituent assembly was

given a key role in putting in place the legal measures necessary to facilitate the transition.⁶¹ The constituent assembly was given legislative powers to play that role, exclusively related to and effective until the constitution's implementation. Its intended function, in other words—in addition to ratification—was to act as a transitional parliament, facilitating a smooth transfer of power to a new National Assembly elected in accordance with constitutional requirements. In the meantime, the existing National Assembly was not disbanded; it continued to perform its normal functions. In reality, except for its role in ratifying the constitution, the constituent assembly has been dysfunctional and disregarded by the PFDJ. It did not take any of the legal steps required of it with respect to transferring power, thus contributing to the constitutional crisis that has prevailed to the present day.

Among the steps that the constituent assembly was supposed to take were those necessary to elect a new government. This requires passing an electoral law and establishing an electoral commission to organize such an election. It also may require passing a law authorizing the existing government to continue in power, pending the election of a government on the basis of the new constitution. There can be no power vacuum, not only for theoretical reasons that may seem esoteric, but also and above all for practical reasons. Furthermore, the constituent assembly's mandate necessitated enacting laws that create institutions, in addition to an electoral commission, necessary for the constitution to come into force and effect. Again, none of these necessary steps has been taken.

In addition to excluding transitional provisions, the constitution also did not provide for an effective date, further complicating the transition and implementation process. The question of an effective date, like the transition process generally, was left to be dealt with by the constituent assembly un-

der Proclamation 92/1996, which gave the constituent assembly the power “to take, or cause to be taken, all the necessary legal steps for the coming into force and effect of the constitution.”⁶² This approach was due, first, to the reality that a number of existing laws and institutions within Eritrea at the time, if left unchanged, would have violated provisions of the new constitution. The commission was persuaded that the government needed time to change these, and that imposing a deadline or specific time limit for doing so would create unnecessary problems, including legal confusion to the detriment of an already traumatized population upon whom four different legal systems had been foisted: Italian, British, Ethiopian, and now that of the fledgling PFDJ. In such circumstances, why not give the government flexibility to clear the deck of old laws and institutions and prepare the ground for the new constitutional order?

The second and related reason not to include an effective date was trust in the government, which only in retrospect was misplaced. It is easy to criticize the commission with the benefit of hindsight, but at the time, the commission had little reason to believe that President Isaias Afwerki would renege on his promises. By all appearances, the president and his PFDJ comrades were committed to a democratic transition to constitutional government and the rule of law. Many of his closest colleagues were shocked by his breach of faith.

What remains now is for the necessary institutions of the state to be created and elections to be held to fulfill the constitution's promise. The principal institutions are the top organs of the state, namely the legislature—the National Assembly—an independent judiciary to be the guardian of the law, and a dynamic executive branch with an efficient bureaucracy to execute the policies of the government. These institutions need to be created, or where they exist, stream-

lined to accord with the constitution. Thus, everything depends on the constitution's implementation.

Conclusion

As the foregoing discussion demonstrated, the Eritrean constitution was created with the government's complete support. Accordingly, all expectation was that it would be implemented very soon after it was ratified. This author had not imagined that a constitution created with so much government care and support would be shelved by the same government. Indeed, the care and support—themselves based on the promise of democracy and rule of law endorsed at two congresses of the ruling party—were such that, far from expecting the shelving of the constitution, the constitutional commission had every reason to believe that the government would implement it within a year of its ratification. The reason that the government gave for the delay was the 1998–2000 War with Ethiopia.

At the time of this writing, it has been eleven years since the constitution was ratified and eight years since the war ended, and the constitution remains shelved, gathering dust. This fact gives the lie to the government's reason for not implementing the constitution. Since the war ended, all demands for its implementation have been ignored. The issue has become a litmus test of the legitimacy of the ruling party and its leader, Isaias Afwerki, who has been ruling by decree.

In 2000, some high-ranking members of the ruling party, including several ministers and army generals, formally called on the president to implement the constitution, actually challenging him to abide by democratic principles of governance. As has already been noted, the president agreed to establish two committees with a view to implementing the constitution, one committee to draft an electoral law and another to regulate politi-

cal parties. Mahmud Sherifo, minister of regional government (who also acted as deputy president), was appointed to head the committee on political parties. It soon became clear, however, that the president had no intention of implementing the constitution. He dismissed Sherifo from his chairmanship of the committee and his ministerial post, short-circuiting the making of the law on regulating political parties. Sherifo and his comrades persisted in their demand to implement the constitution, publicizing it first to the members of the National Assembly, then to all members of the ruling party and the nation at large. The president sent threatening letters in response to their demand. Then, following the events of September 11, 2001, when the attention of the world community was focused on New York and Washington, he ordered the arrest of Sherifo and fourteen other ministers and generals. He also ordered the arrest of all of the editors and lead writers of the private newspapers in the country, which he ordered shut. All of the people thus arrested remain in detention, incommunicado, without being charged in a court of law. Partly as a result of such disrespect for the rule of law, and partly due to the general condition of economic hardship, several opposition political parties have sprouted in the diaspora, vowing to bring about constitutional democracy.

In view of all of the above, two related questions have been raised consistently regarding the issue of the constitution's implementation. First, could the constitutional commission have adopted a different approach in implementing the constitution? Second, can the ratified constitution, in whole or in part, have force and effect by the fact of its ratification?

Regarding the first question, the commission considered inserting a provision fixing an effective date. But because there were several statutes and other laws that contained provisions inconsistent with the constitution,

the commission thought it wise to give the government time and flexibility to bring such laws in line with the constitution. This necessarily implied the trust that the commission had in the government, on the strength of its record of supporting the constitution-making process and the resolutions of two-party congresses. Who would have thought that the PFDJ would go against its own resolution and promise?

Opinions are divided on the second question. One school of thought holds that the constitution must be considered as having come into effect, in its entirety, upon its ratification. The other school takes the position that the bill of rights chapter must be considered as having come into force, whereas the provisions dealing with establishing government institutions, in particular the legislative branch and executive that comes out of the legislature, must, by their very nature, await the constitution's implementation. The constituent assembly was supposed to deal with all of this.

The detained members of the ruling party were heading toward the above ends. But a president who was unwilling to be held accountable in a democratic system defeated their efforts. Thus, a process that was participatory and earned general admiration has been defeated by a willful president who hijacked the democratic process. As the saying goes, the operation was brilliant, but the patient is dead.

Eritrea's promising start was thus frustrated. After the foundation for democratic government was laid, an autocratic man sprung a surprise on the nation, violating past promises and popular expectations. Because dictators use some of the problems associated with democracy as excuses for the delay or denial of constitutional government, it is worth making two points in this respect. First, democracy is a worldwide phenomenon, and thoughtful people everywhere are convinced that there is no better alternative

to it. Nonetheless, no nation can afford to throw caution to the wind and push blindly for overnight democratization at any cost. This leads to the second point, namely that, once launched, constitutional government needs time to take root and flourish. However, this caution is no reason to block the road to democratic transition.

Notes

1. See, e.g., Jon Elster, "Constitutionalism in Eastern Europe: An Introduction," *University of Chicago Law Review*, vol. 58, no. 2 (1991), p. 447; Rett R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominion: Current Development," *Georgia Journal of International and Comparative Law*, vol. 23 (1993), p. 155. See also Richard A. Rosen, "Constitutional Process, Constitutionalism, and the Eritrean Experience," *North Carolina Journal of International and Commercial Regulation*, vol. 24, no. 2 (Winter 1999).

2. The above argument is based partly on my own personal experience in Eritrea's constitution making. It is hoped that such specific experience will contribute additional insight to the usual methodology.

3. Such meetings include the Conference on Constitutionalism in Africa, held at Makerere University in October 1999, and the Conference on Constitutional Design in the 21st Century, held at Notre Dame University in December 1999. Two volumes coming out of these conferences are edited, respectively, by Joseph Oloka-Onyango and Andrew Reynolds. See Joseph Oloka-Onyango, ed., *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* (Kampala: Fountain Publishers, 2001); and Andrew Reynolds, ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford: Oxford University Press, 2002).

4. Art. 4(4), Proclamation no. 55/1994.

5. See Bereket Habte Selassie, "The Eritrean Experience in Constitution Making: The Dialectic of Process and Substance," in Reynolds, *Architecture of Democracy*.

6. Lancaster House is the government building in London in which most of the independence constitutions of former British colonies were negotiated on the basis of drafts prepared by legal experts and bureaucrats of the departing colonial power.

7. See Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1991), p. 6.

8. See Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, 2nd ed. (New York: Harper Collins, 1947), p. 269.

9. *Ibid.*

10. *Ibid.*

11. See Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven, CT: Yale University Press, 1971).

12. *Ibid.*, p. 8.

13. "Democracy at Century's End," keynote address delivered at the National Humanities Center's third annual America Issues Forum. See *IDEAS*, vol. 4., no. 2 (1996), pp. 26–33.

14. Although it was the ELF that started the armed struggle in 1961, the EPLF emerged as a splinter group in 1970, eventually displacing the ELF and becoming the dominant front to defeat the Ethiopian army of occupation. After 1981, the ELF collapsed and left the field of armed struggle.

15. Bereket Habte Selassie, "Field Report: Creating a Constitution for Eritrea," *Journal of Democracy*, vol. 9, no. 2 (April 1998), p. 164.

16. Proclamation no. 37/1993.

17. Proclamation no. 55/1994.

18. James Tully, *Strange Multiplicities: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), p. 7.

19. See Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectic of Process and Substance* (Lawrenceville, NJ: Red Sea Press, 2003), p. 20, citing Tully, *Strange Multiplicities*, p. 7.

20. Selassie, *The Making of the Eritrean Constitution*, p. 7

21. *Ibid.*, p. 14.

22. Proclamation no. 55/1994, art. 4(2).

23. Art. 4(4) of Proclamation no. 55/1994.

24. Preamble to Proclamation no. 55/1994.

25. Art. 4(4) of Proclamation no. 5/1994. See Rosen, "Constitutional Process," p. 284.

26. Selassie, "Creating a Constitution for Eritrea," p. 167.

27. The chairman of the committee, Mahmud Sherifo, who at the time was minister of regional government and who deputized for the president in his absence, insisted on sharing his committee's

findings and the draft law with members of the National Assembly and then with the public at large. The president, on the other hand, required that the draft should be submitted to him and not distributed to members of the assembly. Sherifo would not budge, whereupon the president summarily dismissed him from his post as minister. Sherifo and other reformist assembly members then requested a meeting of the Central Council of the party and of the assembly to discuss this and other issues of contention, including the matter of formation of multiparties before the December 2001 elections. The president did not see this with favor, and the rift has continued to widen between him and the reformist group, which includes some of the heroes of the armed struggle.

28. The resolution of the Organization of African Unity summit held in Algiers in July 1999—demanding that, henceforth, no government formed as a result of a military coup should be recognized—is a hopeful sign that governments in the Africa of the twenty-first century will be sensitive to the question of legitimacy.

29. The author's recent experience as a consultant to the presidential committee on the 1999 constitution of Nigeria confirms the importance of process-driven constitution making or review. The committee adopted the commission model and convened several public meetings in various regions of the country, with generally satisfactory results. Some contentious issues were not resolved as a result of these meetings, but at least a beginning was made to thrash them out in future meetings. One such issue is the role of *sharia* in Nigeria's constitutional dispensation. Another is revenue sharing and its associated derivation principle, i.e., the share in revenue of the areas where resources such as oil are located.

30. Spain, Venezuela, and Zimbabwe provide three examples (examined in this volume) of constitution-making processes that involved both parliamentary or constituent assembly approval as well as a public referendum.

31. In the recent Nigerian review process, the presidential review committee did not accept the popular referendum that some elements of civil society demanded. In its report, dated February 2001, the committee explains its rejection of the referendum option by pointing out that referendums are better used in instances in which there is a single issue, or a few simple issues, requiring a yes-or-no answer.

32. On the customary laws of Eritrea, see Carlo Conti Rossini, *Principi di Diritto Consuetudinario dell'Eritrea* (Rome: Topografia dell'Unione, 1916).

33. These questions dealt with such issues as separation of powers; presidential or parliamentary (or mixed) government; limiting government powers; appointing government officials; powers, terms, and election of the executive branch; foreign relations leadership; the legislature (unicameral or bicameral, election, role, etc.); the judiciary; emergency suspension of the constitution; decentralization; the military's role; religion; basic rights guarantees; guarding minority rights; political parties and their roles; control of the economy; school curricula; mass media; nationality; the connection between international and national law; amending the constitution; and ratification of the constitution.

34. Rosen, "Constitutional Process," p. 285.

35. International Symposium on the Making of the Eritrean Constitution, Asmara, January 6–12, 1995.

36. These eight papers were: 1) *The Electoral System*; 2) *The Legislative Branch*; 3) *Women and the Constitution*; 4) *Decentralization*; 5) *Chapter on Fundamental Rights and Freedom in the Constitution*; 6) *The Executive Branch and the Structure of Government—Which System is Appropriate for Eritrea?*; 7) *The Judiciary*; and 8) *Defense and Security Institutions*. See Rosen, "Constitutional Process," p. 286, n. 128.

37. Rosen, "Constitutional Process," pp. 291–92.

38. Dec. 1966, 99 U.N.T.S. 171, and 993 U.N.T.S. 3. Article 1 of each covenant provides: "All peoples have the right of self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social, and cultural development."

39. Rosen, "Constitutional Process," p. 292.

40. *Ibid.*, p. 292.

41. *Ibid.*, p. 286.

42. *Ibid.*, pp. 285–88.

43. Rosen, "Constitutional Process," p. 293.

44. Selassie, *The Making of the Eritrean Constitution*, 31–32.

45. See Report on Civic Education, Constitutional Commission of Eritrea, February 1996.

46. The young man put it this way: "The constitution proclaims freedom of religion as a fundamental right. I am a devout Muslim, and according

to my religion any swearing of an oath must be done in the name of Allah. If you force the draft's version, you would be violating my religious right."

47. Soon after the start of the process, as chairman of the commission, I invited the heads of the various religious bodies—the mufti of the Muslim community, the archbishop (later patriarch) of the Eritrean Orthodox Church, and the heads of the Catholic and Protestant communities of Eritrea—for a meeting in my office. At that meeting, I explained to them the commission's position on religion: that religion is a fundamental human right and freedom of worship would be one of the cardinal principles of the constitution's bill of rights, and that the commission was dedicated to the principle of the separation of church/mosque and state. Each of the participants expressed support for this. Throughout the process, I maintained contact with these leaders in various capacities, and they graced the commission with their presence.

48. Language persists as a contentious issue, principally centered around the demand by Muslim intellectuals that Arabic be an official language together with Tigrinya. Referring to the fact that the two languages were made official languages under the UN-imposed constitution of 1952, the intellectuals argue that this represents the aspirations of the Muslim segment of the Eritrean population, which comprises approximately 50 percent of the whole population, and that such aspirations must be given due weight in the constitutional scheme. An additional consideration is that Arabic is the language of the Holy Quran, which every Muslim child is expected to study in the Quranic schools. Opposing the idea of making any language official, the commission replied by pointing out that Arabic and Tigrinya are working languages of the state and are both taught at government schools. To insist on officializing language, apart from derogating from the principle of equality of languages, would unduly politicize the issue. It is possible that when the time comes to amend any of the articles of the constitution, this issue will be among the first to be tabled.

49. See Proclamation no. 86/1996, p. 24.

50. In fact, there is a strong movement among Muslim intellectual elites (who depend on Arabic for their own careers) demanding an amendment of the article on language.

51. See Edward McWhinney, *Constitution-Making Principles, Process, Practice* (Toronto: University of Toronto Press, 1981), quoting Russell F.

Moore, *Modern Constitutions* (Ames, IA: Littlefield, Adams, 1957), p. 12.

52. McWhinney, *Constitution-Making Principles*, p. 134.

53. See Commission's Proposal.

54. Pursuant to art. 4(4) of Proclamation no. 55/1994.

55. See art. 5 of Proclamation no. 55/1994.

56. Proclamation no. 92/1996.

57. The seventy-five seats assigned to Eritreans living abroad were distributed in accordance with the number of residents, divided into Ethiopia, Sudan, the Arabian peninsula, Europe, and North America, comprising the United States and Canada.

58. Again, during the 1998–2000 so-called border war with Ethiopia, Eritreans in the diaspora played a crucial role in providing similar resources.

59. Proclamation no. 92/1996, art. 3(1).

60. Constitutions of countries that have a legacy of numerous laws and a complex history and society, such as South Africa and Nigeria, follow the first method. The South African constitution is perhaps the world's most detailed constitution. Eritrea followed the second method; its constitution is one of the world's shortest.

61. Proclamation no. 92/1996, art. 3(2).

62. Proclamation no. 92/1996, art. 3(2).