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## Constitutional Process, Constitutionalism, and the Eritrean Experience

### Cover Page Footnote

International Law; Commercial Law; Law

# Constitutional Process, Constitutionalism, and the Eritrean Experience

Richard A. Rosen<sup>†</sup>

## I. Introduction

Discussion of comparative constitution-making processes is a burgeoning academic field, spurred of late by the spate of constitution-making in Eastern Europe following the dissolution of the Soviet Union.<sup>1</sup> This Article examines the making of a constitution in a different corner of the world – in Eritrea, a small, newly independent nation in the Horn of Africa.

There is a personal touch to this Article. I spent the 1995-96 academic year teaching as a Fulbright Lecturer in Law at the University of Asmara, the sole university in Eritrea. My stay coincided with the latter stages of the Eritrean constitution-drafting process. Although I had almost nothing to do with this process,<sup>2</sup> I was keenly aware of the debates around me concerning

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<sup>1</sup> For a description of the constitution-making process in Eastern Europe, see Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT'L & COMP. L. 155 (1993) AND Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447 (1991) [hereinafter *Constitutionalism in Eastern Europe*]. See also Péter Paczolay, *Constitutional Transition and Legal Continuity*, 8 CONN. J. INT'L L. 559 (1993) (considering the 1989 constitutional revolution in Hungary); Romyana Kolarova, *Tacit Agreements in the Bulgarian Transition to Democracy: Minority Rights and Constitutionalism*, U. CHI. L. SCH. ROUNDTABLE 23 (1993); Paul M. Schwartz, *Constitutional Change and Constitutional Legitimation: The Example of German Unification*, 31 HOUS. L. REV. 1027 (1994); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 9 (1996) (describing “burst of constitution making” at the end of cold war).

<sup>2</sup> Most people I met upon my return to the United States assumed that any

one or another of the constitutional issues then being discussed. I also knew some of the major actors who were drafting the Constitution—most notably, Bereket Habte Selassie, the Chairman of the Constitutional Commission of Eritrea (CCE), who is also a Professor in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill,<sup>3</sup> and several of my Eritrean colleagues in Asmara were also deeply involved in the process. They, along with other Eritreans I knew, participated in various town meetings, radio and television programs, and debates surrounding the constitutional process.<sup>4</sup> Issues such as whether to designate national languages in the Constitution,<sup>5</sup> the wisdom of limiting the number of terms the President could serve,<sup>6</sup> and whether the President should be directly elected or elected by the legislature,<sup>7</sup> were constantly discussed. I found these questions fascinating and their resolution important, perhaps vital, to the future of Eritrea. Indeed, there is

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American law professor in a developing country at the time a constitution was being written had to have played a major role in writing it. In fact, my involvement in the creation of the Eritrean Constitution was limited to discussions with Eritrean friends who were working on it. As will be discussed more fully below, the drafting of the Eritrean Constitution was an Eritrean project, from beginning to end, and foreign influence, including mine, was minimal. This is not to say that foreigners were excluded from *any* participation in the Eritrean constitutional process. The Constitutional Commission of Eritrea did create an International Advisory Board, which met in Asmara and provided some input for the Eritrean drafters. *See infra* notes 112-28 and accompanying text.

<sup>3</sup> For a brief account of some of Dr. Bereket's other accomplishments, *see infra* note 102. My reliance on first names to describe Eritreans in this Article is consistent with Eritrean practice. The second name of a person is his or her father's name and is most commonly used to distinguish between two people with the same first name.

<sup>4</sup> Unfortunately (at least from my point of view), almost all of this activity was conducted in Tigrigna, the dominant language of Asmara and the highlands surrounding the city. Activities in other parts of the country were conducted in Arabic or in one of the predominant languages of the specific locale. Thus, aside from information shared in classroom debates by my students, which were conducted in English, I had to rely on accounts from others as to what was said in the various fora.

<sup>5</sup> The Eritreans decided not to mandate a national language. In fact, a provision in the constitution dictates that "[t]he equality of all Eritrean languages is guaranteed." ERI. CONST. ch. I, art. 4(3).

<sup>6</sup> Two five-year terms was the final constitutional maximum. *See id.* ch. V, art. 41.

<sup>7</sup> The Eritreans chose the latter. The President is to be elected by a majority of all National Assembly members, following nomination by 20% of the Assembly. *See id.*

certainly a law review article to be written about the content of the Constitution of Eritrea, but this is not that Article.

What interested me most was the process swirling around me. The Eritreans had embarked, self-consciously, on a protracted and public process of constitution-making, and had done so in a society largely illiterate and among the poorest in the world.<sup>8</sup> The Eritrean government had determined that a large amount of the scarce human resources in Eritrea, and some of the best minds, would be devoted to this project, although these resources were also needed, often desperately, for other tasks in this war-shattered country.<sup>9</sup> Was this worth it? What difference would it make? Would it not have been better to put the Commission members together in a room for a month or two with orders to produce a Constitution? Did the extended process itself have an independent value? Would the Eritreans have been better off calling a Constitutional Convention on the American model?

This Article addresses these questions, applying standards that have been used to evaluate constitution-drafting processes worldwide. First, however, in Part II, the Article begins with a short history of Eritrea, for it is necessary to understand the context in which any constitution-making process occurs before evaluating that process.<sup>10</sup> Part III of this Article examines constitutionalism and discusses theories of comparative constitution-making.<sup>11</sup> Part IV provides a more complete description of the Eritrean process of constitution-drafting,<sup>12</sup> and Part V attempts to evaluate the Eritrean process in light of the

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<sup>8</sup> Only 20% of Eritreans are literate in one or more of the nation's many languages. See Roy Pateman, *Eritrea Takes Center Stage*, CURRENT HIST., May 1994, at 228, 229 [hereinafter *Center Stage*]. A 1993 World Bank study estimated annual income in Eritrea to be between \$70 and \$150 a year, less than half the \$330 average for other sub-Saharan African nations. See Dan Connell, *Eritrea: An Island of Stability in Strife-Filled Africa*, CHRISTIAN SCI. MONITOR, Nov. 30, 1994, at 10 [hereinafter *Island of Stability*].

<sup>9</sup> There was some external funding support from foreign nations. See *infra* note 115.

<sup>10</sup> See *infra* notes 14-51 and accompanying text.

<sup>11</sup> See *infra* notes 52-75 and accompanying text.

<sup>12</sup> See *infra* notes 76-184 and accompanying text.

values and criteria described in Part III.<sup>13</sup> Finally, Part VI concludes that although it is too soon to determine whether the Eritrean Constitutional venture will ultimately be successful, the constitution-making process that led to the final draft of the Eritrean Constitution was, overall, a positive one.

## II. Eritrea—A Brief Description

Few Americans know much about Eritrea. To the extent it has flashed across the consciousness here, it has usually been in connection with the terrible drought of the 1980s, the long war for independence from Ethiopia,<sup>14</sup> or one of the conflicts involving Eritrea and its neighbors.<sup>15</sup>

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<sup>13</sup> See *infra* notes 185-226 and accompanying text.

<sup>14</sup> See *infra* notes 37-47 and accompanying text.

<sup>15</sup> Forces from Eritrea and Yemen briefly fought over possession of the Hanish Islands, an island group in the southern Red Sea, in late 1995 and 1996. See Daniel Dzurek, *The Hanish Islands Dispute*, 1 ERI. STUD. REV. 133, 133 (1996). The conflicting claims for the strategically located islands date back to the end of the Ottoman Empire and to Eritrea's colonial period. See *id.* Eritrea and Yemen agreed to French-sponsored arbitration in 1996. See *id.* On October 9, 1998, the Permanent Court of Arbitration issued its decision, awarding Eritrea a series of small islets near the Eritrean coast but giving the major islands under dispute to Yemen. See The Eritrea-Yemen Arbitration (visited Mar. 29, 1999) <[http://www.geocities.com/Eureka/Park/5875/News/Analysis\\_Nov15\\_Hanish.html](http://www.geocities.com/Eureka/Park/5875/News/Analysis_Nov15_Hanish.html)> (providing a link to <<http://www.ibru.dur.ac.uk>> where the full decision can be accessed). Both sides accepted the ruling, and relations between the two states were normalized. See *Eritrea and Yemen: Islands' Sovereignty*, N.Y. TIMES, Oct. 14, 1998, at A6, available in LEXIS, News Library, Majpap File.

Eritrea has also experienced tense relations with Sudan. In December 1994, the Eritrean government ended diplomatic relations with Sudan amid allegations that Sudan was helping armed Islamic groups enter Eritrea and engage Eritrean forces. See *Eritrea Breaks Diplomatic Relations with Sudan*, COMPASS NEWSWIRE, Dec. 6, 1994, at 1, available in LEXIS, News Library, Non-US File; see generally Ruth Iyob, *The Eritrean Experiment: A Cautious Pragmatism?*, 35 J. MOD. AFR. STUD. 647 (1997) [hereinafter *Eritrean Experiment*]. Most recently, Ethiopia and Eritrea have battled over a border dispute involving boundaries dating back to the early 1900's, from the early Italian colonial period. See Ian Fisher, *Wherever That Town Is, Someone Will Die for It*, N.Y. TIMES, Mar. 14, 1999, § 4, at 16, available in LEXIS, News Library, Majpap File. In May 1998, Eritrean forces moved into the Badme region and fighting lasted for a month. See *id.* Fighting erupted again February 6, 1999 and by February 26, 1999 Ethiopia had succeeded in pushing the Eritreans out of Badme. See *id.* At that time, Eritrea agreed to a peace proposal that was drafted by the Organization of African Unity in 1998. See *id.* Ethiopia, however, has not agreed to a truce and fighting along the border has continued. See *id.*

One way to describe Eritrea, geographically, ethnically, and culturally, is that it is a place where Africa meets the Middle East. Geographically, the Red Sea borders Eritrea on the north, with Arab Saudi Arabia and Yemen directly across the narrow waters.<sup>16</sup> African Ethiopia is on the south, while the Sudan, now riven with civil war between its largely African south and its Arab, Muslim north, lies to the north and west.<sup>17</sup> Eritrea shares a border with even tinier Djibouti in the southeast.<sup>18</sup>

The ethnic, religious, and linguistic composition of Eritrea also reflects this confluence of two worlds and a history of migrations (and invasions) from the Arab north and west and African south. The population, estimated (there has been no census in modern times) at between two and one-half and three and one-half million people,<sup>19</sup> is roughly half Muslim and half Coptic Christian.<sup>20</sup> Although there is a fair amount of intermingling, the Muslims generally inhabit the northern coastal region and the western lowlands, while the Copts occupy the highlands and southern regions.<sup>21</sup> Most of the highland Christians speak Tigrigna and are ethnically and linguistically close to the inhabitants of the northern Tigrai province of Ethiopia,<sup>22</sup> while the majority of the lowland Muslims speak Tigre and have historically used Arabic as the

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<sup>16</sup> See DAVID POOL, MINORITY RIGHTS GROUP INT'L, ERITREA: TOWARD UNITY IN DIVERSITY 7 (1997) [hereinafter UNITY IN DIVERSITY].

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* Conflict-ridden Somalia occupies the rest of the Horn of Africa but does not border Eritrea. See DAVID POOL, ERITREA—AFRICA'S LONGEST WAR 6 (1982) [hereinafter LONGEST WAR].

<sup>19</sup> In addition to the lack of a census, the large number of refugees still returning to the country makes a more accurate count impossible. See RANDALL FEGLEY, ERITREA xvi (World Bibliographical Series Vol. 181, 1995); see also UNITY IN DIVERSITY, *supra* note 16, at 8. Although many Eritrean refugees have returned to the nation, 700,000 still live in the Diaspora, including 500,000 in the Sudan. See ROY PATEMAN, ERITREA: EVEN THE STONES ARE BURNING 252-53 (1998) [hereinafter STONES].

<sup>20</sup> See STONES, *supra* note 19, at 4-5. There is a small but noticeable Roman Catholic population left from the years of Italian rule, as well as various Protestant denominations. See *id.* One small ethnic group, the Kunama, is mostly Muslim and animist but includes some Christians. See *id.* at 5.

<sup>21</sup> See FEGLEY, *supra* note 19, at xvii; Roy Pateman, *The Legacy of Eritrea's National Question*, SOC'Y, Sept.-Oct. 1996, at 37, 39 [hereinafter *Legacy*].

<sup>22</sup> See FEGLEY, *supra* note 19, at xvii.

language of education in the Koranic schools.<sup>23</sup>

Eritrea is primarily rural and very poor. The capital and only sizable city, Asmara, perches on the edge of the Red Sea escarpment and has a population of approximately 400,000.<sup>24</sup> Most of the population consists of highland peasant farmers struggling to wrest survival from drought-ridden, rocky land, and lowland farmers and pastoralists tending their crops and animals.<sup>25</sup> Since its independence, Eritrea is constantly ranked among the world's poorest nations<sup>26</sup> with an annual per capita income estimated at between \$70 and \$150 per person.<sup>27</sup>

### A. *Early History of Eritrea*

At one time or another, various parts of Eritrea were ruled by the Ottomans, Egyptians, Axumites, Ethiopians, and a sundry of

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<sup>23</sup> See UNITY IN DIVERSITY, *supra* note 16, at 8, 21. There are actually nine officially recognized ethnic groups in Eritrea, but a large majority of the population belongs to one of the two groups discussed in the text. See *id.* at 8-9.

<sup>24</sup> There are two port cities, Massawa and Assab. Massawa is the major port for Eritrea proper and is connected by road to Asmara. A railroad between Massawa and Asmara, constructed by the Italians during Eritrea's colonial period and dismantled during the war with Ethiopia, is being rebuilt. Assab, situated close to the Eritrea and Djibouti border, is not connected by internal road to the rest of Eritrea; it has traditionally served as a port for Ethiopia. One can only travel overland from Asmara or Massawa to Assab by going through Ethiopia or by taking a several day journey on unpaved tracks through the scorchingly hot Dankalia Depression.

The other notable city is Keren, the gateway from the highlands to the western lowlands, which has a population of about 50,000. About 20% of Eritreans live in the cities mentioned above or in towns, with the rest living in rural areas. See STONES, *supra* note 19, at 4.

<sup>25</sup> See UNITY IN DIVERSITY, *supra* note 16, at 8. Despite Eritrea's large percentage of agricultural workers, imports, much of it in foreign aid, were still necessary for approximately one-third of Eritrea's food needs in 1994. See STONES, *supra* note 19, at 242. Understandably, the Eritrean government considers food security for the nation to be an important national goal. See *id.*

<sup>26</sup> By some estimates, however, the Eritrean economy is growing at a rate of 7% to 10% a year, and foreign nations have provided \$250 million in loans through the World Bank to aid economic growth. See STONES, *supra* note 19, at 240. The Eritrean government appears committed to a mixed market economy led by a private sector and governed by liberal trade policies. See *id.*

<sup>27</sup> See *Island of Stability*, *supra* note 8, at 10. As in much of the developing world, a large part of the population lives outside of the money economy, so estimates vary greatly.

indigenous and foreign powers.<sup>28</sup> Until recently, there was no identifiable political entity that could be considered a precursor for Eritrea.<sup>29</sup> This changed with the Italian colonization in the second half of the nineteenth century. In 1889, Eritrea was formally recognized as an Italian colony by the Treaty of Uccali between Italy and Emperor Menelik of Ethiopia.<sup>30</sup> Eritrea has existed as a colony, state, administrative unit, or nation within these borders ever since.<sup>31</sup> The Italians ruled the colony until they were defeated by the British during World War II, and a British military administration governed Eritrea until 1952.<sup>32</sup>

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<sup>28</sup> See BEREKET HABTE SELASSIE, *CONFLICT AND INTERVENTION IN THE HORN OF AFRICA* 49-51 (1980) [hereinafter *HORN OF AFRICA*].

<sup>29</sup> See Minasse Haile, *The Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 482 (1994).

<sup>30</sup> See *HORN OF AFRICA*, *supra* note 28, at 51-55. In 1869, the opening of the Suez Canal marked the beginning of an increased Italian presence in the Horn of Africa. Between 1869 and 1880, the Italian Rubattino Navigation Company bought land near the port of Assab from local chiefs, and the Italian government assumed control of the area in 1882. *See id.* at 51-52. In the late 1880's, an Italian drive inland, which included the occupation of Massawa, ended temporarily in a defeat by Ethiopian forces. *See id.* at 52. However, Emperor Yohannes of Ethiopia, Menelik's predecessor, was killed battling Islamic Mahdist neighbors in western Ethiopia in 1889. *See* Haile, *supra* note 29, at 483. Emperor Menelik was thus content to allow Italian control of the Eritrean region, via the Treaty of Ucciali and the 1896 Addis Ababa Treaty, as a buffer between Ethiopia and his Mahdist adversaries in the Sudan. *See id.*; *see also* FEGLEY, *supra* note 19, at xxxii. The name "Eritrea," chosen by the king of Italy for the new colony in 1890, comes from the term *Mare Erythraeum* (Red Sea) used by Roman geographers who mapped the area. *See* FEGLEY, *supra* note 19, at xxxiii.

<sup>31</sup> *See* *HORN OF AFRICA*, *supra* note 28, at 49-51.

<sup>32</sup> The British never indicated an interest in acquiring permanent control over Eritrea and seem to have viewed their occupation as a necessary corollary to the military and political imperatives of the war and its aftermath. *See* OOKBAZGHI YOHANNES, *ERITREA, A PAWN IN WORLD POLITICS* 51-54 (1991). They did, however, have an interest in dividing Eritrea so that the Sudan, a British colony, could acquire western Eritrea. *See id.* at 53. To that end, the British promoted Islam and Arabic in the western part of Eritrea and stressed ethnic ties rather than nationalist unity in their policies. *See id.* Eritreans tend to remember the British most for their willingness to allow the conquered Italians to continue to exercise colonial prerogatives (for example, Italian judges still presided over disputes between Eritrean and Italian landowners) and for their dismantling of much of the Italian-built industrial base of Eritrea to areas of more importance to the British. *See id.* at 52-53. From 1941 through 1947, the British occupiers removed industrial equipment worth £85 million from Eritrea. *See id.* at 54. The result was a sharp decline in the production of coffee, gold, and other important commodities. *See id.* During this time, the British even distributed 10,000 acres of

During the latter stages of the British rule, the United Nations (U.N.) accepted the task of resolving the question of the future of Eritrea.<sup>33</sup> The U.N. held hearings in Eritrea, where various competing factions supported union with Ethiopia, partition, or independence.<sup>34</sup> A divided U.N. panel compromised by recommending that Eritrea receive autonomy within a federated Ethiopia.<sup>35</sup> This formula, replete with a U.N.-drafted Constitution for Eritrea and provisions for an Eritrean National Assembly within the larger Ethiopian state, was the choice of the General Assembly.<sup>36</sup>

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Eritrean land to demobilized Italian soldiers. *See id.* at 54-55.

<sup>33</sup> *See* Semere Haile, *Historical Background to the Ethiopia-Eritrea Conflict*, in *THE LONG STRUGGLE OF ERITREA* 19, 19 (Lionel Cliff & Basil Davidson eds., 1988). By the terms of a peace treaty between Italy and the Four Powers (Britain, France, the Soviet Union, and the United States), ratified by Italy on August 2, 1947, Italy renounced all rights in its colonies. *See id.* A Four-Power Commission of Investigation was created to determine the desires of former colonials, and the commission submitted a report to the Four Powers' Council of Foreign Ministers on August 31, 1948. *See id.* However, the Council could not agree on the colonies' fate by September 15, as required by the treaty with Italy. *See id.* The treaty mandated that in the absence of an agreement, the United Nations would handle the matter of the colonies. *See id.*

<sup>34</sup> The Unionist party, originally founded by Ethiopian Emperor Haile Selassie as the Society for the Love of the Land of Eritrea in 1941, was committed to union between Ethiopia and Eritrea. *See* STONES, *supra* note 19, at 68. The Independence Bloc and the Eritrean Liberal Progressive Party sought an independent, undivided Eritrea. *See id.* at 68-69. Although the Unionists were in the minority in a Four Power-sponsored 1947 election, an Ethiopian-sponsored intimidation campaign by the Unionists led to a three-way split in the Independence Bloc in 1950, with one group willing to settle for federation with Ethiopia and another only seeking independence for western Eritrea. *See id.* at 71. Some delegations to the U.N. Commission of Inquiry for Eritrea, however, did advocate independence, but the Commission professed some difficulty in determining the political views of the majority of Eritreans. *See* DAN CONNELL, *AGAINST ALL ODDS: A CHRONICLE OF THE ERITREAN REVOLUTION* 55-56 (1993) [hereinafter *AGAINST ALL ODDS*].

<sup>35</sup> Within the U.N.'s five-member commission, Norway, South Africa, and Burma preferred a federation relationship between Eritrea and Ethiopia, while Guatemala and Pakistan favored eventual Eritrean independence. *See* BEREKET HABTE SELASSIE, *ERITREA AND THE UNITED NATIONS* 33 (1989) [hereinafter *ERITREA AND THE UNITED NATIONS*].

<sup>36</sup> The General Assembly adopted this federation plan as Resolution 390(V) on December 2, 1950, by a vote of 46 to 10 (with four abstentions). *See* BOUTROS BOUTROS-GHALI, *Introduction to THE UNITED NATIONS AND THE INDEPENDENCE OF ERITREA* at 10-11, U.N. Sales No. E. 96.I.10 (1996); *see also* G.A. Res. 390(V), U.N. GAOR, 5<sup>th</sup> Sess., Supp. No. 20, U.N. Doc A/1775 (1950) (concerning the General Assembly resolution regarding Eritrea).

*B. Eritrea, Ethiopia, and the Struggle for Independence*

The United Nations may not have noticed the inevitable contradiction caused by creating an autonomous democratic polity within one of the world's last remaining absolute monarchies, but Emperor Haile Selassie of Ethiopia certainly did. Never enamored by challenges to his authority, he steadily eroded the Eritreans' independence and power, and in 1962 he formally dissolved the federation and annexed Eritrea for Ethiopia.<sup>37</sup>

By 1961, political resistance to the Ethiopianization of Eritrea led to the first sporadic instances of armed struggle, and, as the decade progressed, this defiance coalesced into a potent guerrilla force under the leadership of the Eritrean Liberation Front (ELF).<sup>38</sup> However, the ELF, rooted in the Muslim community of Eritrea, never successfully absorbed the growing influx of Christian highlanders who, chafing under the increasing Ethiopian domination of Eritrea, flocked to join the struggle.<sup>39</sup> In the early 1970s, a group of ELF commanders, both Muslim and Christian, defected from the ELF and formed a rival group, the Eritrean People's Liberation Front (EPLF), which pursued an aggressively

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<sup>37</sup> See STONES, *supra* note 19, at 6. Steps toward annexation included the banning of political parties in 1956 and the replacement of the Eritrean flag with that of Ethiopia in 1960. See *id.*

<sup>38</sup> See AGAINST ALL ODDS, *supra* note 34, at 58. The first Eritrean group to struggle against the Ethiopian state in this era was actually the Eritrean Liberation Movement (ELM), established in 1958. See *id.* The ELM proclaimed a secular approach to resistance and later competed with the ELF for support, sometimes in armed combat. See *id.* By 1965, however, the ELF had become the dominant resistance force in Eritrea. See RUTH IYOB, *THE ERITREAN STRUGGLE FOR INDEPENDENCE* 106 (1995) [hereinafter INDEPENDENCE].

<sup>39</sup> The tension between Christians and Muslims in the ELF was exacerbated by ELF food raids on Christian villagers and the Ethiopian Army's establishment of a special anti-guerrilla division recruited largely from Christian regions. See INDEPENDENCE, *supra* note 38, at 113. The ELF leadership tried to handle the sectarian differences by creating separate Muslim and Christian battalions, which led, at times, to charges of discrimination against the Christians and sometimes even to battles between the sectarian forces. See HAGGAI ERLICH, *THE STRUGGLE OVER ERITREA 1962-1978* 23 (1983). In 1967, for example, Muslim fighters were trained in Syria, where the Ba'thist regime saw Eritrea as part of the Arabic world, while Christian fighters were trained in Sudan, where the fighters were forbidden to speak Tigrigna and told that the ELF's goal was to "Arabize" Eritrea. See *id.* 23-24. In one incident, a number of Christian guerrillas were killed by fellow rebels under suspicion of spying for Ethiopia. See UNITY IN DIVERSITY, *supra* note 16, at 11.

secular and non-sectarian policy of uniting all of the ethnic groups and religions in Eritrea behind the liberation struggle.<sup>40</sup>

Despite strong military and political backing from the United States and other Western powers, Haile Selassie was unable to quell the Eritrean uprising. Increasing political unrest in Ethiopia proper undermined his efforts to subdue Eritrea, and the Emperor was removed from power and, some believe, murdered in the mid 1970s.<sup>41</sup> By this time, an Eritrean victory by either political or military means seemed within grasp.<sup>42</sup> This changed abruptly in 1978, when the ruling Ethiopian junta, the Dergue,<sup>43</sup> declared Ethiopia a socialist state and received massive military assistance from the Soviet Union and its allies. The ELF and EPLF were driven back from the environs of Asmara into the hinterlands,<sup>44</sup> and a new stage of the Eritrean-Ethiopian conflict began.

During the 1970s and early 1980s, the two dominant Eritrean liberation forces sporadically fought each other as well as the Ethiopians. By the mid 1980s, the EPLF had vanquished the ELF and had become the only significant armed resistance movement on Eritrean soil.<sup>45</sup> The EPLF fighters survived continual Ethiopian (and Soviet) offensives, and by the late 1980s they were beginning

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<sup>40</sup> See *AGAINST ALL ODDS*, *supra* note 34, at 79, 83. At its inception in February 1972, the EPLF included Christian rebels (comprising more than half of its fighters) and a Foreign Mission led by an Arab Nationalist. See *ERLICH*, *supra* note 39, at 31. A nationalist focus and Marxist ideology were key unifying forces for the religiously diverse movement. See *id.*

<sup>41</sup> For a fascinating account of the last years of Haile Selassie's rule and of his ultimate fall from power, see RYSZARD KAPUSCINKI, *THE EMPEROR: DOWNFALL OF AN AUTOCRAT* (William R. Brand & Katerzyna Mroczkowska-Brand trans., Vintage Books 1984) (1983).

<sup>42</sup> See *LONGEST WAR*, *supra* note 18, at 54. At the end of 1977, the EPLF and ELF together held all of Eritrea except Asmara, a few isolated garrisons, and parts of the area around the port of Massawa.

<sup>43</sup> *Dergue* means "Committee" in Amharic. Amharic was the language of the Ethiopian ruling class until 1991.

<sup>44</sup> See *INDEPENDENCE*, *supra* note 38, at 130. From 1978 to 1980, the Dergue began five offensives in Eritrea, enabling them to recapture key towns and forcing the EPLF to retreat to a base in Sahel in northern Eritrea. See *id.*

<sup>45</sup> See *id.* at 131. In 1980 and 1981, the EPLF pushed ELF units into the Sudan, where the remnant, influenced by foreign governments, splintered into shifting alliances. See *AGAINST ALL ODDS*, *supra* note 34, at 208.

to claim significant battlefield victories.<sup>46</sup> As the fighting continued, the EPLF gradually shed its Marxist ideology, and as early as 1987 it enunciated a new vision of a future Eritrean society—non-aligned, secular, pluralistic, democratic, and, most of all, independent—which was to become the basis of the future constitutional venture.<sup>47</sup>

### C. *Eritrean Independence*

In 1991, the EPLF liberated Asmara, allowing the Ethiopian troops and their supporters to leave.<sup>48</sup> A short time later, the allied Eritrean and Ethiopian guerrilla forces overthrew the Dergue.<sup>49</sup> Since the liberation of Asmara in 1991, Eritrea has been ruled by a Provisional Government consisting almost entirely of the leadership of the EPLF, now reconstituted as the People's Front for Democratic Justice (PFDJ) and headed by Isaias Afwerki, the wartime leader of the EPLF.<sup>50</sup> The Eritreans postponed formal independence until a U.N.-supervised referendum could be held, and finally declared the existence of their new nation in May 1993, after more than 99.8% of the population voted for independence.<sup>51</sup>

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<sup>46</sup> See INDEPENDENCE, *supra* note 38, at 132-34.

<sup>47</sup> See *id.* at 132. The "new vision" was announced at the EPLF's Second Congress in 1987 and represented a revision of the 1977 National Democratic Programme. See *id.* The revised program also contained significant organizational and political changes, including new provisions on developing a multi-party political system and a mixed economy. See *id.*

<sup>48</sup> See *id.* at 136.

<sup>49</sup> The EPLF allied itself with the Ethiopian People's Revolutionary Democratic Front (EPRDF) for a series of coordinated attacks on the Ethiopian government of Mengistu Hailemariam, who fled to Zimbabwe on May 21. See *id.* The combined forces seized the Ethiopian capital, Addis Ababa, on May 28. See *id.* Subsequently, the new Transitional Government of Ethiopia endorsed Eritrea's demand for self-determination. See *id.* at 136-38.

<sup>50</sup> See STONES, *supra* note 19, at 238-39.

<sup>51</sup> See INDEPENDENCE, *supra* note 38, at 137-41. For an historical account of Eritrea and of the long Eritrean struggle for independence, see generally AGAINST ALL ODDS, *supra* note 34; INDEPENDENCE, *supra* note 38; STONES, *supra* note 19; Thomas Keneally, *In Eritrea*, N.Y. TIMES, Sept. 27, 1987, § 6 (Magazine), at 42; Robert D. Kaplan, *The Loneliest War: Civil War in Ethiopia*, ATLANTIC, July 1998. For a fascinating fictionalized account of the latter stages of the fight for independence, see THOMAS KENEALLY, *TO ASMARA* (1989). There are also a number of first hand accounts by those who lived through this time. See ABEBA TESFAGIORGIS, *A PAINFUL SEASON*, A

### III. Evaluating Constitutional Process

#### A. Substance

The first, and most obvious, way to measure any constitution-making process is to determine whether the drafters produced a constitution that provides, for the citizens and their state, an optimal chance for survival, growth, and renewal of the polity.<sup>52</sup> The constitution must provide for various governmental structures and must allocate power and responsibilities between the different branches of government. Constitutions also set out the rights of the people vis-a-vis the government and provide limitations on governmental authority and power.<sup>53</sup> To be useful, the provisions adopted must reflect not only sound political theory but also the values and historical experiences of the people whom the constitution will govern.<sup>54</sup>

Since the focus of this Article is on the process of making the Eritrean Constitution rather than the document's substance, I will not discuss the Constitution itself in detail. However, it is worth remarking briefly on some of the provisions that reflect on the chances for democracy and the rule of law to succeed in Eritrea. The Eritrean Constitution drafters produced a compact but inclusive constitution, one that resembles the U.S. Constitution in its brevity and generality,<sup>55</sup> but which also reflects the Eritrean emphasis on national unity and inclusiveness. It includes provisions for a fully independent judiciary with plenary powers of

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STUBBORN HOPE (1992); ILLEN GHEBRAI, *ERITREA: MIRACLELAND* (1993).

<sup>52</sup> As Professor Bruce Ackerman notes, it is up to the constitution drafters to "somehow hammer out the guiding principles of their movement into an enduring form that will shape political action in the years ahead." BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 49 (1992) [hereinafter *LIBERAL REVOLUTION*].

<sup>53</sup> See Cass R. Sunstein, *Constitutions and Democracies: An Epilogue*, in *CONSTITUTIONALISM AND DEMOCRACY* 327, 327 (Jon Elster & Rune Slagstad eds., 1988) (noting the role of constitutions in limiting the power of governments, including majoritarian governments).

<sup>54</sup> See Ludwikowski, *supra* note 1, at 158 (noting that one significant reason for the failure of constitutions in the Third World was the tendency to copy constitutional structures from pre-existing models, regardless of their applicability to the particular situation).

<sup>55</sup> The Eritrean Constitution contains 59 articles in 7 chapters. See *ERI. CONST.*

judicial review,<sup>56</sup> as well as strong guarantees of individual rights,<sup>57</sup> especially rights for women.<sup>58</sup> The President is limited to two five year terms,<sup>59</sup> and the conditions under which the Constitution can be suspended are strictly limited, both in duration and in effect.<sup>60</sup> One can quarrel about some of the choices made by the Eritrean drafters – for a centralized rather than a federal state,<sup>61</sup> for a unicameral legislature,<sup>62</sup> or for election of the President by the legislature instead of by popular vote<sup>63</sup> – and still conclude that it is a reasonable, well-written Constitution. It is a Constitution written by and for Eritreans,<sup>64</sup> and is one which offers every opportunity for democracy and the rule of law to flourish in the particular circumstances of Eritrean society.

### *B. Fostering Constitutionalism*

The world, unfortunately, is cluttered with reasonable, well-written constitutions, many of which have turned out to have little more value than the wallpaper on the houses of the politicians and generals who have ignored them.<sup>65</sup> The history of constitutional failures leads to the second widely accepted measure of a constitutional process—the extent to which the process fosters

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<sup>56</sup> See *id.* ch. VI, arts. 48, 49.

<sup>57</sup> See *id.* ch. III.

<sup>58</sup> “[T]he fact that Eritrean women’s heroic participation in the struggle for independence . . . will serve as an unshakable foundation for our commitment to create a society in which women and men shall interact on the bases of mutual respect, solidarity and equality.” *Id.* pmbl. For more on the constitutional process and women’s rights, see *infra* notes 101-49 and accompanying text.

<sup>59</sup> See ERI. CONST. ch. V, art. 41.

<sup>60</sup> See *id.* ch. III, arts. 26, 27.

<sup>61</sup> See *id.* ch. I, art. 1(5) (establishing Eritrea as a unitary State divided into units of local government).

<sup>62</sup> See *id.* ch. IV.

<sup>63</sup> See *id.* ch. V, art. 41.

<sup>64</sup> See *infra* notes 201-06 and accompanying text.

<sup>65</sup> See, e.g., Bruce Ackerman, *Essay, The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997) [hereinafter *World Constitutionalism*] (discussing failed constitutional experiments); Ludwikowski, *supra* note 1, at 158; ZIYAD MOTALA, CONSTITUTION MAKING IN AFRICA: MOVING BEYOND ETHNIC BASED CONSTITUTIONS TOWARDS A RESPONSIVE AND DEMOCRATIC CONSTITUTION 14-20 (discussing failed liberal constitutional models in post-independence Africa).

constitutionalism.

Constitutionalism is the societal acceptance of the rule of law under the constitution. It recognizes the constitution as the basic compact between the people and the government, above all other laws, serving as the ultimate arbiter of all disputes. It is a basic requirement of an enduring constitutional order.<sup>66</sup> It is the philosophy that forces a leader to leave office, despite desiring to retain it, if the constitution so dictates; it is the doctrine that makes those wishing to replace a leader follow the rules in the constitution rather than resort to other means. If constitutionalism is sufficiently imbued in a society, even a faulty constitution can survive, by amendment or adaption. If it is absent, the most carefully crafted constitutional document is virtually worthless.<sup>67</sup>

The relationship between the constitution-making process and the fostering of constitutionalism is at best imperfect,<sup>68</sup> but it is indisputable that the manner of constitution-making *can* significantly impact the development of constitutionalism by fostering the legitimacy of the constitution as the basic source of

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<sup>66</sup> This concept of constitutionalism presupposes a written constitution recognized as the supreme law of the land, and is consonant with the American experience. See GRIFFIN, *supra* note 1, at 13. Further, "the idea of conducting government under law is the core of American constitutionalism." *Id.*; see also Anthony Lewis, *Panel I: The Constitutional Culture of America*, in THE LEGACY OF THE CONSTITUTION: AN ASSESSMENT FOR THE THIRD CENTURY 38-39 (William S. Livingston ed., 1987) (noting "civil religion" in the United States is based on the notion of the Constitution as a higher law). There are, however, other definitions given to the term. See GRIFFIN, *supra* note 1, at 11 (discussing different concepts of constitutionalism); Sunstein, *supra* note 53 (describing the "dramatically different" forms of constitutionalism); Thomas C. Grey, *Constitutionalism: An Analytic Framework*, in NOMOS XX: CONSTITUTIONALISM 189, 189 (J. Roland Pennock & John W. Chapman eds., 1979) (discussing "long-standing confusion" about the meaning of constitutionalism).

<sup>67</sup> The existence of a written constitution is insufficient to limit government abuses and arbitrariness, as demonstrated by countries, such as apartheid-era South Africa, where the Constitution was used to support an unjust and oppressive regime. See Gordon J. Schochet, *Introduction: Constitutionalism, Liberalism, and the Study of Politics*, in NOMOS XX: CONSTITUTIONALISM, *supra* note 66, at 1, 5.

<sup>68</sup> Of course, the constitution-drafting process is only one ingredient in the development of constitutionalism, and there is more than one example of a flourishing constitutional regime created by imperfect means. See, e.g., Viktor Mayer-Schonberger, *Into the Heart of the State: Intervention Through Constitution-Making*, 8 TEMP. INT'L & COMP. L.J. 315 (discussing U.S. intervention in constitution-making in the Philippines and in post-war Germany and Japan).

law within the society.<sup>69</sup> To foster constitutionalism, the process itself must be sufficiently transparent, and there must be sufficient popular participation to allow the constitution to be claimed as a product of popular sovereignty of the peoples' will, rather than an expression of their rulers' interests.<sup>70</sup> In a society which has limited experience with successful constitutional governance, and in which the notions of democracy, constitutionalism, and the rule of law are not well developed, the drafters must also popularize and educate the people about these concepts, for a people cannot be wedded to something which they do not understand.<sup>71</sup>

The constitution-making process can also foster constitutionalism by its impact on the rulers. Like the rest of the

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<sup>69</sup> One of the strongest proponents of this viewpoint is Professor Bruce Ackerman who has discussed the wave of constitution-making in Eastern Europe. See LIBERAL REVOLUTION, *supra* note 52; *World Constitutionalism*, *supra* note 65. There was a period of time when constitutional failures in the nineteenth and twentieth century, in European countries like Spain, Weimar Germany, and developing countries throughout the world, led many to look at the whole notion of constitutional process and constitutionalism with a jaundiced eye. See *World Constitutionalism*, *supra* note 65, at 771 (noting jaundiced view of constitution-making and constitutionalism). Ackerman is not alone, for, as Andrew Arato has noted, the process used for drafting and implementing a constitutional process is an essential ingredient for constitutional success or, at the very least, "can hardly be seen as irrelevant." Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 191 (1995).

<sup>70</sup> See David A.J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda For Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 14-15 (1993) (noting that popular discussion and debate in American constitution-making was important for the legitimacy of institutions created by the Constitution); see also Arato, *supra* note 69, at 205. According to Arato, Hannah Arendt saw "the extraordinary commitment of a large number of (admittedly self-selected) people to political debate, discussion and participation" as the great hallmark of the U.S. and French constitutional movements of the late 18th Century. *Id.* (citing HANNAH ARENDT, ON REVOLUTION 162 (1965)).

<sup>71</sup> Ultimately, no objective is more important than civic education—the inculcation of civic virtues. A viable democracy requires that citizens understand that liberty is not license, that the open society depends on mutual tolerance, that rights have a universal quality. A people who do not understand the basic precepts of free government are unlikely to keep it alive and vibrant.

A.E. Dick Howard, *Constitution Making in Central and Eastern Europe*, 28 SUFFOLK U. L. REV. 5, 15-16 (1994); see also Alan S. Rosenbaum, *Introduction to CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION* 5 (Alan S. Rosenbaum ed., 1988) (noting the importance of constitutionalism for development of democracy in societies with long non-democratic traditions).

populace, those in charge of society are often quite uneducated in constitutional values. Constitution-making is often made possible by revolution, or at least by years of struggle, political or military, against authoritarian or dictatorial regimes, and these are not conditions likely to produce rulers fully steeped in the wisdom of limited government and attuned to the blessings of constitutional faith.<sup>72</sup> Further, the more the rulers publicly commit themselves to the constitutional venture and announce that the ultimate success of their revolutionary venture will be embodied in the constitution, the harder it will be for them, or their successors, to turn around and cast aside its provisions.<sup>73</sup>

Exactly how to accomplish these goals—to produce a worthwhile constitution, to involve the society and the rulers in the process while educating them about the value of constitutionalism—is another matter.<sup>74</sup> The means available must of necessity differ, for the particular factors of each society in its own epoch of constitution-making both limit the constitutional process and provide unique opportunities for the realization of constitutionalism.<sup>75</sup> History does not judge the makers of a

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<sup>72</sup> See Jon Elster, *Essay: Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. J. 364, 394 (1995) [hereinafter *Forces and Mechanisms*] (noting that the turbulent conditions that produce the opportunity for constitution-making tend to foster passion rather than reason, and thus “the task of constitution making generally emerges in conditions that are likely to work against good constitution making”).

<sup>73</sup> Ackerman notes that once the elite accept the constitution, it will be more difficult for them to upset the “constitutional equilibrium.” LIBERAL REVOLUTION, *supra* note 52, at 62; see also Rosenbaum, *supra* note 71, at 5 (noting the importance of commitment of contemporary rulers to the constitutionalization of society); GRIFFIN, *supra* note 1, at 15 (noting the importance of political actors accepting the constitution as the fundamental law).

<sup>74</sup> As recently as 1995, one commentator, John Elster, noted the absence of a meaningful body of literature “that deals with the constitution-making process in a positive, explanatory perspective . . . . [T]here is not, to my knowledge, a single book or even article that considers the process of constitution-making, in its full generality, as a distinctive object of positive analysis.” *Forces and Mechanisms*, *supra* note 72, at 364. Elster believes that what is needed is literature fully discussing “the optimal design of the constitution-making process, an issue that is both separate from and indirectly related to the issue of designing the optimal constitution.” *Id.* at 365.

<sup>75</sup> “In a given situation, the circumstances must take priority in the analysis, for among them lie the important factors of a country’s or a culture’s own constitutional experience, from which it is possible to learn.” Arato, *supra* note 69, at 219. Given the apparent success of the American constitutional venture, as well as the United States’

constitution on whether they used some theoretically perfect procedure, or even whether they measured up well to that procedure in the abstract. Ultimately, the test has to be whether the drafters used well their own particular historical moment, with all of its opportunities and limitations.

#### IV. Creating the Eritrean Constitution

##### A. *The Historical Moment*

Eritrea's epoch for constitution-making began in the spring of 1993, when independence was formally proclaimed. The practical problems facing the country were huge: extreme poverty, a nation ravaged by decades of war, deprivation, and at times even famine. The population was largely illiterate,<sup>76</sup> with almost no history of democratic governance at the national level.<sup>77</sup> The country's infrastructure had been destroyed,<sup>78</sup> education neglected,<sup>79</sup> and the

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current dominance in the world, it is perhaps inevitable for the American constitutional process to have become, in some minds, the model for all constitutional processes, the lodestar by which other processes are measured. Perhaps the leading proponent of this "American exceptionalism" is Professor Bruce Ackerman. In his writings, Ackerman describes (or often prescribes) constitution-making procedures from those states emerging from the ruins of the Soviet empire. See LIBERAL REVOLUTION, *supra* note 52; *World Constitutionalism*, *supra* note 65. Ackerman notes that the constitutional convention is "one of the most famous American contributions to the fund of Western political thought and practice." LIBERAL REVOLUTION, *supra* note 52, at 51. Ackerman sees the requirement of separate ratifying conventions elected separately from existing governments as the "second decisive step" in the constitutional process. *Id.* at 54. However, Ackerman's emphasis on exporting the American model has been strongly criticized. See Arato, *supra* note 69, at 213; David Golove, *Liberal Revolution, Constitutionalism and the Consolidation of Democracy: A Review of Bruce Ackerman's THE FUTURE OF LIBERAL REVOLUTION*, 1993 WIS. L. REV. 1591, 1594 (1993) (book review); Book Note, *We The People of . . . Europe?*, 106 HARV. L. REV. 1364 (1993) (reviewing BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992)).

<sup>76</sup> See Steve Steinberg, *Audacious Eritrea: Hope Springs on the Horn*, *NEWSDAY*, Jan. 15, 1995, at A52; *supra* note 8.

<sup>77</sup> Democracy does, however, have some roots in the traditional culture of Eritrea, with the village council, or *baito*, playing an important judicial and administrative role throughout much of Eritrean rural society. See *UNITY IN DIVERSITY*, *supra* note 16, at 25. During such village assemblies, leaders were elected in democratic fashion. See Paulos Zaid, *Indigenous Democracy, Single Spirit*, *ERI. PROFILE*, Jan. 11, 1997, at 4.

<sup>78</sup> See *AGAINST ALL ODDS*, *supra* note 34, at 248.

<sup>79</sup> See *STONES*, *supra* note 19, at 221.

sole university virtually dismantled.<sup>80</sup> Many of the best and most educated had died in the war or had abandoned their intellectual pursuits for life in the trenches.<sup>81</sup> It would be no easy task to involve the population in anything other than the mechanics of survival and rebuilding of the economy.

Most of the people could not be reached by the one television station in the country, which at that time broadcast only sporadically.<sup>82</sup> More people did have some access to radio.<sup>83</sup> A significant number of Eritreans, some estimate over one million, remained in the Diaspora, in Ethiopia proper, in Sudanese refugee camps, or were scattered throughout the rest of the world.<sup>84</sup>

The Eritreans did have one significant asset—Eritrea, *circa* 1993, presented almost a textbook example of what Bruce Ackerman has called a “constitutional moment,”<sup>85</sup> a crucial point in time when a victorious revolutionary movement has an

<sup>80</sup> See Andrea Useem, *Eritrea Strives to Transform A Struggling University Into A Vital Institution*, CHRON. HIGHER LEARNING, May 29, 1998, at A47; STONES, *supra* note 19, at 247; Craig Calhoun & Pamela DeLargy, *Rights After Liberation*, DISSENT, Summer 1996, at 129, 130.

<sup>81</sup> Approximately 100,000 men and women fought (without pay) in the liberation struggle, and demobilization has been an important political issue. See Roy Pateman, *Eritrea Takes a World Stage*, CURRENT HIST., May 1994, at 229. Meanwhile, Eritrea continues to lack the teachers, doctors, lawyers, and other professionals that are essential to transforming both the economy and society. See *id.*

<sup>82</sup> See Steinberg, *supra* note 76. Mr. Steinberg led a workshop on television production for Eritrean TV.

<sup>83</sup> The EPLF used radio to communicate with the general populace during the liberation struggle. See *id.*; see also Interview by Menghis Samuel with Dr. Bereket Habte Selassie, Chairman, Constitution Commission of Eritrea (Aug. 7, 1994) (visited Jan. 26, 1999) <[http://www.primenet.com/~ephrem/Interview\\_Bereket](http://www.primenet.com/~ephrem/Interview_Bereket)> [hereinafter Menghis Samuel's Interview of Dr. Bereket] (“[I]f you want to reach a vast majority of people [in Eritrea], you have to use Radio.”).

<sup>84</sup> See STONES, *supra* note 19, at 252-53; John Balzar, *An Expectant Eritrea Calls Its Children Home*, CHARLOTTE OBSERVER, June 4, 1995, at 22A.

<sup>85</sup> LIBERAL REVOLUTION, *supra* note 52, at 49. This is a time, according to Ackerman, that revolutionaries can:

somehow hammer out the guiding principles of their movement into an enduring form that will shape political action in the years ahead. Writing a constitutional text offers an opportunity for a victorious movement to make a collective effort both to frame their fundamental principles and to mobilize broad popular support for their crucial initiatives.

*Id.*

unparalleled opportunity to transform triumphal unity into a constitution that could “function for the wider public as the central symbol of its revolutionary achievement and become, over time, the center of an enlightened kind of patriotism.”<sup>86</sup> The Eritreans had achieved victory against overwhelming odds. They seemed united as a people and had established their new society with minimum rancor, even against the Ethiopians. They confirmed their collective desire for independence and national unity by an overwhelming referendum result in favor of independence.<sup>87</sup>

Even the overwhelming unity, however, presented a problem for successfully fostering constitutionalism. The unity that pervaded Eritrea in 1993 was unusual in its magnitude. There were no functioning opposition political parties in 1993<sup>88</sup> and, aside from organized religion, virtually no functioning civil society at all outside of the EPLF/PFDJ and its connected organizations. No independent Eritrean political parties had been allowed by the Ethiopians,<sup>89</sup> and the EPLF had long since eliminated the rival ELF as a meaningful political voice inside the country.<sup>90</sup> The government in place was unmistakably a partially transformed military government, and there was no indication that it was interested in fostering a current opposition within the society.

There was, therefore, little opportunity for the Eritreans to engage in the sort of political horse-trading that characterized the American constitutional process, as well as some of the more recent constitutional endeavors; a process which by its nature ensures that at least some of the different interest groups in the society have their say in the constitutional design.<sup>91</sup> There is no

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<sup>86</sup> *Id.* at 61.

<sup>87</sup> *See supra* note 51 and accompanying text.

<sup>88</sup> *See Eritrean Experiment, supra* note 15, at 667.

<sup>89</sup> *See AGAINST ALL ODDS, supra* note 34, at 57.

<sup>90</sup> *See supra* note 45 and accompanying text.

<sup>91</sup> *See, e.g.,* Elizabeth F. Defeis, *Armenian Constitutional Referendum: Towards A Democratic Process*, 9 TEMP. INT’L & COMP. L.J. 269 (1995) (noting that the Armenian constitutional process was characterized by challenging political elites in the dominant political party and organizing several new, smaller political parties); Elster, *supra* note 1 (discussing the role of various opposition forces in constitution-making in post cold-war Eastern Europe); Albie Sachs, *The Creation of South Africa’s Constitution*, 41 N.Y.L.

such thing, however, as absolute and lasting national unity. Different segments of society, even if temporarily united behind a nationalist goal, like independence, have different interests—ethnic, religious, economic—and constitution-makers ignore these interests only at a grave risk for the development of a healthy constitutionalism.

Indeed, the potential divisions within Eritrean society, especially the religious and ethnic ones, were necessarily a matter of serious concern to the Eritrean constitution drafters. This is a society with nine recognized ethnic groups, and with a population half Christian and half Muslim.<sup>92</sup> There was a history of sectarianism between these groups up until the ascendancy of the EPLF,<sup>93</sup> and Eritrea's religious and related ethnic divisions are frighteningly similar to those that have torn apart other African countries, such as Nigeria and the neighboring Sudan.<sup>94</sup> Religion and ethnicity were problems that had to be addressed so that all groups would feel included in the process and would develop a stake in the coming constitution.

Potentially even more intractable was the problem of gender and women's role in society. In this regard, the division was not between Christian and Muslim, but between the traditional society, both Christian and Muslim, and a victorious army of freedom

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SCH. L. REV. 669 (1997) (noting there were "two main 'blocs' involved in the South African constitutional process).

<sup>92</sup> See Calhoun & Delargy, *supra* note 80, at 131.

<sup>93</sup> For more on the Islamic and Christian schism that marked much of the early Eritrean resistance movement, see *supra* notes 39-40 and accompanying text. Political conflicts between Muslims and Christians in Eritrea date back to at least the 1940s, when parties, such as the Moslem League (ML) and the Christian Unionist Party (UP), independently sought to define Eritrean identity. See INDEPENDENCE, *supra* note 38, at 56-57. Later, the ELF emphasized Pan-Islamic unity to encourage aid from Arab states. See *id.* The formation of the EPLF in 1972, with joint Muslim and Christian leadership, marked a significant step toward nationalist, nonsectarian unity, but the societal divisions remained. See ERLICH, *supra* note 39, at 31.

<sup>94</sup> See John S. Pabee, *Religious Human Rights in Africa*, 10 EMORY INT'L L. REV. 163, 164-65 (1996). Nigeria was divided between Christian and Islamic parts of the country. See *id.* at 164. As in the Sudan and Nigeria, see *id.* at 164-65, the religious differences in Eritrea also reflected, to an uncomfortable degree, ethnic differences, with Coptic, Tigrigna-speaking highlanders related to their Ethiopian neighbors to the south, and the Muslim, Tigre and Arabic-speaking lowlanders more connected to their Arab Muslim brethren to the north. See *supra* notes 16-23 and accompanying text (addressing religious and geographic divisions in Eritrea).

fighters that had a long history of supporting equality for women and, perhaps more than any other liberation movement in history, had incorporated women in the larger struggle at all levels.<sup>95</sup> The status of women was an issue that loomed larger than all others.<sup>96</sup> In some ways, it is symbolic of the overall difficulties inherent in trying to draw up a modern, liberal, and democratic constitution for a nation still steeped in its traditional ways. Inevitably, this contradiction became for many the focus of the upcoming constitutional dialogue.

A final difficulty facing the constitution-makers was the lack of a significant constitutional tradition among the Eritrean population. Eritrea had never before been an independent nation,<sup>97</sup> nor had its constituent parts ever had any significant experience with constitutionalism. Neither the Italians nor the British had introduced a written constitution during their administration of the colony. The U.N.-dictated 1952 Eritrean Constitution had no roots in the populace and was largely ignored by Haile Selassie until he finally abrogated it.<sup>98</sup> After the federation dissolved, the Ethiopian Constitution was theoretically applicable to Eritrea, but it was based on the absolute sovereignty of the Emperor and never had

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<sup>95</sup> Estimates vary, but as many as 30% of EPLF fighters were women. See John Balzar, *Horror to Hope: Birth of a Nation*, L.A. TIMES, May 23, 1995 at A8; see also UNITY IN DIVERSITY, *supra* note 16, at 19 (estimating women comprised 13% of front-line fighters and 30% of EPLF membership). Women's rights were a significant part of the EPLF's National Democratic Programme of 1977. See NATIONAL DEMOCRATIC PROGRAMME OF THE ERITREAN PEOPLE'S LIBERATION FRONT 30 (1977) [hereinafter EPLF PROGRAMME]. Also during the struggle, the EPLF's Central Committee mandated a comprehensive marriage law in 1977, applicable to Eritrean fighters, which gave unprecedented rights to Eritrean women. See AGAINST ALL ODDS, *supra* note 34, at 132.

<sup>96</sup> When the Constitutional Commission of Eritrea held the first meeting of its Advisory Board on Customary laws, elders from various Eritrean ethnic groups identified the issue of women's rights as the most controversial issue involved in reconciling customary laws with internationally recognized human rights standards. See Daniel Mebrahtu, *Ripe Time*, ERI. PROFILE, Aug. 26, 1995, at 3. This prediction proved accurate, as is clear from accounts of the seminars and meetings held in the upcoming years. From my days in Asmara, I have vivid images of khaki-clad freedom fighter women walking down the streets side-by-side with fully cloaked women in traditional garb. This was more than a visual contradiction; it accurately reflected the coexistence of two societies on the streets of the country.

<sup>97</sup> See YOHANNES, *supra* note 32, at 1.

<sup>98</sup> See *supra* note 37 and accompanying text.

any meaningful impact in Eritrea, especially after the ascension of the Dergue in the mid-1970s.<sup>99</sup>

So while the Eritreans may have had the constitutional moment, they had no easy road to constitutional success.

### *B. Drafting an Eritrean Constitution*

In April 1993, shortly after the results of the overwhelming vote for independence from Ethiopia had been certified and independence declared, the Provisional Government of Eritrea issued a proclamation calling for the establishment of a Constitutional Commission.<sup>100</sup> The Commission was charged with drafting a democratic constitution and organizing public participation in the constitutional process.<sup>101</sup> In July 1993, Eritrean President Isaias Afwerki asked noted Eritrean scholar Bereket Habte Selassie to chair this commission.<sup>102</sup>

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<sup>99</sup> During the first few years of the Dergue's rule, Eritreans and Ethiopians alike endured torture and mass arrests. See AGAINST ALL ODDS, *supra* note 34, at 19. In Ethiopia, a campaign of street executions in 1976, known as the "Red Terror," included the slaughter of more than 10,000 people to destroy the Dergue's opposition. See *id.* In one nine-month period during the same year in Eritrea, an estimated 450 civilians were killed and 1,000 were arrested and sent to prisons in Asmara. See *id.*

<sup>100</sup> See ERI. PROC. NO. 37/1993 (1993).

<sup>101</sup> See *id.*; see also CONSTITUTIONAL COMMISSION OF ERITREA, CONSTITUTIONAL PROPOSALS FOR PUBLIC DEBATE 3 (1995) [hereinafter CCE: PROPOSALS]; Mussa Hussein Naib, The Eritrean Constitution-Making Process and Its Philosophy 3 (1998) (unpublished Degree of Law thesis, University of Asmara) (on file with author). Mussa Naib, now the Attorney General of Eritrea, served as a member of the Executive Committee of the Constitutional Commission of Eritrea, and his academic thesis, on the Eritrean constitutional process, is drawn largely from his own experiences. See *id.* at 1.

<sup>102</sup> See Interview with Dr. Bereket Habte Selassie, William E. Leuchtenburg Professor of African Studies at the University of North Carolina at Chapel Hill, in Chapel Hill, N.C., at 4 (July 9-10, 1997) [hereinafter Dr. Bereket Interview].

Dr. Bereket has a long and distinguished history. Holder of both a Ph.D. and an L.L.B. from the University of London, he served as both the Attorney General and a Supreme Court Justice in Haile Selassie's Imperial Ethiopia before fleeing Ethiopia in the mid-1970s to join the EPLF. See Peggy Ann Hoyle, Eritrean National Identity: The Role of Education and the Constitution 151 (1997) (unpublished Ph.D. dissertation, University of North Carolina (Chapel Hill)) (on file with author). After two years with the fighters inside Eritrea, he went to the United States and, between 1985 and 1991, served as the EPLF representative at the United Nations. See Dr. Bereket Interview, *supra*, at 4. In 1993, he was on the faculty of Howard University's Department of African Studies, see Hoyle, *supra*, at 151, and is currently on the faculty at the

Following extensive preparatory work, including the drafting of the enabling legislation and a budget,<sup>103</sup> the proclamation actually creating the Constitutional Commission and the parameters of the upcoming process was issued in March 1994.<sup>104</sup> The commission was to be composed of fifty members, and was to be representative of the diverse Eritrean populace.<sup>105</sup> The Commission was charged not only with drafting a constitution for the country, but also with the responsibility to “organize and manage a wide-ranging and all embracing national debate and education through public seminars and lecture series on constitutional principles and practices.”<sup>106</sup>

One month later, the fifty members of the Commission were appointed, as were those among the fifty who were to serve on the ten-member Executive Committee.<sup>107</sup> The members represented

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University of North Carolina at Chapel Hill.

Dr. Bereket is also widely published. His books include *CONFLICT AND INTERVENTION IN THE HORN OF AFRICA*, *supra* note 28, and *ERITREA AND THE UNITED NATIONS*, *supra* note 35. See Dr. Bereket Interview, *supra*, at 3.

<sup>103</sup> Dr. Bereket prepared a budget estimate of \$4.5 million in the fall of 1993 and discussed possible Commission members with Eritrean President Isaias Afwerki. See Dr. Bereket Interview, *supra* note 102, at 15. Dr. Bereket also drafted the basic legislation establishing the Constitutional Commission, later enacted as Eritrean Proclamation No. 55/1994. See *id.* at 22.

<sup>104</sup> ERI. PROC. NO. 55/1994 art. 4, § 1 (1994) reads:

The mission of the Commission shall be:

1) To draft a constitution on the basis of which a democratic order would be established, and which, as the basic law, shall be the ultimate point of reference of all the laws of the country, and the final arbiter of all basic issues in dispute.

The other listed missions of the Commission are to organize national debate and education, see *infra* note 106 and accompanying text; to “seek and receive assistance in funds, written materials in additional expert opinion on different constitutional practices . . . and to learn from the experience of other countries”; and “to present to the National Assembly a Draft Constitution . . . and to prepare a final draft . . . for eventual submission to a democratically formed representative body.” *Id.* art. 4, § 4. Article 5 empowers the Commission to carry out these missions via seminars, forums, issuing directives, and drafting a constitution. See *id.* art. 5.

<sup>105</sup> Eritrean Proclamation No. 55/1994 art. 6, § 1 mandates a fifty-member Council of the Commission, and art. 6, § 2 states that “[t]he members of the Council shall be experts and other citizens with proven ability to make a contribution to the process of constitution making representing a cross-section of Eritrean society.”

<sup>106</sup> *Id.* art. 4, § 2.

<sup>107</sup> Eritrean Proclamation No. 55/1994 art. 6, § 1 states that “[t]he council of the

Eritreans from many backgrounds.<sup>108</sup> All nine of the distinct Eritrean ethnic groups were represented, as were Christians, Muslims, and animists.<sup>109</sup> The ages of the members ranged from thirty-four to eighty-two.<sup>110</sup> Women were assigned twenty-one of the fifty places on the Commission.<sup>111</sup>

The actual drafting process can best be characterized as one in which broad constitutional principles were consistently refined, narrowed, and given concrete substance. The Commission started the process by creating four *ad hoc* committees to conduct research into substantive areas, as well as a separate committee to handle civic education and public debate.<sup>112</sup> Two advisory boards were created: a fifteen member Advisory Board of Foreign Experts, which included lawyers and scholars from Africa, Europe and the United States,<sup>113</sup> and an Advisory Board on Customary

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Commission (hereinafter the Council) shall be composed of fifty (50) members elected by the National Assembly." The Proclamation also creates an Executive Committee, *see id.* art. 9, and the positions of Chairman of Council, *see id.* art. 12, Vice-Chairman of Council, *see id.* art. 13, and Secretary of Council, *see id.* art. 14, but does not provide a method of selecting members for these positions. In September 1993, Dr. Bereket recommended, but did not appoint, several Eritreans, mostly lawyers, to Eritrean President Isaias Afwerki as possible members of the Constitutional Commission's Executive Committee. *See* Dr. Bereket Interview, *supra* note 102, at 7. The Eritrean government and ruling PFDJ chose other members. *See id.* at 8-9.

<sup>108</sup> *See* Dr. Bereket Interview, *supra* note 102, at 9.

<sup>109</sup> *See id.*

<sup>110</sup> *See* Hoyle, *supra* note 102, at 150.

<sup>111</sup> *See id.* The majority of the Commission members were veteran fighters from the independence struggle. *See* Bereket Habte Selassie, *Creating a Constitution for Eritrea*, J. DEMOCRACY, Apr. 1998, at 164, 165 [hereinafter *Constitution for Eritrea*]; *see also* Dr. Bereket Interview, *supra* note 102, at 9. The members represented both rural and urban areas, professionals from groups such as the Eritrean Chamber of Commerce, and Eritreans in the Diaspora. *See* Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91, 129 (1997) [hereinafter *Self-Determination*]. Members of the Executive Committee and the Council are listed in a CCE pamphlet. *See* CONSTITUTIONAL COMMISSION OF ERITREA, INFORMATION ON STRATEGY, PLANS, AND ACTIVITIES 2 (1995) [hereinafter CCE: INFORMATION].

<sup>112</sup> These bodies included the Committee on Governmental Institutions and Human Rights, the Economic Committee, the Social and Cultural Committee, the Committee on Governance and Related Issues, and the Civic Education and Public Debate Committee. *See* CCE: INFORMATION, *supra* note 111, at 4.

<sup>113</sup> The head of this body was Professor Owen Fiss of Yale Law School. *See id.* at 5. Other members included Professor Martin Doornbos from the Institute of Social

Laws, with forty-five members made up of representatives of the community elders from each of Eritrea's ethnic groups.<sup>114</sup>

The Commission planned a four-step constitutional process, which it initially projected would last two years from start to ratification, with a cost of approximately \$4.3 million.<sup>115</sup> According to the original plan, the first phase would be devoted to organizing the Commission, raising funds, beginning the drafting, and public education.<sup>116</sup> Phase two would be largely focused on educating the public about the role of the Commission and about basic constitutional ideas, and to developing some concrete constitutional proposals for public debate.<sup>117</sup> The third phase was to be used for debate of these proposals both publicly and within the Commission, leading to the writing of a draft constitution. The fourth phase would be dedicated to a public debate on this draft and, ultimately, the submission of the draft to the National Assembly and to a separate elected body for ratification.<sup>118</sup>

During the first phase, which began in April 1994, the Commission set up offices, assigned tasks, and organized

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Studies, the Hague; Mr. Bona Malwal from St. Anthony's College, Oxford; Professor Didier Maus from the University of Paris, Sorbonne; Dr. Zaki Mustapha from the Law Office of A.Z. Yemani in Jeddah, Saudi Arabia; Professor Spiros Simitis from the University of Frankfurt, Germany; Dr. Laszlo Solyom, the President of the Constitutional Court in Budapest, Hungary; and Mr. Peter Weiss of the Center for Constitutional Rights in New York, New York. *See id.* For a full list of members of the Advisory Board of Foreign Experts, *see id.*

<sup>114</sup> *See id.* at 5. For a full list of the members on the Advisory Board on Customary Laws, *see id.* Fifteen different sets of customary laws exist among Eritrea's nine ethnic groups. *See Mebrahtu, supra* note 96, at 3. In one region, Hamassien, for example, six different customary laws apply in different parts of the region. *See id.* The customary laws include some ideas normally considered "modern," such as control of executive power and the importance of due process of law, but have a more traditional, restrictive view on issues like the equality of men and women. *See id.*

<sup>115</sup> *See* CCE: INFORMATION, *supra* note 111, at 7. The State of Eritrea provided \$384,000, or approximately 9% of the estimated budget. *See id.* Nations such as Norway, Germany, Canada, Australia, Denmark, the Netherlands, and the United States contributed to the CCE's budgetary needs. *See id.*

<sup>116</sup> *See id.* at 7-8.

<sup>117</sup> *See id.* at 11.

<sup>118</sup> *See id.* at 17. The Proclamation did not specify the exact nature of the body that would have to give final approval to the constitution, but it did make it clear that it should be a "democratically formed representative body" that would be separate from the National Assembly. ERI. PROC. NO. 55/1994 art. 4, § 4 (1994).

preliminary public seminars.<sup>119</sup> Internally, substantive debates began after Chairman Bereket submitted twenty-two questions outlining issues he had drawn from other constitutions,<sup>120</sup> raising basic constitutional questions like separation of powers, the role of political parties, and the role of the military. At the request of Commission members, the issue of women's rights was added to the agenda as a separate item.<sup>121</sup>

In July 1994 the Commission held what was termed a "mini" international conference in Asmara, which focused on key

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<sup>119</sup> See CCE: INFORMATION, *supra* note 111, at 7. The full Constitutional Commission began inaugural meetings on April 17, 1994. See Dr. Bereket Interview, *supra* note 102, at 14. Before these formal meetings, and before the Commission had an office, some CCE members held logistical meetings at the Municipality of Asmara building. See CCE: INFORMATION, *supra* note 111, at 9; see also Dr. Bereket Interview, *supra* note 102, at 15. During the constitutional process, the full, fifty-member commission met approximately every three months. See Dr. Bereket Interview, *supra* note 102, at 23.

<sup>120</sup> See Dr. Bereket Interview, *supra* note 102, at 14. The 22 questions dealt with: (1) separation of powers; (2) presidential or parliamentary (or mixed) government; (3) limiting government powers; (4) appointing government officials; (5) powers, terms, and election of the executive branch; (6) foreign relations leadership; (7) the legislature (unicameral or bicameral, election, role, etc.); (8) the judiciary; (9) emergency suspension of the constitution; (10) decentralization; (11) the military's role; (12) religion; (13) basic rights guarantees; (14) guarding minority rights; (15) political parties and their roles; (16) control of the economy; (17) school curricula; (18) mass media; (19) nationality; (20) the connection between international and national law; (21) amending the constitution; and (22) ratification of the constitution. See Peggy Ann Hoyle, *supra* note 102, at 166. Dr. Bereket later summarized these issues into seven general questions:

1. What lessons, if any, do historical experiences offer?
2. Do such experiences yield helpful models or guidelines?
3. Is it desirable, or practical, to use models; are they transferable like some technology?
4. What are the values and goals that a nation needs most emphatically to promote and protect? Should these be incorporated into the constitution, and if so, how?
5. What form of government would be best suited for Eritrea?
6. What degree of centralization should there be?
7. Should there be an official language, or languages? If so, which ones should be chosen, and why?

*Constitution for Eritrea*, *supra* note 111, at 165.

<sup>121</sup> See Dr. Bereket Interview, *supra* note 102, at 15.

constitutional issues identified by the Commission.<sup>122</sup> At this meeting, papers were submitted by the four substantive committees that had been formed,<sup>123</sup> and the Commission members also heard and discussed presentations by the Namibian and Swiss ambassadors to Ethiopia and by the Chairman of the Constitutional Committee of Ethiopia.<sup>124</sup>

In the second phase of the process, the Commission consolidated the twenty-two questions into four themes, focusing on the constitution's relationship to government, human rights, social and economic rights, and democracy.<sup>125</sup> Commission members were assigned to draft issue papers on these themes, including analysis and recommendations for each topic.<sup>126</sup> The issue papers were presented and debated at an International Symposium held in Asmara in January 1995, at which two hundred Eritreans and forty-two invited experts from around the world participated in the discussions.<sup>127</sup> After the conference, the

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<sup>122</sup> See CCE: INFORMATION, *supra* note 111, at 9.

<sup>123</sup> See *id.* Topics discussed at the meeting included: (1) governmental institutions; (2) human rights and the rule of law; (3) social and cultural issues in the constitution; (4) governance and the constitution; and (5) economic issues and the constitution. See *id.* A number of Eritrean scholars and governmental officials also participated in the conference. See *id.*

<sup>124</sup> See *id.* The ambassadors and chairman submitted papers about their respective nations' constitutional experiences. See *id.* Because the constitutional process had just begun, and because funding was not available at the time, the international guests were limited to those from nations around Eritrea, including an Egyptian scholar from Cairo University. See Dr. Bereket Interview, *supra* note 102, at 16.

<sup>125</sup> See Hoyle, *supra* note 102, at 167.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.* at 13; see also Naib, *supra* note 101, at 14-15. The Commission members' papers fell under the following four themes:

(1) The Constitution and its Relation to Government—a paper was prepared on the legislature by Kibreab Habtemichael, the judiciary by Yohannes Berhane, the electoral system by Gebrehiwet Tesfagiorgis, and decentralization by Commission Chair Bereket Habte Selassie;

(2) The Constitution and Human Rights—a paper on this theme was prepared by Dr. Seyoum Haregot and Paulos Tesfagiorgis;

(3) The Constitution and Economic and Social Rights—a paper was prepared on economic rights by Commissioners Fessahazione and Mesghenna and on social and cultural rights by Mehret Iyob and Zabra Jaber;

(4) The Constitution and Democracy—a paper on this theme, entitled *Equality*

Commission and its members transformed the issue papers into position papers.<sup>128</sup>

Seven months later, in August 1995, the Commission approved and published a number of "proposals" relating to the upcoming constitution.<sup>129</sup> These proposals were divided into two parts. In part one, the Commission outlined a number of broad principles relating to the basic constitutional framework, stressing the primacy of the constitution as the organic link between the people and the government, the importance of democracy, diversity, and national unity, and other hallmarks of a constitutional order.<sup>130</sup> In part two, the Commission for the first time established specifics of what was envisaged for the forthcoming constitutional order.<sup>131</sup>

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*Guarantees Under the Constitution*, was prepared by Dr. Gebrehiwet Tesfagiorgis.

See Hoyle, *supra* note 102, at 167-73.

These issue papers were made available at CCE headquarters, and a summary report on the conference was published in 1995 in Tigrigna, Arabic, and English. See CCE: INFORMATION, *supra* note 111, at 13-14.

<sup>128</sup> Eight papers were produced: (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 *id.* at 14.

<sup>129</sup> See CCE: PROPOSALS, *supra* note 101. The Commission published the proposals in Tigrigna, Arabic, and English, and also disseminated them via radio (the key news medium in Eritrea) and television. See Hoyle, *supra* note 102, at 157.

<sup>130</sup> The pamphlet defines a constitution as "a basic law which governs the workings of government and society. It is the highest law of a country providing for the establishment of government and the manner in which it administers its citizens and defining the rights and responsibilities of citizens." CCE: PROPOSALS, *supra* note 101, at 3. Part I suggests that Eritrea's political system should be based on nationalism, secularism, and democracy, and adds that "[t]he experience of our revolution provides incontrovertible evidence to prove that a diverse society can be a source of unity and strength rather than one of division and weakness." *Id.* at 8. The pamphlet acknowledges the need for political pluralism, respect for human rights, and institutions to implement these goals in a constitutional system. See *id.* at 6-7. The pamphlet also emphasizes that "[a] constitution without constitutionalism is a lifeless document." *Id.* at 4.

<sup>131</sup> In both the Proposals and the final drafts of the Constitution, the CCE consciously omitted details and implementation strategies. This was based on a philosophy that "[a] constitution contains, in generic terms of principle, provisions on the powers and responsibilities of government and the rights and duties of citizens. Its application is dealt with by laws and regulations." *Id.* at 3. For example, the CCE decided that issues such as employment and economic development should be addressed

These included a unicameral legislature, the National Assembly, with members elected for five-year terms.<sup>132</sup> This Assembly would choose the chief executive, the President, who would be commander-in-chief of the armed forces and would be limited to two five-year terms.<sup>133</sup> There would be an independent judiciary, with a Supreme Court and lesser courts to be set up by law, and the Supreme Court would have an express grant of authority to determine the constitutionality of any law or governmental action.<sup>134</sup> Federalism was rejected in favor of a unitary governmental structure,<sup>135</sup> and the suggestion was made that there

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only generally in the Constitution. See Dr. Bereket Interview, *supra* note 102, at 35; see, e.g., ERI. CONST. ch. III, art. 21(5) ("The National Assembly shall enact laws guaranteeing and securing the social welfare of citizens, the rights and conditions of labour and other rights and responsibilities . . .").

<sup>132</sup> See Dr. Bereket Interview, *supra* note 102, at 22; ERI. CONST. ch. IV, art. 31. The CCE decided to follow the example of the 1952 Eritrean Constitution's unicameral legislature, as well as the extant Provisional Government's unicameral National Assembly. See Kebreab Habte Michael, *The Legislative Power, Presentation of Issue Paper No. 1, Part 1 at the First International Symposium on the Making of the Eritrean Constitution (Jan. 7-12, 1995)* (transcript on file with author).

<sup>133</sup> See CCE: PROPOSALS, *supra* note 101, at 23; ERI. CONST. ch. V, arts. 39, 41. Though it acknowledged that "executive bodies have shown a persistent tendency to accumulate power in their own hands," the CCE decided that "since a strong leadership with clear vision is essential for development, the establishment of an appropriate executive body is fundamental." CCE: PROPOSALS, *supra* note 101, at 20. Nevertheless, the executive was one of the most frequently discussed topics during the public debates. See Hoyle, *supra* note 102, at 160; see also *supra* notes 6-7 and accompanying text. The CCE proposed Parliamentary (indirect) election of the President because its members felt that "electing the president through a direct popular vote, may cause national election to assume some undesirable personal aspects and to reflect regionalistic overtones." Amanuel Sahle, *A Deeper Meaning of Democracy*, ERI. PROFILE, Apr. 6, 1996, at 2 (quoting Mussa Naib of the CCE's executive committee).

<sup>134</sup> See CCE: PROPOSALS, *supra* note 101, at 23; ERI. CONST. ch. VI, arts. 48, 49. There was extensive debate about whether it would be better to have this power of judicial review lodged in a separate Constitutional Court, but the Commission opted to give this power to the Supreme Court. See Dr. Bereket Interview, *supra* note 102, at 36.

<sup>135</sup> See CCE: PROPOSALS, *supra* note 101, at 27 ("[I]t is essential that Eritrea should have a unitary government. This is consistent with our goal of building a unified and strong nation."); ERI. CONST. ch. I, art. 1(5). Unity is understandably essential in a country containing nine ethnic groups and evenly divided between Muslims and Christians. The Commission was building on a sense of unity and solidarity developed during the thirty-year struggle against often oppressive Ethiopian governments. See INDEPENDENCE, *supra* note 38, at 1.

be no official language.<sup>136</sup> The proposals contained a guarantee of democracy, but after extensive debate the Commissioners decided not to mandate any specific electoral system.<sup>137</sup> A number of fundamental rights—life, privacy, freedom of belief, expression and organization—were included,<sup>138</sup> along with a discussion of concomitant duties.<sup>139</sup> Special emphasis was given to the equality of women, with the statement “it should be clearly stated in the constitution that all rights and duties apply to both men and women without gender distinction.”<sup>140</sup>

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<sup>136</sup> See CCE: PROPOSALS, *supra* note 101, at 29. The constitution mandates that “[t]he equality of all Eritrean languages is guaranteed.” ERI. CONST. ch. I, art. 4(3). The issue is very important to Eritreans, in part, because Ethiopia imposed Amharic (the official Ethiopian language at the time) on Eritreans in schools and in public businesses. See Calhoun & DeLargy, *supra* note 80, at 129. The Ethiopian regime even burned Arabic and Tigrigna texts. See *Legacy*, *supra* note 21, at 4. During the struggle for independence, the EPLF began radio broadcasts in all national languages. See Calhoun & DeLargy, *supra* note 80, at 131. After the EPLF’s victory, the government began trying to educate each student in his or her mother tongue. See *id.*

<sup>137</sup> “[W]e think it is sufficient to describe in the constitution that the electoral system should ensure fair representation and full participation of all eligible citizens.” CCE: PROPOSALS, *supra* note 101, at 28. The final constitution guarantees the right to vote, see ERI. CONST. ch. III, art. 20, and requires the National Assembly to “enact an electoral law, which shall ensure the representation and participation of the Eritrean people,” *Id.* ch. IV, art. 30(2).

<sup>138</sup> See CCE: PROPOSALS, *supra* note 101, at 24; *cf.* ERI. CONST. ch. III, art. 15 (Right to Life and Liberty); art. 18 (Right to Privacy); art. 19 (Freedom of Conscience, Religion, Expression of Opinion, Movement, Assembly, and Organisation). After public debates, the Commission changed the related proposal advocating a secular government to reflect that the Commission advocated a government that would not interfere with religion, rather than an atheist government. See Hoyle, *supra* note 102, at 161.

<sup>139</sup> See CCE: PROPOSALS, *supra* note 101, at 25 (“To be faithful and obedient to one’s country and its constitution, to protect one’s own country and do national service, and to respect national laws are some of the main duties of citizens.”); *cf.* ERI. CONST., ch. III, art. 25 (Duties of Citizens).

<sup>140</sup> CCE: PROPOSALS, *supra* note 101, at 25; *cf.* ERI. CONST., ch. I., art. 5 (Gender Reference). Women’s rights has long been a critical issue for the EPLF and now the PFDJ. See *supra* note 58 and accompanying text. Women’s rights were a significant part of the EPLF’s National Democratic Programme of 1977. See EPLF PROGRAMME, *supra* note 95, at 30. After liberation, the National Union of Eritrean Women (NUEW) argued that women’s rights should be explicitly written in the constitution, although some Commission members felt mentioning gender equality in the preamble would be sufficient. See UNITY IN DIVERSITY, *supra* note 16, at 20. The position of the Eritrean Women’s Union eventually prevailed. See *id.*; see also ERI. CONST. ch. III, art. 41

Following the release of the proposals and the ensuing debate, the Commission drew up a draft Constitution, which the Commission released for publication in July 1996.<sup>141</sup> This draft consisted of a preamble, seven chapters, and fifty-nine articles,<sup>142</sup> and substantively mirrored the Commission's earlier proposals.

The Commission met in February and March 1997 to finalize the Constitution.<sup>143</sup> The members approved the final draft for submission to the National Assembly, the first step in the ratification process, as required by the Commission's charter.<sup>144</sup> The final step of the process involved submission of the Constitution to a Constituent Assembly, which was composed of seventy-five National Assembly members, three hundred ninety-eight Eritreans who had been elected by the population to the nation's six Regional Assemblies, and seventy-five representatives elected by Eritreans residing abroad.<sup>145</sup> The Constituent Assembly discussed the final draft of the Constitution in the City Hall of Asmara for three days in May 1997.<sup>146</sup> On May 23, 1997, after

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(Equality Under the Law); *supra* note 58 and accompanying text.

<sup>141</sup> See Naib, *supra* note 101, at 24. Prior to publishing the draft, the CCE submitted it to the National Assembly as required by Proclamation 55/1994. See ERI. PROC. NO. 55/1994 art. 5, § 4 (1994). The National Assembly decided to strengthen the rights of women in the draft, which originally included a compromise article that enabled the new National Assembly to pass laws dealing with inequality. See Dr. Bereket Interview, *supra* note 102, at 28; see also ERI. CONST. ch. III, art. 14. (guaranteeing equality before the law and forbidding various forms of discrimination, including gender discrimination).

<sup>142</sup> See ERI. CONST. (revised Mar. 20, 1997).

<sup>143</sup> See *CCE Making Preparations for Final Draft*, ERI. PROFILE, Feb. 22, 1997, at 1; *CCE Council Finalizes Draft*, ERI. PROFILE, Mar. 15, 1997, at 1. Before submitting the revised draft to the National Assembly, the CCE added the position of Advocate General to the chapter on the judiciary. See ERI. CONST. ch. VI, art. 54; Dr. Bereket Interview, *supra* note 102, at 29.

<sup>144</sup> See ERI. PROC. NO. 55/1994 art. 4, § 1. The National Assembly did not make any changes to the revised draft at this time. See Dr. Bereket Interview, *supra* note 102, at 32.

<sup>145</sup> See Naib, *supra* note 101, at 24. The National Assembly established these criteria for the Constituent Assembly in Proclamation 92/96. See *id.* Due to deteriorating relations with the Sudan, the 12 spaces allotted to Eritreans there were not used. See *id.* Fourteen additional delegates were absent, so the total who participated in the National Constituent Assembly was 522. See *id.*

<sup>146</sup> See *id.*

making several minor changes,<sup>147</sup> the Assembly unanimously ratified the Constitution, just in time for the next day's celebration of four years of nationhood,<sup>148</sup> and the sixth anniversary of the EPLF entry into Asmara to end the thirty-year war for the independence of Eritrea.<sup>149</sup>

### *C. Public Participation in the Eritrean Constitution-Making Process*

No description of the Eritrean constitution-making process is complete without a discussion of the truly outstanding characteristic of the Eritrean experience; the Commission's extensive campaign, at every stage, to educate and involve the public in the constitutional process. Using everything from comic books to musical plays,<sup>150</sup> radio broadcasts to secondary school essay contests,<sup>151</sup> the Commission introduced people who had never even heard the word "constitution" to the notion of the primacy of the Constitution, and to the need to respect the rights of those protected by it.

More importantly, the Commission went beyond just educating a passive public, and made every effort to actively engage the population in the constitutional process. The records of the literally thousands of meetings and seminars surrounding the drafting of the Eritrean Constitution have yet to be compiled and made public, but even the fragmentary accounts now available

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<sup>147</sup> During discussions, the Constituent Assembly expanded parliamentary immunity, which the revised draft permitted only during sessions of the National Assembly, to the entire five-year parliamentary term. See ERI. CONST. ch. IV, art. 38(2); Dr. Bereket Interview, *supra* note 102, at 33; Naib, *supra* note 101, at 25 nn.1-2. The Constituent Assembly also slightly altered the foreign policy article of the National Objectives chapter: "The foreign policy of Eritrea is based on respect for state sovereignty and independence and on promoting the interest of regional and international peace, cooperation, *stability* and development." ERI. CONST. ch. II, art. 13 (emphasis added). The draft had read "cooperation, *harmony* and development." ERI. CONST. ch. II, art. 13 (revised May 23, 1997) (emphasis added).

<sup>148</sup> See *Constitutional Assembly Ratifies Nation's Basic Law*, ERI. PROFILE, May 24, 1997, at 1.

<sup>149</sup> See *Self-Determination*, *supra* note 111, at 119.

<sup>150</sup> See CCE: INFORMATION, *supra* note 111, at 16; Naib, *supra* note 101, at 13 (referring to a book in cartoon form entitled *Elements of a Constitution*).

<sup>151</sup> See *infra* note 165 and accompanying text.

reveal that the participants were actively engaged in the constitutional discourse, questioning various proposals, voicing their concerns about the impact of the Constitution on their personal lives, and even, at times, questioning the legitimacy of the Constitutional Commission itself.<sup>152</sup>

The extensive campaign to involve the public in the constitutional process commenced at the very beginning of phase one,<sup>153</sup> when the Commission translated a number of international compacts and legal documents, including the Universal Declaration of Human Rights and the Convention on the Rights of the Child, into Tigrigna and Arabic, and disseminated them for public discussion.<sup>154</sup> The Commission also held numerous public seminars throughout Eritrea and among Eritreans in the Diaspora, reaching more than ten thousand people.<sup>155</sup> The participants were informed and encouraged to participate in the upcoming process, and were also educated about basic concepts such as democracy and the rule of law.<sup>156</sup>

Consistent with the original plan, the Constitutional

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<sup>152</sup> I can personally attest to at least one challenge to the Commission's legitimacy. I attended several sessions of the University of Asmara Law Program class on Constitutional Law, taught by Kebreab Habte Michael, one of the key Commission members. During a class, one of the students vigorously challenged him about the lack of democracy in choosing the Commission membership. I then learned that this same student issued the same challenge as the very first question in a highly publicized public seminar sponsored by the Commission in a large hall in Asmara. Such challenges were apparently not rare. See Dr. Bereket Interview, *supra* note 102, at 9-12.

<sup>153</sup> See *supra* notes 115-16 and accompanying text.

<sup>154</sup> See CCE: INFORMATION, *supra* note 111, at 10-11. Other documents translated included: (1) *The Declaration of the Principles on International Cultural Cooperation*; (2) *The Declaration on the Principles to Development*; (3) *The International Covenant on Economic, Social and Cultural Rights*; (4) *The International Covenant on Civil and Political Rights*; (5) *The Declaration on the Elimination of Discrimination Against Women*; (6) *The Convention on the Elimination of All Forms of Discrimination Against Women*; and (7) *The African Charter on Human and Peoples' Rights*. See *id.*

<sup>155</sup> See *id.* at 8. Seminars abroad were held in cities throughout Europe, Asia, the United States, Africa (Ethiopia, the Sudan, and Kenya), and in the Middle East (Yemen and Saudi Arabia). See *id.* Within Eritrea, seminars were held in larger cities and towns, as well as at the sub-provincial level. See *id.* at 8-9. The sub-provincial seminars included meetings for students, teachers, women's associations, lawyers, and members of the Eritrean defense forces. See *id.*

<sup>156</sup> See Naib, *supra* note 101, at 12.

Commission's second phase was even more heavily oriented towards public debate and education.<sup>157</sup> In December 1994, the Commission held a four-day training session for four hundred individuals enlisted to help in the public education and involvement project.<sup>158</sup> The sessions introduced the attendees to the constitutional process and taught them how to educate others and facilitate public debates.<sup>159</sup> The Commission also established seven provincial offices and seventy-three locally based committees to assist in public education.<sup>160</sup>

Printed materials were made available in as many local languages as possible, but, because of Eritrea's low literacy rate, the Commission had to come up with innovative means of communicating with the populace.<sup>161</sup> Television and radio were used whenever possible,<sup>162</sup> and the Commission also made use of traditional oral means of communication, including mobile theater groups and concerts dealing with constitutional themes.<sup>163</sup> A cartoon comic book entitled *Elements of a Constitution* was published.<sup>164</sup> Special efforts were made to involve students in the process. The Commission sponsored contests and debates, some broadcast on radio and television, in schools and in the country's sole university, and students were encouraged to raise constitutional issues via poetry and the arts.<sup>165</sup> All told, the

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<sup>157</sup> See *supra* note 117 and accompanying text.

<sup>158</sup> See CCE: INFORMATION, *supra* note 111, at 11.

<sup>159</sup> See *Self-Determination*, *supra* note 111, at 133-34. The trainees received eight booklets on constitutional, social, and political issues, including a thirty-page handbook and translations of various international legal documents.

<sup>160</sup> See CCE: INFORMATION, *supra* note 111, at 12.

<sup>161</sup> See *Center Stage*, *supra* note 8, at 229. Eritrea's literacy rate at this time was estimated at 20%. See *id.*

<sup>162</sup> See CCE: INFORMATION, *supra* note 111, at 17; Dr. Bereket Interview, *supra* note 102, at 3.

<sup>163</sup> See Naib, *supra* note 101, at 15; CCE: INFORMATION, *supra* note 111, at 15-16.

<sup>164</sup> See Naib, *supra* note 101, at 12.

<sup>165</sup> See CCE: INFORMATION, *supra* note 111, at 16-17. The Commission sponsored art, poetry, and essay contests centered on constitution-related themes for students, and questions about constitutional issues were incorporated in the secondary school curriculum. See *id.* at 16. Some of the secondary school student contests were broadcast on radio, and university students participated in televised contests and a panel discussion on five different constitutional issues. See *id.* at 17. Much of this activity

Commission estimated that more than 500,000 Eritreans were actively involved in this phase of the educational programs.<sup>166</sup>

Before beginning the debates in phase three, the Commission held a series of seminars previewing this phase in Eritrea and abroad.<sup>167</sup> Phase three itself commenced with public debates on the constitutional proposals in October 1995.<sup>168</sup> According to Commission estimates, during this part of the public discourse, 147,000 Eritreans debated the constitutional proposals in 157 locales in Eritrea, while 11,000 other Eritreans participated in 16 locations abroad.<sup>169</sup>

These debates, which on the average lasted about three hours, generally began with a summary by a civic educator, followed by questions and a discussion with the audience.<sup>170</sup> Extensive efforts were made to record the debates, using note-takers and, whenever possible, tape recorders.<sup>171</sup> The Commission proposed a number of broad topics for debate,<sup>172</sup> and those who attended responded on issues of interest to them. Of particular concern was the explicit gender-equality mandate in the proposals, since many of the more

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was done in collaboration with other groups, such as the National Youth and Students Association of Eritrea, the Ministry of Education, the Artists' Association, and foreign airlines, including Egypt Air and Yemen Airlines (who provided prizes and tickets to contest winners). *See id.*

<sup>166</sup> *See id.* at 12. More than 40% of the participants in the public programs were women. *See id.*

<sup>167</sup> *See Constitutional Seminars at Home and Abroad*, ERI. PROFILE, Oct. 21, 1995, at 1. Seminar locations included Massawa, Addis Ababa (Ethiopia), Saudi Arabia, and several European countries (Britain, Italy, France, Germany, the Netherlands, and Switzerland). *See id.*

<sup>168</sup> *See Self-Determination*, *supra* note 111, at 134. By this time, the Commission had shifted its focus from research (by consolidating the four research committees into one) to the Civic Education Committee and new Media Committee. *See id.*

<sup>169</sup> *See Naib*, *supra* note 101, at 16.

<sup>170</sup> *See Hoyle*, *supra* note 102, at 158.

<sup>171</sup> *See id.* at 159. Although the tapes have yet to be transcribed, in 1996 the Commission heard a summary of public opinion from these debates. *See Self-Determination*, *supra* note 111, at 134.

<sup>172</sup> In August 1995, the CCE proposed six main topics for the debates: type of government, basic human rights, system of government, electoral system, desirability of national language(s), and role of the armed forces in the constitutional government. *See CCE Identifies Major Constitutional Issues*, ERI. PROFILE, Aug. 26, 1995, at 1.

tradition-minded Eritreans apparently feared, with good reason,<sup>173</sup> that a future government could use this provision to intrude into family relationships and customary practices in areas like divorce, land tenure, and marriage.<sup>174</sup> Others who joined the debates commented on the powers and limitations of the executive branch and the role of the judiciary.<sup>175</sup> There was widespread concern among both Christian highlanders and Muslim lowlanders about the specific proposal for a "secular state."<sup>176</sup> Many saw this as requiring atheism, and as a result this terminology never made it to the draft constitution.<sup>177</sup> In addition to the debates, the Commission's media committee conducted other mass informational campaigns.<sup>178</sup> They sponsored a radio program twice a week in all Eritrean languages, broadcast a panel discussion on television, and ran a series of newspaper articles on the constitution.<sup>179</sup>

Once the draft constitution was published, it served as the basis of the final round of public activities. The Commission circulated the draft in the local vernaculars, and another round of seminars and meetings were held in villages, towns, and the Diaspora.<sup>180</sup> In all, more than 400,000 Eritreans participated in this part of the

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<sup>173</sup> I say "with good reason" because the EPLF/PFDJ position on women's rights clearly contemplated changes in these areas. *See supra* notes 95-96 and accompanying text; *see also* Dr. Bereket Interview, *supra* note 102, at 28-29.

<sup>174</sup> *See generally* Hoyle, *supra* note 102, at 158 (detailing a five-hour meeting with 5,000 Eritreans that centered around family issues.)

<sup>175</sup> *See id.* at 160-61. For example, one participant at an October debate in Asmara contended that allowing the National Assembly to elect the chief executive gave the President too much power, while another suggested "that the constitution should include a provision that allows [efficient] presidents to stay in power for life." Daniel Mebrahtu, *Constitution-Making: A People's Project*, ERI. PROFILE, Nov. 11, 1995, at 34.

<sup>176</sup> *See* Hoyle, *supra* note 102, at 161.

<sup>177</sup> *See id.*

<sup>178</sup> *See* Naib, *supra* note 101, at 16.

<sup>179</sup> *See id.*

<sup>180</sup> *See id.* at 17. Ultimately, 68 locations hosted general public meetings, while 40 more meetings reached organized groups of women, students, workers, and professionals. *See id.* Groups participating included the National Union of Eritrean Women, the Eritrean Youth and Students' Association, and the National Confederation of Eritrean Workers (NCEW). *See id.* at 18-21.

public process.<sup>181</sup> Radio programs broadcast the constitution in seven languages, while a documentary video, *The Journey to the Constitution Making Process*, was shown in cities, villages, and towns across Eritrea.<sup>182</sup>

The final stages of the constitution-making process—publication of the final draft, submission to the National Assembly, and ratification by the Constituent Assembly—were the subject of massive publicity in the media.<sup>183</sup> The decision to have final ratification just in time for the May 24<sup>th</sup> independence celebration was no happenstance. It allowed the final stage of the constitutional process to occur in full public light, as the centerpiece of the biggest celebration of the year.<sup>184</sup>

## V. Evaluating the Eritrean Process

### A. Public Participation and Education

In light of the immense problems of poverty and nation-building the Eritreans faced, it is hard to imagine that more could have been done to educate and involve the public in the constitution-making process. It is also clear that the Eritreans gained much from this aspect of the process.

The public involvement certainly contributed to building national solidarity and helping construct or solidify a national identity, themselves worthy goals.<sup>185</sup> More importantly, if the prevailing theory is accurate that public involvement increases the development of constitutionalism, and public acceptance and respect for the constitution is engendered by a process that is transparent and as public as possible,<sup>186</sup> then the Eritrean experience will stand out in the history of meaningful constitution-

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<sup>181</sup> See *id.* at 17.

<sup>182</sup> See *id.*

<sup>183</sup> See, e.g., *CCE Council Finalizes Draft*, *supra* note 143; *Constitutional Assembly Ratifies Nation's Basic Law*, *supra* note 148.

<sup>184</sup> See *Formulation of the Constitution Gives New Dimension to 6<sup>th</sup> Liberation Day Anniversary Celebrations*, ERI. PROFILE, May 31, 1997, at 1.

<sup>185</sup> See generally Hoyle, *supra* note 102, at 191-204 (discussing the role of the constitution-making process in constructing Eritrea's national identity).

<sup>186</sup> See *supra* notes 65-71 and accompanying text.

making. Further, to the extent that it was imperative that the Eritrean constitution-drafters educate the public about the rule of law, democracy, and the meaning and principles of constitutionalism,<sup>187</sup> then the Eritreans surely achieved this end.

In addition, the potential impact of the immense popularization and education effort on those who now hold the reigns of power in Eritrea, and are likely to do so for the foreseeable future, should not be ignored. Although the EPLF had succeeded in gaining overwhelming popular support by the time Eritrea gained its independence, it had gained this summit by dint of its efforts as a highly disciplined military and political force, which had used popular support, sacrifice, and military prowess to seize power from a brutal and ruthless colonial occupier – not the most fertile grounds for developing a deep culture of constitutionalism.<sup>188</sup>

So it is especially important that the Eritrean leadership not only acceded to the popular constitution-making process, but also supported it, in public and private.<sup>189</sup> The high public visibility of the constitutional process, together with the present leadership's very public commitment to that process, will make it much more difficult for future Eritrean governments to ignore or discard the

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<sup>187</sup> "Ultimately, no objective is more important than civic education-the inculcation of civic virtues." Howard, *supra* note 71, at 15; *see also* Golove, *supra* note 75 (suggesting that compromise be added to the constitution-making process in order to "broaden[] the base of support and giv[e] different constituencies a self-interested reason for insisting upon strict observance of the constitution").

<sup>188</sup> *See supra* notes 40-51 and accompanying text. The EPLF had proclaimed a democratic program in the late 1970s, as it moved to shed its Marxist roots in the light of Soviet and Cuban support for the Dergue. *See supra* note 47 and accompanying text. But even as it acquired state power, changed into the PFDJ, and set up the new Eritrean state, there were certainly aspects of EPLF/PFDJ practice that could be described as authoritarian, rather than democratic. *See generally Eritrean Experiment, supra* note 15 (detailing the steady but sometimes heavy-handed approach the EPLF used to install democracy in Eritrea). For example, Iyob notes that, partly because of the revolution's emphasis on secrecy, "the discourse about parties is subject to self-censorship and ambiguity." *Id* at 663. *See* Calhoun & DeLargy, *supra* note 80, at 129 (applauding the Eritrean government's constitutional efforts but concluding that additional efforts are needed to bolster political rights, such as freedom of the press).

<sup>189</sup> Dr. Bereket and his committee were given virtually complete autonomy by the government. *See* Dr. Bereket Interview, *supra* note 102, at 7, 32-33. The Eritrean government (and hence the PFDJ) provided funding, \$384,000 as of fall 1995, for the Constitutional Commission. *See* CCE: INFORMATION, *supra* note 111, at 7.

Constitution.<sup>190</sup> The preamble of the new Constitution describes the Constitution as the product of the blood of the Eritrean martyrs who died fighting for independence.<sup>191</sup> This is, in the context of present-day Eritrea, an immensely important statement. It is all the more significant because it is made in relation to a document that had become the centerpiece of a very public discourse. No flowery phrases and no amount of public involvement can guarantee that a constitution will not be discarded at some future date, but what happened between 1993 and 1997 will certainly make it far more difficult for this to happen to the Eritrean Constitution.

*B. Self-Reliance and Self-Consciousness in the Eritrean Constitution-Making Process*

Two additional characteristics of the Eritrean constitution-making process are worth brief commentary. The first is the extreme self-consciousness with which the Eritreans carried out their constitutional task. Perhaps more than any constitution-makers since 1787,<sup>192</sup> those involved in creating the Eritrean Constitution believed and acted on the premises that they were playing a meaningful historical role, and that *how* they carried out that role was as significant as the end product of their activity. This is especially true with regard to the extensive public education and involvement in the Eritrean process. The first Proclamation calling for the creation of a constitution gave those charged with producing the constitution the added responsibility of

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<sup>190</sup> See Dr. Bereket Interview, *supra* note 102, at 7 ("people will feel that in the future, if anybody tampers with this thing that they own, then they will take up arms if necessary").

<sup>191</sup> See ERI. CONST. pmbl.

<sup>192</sup> The self-consciousness with which the American drafters acted has been described as one of the unique aspects of American constitutionalism. See Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations On State Constitution-Making In The Nineteenth-Century West*, 25 RUTGERS L. J. 945, 950 (1994) [hereinafter *American Constitutional Tradition*]. This self-consciousness was based on the recognition of the distinctions between ordinary statutory law and constitutional law. See Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 324 (1997).

organizing public participation in the process.<sup>193</sup> The Proclamation that established the Commission detailed the necessity for organizing popular participation.<sup>194</sup> Official Commission publications and statements proclaimed the essential nature of this involvement,<sup>195</sup> and the importance of public participation was also constantly reflected in the pronouncements of the Chairman and other members of the Commission who spoke or wrote about the process.<sup>196</sup>

Why the Eritreans felt and acted this way is an interesting question. Certainly the role of the Chairman of the Commission cannot be ignored. Dr. Bereket Habte Selassie is a senior African statesman, one who witnessed decades of African experiments and failures in constitutional politics. Both as an academic and as a political actor, he observed the rise and fall of the first wave of independent African constitutionalism, and his writings, since undertaking the chairmanship, reflect the conclusion that a lack of popular involvement and understanding led to many of those constitutional failures.<sup>197</sup> It would, however, be an oversimplification to attribute the Eritrean process to the influence of one person, for the mobilization of the public as part of the constitution-making process is also consistent with the long-standing practices of the EPLF/PFDJ, which has always emphasized popular involvement as the key factor in the struggle for independence and national development.<sup>198</sup> To a large degree,

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<sup>193</sup> See ERI. PROC. NO. 37/1993 (1993), *quoted in* ERI. PROC. NO. 55/1994 (1994).

<sup>194</sup> See ERI. PROC. NO. 55/1994 arts. 4, 5, 7.

<sup>195</sup> See CCE: INFORMATION, *supra* note 111, at 19; CCE: PROPOSALS, *supra* note 101, at 1.

<sup>196</sup> See, e.g., Amanuel Sale, *A Constitution from the People, to the People*, ERI. PROFILE, Oct. 26, 1996, at 2 (quoting Commission Secretary Zemehret Yohannes: "Our constitution is going to be incorporated into educational programs and curricula with a view to acquainting the public with its provisions. It is only when the people know their constitution in depth that defending it becomes a matter of course."); Sahle, *supra* note 133 (quoting Constitutional Commission Executive Committee member Mussa Naib: "Constitution making is a political process in which the public participates and develops its political awareness.").

<sup>197</sup> See *Self-Determination*, *supra* note 111; *Constitution for Eritrea*, *supra* note 111.

<sup>198</sup> See *AGAINST ALL ODDS*, *supra* note 34, at 64. See Hoyle, *supra* note 102, at 47-57, for a detailed discussion of how public involvement has shaped Eritrean national

the constitutional process can thus be seen as simply an extension to another arena of the principles which carried the EPLF to ultimate victory and the nation to independence.

Also consistent with the Eritrean liberation struggle, and with the practices of the state that has emerged from it, is the self-reliance and freedom from foreign control that characterized the Eritrean constitution-making process and the document it produced. This is not to say that the Eritrean Constitution had no foreign antecedents or was a purely autarkic document. To the contrary, the Eritreans freely looked for ideas at other constitutions and constitution-making processes.<sup>199</sup> Unlike many other recent examples, however, the Eritreans can claim their final document as their own, the product of choices made by Eritreans, taking into consideration the realities of Eritrean life.<sup>200</sup>

A constitution is, in the last analysis, a political document: to survive, it must reflect the present and future realities of its native soil. From the beginning, the Eritreans resisted the "Lancaster House" method of constitution-making, which involves foreign drafting and imposition of a constitution.<sup>201</sup> All of the drafting was done by Eritreans, and what foreign influence there was tended to be early in the process, and was primarily devoted to helping the Eritrean drafters prepare for the tasks ahead. Both the initial "mini-international conference"<sup>202</sup> and the larger January 1995 international gathering<sup>203</sup> came before any significant drafting was done. In contrast to the recent Eastern European experience,<sup>204</sup> drafts were not circulated to Western "experts" for formal commentary and suggested revisions.<sup>205</sup> While there may have

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identity.

<sup>199</sup> See Dr. Bereket Interview, *supra* note 102, at 11-12, 14-15.

<sup>200</sup> For a description of the extensive Western, and especially American, influence on recent Eastern European constitution-making ventures, see generally Defeis, *supra* note 91; Elster, *supra* note 1; Ludwikowski, *supra* note 1. See also MOTALA, *supra* note 65 (discussing harm caused by Western influence on earlier African post-independence constitutions).

<sup>201</sup> See *Self-Determination*, *supra* note 111, at 131.

<sup>202</sup> See *supra* notes 122-24 and accompanying text.

<sup>203</sup> See *supra* notes 127-28 and accompanying text.

<sup>204</sup> See *supra* note 1.

<sup>205</sup> See *supra* notes 141-49 and accompanying text.

been some informal contacts between the Eritrean drafters and their friends and counterparts elsewhere, the final constitution was clearly the product of the Eritreans, and not of foreign "experts." The constitution that emerged belonged to them.<sup>206</sup>

*C. Critique of the Eritrean Constitution-Making Process:  
Participation Versus Democracy*

In constitution-making, as in life, no venture of any significance can proceed without criticism. In the case of the Eritrean constitutional process, the criticisms have basically been that, despite the widespread public involvement, the overall process, or at least certain aspects of it, were insufficiently democratic.<sup>207</sup> One claim was that the members of the Commission should have been democratically elected rather than government appointed.<sup>208</sup>

On a theoretical level, the notion of elections to a Constitutional Commission has appeal; if democracy is the ultimate goal, then it would make sense for the process itself to be as purely democratic as possible. There is, however, a degree of circularity in requiring democracy in the process that is supposed to create democracy. In a society that already operates as a democracy, it might be possible to write a new constitution

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<sup>206</sup> The Eritrean attitude toward foreign advice is aptly captured by Mussa Naib, an Executive Committee member of the Constitutional Commission of Eritrea: "For our constitution not to be a carbon copy of other countries' constitutions, we should be critical in looking at advice given by non-citizens. Here, we should exercise free political thinking." *Viable, Long-Lasting Document*, ERI. PROFILE, Aug. 12, 1995, at 3.

<sup>207</sup> Some of these criticisms have focused on parts of the process without attacking the overall legitimacy of the effort. A more extreme view has been offered primarily by those affiliated with the remnants of the ELF, in which the constitution-makers are hand-picked puppets, unrepresentative of the Eritrean people. In this version, the public involvement is seen as a charade to build up popular support for the regime with no real impact on the Constitution, which was itself dictated by the EPLF/PFDJ government, and with both the choice of Commission members and the ratification process likewise tainted by government control. See TESFATSION MEDHANIE, *ERITREA AND NEIGHBORS IN THE NEW WORLD ORDER* 65-68 (1994); Dr. Bereket Interview, *supra* note 102, at 53-54. As discussed above, throughout the extended process there were also many criticisms directed towards the substantive proposals and drafts of the Commission. See *supra* notes 120-142, 168-177 and accompanying text.

<sup>208</sup> See *supra* note 107 (noting the selection process of the Constitutional Commission of Eritrea); see also Dr. Bereket Interview, *supra* note 102, at 10.

without violating any democratic norms. However, a society in which democracy is the unrealized *goal* of the constitution drafters, at some point in the process an element of non-democracy, or “pre-democracy,” is inevitable.<sup>209</sup> Important factors in the constitutional process are transparency and publicity, rather than democratic purity.<sup>210</sup>

Moreover, regardless of theory, holding elections for membership in a constitutional commission, given the situation in Eritrea in 1993, would have been impractical. The referendum on national independence had just been completed, and national rebuilding had only just begun. At that stage, before the Commission’s extensive publicity campaign, most of the population had little or no idea what a constitution was, and what role a creature like a “Constitutional Commission” would play. There were no political parties, no rules of the game, no way of ensuring that any election would not degenerate into religious or ethnic rivalry. And to the extent that the elections inevitably would have been organized and supervised by the EPLF, which held exclusive power in Asmara, they would have been subject to the criticism of EPLF control.<sup>211</sup>

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<sup>209</sup> Arato, *supra* note 69, at 191 (noting that “we cannot logically eliminate an element of non-democracy prior to the democratic procedures that produce a democratic constitution.”); Elster, *supra* note 1, at 472 (noting the failure to have an elected constituent assembly did not mar Hungarian constitution-making process). Indeed, the failure of the French 18<sup>th</sup> century constitutional experiment has been blamed on a process that was *too* democratic and, therefore, too subject to majoritarian whims. See Arato, *supra* note 69, at 207 (discussing Hannah Arendt’s view on problems with the French experience).

<sup>210</sup> See, e.g., Arato, *supra* note 69, at 205, 225; *American Constitutional Tradition*, *supra* note 192, at 987; Richards, *supra* note 70, at 15. Along with the publicity and transparency, however, it is also often necessary for the drafting and deliberative process to take place with some degree of secrecy. See *Forces and Mechanisms*, *supra* note 72, at 395 (discussing the need for elements of secrecy and private deliberation to go along with the public participation in a constitution-making process); Arato, *supra* note 69, at 225. In addition to drafting in secret during the Philadelphia convention, the American drafters were hardly the product of a highly democratic process. The drafters of our constitution were chosen by and represented only a small minority of the population: property owning white males. See Catherine MacKinnon, *Freedom From Unreal Loyalties: On Fidelity in Constitutional Interpretation*, 65 *FORD. L. REV.* 1773, 1774 (1997).

<sup>211</sup> For instance, one writer criticized the referendum noting that while it may have been *supervised* by the U.N., it was *conducted* by the EPLF. See MEDHANIE, *supra* note

There is, however, another, related criticism that is not so easily met. This is that, regardless of the desirability of holding elections to the Constitutional Commission, the government should have included representatives of other political groupings among the Commission members.<sup>212</sup> There was no practical obstacle to doing this, and requests for this to happen were in fact made, especially by members of the ELF in the Diaspora,<sup>213</sup> some of whom claimed to have a significant following inside Eritrea.<sup>214</sup> The Commission Chairman welcomed their participation in the public seminars and meetings and invited them to make substantive suggestions about the shape of the coming constitution,<sup>215</sup> but neither he nor anybody else offered the opposition a formal place at the constitution-drafting table.<sup>216</sup> Thus, while the government had included in the Commission, and even on the Executive Committee, a number of former ELF leaders who had previously returned and had agreed to work with the EPLF, there were no independent political forces represented on the Commission.<sup>217</sup>

In the end, how one evaluates this omission depends largely on one's view of the political situation in Eritrea following independence. One might believe that there was a significant,

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207, at 57-60. Unless the victorious EPLF was willing to cede authority to its long-time rivals, vanquished in the field, anything that they did in Eritrea was subject to this criticism. *See id.*

<sup>212</sup> *See* Bereket Interview, *supra* note 102, at 54; MEDHANIE, *supra* note 207, at 65-67.

<sup>213</sup> *See* Dr. Bereket Interview, *supra* note 102, at 10, 54.

<sup>214</sup> *See* MEDHANIE, *supra* note 207, at 131.

<sup>215</sup> Despite Chairman Bereket's express invitation, the ELF forces never articulated any alternative version of Eritrean society that can stand in opposition to the Constitution that was ultimately enacted. *See* Dr. Bereket Interview, *supra* note 102, at 53. Consequently, the Commission "concluded from that, early on, that there was a national consensus based on the Front's charter, which everybody, even the so-called opposition, accepted." *Id.*

<sup>216</sup> *See id.*

<sup>217</sup> The Constitutional Commission's Vice Chairman Azien Yasin, and the Commission's Secretary Zemhret Yohannes, were both former ELF leaders, as were Executive Committee members Zahara Jaber (one-time head of the ELF's women's organization) and Idris Gelawdious. *See* Menghis Samuel's Interview of Dr. Bereket, *supra* note 83, at 6. *See also* CCE: INFORMATION, *supra* note 111, at 2, for a full listing of Constitutional Commission Members.

legitimate political opposition with roots in the Eritrean population, at home and abroad—an opposition that accepted nationhood and represented a meaningful portion of the population. If that were the case, then the exclusion of this segment of society from the constitution-drafting process could be considered a noteworthy, although not necessarily fatal, flaw undermining the legitimacy of the constitutional process.

There are some questions, however, whether such forces really existed, at least in a form that would have necessitated their inclusion in the process. The Eritrean government, and the Commission leadership, certainly did not believe that they did.<sup>218</sup> In the long run, given the democratic nature of the final document, this deficiency in democracy of the process, if indeed it existed, will most likely be less important than whether or not the Constitution itself delivers on its promises of a pluralistic society firmly committed to the rule of law.<sup>219</sup>

Another challenge to the constitutional process – one that I heard made by a number of westerners when I was in Asmara –

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<sup>218</sup> See Dr. Bereket Interview, *supra* note 102, at 52-54. Little needs to be said about those in Eritrean society who supported the Ethiopians and opposed independence—they had been defeated on the battlefield, and their political position had been resoundingly rejected in the referendum. There was no more reason to include them in the constitutional process than there was to reserve a place for the defeated Tories in 1787. See *id.* at 10-11.

<sup>219</sup> A similar criticism could be made to the final step in the process—the ratification process. In Eritrea, ratification was not by referendum, but by a body that was only partly popularly elected. See Dr. Bereket Interview, *supra* note 102, at 46-47; Naib, *supra* note 101, at 24-25. Some of the delegates to the final “Constituent Assembly,” which approved the constitution, were chosen by the National Assembly, which itself had not been popularly elected. See Naib, *supra* note 101, at 24. Others were chosen by more democratic means. They were selected by the popularly elected Regional Assemblies and by Eritreans in the Diaspora. See *id.* Again, the process was subject to being criticized as being controlled by the EPLF, and it certainly lacked the democratic purity of ratification by referendum. Yet ratification by referendum is only one means of ratification, and what is most important is that whatever ratification process used must reflect and must be perceived to reflect an acceptance of popular sovereignty. Ratification of the U.S. Constitution was not by referendum, but by bodies of only limited democratic credentials, yet it has generally been considered sufficient to satisfy the notion of popular acceptance and legitimacy. See *American Constitutional Tradition*, *supra* note 192, at 986-87 (noting that popular ratification was not commonly used in 18<sup>th</sup> century America, and focus should be on recognition of popular sovereignty rather than form of ratification).

was that the public involvement was all window-dressing. According to this account, the process was deficient because the constitution-drafters were not really listening to the population but were just following their own agenda or the agenda of the government.<sup>220</sup> If what is being said by this charge is that the Commission members did not see their job as translating the majority political tendencies of the day into constitutional strictures, then it contains an element of truth, but this both overstates the facts and misses the point.

The Commission did work under guidelines established by the government—government Proclamations created the Commission, defined its goals, and directed its activities.<sup>221</sup> This, however, is more the norm than the exception in constitution-making projects. Unless the existing government lacks sufficient support in the population, it creates and directs the constitution-making process. Nor is it really problematic that the Commission used as its starting points the principles enunciated in the PFDJ Charter,<sup>222</sup> given the unobjectionable nature of these principles—stability, national unity, economic development, democracy, social justice, and human rights.<sup>223</sup>

It is also inaccurate to say that the drafters ignored popular input. The substantive Eritrean constitution-drafting in large part involved narrowing general principles down to specifics; issue papers were transformed into broad proposals, and the proposals were subsequently refined into particular Articles.<sup>224</sup> The final content was the result of a complex interaction between the drafters, the contemporary ruling elite (the government and the PFDJ), and the participants in the public debate. On some issues, it is clear that public response did play a role, such as with the removal of the description of the coming nation as a secular

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<sup>220</sup> See, e.g., Dr. Bereket Interview, *supra* note 102, at 30-31.

<sup>221</sup> The Commission's Chairman, Dr. Bereket, drafted some of these proposals. See *id.* at 8.

<sup>222</sup> See Bereket Habte Selassie, Constitution Making as a Historic Moment, Keynote Speech at the First International Symposium on the Making of the Eritrean Constitution, *supra* note 132.

<sup>223</sup> See *id.*

<sup>224</sup> See *supra* notes 124-42 and accompanying text.

state.<sup>225</sup> In other areas, the role of various inputs is less clear. Questions like whether to have a national language and whether to have a separate constitutional court were not decided until late in the process, after extensive public debate, and it is simply impossible to gauge the impact on these issues of any one player in the national dialogue.<sup>226</sup>

More to the point, the purpose of a constitution-drafting process is not to memorialize the prevailing majority views of the day but to craft a document and to help create a constitutional order that will govern the citizens and the governors for the centuries ahead. Drafters certainly have an obligation to listen to their society, but ultimately the drafters themselves, subject to the requirements of ratification and acceptance by the people, must make the particular choices embodied in the final constitution. What is most important is that the process itself be perceived as legitimate by the population, and this can occur even if not one word of the constitution is changed after consultations with the public.

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<sup>225</sup> Many Eritreans strongly objected to the possibility of a secular government after the idea was published with other constitutional proposals in 1995. See Hoyle, *supra* note 102, at 200. Citizens thought a secular government would be an atheistic one, and the government had to clarify that the proposals only meant that the government would not interfere with religion in order to satisfy public opinion. See *id.* More opposition arose when the first constitutional draft provided that public officials would take an oath by swearing “in the name of the Eritrean martyrs” of the independence struggle. *Id.* Many Eritreans, including a number of university students, felt the oath should be sworn only to God; the final draft allows officials to swear to the martyrs or to God as they choose. See *id.* Many religious leaders, however, including representatives of the Eritrean Orthodox Church, Muslims, Catholics, and Protestants, supported the Constitution’s separation of religion from politics. See Dr. Bereket Interview, *supra* note 102 at 55-56. Early in the process, the country’s religious leaders were invited to the office of the Commission. See *id.* At this meeting, Dr. Bereket discussed with them the Commission’s intent to guarantee both freedom of religion and the separation of church/mosque and the state, in the coming Constitution. See *id.*

<sup>226</sup> Initially, some Commission members wanted to adopt Arabic and Tigrigna as national languages in the constitution. See Dr. Bereket Interview, *supra* note 102, at 33. However, members of the PFDJ and the general public (which were divided on the issue) convinced the Commission that guaranteeing the equality of languages, yet labeling two as “official,” were mutually exclusive undertakings. See *id.* at 34. In Eritrea in particular, language is a key component of ethnicity and culture. See *id.* at 33.

## VI. Conclusion

It would be rash to predict success for any particular act of constitution-making, especially soon after it has been completed and before it has been formally implemented.<sup>227</sup> Only the passage of years reveals whether a constitution will be honored and respected by both the governors and the governed, whether it will bend men and women to its dictates or be overshadowed by the necessities of the moment.

With his characteristic reticence, the current Eritrean President has described his country's constitution-making experience as "not perfect."<sup>228</sup> The tentative conclusion on the Eritrean's constitution-making process, however, has to be a positive one. The Eritreans created their own constitution. They did this in a manner calculated to invest the public, as well as present and future governments, in the survival and prosperity of the Constitution and in making constitutionalism the basis of the nation. They did this under conditions hardly conducive to a grand constitutional experiment but with full knowledge of the

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<sup>227</sup> Having debated, drafted, and ratified the Constitution in a burst of energy, the Eritreans are now taking their time in getting it off the ground. They describe this as using their usual "pace of the tortoise." *Eritrean Experiment*, *supra* note 15, at 650. An Electoral Commission was appointed to prepare the elections for the National Assembly, the first step in implementing the process. According to discussions I had with a member of this Commission when I was recently in Asmara, this Commission was proceeding with its work when the fighting with Ethiopia erupted in May 1998, and this has delayed further activity. While this delay might be of concern in some locales, it is worth remembering that this is a country that was willing to wait two years to declare formal independence after throwing out their occupiers and achieving *de facto* independence. *Akay'da gobi'ye*, or "pace of the tortoise," is a consistent and long-standing EPLF strategy, nurtured during thirty long years of revolutionary warfare, and it is no surprise to see it operating here. *See id.*

<sup>228</sup> *President Isaias Replies to Questions on National, Regional and International Issues*, ERI. PROFILE, May 24, 1997, at 3. In an interview with the Eritrean national newspaper published on Liberation Day, May 24, 1997, the first anniversary of the ratification of the Constitution, Eritrean President Isaias Afwerki stated, "If the question is whether we have realized all what [sic] we aspired for, the answer is definitely no. Of course this does not mean underestimating the rich experience and practice that contributed undoubtedly in raising the consciousness of citizens. This notwithstanding, the experience acquired was not perfect. It had some shortcomings." *Id.* Afwerki cited the brevity of the constitutional process, problems with the media, and a remaining "low standard of general awareness of citizens who had long been deprived of educational opportunities." *Id.*

gravity of their undertaking. History can ask no more.

