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Integration:
An Approach to Eritrea's
Predicament and
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Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia⁺

Tesfatsion Medhanie^{**}

Abstract

The absence of a constitution is one of the major deficiencies in Eritrea's current political situation. The “constitution” prepared in 1997 never came into effect. This paper argues that the most serious problem in respect of that document is that its making process was fundamentally flawed, and thus lacking in legitimacy. The only historically legitimate and operative constitution Eritrea ever had was that of 1952. It was a multi-party, liberal-democratic constitution. Without a properly made constitution and the rule of Law, Eritrea is now suffering under a one-party dictatorship. Mainly due to this, its relations with the neighbouring countries, especially with Ethiopia, are hostile. A constitution that is the product of a truly participatory process, in which that of 1952 would serve as the working document, is necessary for establishing the rule of Law and regime legitimacy in Eritrea, and for relations of co-operation with the neighbouring countries, especially Ethiopia. This paper also maintains that the situation in Ethiopia has seriously degenerated since the 2005 elections and the subsequent invasion of Somalia. The regime has become unpopular; many Ethiopians have serious concerns about its politics of ethnicity and especially about the secession clause in the constitution. Hence, in Ethiopia too, there is a need for reform so that a political atmosphere and a constitutional system can develop that would facilitate co-operation with Eritrea and other neighbouring countries.

Introduction

Once acclaimed as a newly liberated country “off to a promising start”, Eritrea has turned out to be a disappointment to many. Africa's youngest state is now a land of the oppressed and the destitute, primarily known for political repression, egregious human rights violations, border wars, abject poverty and related problems. Indeed, it suffers from severe deficits in quite a few areas. For one thing,

+ This is the final version of a paper first presented at the *16th International Conference of Ethiopian Studies* held in Trondheim, Norway, July 2-6, 2007, and later at the conference on “*What is the Way out: Challenges in Overcoming Governance Crises, Endemic Conflicts and Negative External Involvements in the Horn of Africa*”, Aalborg University, Denmark, May 25-26, 2008.

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though it has been independent and sovereign for the last decade and a half, it does not have a constitution by whatever name or in whatever form.¹

There is one thing that makes Eritrea's situation particularly curious: a "constitution" was drafted by a Commission and "ratified" by the "Assembly", but, by the decision of the President, was prevented from coming into force. Eleven years after its ratification, the constitution is still "collecting dust", as one Eritrean opposition leader put it a few years ago. It is the only constitution that we know of that was suspended before it ever came into effect.

Not constrained by any constitutional structure and rule of Law, the current regime in Eritrea is a horror to the people and a menace to the region. It is oppressing and impoverishing the Eritrean society. It is also pursuing harmful policies towards neighbouring states, including Ethiopia. As a result, Eritrea has become incapable of regional cooperation and integration.

In this connection, there is one thing to note that is significant. The people of Eritrea have not shown any observable interest in the fate of the constitution. Only a few who are affiliated with the *Eritrean Democratic Party (DP)* - a very small movement purportedly in opposition to the regime - are demanding its implementation. Among them is the Chairman of the Commission that drafted the constitution.

However, the main problem with the 1997 constitution is not its suspension or non-implementation. Its main problem is the way it was drawn up which was fundamentally lacking in legitimacy.

A cardinal task in Eritrea following political changes would thus be the framing of a democratic constitution. And this means that constitution-making is an issue that needs to be discussed and resolved in respect of Eritrea. Hence, the importance of reflecting on the theme "*Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia.*"

This essay begins with a brief discussion on the present-day understanding of *democratic* constitution-making. It then exposes the flaws in the making of the

1. At present there probably are no other sovereign states that do not have constitutions or "basic Laws". If there are any, they are out of the ordinary and invariably under authoritarian rule of one or another sort. Until very recently, a state well known for its lack of a constitution was Bhutan, the tiny "Dragon Kingdom" in the eastern Himalayas. But in early November 2008, a new king was crowned in Bhutan, whose political system is transformed – at least ostensibly - from an absolute monarchy to a parliamentary democracy with a constitution.

1997 constitution, recalls the virtues of the 1952 constitution and suggests ideas on a credible and worthwhile constitution-making process for Eritrea today. It then briefly deals with the subject of cooperation and integration between Ethiopia and Eritrea. Specifically it will consider the impact of democratic constitution on the process of regional integration and how a legitimately made constitution in Eritrea can help in this respect. In this connection this essay will assess the situation in Ethiopia and indicate what needs to be done to promote smooth relations of cooperation and integration with Eritrea.

Democratic Constitution-making Today

Constitutions and corresponding concepts of constitutionalism are classified in various ways depending on the purpose for which the categorisation is sought. This section of the essay discusses the classification of constitutions and corresponding brands of constitutionalism with regard to their roles in the creation of new orders or perpetuation of existing ones, as the case may be.

In this context, various perspectives on constitutions and/or constitutionalism are offered. Some classify the perspectives into three categories: the “realist”, the “idealist” and the “transitional” or “new” perspective.

According to the realist approach, a constitution is an expression of “the balance of power”² obtaining at the time of its making. Hence, a constitution represents that which is sanctioned or permitted by the existing state of affairs as regards power; it “merely divides the spoils between political elites”³. It is not an agent playing a mediating role in a process of “change or transition”.

The idealist perspective on the other hand views a constitution as having a “foundational” function⁴. It represents the end of the old order and the establishment of a new one. In other words, according to the idealist perspective, a constitution is the “foundation of a new political order.”⁵

The “transitional” or “new” perspective differs from both the “realist” and the “idealist” approaches, even though not to the same degree. It is close to the “idealist” approach; but it envisages a deeper and broader appreciation of a constitution’s role in the establishment and development of a new order. It focuses on

2. Kirsti Samuels: 2000, p. 6 “Balance of power” is a concept applied in international relations. It is mostly used to refer to a policy of maintaining “approximate equilibrium” among states or blocs “in military potential”. The phrase “balance of power” is also used as a reference to “*a political system characterized by a particular configuration of power relationship*”. (Roger Scruton: 1982, p. 35) The latter is the sense in which it is used in this essay.

3. Kirsti Samuels: 2006, p. 6.

4. The term *foundational* is also used in another sense which will be discussed later.

5. Kirsti Samuels: 2006, p. 5.

the significance and role of a constitution in times of political transformation, as distinguished from a period of stability. It relates to “constitutional developments” taking place immediately following a “political change” of great magnitude. It is a type of constitutionalism in which law –i.e. the constitution in this case- has “an extraordinary constituting role’ in the stabilisation of democratic governance”⁶.

While this perspective “recognises” the complex and many-sided function of constitutions, it views constitutionalism as an ongoing process, “inextricably enmeshed in transformative politics”⁷. In other words, according to this perspective, constitutionalism reckons with and “codifies” the predominant “consensus” but “transforms it” as well. This means that it continues to strengthen the process that upgrades the environment and stabilises and develops the new order or governance. And hence, according to this perspective, constitution-making is “a forum for negotiation amid conflict and division”⁸, a forum in which - inter alia - the foundation for the process of “democratic education” and empowerment of the people is laid.

Notwithstanding the plausibility of the above classification of the perspectives on constitutionalism and constitution-making, many scholars opt for a simpler categorisation. To them, there are two basic approaches –namely, the traditional and the new. According to the traditional approach, a constitution is “an ‘act of completion’”. It is perceived as “*a contract, negotiated by appropriate representatives, concluded, signed, and observed.*”⁹ The issues are deemed settled with presumed finality and conclusiveness.

The new constitutionalism, on the other hand, is an approach centring “on ‘participatory constitution-making’ or ‘conversational constitutionalism’”.¹⁰ It is perceived as “*a continuing conversation between the elites of a given society and the population.*”¹¹ It is carried on by all the stakeholders and is “*open to new entrants and issues*”; and its aim is to fashion and provide “*a workable formula that will be sustainable rather than assuredly stable.*”¹² The issues are not deemed disposed of for good and all, although a consensus is reached on how they should be resolved presently.

This approach - i.e. new constitutionalism - is more sensible especially considering the essential nature or function of a constitution. A constitution can be nei-

6. Ruti Teitel, quoted and restated in Samuel Issacharaoff: 2004, p. 74.

7. Ruti Teitel, quoted in Kirsti Samuels: 2006, p. 6.

8. Vivien Hart, quoted in Ibid. p. 6.

9. Vivien Hart: 2003.

10. Paul R. William: 2006.

11. Louis Aucoin: 2007, p. 35.

12. Vivien Hart: 2003.

ther value-neutral nor agenda-free. It is necessarily informed by some desiderata that may be expressly declared - usually recited in its preamble - or tacitly stated. What this means is that a constitution is designed bearing in mind the apprehensions or anxieties of the polity concerned as well as the ends or goals aspired to. H. W. O. Okoth-Ogendo in effect points to this idea when he characterises the constitution

*“as a ‘power map’ upon which the framers may delineate a whole set of concerns which may range all the way from an application of the Hobbesian concept of ‘the covenant’, ...to an authoritative affirmation of the basis of social, moral, political or cultural existence including the ideals towards which the policy is expected to strive....”*¹³

It follows from this that the framers of a constitution determine which concerns should be highlighted as the desiderata informing the content and spirit of the document. In other words, constitution-making, as Okoth-Ogendo put it, is a process which *“involves, inter alia, making choices as to which one of those concerns should appear on that map”*.¹⁴ The choices made do not necessarily remain sound for all time. With changes taking place in the society, new concerns may emerge or some of the concerns not highlighted heretofore may be found to have become more important. This means there is need for dialogue - a conversation - and change so as to respond to the new claims, so to speak, or adjust to the new reality.

Quite significantly for situations in the countries of the Global South, constitution-making of the new type is understood as *“a creative and developmental part of the transformation of inter- or intra- state conflict”*. Specifically, it is *“a tool for the transformation of conflict”*.¹⁵ As such, constitution-making affords, as the late Pierre Trudeau put it, *“a site for ‘civil dialogues’, a ‘meeting ground’ where adversaries build trust and test mutual good faith”*.¹⁶ In plain words, it is a forum of conflict resolution.

Such constitution-making is not only about rights and principles of governance; it is also, *“essentially about the distribution of power”*.¹⁷ The various elites and other stakeholders – especially the former adversaries - converse, debate, compromise and agree how or in what form power would be shared. One of the cardinal rules of new constitution-making thus stresses the need to *“limit the appearance of incumbent/occupier dominance”*.¹⁸ Going beyond appearance,

13. H. W. O. Okoth-Ogendo, quoted in Julius Ihonvbere (2000).

14. Ibid.

15. The Cunliffe Centre: 1999.

16. Ibid.

17. Vivien Hart: 2003.

18. Paul R. Williams: 2006.

Jolynn Shoemaker says that “no party or interest should have a dominant voice”.¹⁹ The reason for this is that

“incumbent control of the drafting process can de-legitimise the constitution and sow distrust. Also, the appearance of control by an international force, such as the Coalition in Iraq, can deligitimise the constitution”.²⁰

In post-conflict situations, the way a constitution is made, as well as its substance, is of crucial importance. It plays “an important role in the political and governance transitions.” In such situations the process of making a constitution

“is an opportunity to create a common vision of the future of a state and a road map of how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate”.²¹

The process of such constitution-making is inclusive or expansive also in the temporal sense. It has several phases. Normally, there are four phases in a constitution-making process. They are the phases of preparation, drafting, public consultation and final review and adoption.²² However, in many cases, especially in post-conflict situations, the process in effect begins before the preparations for the actual making of the constitution. The “anticipation” to negotiate a constitution in a participatory process influences or determines the spirit, style, and direction of the “pre-constitutional phases of debate and conflict transformation”.²³

Today there is a virtual consensus that a constitution should be democratic - i.e. it should be made democratically. And the understanding now prevails that a constitution-making process can be democratic only if it is participatory.

This understanding is gaining ascendancy. Due to this, a tenet of new constitutionalism is that how a constitution is made is as important as, if not more important than, the substance. In the words of Louis Aucoin,

“... new constitutionalism is characterized by the view that the process is as important, if not more important, than the ultimate content of the final charter. The theory underlying this view is that an open and inclusive process will contribute to healing and reconciliation”.²⁴

19. Jolynn Shoemaker: 2004, p. 17.

20. Paul R. Williams: 2006.

21. Kirsti Samuels: 2006, p. 2.

22. Paul R. Williams: 2006.

23. The Cunliffe centre: 1999.

24. Louis Aucoin: 2007, p. 34.

This is true especially in a post-conflict setting. The situation of a society in post-conflict is still vulnerable, which means that considerable care is required to maintain the consensus reached. Hence, the need for a constitution that is legitimate and sustainable. And the chances for a constitution to become so “will largely depend on its acceptance by the people”.²⁵

Importance of Process

What does the statement mean that the process of a constitution’s making is as important as, if not more important than, the substance? What this means is that the “norms of democratic procedure” formerly upheld as regards “daily political decision-making” are now deemed essential for the constitution-making process.²⁶

The strength of participatory constitution-making process is that it secures the consent of all the elites and stakeholders. All have to be included because “in divided societies, inclusion is a prerequisite of genuine consent”.²⁷ More broadly, it is “a process of constructing a political consensus around constitutionalism” in the society as a whole.²⁸ This means that not only the elites but also the people at large consent to it. As a result of this process, the people will have “a sense of ownership” of the constitution.²⁹ They identify with, uphold and safeguard it.

The consent is actually the source of the constitution’s legitimacy, which is different from legality or legal validity. Legality or legal validity only indicates propriety or appropriateness of a measure within the framework of the existing law or legal system. Legitimacy is however a different matter. In the words of Lorz, “Legitimacy asks for the fundamental justification at the basis of the whole state order”. Paraphrasing Habermas, Lorz adds that legitimacy

*“encompasses all publicly announced reasons and constructions which have been designed to secure the acceptability of a constitution. In other words, there is always a certain idea of legitimacy within a given society, and the legitimacy of the constitution depends on the degree of its conformity with this idea”.*³⁰

25. UNDP (2004), p. 127.

26. Vivien Hart: 2003.

27. The Cunliffe Centre: 1999.

28. Julius Ihonvbere: 2000.

29. Ibid; see also Louis Aucoin (2007), pp. 34-35.

30. R. Alexander Lorz: 2007.

Even more fundamentally, in a number of cases a democratic constitution-making process has a “constitutive” function as regards the establishment of a modern state. Some writers use the term “foundational” to express the same concept. For example, the making of constitutions in Europe in the 1990s or since the end of the Cold War is said to be “foundational”, an expression used in two senses. The first sense - already mentioned - is “regulative” and conveys the idea that a constitution establishes the new political order –i.e. the system of liberal democracy comprising of separation of powers, constitutional procedure and principles of human rights. The second sense, also referred to as “geographical legitimacy”, relates to the establishment of the very “identity” of the geographical entity as a political state. Explaining this in the context of the European Union’s “constitution-making efforts”, Jiri Priban says:

*“...the second function pursued the goal of constituting the identity of a sovereign people and political legitimacy and thus reflected symbolic rationality of law and its expressive power to speak for a political community”.*³¹

A democratic constitution-making process has such a function not only in the framework of developed polities such as those in the European Union, but also as regards the establishment of states – mostly multiethnic - in the Global South. It confirms the country concerned as a politico-geographical entity. The participation of all the political, ethnic and socio-economic groups in this “democratic” process fosters or strengthens in all of them the awareness that they are part of the same polity. It endorses and sustains the people’s “sense of commonality” -i.e. “*the sociological claim of a ‘We’ that defines a people*”.³² This *legitimacy* - this sense of the “We” - minimises the threat to the continued territorial integrity of the state.

Established in accordance with a constitution fostered by this process, the political regime - as well as its governing institutions and authorities - acquire legitimacy.³³ This legitimacy also lends the state the quality needed for its genuine acceptance and internal and international recognition.

Such a constitution fundamentally contributes to peace making and peace maintenance. A constitution that is the product of such a process will enhance the chances of the state for “long term peace” and boost “the quality of the democracy created”.³⁴ In the process of constitution-making, the various groups and stakeholders dialogue and reach an understanding or consensus. A state estab-

31. Jiri Priban: 2005, pp. 1-2.

32. Neyire Akpinarli: 2008, p. 204.

33. Julius Ihonvbere: 2000.

34. Kirsti Samuels: 2006, p. 6.

lished on the basis of such a constitution has more capacity to observe the rule of Law internally and to maintain normal relations with neighbouring and other states. Going beyond normal relations, it can enter into relations of cooperation and even political association such as confederation.

On the other hand, processes that are not really representative and inclusive but “*dominated by one interest or faction tended to result in constitutions favouring that interest or entrenching power in the hands of certain groups*”.³⁵ A state controlled by such a group is less inclined to observe the rule of law and less capable of cordial relations internationally.

Participatory constitution-making is a necessity. It provides peace and stability that are important components of the context for development. Unfortunately, it cannot be undertaken in any situation. It can be launched and realised only under certain conditions. As Ihonvbere put it,

“for constitutions to have value and legitimacy, the enabling environment for constitutionalism must first be established”.³⁶

Detailing the enabling environment, Sam Brooke wrote that, in addition to “social inclusion in the process” and freedom of expression, “*there must be general security, for without this, the other efforts for inclusion and for freedom of expression could face insurmountable obstacles*”.³⁷ In other words, the prevailing environment should be such as to guarantee or provide security, and enable enjoyment of civil liberties and dialogue.

It is also important to note that the international situation matters. One even dare say that the possibility of such a constitution-making process is affected by the international environment. This is quite true especially considering that “*the process is characterised by (among others) increasing international involvement - what is being called a ‘shared international effort’*”.³⁸ This involvement is appropriate particularly in light of the argument that there is a basis in international law for the right to participate in constitution-making.

International Legal Basis for Participative Constitution-Making

The claim that there is a right to participation in constitution-making rests on two grounds. These are (i) the internal right to self-determination which is enunciated in UN resolutions and treaties; and (ii) the “international constraints on

35. Kirsti Samuels: 2006, pp. 6-7.

36. Julius Ihonvbere: 2000.

37. Sam Brooke, (2005), pp. 8-9.

38. Paul R. Williams: 2006.

constitution-making” based on the Universal Declaration of Human Rights (UDHR) and other international instruments of human rights.

By internal right to self-determination is meant that people have the right to determine the political and socio-economic order for themselves. This contemplates that the people are independent in making the determination. It follows that the states must guarantee “*the constitutional and political processes which in practice allow the exercise of this right*”.³⁹ What this means is simply that public international law demands that “*it is indeed the people which make the choice on the future political and constitutional system of their state.*”⁴⁰ In other words, internal self-determination demands that the people participate in the constitution-making process. It is such participation that provides them with the opportunity to debate, compromise and reach consensus on, among others, the ideals - *the fundamental desiderata* - that should inspire the content and spirit of the constitution as well as the pertinent objectives and frameworks of operation.

By international constraints on constitution-making is meant that there are certain principles that should be observed when constitutions are made. The constraints are substantive and procedural. They are basically applications of human rights principles stipulated in various international instruments.

The substantive constraints concern the contents of the constitution. The earliest source of such constraints is the 1948 Universal Declaration of Human Rights. A non-binding proclamation at the outset, the UDHR has become authoritative over time. Its provisions are now “considered to be part of international customary law”.⁴¹ Moreover, much of the UDHR has been concretised in the provisions of the International Covenant on Civil and Political rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are multilateral treaties and thus binding. All these instruments provide for the rights to which citizens are entitled. This means that constitutions should provide for the protection of the rights stipulated in these instruments. In other words the international human rights instruments constitute “internationally mandated constraints” on constitution-making. For example, a state would have serious problems enjoying effective international recognition if its constitutional order is openly violative of fundamental freedoms.

Procedural: The procedural aspect of the international constraint on constitution-making is closely tied in with the right of internal self-determination, the essential meaning of which is that “*it is indeed the people which make the choice on the future political and constitutional systems of their state*”. Choos-

39. R. Alexander Lorz: 2007.

40. Ibid.

41. Ibid.

ing a political and constitutional system necessarily entails participation in the making of the constitution.

More concretely, many legal scholars agree that “international human rights instruments” such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political rights (ICCPR) provide for the right of such participation.⁴² For example, Art. 25 of the ICCPR provides that “every citizen shall have the right and the opportunity”, among others, “to take part in the conduct of public affairs, directly or through freely chosen representatives”. Participation in the making of the constitution is a form or an instance of taking part in the conduct of public affairs and is thus upheld in international law. Besides, it is known that the UN Commission on Human Rights has “articulated the specific right to participate in constitution-making”.⁴³

Historic Specificity of Actual Constitution-making Processes

What do people mean? The manner of the constitution-making process is historically specific. How the “people” participate - in fact who the “people” are - is thus determined by the history and the situation of the polity concerned. Are political parties “people”?

Likewise, the forms of participation are historically specific. Hence, there are various forms of participation.

We have already seen that the process is legitimate if it advances with the people in charge in one or another genuine sense. In processes in which this requirement is fulfilled, what are the elements of a legitimate or democratic constitution-making? An example of a constitution made in a process reflecting new constitutionalism is that of South Africa. The importance of “process”, as distinguished from substances, was most clearly demonstrated in the making of the South African constitution. Hassen Ebrahim says:

“Process tends to be as important as the substance of all agreements. As a result of this, more time and energy was spent in South Africa on negotiating the process of arriving at the final constitution than on negotiating the substance of it. The most vigorous opposition, disruptions, and disturbances took place in support of demands relating to the process of drafting the

42. For example, Yash Gai states: “Participation in constitution-making is considered nowadays as fundamental. International human rights instruments require as a manifestation of self-determination, that all the people and communities should participate in deciding on the constitutional and political system” (Yash Gai: 2004, p. 7).

43. Jolynn Shoemaker: 2004, p. 16.

constitution. The levels of political violence during the negotiation process also manifested this trend”.⁴⁴

It is important to see the elements of the procedural aspect of democratic constitution-making process applied in the South African case.

Practically fulfilling the principle of internal self-determination, the following were among the characteristics of the South African constitution-making process:

a. “Inclusivity”. This means that the participation of all the people or the groups in which they are represented should be ensured. The people should take part in the process and influence the contents of the constitution.

b. Empowered civil society. This means that interest groups should be allowed and encouraged to organise themselves and articulate their interests and take part in the constitution-making process. Public participation was interpreted to signify that the “broader society” was enabled to take part and influence the process. The dialogue with the various structures of civil society “was based on the concept of partnership in the process of drafting” the constitution.⁴⁵ Such groups constitute the link or bridge between the people and the constitution-making body.

It should be acknowledged however that civil society in most African states is at an embryonic stage. Actually, Africa is “a region most observers consider less likely to have civic organisations”.⁴⁶

c. Political parties: The role of political parties depends on the history of the country or polity concerned. The phrase “political parties” here refers to organisations - whether labelled parties or not - established for political purposes including that of contesting for or sharing state power. Hence, “Fronts” are parties. The history of South Africa was such that the role of political parties in the constitution-making process was considerable.

Political parties are among the major stakeholders in the constitution-making process. They are directly interested in the question of distribution and application of power. They have the foremost interest in the determination of the rules of political relations and contest. It is essential that they are satisfied with and accept the constitutional rules that govern power relations in the society. This is vital for the legitimacy of the state.

44. Hassen Ebrahim: 2002, pp. 25-26.

45. Ibid. p. 30.

46. Jennifer Widner: 2004, p. 19.

Political parties have members and followers. They develop positions on various political and other issues. The positions are adopted by the masses of their members and followers. They also influence the debates at national level. Political parties “facilitate the public meetings” and other activities by which the constitution-making process involves the people. They help the process or the Commission entrusted with the task “to solicit public views”.⁴⁷

In addition, experts have also important roles to play.

Regarding the process in the technical or narrow sense, the South African scenario was characterised by the following, among others: openness, transparency, and accessibility.

Openness: This means that the process is such that it is possible - open - for the public to make their inputs. There are no impediments blocking them from being heard and making their contributions. This is of crucial importance for legitimacy: It is when the people feel that they could make their contributions that they would consider the final document as legitimate, in fact as their own.

Transparency means that the deliberations on the making of the constitution and their outcomes should be visible to the people. Groups and individuals who put forward suggestions and views should know that they were given due consideration; they should also be informed of the response to their suggestions. In other words, “*transparency would ensure that the constitution is not negotiated behind closed doors*”.⁴⁸

Accessibility. What this means is that it must be easy for people - physically, technically etc.- to actually take part in the process. It is not enough to announce to people that they can make “submissions”. They should be provided with the necessary assistance to do so. They should be enabled “to access the process both physically and intellectually”.⁴⁹ For example, in South Africa the “public was provided with toll-free telephone numbers”. This “principle of accessibility” was also applied as regards the question of language. This meant two things: (1). Various languages spoken in the country were used in transmitting information and preparing the necessary documents. (2). The constitution as well as other important documents were written in simple language the people could understand. People were trained for this purpose.

47. Hassen Ebrahim; 2002, p. 27.

48. Ibid, p. 22.

49. Ibidem.

The process materialised and South Africa proclaimed a constitution appropriate for a non-racial democracy because an “enabling environment for constitutionalism” was established in the first place. The basic civil and political rights were being enjoyed in practice. The “pre-constitutional phases of debate and conflict transformation” were adequately influenced by the principles of democracy, human rights and civic cultures that new constitutionalism contemplates.

In the case of Eritrea the process and the outcome were quite the opposite of those in South Africa.

The Initiative in Eritrea: False and Deceptive

In the year 2000, Prof. Julius Ihonvbere wrote an article in the *Third World Quarterly* entitled “*How to make an undemocratic constitution: the Nigerian example*”. He was right about Nigeria. He would have been equally, if not more, correct had he used Eritrea as the example.

The process by which Eritrea’s shelved “constitution” of 1997 was made was entirely undemocratic. This was very sad especially considering the fact that in 1950-52, Eritrea had experienced a highly commendable democratic process of constitution-making. The regime of independent Eritrea simply refused to build on Eritrea’s proud constitutional history. In what follows we briefly recall the 1950-52 constitution-making process.

The Making of the 1952 Constitution

The 1952 constitution was made in a way that closely approximated the new or participatory constitution-making process described above. The process was informed by elements akin to those constituting what we call today “international constraints” on constitution-making, both substantive and procedural.

The UN General Assembly Resolution (390 A V) of 1950, in which it was decided that Eritrea shall be “federated” with Ethiopia, practically determined the way the 1952 constitution was made. It included articles that provided for what became substantive and procedural constraints to the constitution-making process. Art. 8 of the Resolution provided that paragraphs 1-7, which were clauses on civil and political rights reflecting the 1948 Universal Declaration on Human Rights, were to constitute the Federal Act.

The Resolution also provided that a United Nations Commissioner for Eritrea was to be appointed by the General Assembly and that one of his cardinal tasks would be to prepare a draft constitution for the country. In its paragraph 12, the Resolution provided that the Eritrean constitution

“shall be based on the principles of democratic government and shall include the guarantees contained in paragraph 7 of the Federal Act”.

This meant that the constitution-making process was constrained by, or had to be in accord with, the human rights and liberties paragraph 7 contained. In other words, these rights and liberties were in effect the “immutable principles”⁵⁰ the process had to observe.

Regarding the process of making the constitution, paragraph 12 of the Resolution had provided that the Commissioner was to prepare the document in consultation with “the inhabitants of Eritrea” as well as with the Ethiopian government and the British Military Administration (BMA).

Once the draft constitution was prepared, it was to be considered and adopted by the Eritrean Assembly, which, according to the Resolution, was to comprise of “representatives ... chosen by the people”.

The constitution was to enter into effect following its ratification by the Emperor of Ethiopia.

The Commissioner the UN General Assembly appointed for Eritrea was Eduardo Anze Matienzo, a Bolivian diplomat who, obviously, was unrelated to any of the Eritrean political parties or to the Ethiopian government.

In discharging his task the Commissioner strictly adhered to the wording of paragraph 12 of the UN Resolution. He rejected outright the suggestion to limit the consultations to the leaders of political parties or even to simply submit the draft to the Eritrean Assembly.⁵¹ He conducted the process in such a way that a credible constitution reflecting a genuine compromise between all the stakeholders was produced. Under what conditions - and how - was the process carried out?

In the first place, there was an environment in Eritrea, which enabled free expression, exchange and dialogue necessary for participatory constitution-making. Prof. Arthur Schiller of Columbia University, who was an advisor to the Commissioner, was impressed with the openness of the debates and the exchange of ideas in the country at that time. In an article published in the *Ameri-*

50. One researcher defines immutable principle as “a principle or concept that provides a substantive limit on a political process related to the formulation or amendment of a constitution” (Sam Brooke: 2005, p. 3).

51. Kesete Haile: 1965, p. 25.

can Journal of Comparative Law, he recalled that “*the period was one of real education*”.⁵²

In the context of the enabling environment, the Commissioner was determined to ensure that the inhabitants were - and felt - free to express their wishes on the various issues of the consultations. He even took actual measures to make certain that there would not be any appearance of agents of the administering authority (i.e. the BMA) influencing the choice of the inhabitants in any way.⁵³

The representatives with whom the Commissioners held consultations really spoke for the people who had mandated them. Prof. Schiller was impressed with the consultations and meetings the Commissioner and his staff held with the inhabitants. He attested that, in their exchange with the Commissioner, the representatives were “*unwilling to discuss anything on which they had not been instructed by the people.*” The Commissioner communicated with the representatives through translators. Professor Schiller added that

“the political and religious leaders, the minority and special groups, generally came well-primed with material to urge the adoption of constitutional provisions favouring personal or small group interests”.⁵⁴

The Commissioner held consultations and exchanges with all the stakeholders in the country at that time. Specifically, he held consultations with

1. the British Military Administration in Eritrea
2. Ethiopian authorities
3. the inhabitants of the country
 - (i) the various political parties,
 - (ii) Religious leaders,
 - (iii) foreign communities, including, those of the Italians, Arabs, Greeks and Jews.
 - (iv) Economic, Cultural and Professional Organisations.

52. Arthur Schiller: 1953, p. 379.

53. In his Final Report to the United Nations, the Commissioner said:

“The Commissioner pointed out to the British Administration that in order to prevent the inhabitants from claiming later that they had been influenced in their views or unable to express themselves freely on account of the presence of officials of the British Administration, it would be well to hold large open assemblies in the different divisions without local officials or Eritrean police, except when he considered it necessary for them to be present. The British Administration, at all times willing to assist the Commissioner, gave instructions that no official other than Eritrean administrative assistants, should be present. It can therefore be said that the meetings provided a means of truly democratic expression of the people's will.” (E. Anze Matienzo: 1952, p. 13, para. 137).

54. Arthur Schiller, 1953, p. 379.

Matienzo effectively considered the situation of the various interest groups from the standpoint of sophistication and information. He sought to ensure to the extent possible that their decisions were based on an adequate understanding of the issue. In discussing with the representatives of the communities, he was conscientious enough to explain the meaning of the “*federal*” arrangement Eritreans were entering into with Ethiopia. On the very day of his arrival in the country, Matienzo made a public statement in which he informed the people that the “*federation*” was “*a middle of the road plan which should give satisfaction both to those who had wished Eritrea to be united with Ethiopia, and to those who had desired her independence*”.⁵⁵

The Commissioner duly considered the proposals and concerns of all the interested organisations and groups. He then, with the aid of experts,⁵⁶ prepared the draft constitution seeing to it that it had “as its primary aim the well-being of the whole of Eritrea” while safeguarding “the rights of special groups”.

Among the Eritrean interest groups, the most active and influential were the political parties, which were established in the country in the mid-1940s. As Tekeste Negash put it, since the emergence of parties

“the Eritrean political elite had learned to articulate its views on Eritrea and its links with Ethiopia. The 1947-52 period was indeed a period when the Eritrean political class could express its opinions on Ethiopia with impunity”.⁵⁷

Actually one reason for concern in the efforts of the Commissioner to obtain the wishes of the communities through the consultations was that the political parties were too influential. The representatives of the communities were too swayed by the political parties and relied too much on them for guidance on the issues. In the consultations with the Commissioner they mostly reflected the positions of the political parties. Arthur Schiller noted that in fact

“the Commissioner was somewhat disappointed during the consultations in the field because the opinions offered were too often reflections of the views

55. Anze Matienzo, 1952, p. 4, para. 39.

56. The first panel of experts comprised of four jurists. They included a French and a British who could not agree on basic issues such as whether voting should be “unique, equal, and secret”. The two are said to have prepared drafts that were “*as alike as chalk and cheese*”. Due to reasons unrelated to the disagreement, which was not resolved, the panel disbanded and a new one was appointed consisting of jurists nurtured in French legal tradition. A French jurist prepared a draft that got the acceptance of Commissioner Anze Matienzo, who submitted it to the Eritrean Constituent Assembly. It was this draft which was debated and became the Eritrean constitution of 1952 (Sir Ivor Jennings: 1956, pp. 21-22).

57. Tekeste Negash: 1997, p. 77.

earlier presented by the various political parties at Asmara. Nevertheless, it was at the scores of these meetings held throughout the country and participated in by the people that the autonomy of Eritrea was truly achieved”.

When the federation came into effect in September 1952, the political parties had declined. In fact the main formerly anti-unity parties had willingly dissolved. However, with clear indications appearing as early as 1953 that the future of Eritrea’s autonomous status was in danger, the parties re-emerged. They became revitalised, as Tekeste Negash wrote, so as “to safeguard the rights laid out in the constitution”.⁵⁸ Though practically outlawed, the parties continued to exist, giving rise eventually to resistance movements that finally culminated in the formation of the *Eritrean Liberation Front*.

It is significant that people protested the violations and finally the annulment of the constitution and the “federal” arrangement as a whole. This clearly attests to the fact that the people identified with the constitution and regarded it as the embodiment of their rights. In other words, they had “a sense of ownership” of the constitution. It was indeed a legitimate constitution.

Perhaps more importantly, the constitution had a *constitutive* function with regard to Eritrea as a politico-geographical unit. It was a component of the basis of Eritrea's continued existence as one entity. Following the end of Italian colonialism and the establishment of the British Military Administration (BMA) as the caretaker government, Eritreans were divided regarding the destiny of the country. The main factions were those favouring union with Ethiopia and those calling for separate Eritrean sovereignty, in the case of some parties, following a period of Trusteeship under Great Britain or Italy. At one point there was the real possibility that the country would disintegrate with the Moslem populated western lowlands joining the Sudan and the Christian highlands, including the port of Massawa, uniting with Ethiopia. The British who had a plan to reshuffle the region as a whole had subtly encouraged this idea.

The federal arrangement was devised as a compromise formula to satisfy the various Eritrean political groups. Broad autonomy within the framework of Ethiopian unity and a liberal democratic constitution to safeguard this was acceptable to all the groups. On that basis they agreed to continue being part of the Eritrean entity. The constitution was thus an element of a process that bestowed “geographical legitimacy” on Eritrea - i.e. due to the federal arrangement all the ethnic components accepted that they would continue to be part of the entity called Eritrea. In other words, the constitution was an important part of the whole “federal” arrangement which allowed Eritrea to continue to exist as one

58. *Ibid.*, p. 85.

political entity.⁵⁹ Needless to say, it was also the basis of the legitimacy of the state –i.e. the legitimacy of Eritrea’s autonomous government.

In almost every important respect, the making of the EPLF's 1997 constitution was a contrast to that of 1952.

The Constitution-making Process of 1997

When Eritrea seceded from Ethiopia in 1991, its situation was literally one of post-conflict. This was both in the sense that the country had emerged from a conflict with Ethiopia and in that the EPLF (now PFDJ) that seized state power had been in conflict with other Eritrean organisations. Actually the intra-Eritrean conflict was still going on. The Eritrean Liberation Front (ELF) and other organisations were still engaged in guerrilla fight against the ruling EPLF (PFDJ).

Eritrea's was thus the kind of situation that strictly called for dialogue, national reconciliation, compromise and democracy so as to build an environment necessary for framing a legitimate and sustainable constitution. Not merely the most appropriate, but the only realistic way to produce such a constitution in multi-ethnic and bi-confessional Eritrea which had emerged from - and was in fact still going through - internecine conflict was a participatory process as described above.

Besides, Eritrea emerged as an independent state at the beginning of the 1990s when the African continent was going through the euphoria of democratisation. Most of the sub-Saharan African states were democratising their constitutional systems. It would have been logical for Eritrea to engage in a democratic constitution-making.

Indeed, the situation was one that could have fostered what is known as “constitutional moment”. This is a reference to that “unique moment” when it is hoped that parties formerly in conflict “can find a common ground” and devise constitutional principles “to guide the nation and keep it off the course of conflict and instability”.⁶⁰ The EPLF (PFDJ) that pursued an unabashed policy of monopolising power and disallowing the participation of other political organisations prevented the emergence of a constitutional moment in Eritrea.

59. Commissioner Anze Matienzo clearly implied this idea in his Final Report. He wrote:

“Among the guiding principles of the resolution of December 2, 1950, the Commissioner did not hesitate to place in the forefront the unity of the Eritrean people, which, gradually prevailing over the diversity of traditions, religions and customs, would enable all Eritreans to dwell, so to speak, in one and the same house.” (Anze Matienzo:1952, p. 17, para. 186).

60. Louis Aucoin: 2007, p. 34.

In actual fact, what happened in Eritrea was quite the opposite of what was needed and what was becoming familiar in Africa. The constitution-making process was launched and carried out in the total absence of the necessary democratic environment.

The Eritrean environment: Severe Anti-democracy

The following marked the anti-democratic environment in Eritrea.

(i) The EPLF wielded state power to the total exclusion of all other forces. It became the government.

(ii) Not only were other organisations excluded from state power, but also banned and not allowed to exist. In his first public address the president, Isayas Afeworki, openly declared that the establishment of political organisations was not allowed. He had made a blatant announcement that “*there shall be no game in the guise of organisations*”.

(iii) Not only did the EPLF prohibit the existence of other organisations, but it also attacked them militarily and hunted down their erstwhile members, imprisoning many of them.

(iv) For the people in general, there was no democracy whatsoever. There was no freedom in any form: no freedom of expression, no freedom of association or any other freedom particularly relevant to political democracy.

The Drafting of the 1997 Constitution

(i) The drafting of the constitution was launched as the project of only one organisation - the ruling EPLF (PFDJ). The process of making the constitution was utterly bereft of the procedural aspects of the international constraints of constitution-making. It did not have the procedural qualities demanded by the principle of internal self-determination, which qualities are a prerequisite for its legitimacy in the polity.

(ii) A Commission was set up for the task. It was called the “National Constitutional Commission”. It was established by the regime in power - the EPLF. Its Chairman, Prof. Bereket Habte Selassie, was handpicked by the regime. He was a member of the EPLF itself, actually one of its cardinal representatives abroad. In that capacity, he had been busy throughout the years glorifying this organisation at the expense of the others and, indeed, to the long-term detriment of Eritrea. Prof. Bereket’s qualifications as a lawyer and his rich academic background notwithstanding, his appointment as the Commission Chairman only

contributed to discredit the process tainting it as an exclusive project of the ruling EPLF/PFDJ.⁶¹

(iii) Under the Chairmanship of Prof. Bereket, the Commission acted plainly as the emissary of the ruling EPLF/PFDJ. It expressly justified the exclusion of the other Eritrean organisations. It argued that it was correct for the EPLF/PFDJ to appoint a Commission alone since it was the winner in the armed conflict. In his book on the making of the 1997 constitution published in 2003 Professor Bereket still justified the exclusive process. It is important to quote him at length:

“... some Eritrean groups living in foreign countries, question the right of the government of the PFDJ (formerly EPLF) to appoint the Commission. This question concerns legitimacy of a special kind which needs to be mentioned here

“First, the government is a government of a country recognized by the world community assembled at the United Nations. The power that the government wields in the name of the nation came out of the 'barrel of the gun' and was later given the cloak of legality, following a popular referendum. The power on which the government's authority to rule, and to appoint a commission, rests and its historical origin need hardly be the subject of controversy. ... Simply put, the story is that the world community accepted the Eritrean nation as a member, following the referendum of April 1993, as already noted. The referendum was held because the Eritrean nation was liberated by force of arms. The armed struggle that resulted in the liberation of Eritrea was led by the EPLF (now the PFDJ)...

“Since this subject has been raised in connection with the concept of legitimacy, it is worth pointing out that the legitimacy of the EPLF is based not merely on the fact that it was an armed political organization that defeated the enemy, but also because its members are people who spent the best parts of their lives in the mountains and trenches, and who created a social-infrastructure that benefited the people and thus secured their wholehearted support. ...In short, the original legitimacy derived from initiative and sacrifice, reinforced by service was ultimately cemented by success in the achievement of victory.

“And, as Ronald Reagan used to say, no one quarrels with success, no one that is, except people who do not have respect for the facts on the ground. The government of the EPLF (now PFDJ) could, and did, legitimately

61. It is rather sad to see that, for reasons that are not clear, some astute and usually plausible African scholars seem to believe that Prof. Bereket's Chairmanship added to the credibility of the process. For example, Julius O. Ihonvbere wrote, *“The membership and leadership of the reform process is important. In Eritrea, the appointment of a highly respected lawyer, academic and activist in Bereket Selassi gave credibility to the Constitutional Commission of Eritrea (CCE).”* (Julius Ihonvbere: 2001, p. 7).

*appoint a Constitutional Commission to draft the future Constitutional (sic) of Eritrea. It had the right and the duty to do so”.*⁶²

The view of the Commission Chairman, Prof. Bereket, sharply counters the cardinal principles of democratic constitution-making today. Most conceitedly, it disregards the considered view of experts that a primary rule of constitution-making today is to “*limit the appearance of incumbent/occupier dominance.*”⁶³ It defies the wisdom of the already mentioned observation that “*incumbent control of the drafting process can de-legitimise the constitution and sow distrust.*”⁶⁴

Prof. Bereket’s pronouncement above is close to the old, realist approach, according to which a constitution or constitution-making represents “the balance of power” in the sense of the status quo prevailing at the time. It is simply astounding that Prof. Bereket claims that “*Eritrea’s constitution represents in fact a new approach in Africa’s constitution-making*”.⁶⁵ What is more deplorable – and very sad - is that, for some reason, several other scholars who are conversant with, and apparently supportive of, the new democratic constitution-making process, spread the false notion that Eritrea’s was an instance of it. Among these scholars are Hassen Ebrahim,⁶⁶ Julius Ihonvbere,⁶⁷ and Edmond Keller.⁶⁸ It appears that several of these scholars are acquaintances of Prof. Bereket.

62. Bereket Habte Selassie: 2003, 84-86.

63. Paul R. Williams: 2006.

64. Ibidem.

65. Bereket Habte Selassie: 2003, p. 20.

66. Hassen Ebrahim discusses the process in Eritrea as though it had satisfied much of the criteria for democratic constitution-making -criteria such as accessibility and accountability. Actually he essentially maintains that together with the constitution-making processes of Uganda and South Africa, Eritrea's was an example of “best practice in constitution-making”. He even implies that it is not “premature to speak of the existence of constitutional government” in Eritrea (Hassen Ebrahim: 2002).

67. Ihonvbere emphasises that, in contrast to that of Nigeria, Eritrea's constitution-making process was “transparent”. He implies that in Eritrea, as in South Africa, “every effort was made to open up the process, build public confidence, and remain constantly in touch with the public” (Julius Ihonvbere: 2000).

68. Prof. Edmond Keller characterised the constitution as “democratic”. He wrote in 1998:

“... the government of Eritrea continued its measured and resolute steps to reconstruct society and to create a unique brand of democracy. While the establishment of opposition parties was contemplated, the official rhetoric of the sole functioning political party, the People's Front for Democracy and Justice (PFDJ), seemed to discourage their formation. Nevertheless, strides were made toward the implementation of a democratic constitution. “...the government of Eritrea continued its measured and resolute steps to reconstruct society The constitution was ratified on May 23, 1997, but at the year's end, had yet to be implemented. The commitment to democracy could be seen, however, in the political structures that had been established, particularly at the regional level in the form of popularly elected local and district governments.” (emphasis added) (Keller: 1998).

Actually, one of the factors accounting for the false portrayal of the process as an instance of new constitution-making was Prof. Bereket's personal connection. He had - and apparently still has - a broad network of friends and acquaintances in the Euro-American world and in Anglophonic Africa. They include politicians, active and retired diplomats as well as area specialists, members of the early post-colonial African elite, the intelligentsia of the African Diaspora, and even one politically controversial celebrity in the liberal and feminist circles of America.⁶⁹ It appears that, whatever means were used, Prof. Bereket managed to involve his connections in the project to popularise the “constitution” as a really democratic one.

Total denial of the fundamental principles of new constitutionalism marred the approach of the EPLF's Constitutional Commission chaired by Prof. Bereket. Such being the approach, the process was delegitimized from the beginning. It was a foregone conclusion that the document to be produced would be utterly delegitimized.

(iv) The Commission organised meetings, produced documents and applied the familiar rituals and paraphernalia associated with the technical process of constitution-making. However, all this was done under strict control of the regime. It was a hollow exercise that could not in any way improve – let alone rectify – the process from the standpoint of democracy.

(v) The Commission made no attempt to utilise Eritrea's rich history of constitution-making. No effort was made even to take advantage of the legitimacy of the 1950-52 Matienzo-led constitution-making process. It is quite significant that in his latest book on the subject entitled “*The making of the Eritrean constitution: The dialectic of Process and Substance*”, the Chairman of the Commission, Prof. Bereket Habte Selassie, while discussing the historical background to the

Prof. Keller has written extensively on Africa, including the Horn states. Actually, he is a keen follower of developments in Ethiopia and in Eritrea. In view of this, it is rather unfortunate that he seems unaware that ever since it came to power, Isayas Afeworki's was an authoritarian one-party regime, and that there was no environment for a free process of constitution-making in Eritrea.

A constitution cannot be democratically made-and thus can hardly be democratic- when formation of political parties is officially forbidden, as it was in Eritrea since Isayas Afeworki's declaration to that effect on the 20th of June 1991. Moreover, it is not possible that a regime commits itself to democracy at regional level while remaining anti-democratic at national level. Democracy is not divisible in this sense. Needless to say, it is now clear to followers of Eritrean events who are impartial -and scholars should be particularly so- that in this country there is no commitment to democracy whatsoever or at whatever level, and that actually the regime is headed by “*a crazed and perverted monster*” (Douglas McGill. 2008).

69. For the broad network of Prof. Bereket's connections, see his recently published memoir, (Bereket Habte Selassie: 2007, for example p. ix, and chapter 11, pp. 195-214). See also the agenda of the event held in his honour at the University of North Carolina in April 2007. (The Agenda is available online).

1997 constitution, devotes in the text only one short sentence to the Matienzo-led process. And the sentence does not say anything in appreciation of the 1952 constitution. It reads: “A *UN Commissioner* was appointed to prepare a *Constitution for Eritrea*, which he did within a year of his appointment”.⁷⁰ In a footnote to this sentence, Prof. Bereket adds that “*the Commissioner* was assisted by a *panel of experts*”.⁷¹ That is all.

In this connection, Prof. Bereket, argued in an interview that since the 1952 constitution was not one “of an independent country”; but that of a unit federated “with Ethiopia ‘under the sovereignty of the Ethiopian Crown’”,⁷² it was not apt for use in a sovereign Eritrea. This argument holds little water, if any. It is indeed flimsy, so much so that one is somewhat amazed it was offered in all seriousness. For purposes of basic content and making-process, it does not matter whether a constitution is that of a separate sovereign state or of an entity federated with another or others in a sovereign union. In many countries with federal systems of government – like the USA and Germany – the component states have constitutions that are democratic both in terms of their content and making process. Prof. Bereket’s view that aims to discredit the 1952 constitution is simply without foundation.

(vii) Finally the document was produced and went through the ritual of ratification by the rubberstamping body known as the Constituent Assembly. The Assembly ratified it.

(viii) The document was then submitted to the President who decided that it should not be enforced at the moment. That was in 1997. It is still not in force. The document never became an operative constitution. It remained a draft though supposedly “ratified”.

(ix) Of course, the document includes provisions on civil and political rights, which are now rather ubiquitous. Any regime - no matter how autocratic - would include such provisions for diplomatic and other international consumption. But such regimes are never inclined to observe those provisions

(x) Cast aside right after its “ratification” and left “to gather dust”, the document was denigrated in the eyes of the people. Really, it has been disgraced before it could even begin to acquire the weight and the kind of dignity associated with the concept of a constitution.

70. Bereket Habte Selassie: 2003, p. 8.

71. Ibid., p. 17.

72. Bereket Habte Selassie, 2001.

Indeed the constitution-making process in Eritrea was categorically opposed to the new or the participative approach. Due to this, the principles of human rights and civil liberties in it were not reassuring; at least they were not deemed to carry great weight and significance. In fact, more fundamentally, they were not applied since the constitution has not been implemented.

On the Non-Implementation of the Constitution

Prof. Bereket appears to believe that a main problem with the constitution is that no date was stipulated for its implementation. The assumption here is that had such a date been stipulated there would have been a bigger chance for the constitution to come into force.

Prof. Bereket vows that his Commission included no date of implementation simply because there was the “implicit understanding” or “promise” that the constitution would be put into effect; and the Commission trusted that the government of Isayas Afeworki would faithfully act on the basis of that understanding or promise. In an interview he gave in 2001, Prof. Bereket said:

“...But promises have been made and easily broken in the past, including the undertaking to put the constitution into effect soon after its ratification. The Constitutional Commission of Eritrea opted not to include an article in that constitution mentioning a date for its coming into effect on the strength of such implicit understanding. In retrospect, it was a mistake for which the Commission, and I personally as its chairman, must take responsibility. It was a mistake based on trust. There is a commercial ad of an insurance company showing the picture of a little child touching the base of the horn of a rhinoceros. The caption reads: ‘Trust is not being afraid even if you’re vulnerable.’ The Commission chose not to be afraid, even though it was vulnerable to betrayal. It made a decision based on trust, and has been living the consequences.”⁷³

Some, who are familiar with President Isayas’ modus operandi, maintain that it was too naive for the Constitutional Commission to act on the basis of such an understanding or promise. However, according to more astute observers, the situation indicates basically that the members of the Commission - known to be too seasoned and urbane to place so much “trust” in the regime – had no reason to suspect the president would prevent the enforcement. They were by and large adulators of Isayas Afeworki and had prepared the constitution in a way that suited his power interest as the executive president. The pertinent provisions of the constitution - i.e. articles 42-47, as well as art. 27- the emergency clause - accord vast powers to the President.

73. Bereket Habte Selassie: 2001.

Moreover, there are two important points to note. Even if a date of enforcement had been stipulated, in all probability it would not have made a difference. Isayas Afeworki is an autocrat to the core. He would have regarded no provision stipulating a date of enforcement as binding. Secondly, even if the constitution had been promulgated and officially come into effect, it would not have prevented President Isayas from doing anything in violation of it. Since in all probability, the Commission members knew that, they could have had no reason to suspect that the president would prevent the official promulgation or coming into force of the constitution.

Prof. Bereket's argument on “trust” and “understanding” notwithstanding, the real explanation for the non-inclusion of an implementation provision lies in the very nature of the constitution-making process. Specifically it lies in the fact that the process had excluded the opposition organisations. Let me explain.

An enforcement mechanism is an important aspect of the guarantee that the pacts or agreements reached between various parties with regard to the constitution will be observed. This means that the need for an enforcement mechanism - including the date of implementation - is more likely to be felt, not by the regime in power but by the opposition parties represented or participating in the process.

Besides, it is the opposition parties that are more interested to ensure the safeguard of the constitution. They are aware that the safety of their existence and their freedom to operate is dependent on the respect and observance of the constitution. They are bound to be the leading force to protest and resist any moves by the executive or anyone to violate or do away with the constitution. Actually, the history of Eritrea bears this out. It was the former opposition parties that protested in the 1950s the violation of the constitution – in fact moves to dissolve the constitution and the “federation” - and it was their protest that brought about the formation of the *Eritrean Liberation Movement* (ELM) and later the *Eritrean Liberation Front* (ELF).

The Commission Prof. Bereket chaired excluded the opposition organisations. This means that the forces that could have been naturally concerned about the danger of the constitution being undermined or not implemented were not involved in the process. Hence, for the implementation of the constitution or for the observance of its principles, the people of Eritrea were, for all practical purposes, at the mercy of the sole ruling party, the EPLF/PFDJ. Sam Brooke noted this point correctly thus:

*“Eritrea ratified a new constitution in 1997, marking the formal end of a period of transition from Ethiopian rule.... Eritrea's transition did not involve a coalition of competing political parties who needed to reconcile their differences; Ethiopia was not involved in this constitution-making exercise, and there was really only one domestic party. As such, the constitutional principles in Eritrea can be seen less of an agreement between political parties, and more of a political promise to the people of Eritrea”.*⁷⁴

In the absence of oppositional political parties or organisations, there was no one to demand the inclusion of an enforcement date and no one to pressure the ruling EPLF/PFDJ to live up to whatever promises it had made. The main problem was thus the exclusion of the said organisations, exclusion Prof. Bereket approved and justified in the book above referred to which was published as recently as 2003. To quote Sam Brooke again:

*“There was no ‘enforcement mechanism’ employed in the Eritrean example. This is not surprising since the constitutional principles were asserted by the only political party involved in the process ... this ... reveals the weakness of the constitutional principles in this example; it is incumbent upon the PFDJ to assure their compliance, but there is still no other political party in Eritrea, and thus, no political counter-part to assure that the PFDJ fulfils its promises”.*⁷⁵

In various instances Prof. Bereket has expressed regret but only in connection with the non-inclusion of an enforcement date. In the 2001 interview with *awate.com* referred to above, he said that *“in retrospect, with the hindsight of nearly four years after the ratification of the constitution, we must admit that it was a mistake not to fix an effective date...”*⁷⁶ As yet, that is his only regret. It is rather sad that now, 11 years since the “ratification” of the constitution, he and the rest of the Commission members do not admit or realise that the main mistake - in fact blunder - was not the non-inclusion of enforcement date but the exclusion of the opposition organisations from the process.

It is significant that the people of Eritrea do not demand the enforcement of the constitution. Only a few groups in the Diaspora do so. One of them is a small organisation whose leading members include the former Chairman of the National Commission, Prof. Bereket himself.

How come that the people are not interested in this constitution? There is a simple explanation for this. Since the people did not freely participate in the making

74. Sam Brooke: 2005, pp. 40-41.

75. *Ibid.*, p. 43.

76. Bereket Habte Selassie: 2001.

of the constitution, they have no sense of ownership in connection with it; and they do not in any visible way identify with it.

There is no prospect of the situation in Eritrea improving for purposes of constitutionalism under the current regime, which is becoming increasingly notorious as a violator of human rights and as one of the most repressive in the world.

Isayas Afeworki's Regime: Factor of Regional Instability

Unconstrained by the rule of Law, the autocratic regime has provoked wars with all of Eritrea's neighbours. Its relations with its erstwhile ally, the TPLF/EPRDF-led Ethiopia, against which it provoked a most devastating war in 1998, appear most bellicose.

Virtually all followers of Eritrean events agree that the regime in Asmara is not only most oppressive but also a big factor of instability in the Horn region. Since a couple of years ago, even American authorities seem to share this view. In the period 2007 and 2008, several prominent authorities of the Bush administration made remarks very critical – in fact condemnatory – of the Asmara regime and its policies.⁷⁷

While expressing condemnation of Isayas Afeworki, portraying him as “tyrannical” and as a promoter of regional instability, Washington is not engaged to help rescue – in a fundamental sense - the Eritrean people from their present predicament. Actually, to many Eritreans who now feel that “the removal” of Isayas’ regime – lock, stock and barrel – is the only means of salvation for their country, the American policy appears hypocritical and even suspicious.⁷⁸

77. On the 4th of August 2007 the Deputy Assistant Secretary for African Affairs, Mr. James Swan, said that the regime's policies “*choked (Eritrea's) ... economy*” and that President Isayas Afeworki, who “*has become increasingly tyrannical and megalomaniacal*”, is engaged in efforts “*to destabilise the Horn*” (James Swan: 2007). On the 7th of December 2007, the Director of the Office for East Africa in the Bureau of African Affairs, Department of State, Mr. James Knight, remarked that “*Eritrea pursues expensive and dangerous adventurism in the Horn*” and that “*President Isaias ... has made exacerbated regional instability an Eritrean national priority*”. (James Knight: 2007). In a testimony before the US Senate Committee on foreign relations, subcommittee on African Affairs, on March 11, 2008, the Deputy Assistant Secretary of Defense for African Affairs, Theresa Whelan, noted that “*the Government of Eritrea continues to undermine security in the Horn of Africa by supporting destabilising elements in the region*” (Theresa Whelan: 2008). On the 11th of March, in a testimony before the same Senate Foreign Relations Subcommittee on Africa, the Assistant Secretary for African Affairs, Dr. Jendayi Frazer, said the regime “*pursued a widespread strategy of fomenting instability throughout the Horn of Africa and privately undermined nearly all efforts for broad-based inclusive dialogue and reconciliation in the region*” (Jendayi Frazer: 2008).

78. Reflecting the feeling among many Eritreans, a Diaspora intellectual in Atlanta, Georgia, Seyoum Tesfaye, bemoans the US' lack of “*a clearly defined policy or attainable agenda*” as regards Isayas Afeworki who is creating “*a regional havoc while starving and suffocating the people ...*”

It is now virtually incontrovertible that Eritrea under the present regime, which has no constitution whatsoever, is incapable of good neighbourliness, let alone of relations of cooperation and political association with Ethiopia or with any other neighbour. The country today cannot be part of a process of regional integration.

The main and credible Eritrean opposition organisations, still banned, do not accept the 1997 “constitution”. They do not even recognise it as one with historical validity, since it has never been operative.⁷⁹ The substantial majority of the opposition organisations regard that of 1952 as the historically legitimate constitution of Eritrea which they say should serve as the working document in the future democratic constitution-making process.⁸⁰

Virtues of the 1952 Constitution

The 1952 constitution has indeed several virtues that make it convenient and serviceable as a working document. This proposition is plausible especially considering the cardinal ideals or desiderata in respect of the country today. These include regime legitimacy, rule of Law, peace, state legitimacy and national unity, as well as co-operation and fraternal relations with neighbouring countries, in particular with Ethiopia.

- (i) It is the only document Eritreans practically know as a constitution. It is the only one they experienced as a constitution because it has been applied as the basic Law of autonomous Eritrea.

literally and figuratively”. Applying what he calls “*straight talk*”, he says “*Without decisively dealing with the gangster in Asmara, Horn of Africa will not have a lasting peace.... All sentiments and political posturing aside, engineering the removal of the Isaias regime is the most overriding agenda in the Horn of Africa. ... The ushering of democratic governance in Eritrea will be the beginning of regional peace in the Horn of Africa*” (Seyoum Tesfaye: 2008).

79. This is clearly stated in the Political Programme of one of the major opposition movements, the Eritrean Liberation Front - National Council (ELF-NC). In article 1 (3) of section III, the Programme declares with reference to the 1997 “constitution”:

“that the so called constitution, which the regime initiated with great fanfare just to be shelved at the whim of the dictator, had had no procedural and legal legitimacy by virtue of the fact that neither the commission that wrote it, nor the council that 'ratified' it was mandated by duly expressed will of the people.” (Eritrean Liberation Front - National Council: 2004, p 14.

80. The ELF - NC has stated this in its Programme. Resolving to “actively struggle for a permanent national constitution sanctioned by the popular will of the people”, the organisation says in the Programme that it

“shall advocate that the body that shall be entrusted with writing the future constitution ... take up the Eritrean constitution of 1952 as historic precedent reminding of how the founding fathers reached consensus on issues that could determine the destiny of national unity” (Eritrean Liberation Front N-C: 2004, p. 16).

- (ii) The procedural aspect of the international constraint on constitution-making has been satisfied in the case of that constitution. Every political and ethnic group had freely participated in the making of it. As a result, all Eritrean groups can identify with and relate to it equally.
- (iii) Because the constitution was legitimately made, Eritreans demonstrated a sense of ownership in respect of it. They protested its violation and fought to safeguard it. In other words their sense of ownership in respect of that constitution has been practically demonstrated.
- (iv) The constitution has a respectable history that enhances its authority. The protest against its violation gave rise to the armed movement culminating in the birth of the ELF. It has an aura that lends it the quality of a truly revered national document that can genuinely inspire and rally Eritreans. It is “a precedent” that can very well serve as a “focal point” in the same way that the constitutions of the pre-socialist period are being utilised in some European countries.⁸¹
- (v) It was a constitutive document. As the outcome of a participatory process, the constitution strengthened what one researcher termed a “sense of inclusion and trust (social capital).”⁸² It was the basis of the geographical legitimacy of Eritrea. It is needed for resuscitating the unity of the country that is now in jeopardy. It was also the basis of the legitimacy of the state established in Eritrea. It is now needed for devising a constitution that can establish a legitimate state.
- (vi) Though it was the constitution of an autonomous unit under the sovereignty of the Ethiopian crown, it can easily be modified to become the constitution of an internationally sovereign Eritrea.
- (vii) The spirit of the constitution is one that is supportive of the fraternal relations between Eritreans and Ethiopians. After all, it provided for a single citizenship in both lands, which idea can be easily used to support the concept of dual citizenship today.
- (viii) The 1952 constitution can help bring Ethiopians and Eritreans closer. In other words, it can help expedite Ethio-Eritrean integration. It should be recalled in this connection that this constitution was also an Ethiopian document, approved and ratified by the Ethiopian sover-

81. Jon Elster: 1992.

82. Jennifer Widner: 2003, p. 7.

eign.⁸³ Ethiopians have reason to respect and recognise it. They would be more inclined to accept and associate with a state established pursuant to a constitution made on the basis of the 1952 one.

Hence, following a process of national reconciliation, Eritreans should embark on a constitution-making process. The process should be inclusive of all political organisations and socio-economic groups. It should also be one in which Ethiopians and Sudanese experts effectively participate and observers attend. In that process, there is every reason for using the 1952 constitution as a working document.

With a constitution based on the 1952 document and a state established on the basis of its authority, Eritrea would be capable of association and integration with Ethiopia. And such association and integration can be realised especially if there is a situation in Ethiopia compatible to that to be established in Eritrea.

What about Ethiopia?

Until the 2005 elections the situation in Ethiopia was significantly different to that in Eritrea from the standpoint of democracy and human rights. There was indeed a measure of political democracy that allowed for the exercise of civil and political liberties to a greater extent than in Eritrea. In fact the situations in the two countries were not comparable. Political parties, independent newspapers, civil society organs - all could exist and operate in Ethiopia but not in Eritrea.

The situation has changed since the 2005 elections. The ruling TPLF/EPRDF has become very defensive and much more repressive than before. It has become much weaker in the political sense. It has much less popular support. It is increasingly being isolated from the people who now view it as an authoritarian regime staying in power by rigging election votes. In fact its legitimacy - and hence the legitimacy of the existing Ethiopian state - is now being increasingly questioned. Under the current regime Ethiopia has become much less capable of cooperation and regional integration especially with Eritrea.

There is thus the need for political change in Ethiopia. A reform process is needed that should result in a power sharing arrangement. Actually for such reform to be successfully launched a process of national reconciliation is really needed. Following reconciliation and reform a state whose legitimacy is not

83. In accordance with the UN General Assembly Resolution 390 (V) of December 2, 1950, the Ethiopian Emperor did "approve, adopt and ratify" the Eritrean Constitution on the 11th of August 1952, and the Federal Act on the 11th of September 1952 (Anze Matienzo: Paragraphs 482 and 493).

questionable can be established. Ethiopia can then be a credible partner in regional cooperation and integration.

There are two other issues as regards Ethiopia that pertain or at least are relevant to the subject of regional integration. These are (1) art. 39 of the current Ethiopian constitution and (2) the Ethiopian invasion of Somalia.

(1) Ever since the constitution was promulgated in 1995, many Ethiopians became seriously concerned about the unity of the country being endangered. The concern stems mainly from article 39 (i), which accords to “*every nation, nationality, and people*” in the country “*the unconditional right to self-determination, including the right to secession*”. The professed justification for the inclusion of this “*secession clause*” is that it guarantees *democracy, voluntary union and peace*. Principally on account of this provision, the constitution and the whole framework of ethnic federalism the TPLF/EPRDF introduced have been very controversial. Those “*of an ethnonationalist persuasion*” are in favour of “*the multiethnic federal constitution*”, and only bemoan that it has not really been applied.⁸⁴ Other Ethiopians maintain however that the constitution poses the danger of disintegration and in effect contradicts the claim that it is designed to serve as a framework of democracy and stability. Opposition activist Dr. Aregawi Berhe expressed this viewpoint thus:

*“With the enforcement of its party-designed constitution, the EPRDF dictated the path along which Ethiopia trails. The constitution poses the danger of fragmentation on the basis of ethnicity and is not sufficiently conducive to democracy and peace in the country.”*⁸⁵

Other pan-Ethiopianists are of the view that the future of ethnic federalism in Ethiopia is “indeterminate”, if not bleak. The reason relates mainly to the “*mismatch*” between the principles of liberal democracy enshrined in the constitution on the one hand, and the ruling party’s centralist, authoritarian modus operandi on the other. Hence, according to such Ethiopians, it is unlikely that any nationality or people would actually be permitted to separate from Ethiopia in accordance with the constitution. Ethiopian scholar Prof. Alem Habtu stated this point thus:

*“Even though any ethnic group has, in principle, a right to secede, the exercise of this right is most unlikely, especially for small or medium-sized ethnic groups.”*⁸⁶

84. Restated in Alem Habtu: 2005, p. 314.

85. Aregawi Berhe: 2008, p. 344.

86. Alem Habtu: 2005, p. 328.

This view is plausible as regards the small or medium-sized groups. However, the fear of many astute observers of Ethiopian politics has been that the ruling TPLF itself may utilise article 39 and effect the secession of Tigray. This fear is not unfounded, given that the TPLF, as the regime in power, has the military might to realise secession.

What makes the secession clause in the constitution particularly dangerous in the eyes of Ethiopians is hence the virtual monopolisation of power by the TPLF/EPRDF. This ethnic-based organisation ruling the country is not - at least not at all perceived as being - representative of all Ethiopians. The need for reform or change to establish a credibly representative government is most evident.

Once such a government is established - i.e. once a state is set up whose legitimacy is in no doubt - it would be important to amend art. 39 so that it would provide for the rights of nationalities and peoples while safeguarding Ethiopian unity.

(2) Invading Somalia was simply and utterly unbecoming of the Ethiopian government. It was not only unjust but also unwise. Apparently, even the government itself realises this now. According to some reports Prime Minister Meles has practically admitted that going into Somalia was an incorrect move based on “wrong assumptions.”⁸⁷ The invasion has not brought stability to Somalia. If anything, it has worsened the situation; and Ethiopia has become discredited. And more seriously, the aftermath of the invasion of Somalia has engendered a situation that can deteriorate and spawn inter-confessional dissension and strife not only in the region but also within Ethiopia itself.

It is important that Ethiopia pulls its forces out of Somalia as early as possible. The African Union and other international organisations should devise an approach to bring about reconciliation and consensus among the various Somali factions, and restore order and a functioning government.

The government to be established in Ethiopia will have to work very hard to realise good neighbourliness with Somalia. It will have to improve relations further so that it will be trusted for purposes of cooperation and processes of integration.

Hence, reforms are necessary in Ethiopia, so that there would actually be a *government* - the *state* in the narrow sense - whose legitimacy is beyond doubt, and a *constitution* that secures the territorial integrity of the country. Such political

87. Stephanie McCrummen: 2007, Page A16.

and constitutional reforms would facilitate processes of co-operation and association with the other countries of the Horn, beginning with Eritrea.

The call for reform is even more appropriate – in fact urgent – as regards Eritrea that as yet does not have a constitution. The document prepared in 1997 was wholly illegitimate, the process of its making being utterly flawed. All those associated with the making of it should resolve and undertake in earnest to rectify the grave errors they committed. They should join the call for a constitution-making process that is truly observant of the tenets of new constitutionalism. That way they would help Eritrea experience independence in the true sense, and perhaps also remedy their own history in this respect.

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