

The status and fate of the Eritrean Constitution

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Summary

Between 1993 and 1997, Eritrea was engaged in a constitution-making process. In accordance with the legal framework set to guide the process, the constitution-in-the-making was finalised on 23 May 1997. There is disagreement about the status of this Constitution. Although it remained supportive throughout the constitution-making process, the transitional government of Eritrea has declined to implement the Constitution more than ten years after the Constitution had been ratified. The government of Eritrea's reluctance is ascribed to the absence of an entry into force clause in the Constitution and the 1998-2000 border conflict between Eritrea and Ethiopia. The government used this as a pretext and as a result, constitutional development in Eritrea has been arrested for a period of ten years. This article investigates the factors affecting the status of the Constitution and concludes that, in spite of certain flaws in the constitution-making process, the Constitution is a legitimate pact that has been in force since the date it was ratified.

1 Introduction

Considering the way state formation finally took shape in Africa as a result of colonisation, Eritreans believed that they were entitled to an autonomous state of their own. However, they were put together in

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a federation with neighbouring Ethiopia.¹ The federation that gave Eritrea a semi-autonomous status was not respected. As a result, political resistance to the Ethiopianisation 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).²

In the early 1970s, a group of ELF commanders defected from ELF and, after forming many factions, eventually formed a rival group, the Eritrean People's Liberation Front (EPLF).³ Both fronts continued fighting against Ethiopian domination and from time to time fierce fighting took place between the two fronts (during the 1970s and 1980s).⁴ By 1981, EPLF had vanquished ELF, removed the latter from Eritrea to exile and had become the only significant armed resistance movement on Eritrean soil.⁵ EPLF fighters survived continual Ethiopian offensives and, by the late 1980s, they were beginning to claim significant battlefield victories and ultimately, on 24 May 1991, EPLF forces entered Asmara, the Eritrean capital.

On the other hand, since its exile, ELF generated factions that now stand as opposition political parties in exile.⁶ Their organisational existence did not face the same setbacks as their military defeat.⁷ Yet, they are so weak that many of them are run by part-time leaders with no or little public support.⁸

Some important post-May 1991 events were that EPLF formed a provisional government, later re-named as 'the government of Eritrea' (GoE); a referendum was conducted by which the fate of the *de facto* inde-

¹ The birth of the Eritrean statehood is a contested terrain. For more, see BH Selassie 'Self-determination in principle and practice: The Ethiopian-Eritrean experience' (1997) 29 *Columbia Human Rights Law Review* 92-142; E Gaym *The Eritrean question* (2000); GN Trevaskis *Eritrea: A colony in transition 1941-52* (1960); D Weldegiorgis *Red tears: War, famine and revolution in Ethiopia* (1989) and M Haile 'Legality of secessions: The case of Eritrea' (1994) 8 *Emory International Law Review* 479-537.

² D Connell *Against all odds: A chronicle of the Eritrean revolution* (1997) 76.

³ See generally Connell (n 2 above) and Z Yohannes 'Nation building and constitution making in Eritrea' (1996) 1 *Eritrean Studies Review* 157-8.

⁴ See Connell (n 2 above) 73-91.

⁵ Yohannes (n 3 above) 158.

⁶ Awate Team 'Eritrean political organisations: 1961-2007' (2007) <http://www.awate.com/portal/content/view/4485/9/> (accessed 23 November 2007).

⁷ A Bariagaber 'Eritrea: Challenges and crises of a new state' (October 2006) 5 (a Writenet Report commissioned by United Nations High Commissioner for Refugees, Status Determination and Protection Information Section (DIPS)).

⁸ Not much is known about the size of each political party. The number of the parties also fluctuates because of frequent mergers and splits. In 2005, 16 political parties formed an umbrella organisation called the Eritrean Democratic Alliance (EDA); and there are few outside the EDA. Apart from the political parties, as the GoE became increasingly repressive, a growing number of individuals and civic organisation have been opposing the GoE. The author's reference to 'opposition' thus denotes a broader group than the opposition political parties.

pendent Eritrea was decided along the line of self-determination and, subsequently, the GoE took the initiative to prepare a constitution.

2 The constitution-making process

Much has been written by Eritreans and non-Eritrean observers about the Eritrean experience of constitution making.⁹ What follows is a brief presentation of the facts of the constitution-making process to the extent relevant to this article.

2.1 Prelude to the process

It was in 1992 that the EPLF formed the GoE.¹⁰ Ideally, the post-independence era was ripe for a process of national reconciliation and forming a transitional government that includes the opposition parties.¹¹ Generally, the opposition forces expected a transitional government of national unity to be formed and they would thus have a say on the transitional affairs of Eritrea.¹² Nevertheless, the issue of national reconciliation was not accepted by the GoE in the way the opposition forces wished, which required recognition of not only the latter's contribution to free Eritrea, but also the latter's right to participate in the transitional governance.¹³ However, EPLF led the independence struggle to its end and thus felt it had the sole right to preside over the transition, as was manifested in some of the legislation it had promulgated.¹⁴ As was true with many early post-colonial African governments, EPLF was not enthusiastic about seeing a multi-party system in Eritrea immediately

⁹ BH Selassie *The making of the Eritrean Constitution: The dialectic of process and substance* (2003); RA Rosen 'Constitutional process, constitutionalism, and the Eritrean experience' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 263-311; Selassie (n 1 above); GH Tesfagiorgis 'When the drafting of a constitution is not confined to men of stature or legal experts: The Eritrean experience' (1998) 2 *Eritrean Studies Review*; RA Rosen & BH Selassie 'The Eritrean constitutional process: An interview with Dr Bereket Habte Selassie' (1999) 3 *Eritrean Studies Review*; Yohannes (n 3 above) and other contributions hosted at the Eritrean cyber space.

¹⁰ See Proclamation 23/1992.

¹¹ T Medhanie 'First things first: Reconciliation before "national" conference' paper presented at the Seminar on Dialogue for National Reconciliation in Eritrea (Stockholm, 23 May 2002).

¹² ELF-RC's 'Constitution and constitutional commission' (1994) 12 *Demokrasawit Eritrea* 22; ELF-RC 'Our demand is constitutionalism, not constitution' (1996) 21 *Demokrasawit Eritrea* 4; ELF-RC 'Interview with fighter Ahmed Nasr' (1996) 18 *Demokrasawit Eritrea* 4 & ELF-RC 'Interview with ELF-RC chairperson ...' (1996) 19 *Demokrasawit Eritrea* 3 (all sources are in Tigrinya).

¹³ Medhanie (n 11 above).

¹⁴ Preambles of Proclamations 23/1992 & 37/1993. See also S Ibrahim 'From exemplary revolution towards a failed state: What went wrong with the Eritrean dream?' (2005) http://www.awate.com/artman/publish/article_4314.shtml (accessed 31 January 2008).

after the hard-won independence. The only sign of a willingness to promote reconciliation was EPLF's willingness to let the opposition leaders abandon their organisations and join EPLF and the GoE.

Thus, when some of the opposition leaders were boycotting the GoE's call for assimilation, the GoE presented the opposition forces as mere terrorist groups with 'sub-national agendas'.¹⁵ The GoE did all it could to claim all the credit for liberating Eritrea.¹⁶ As a result, as one observer noted, the GoE was able to make the Eritrean public believe that there was no adversary political force with which EPLF needed to be reconciled.¹⁷

Furthermore, amidst the jubilation of the independence days, according to the perception of many Eritreans, there were no major political differences or ethnic or religious issues that needed to be dealt with sensitively during the constitution-making process. However, the country is made up of nine ethnic groups, each with its own dialect, though multilingualism is common and roughly half of the population is Christian and half is Muslim. Three years after the *de facto* independence, the whole nation was enthusiastically celebrating.¹⁸ Thus, Eritreans felt or were made to believe that they were 'one people' with one way of thinking and nobody was outside or excluded.¹⁹ Indeed, the opposition forces have gained little public support, even at a time when the GoE turned extremely repressive.

2.2 Evaluating the pre-constitutional process setting

A flaw in early post-1991 Eritrean politics was a complete ignorance of the need for a post-conflict process of reconciliation. When seen with the advantage of hindsight, these different political groups should have reconciled with each other after the aim of the struggle for which they had all fought had been achieved. Regrettably, this did not happen. As a result, the constitution-making process was dictated by the GoE. The reluctance of EPLF to accommodate other political forces, on the face of it, looks like a blemish, and is the main source of the opposition's discontent regarding the Constitution.²⁰

¹⁵ DR Mekonnen 'Transitional justice: Framing a model for Eritrea' (November 2007) 169 (thesis submitted in accordance with the requirements for the Degree of Doctor of Laws in the Faculty of Law, Department of Constitutional Law and Philosophy of Law at the University of the Free State — first draft).

¹⁶ This attitude of the government is irritating to the opposition and remains the main variable defining relations between the opposition and the government as reflected in the EDA Political Charter, para 3.

¹⁷ Rosen (n 9 above) 307.

¹⁸ Rosen (n 9 above) 281.

¹⁹ As above.

²⁰ ELF-RC 'The question of constitution from democratic and dictatorial perspective' (1995) 13 *Demokrasiawit Eritrea* 8 & 9.

The Eritrean public deserves a share of the blame for not pressurising the GoE to correct this mistake in time. Unlike the Eritreans of the 1970s, who attempted to reconcile the antagonistic factions, those who on Independence Day simply rejoiced with the winning side were unaware of the need for reconciliation. Some even went ahead and alienated the opposition parties from the Eritrean political scene.²¹

Nevertheless, the GoE called members of the opposition parties to abandon their organisations and join it; but the opposition forces, questioning the genuineness of such an offer, opted to stay separate.²² Thus, the opposition forces are also criticised for self-exclusion.²³ In addition, the opposition forces were criticised for not contributing to the process by outlining their position in many issues that they considered constitutional matters.²⁴

2.3 The legal framework of the process

A step towards the constitution-making process was taken when, in 1993, Proclamation 37/1993 was enacted, providing for the structure, powers and responsibilities of the GoE. The same proclamation stated that the GoE was established with various responsibilities and, above all, with the responsibility of preparing the ground and laying the foundation for a democratic system of government.²⁵

As a mechanism of discharging the above-mentioned responsibility, it is provided that the National Assembly (the legislature of the GoE) shall establish a constitutional commission charged with the responsibility of drafting a constitution and organising popular participation in such a process.²⁶ Accordingly, Proclamation 55/1994, the Proclamation to Provide for the Establishment of the Constitutional Commission (the Commission), was issued on 15 March 1994.²⁷

²¹ P Tesfagiorgis 'A new crusade to end the conspiracy of silence of Eritreans in the Diaspora' (2007) <http://www.awate.com/portal/content/view/4501/5/> (accessed 26 November 2007).

²² Many did join the GoE. See ELF-RC 'Fighters returned to their country faced harassment' (1996) 17 *Demokrasiawit Eritrea* 2 & 3. In spite of the harassment alleged to have been committed against the returnees, their attempt to influence the GoE was commendable. In this regard, it is enlightening to note that the most notable challenge to the GoE came in 2000/01 from within. For those challenges, see generally D Connell *Conversation with Eritrean political prisoners* (2005).

²³ In this regard, SAA Younis observed: 'When the constitution-drafting process began, there were three classes of Eritreans: those who were opposed to it on the basis that it was illegitimate, those who had reservations with it but agreed to participate, and those who embraced it wholeheartedly ... Those who had reservations ... participated with the view that it is only by doing so that we can affect the end result.' Reaction e-mail written to the author by Younis on 26 April 2007 on the issue of the Constitution.

²⁴ Rosen & Selassie (n 9 above) 174.

²⁵ Art 6.

²⁶ Arts 4(6)(a) & (b).

²⁷ Rosen & Selassie (n 9 above) 143.

Proclamation 55/1994 required that the Commission be composed of a Council and an Executive Committee.²⁸ The Council was supposed to be composed of 50 members that had to be elected by the National Assembly.²⁹ The qualification set for membership is that ‘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’.³⁰ The National Assembly was empowered to appoint commissioners.³¹

The missions of the Commission, *inter alia*, were to (1) organise and manage a wide-ranging and all-embracing national debate and education through public seminars and lecture series on constitutional principles and practices;³² (2) draft a constitution after such deliberations; (3) present the draft to the National Assembly for a final public discussion; and (4) at the conclusion of such public discussion, prepare a final draft and submit it to the National Assembly for approval.³³ Again, the approved draft had to be submitted to a ‘democratically formed representative body’ for ratification.³⁴ Two years later, Proclamation 92/1996 (the Constituent Assembly Proclamation) required the ‘democratically formed representative body’ to be composed of (1) the members of the National Assembly; (2) members of the six regional assemblies; and (3) 75 representatives elected from among Eritreans residing abroad.³⁵

2.4 The process in practice

The formal appointment of the Commission was made by the National Assembly early in 1994.³⁶ It is important to examine the composition of the National Assembly that appointed members of the Commission and approved the drafts of the Constitution.³⁷ On 19 May 1993, the GoE repealed Proclamation 23/1992 by Proclamation 37/1993. Among the reasons that prompted the replacement of the proclamation was the need to consider representation of the Eritrean people.³⁸ Thus,

²⁸ Art 2(2).

²⁹ Art 6(1).

³⁰ Art 6(2).

³¹ Arts 6(1) & (3).

³² Public participation was sought for two ends. One end was to get input and reflect the wishes of the Eritrean public in the draft. The other end was to teach the Eritrean public about the basic ideals of constitutional government and constitutionalism (art 5).

³³ Art 4 Proclamation 55/1994.

³⁴ Art 6(b) Proclamation 37/1993.

³⁵ Art 2 Proclamation 92/1996.

³⁶ See also Awate ‘An exclusive interview with Dr Bereket Habte Selassie’ (2001) http://www.awate.com/artman/publish/article_81.shtml (accessed 31 January 2008).

³⁷ As above.

³⁸ Preamble Proclamation 37/1993.

Proclamation 37/1993 envisaged a National Assembly composed of the Central Council of EPLF and 60 others.³⁹ From the 60, 30 were drawn from the regional assemblies of the then 10 administrative regions of Eritrea.⁴⁰ Of the remaining 30, 10 had to be female, and were selected by the Central Council⁴¹ of EPLF.⁴²

This part of Proclamation 37/1993 was, however, repealed very soon by Proclamation 52/1994, which provided that the National Assembly had to be composed of the 75 members of EPLF's Central Council and 75 others elected by the Eritrean public.⁴³ Nevertheless, this provision did not take effect immediately. Hence, the same proclamation added that, pending elections, the National Assembly would retain its composition. It was only in May 1997, after elections for the regional assemblies were conducted and the Constituent Assembly was constituted to consider ratification of the Constitution, that the National Assembly assumed the composition required by Proclamation 37/1993.⁴⁴

With the exception of some members of the Executive Committee who were included for their unique expertise, the primary consideration the National Assembly used in selecting the members of the Commission was their participation in Eritrea's independence struggle, and the small number of members who were not liberation fighters reflected the concern of the appointing authorities for representation of Eritrean society.⁴⁵ Nevertheless, within these parameters, representation in terms of ethnic, religious and gender balance was considered.

Looking at the actual composition of the Commission, all the nine ethnic groups of Eritrea were represented.⁴⁶ The two major religions, Christianity and Islam, were represented on an equal basis. There were 23 female members, who represented 47% of the total membership, and the average age of the members of the Commission was about 50, ranging from 32 to 80 years.⁴⁷ The majority of ELF-originated political forces (often referred to as fronts), now composing the bulk of opposition, were not represented as an entity in spite of official requests.⁴⁸ Some of the members of the Commission were, however, ex-opposition members who joined the GoE following the latter's call

³⁹ Art 4(2).

⁴⁰ The Chairperson, the Secretary and one elected female member from each regional assembly (art 4(2)).

⁴¹ The Central Council is the legislative arm of the EPLF (now called PFDJ). See PFDJ Charter http://www.shaebia.org/PFDJ_Charter_1994.html (accessed 21 April 2007).

⁴² Art 4(2) Proclamation 37/1993.

⁴³ Arts 2(3) & (4).

⁴⁴ Rosen & Selassie (n 9 above) 172.

⁴⁵ Awate (n 36 above).

⁴⁶ Tesfagiorgis (n 9 above) 144.

⁴⁷ Rosen & Selassie (n 9 above) 144.

⁴⁸ Rosen (n 9 above) 306. See also Rosen & Selassie (n 9 above) 175.

after and before independence.⁴⁹ In this regard, one Eritrea political analyst observed:⁵⁰

Much is said about the diversity of the commissioners — that the gender, age, religious diversity reflected Eritrea's cross-section. That is true. The one diversity that was not accommodated was ideological diversity.

The Commission prepared its first draft which was submitted to the National Assembly for comments.⁵¹ A second draft was submitted to the National Assembly who approved it. Afterwards the draft was submitted to the Constituent Assembly and was eventually ratified.⁵²

2.5 Evaluating the legal framework and practice

In my view, the envisaged legal framework of preparing the Constitution was not undemocratic, although the non-participation of the opposition forces was the main flaw. Rosen differs on two grounds. First, Rosen questions whether there was 'an opposition that accepted nationhood and represented a meaningful portion of the population at least in a form that would have necessitated their inclusion in the process', and second, even if such opposition existed, its non-participation is 'not necessarily a fatal flaw undermining the legitimacy of the constitutional process'.⁵³

By contemporary standards of democratic constitution making, the democratic deficiency one sees when looking at the legal framework is minimal.⁵⁴ The constitution-making process lacked a national referendum. Nevertheless, a referendum as a means of public participation in a constitution-making process is not always a desirable step.⁵⁵ A typical constitution, no matter how concise it may be, embraces numerous issues on which submissions to a referendum are not practically feasible. Often, when the whole draft is submitted to a referendum and voters are required either to accept or reject the entire draft, voters tend to judge the entire draft based on a single or few provisions with which they agree or disagree.⁵⁶ It was, however, possible to submit certain

⁴⁹ Rosen (n 9 above) 306.

⁵⁰ S Younis 'Constitutions as a door stop' (2007) (paper presented to a conference organised by the African and Afro-American Studies Department of the University of North Carolina at Chapel Hill entitled Islam, Politics and Law in Africa, 12-14 April 2007).

⁵¹ Rosen & Selassie (n 9 above) 166-168.

⁵² As above.

⁵³ Rosen (n 9 above) 304.

⁵⁴ Rosen (n 9 above) 307.

⁵⁵ JS Read 'Nigeria's new Constitution for 1992: The Third Republic' (1991) 35 *Journal of African Law* 175-6.

⁵⁶ The 1992 experience of Seychelles is illuminative. A considerable number of the voters voted 'no' for the Constitution because, led by the influential Catholic Church, they opposed a provision permitting abortion.

contentious issues; although the poor economic situation of the war-ravaged nation could have justified the absence of a referendum.

In evaluating the legal framework and the practice, it is important to focus on the three main bodies involved: the Commission, the National Assembly and the Constituent Assembly. Some have argued that the Commission should have been a democratically elected body rather than being appointed by the National Assembly.⁵⁷ Others, however, argue that this was unnecessary given all the circumstances of the country at the time the Commission was formed and its limited mandate which again was checked by the National Assembly and the Constituent Assembly.⁵⁸

Another important query is whether the Commission did what it was obligated to do: involving and educating the Eritrean public in the course of preparing the draft and incorporating the wishes of the public. Much has been written on the Commission's work by non-Eritrean writers and their assessment has been positive. Rosen, for example, noted:⁵⁹

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, radio broadcasts to secondary school essay contests, 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.

Similarly, Hart observed:⁶⁰

Between 1994 and 1997, Eritreans engaged in constitutional education and consultation, addressing a nation with markedly low literacy rates through songs, poems, stories, and plays in vernacular languages, and using radio and mobile theatre to reach local communities.

To an insider who knows the politics of the Eritrean independence struggle and the Eritrean public, the most authoritative testimony in this regard is Connell's observation.⁶¹

Meanwhile, the year-long mobilisation for the 1993 referendum on Eritrea's political status brought thousands of people into the political process for the first time. Following close on this was a highly-participatory, three-year constitution-making process that produced a legal foundation for the articulation, exercise and future contestation of the basic civil and human rights

⁵⁷ DR Mekonnen 'The reply of the Eritrean government to ACHPR's landmark ruling on Eritrea' (2006) 31 *Journal for Juridical Science* 50; Rosen (n 9 above) 304 and ELF-RC 'Interpretation of democracy in a democratic system' (1996) 18 *Demokrasiawit Eritrea* 16 & 17.

⁵⁸ Rosen & Selassie (n 9 above) 145.

⁵⁹ Rosen (n 9 above) 290.

⁶⁰ V Hart 'Democratic constitution making' (2003) 7 Special Report 107 of the United States Institute for Peace <http://www.usip.org/pubs/specialreports/sr107.pdf> (accessed 25 March 2007).

⁶¹ Connell (n 22 above) 7.

... the manner in which [the Constitution] was produced, involving tens of thousands of Eritreans at home and abroad in discussions of what rights they held dear and what they wanted from their newly created state, added value well beyond the document itself or the specific articles it contains.

McCord agrees:⁶²

A constituent assembly ratified Eritrea's first Constitution on May 23, 1997, bringing to closure a three-year process involving extensive public participation and consensus-building ... Nearly 400 grassroots trainers were mobilised and trained to conduct civic education at the village level. Committees and seminars were also conducted among the diaspora in North America, Europe, the Middle East, and Africa. In all, an estimated 500 000 people [out of Eritrea's 3,5 million population] actively participated in the civic education activities.

However, some Eritrean opposition critiques question the genuineness of the public participations and argue that the whole endeavour was window-dressing and that the contribution of the public was simply discarded.⁶³

At the stage of the National Assembly and the Constituent Assembly some argue that EPLF/PFDJ had a majority in the first body and a notable presence in the latter. However, in terms of public support and membership, they failed to note that by then EPLF/PFDJ was so popular that it embraced almost the entire Eritrean public. They add that neither body was democratically formed.⁶⁴ In forming the Constituent Assembly, 75 members of the PFDJ Central Council were moved into the Assembly together with another 75 representatives of the Eritrean Diaspora of whom one might be inclined to say that they were hand-picked by the GoE. The rest of the members of the Constituent Assembly (375 people) were, however, elected by the public.

Bereket concludes that the public elections were free and fair.⁶⁵ Mekonnen differs and ponders whether it is 'possible to have a free and fair election when there are no independent political parties, no independent professional and non-professional organisations ... no independent civil society, no free press, no independent parliament and no independent judiciary'.⁶⁶ Leaving aside whether or not all these democratic institutions were completely absent or whether there was substitution, Mekonnen's observation is valid in principle.

In assessing whether or not the elections were free and fair, however, apart from general benchmarks, peculiarities of the Eritrean society — a society that wants to know not only the candidate's profile but also his

⁶² MR McCord 'The challenges of constitution making in Eritrea' (1997) 6(3) *African Voices* 3. McCord JD by then was a democracy fellow with the USAID mission in Eritrea.

⁶³ Younis (n 23 above) and ELF-RC (n 12 above).

⁶⁴ DR Mekonnen 'Comments on the draft article: "Ten years old yet not born: The status of the 1997 Eritrean Constitution"' (March 2007) 5 & 6 (on file with author).

⁶⁵ Rosen & Selassie (n 9 above) 175.

⁶⁶ Mekonnen (n 64 above) 2.

genealogy — should be considered. The Eritrean public hardly needed the above democratic tools to identify the persons it wanted to elect. Indeed, there is a strong tradition of tracing a person's genealogy, social status and other factors that election campaigns (often suffocated with false promises) do not uncover. Drawing a comparison from the Gambian society — a society comparable to that of Eritrea, not only in numbers but also in many other features — the author is able to note that within such societies, candidates are identified from their position in and contribution to the society in a long and complicated process.⁶⁷ Although comprehensive statistics are not available, the free and fair nature of the elections was demonstrated by the fact that officials of the former Ethiopian government, who had proven their commitment to their constituencies, were elected as members of the regional assemblies, in spite of the general public prejudice against such officials.

Another important factor is the way in which the GoE approached the elections for regional assemblies. Perceiving that they have little effect on the politics of the GoE, the GoE took an independent position *vis-à-vis* the process of the elections — leaving the public to choose whom it wants. This is an important benchmark and, seen from this angle, the elections for regional assemblies were conducted in a free atmosphere, more so than the referendum of which the outcome was not questioned by the opposition.⁶⁸ While what the GoE wanted from the people was apparent in the referendum, namely to vote, and as there was strong apprehension or fear of doing the 'wrong thing',⁶⁹ elections for the regional assemblies were conducted freely. In the same manner, under the repressive GoE, free and fair elections for various grassroots democratic institutions, such as magistrates of the communal courts, were conducted. Perceiving the minimal effect such grassroots institutions can have on the politics of the GoE, the latter showed no interest in tampering with them.

This writer concludes that the legal framework of the constitution-making process was not totally undemocratic and neither was its practice, except that the opposition forces were not permitted participation in the way they demanded. In theory, the opposition could have enriched the constitution-making process in terms of ideology, as contended by Younis.⁷⁰ However, there were no meaningful ideological differences

⁶⁷ The author resided in The Gambia from July 2007 to March 2008 and closely observed the preparation for regional assembly elections.

⁶⁸ For critical observations on the Referendum, see generally K Tranvoll 'The Eritrean referendum: Peasant voices' (1996) 1 *Eritrean Studies Review* 23-67. Written from an anthropological perspective, the article introduces benchmarks of evaluating elections which electoral formulas do not often consider.

⁶⁹ As above.

⁷⁰ Younis (n 50 above). Younis contended that the 'people [commissioners] that were shortlisted passed a litmus test imposed by the one-party one-ideology National Assembly. If a city is trying to pass an ordinance banning smoking, it cannot exclude smokers on the basis that smoking is bad for you, nor can it include ex-smokers and claim "Everybody was invited".'

between the GoE and the opposition forces.⁷¹ Importantly, the process was conducted in a free environment in a spirit of optimism and jubilation. The Constitution that was eventually ratified (which many have described as progressive) contains numerous provisions that are not approved of by the GoE — a fact that attests to the independence of the process. That the GoE is hesitant to implement the Constitution is another testimony to the quality of the Constitution. For those and other reasons explained below, particularly the fact that the public did participate, it is reasonable to conclude that the Constitution passes the legitimacy threshold.

3 Divergence of views on the legitimacy of the Constitution

While simplifying matters somewhat with regard to the legitimacy and status of the Constitution, it is possible to categorise five positions.

In the view of many Eritreans the Constitution is legitimate, both in its making and its substance. This first group is spearheaded by the Chairperson of the Commission who has already written much on the Constitution and who, when once asked in 1999 if there is anything he would have done differently, responded that he would not have done anything of substantive importance differently.⁷² A group of 13 Eritrean intellectuals, often referred to as G-13, also strongly echoed their call for implementation.⁷³

The second group maintain that the Constitution, in spite of its shortcomings, can be used as a fundamental strategic tool to bring all Eritreans to a common ideal and that all other concerns, issues and reservations can be contested later by means of amendments.⁷⁴

A third group maintain that the Constitution can be shaped and moulded to meet the demands of the opposition.⁷⁵ Stressing the non-participation of the opposition camp as a flaw, they decline to accept the Constitution as it is and rather call for a mechanism (constitutional convention) to revise and enact the Constitution which they recognise

⁷¹ Squarely on the issue, Younis observed that 'the ELF and the EPLF were mostly left-of-centre revolutionaries and their views overlapped in many important areas'. Connell also sees no ideological difference between ELF and EPLF. Younis (n 23 above) and Connell (n 2 above) 73-91.

⁷² Rosen & Selassie (n 9 above) 178.

⁷³ Letter of concerned Eritreans to President Isaias Afwerki, October 2000, quoted in BH Selassie 'The disappearance of the Eritrean Constitution' (2001) <http://news.asmarino.com/Articles/2001/01/bhs-20.asp> (accessed 31 January 2008).

⁷⁴ KG Kahsai 'Pull-push strategy: Common fallacies amongst us' (2003) http://eri24.com/Article_146.htm (accessed 31 January 2008).

⁷⁵ Younis (n 50 above).

as a good draft.⁷⁶ They schedule this task after the ‘collapse’ of the GoE. Nevertheless, their position can only be characterised as a rejection of the Constitution. Their position could have been considered a meaningful acceptance of the Constitution if an agreement existed within the opposition camp on acceptable parts of the Constitution and on provisions that needed revision. However, there is no such agreement and there is no guarantee that the process cannot regress into considering each and every section of the Constitution. In addition, from a legal point of view, the status of the Constitution can either be that of a legitimate binding covenant or not. To take the Constitution as a good draft document and also demand final touches falls outside of legal discourse into the realm of politics which can be settled by means of a compromise.

A fourth group does not regard the ratified Constitution as ‘legitimate’.⁷⁷ Independently, some Eritreans⁷⁸ might share the point that a new constitution should be written, but it is evident that this is the position of some 16 political forces that formed the Eritrean Democratic Alliance (EDA).⁷⁹ Some of these rejected the constitution-making process from the very beginning and rejected the ratified Constitution.⁸⁰

The GoE’s position *vis-à-vis* the Constitution can be regarded as a fifth position and can be seen along two lines: substance and implementation. On substance: During the constitution-making process, officials of the GoE and its party were thought to be against the need to limit the number of terms of office of the President.⁸¹ By then, their main concern was that it was not wise to deny the nation the services of persons such as the incumbent President.⁸² Some officials of the GoE were against multiparty democracy and advocated a ‘guided democracy’, saying that for a long time to come, Eritrea needed to have only one party.⁸³ On both points, the Constitution rejected the desires of the GoE.⁸⁴ Nevertheless,

⁷⁶ Reflecting this view, Younis (n 23 above) commented that ‘next month will mark 10 years since the Constitution has been shelved. It is not going to be as simple as pulling it out of a drawer and implementing it — there is a lot of footwork we will have to do. A lot of discussion — without malice, without arrogance and with humility and a spirit of compromise.’ See also A Hidrat ‘The red herring on the constitutional process’ (2007) <http://zete9.asmarino.com/index.php?itemid=883> (accessed 26 November 2007).

⁷⁷ Z Ibrahim ‘Legitimising the illegitimate’ (2003) <http://www.gabeel.com/modules.php?name=News&file=article&sid=82> (accessed 31 January 2008).

⁷⁸ See eg TA Taddesse ‘The roadmap to democracy and prosperity in Eritrea’ (2005) http://news.asmarino.com/Comments/August2002/DrTATaddesse_27.asp (accessed 31 January 2008).

⁷⁹ See the Political Charter of the EDA in which the EDA envisaged to write a new constitution after the fall of the GoE.

⁸⁰ ELF-RC ‘The EPLF and its “Constitution”’ (June/July 1994) 59 *The Eritrean Newsletter* 12-13.

⁸¹ Rosen & Selassie (n 9 above) 162.

⁸² As above.

⁸³ Rosen & Selassie (n 9 above) 166.

⁸⁴ The Constitution limits the office term of the State President to two terms of five years each and it provides for multi-parties (arts 19(6), 41(2) & 41(3)).

the GoE supervised the whole process and the National Assembly, dominated by its members, twice approved the drafts and eventually ratified the Constitution together with other members of the Constituent Assembly. One can thus reasonably expect the GoE to be comfortable with the Constitution. Contrary to this, ten years after the Constitution was ratified, the GoE has not started its implementation.

The GoE has been paradoxical in its position with regard to the Constitution. Generally, the government has used three excuses: (1) the lack of an entry into force clause; (2) intervening factors; and (3) a rejection of constitutional democracy.

The Constitution does not contain an entry into force clause or transitional provisions that would have bound the GoE to a fixed time-frame to implement the Constitution.⁸⁵ The only relevant provision is that the Constituent Assembly, which ratified the Constitution, is empowered

⁸⁵ In the context of the Eritrean Constitution, it is important to note that a demand for the implementation of the Constitution is different from a demand for a full or high level of compliance with the Constitution. In many African countries, certain parts of constitutions are violated or they are paid lip service. Yet, such constitutions are part of the legal system and government actions are taken or alleged to have been taken in accordance with these. At least, such constitutions are often cited by government authorities, judicial officials, legal professionals and activists. The situation with the Eritrean Constitution is different. Once ratified, the Constitution is completely ignored by the GoE. The term 'constitution' itself is a term which Eritreans do not dare to say publicly. Except for two initiatives started in 1997 and in 2000 and soon halted, no other action was taken to bring about a transformation from the transitional to the constitutional setting. Logically, elections for the establishment of the constitutional National Assembly had to come first, as the National Assembly is empowered to put the head of the executive and many other constitutional institutions in place. Thus, the Constituent Assembly had to issue relevant laws and establish relevant institutions that are needed to conduct elections for the National Assembly, such as an electoral law and election-supervising body. After being constituted, the constitutional National Assembly has to elect from its members the President and has to issue laws that are required for the full implementation of the Constitution. Afterwards, both the Assembly and the President have to, according to the Constitution, put in place all the relevant institutions. Once these acts have been done and the main state apparatus have been transformed from transitional structures to constitutional structures, it can be said that the constitutional setting has been put in place. Therefore, when one says that the Eritrean Constitution is not implemented, it means that none of the above transformative steps have taken place, nor are the directly operative parts of the Constitution being respected. There is not even a pretentious resemblance to the constitutional order. Institutions and laws which clearly contravene the Constitution have not yet been abolished. Ironically, however, probably assuming that it is hidden from the Eritrean public, the GoE recently heavily relied on the Constitution to defend a case before the African Commission on Human and Peoples' Rights. In its consolidated second and third reports under the Convention on the Rights of the Child submitted to the Committee on the Rights of the Child on 14 June 2007, the GoE again cited almost every part of the Constitution to fool the Committee. See Communication 275/2003, *Article 19 v Eritrea* (ACHPR, 22nd Activity Report, 2007) para 58. See also the submission of the GoE on the merits, page 2, as attached to the letter of the Ministry of Foreign Affairs, 19 April 2006, reference AAP/244/06. See also SM Weldehaimanot 'The Eritrean journalists' case before the African Commission' (2008) 27-32, <http://selfi-democracy.com/?p=2&l=e> (accessed 5 April 2008). See the report <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.ERI.3.pdf> (accessed 8 May 2008).

to 'take, or cause to be taken, all the necessary legal steps for the coming into force and effect of the Constitution'.⁸⁶ Thus, a whole year (May 1997 to May 1998) passed after the Constitution had been ratified, without the GoE taking any of the transformative actions that would have implemented the Constitution.⁸⁷ Nevertheless, considering the supportive stand the GoE took during the entire process, there was no public call for implementation. Indeed, there was confidence in the GoE and it was this confidence that gave rise to the lack of a specific entry into force clause.⁸⁸

From May 1998 to 2000, Eritrea and Ethiopia engaged in full-fledged war. It was consequently virtually impossible to embark on the implementation of the Constitution. After both countries signed an agreement to resolve the conflict by international arbitration, a group of high-ranking government, party and military officials criticised the democratic deficiencies within the GoE and publicly called for democratic reform.⁸⁹ One of their demands was the implementation of the Constitution. Under this pressure the GoE agreed to a time-frame (December 2001) for the implementation of the Constitution and started to take some preparatory steps.⁹⁰ Nevertheless, while the attention of the world was focused on the events of 'September 11', the GoE arrested 11 of the reformers, closed all the private newspapers, and took numerous illegal actions that effectively silenced the reform initiative.⁹¹ The term 'constitution', itself, became prohibited and citizens did not dare mention it in public. Effectively, the GoE eliminated the Constitution, not only from its priorities but even from its propaganda.

After the signing of a peace agreement in 2000, and up to the time that the dispute was decided in April 2002,⁹² the GoE, whenever forced

⁸⁶ Art 3(2) Proclamation 92/1996.

⁸⁷ In 1997, six months after the ratification of the Constitution, the government appointed a committee to prepare the ground for elections in accordance with the Constitution. It did not continue, though. Selassie (n 73 above).

⁸⁸ In this regard, the Commissioner lamented: 'I see that it was a mistake to be too trusting of the government and not to insert in the Constitution a definite effective date.' BH Selassie 'Grammar of politics: The Eritrean Constitution and its implementation (part seven)' (2004) <http://www.asmarino.com> (accessed 31 January 2008).

⁸⁹ See generally Connell (n 22 above).

⁹⁰ In the summer of 2000, the National Assembly, decided elections for the Constitutional National Assembly to be conducted in December 2001 and appointed a committee to draft the electoral and party formation laws. This too was stopped. Awate Team 'The chronology of the reform movement' (2004) http://www.awate.com/artman/publish/article_3629.shtml (accessed 31 January 2008).

⁹¹ M Ephrem & S Kesete *The ruling* (2004).

⁹² Eritrea and Ethiopia signed the Cessation of Hostilities Agreement in June 2000 and the Framework for Comprehensive Peace Agreement (Algiers Peace Agreement) in December 2000. The main case (delimitation of their common boundary) was decided on 13 April 2002.

to speak about the Constitution,⁹³ alleged that the war situation, coupled with ‘internal sabotage’, have hampered the implementation of the Constitution.⁹⁴ At times, other factors have also been added: The Eritrean people are not ready for constitutional government because of their low level of education, cognition, and awareness on constitutional matters;⁹⁵ the Eritrean people need ‘bread not democracy’;⁹⁶ the implementation of the Constitution should not be a priority over ‘economic development’;⁹⁷ the Eritrean people has rejected a multiparty system;⁹⁸ and other reasons.

When the GoE echoed such reasons, it implied that the Constitution had never been implemented. Paradoxically, however, certain government officials declared that the Constitution was being enforced and respected although their government (GoE) did not have a ‘ribbon-cutting’ ceremony to signify its implementation.⁹⁹ Recently, a presumably pro-GoE writer, but believed to be GoE’s mouthpiece, stated that the Constitution was being ‘implemented’ partially and that full implementation would follow.¹⁰⁰ Using the conclusion some Eritrean lawyers had reached on the status of the Constitution, the same writer alleged that the GoE obeyed the immediately-operative parts of the Constitution while working to take actions that would amount to a full implementation of the Constitution. In addition, the GoE recently relied heavily on the Constitution to defend a case before the African Commission on Human and Peoples’ Rights (African Commission) and in its consolidated second and third reports under the Convention on the Rights of the Child submitted to the Committee on the Rights of the Child.¹⁰¹

Objectively assessing the GoE’s excuses, except for the time of war (May 1998 to 2000), nothing has hindered the implementation of the Constitution and all the allegations are unfounded. In addition, as the reports of respected human rights organisations have indicated, the GoE has never respected the directly-operative parts of the Constitu-

⁹³ Such questions come from foreign quarters and often focus on why the Constitution has been shelved. The issue of the Constitution has been so thorny to the GoE that its officials regard it with agitation.

⁹⁴ At the end of 2003, eg, the State President stated that it is the prevailing war situation or the ‘no ‘peace or no war’ situation that hindered the implementation process. See the President’s interview in *PFDJ* ‘Interview with President Issaias Afewerki’ (December 2003) *Hidri* (PFDJ’s quarterly official magazine) 16 & 17 (in Tigrinya).

⁹⁵ Kahsai (n 74 above).

⁹⁶ Nharnet.com ‘Editorials: elections under PFDJ dictatorship’ http://www.nharnet.com/Editorials/EritreaToday/pfdj_elections.htm (accessed 31 January 2008).

⁹⁷ Kahsai (n 74 above).

⁹⁸ P Tesfagiorgis ‘In search of a normal Eritrea’ (2003) http://eritreane.com/pipermail/opinion_eritreane.com/2003q4.txt?ABCDEFGH (accessed 31 January 2008).

⁹⁹ Younis (n 50 above).

¹⁰⁰ S Tesfamariam ‘US-Eritrea relations: Soured by design’ (2007) <http://www.shaebia.com/> (accessed 28 September 2007).

¹⁰¹ n 85 above.

tion. It is very clear that the GoE has rejected the notion of the rule of law by flagrantly acting above the law. The body of Eritrean laws have never been respected to the extent that they tend to limit the powers of the GoE. The Constitution faced the same fate.

This is unequivocally expressed in the President's repeated attempts to reject a constitutional democracy.¹⁰² Whereas on one occasion he has rightly pointed to the fallacy of reducing democracy to formalities — elections and their periodicity, the existence and pluralism of political parties¹⁰³ — in his interviews with his government's media, in particular, he has tried to limit the definition of democracy to the realisation of some socio-economic rights only.¹⁰⁴ The effect of such expression is to eliminate many facets of democracy as are enshrined in the Constitution.¹⁰⁵ This was repeated unequivocally recently by the President who, when asked when his government was planning to implement the Constitution, bluntly said:¹⁰⁶

The constitution is a paper ... It's only a paper. I don't want to cheat everyone with this paper. I don't want to mislead everyone that this paper is a panacea. We have to create a conducive environment for a viable political process in this country.

These different positions finally boil down to indicating the status of the Constitution. Considering the process that gave rise to the birth of the Constitution, whether the Constitution passes a legitimacy test is a point that is discussed above and touched upon below. There is also another angle, akin to the fluidity of the GoE, that merits consideration in order to fully dispose of the status of the Constitution. Both angles are dealt with below.

4 The status of the Eritrean Constitution: The government of Eritrea's side of the argument

When the coming into operation of the Constitution was delayed, some Eritrean lawyers argued that, in the absence of any specific date on which the Constitution should have come into force, the (entire) Constitution should be considered as having come into force the min-

¹⁰² See eg I Afewerki 'Democracy in Africa: An African view' (1998) 2 *Eritrean Studies Review* 133-141.

¹⁰³ Afewerki (n 102 above) 134.

¹⁰⁴ PFDJ (n 94 above) 16-17.

¹⁰⁵ In 2002, eg, the National Assembly was forced to pronounce that the Eritrean people do not want a multi-party democracy. Tesfagiorgis (n 98 above).

¹⁰⁶ Interview with Edmund Sanders, *Los Angeles Times* Staff Writer <http://www.latimes.com/news/nationworld/world/africa/la-fg-eritreaweb2oct02,1,7946352.story?coll=la-africa&ctrack=1&cset=true> (accessed 3 October 2007).

ute it was ratified.¹⁰⁷ Their argument is to a large extent valid.¹⁰⁸ That the Constitution does not indicate a specific date on or after which it has to come into force, does not mean that implementation measures cannot take place forever.

However, considering the transformative steps required by the implementation of the Constitution, it is inevitable that certain provisions of the Constitution could not have entered into force automatically the minute the Constitution was ratified. A period of time (six months to one year) within which the necessary transformation should take place and after which it would be wise to rule scenarios of non-compliance as unconstitutional, is mandatory. On the other hand, the directly operative parts of the Constitution can be considered as having been in force from the date of ratification.¹⁰⁹ That the GoE has done nothing to implement the Constitution ten years after its ratification and seven years after the war with Ethiopia was resolved is tantamount to a violation of the Constitution.

5 The status of the Eritrean Constitution: The question of legitimacy

A query as to the legitimacy or illegitimacy of the Constitution is relevant on the principle that not all laws that are passed by those who claim to have law-making power are legitimate. This is the democratic element of law making and in this democratic era it has paramount importance. Thus, the opposition's questioning of the legitimacy of the Constitution is valid in principle. However, there are no hard and fast rules of quantifying the legitimacy or illegitimacy of law makers and the process they follow, particularly in transitional periods such as the Eritrean constitution-making era. This author offers three ways of civilly disposing of the legitimacy/illegitimacy contentions: (1) a political solution; (2) a referendum; or (3) arbitration by third parties.

A constitution-making process is often a highly politically-charged venture. Although public participation in the making of the Constitution was high, the Eritrean public would not object to any compromise reached by the GoE and the opposition parties as main political stakeholders. This compromise could be (1) accepting the Constitution by the opposition force, or (2) allowing a new process that remedies the mistakes of the past to take place. In a related manner, the stakeholders can also agree on submitting the Constitution to a referendum so that,

¹⁰⁷ Awate (n 36 above).

¹⁰⁸ Immediate implementation of the Constitution after its ratification was clearly envisaged in the various legislations. Arts 3(2) and 4(4) of Proclamation 37/1993 clearly indicate that the lifespan of the GoE is four years (1993 to 1997) maximum and immediately thereafter a constitutional government should have been established.

¹⁰⁹ See chs 2 and 3 of the Constitution. See Awate (n 36 above).

in a similar way to the referendum of 1993, the Eritrean public may be asked whether or not it accepts the Constitution. Even in the opposition's assumption that it will remove the GoE, the opposition would be wrong to run to a new constitution-making process without consulting the Eritrean public on the fate of an already ratified Constitution.

Although one could risk a counter-majoritarian dilemma, an adjudicative or arbitration mechanism is another solution. This is premised on the fact that disputes on the fairness or otherwise of elections, which are similar to contention over the Constitution, are often resolved in an arbitration or adjudication. Indeed, the judicial disposition of disputes has advantages over democratic tools such as simple majority takes all, because the first is often based on reason as opposed to the latter which is based on preference.¹¹⁰ Recourse to arbitration is feasible as it can be done outside of Eritrea and the interested parties can argue their own positions. Arbitration needs to be formal — both parties can set the arbitrating body and provide it with the guidelines. A point to settle should be whether the Constitution passes the legitimacy test and whether, given the overall circumstances, the Eritrean public will have an interest in all Eritrean political forces accepting the Constitution now and working for its implementation.

Along this line, this author backs a conclusion that the Constitution can be accepted by all Eritreans. Pertinent to this conclusion is an evaluation of constitution-making experiences and an evaluation of how the Eritrean experience fits into the scale. An evaluation from third party experts is not only predominantly positive,¹¹¹ but also presents the Eritrean constitution-making process as a new model and the eventually ratified Constitution as beautiful and progressive.¹¹² Apart from this angle, this author also relies on other benchmarks outlined below.

5.1 Re-inventing the wheel

The position that the Constitution is legitimate is further reinforced by the way the EDA envisaged writing a new constitution which would repeat worse errors than the process out of which the existing Constitution was born, which many parties within the EDA loudly criticised. In 2005, the EDA wrote its Political Charter, by which it crudely outlined how it envisaged going about governing Eritrea, including writing a constitution after the defeat of the GoE.

¹¹⁰ A good example is the role the South African Constitutional Court played in the constitution-making process of South Africa.

¹¹¹ Considering the fact that relations between the GoE and the opposition parties and among the opposition parties themselves are hostile, observations of both sides in the constitution-making process and the eventually ratified Constitution are biased. The opposition, in particular, suffers from 'opposition syndrome' of viciously criticising everything the GoE did which in return affects the opposition's maturity and credibility.

¹¹² See eg Hart (n 60 above); Rosen (n 9 above) and Connell (n 22 above) 7.

The EDA planned to erect a transitional government from the opposition camp only.¹¹³ The defeated elements would not be part of the transitional government. In addition, the defeated elements would not be included in the National Transitional Assembly. The EDA planned to constitute a National Reconciliation Conference in which all political forces and cross-sections of Eritrean public were allowed to participate.¹¹⁴

This the GoE did, and, on the basis of ‘winner takes all’, the opposition criticised the process and rejected the Constitution. This shows that in rejecting the Constitution, the EDA leaders were motivated by sheer hatred and their desire was to undo and redo what has been done by the GoE.¹¹⁵ The flaw of the EDA is noted by a leading opposition website that asked the EDA to re-consider ‘provisions for including forces that might actively participate in bringing about change inside Eritrea in the provisional government’.¹¹⁶

As described above, one of the criticisms directed against the constitution-making process was that members of the Constitution Commission should have been popularly elected rather than appointed by the National Assembly. However, EDA’s approach in this regard is worse. The EDA gave the executive branch of the transitional government the power to establish a constitution-drafting commission.¹¹⁷ In comparison, the Commission that led the constitution-making process was established by the National Assembly of the GoE.

Another factor that should inform whether the Constitution should be taken as legitimate is the content of the Constitution. In recent discourse, the constitution-making process *per se* is given greater value – participatory process is assumed to confer legitimacy and ownership to a constitution.¹¹⁸ In principle, however, any party which does not participate in the making of a constitution but agrees with the contents of the eventually-ratified one lacks valid justification to reject such a constitution. Related to this point is the fact that a constitution cannot satisfy all its subjects. Even if all the subjects embrace the same values, these can be expressed in many forms. It is naïve to say that there is a model that could satisfy four million Eritreans and thus even in a participatory process, there could be a loser and a winner.

¹¹³ Art 3(2)(a) EDA Political Charter.

¹¹⁴ See art 3(3) in conjunction with art 3(4)(2).

¹¹⁵ To understand the controversy on the Constitution, it is important to note the fact that personal hatred does exist between the high echelon of the GoE and the personalities of the opposition political parties.

¹¹⁶ Awate Team ‘Strengthening the EDA’ (2006) <http://www.awate.com/portal/content/view/4223/2/> (accessed 22 November 2007).

¹¹⁷ Art 3(6)(2) EDA Political Charter. What is even worse, the EDA gave the executive branch of the transitional government the power to establish an electoral commission (art 3(6)(3)).

¹¹⁸ K Samulels ‘Post-conflict peace building and constitution making’ (2006) 6 *Chicago Journal of International Law* 667. See also Hart (n 60 above).

Content-wise, the EDA has accepted the Constitution, albeit inadvertently. The Constitution is very concise. Even the 1997 Constitution of The Gambia (a country comparable to Eritrea in many respects, including its geographical size) is six times longer in scope than the Eritrean Constitution. The Eritrean Constitution has left many issues (which other constitutions treat in detail) to be governed by legislation. This means that fewer contentious issues are addressed in the Constitution.¹¹⁹ As such, it contains basic principles, many of which are a reflection of customary international law and some peremptory norms. Some principles are codified in international treaties,¹²⁰ and others are a reflection of international soft law.¹²¹ The EDA has accepted many of these provisions by committing itself to abide by international charters and treaties.¹²² One sensible Eritrean academic who questions the legitimacy of the constitution-making process agrees that, content-wise, there is nothing to object to in the Constitution.¹²³ This is further reinforced by a bold admission on the website of one of the important political parties, the ELF-RC, which rejects the Constitution:¹²⁴

Like most of the programmes of the Eritrean political organisations, contents of constitutions are similar the world over. Let alone a document prepared by an Eritrean expert like Dr Bereket, even the two centuries old American Constitution may have up to 70-80% relevant in its content ... If we are asked to write a draft, may be over 90% of what we have in the PFDJ Constitution could be acceptable.

Most commentators agree that the content of the Constitution reflects internationally-agreed norms. During the struggle days for Eritrea's liberation, the views of EPLF and ELF overlapped in many important areas. However, there were a few major differences on emotional issues: the flag,¹²⁵ the issue of the Eritrean language,¹²⁶ the preservation of the cul-

¹¹⁹ These included the issue of decentralisation (art 1(5)); citizenship (art 3(2)(3)); the meaning of national symbols (art 4); political parties' law (art 19); electoral law and the detailed organisation, powers and duties of the Electoral Commission (arts 20, 30(2) & 58(3)); land ownership (arts 8(3) & 23(2)); the tenure and number of justices of the Supreme Court (art 49(4)); the jurisdiction, organisation and function of lower courts and the tenure of their judges (art 50); the detailed organisation, powers and duties of the Judicial Service Commission (art 53(2)); the powers and duties of the Advocate-General (art 54), the Auditor-General (art 55(3)), the National Bank (art 56(3)) and Civil Service Administration (art 57(2)).

¹²⁰ See chs 1, 2 & 3 of the Constitution.

¹²¹ See the sections of the Constitution related to the independence of the judiciary, the Electoral Commission, the Advocate-General and the Auditor-General.

¹²² Art 1(10) EDA Charter.

¹²³ Mekonnen (n 64 above) 5 & 6.

¹²⁴ Nharnet Team 'Democratic constitution making' (2006) <http://www.websitetoolbox.com/tool/post/adal/vpost?id=1209620&trail=15#3> (accessed 8 April 2007).

¹²⁵ In addition to the blue Eritrean flag, the EPLF had a party flag but the ELF did not.

¹²⁶ The EPLF advocated 'equality of all languages', while the ELF advocated Tigrinya and Arabic to be official languages.

tural values of the Eritrean public,¹²⁷ land ownership and nationality.¹²⁸ In criticising the Constitution, some people from the opposition argue that, on all three points the position of EPLF is reflected in the Constitution and add that these are important issues that should have been seriously debated or required a popular referendum.¹²⁹

However, the same parties have made it clear that such differences are not important. Interestingly, the EDA has embraced the ‘contentious’ provisions of the Constitution. Specifically on the issue of language, all the Constitution provides is that ‘equality of all Eritrean languages is guaranteed’.¹³⁰ When asked about the meaning of this provision, Professor Bereket, the Chairperson of the Commission, observed that it was left to the wisdom of the judiciary and, by implication, the legislature to handle.¹³¹ Indeed, the Constitution does not prohibit Eritrea from adopting an official language by legislation and the EDA has endorsed this position when it affirmed the equality of all Eritrean languages and nominated Tigrinya and Arabic as official languages.¹³²

On the issue of the national flag, the contention of the opposition is that the GoE in 1993 replaced the blue Eritrean flag of the 1950s (when Eritrea was a semi-autonomous state). The blue flag was used by the liberation forces as the Eritrean flag all through the struggle days. The opposition parties, except those PFDJ splinters, still consider the blue flag as the Eritrean flag.¹³³

Stipulating that the ‘Eritrean flag shall have green, red and blue colours with golden olive leaves’, the Constitution does adopt a similarly coloured flag to the one the GoE adopted in 1993.¹³⁴ A detailed description of the flag is, however, left to be determined by law.¹³⁵ Although the colours are specified, the Constitution does not specify the layout and, considering the alleged historical injustices the present flag embodies, its constitutionality may be challenged. Using the colours provided by the Constitution, a different-looking

¹²⁷ The EPLF favoured social transformation while the ELF believed that the national culture should remain unmolested.

¹²⁸ Younis (n 23 above).

¹²⁹ See ELF-RC ‘Interview with fighter Ahmed Nasr’ (1996) 18 *Demokrasawit Eritrea* 5. (The source is in Tigrinya.)

¹³⁰ Art 4(3).

¹³¹ Awate (n 36 above).

¹³² Art 1(6) EDA Charter. The only difference is thus that the Constitution left the issue of an official language to subsidiary legislation and probably the EDA will make it a constitutional matter.

¹³³ A glance at the websites of the opposition parties (link to all websites is available at <http://www.meskerem.com>) shows the politics related to the national flag.

¹³⁴ Adopted by art 10 of Proclamation 37/1993.

¹³⁵ Art 4(1).

flag from both flags can be adopted as a compromise.¹³⁶ Apart from these differences, the EDA reaffirmed what has been provided in the Constitution.¹³⁷

5.2 Other benchmarks

In addition to the above grounds, there are many advantages in regarding the Constitution as legitimate. At present, the Eritrean political 'struggle for democratic change' lacks a unifying factor — a body of ideals for which citizens should struggle and on the basis of which advocacy strategies of internal forces (the Eritrean public) and external forces (the African Union (AU) and others) should be pursued. One may argue that the EDA Political Charter is a common denominator for the 16 political parties. However, the Charter is not accepted by the GoE and, by extension, its supporters. In addition, the Charter is a crude outline of how to dispose the GoE¹³⁸ and subsequently erect a transitional government and write a new constitution. In addition, the Charter is not the product of public participation as the Constitution is. Thus, the EDA is waiving the many advantages it can gain by its intent to write a new constitution after the 'defeat' of the GoE, instead of pressing the GoE to respect the Constitution.

5.2.1 Legal and political advantages: The relevance of the African Charter on Democracy, Elections and Governance

First, the EDA ruled out the possibility that the Constitution will bring about a regime change. The implementation of the Constitution is an important tool by which the opposition can score a peaceful victory over the GoE. Many scholars have convincingly argued that a right to democratic governance now exists both as part of customary

¹³⁶ This author differs from Prof Bereket's position that only the dimension of the flag is left by the Constitution to be determined by law. The layout, which is the most important, is left unspecified. See Awate (n 36 above).

¹³⁷ Even the provision of the EDA Charter that tends to provide for a federal form of government is unclear and it can be read as referring to a decentralised unitary form of government which the Constitution provides for. Art 1(8) EDA Charter. On land and nationality, the Charter is silent.

¹³⁸ Art 2(2). The EDA is permitted to resort to any means of struggle. Many of the parties within the EDA have military wings with a few armed forces. Awate Team 'Proliferation of armed resistance In Eritrea' (2007) <http://www.awate.com/portal/content/view/4660/9/> (accessed 26 November 2007).

international law and treaty law.¹³⁹ According to these scholars, constitutional governance has been cemented into the domain of customary international law. The AU's emphasis on the protection of human rights and the promotion of democracy and good governance in its Constitutive Act¹⁴⁰ attests to the consolidation of the right to democracy even in Africa — a continent that not only has been resistant, but hitherto to a certain extent remains undemocratic. This commitment was further and strongly reinforced when the AU adopted the African Charter on Democracy, Elections and Governance (Charter).¹⁴¹

The AU adopted the Charter, among other reasons, (1) inspired by the objectives and principles enshrined in the Constitutive Act of the AU, which emphasise the importance of good governance, popular participation, the rule of law and human rights; (2) committed to promote the universal values and principles of democracy, good governance, human rights and the right to development; (3) seeking to entrench in Africa a political culture of change of power based on the holding of regular, free, fair and transparent elections; and (4) concerned about the unconstitutional changes of governments that are one of the essential causes of insecurity, instability and violent conflict in Africa.¹⁴²

Thus, the objectives of the Charter included (1) the promotion of adherence, by each state party, to the universal values and principles of democracy and respect for human rights and enhancement of adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order; (2) the promotion of the holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments; and (3) the prohibition, rejection and condemnation of unconstitutional change of government in

¹³⁹ See eg R Ezetah 'The right to democracy: A qualitative inquiry' (1997) 22 *Brooklyn Journal of International Law* 495-534; L Fielding 'Taking the next step in the development of new human rights: The emerging right of humanitarian assistance to restore democracy' (1995) 5 *Duke Journal of Comparative and International Law* 329-77; J Ebersole 'National sovereignty revisited: Perspectives on the emerging norm of democracy in international law' (1992) 86 *American Society of International Law Proceedings* 249-71; NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209-87; RA Barnes 'Democratic governance and international law' (2000) 8 *Indiana Journal of Global Legal Studies* 281-99; JI Levitt 'Pro-democratic intervention in Africa' (2006) 24 *Wisconsin International Law Journal* 785-832.

¹⁴⁰ See arts 3 and 4 of the Constitutive Act of the African Union adopted in Lomé, Togo, on 11 July 2000.

¹⁴¹ Adopted by the 8th ordinary session of the Assembly of Heads of State and Government, held in Addis Ababa, Ethiopia, on 30 January 2007. The Charter, although hitherto with no ratification (merely adopted and signed by 17 states) is a clear manifestation of the consolidation of the right to democratic governance in Africa.

¹⁴² See the Preamble to the Charter.

any member state as a serious threat to stability, peace, security and development.¹⁴³

Respect for human rights and democratic principles, access to and exercise of state power in accordance with a constitution and the principle of the rule of law, promotion of a system of government that is representative, holding regular, transparent, free and fair elections, condemnation and total rejection of unconstitutional changes of government and strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law, are the key principles on the basis of which African states have committed themselves to implement the Charter.¹⁴⁴

As one of the many enforcement mechanisms, member states are committed to co-operate with each other and to take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.¹⁴⁵ Article 23 of the Charter defines illegal and unconstitutional means of changing government not only to include the obvious *coups* or *putsch* against a democratically elected government, but also any refusal by an incumbent government to relinquish power. The same article stipulates that such an act shall be met by appropriate sanctions by the AU. The Peace and Security Council of the AU is empowered to exercise its responsibilities in order to maintain the constitutional order in accordance with the relevant provisions of the Protocol¹⁴⁶ relating to the establishment of the same council.¹⁴⁷

Specifically, in accordance with article 25(1) of the Charter, when the Peace and Security Council observes that there has been an unconstitutional change of government in a member state, and that diplomatic initiatives have failed, it shall suspend the said state from the exercise of its right to participate in the activities of the AU in accordance with the provisions of articles 30 of the Constitutive Act and 7(g) of the Protocol. The suspension shall take effect immediately. In addition, article 25(7) of the Charter empowers the Assembly of Heads of State and Government to decide to apply other forms of sanctions on perpetrators of unconstitutional change of government, including punitive economic measures.

Although inversely, the GoE's reluctance to end its transitional existence and open the country for constitutional democracy typically fits into the definition of unconstitutional change of government provided

¹⁴³ Art 2.

¹⁴⁴ Art 3.

¹⁴⁵ Art 14.

¹⁴⁶ Protocol Relating to the Establishment of the Peace and Security Council of The African Union, adopted by the 1st ordinary session of the Assembly of the African Union held in Durban, 9 July 2002.

¹⁴⁷ Art 24 of the Charter.

under article 23(4) of the African Charter on Democracy, Elections and Governance. The Eritrean case demonstrates a typical case of illegal perpetuation of transitional government beyond the reasonable transitional period in clear contempt and defiance of a popularly prepared constitution. The Constitution was written to govern, not to be stashed away indefinitely. Nevertheless, it has been 10 years and the Constitution is yet to be implemented and there is no time-frame set for the implementation of the Constitution. In accordance with the Constitution, two rounds of elections for the national legislature should already have been held. This has not happened and there are none scheduled. In this regard, lamenting on the GoE defiance of the implementation process and its implications, Bereket rightly notes that '[t]here is no excuse for such failure ... To neglect a ratified constitution is tantamount to negating the will of the people whose delegates ratified the Constitution.'¹⁴⁸ This writer has previously commented:¹⁴⁹

... by its own laws and calendars, the GoE has been rendered illegal since long and thus illegitimate. In accordance with Proclamation 37/1993 – the interim constitution – the GoE should have ended its life span in 1997 and opened the country for constitutional democracy ... the Eritrean Constitution that was ratified in 1997 (the very Constitution that was prepared with full support of the GoE) also put an end to the life span of the GoE. Because of the border conflict which due to mishandling of the governments in Ethiopia and Eritrea escalated into devastating war, many Eritreans excused the GoE to extend its presence up to few months after the signing of peace agreement in 2000. At any time afterwards, the GoE has no justification to detain the process of transformation to constitutional governance.

The unimplemented Constitution is therefore an important tool that the Eritrea opposition may use before AU forums to exert pressure on the GoE and to gain the benefits the Charter offers. By accepting the Constitution, without the opposition participating in its making, the opposition could have proved that it does not suffer from the typical opposition syndrome of 'boycotting everything' an incumbent government does. In so doing, the opposition could legally and diplomatically have placed the GoE in a weaker position. The Eritrean constitution-making process has been complimented by many as 'democratic' and 'participatory' and the eventual Constitution is credited as 'progressive' and 'beautiful' by politically influential quarters.¹⁵⁰ In addition, the

¹⁴⁸ Quoted in SM Weldehaimanot 'Ten years old not yet born: The status of the Eritrean Constitution' (March 2007) <http://selfi-democracy.com/?p=2&l=e> (accessed 10 April 2008).

¹⁴⁹ SM Weldehaimanot 'Government in exile and its legitimacy: Insight to EDA' (March 2008) <http://www.awate.com/portal/content/view/4807/5/> (accessed 10 April 2008).

¹⁵⁰ See the yearly (2000-06) reports of US Department of State on human rights practices of Eritrea, lamenting that the Constitution has remained unimplemented. See also Department of State *Country report on human rights practices for 1997(1998)* 105 that observed: 'After a broad process of consultation and civic education, the Constitution was ratified by a constituent assembly elected from newly elected local assemblies.'

main criticism the GoE is facing is due to its reluctance to implement the Constitution.¹⁵¹

Two feasible outcomes could, therefore, follow from the opposition's acceptance of the Constitution. First, when a united pressure of Eritreans join the call from non-Eritreans for the implementation of the Constitution, it is possible to force the GoE to accept the implementation of the Constitution in a short and agreed upon time-frame. Second, in the alternative, after putting the GoE in clear default, the opposition may convincingly form a constitutional government in exile, thus leading the struggle for democratic change in Eritrea in a unified manner. The idea of forming a government in exile is currently seriously contemplated by many leaders within the opposition camp.¹⁵² Although the idea is valid, it can have a stronger legal anchor when the opposition bases itself on the African Charter and also on the very Constitution popularly ratified with the full support of the GoE. The very Constitution the GoE sponsored gives the right to the opposition to form a constitutional government in Diaspora. Diaspora Eritreans make up one-third of the Eritrean population.¹⁵³

Pertinent parts of the Constitution read (1) that the Constitution 'enunciates the principles on which the state is based and by which it shall be guided and determines the organisation and operation of government'; (2) that the Constitution 'is the source of government legitimacy and the basis for the protection of the rights, freedoms and dignity of citizens and of just administration'; (3) that in 'the state of Eritrea, sovereign power is vested in the people, and shall be exercised pursuant to the provisions of this Constitution'; (4) that the Constitution is the supreme law of the country and the source of all laws of the state, and all laws, orders and acts contrary to its letter and spirit shall be null and void'; (5) that 'all organs of the state, all public and private associations and institutions and all citizens shall be bound by and remain loyal to the Constitution and shall ensure its observance'.¹⁵⁴

5.2.2 Disadvantages

Another problem with the EDA's position of rejecting the Constitution is the EDA's over-simplistic and narrow perception of the transitional period in which it contemplated writing a new constitution. The entire EDA transitional project is scheduled to cause the fall of the GoE, and the collapse of the GoE envisaged by the EDA is the same kind of regime change Asmara witnessed in May 1991 — a total collapse of the GoE.

¹⁵¹ Statement by The Honourable Jendayi Frazer, US Assistant Secretary on African Affairs before Senate Foreign Relations Sub-Committee on African Affairs' Hearing on Horn of Africa Policy, 11 March 2008.

¹⁵² Weldehaimanot (n 148 above).

¹⁵³ Awate Team (n 116 above).

¹⁵⁴ See arts 1 and 2 of the Constitution in 'Constitution of Eritrea' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 521-45.

The EDA is very naïve to assume so. As far as the EDA remains weak and disunited, Asmara can produce another government that can contend with or monopolise power. If the local force is to chart out implementation of the Constitution as a matter of priority and call the EDA to participate, the current position of the EDA could entail huge political losses to the EDA because the Eritrean public does not have the luxury of choosing between constitutions. On the other hand, the EDA that has accepted the Constitution, or the EDA that already formed a shadow government in the Diaspora based on the Constitution, can be a force strong enough to influence Asmara. In case Asmara faces a military *coup*, such EDA can also force a military regime to swiftly allow civilian government to take power on the basis of the Constitution and the African Charter.

Even if the local forces accept the writing of a new constitution in accordance with the EDA's Political Charter, coming up with an acceptable constitution cannot be taken as a simple matter. What must be borne in mind are the atmosphere in which the process takes place and a whole range of other factors. The present Constitution is written in a mood of optimism and jubilation — an important aurora to hammer agreements. After the bad times Eritreans have passed through recently, a new venture might have similar advantages. One can take it as inevitable that those who participated in the previous constitution-making process would approach the new initiative with dissenting tendencies and high standards. If the new constitution is to look similar to the existing one, then the 're-inventing the wheel' argument would haunt the new venture. If the draft of the new constitution is to show a big difference, dissent would be another problem. At the very least, fault-finding is simple.

Along this line, the political maturity of the 'would-be' key actors should be considered. In addition, the state of 'semi-political vacuum' in which the actors negotiate is important to bear in mind. The EDA naïvely fails to contemplate the possibility of failing to achieve its goals, which can lead to chaos. At present, the main unifying factor for the opposition block is the repressive GoE in Asmara. Apart from this unifying factor, although not different in their programmes, the history of the opposition political parties is known for forming rounds of alliance and ending up in disputes. The formation of the EDA in 2005 and the agreement 16 political parties reached on a political charter brought hope. However, the EDA divided into two blocks a year later on unimportant matters.¹⁵⁵ Thus, there is a real concern that a leadership vacuum in Asmara that would give a free opportunity for all the opposition parties to land in Asmara and form a transitional government could fail. Con-

¹⁵⁵ S Bizen 'EDA: From where to where' (June 2007) <http://www.emdhr.org/> (accessed 26 June 2007).

sidering the weakness and disunity within the opposition, Eritreans are thus rightly worried about what Asmara will produce thereafter.¹⁵⁶

In addition, a rejection of the Constitution will definitely entail legal chaos in Eritrea. Potentially, all the laws (proclamations and legal notices) hitherto passed and the international treaties ratified by the GoE can be challenged on the same ground that confronts the Constitution.¹⁵⁷ Indeed, considering the undemocratic law-making process, very few of these laws can pass the legitimacy standard the Constitution is subjected to.¹⁵⁸ Already, opposition academics follow an unconvincing selection of and reliance on transitional laws. Mekonnen, for example, although he questions the legitimacy of the Constitution, relies on many of the transitional legislation and the treaties the GoE ratified.¹⁵⁹ On the other hand, Article 19 and the Eritrean Movement for Democracy and Human Rights (EMDHR) have relied on the Constitution in their communications filed before the African Commission.¹⁶⁰ The opposition parties are not articulate on how to handle such a phenomenon. At a time international treaties are gaining supremacy over municipal laws, including constitutions, it seems that opposition parties are unaware of the implications of the treaties the GoE has ratified for the constitutional debate.

6 Conclusion

The Constitution, in spite of certain flaws in its making, is a democratic document that has the potential to be a national covenant if accepted by the dissenting opposition. Although all the actions of the GoE imply rejection of the Constitution, the GoE has no valid ground to rebuff the Constitution ratified after such extensive public participation. The opposition's acceptance of the Constitution can bring a unifying body

¹⁵⁶ DG Mikael 'Unsolicited advice to Mr Isaias Afewerki' (2007) <http://www.awate.com/portal/content/view/4635/5/> (accessed on 26 November 2007).

¹⁵⁷ It is true that a constitution is of a higher level of importance than ordinary legislation. Generally a constitution is different from ordinary legislation in three respects: (1) Apart from common contents, what is contained in a constitution is generally considered of higher importance. (2) In almost all countries, a constitution is supreme over ordinary legislation in that the first prevails over contradictory provision of the latter. (3) In almost all countries, a constitution is more entrenched than ordinary legislation. Thus, it is arguable that the reason why the opposition targeted only the Constitution but not the rest of the laws could be due to the above peculiarities of the Constitution.

¹⁵⁸ SM Weldehaimanot & DR Mekonnen 'The nebulous law-making process in Eritrea' (2008 under review) *Journal of Legislative Studies*.

¹⁵⁹ See Mekonnen (n 15 above). See also DR Mekonnen 'Annihilation of rule of law: Cause for all pitfalls in Eritrea' (article series in Tigrinya, part 1 to part 6) (2007) <http://www.awate.com> (accessed 22 November 2007).

¹⁶⁰ *Article 19 v Eritrea* (n 85 above). The communication filed by EMDHR was filed in August 2007 and is expected to be seized of by the African Commission on Human and Peoples' Rights in its 43rd ordinary session.

of ideals to the Eritrean political spectrum the realisation of which all Eritreans can work towards. A unified call for the implementation of the Constitution can force the reluctant GoE to agree. In the alternative, using the Constitution, after proving manifestly the GoE's defiance of the rule of law, the opposition can legitimately step in to form a government in exile. In addition, accepting the Constitution can save Eritreans from the uncertainties of the future. As the GoE is getting weaker, Asmara may face a political vacuum, in which case the failure of the succeeding political actors to produce a constitution could lead to a dangerous political crisis. A military junta could take power and could use the pretext of writing a new constitution to reinforce its grip of power.