

## Constitution Making in Eritrea: Why it's Necessary to Go Back to the Future

**Joseph Eliot Magnet**

### Overview

Eritrea became independent in 1993. It quickly became a pariah state, ruled by an authoritarian regime that United Nations organs have condemned for human rights abuses, possible crimes against humanity and sanctioned for terrorism and adventurism in the Horn of Africa. Eritrea has never held an election. The legislature has not met since 2002. The country lacks effective institutions of governance or civil society. Eritrea ranks 182 out of 187 countries on the Human Development Index. Refugees stream out of the country. There have been recent coup attempts. The situation is unstable, and unlikely to last long.

The question debated here is: what system of governance should replace the implosion or explosion of the dictatorship.

Eritrea is multi-ethnic, multi-religious and multi-lingual – a country riven by deep divisions. The societies and cultures of its population are ancient, reaching back, in some cases, into pre-history. The concept of Eritrea as a political and territorial unit is a colonial creation from the late 19th century, having little to do with the societies incorporated.

Eritrea went through a constitutional drafting process from 1995 to 1997. President Afwerki handpicked the Chair of the Commission, an American scholar of Eritrean descent, Professor Bereket Habte Selassie. The Commission was accountable to the National Assembly which was controlled by the sole political party allowed to operate in Eritrea.

Professor Selassie's Commission produced a draft, which was ratified by the National Assembly in 1997, but never implemented. The document provides for democratic institutions, constitutional rights, directing objectives specific to the Eritrean reality, and for other machinery commonly found in the constitutions of modern democratic, rule of law inspired states.



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The 1997 Constitution has the support of the United Nations, the USA and the EU. Their common prescription for what ails Eritrea is that the country should “[i]mplement fully and without further delay the Constitution of 1997”.

Despite its veneer of democracy, rule of law and rights, I argue that the 1997 Constitution suffers from outsized flaws of procedure and substance. The Commission’s process took place in an anti-democratic landscape that did not tolerate dissident political opinion or engage the different national communities in interest based negotiations. The Commission produced a highly centralized Stalinist conception that experience teaches does not work in deeply diverse or multi-national democracies.

As I will show in what follows, the U.N. recommendations to implement Eritrea’s 1997 Constitution are misguided. If acted on, the Constitution would likely become a procedural facade behind which Eritrea’s two large nationalities would continue to dominate and dispossess its eight smaller nationalities, as is happening today. Over time, with the dictatorship removed, Eritrea would probably descend into a protracted civil conflict between national communities, perhaps spilling over into neighbouring countries, with uncertain outcomes for geopolitics and devastating consequences for human rights.

In the following pages I will defend the argument that Eritrea requires a power sharing constitution. This is not only the best means to promote peace and security in multi-nation states, it is the only means known to constitutional designers today.

I will first explain the origins and dimensions of Eritrea’s internal nations and the colonial motivation for bringing them together in an overarching political structure; second, describe how a revolutionary struggle resulted in a military dictatorship and how the revolutionary assumptions and structures infected the constitution-making effort in 1995-7, drawing perspective from parallel events in Ethiopia; third, show why the resulting constitutional document, despite its veneer of democracy and rule of law, is unlikely to work in Eritrea; and lastly, outline the kind of constitutional process and substance that Eritrea requires to promote stability, peace and development.

**Keywords:** Constitutional Law; Comparative Constitutional Law; Constitutional Design; Constitution Making; African Constitutional Law; Eritrea; Eritrea Constitution

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*“Between the strong and the weak, between the rich and the poor, between master and servant, it is freedom that oppresses and the law that sets free.”*

– Jean-Baptiste Henri Dominique Lacordaire

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## Overview

Eritrea became independent in 1993. It quickly became a pariah state, ruled by an authoritarian regime that United Nations organs have condemned for human rights abuses, possible crimes against humanity and sanctioned for terrorism and adventurism in the Horn of Africa.<sup>1</sup> Eritrea has never held an election. The legislature has not met since 2002. The country lacks effective institutions of governance or civil society.<sup>2</sup> Eritrea ranks 182 out of 187 countries on the Human Development Index.<sup>3</sup> Refugees stream out of the country. There have been recent coup attempts. The situation is unstable, and unlikely to last long.<sup>4</sup>

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<sup>1</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Eritrea*, 28 May 2013, A/HRC/23/53, online: <http://www.refworld.org/docid/51a748694.html> [accessed 1 November 2015] [Keetharuth Report, 2013]; The SR's Report was approved by the Human Rights Council: HRC resolution 23/21, UN Doc A/HRC/RES/23/21, based upon UN Doc A/HRC/23/L.17, Human Rights Council, 23rdSess, 10 June 2013, item 4; online: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G13/145/92/PDF/G1314592.pdf?OpenElement>; UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Eritrea*, 13 May 2014, A/HRC/26/45, online: <http://www.refworld.org/docid/53a028174.html> [accessed 1 November 2015] [Keetharuth Report, 2014]; UN Human Rights Council, *Report of the Commission of Inquiry on Human Rights in Eritrea*, 4 June 2015, A/HRC/29/42. Online: <http://www.ohchr.org/EN/HRBodies/HRC/CoIEritrea/Pages/ReportCoIEritrea.aspx> [accessed 1 November 2015] [COI Report, 2015].

<sup>2</sup> Keetharuth Report, 2013, paras 18-24, 26; Keetharuth Report, 2014, para 20.

<sup>3</sup> United Nations Development Programme, “Human Development Reports, online: <http://hdr.undp.org/en/reports/global/hdr2013/>

<sup>4</sup> International Crisis Group, *Eritrea: Scenarios for Transition* (March 28, 2013), pp. 3-6, online: <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/ethiopia-eritrea/200-eritrea-scenarios-for-future-transition.pdf>

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Professor Selassie's Commission produced a draft, which was ratified by the National Assembly in 1997, but never implemented. The document provides for democratic institutions, constitutional rights, directing objectives specific to the Eritrean reality, and for other machinery commonly found in the constitutions of modern democratic, rule of law inspired states.

The 1997 Constitution has the support of the United Nations, the USA and the EU. Their common prescription for what ails Eritrea is that the country should "[i]mplement fully and without further delay the Constitution of 1997".<sup>7</sup>

Despite its veneer of democracy, rule of law and rights, I argue that the 1997 Constitution suffers from outsized flaws of procedure and substance. The Commission's process took place in an anti-democratic landscape that did not tolerate dissident political opinion or engage the different national communities in interest based negotiations.<sup>8</sup> The Commission produced a highly centralized Stalinist conception that experience teaches does not work in deeply diverse or multi-national democracies.

As I will show in what follows, the U.N. recommendations to implement Eritrea's 1997 Constitution are misguided. If acted on, the Constitution would likely become a procedural facade behind which Eritrea's two large nationalities would continue to dominate and dispossess its eight smaller nationalities, as is happening today. Over time, with the dictatorship removed, Eritrea would probably descend into a protracted civil conflict between national communities, perhaps spilling over into neighbouring countries, with uncertain outcomes for geopolitics and devastating consequences for human rights.

In the following pages I will defend the argument that Eritrea requires a power sharing constitution. This is not only the best means to promote peace and security in multi-nation states, it is the only means known to constitutional designers today.

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<sup>5</sup>Bereket Habte Selassie, *Wounded Nation: How a Once Promising Eritrea was Betrayed and its Future Compromised*, (Trenton, NJ: The Red Sea Press Inc, 2011), pp. 106-8.

<sup>6</sup>Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectics of Process and Substance* (Trenton, NJ: The Red Sea Press, 2003) at 24.

<sup>7</sup>COI Report 2015, para 85a; Keetharuth Report, 2013, para 107(b).

<sup>8</sup>Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" (2008), 8 *Afr Hum Rts LJ* 108 at 111.

## Formation of Eritrean Societies and the Eritrean Polity

The present day societies of Eritrea are the products of cultural mixings dating from pre-history. A generally accepted scholarly narrative recounts that South Arabian colonists formed a polity in the Eritrean highlands and Tigray region of Ethiopia in the first millennium B.C., which became the Kingdom of Axum (c. 400 BC–700 AD), a large trading empire that absorbed Semites in the area bordering both sides of the southern Red Sea and stretching inland to embrace large parts of modern day Ethiopia and Yemen. The Axum Empire is thought to have converted to Christianity, in the early 4<sup>th</sup> century.<sup>9</sup> When Muslims took control of Axum early in the seventh century, Axum's Christian population shrunk rapidly and dramatically in size, moved inland to the central highlands where it still resides, and relocated the capital.<sup>10</sup>

Continuity of the Axumite Christians with modern day Eritrean Christian communities has been noted by scholars from various disciplines.<sup>11</sup>

Axum allowed significant immigration from the Arabian Peninsula along the Red Sea coast. The newcomers formed durable communities along the southern coastline, and also spread Muslim culture inland.<sup>12</sup> These societies are thought to have continuity with modern day Saho and Afar communities in Eritrea.<sup>13</sup>

After Axum's decline in the seventh century, mass movements of people into and around the area resulted in a major territorial/religious divide, between Christian communities in the Eritrean highlands and Muslim communities in the Eritrean lowlands. Within this divide multiple ethnicities formed, distinguished by separate histories, cultures and languages. There was no common "state-like organisation."<sup>14</sup>

Nine major language groups inhabit present day Eritrea: two, the Nara and Kunama, speak Nilo-Saharan languages; three, the Tigrinya, Tigre and Arabic groups, speak Semitic languages; and four, the Afar, Bilen, Hadareb and Saho, speak Cushitic languages.<sup>15</sup> Religious observance is high in all groups: 50 percent of Eritrea's population of 3.6 million is Sunni Muslim; 30 percent is Orthodox Christian; 13 percent is Roman Catholic, 2 percent practice traditional indigenous religions, with the remainder a mix of Protestants, Seventh-day Adventists, Jehovah's Witnesses, Buddhist, Hindus and Baha'is.<sup>16</sup>

Italian colonization began in the mid-19<sup>th</sup> century. The Italian government purchased the port of Assab in 1882, and occupied the port of Massawa shortly thereafter.<sup>17</sup> Italy and Ethiopia demarcated the territory of

<sup>9</sup>David W. Phillipson, "The Aksumite roots of Medieval Ethiopia" (2004), 39:1 *Azania: Archaeological Research in Africa*, 77, 82: "The state was nominally Christian and its rulers were probably firm adherents. Some coinage inscriptions of this time may be interpreted as indicating that the new religion was not yet widely accepted in the countryside." Available online: <http://dx.doi.org/10.1080/00672700409480389>.

<sup>10</sup>Phillipson, *Id.*, pp 83-4.

<sup>11</sup>*Id.*, p 88.

<sup>12</sup>Rodolfo Fattovich, "The Development of Ancient States in the Northern Horn of Africa, c. 3000 BC–AD 1000: An Archaeological Outline," (2010), 23(3) *Journal of World Prehistory*, pp 145-175.

<sup>13</sup>*Id.*; Abdulkader Saleh Mohammad, *The Saho of Eritrea: Ethnic Identity and National Consciousness* (Vienna: Lit Verlag, 2010), p, 86-88.

<sup>14</sup>Redie Bereketab, *Eritrea: The Making of a Nation* (NJ, Red Sea Press, 2007)

<sup>15</sup>Tekle Woldemikael, "Eritrea's Identity as a Cultural Crossroads" in P. Spickard, *Race and Nation* (Routledge, 2004), p. 337 at p. 340; Tekle Woldemikael, "The Cultural Construction of Eritrean Nationalist Movements", in Crawford Young, *The Rising Tide of Cultural Pluralism: The Nation-State at Bay?* (Madison: University of Wisconsin, 1993), p. 317

<sup>16</sup>U.S. Dept of State, Bureau of Democracy, Human Rights, and Labor, *International Religious Freedom Report* (2007). Online: <http://www.state.gov/j/drl/rls/irf/2007/90096.htm>. The Dept cautions that it is difficult to produce reliable numbers.

<sup>17</sup>Jonathan Miran, *Red Sea Citizens, Cosmopolitan Society and Cultural Change in Massawa* (Bloomington, Indiana University Press, 2009), pp 3-4 presents a panoramic chronology of the port city of Massawa.

the Italian Colony by the *Treaty of Wuchale* in 1889, which empowered a Commission to draw boundaries roughly consistent with present day Eritrea.<sup>18</sup> The Treaty cobbled together into an Italian colonial unit a patchwork of diverse societies and ethnicities to suit Italy's needs, without regard to the peoples incorporated.<sup>19</sup>

Italy divided governance into nine territorially-based administrative units. It settled the colony with thousands of Italians, and imposed an Italian administration operated by an Italian bureaucratic class which excluded the indigenous societies. Mussolini's fascist ideas of racial supremacy were harshly implemented and racial segregation strictly enforced. Italian law was imposed. The colonial government tried, unsuccessfully, to eradicate indigenous customary law and institutions. Local institutions, customs and customary law remained largely intact and applicable to the indigenous population, while Italian law governed the higher reaches of the state and Italian commercial activity.

In 1941, British and allied forces defeated Italian forces at Keren in Eritrea. This terminated Italian rule and brought British administration to the colony until 1952.<sup>20</sup> Stephen Longrigg, who served as the British Military Administrator between 1942 and 1944, considered Eritrea as an "artificial unit".<sup>21</sup> Longrigg thought that "the interests of the inhabitants of the territory" should be "the first consideration" in deciding disposition of the colony; and accordingly recommended partition.<sup>22</sup>

Longrigg suggested that Muslim tribal areas adjoining the Anglo Egyptian Sudan should be included in Sudan. Dankalia, from Assab to Arafali, should be joined to Ethiopia. The central Christian highlands should form a united province of Tigray under Ethiopian sovereignty, but administered by a European power for some years. Longrigg concluded: "Eritrea would cease to exist."<sup>23</sup>

Longrigg's partition proposal was displaced by American and British concerns.<sup>24</sup> UN General Assembly Resolution 289(IV) of 1949 established a Commission to investigate the disposal of Italy's colonies, taking into account "the wishes and welfare" of the inhabitants of Eritrea, "the interests of peace and security in East Africa" and the "rights and claims of Ethiopia."<sup>25</sup>

Britain and the United States decided on a federal style arrangement to join Eritrea to Ethiopia, a country then within the American sphere of influence.<sup>26</sup> A United Nations General Assembly resolution of 1952

<sup>18</sup>The *Treaty of Wuchale*, Art. 3 sets the boundaries: see the Treaty text at <http://danielberhane.com/2011/08/17/text-of-wuchale-treaty-1989-ethio-italian-treaty/>.

<sup>19</sup>Kidane Mengisteab & Okbazghi Yohannes, *Anatomy of an African Tragedy: Political, Economic and Foreign Policy Crisis in Post-independence Eritrea*, (Trenton, NJ: The Red Sea Press Inc, 2005) at 37.

<sup>20</sup>Kidane Mengisteab & Okbazghi Yohannes, *Anatomy of an African Tragedy: Political, Economic and Foreign Policy Crisis in Post-independence Eritrea*, (Trenton, NJ: The Red Sea Press Inc, 2005) at page 40

<sup>21</sup> Stephen Longrigg, *A Short History of Eritrea* (Oxford: Clarendon Press, 1945 repr Greenwood Press, 1974), p 171. Considering how the colony Britain inherited by defeating the Italians should be disposed of, Longrigg continued: "...there is no *a priori* reason why the present artificial unit of Eritrea should, after a mere half-century of existence, be perpetuated if it can be shown that the resolution of the territory into its racial and geographic elements can provide a sounder solution."

<sup>22</sup>S.H. Longrigg, *A Short History of Eritrea* (Oxford: Clarendon Press, 1945 repr Greenwood Press, 1974), p 171. He wrote: "...the single Eritrea of today is doomed. Dismemberment, in some form, and to some extent, must be the alternative." (p. 172).

<sup>23</sup> Id, pp. 172-75. See also S.H Longrigg, "Disposal of Italian Africa" (1945), 21 (3) *International Affairs* 363 – 369; S.H. Longrigg, "The Future of Eritrea" (1946), 45 *African Affairs* 120–127.

<sup>24</sup>Memorandum from Mr. Rusk to the Secretary of State, 1949-03-05: "The United States and the United Kingdom have (similarly) agreed to support the cession to Ethiopia of all of Eritrea except the Western province. The United States has given assurances to Ethiopia in this regard."

<sup>25</sup> UN GA Resolution 280(IV) 21 November 1949 online: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/051/08/IMG/NR005108.pdf?OpenElement>

<sup>26</sup>According to Longrigg, this was against the wishes of the local inhabitants of Eritrea: *A Short History of Eritrea* (Oxford: Clarendon Press, 1945 repr Greenwood Press, 1974), p 170-71. This is the context for the often quoted remark by the US Ambassador to the



solidified this arrangement. Ethiopia ratified a federal constitution on September 11, 1952 under which Eritrea became an autonomous region in the Ethiopian Federation under the sovereignty of the Ethiopian Crown.<sup>27</sup>

Eritrea's limited autonomy under these constitutional arrangements was undermined from the outset. Amharic, Ethiopia's official language,<sup>28</sup> replaced Tigrinya and Arabic which were the languages traditionally used in Eritrea. Amharic also became the language of instruction in schools and in public institutions.<sup>29</sup> Emperor Haile Selassie introduced Ethiopia's civil and penal codes, closely controlled Eritrean political activity, censored Eritrean media and prohibited the display of Eritrean state symbols.<sup>30</sup>

Ethiopia's repressive language policies were an important cause of the Eritrean uprising which began in 1961.<sup>31</sup> In 1962, the Emperor pressured the Eritrean Assembly to dissolve the Federation, annexed Eritrea as part of the Ethiopian Empire, and sent a large army of occupation to enforce the new situation. Eritrea then descended into a bitter civil war which lasted for 30 years.

The struggle for Eritrean independence was led, initially, by the Eritrean Liberation Front [ELF].<sup>32</sup> The ELF was wracked by religious and philosophical factionalism. In the early 1970s, a group of ELF commanders formed a rival group, the Eritrean People's Liberation Front [EPLF], which engaged the ELF in two internecine wars in which the EPLF emerged victorious.<sup>33</sup>

The EPLF itself was wracked by factionalism, armed dissension and splintering. Its leader, Isaias Afwerki, repressed political rivals, executed dissenters and consolidated control through a secretive Marxist-Leninist "party within the party," the Eritrean People's Revolutionary Party [EPRP]. This was an early form of investing Afwerki with supreme power in Eritrea.<sup>34</sup>

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UN, John Foster Dulles, who said, "From the point of view of justice, the opinions of the Eritrean people must receive consideration. *Nevertheless* the strategic interest of the United States in the Red Sea basin and the considerations of security and world peace make it necessary that the country has to be linked with our *ally* Ethiopia."

<sup>27</sup>The *Ethiopian-Eritrean Federation*, UNGAOR, UN Document A/1605, 4 Dec 1950. The arrangement was confirmed in the *Constitution of Eritrea*, 1952 and reinforced in the *Constitution of Ethiopia*, 1955.

<sup>28</sup> Amharic was the official language of Ethiopia under the Constitution of 1931. Under a new constitution of 1955, art 125 declared Amharic to be the official language of Ethiopia, and this extended to the new province of Eritrea. Amharic was used as the sole language of education in schools, and in public institutions including the courts.

<sup>29</sup>Fiseha Haftetsion Gebresilassie, *Choosing a Working Language in Multiethnic Nations: Rethinking Ethiopia's Working Language Policy*, p. 4 online: <http://aigaforum.com/articles/Paper-on-Ethiopia-Language-Policy.pdf>

<sup>30</sup>B. de Villiers, "Secession – the Last Resort for Minority Protection" (2012) 48:1 *Journal of Asian and African Studies* 81 at p 87; Kidane Mengisteab & Okbazghi Yohannes, *Anatomy of an African Tragedy: Political, Economic and Foreign Policy Crisis in Post-independence Eritrea*, (Trenton, NJ: The Red Sea Press Inc, 2005) at 38-9.

<sup>31</sup> The EPLF Manifesto, *Our Struggle and its Goals*, written in 1971, justified the armed struggle in somewhat different terms. ...we have been struggling for many years because we were held back by African oppressive colonisers who have become puppets of imperialism; because our history is distorted, our languages outlawed, our cultures and traditions dominated and our dignity and human rights violated."

The Manifesto is thought to have been written by Afwerki. It provides useful insight into EPLF thinking. It is reproduced in (2011), 38 *Review of African Political Economy* 565-585, at pg. 568 ff. There are useful notes by Simon Weldehaimanot and Emily Taylor starting at p 565. Online: <http://dx.doi.org/10.1080/03056244.2011.630870>

<sup>32</sup>Redie Bereketeab, *Eritrea: The Making of a Nation*. Trenton, NJ: The Red Sea Press, 2007; See also Gaim Kibreab, *Eritrea: A Dream Deferred*, (New York: Boydell & Brewer, 2009) at 2.

<sup>33</sup>Kidane Mengisteab & Okbazghi Yohannes, *Anatomy of an African Tragedy: Political, Economic and Foreign Policy Crisis in Post-independence Eritrea*, (Trenton, NJ: The Red Sea Press Inc, 2005) at 42-54; Z. Yohannes 'Nation building and constitution making in Eritrea' (1996) 1 *Eritrean Studies Review* 157 at 158; Dan Connell, *Against All Odds: A Chronicle of the Eritrean Revolution* (1997) 73-91.

<sup>34</sup> Dan Connell & Tom Killion, *Historical Dictionary of Eritrea*, (Toronto: The Scarecrow Press, Inc, 2011), p 231.



In 1974, a military coup deposed Emperor Haile Selassie in Ethiopia.<sup>35</sup> A military junta, the Derg, took power, received significant support from the Soviet Union, and brought Ethiopia under Soviet influence. Soviet support propped up the Derg against the Eritrean insurrection throughout the 70s and 80s. With the unravelling of the Soviet state in the late 1980s, the Soviet Union decided not to renew the Soviet–Ethiopian defence agreement. Without Soviet assistance, the Ethiopian/Eritrean conflict tilted decisively toward the EPLF.<sup>36</sup> On May 24, 1991, EPLF forces entered the capital, Asmara, placing the EPLF in control of Eritrea.

## **Fateful Constitutional Choices in the Transitional Period**

### Ethiopia

While Eritrea was fighting for independence from Ethiopia, Ethiopia's Soviet-backed Derg regime was contesting another challenge from a coalition of rebel groups styled the Ethiopian People's Revolutionary Democratic Front [EPRDF]. This fight started in 1974. When the Soviet Union withdrew its support from the Derg in 1991, the regime quickly collapsed, and the EPRDF gained control of Ethiopia.

In July 1991, the EPRDF convened a National Conference on Peace and Reconciliation. This brought together disparate Ethiopian political organizations to lay a foundation for the Ethiopian Transitional government. The EPLF attended, and secured an agreement that Eritrea would hold a referendum on gaining independence from Ethiopia.

As part of this conference, the EPRDF adopted a *Transitional Charter*.<sup>37</sup> This guaranteed the right to ethnic self-determination for nations, nationalities and peoples within Ethiopia as well as local administration along ethnic lines. The *Charter* was far reaching in stipulating for a right of self-determination including a right of secession. It also provided for Eritrea's independence, subject to the outcome of the referendum.<sup>38</sup> The principles espoused in the *Transitional Charter* were then replicated in the 1995 *Constitution of Ethiopia*.

Stark choices confronted Ethiopia as well as Eritrea in 1991. Both polities were multi-ethnic and multi-lingual; both were deeply diverse in cultures and religions; both contained indigenous peoples. Both had experienced wrenching ethnic conflict; both had previously been centralized and unitary states.<sup>39</sup> Both had to decide the best constitutional design to control ethnic strife and to reconcile the various nationalities, ethnicities and indigenous peoples to the new polities.

At the time, Ethiopia faced various internal ethnic secessionist movements, including a substantial challenge from the Oromo Liberation Front. Ethiopia's choice for federalism was a strategy to preserve unity in the face of these challenges. Ethiopia innovated with ethnic power sharing agreements to deal with the conflicts.<sup>40</sup> The Ethiopian Constitution provided for autonomous self-governance of its various territorially organized nationalities. This divided local administration along ethnic lines.

<sup>35</sup> See generally Bereket Habte Selassie, *Wounded Nation: How a Once Promising Eritrea was Betrayed and its Future Compromised*, (Trenton, NJ: The Red Sea Press Inc, 2011)

<sup>36</sup> Dan Sherman, *Eritrea, the Unfinished Revolution*, (New York: Praeger's Publisher, 1980) at 90.

<sup>37</sup> Hashim Tewfik, *Transition to Federalism: The Ethiopian Experience*, (Ottawa: Forum of Federations, 2010) at 5.

<sup>38</sup> *Transitional Period Charter of Ethiopia, No.1*. July 1991, online: <http://www.mlgi.org.za>, Part One, Art. 1 – 3.

<sup>39</sup> Hashim Tewfik, *Transition to Federalism: The Ethiopian Experience*, (Ottawa: Forum of Federations, 2010) at 2: Ethiopia was previously under imperial rule until 1974 and was then ruled by a Military junta, the Derg. Despite Ethiopia's ethnic diversity, its polity had been primarily centralized with the centre wielding the state apparatus.

<sup>40</sup> See also Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000*, (Bergen, Norway: Chr Michelsen Institute, 2002) at 2: "regional power has always been a feature of Ethiopian political structure. During the imperial era, it manifested itself through the disputes between regional feudal lords and the Central emperor"

Ethiopia could have embraced a unitary political system with power concentrated in the hands of a central authority. Ethiopia rejected this option. Instead, Ethiopia embraced multinational federalism with concomitant power sharing between a federal government and various nations within the federal state. The aim of this system was to empower Ethiopia's nationalities and to reconcile their various ambitions as parts of a unified Ethiopia strong enough to counter external threats.<sup>41</sup> Ethiopia's choice was a pragmatic hope that local autonomy, self-administration and language rights would stop the war and help prevent another.<sup>42</sup>

Ethiopia's constitution implemented multinational federalism in practice. The *Transitional Charter* declared that that "freedom, equal rights and self-determination of all peoples shall be the governing principle of political, economic and social life."<sup>43</sup> It pursued this principle by establishing a central government and regional self-governments on ethnic principles.<sup>44</sup> Ethiopia's federal system allows the "establishment of local and regional councils...defined on the basis of nationality and with a view to giving effect to the right of nations, nationalities and peoples to self-determination."<sup>45</sup> Ethiopia's multinational federal model devolves state power to ten territorially based ethno-linguistic communities and imbues them with legislative, executive and judicial powers over all matters not expressly within the federal government's power.<sup>46</sup> The Constitution defines and demarcates the powers and relationship between the federal and regional states and requires both entities to respect each other's powers, while encouraging cooperation and interdependence.<sup>47</sup>

Under Ethiopia's ethnic federal model, Ethiopia has enjoyed an economy that has grown on average 10.6% per year since 2004.<sup>48</sup> Its Gross National Income per capita has tripled from \$150 USD to \$ 380 USD. Ethiopia is building new geothermal and hydroelectric power generating plants and developing an energy infrastructure for redistribution and export.<sup>49</sup> Ethiopia's social and human development have steadily improved since adoption of the federal Constitution. Ethiopia's primary school enrolment has increased from 41% in 1997 to 95% in 2012. Its gross attendance rate, a measure of the percentage of post-secondary students compared to the total population of post-secondary age students has risen from 2% in 2000 to 21% in 2012.<sup>50</sup> Ethiopia's cultural and artistic productions have garnered regional acclaim.<sup>51</sup> The growing art, film and music industries seem to indicate that at least some people feel enabled to create and express themselves. Most importantly, despite a history of armed secessionist movements,<sup>52</sup> Ethiopia has remained relatively stable since 1991.

<sup>41</sup> Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000*, (Bergen, Norway: Chr Michelsen Institute, 2002) at 13,40.

<sup>42</sup> Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000*, (Bergen, Norway: Chr Michelsen Institute, 2002) at 40; Bahru Zewde, *A History of modern Ethiopia: 1855-1974*, (London: James Curry, 1991).

<sup>43</sup> *The Transitional Period Charter of Ethiopia*, Charter No.1 of 1991, Negarit Gazette, 50<sup>th</sup> Year, Preamble, para.2.

<sup>44</sup> Hashim Tewfik, *Transition to Federalism: The Ethiopian Experience*, (Ottawa: Forum of Federations, 2010) at 6.

<sup>45</sup> Id at 6

<sup>46</sup> Id at 7: These include: "broad powers over such matters as language, culture, education, health, police and security, social and economic development activities."

<sup>47</sup> Id at 16.

<sup>48</sup> The World Bank, Ethiopia: Country Brief, online: <http://www.worldbank.org>

<sup>49</sup> The Africa Report. "Ethiopia to build Africa's Biggest Geothermal Power Plant" (Oct 16, 2013), online: <http://www.theafricareport.com>; Aaron Maasho, "Ethiopia Opens Africa's Largest Wind Farm to Boost Power Production," Reuters (Oct 26, 2013), online: <http://www.theafricareport.com>

<sup>50</sup> The World Bank, Ethiopia: Country Brief, online: <http://www.worldbank.org>

<sup>51</sup> Gisela Williams, "Addis Ababa, Ethiopia: An Ambitious Art Scene Heads Toward the International Stage", *New York Times*, online: <http://www.nytimes.com/>

<sup>52</sup> See generally Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000*, (Bergen, Norway: Chr Michelsen Institute, 2002) .

Ethiopia clearly has challenges to overcome. It exhibits disturbing authoritarian and repressive tendencies.<sup>53</sup> It is widely criticized for its crackdowns on journalists and bloggers.<sup>54</sup> These are worrisome obstacles to the leadership's expressed desire to democratize. Notwithstanding, there are reasons to think that Ethiopia's choice for multinational federalism starting in 1991 has brought relatively more internal peace and freedom, and enabled relatively more human potential, as contrasted with Ethiopia's centralized neighbours.

In the same period, Sudan fractured in two; the new counties plunged into horrific conflicts. Djibouti's authoritarian, one-party, highly centralized system mocks democracy. Somalia is a failed state that harbours terrorists and is wracked by violent conflict. The situation of these centralized states compared with Ethiopia places an onus on those who debunk ethnic federalism to explain why.<sup>55</sup>

### Eritrea

In contrast to Ethiopia's choice for ethnic federalism, Eritrea decided to establish a highly centralized unitary state. In contrast to Ethiopia's strategy to promote sub-state national identities, Eritrea decided to smother local identities by building a pan Eritrean identity controlled from the centre.

Unlike Ethiopia, Eritrea did not prepare a *Transition Charter* during the 1991 conference. Nor did Eritrea make reconciling its disparate ethnic groups through a power sharing structure part of its agenda either at the conference or in the principles of cooperation drafted between the two states. Eritrea proceeded on the assumption that all Eritreans shared, or would construct, an all-encompassing Eritrean identity.<sup>56</sup>

The result of the conference was that while Ethiopia set off on a course to conciliate its interior nations with a multinational constitution, Eritrea never really abandoned its centralized military organization. Upon taking control of Eritrean territory, the EPLF alone presided over the post-independence transition; other parties and organizations were excluded. The EPLF was more than anti-democratic: it was controlled by a secretive EPRD Marxist Leninist core, a clique of 13 military leaders.

In the transitional period, the EPLF leadership was intoxicated with its hard-fought victory. Small wonder – the EPLF had defeated the principal African client of the Soviet Union, one of the most powerful military machines in the history of the world. There was jubilation throughout the country. It was not a climate conducive to sober evaluation of the EPLF's strategies and tactics by the populace, or to self-criticism by the ERPD leadership.

The EPLF did not make efforts to reconcile the various EPLF factions. Weldehaimanot, who reviewed the post-independence process and transition, wrote:

The only sign of a willingness to promote reconciliation was EPLF's willingness to let the opposition leaders abandon their organisations and join EPLF...<sup>57</sup>

<sup>53</sup> Freedom House, *Ethiopia Report* (2012), online: <https://freedomhouse.org/report/freedom-world/2012/ethiopia>.

<sup>54</sup> Freedom House, *Ethiopia Report* (2015), online: <https://freedomhouse.org/report/freedom-press/2015/ethiopia>.

<sup>55</sup> Will Kymlicka observed that in developed democracies including Canada, Belgium and Switzerland, all ethnic groups which numbered over 250,000 who demanded autonomy have either won or had it granted to them. See *Multicultural Odysseys* (New York: OUP, 2007), pp. 69-70

<sup>56</sup> Sarah Vaughan, *The Addis Ababa Transitional Conference of July 1991: Its Origins, History and Significance*, Centre of African Studies, Edinburgh University, 52-53, (1994) online: [http://www.cas.ed.ac.uk/data/assets/pdf\\_file/0013/27301/No\\_051\\_The\\_Addis\\_Ababa\\_Transitional\\_Conference\\_of\\_July\\_1991-.pdf](http://www.cas.ed.ac.uk/data/assets/pdf_file/0013/27301/No_051_The_Addis_Ababa_Transitional_Conference_of_July_1991-.pdf)

The Draft Paper outlining the principles of cooperation between Ethiopia and Eritrea focused on 8 principles, none of which included minority rights protection. The EPLF was focused on consolidating its power.

<sup>57</sup> Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" (2008), 8 *Afr Hum Rts LJ* 108 at 111.

Nor did the EPLF make efforts to bring the small nationalities into the centre of decision making or to accommodate their minority claims. The jubilant climate again explains why it was easy to overlook many things, including the EPLF's anti-democratic tendencies. Weldehaimanot observed that "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."<sup>58</sup>

As Rosen explained, this was erroneous:

the potential divisions within Eritrean society, especially the religious and ethnic ones, were...a matter of serious concern...This is a society with nine recognized ethnic groups [these groups are distinct and each possesses a unique dialect, history and culture], and with a population half Christian and half Muslim. There was a history of sectarianism between these groups up until the ascendancy of the EPLF...Religion and ethnicity were problems that had to be addressed so that all groups would feel included in the process and would develop a stake in the coming constitution.<sup>59</sup>

Rosen concluded that Eritrea's multinational and multiethnic history was all but ignored in the fervour over independence.<sup>60</sup>

### **The Constitution Making Process 1995-1997**

This fervour, perhaps understandable in the transitional period, carried over to the Constitution making process. In this process, Eritreans were made to believe that they were "'one people' with one way of thinking and nobody was outside or excluded."<sup>61</sup> This, of course, was not accurate.

Some of Eritrea's societies are deeply traditional; some are pastoral; all have longstanding customary ways of doing things and using their homelands. The decisions Constitution makers take concern weighty matters: distribution of power; participation in governance; languages of the state, bureaucracy and schools; distribution and use of lands and natural resources; ownership of ports and harbours; indigenous rights; self-government and/or minority rights for minority communities.

Some of these issues are of existential importance to minority communities in the sense of their ability to continue to survive intact as distinct entities. Constitution making exercises in deeply diverse polities require the various sub-national communities to reflect upon their situation, power, needs and interests, and to understand the situation, power, needs and interests of other communities to enable compromises to be made. Expert assistance is required.

The EPLF was hardly the ideal organization to enable such a process. It was deeply anti-democratic. Its leaders were inspired by a Stalinist emphasis on "creating a national, homogeneous and all-embracing nation with an Eritrean identity."<sup>62</sup> To accomplish this the EPLF set out "by all means and policies to subdue and neutralise ethnicity in Eritrea."<sup>63</sup> In this environment, multinational or power sharing constitutional models were not really on the table.

<sup>58</sup>Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" (2008), 8 *Afr Hum Rts LJ* 108 at 111

<sup>59</sup>RA Rosen "Constitutional process, constitutionalism, and the Eritrean experience" (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 263 at 282

<sup>60</sup> RA Rosen "Constitutional process, constitutionalism, and the Eritrean experience" (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 263 at 281.

<sup>61</sup> Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" (2008) 8 *Afr Hum Rts LJ* 108 at 111

<sup>62</sup>Tekeste Negash and Kjetil Tronvoll, *Brothers at War* (Oxford, 2000), p. 16

<sup>63</sup>Tekeste Negash and Kjetil Tronvoll, *Brothers at War* (Oxford, 2000), p. 16. To some extent, the fantasy of a single Eritrean national character had incubated in the EPLF from the beginning. The EPLF's 1971 *Manifesto* declared:

Proclamation 55/1994 established a Constitutional Commission. The Commission was mandated to organize popular participation in the process and to draft the constitution.<sup>64</sup> President Afwerki handpicked the Chair of the Commission, an American scholar of Eritrean descent, who had been an EPLF activist, Professor Bereket Habte Selassie.<sup>65</sup> The Commission was accountable to the National Assembly<sup>66</sup> which was controlled by the PFDJ (the successor to the EPLF). This was the sole political party allowed to operate in Eritrea.

Professor Selassie described the Commission's process in 1998 while he was still a government insider (he has since become a dissident):<sup>67</sup>

Commission members and more than four hundred specially trained teachers instructed the public on constitutional issues and related political and social questions. In addition to [songs, poetry or short-story recitals, and plays in the various Eritrean vernaculars], the Commission prepared pamphlets and translated into local vernaculars several international legal instruments, including the Universal Declaration of Human Rights and the 1966 International Covenants on Civil and Political Rights and on Social, Economic, and Cultural Rights. The civic-education campaign reached more than half a million people (out of a total population of about 4.5 million), and proved crucial in rallying public opinion behind the constitution-making process.<sup>68</sup>

The utility and influence of this activity has been brought into question. Mengisteab and Yohannes concluded that the Commission's public consultations had little impact on the content of the document. Mass public meetings of this type, they observed, are not conducive to the expression of societal interests. Moreover, they opined: "the inclusion in the constitution of some unpopular provisions, such as those on the issues of official language and land tenure, also suggests that input by the public had a rather limited impact."<sup>69</sup>

The Commission itself was inspired by the EPLF. Professor Selassie now believes he was duped by the President into believing the process would be democratic:

The people lionized the liberation fighters, whom they viewed as though they were messengers sent from heaven to deliver them from bondage. And at the head of these heroes was the super hero, Isaias Afwerki, whom people saw as a demigod who could do no wrong. I was among those ... we now know he did not plan to honor his word; it was a devilish ruse.<sup>70</sup>

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the Eritrean people, as peoples of other countries, are diverse. However, because for centuries they have together endured colonial oppression, intermarried, shared a common history, related livelihoods, political development, language, culture and tradition; they cannot be divided and factionalised for any reason." (2011), 38 *Review of African Political Economy* 565, at pg. 572.

<sup>64</sup>Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" (2008), 8 *Afr Hum Rts LJ* 108 at 112.

<sup>65</sup>Bereket Habte Selassie, *Wounded Nation: How a Once Promising Eritrea was Betrayed and its Future Compromised*, (Trenton, NJ: The Red Sea Press Inc, 2011), pp. 106-8.

<sup>66</sup>Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectics of Process and Substance* (Trenton, NJ: The Red Sea Press, 2003) at 24.

<sup>67</sup> *Wounded Nation*, supra, at 59-60: "Isaias Afwerki is an unelected dictator ... Isaias Afwerki is addicted to power... As a dictator he will not relinquish it."

<sup>68</sup>Bereket Habte-Selassie "Creating a Constitution for Eritrea." (1998), 9(2) *Journal of Democracy* 164-74.

<sup>69</sup>Kidane Mengisteab and Okbazghi Yohannes, *Anatomy of an African Tragedy: Political, Economic and Foreign Policy Crisis in Post-Independence Eritrea*. Trenton, NJ: Red Sea Press, 2005, p. 139. Simon M Weldehaimanot, "Constitution-making in Eritrea," in Mbendenyi and Ojienda, *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub Saharan Africa* (Cape Town: Pretoria University Law Press, 2013), p. 89 at p 105, fn 99 collects together the literature supporting and critiquing the constitution-making process in Eritrea.

<sup>70</sup> *Wounded Nation*, supra, at 63.

It is an open question whether, had the Commission tried to engage in a process that surfaced communal needs and assisted smaller nationalities and minority communities to express and negotiate their interests, the President or his minions would have intervened.

In any event, it is a fact that the process of the Constitutional Commission did not enable the smaller nationalities to express or negotiate their needs. More, the Commission was supremely unaware of what those needs were; at best it was naïve. Professor Selassie conceded as much:

I don't think we went to sufficient length to consider the possibility that our framework might not work for the minorities and that made hubris possible, hubris from dominant groups like highlanders.<sup>71</sup>

In short, the constitution making process did not emphasize broad participation, dialogue and national reconciliation; it failed to surface Eritrea's multiethnic reality; to understand the needs and interests of the smaller nationalities or minorities or to seek ways to accommodate these. It simply did not negotiate with, or engage the smaller nationalities in the necessary political dialogue.

The resulting text the Commission produced failed to accommodate the fundamental interests of minorities in Eritrea's multi-lingual, multi-ethnic and indigenous situation: effective participation in governance, autonomy, protection for local customs and customary law, lands and resources, language and minority rights, indigenous rights. The Commission simply did not come to grips with these issues.

The Commission's failure is somewhat egregious, given that by 1997 the minority rights movement was well underway around the globe. It was generally accepted that varieties of power sharing constitutions were the right way to deal with deep diversity in multinational states in terms of promoting stability and peace.<sup>72</sup> The academic community was engaged in a lively debate about diversity, liberal multiculturalism and the right strategies and mechanisms for implementing these.<sup>73</sup> The United Nations General Assembly had adopted a muscular *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* in 1992,<sup>74</sup> which not only built out the promise of art. 27 of the *International Covenant on Civil and Political Rights*<sup>75</sup> concerning state human rights obligations to minorities, but also had hardened concepts concerning minority rights into international human rights law. The Conference on Security and Co-operation in Europe and Organization for Security and Co-operation in Europe had set out

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<sup>71</sup> The round table discussion was video recorded and uploaded onto You Tube, where Professor Selassie's comments may be viewed. See Bereket Habte Selassie, Discussion on 1997 Constitution, part two ( 21:50 – 24:00)[http://www.youtube.com/watch?v=z-g-YPz\\_olc](http://www.youtube.com/watch?v=z-g-YPz_olc).

<sup>72</sup> For example, the Report of the OSCE Meeting of Experts on National Minorities, Geneva, 1991 made a dramatic break with the principle States do not interfere in the internal affairs of other states, justified by the importance attributed to national minorities: "Issues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern ... not ... exclusively an internal affair of the respective State." And by 1993 respect for minority rights had become a criteria countries must meet to join the Union.

<sup>73</sup> Will Kymlicka's first book *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989) appeared in 1989 and set off vigorous academic debate. In 1995, Kymlicka's *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) set a widely shared baseline for all discussions of state accommodation of diversity.

<sup>74</sup> This, among other documents, set out a generalized content for minority rights regimes.

<sup>75</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, entered into force 1976, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>



the basic content of minority rights in foundational documents,<sup>76</sup> and created machinery to deal with different facets of the issue, including the creation of a High Commissioner for National Minorities.

The OSCE's first High Commissioner for National Minorities, Max van der Stoep, expressed the bed rock premise of all this activity in his usual penetrating way:

a minority must be able to perceive that there are legitimate opportunities for maintaining and developing its distinctive identity and for participating in the economic, social, and political life of the country. The majority group must see that no dangers, but instead some benefits, arise from the expression of cultural differences and the full participation of all citizens in society, governance and the economy.<sup>77</sup>

The Constitutional Commission's decision not to deal with minority issues is somewhat surprising given that at the time the Commission was at work the idea of the centralized, unitary, homogeneous state as a basic unit of international politics had become an anachronism. Constitutional systems had made a decisive turn towards accommodating diversity in the interests of justice, fairness, peace and stability.

Dr. Selassie explained the ideological influences of the Constitutional Commission, and why these contributed to the Commission's failure to explore or accommodate the needs of the smaller nationalities, at a roundtable organized in Ottawa to discuss the Constitution-making process and its substance:

The timing of the writing of the constitution was in the context of the 30-year war and most people of that generation regarded themselves as socialists. The socialist ethos was a crucial point for the creation of values that were understood to be the main principles. That mindset did not consider the possibility of the minorities not agreeing...we had a mentality of "we are all in it together."<sup>78</sup>

In response to a question from Canadian Ambassador John Schram, a participant in the roundtable proceedings, about whether the Commission considered a federal ethnic-based constitutional model during the constitution-making process, Professor Selassie replied:

We did not. We all fought together so we never considered that possibility. In retrospect, I would consider a system in which the regional autonomy is guaranteed...<sup>79</sup>

Professor Selassie acknowledged that the smaller nationalities, the Afar in particular, had been marginalized during the Constitution-making process and in the period thereafter. He also acknowledged and apologized for the mistreatment meted out to the Afar while he was in a position of authority in Eritrea.<sup>80</sup>

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<sup>76</sup> Arie Bloed, *The Conference on Security and Co-Operation in Europe: Analysis and Basic Documents, 1972-1993* (Boston: Martinus Nijhoff Publishers, 1993).

<sup>77</sup> W. Kemp, *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (The Hague: Kluwer Law Intn'l, 2001), p. 113.

<sup>78</sup> The round table discussion was video recorded and uploaded onto You Tube, where Professor Selassie's comments may be viewed. See Bereket Habte Selassie, Discussion on 1997 Constitution, part two ( 21:50 – 24:00) [http://www.youtube.com/watch?v=z-g-YPz\\_olc](http://www.youtube.com/watch?v=z-g-YPz_olc).

<sup>79</sup> Ibid, (24:00 - 25:00). Previously Dr. Selassie explained the Commission's choice for a unitary state in terms of four reasons: the country's size, resource base "the history of national unity, and the country's ethnic makeup": Bereket Habte Selassie, "Constitution Making in Eritrea: A Process-Driven Approach," in L. Miller (ed.), *Framing the State in Times of Transition: Case Studies in Constitution Making* (Washington: USIP Press, 2010), p. 72.

<sup>80</sup> Bereket Habte Selassie, "Truth and reconciliation in South Africa help confront, deal with it past crimes, I think until we confront our past, which will involve a lot of bring lots of painful revelations, and to come to terms with our own mistakes, I don't think we will succeed in creating the future., including the basic dignity of Afar and Kunama and others, which is basis of everything, unless you recognize the basic dignity you will not go to next step of control of their resources on the future," Id., (11: 45 - 12:48).

Commentators largely agree with Professor Selassie that the process leading to the 1997 constitution was flawed. Medhanie stated:

The main problem with the 1997 constitution is...the way it was drawn up which was fundamentally lacking in legitimacy.<sup>81</sup>

He also observed:

The constitution-making process was launched and carried out in the total absence of the necessary democratic environment...The process of making the constitution was... 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.<sup>82</sup>

The procedural failing of the Constitutional Commission comes into sharp focus when viewed from the perspective of the Afar, one of Eritrea's nine officially recognized nationalities. The Afar are an ancient people living along the southern coast of the Red Sea, who occupy traditional homelands, villages and fisheries from at least the fourth century. The Afar are highly distinctive as a nationality as regards language, territory, religion (Muslim), economy, patri-lineal clan structure, customary governance, customary and religious law and way of life.

The process which led to the 1997 Constitution did not include the Afar in any significant sense. The Afar leadership was not consulted. The Afar people were immune to much of the literature distributed by the Commission as few speak Tigrigna or Arabic, the languages of the Commission's printed materials, and in any event over 90% of the Afar are illiterate and many are nomadic. The Afar lacked knowledge of the Commission's decisions and did not consent to them. The Afar were "represented" on the Commission by a single naval officer. He did not consult with the clan leadership. Professor Selassie stated at the Ottawa roundtable that he, as the Commission's Chair, was misled by the admiral, with the result that the Commission did not have adequate knowledge of the Afar and the Afar did not have knowledge of the Commission's intentions.

This evaluation of the Commission's process is at odds with the published accounts of Professor Selassie, and with those of other thoughtful observers, including Simon Weldehaimanot. Professor Selassie's accounts are review pieces which were not subjected to the pointed questioning and challenge he endured at the Ottawa roundtable. This interchange elicited additional details which, in combination with the accounts of Afar leadership, support the negative evaluation made here. Simon Weldehaimanot's impressive account of Eritrea's constitutional development relies on different materials for evaluating the Commission's process than the primary sources relied on here.

In common with certain other commentators, I also disagree that songs, dances and similar participatory exercises in a jubilant atmosphere are the proper means to elicit the needs and interests of national minorities, to assist them to articulate their visions of their place in the united fabric of Eritrea or to enable them to bargain with other communities who have different ideas and different, conflicting interests. The imposition of art 23(2), which confiscates indigenous lands, if properly explained and discussed with Eritrea's small nomadic minorities, could not possibly have escaped criticism from them. That Professor

<sup>81</sup>Testafion Medhanie, "Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia" (2008), Aalborg: Institut for Historie, Internationale Studier og Samfundsforhold, Aalborg Universitet at 2.

<sup>82</sup> Id at 20

Selassie records the Commission received no such criticism is telling in assessing the adequacy of the Commission's process.<sup>83</sup>

I believe that the song, dance and other mechanisms that were used by the Commission to engage some of the small nationalities were not adequate or appropriate procedures for this constitution making exercise. The use of such techniques did not enable the leadership of Eritrea's traditionally governed interior nations to understand or explore fully the choices, ambiguities and power relations that were being proposed to them. The Commission's procedures did not surface the full array of competing interests among affected participants. They did not enable these communities to articulate their needs and interests, and how those needs and interests might be affected by the proposals that were being developed. The Commission's procedures did not provide the small nationalities with expert advice on technical issues or otherwise assist them to consider the issues that will fundamentally affect them, their futures and perhaps their survival as distinct peoples.

To make matters worse, Eritrea compounded the situation from the Transitional Conference forward with a Stalinist emphasis on "creating a national, homogeneous and all-embracing nation with an Eritrean identity,"<sup>84</sup> and to use "all means and policies to subdue and neutralise ethnicity in Eritrea"<sup>85</sup> in pursuit of this objective. In such an anti-democratic landscape epitomized by "the reluctance of the EPLF to accommodate other political forces,"<sup>86</sup> proper consideration of power sharing or multinational constitutional models simply could not be, and were not, considered.

### **Substance: The 1997 Constitution from a Minority Perspective**

The 1997 Constitution does not meet the needs of Eritrea's smaller nationalities in the following significant respects.

#### *Autonomy and Self-Determination*

Article 1(5) of the Constitution declares that Eritrea is a unitary state.<sup>87</sup> While this article goes on to call for decentralization "into units of local government" established by law, there are no constitutional guarantees for devolution nor any suggestion that local governments should be under control of the smaller nationalities. Autonomy for the nationalities and regions is neither specified nor protected. The nationalities do not enjoy the right of self-government under the constitution nor do they enjoy any aspect of this right. The constitution allows communities that have traditionally exercised deep forms of autonomy and self-government since pre-history to be deprived of this.

Such excessive centralization contrasts sharply with Eritrea's 1952 Constitution.<sup>88</sup> Chapter 5 of that document (arts. 36 to 38) provided for special rights for the various minority groups in Eritrea. These

<sup>83</sup> Bereket Habte Selassie, "Constitution Making in Eritrea: A Process-Driven Approach," in L. Miller (ed.), *Framing the State in Times of Transition: Case Studies in Constitution Making* (Washington: USIP Press, 2010), p. 70.

<sup>84</sup> Tekeste Negash and Kjetil Tronvoll, *Brothers at War* (Oxford, 2000), p. 16

<sup>85</sup> Tekeste Negash and Kjetil Tronvoll, *Brothers at War* (Oxford, 2000), p. 16. To some extent, the fantasy of a single Eritrean national character had incubated in the EPLF from the beginning. The EPLF's 1971 *Manifesto* declared:

the Eritrean people, as peoples of other countries, are diverse. However, because for centuries they have together endured colonial oppression, intermarried, shared a common history, related livelihoods, political development, language, culture and tradition; they cannot be divided and factionalised for any reason." (2011), 38 *Review of African Political Economy* 565, at pg. 572.

<sup>86</sup> Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" (2008), 8 *Afr Hum Rts LJ* 108 at 111.

<sup>87</sup> *The Constitution of Eritrea, 1997*, Art 1.5

<sup>88</sup> *Constitution of Eritrea, 1952*. Final Report of the United Nations Commissioner in Eritrea, General Assembly Official Records: Seventh Session Supplement No.15 (A/2188), 76-89. In 1961, less than 10 years after the 1952 Constitution was implemented,

included recognition for “the existence of local communities,”<sup>89</sup> accorded municipalities “the management of their own affairs”<sup>90</sup>, and mandated that “officials selected for the administration of village and tribal communities shall be selected from persons of those local communities.”<sup>91</sup>

In an admirable display of open mindedness, Dr. Selassie conceded that the Commission’s centralized constitution model did not take minority interests into account, that the centralized model was the result of inadequate consultations with minority groups and that it was a mistake:

I think as a nation, we need to come to terms with our mistakes, we can't just castigate Isaias unless we admit we were part of the mistake. I will profess of this mistake. With all the good will and misguided conception of socialist visionary with land issues, well, we now realize we made a mistake.<sup>92</sup>

Dr. Selassie acknowledged that a federal model could be the preferred model:

In retrospect, if we had the chance to rewrite I would consider if not a federal system, a system in which a local autonomy of the control over their resources are guaranteed, iron guaranteed.<sup>93</sup>

### *Effective Participation in Central Institutions*

Art. 31 of the 1997 Constitution creates a National Assembly as the sole legislative body with power to make law.

The Constitution makes no provision for electoral machinery to insure that the voices of Eritrea’s eight smaller nationalities will be heard in the National Assembly. It does not reserve seats for the minorities in the National Assembly or on its committees. Nor does it provide for legislative, executive or administrative officers to address minority concerns or mechanisms to ensure that such interests are considered in ministries. Nor does it reserve places for the minorities in the civil service. Instead, the Constitution simply provides that the National Assembly shall enact an electoral law which shall ensure the representation and participation of the *Eritrean people*.<sup>94</sup>

Art 31(3) provides that the National Assembly is elected by all citizens. Given the implied one person, one vote principle, the article insures that the National Assembly will be dominated by Eritrea’s two large nationalities, the Tigrinya who make up about 48% of the population, and the Tigre who constitute approximately 30% of the population.

Art. 41(1) provides that the President is elected from among the members of the National Assembly by an absolute majority vote of its members. The President, accordingly, will also be responsive to the concerns of the Tigrinya - Tigre majority of 78%.

Art. 46 provides for the Cabinet. There is no requirement anywhere that the minorities be equitably represented in the Cabinet.

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operation of the Constitution was suspended when Ethiopia violated the federal agreement with Eritrea and annexed it. The Constitution’s legacy remains the subject of debate. See generally Testafion Medhanie, “Constitution-making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia” (2008), Aalborg: Institut for Historie, Internationale Studier og Samfundsforskning, Aalborg Universitet

<sup>89</sup>*The Constitution of Eritrea, 1952*, c 5, Art 83.1.

<sup>90</sup>*The Constitution of Eritrea, 1952*, c 5, Art 83.2.

<sup>91</sup>*The Constitution of Eritrea, 1952*, c 5, Art 83.3

<sup>92</sup> Bereket Habte Selassie, Video Discussion on 1997 constitution, part three( 5:10-5:44)[http://youtu.be/9a95b9W\\_-FE](http://youtu.be/9a95b9W_-FE)

<sup>93</sup> Bereket Habte Selassie, Id. [http://youtu.be/z-g-YPz\\_olc](http://youtu.be/z-g-YPz_olc) (at 24:09-24:53)

<sup>94</sup> Art 30.2, emphasis added.

Art. 57 provides for the civil service, and empowers the civil service administration to recruit, select and classify civil servants. There is no requirement anywhere in the 1997 Constitution that the minorities be equitably represented in the civil service or represented at all. This omission undoes protections which the small nationalities formerly enjoyed. The 1952 Constitution provided a mechanism to bring the smaller nationalities into the bureaucracy through a requirement that Secretaries of Executive Departments [equivalent to Cabinet Ministers] must be chosen to provide:

as far as possible a fair representation...of the principal groups of the population and the various geographical areas of the territory.<sup>95</sup>

This was a specific commitment to ensuring equitable representation of the nationalities in the civil service ranks, which is a matter of basic fairness and a best practice to insure that the government is responsive to all nationalities.

Chapter VI, Administration of Justice, provides no guarantees for effective participation of minorities in the administration of justice in local courts or other institutions for dispute resolution. The totality of the administration of Justice in the homelands of the nationalities is subject to dictation by the central authorities. The constitution grants no guarantees regarding participation of minorities in court administration, the selection of judicial officers, the language in use in court proceedings, the knowledge or use of customary systems of law, or any other facet of the administration of justice.

The emphasis throughout the design of central institutions is on the new Eritrean national character and new national identity which is a driving force of the Constitutional ideology. This is set out specifically in art 9:

The State shall be responsible for creating and promoting conditions conducive for developing a national culture capable of expressing national identity, unity and progress of the Eritrean people.

By contrast, the minorities are nowhere to be seen. There is nothing anywhere in the constitution that makes either the legislative, executive or judicial institutions responsive to concerns of Eritrea's minority nationalities or that prevents the two large nationalities from using their control of central institutions where power resides to dominate the eight small nationalities.

Constitutional architecture of this type is contrary to the understandings reached by virtually all who have wrestled with the problems of how to minimize tensions in divided polities. Effective participation of minorities in central institutions is well understood to be indispensable to prevent minority issues from becoming sources of conflict within states. Effective participation of minorities is also understood as important to preventing conflict between states as national minorities under stress tend to make common cause with kinship communities residing in neighbouring states. The latter phenomenon has been long at work in Eritrea.

Both of these sources of instability and conflict are long standing issues and have deep roots in Eritrea. They persuaded Longrigg, who valued "above all security, tranquility and the possibility of progress" that "the single Eritrea of today is doomed." He concluded that the better way to promote security was to partition Eritrea in view of "the evident racial and cultural and historical diversities."<sup>96</sup>

<sup>95</sup>*The Constitution of Eritrea, 1952*, c 5, Art 69(3).

<sup>96</sup> Longrigg, *A Short History*, supra, p. 170, 172.

The OSCE High Commission on National Minorities assembled internationally recognized experts on this subject who reviewed the experience in Europe and elsewhere. The *Lund Recommendations* which issued from this process are contrary to the driving ideology of the 1997 Constitution. Those recommendations attempt to clarify a basic content of minority participation. They offer a broad suite of various, alternative mechanisms, at a generalized level, for states to consider.

The fundamental conclusions of the *Lund Recommendations* are that mechanisms for effective participation of minorities in central institutions are “an essential component of a peaceful and democratic society,” and that the establishment of such institutions and procedures must be done through an “inclusive, transparent and accountable process of consultation with minorities to maintain a climate of confidence.”<sup>97</sup> None of this is visible either in the proceedings of the Constitutional Commission, or in the text it produced in 1997.

### *Local Governance and Customary Law*

The 1997 Constitution does not provide for constitutionally protected forms of local governance, customary laws, control over personal status, legal capacity, family law or other matters of private law traditionally within the control of the indigenous societies’ highly developed systems of customary law. The 1997 constitution withholds any guarantees in this regard, and makes all customary systems of law dependent on choices adopted by the central authorities which, as we have seen, will be dominated by the two large nationalities.

By contrast, the 1952 Constitution provided for significant, concrete and specific protections for minority group autonomy. These continued autonomous forms which Eritrea’s nationalities were used to exercising. Included among the rights recognized was:

respect for their customs and their own legislation governing personal status and legal capacity, the law of the family and the law of succession.<sup>98</sup>

The 1952 Eritrean Constitution created significant institutional strength for customary law and the authorities that administered it. It continued the system of legal pluralism inherited from the colonial regime, empowered the judiciary to “apply the various systems of law in force in Eritrea” and mandated that judges shall be “well versed in the customs and legislation peculiar to the various systems of law which they are required to apply.”<sup>99</sup>

These constitutional protections are undone by the 1997 Constitution. The document that emerged from the Constitutional Commission makes continuance of long established systems of customary law dependent on the whims of distant authorities in central institutions who would likely lack sensitivity to the intricacies of such matters.<sup>100</sup>

### *Lands and Resources*

Article 23(2) of the Constitution provides:

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<sup>97</sup> *The Lund Recommendations on the Effective Participation of National Minorities in Public Life* (OSCE HCNM, 1999), General Principles 1 and 5.

<sup>98</sup> *The Constitution of Eritrea, 1952*, c 5, Art 36.

<sup>99</sup> *The Constitution of Eritrea, 1952*, c 5, Part V: The Judiciary

<sup>100</sup> *The Constitution of Eritrea, 1997*, c VI, Art 48: The 1997 constitution only provides for “such other lower courts as shall be established by law” but does not constitutionally mandate or protect local or minority groups’ judicial systems.



All land and all natural resources below and above the surface of the territory of Eritrea belongs to the state.<sup>101</sup>

Article 23(2) amounts to an expropriation of the traditional land and resource rights of long established communities. All of these communities have claims as national minorities. At least four of them have claims as indigenous peoples.<sup>102</sup> This puts the 1997 Constitution on a collision course with state practice and theory concerning national minorities,<sup>103</sup> and also with the United Nations *Declaration on the Rights of Indigenous Peoples*.

The central government is already exploiting the lands of two of these indigenous peoples, the Afar and Kunama, without their consent. The UN Special Rapporteur described this in her *Report*. Concerning the Kunama, she wrote:

80. Since independence, many people from other regions of Eritrea, particularly from the highlands, have been encouraged to settle in areas traditionally populated by the Kunama. The Government's policy, turning all land into State property, undermined the clan-based traditional land tenure system of the Kunama people. It led to competition between the Kunama agro-pastoralists and the new settlers for land and grazing grounds, resulting in encroachment until much of the land was taken over, forcing the population off it.<sup>104</sup>

As to the Afar, the SR concluded:

They have also been forced into displacement from their traditional territory.<sup>105</sup>

At the very least, art. 23(2) allows the central authorities to exploit the lands, resources, harbours and fisheries of long established communities without their consent – something the central government is already doing and drawing condemnation as a human rights violator for doing it. The small nationalities depend on their lands and resources to sustain themselves and their way of life. Some of the communities are nomadic and use the lands and resources in ways that are incompatible with modern day resource extraction activities, which Eritrea is trying to promote.<sup>106</sup>

Art. 23(2) contrasts sharply with the 1952 Eritrean Constitution. Art. 37 of the 1952 document, included in the chapter on minority rights, provided:

Property rights and rights of real nature...established by custom or law and exercised in Eritrea by the tribes, the various population groups and by natural or legal persons, shall not be impaired by any law of a discriminatory nature.”<sup>107</sup>

By contrast art. 23(2) of the 1997 Constitution places the traditional land and resource rights of Eritrea's small nationalities in the hands of the large nationalities, and it does so in a context where the interests of

<sup>101</sup> *The Constitution of Eritrea, 1997*. Online: [http://www.servat.unibe.ch/icl/er00000\\_.html](http://www.servat.unibe.ch/icl/er00000_.html)

<sup>102</sup> In a thorough legal opinion dated 21 March 2011 Sébastien Grammond, Dean of Civil Law, University of Ottawa, reached the conclusion that “the Afar people show all the characteristics usually associated with the concept of indigenous people in international law. Hence their assertion that they are indigenous and that they are entitled to the rights and to the protections afforded to indigenous peoples in international law should be respected.” The opinion is on file with the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya.

<sup>103</sup> *Lund Recommendations*, supra, para 20.

<sup>104</sup> *Keetharuth Report*, p 15, para 43

<sup>105</sup> *Id.*, para 77.

<sup>106</sup> Human Rights Watch, *Hear No Evil: Forced Labour and Corporate Responsibility in Eritrea's Mining Sector* (HRW 2013), p 1. Online: <http://www.hrw.org/sites/default/files/reports/eritrea01134Upload.pdf>

<sup>107</sup> *The Constitution of Eritrea, 1952*, c 5, Art 37.

the small and large nationalities are in opposition. Art. 23(2) removes restraints on the large nationalities by undoing constitutional protections for customary landholding the small nationalities formerly enjoyed. By so, doing art. 23(2) depreciates the weight of the small nationalities in the balance of power. These are fragile communities. Protection of their lands and resources rights is not only a matter of subsistence and livelihood; it is also a matter of their survival as peoples.

Professor Selassie conceded that giving the smaller nationalities control of their resources was crucial to a successful constitutional outcome:

I don't think we will succeed in creating the future, including the basic dignity of Afar and Kunama and others, which is basis of everything, unless you recognize the basic dignity you will not go to next step of control of their resources on the future.<sup>108</sup>

It is hard to disagree with Dr. Selassie's characterization of the Constitutional Commission's decision on land issues as "misguided conception of socialist visionary". It is equally difficult to disagree with his conclusion about the Commission's work on land issues: "we now realize we made a mistake."<sup>109</sup>

### *Language*

The 1997 Constitution does not provide for official languages for Eritrea or grant status of any kind to the languages of Eritrea's nationalities. There is a single article concerning language, which stipulates:

The equality of all Eritrean languages is guaranteed.<sup>110</sup>

Opposition groups, including the ELF, advocated for the inclusion of Arabic and Tigrinya as the official languages of Eritrea during the Constitution-making process. The Commission rejected this.<sup>111</sup> When asked why at the Ottawa roundtable, Professor Selassie referred to the cost of implementing additional languages as the working languages of the State.

The choices of the Constitutional Commission are offside with the 1952 constitutional provisions for minority languages. The 1952 Eritrean Constitution proclaimed Tigrigna and Arabic the official languages of Eritrea.<sup>112</sup> It guaranteed Eritreans the right to use the smaller national languages in their dealings with the public authorities, in education, in religious institutions and in the private sphere.<sup>113</sup> While these protections could have been more vigorous, the protections guaranteed are for the key institutions, especially education, and are reasonably robust for the year 1952 in which they were crafted.

The absence in the 1997 Constitution of any significant provisions on language in such a deeply diverse polity is notable. It lends credibility to the allegations of the commentators that the 1997 Eritrean Constitution is trying "by all means and policies to subdue and neutralise" ethnic identities.

### *Minority Rights*

<sup>108</sup> Bereket Habte Selassie, Video Discussion on 1997 Constitution, Part Three [http://youtu.be/9a95b9W\\_-FE](http://youtu.be/9a95b9W_-FE) (12:00 - 12:20).

<sup>109</sup> Bereket Habte Selassie, Video Discussion on 1997 constitution, part three [http://youtu.be/9a95b9W\\_-FE](http://youtu.be/9a95b9W_-FE) (5:10-5:44)

<sup>110</sup> *The Constitution of Eritrea*, 1997, art. 4(3).

<sup>111</sup> Simon M Weldehaimanot, "The status and fate of the Eritrean Constitution" (2008), 8 *Afr Hum Rts LJ* 108 at 129.

<sup>112</sup> *The Constitution of Eritrea*, 1952, c 5, Art 38(1).

<sup>113</sup> *Id.*, art. 38(2).

Not surprisingly, the 1997 Constitution contains no chapter on minority rights. Neither does it have any articles devoted to minority rights. Its basic ideological thrust goes against the grain of accommodating Eritrea's interior national communities.

In virtually any other setting, constitution making for a polity as ethnically diverse and multi-lingual as Eritrea would have paid at least some heed to state practices and experiences with national minorities. These were summed up in various places, including by the Council of Europe Parliamentary Assembly:

[i]n the regions where they are a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation and in accordance with the domestic legislation of the state.<sup>114</sup>

Not so Eritrea. More, the 1997 document undoes the protections for minorities that were extant in the 1952 Constitution. As we have seen, Chapter V of Eritrea's 1952 Constitution, styled "Special Rights of the Various Population Groups in Eritrea," provided a package of minority rights for Eritrea's nationalities and other communities which were muscular for the time. These included protections for language, land, local administration, customary law and effective participation in government. The power of the legislature to abridge these guarantees was specifically limited.

Seen in this light, it is a safe assumption that if the choices of the Constitutional Commission were properly explained to any of Eritrea's smaller nationalities – if they were enabled to freely and fully consider the Commission's decisions and given the means to fully and freely express their will, it is highly unlikely that any would have, or would now, accept the document.

### **The 1997 Constitution from a Majority Perspective**

Precisely because this excessively centralized model is unlikely ever to be accepted freely by Eritrea's eight smaller nationalities, it is hard to see that the 1997 Constitution ultimately is in the interest of Eritrea's two large nationalities either. Over time, the amount of force required to make this kind of centralization stick is likely to lead to costly irredentism, resistance and conflict. The Afar are already on record as opposed to the 1997 Constitution precisely for the reasons explored here.<sup>115</sup>

For the large nationalities, the worst thing that can happen is the appearance within the country of a prolonged civil conflict that uses violent means. Eritrea has long and recent experience with this, both within the ELF, within the EPLF, between the ELF and the EPLF and between both of these groups and the state. There is a real, serious risk of igniting similar conflagrations again, especially if the minority nationalities do not feel secure, included and acknowledged in the running of the state.

The interest of Eritrea's two large nationalities lies in promoting stability and tranquility so that the country can be developed peacefully in the interests of all. Modern constitutionalism teaches that the best way to do this is to deepen the sense of inclusion and belonging in the smaller nationalities. The minorities must be made to feel that the state is committed to security of their communities, that their distinctive identities will flourish and prosper.

Care must be taken to blunt the disintegrating effects of minority nationalism, which is the great destroyer of constitutions in the modern age. Minorities believe fundamentally that their communities should survive and

<sup>114</sup> EUR. PARL. ASS., Recommendation 1201 on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, 44th Sess., Rec. 1201, art. 11 (Feb. 1993).

<sup>115</sup> *Afar State of Dankalia in Eritrea: Policy*, online: <http://aigaforum.com/articles/EASE-Policy.pdf>.

develop. If they perceive that the state is corroding their identities, languages, communities or prosperity, they will resist.

Minority nationalism is built from the same materials as patriotism. Minority nationalism is rational and responds to rational policies that promote the minority community. Intelligent constitutional design can blunt the disintegrating force of minority nationalism and convert it into a force for national unity.<sup>116</sup>

Modern constitutionalism teaches that the best (if not the only) way to achieve these objectives is by accommodation strategies which recognize, institutionalize and empower differences.<sup>117</sup> Accommodation strategies address minority insecurity by guaranteeing national minorities a permanent share of power in public institutions.<sup>118</sup> Means to achieve this include multinational federalism, constitutionally guaranteed devolution and administrative decentralization, legal pluralism, non-territorial minority rights, language rights in central institutions, the bureaucracy and the education sector, religious rights, consociationalism, affirmative action, and legislative quotas.<sup>119</sup>

Accommodationist strategies must be crafted with care. They proceed from no universally applicable model, must target highly differentiated situations across different national contexts, address critical issues of power and resources and frequently re-allocate these and other political assets – all of which is to say that they are variable and highly charged.<sup>120</sup> If applied too aggressively, accommodationist strategies risk exaggerating or intensifying weak ethnic identities, and fueling divisions that may not have been so prominent or troublesome otherwise. If applied too weakly or not at all, minority nations may come to believe that the state is, over time, their mortal enemy.

Constitutional design is a dynamic and individualized process requiring careful targeting of strategies to the peculiarities and stages of development reached by specific situations. There is no single approach that is best for all national situations.

In Eritrea's case, the 1997 Constitution poses real risks of fuelling the disintegrating aspects of minority nationalism. The Constitution pre-supposes a weak Eritrean identity will be reinforced at the expense of the nationalities' strong traditional identities. The smaller nationalities are likely to resist this.

Conversely, the 1997 Constitution does nothing to make the small nationalities feel included or perceive that the state is committed to protecting their identities and developing their communities. The Constitution contains no entrenched representation for the small nationalities in the National Assembly or other central institutions. The design guarantees that the small nationalities will be swamped in all central institutions.

The Constitution's language provisions intensify this effect as there are no guarantees for minority languages in central institutions, not even rights to translation. Most of the smaller nationalities are not bilingual.

<sup>116</sup> Joseph Magnet, *Modern Constitutionalism* (Toronto: Butterworths, 2004), pp. 30-31.

<sup>117</sup> Joseph Magnet, *Modern Constitutionalism* (Toronto: Butterworths, 2004), ch. 1 "Nation and State"; Will Kymlicka, "The Internationalization of Minority Rights" (2008), 6 *International Journal of Constitutional Law* 1 ("minorities and national minorities demand cultural security; peoples demand recognition of their right to self-determination, or self-government."). Sujit Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford: OUP, 2008, p 26 ff. believes single minded concentration on accommodationist strategies is inappropriate, and that accommodationist strategies can and should be combined with integrationist strategies.

<sup>118</sup> Sisk, T. (2003)

<sup>119</sup> W. Pildes, Ethnic "Identity and Democratic Institutions," in Choudhry, *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford: OUP, 2008, p 173 at pp. 184 ff.

<sup>120</sup> Kymlicka, *Multicultural Odysseys*. Oxford: OUP, 2008, pp. 79-81.

There are no entrenched sub-national jurisdictions where the minorities are guaranteed they will be autonomous and able to self-govern. The Constitution guarantees them no political space where they can feel secure.

The 1997 Constitution contains no protections for minority languages in the bureaucracy or schools. In a country as linguistically diverse as Eritrea, the absence of positive language rights means that Tigrinya and Tigre will continue to erode the smaller linguistic groups.<sup>121</sup> This conclusion follows from well understood phenomena which occur when languages are in contact. Over time, stronger languages eclipse weaker languages, usually completely in three generations.<sup>122</sup>

The 1997 Constitution provides no protection for indigenous rights or for indigenous title to or use of traditional land and resources.<sup>123</sup> The land practices of the government are, in some cases, aimed directly at destroying the nomadic and pastoral lifestyles of these nationalities.<sup>124</sup> The 1997 Constitution would complete this process in theory, and give the government license to implement it at whatever rate of speed it chose to do so.<sup>125</sup>

As recognized by many observers, indigenous peoples depend on their traditional lands and resources for their livelihoods, way of life and survival as distinctive peoples.<sup>126</sup>

The counter-intuitive teaching of modern minority rights experience is that domination of the small by the large is in not in the interests of the large nationalities. Modern constitutionalism teaches that it is erroneous to think that recognition of minority rights weakens the large nationalities. A power sharing constitution which ensures that minority groups are accommodated, recognized, and respected, which gives the small nationalities tools to develop themselves within the constitutional structure of a diverse nation is the only way to guarantee stability. Stability is the primary interest of the larger nationalities.

A power sharing constitution which guarantees Eritrea's small nationalities the means to survive intact as distinctive communities is in the interest of Eritrea's large nationalities. This is not a gesture of generosity; it grows out of modern constitution making experience which teaches that this is the only known way to promote stability in deeply diverse polities.

Interestingly, the importance of including smaller nationalities in the political process leading to the making of the Constitution was stressed by Professor Selassie. He argued:

the principle of inclusion requires that serious grievances must be heard during the constitution making process. To begin with, minorities must be represented in constitutional commissions. Moreover, organized groups of such minorities should be given a chance to air their views in structured meetings and have their views debated,

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<sup>121</sup> Article 21(1) of the 1997 Constitution guarantees universal education. However, it does not provide any guarantee for minority language rights. Language composes one of the primary components of a distinctive national identity. The concern, therefore, that the dominant forces in Eritrea would see language education as a means of eradicating minority national identities seems plausible.

<sup>122</sup> Joshua A Fishman, *The Sociology of Language*, Rowley, Mass, Newberry House Publishers, 1972; see Joseph Magnet, *Modern Constitutionalism*, Toronto: Butterworths, 2004, p. 147 for elaboration.

<sup>123</sup> Eritrea includes at least four groups that qualify as indigenous: the Afar, the Kunama, the Nara, and the Tekurir. Sébastien Grammond, Dean of Law, University of Ottawa, produced a Legal Opinion dated 21 March 2011 (on file with the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya), that concluded the Afar are indigenous according to international law criteria.

<sup>124</sup> ILO 2009 p 40 – 41

<sup>125</sup> Art. 23(2) provides: “all land and all natural resources below and above the surface belong to the state”.

<sup>126</sup> ILO, African Commission on Human and Peoples Rights, Centre for Human Rights, Univ of Pretoria, *Eritrea: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples* (Geneva: ILO, 2009), p 7.

recorded, and submitted as part of the data that the drafting entity takes into account. This exercise in itself opens avenues for resolution of conflicts related to such issues;<sup>127</sup>

Despite these exhortations, the plain fact is that these conditions were not satisfied in the 1995-7 constitutional exercise. The limitations of the consultations and the lack of opportunity for ethnic minorities to make their grievances heard are made clear when Professor Selassie records that

In the Eritrean experience, there were no ethnic- or religious- based grievances expressed or complaints submitted to the Commission...<sup>128</sup>

As we have seen in the case of the Afar, if this is true, it only happened because the Afar were not consulted adequately, did not have the opportunity or means to voice their concerns and did not voice their concerns. This flawed process resulted in a Constitution whose substance is antithetical to what the Afar say they desire.<sup>129</sup>

The substance of the 1997 Constitution has been hotly debated. It has attracted condemnation from various opposition groups, including an umbrella organization, the Eritrean Democratic Alliance [EDA]. Weldehaimanot, who reviewed the debate in 2008, noted disagreements on what he called “emotional issues” including the flag, cultural values, land ownership and nationality.<sup>130</sup> Nowhere do the debates he rehearses raise the issues put at the centre of the argument here: the place of Eritrea’s eight small nationalities in the national fabric, including protections for minority autonomy and self-determination, effective participation in central institutions, local governance and customary laws, lands and resources, languages, identities, economies, cultures and ways of life. These issues are not properly conceived of as “emotional issues”. Rather, they are the issues – the ones that lay at the foundation of all necessary discussions that must precede making a durable Constitution. They are the issues as to what a united Eritrea is, and what it aspires to become.

The recommendations to implement the 1997 Constitution proffered by the U.N. organs come without discussion or analysis of the document’s substance or the procedure by which it was created, and without evidentiary or analytical support for the recommendation to implement it. The recommendations seem little more than an assumption that, as the 1997 Constitution has a democratic and rule of law facade, and seemed to emerge from a process, it should be fine. This is a deeply flawed recommendation to implement a deeply flawed document. It carries little weight, and should be withdrawn.

### **Should the Constitution Come into Effect and be Modified Subsequently?**

Subsequent to the Ottawa roundtable, Professor Selassie ventured the opinion that the Constitution should be used as a rallying point for the forces of democracy against the authoritarianism of the present Afwerki clique. While improvements are possible and desirable, he said, these should be left to another day.<sup>131</sup> He added that the process took three years, solicited the views of a broad cross section of Eritreans, that the majority of Eritreans participated and that this gave people a “sense of ownership of the constitution”.<sup>132</sup> For

<sup>127</sup> Bereket Habte Selassie, *The Making of the Eritrean Constitution: The Dialectics of Process and Substance* (Trenton, NJ: The Red Sea Press, 2003) at 29.

<sup>128</sup> Bereket Habte Selassie, “Constitution Making in Eritrea: A Process-Driven Approach,” in L. Miller (ed.), *Framing the State in Times of Transition: Case Studies in Constitution Making* (Washington: USIP Press, 2010), p. 70.

<sup>129</sup> *Afar State of Dankalia in Eritrea: Policy*, online: <http://aigaforum.com/articles/EASE-Policy.pdf>.

<sup>130</sup> Simon M Weldehaimanot, “The Status and Fate of the Eritrean Constitution” (2008), 8 *Afr. Hum. Rts. L.J.* 108 at p. 128

<sup>131</sup> Semere T Habtemerian, *Interview with Dr Bereket Habte Selassie (Part 2)*, July 15, 2013, online: <http://awate.com>

<sup>132</sup> Semere T Habtemerian, *Interview with Dr Bereket Habte Selassie (Part 3)*, October 09, 2013, online: <http://awate.com>



these reasons, Professor Selassie argued, the 1997 Constitution should be embraced now; its imperfections can be remedied later.

Professor Selassie's comments were made in the context of trying to influence the opinions of the EDA and former ELF members who were disillusioned with the constitution process. This is a discourse that occurs chiefly among the members of the large nationalities. As Weldehaimanot pointed out, quoting other academics, the assumption of this discussion is that the "contents of constitutions are similar the world over."<sup>133</sup>

It is true that the 1997 Constitution contains certain elements that are ubiquitous in modern Constitutions including respect for democracy, human rights, social justice and a commitment to sustainable development.

It is profoundly inaccurate that the contents of constitutions are similar the world over. Constitutions divide resources, privilege languages and their communities, determine status, protect identities, reserve territories and rights to indigenous peoples and minorities as appropriate to the local situations. They also decide fundamental issues concerning the character of the state and minority participation in it. They give some communities the tools to maintain their identities in the future and flourish; they also determine that other communities, lacking the necessary tools, will likely wither away.

When constitutional moments come, these things must be decided. In the usual work of legislative bodies, it is enough for the inertia of things as they are to keep these issues off the table. The energies expended to build a nation and a national character will silently grind away at the strength and particularity of differences. Minorities, like sugar cubes in coffee, are there until ... they're not; or until an explosion of minority nationalism changes everything in unforeseen and sometimes unpleasant ways.

Eritrea is fragile, unstable and unlikely to last long in its present configuration. Modern constitutional experience has shown that the way to strengthen and preserve its unity is through sophisticated constitutional mechanisms targeted to its specific diversities. It is neither the interest of the large nationalities nor that of the small, to load, through omission, a ticking bomb of minority irredentism into Eritrea's constitutional structure.

The 1997 Constitution does not require incidental or cosmetic changes. Its central axis is twisted out of shape, according to the modern constitutional experience of diverse polities. This teaches that the centralizing crush of the 1997 Constitution will probably weaken Eritrea's unity and stability. It is likely to promote alliances of resistance between Eritrea's minorities and kinship nations across Eritrea's borders, thereby further unsettling regional peace.

As the Constitution guarantees that Eritrea's central institutions will be dominated by the 78% Tigrinya – Tigre majority, it is unrealistic to think that, should the Constitution be implemented, it will be changed fundamentally thereafter to reflect minority concerns. If the constituency to make those changes cannot be gathered together in this period of flux, when most people are trying to unite in opposition to the dictatorship, it is unlikely to be gathered when the large nationalities, possibly in the grip of some other military-type clique, control the institutions of power. Even if some might be motivated to address minority concerns through a constitutional amendment, the constitutional amending procedure is rigid and requires very high levels of agreement over a sustained period of time. This renders fundamental changes as suggested here unlikely after implementation.<sup>134</sup>

<sup>133</sup> Simon M Weldehaimanot, "The Status and Fate of the Eritrean Constitution" (2008), 8 *Afr. Hum. Rts. L.J.* 108 at p. 128.

<sup>134</sup> Article 59 of the 1997 *Constitution* requires that amendment proposals must be tabled by a coalition representing at least 50 percent of all the members of the National Assembly assented to by at least 75% of the National Assembly for each proposed amendment, and

For the same reasons, it is unlikely that the Constitution can serve as a rallying point. It already is a significant source of division among the minority communities.

For these reasons, Professor Selassie's suggestion that despite its imperfections, the Constitution should be embraced now and tinkered with later should be rejected. Eritrea requires a recast Constitution that will have to be forged through a new, inclusive process. It is necessary to go back to the future.