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Seth Barrett Tillman

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Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa

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CHAPTER 4

CONSTITUTION-MAKING IN ERITREA

Simon M Weldchaimanot

1 Introduction: Higher law and fine-tuning

Of all laws, a constitution is probably the most closely linked to the notion of the rule of law. A constitution is a type of law but three important factors differentiate it from all other laws: (1) its content, (2) its supremacy, and (3) the more rigorous procedure for its amendment. Not much needs to be said about the first issue, except that the content of a constitution may be quite contentious. As for the second, a constitution is supreme to other laws in the sense that a constitution overrides conflicting legislation. Closely linked to the second differentiating factor is the third. If a constitution is supreme, it necessarily follows that it should be protected from changes that can be effected through the normal law-making process.

Supremacy and more rigorous procedures of amendment aim to serve two conflicting interests. ‘One of the first requisites of any constitutional system’, according to Willoughby, one of the few authorities Eritreans consulted in drafting their 1952 Constitution, ‘is that it shall have a high degree of stability’. However, there is another consideration directly opposed to the imperative of stability that is no less important. Willoughby explained that conditions to be met by a government are not unchangeable; political ideas and aspirations of a people are not always the same and framers of constitutions are not all-skilful in foreseeing the future. There is thus a need to leave some room for subsequent alteration.

1 W.F. Willoughby An introduction to the study of the government of modern states (1919) 108. For the reference to Willoughby, see AA Schiller Eritrea: Constitution and federation with Ethiopia (1953) 2 American Journal of Comparative Law 375 382 noting that searching for answers to some questions such as ‘the allocation of the powers of government to the proper authority, Eritrean or federal ... entails study of the few texts available, Willoughby for one advisor and Rousseau or Duvenger for the other’.

2 Willoughby (n 1 above) 109.

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days delay was 'to obviate the adoption of amendment under pressure of extraneous circumstances'.

Article 93 provides two ways of amending the Constitution. A majority of three-quarters of the members of the Assembly in office can automatically amend the Constitution. In addition, a majority of two-thirds of the members present and voting or a majority of the members in office can amend the Constitution if the proposed amendment is approved by two successive legislatures. In regard to the latter, 'the second debate can only take place after the next legislature has been elected. Thus the amendment is indirectly put to the electorate'. The next stage is entry into effect which, as stipulated in article 93(3), required ratification by the Emperor, the Sovereign of the Federation.

The above provisions pertain to procedure. Even if the amendment procedure is complied with perfectly, article 91 of the Constitution which provides for substantive restrictions, also has to be met before an amendment would be constitutional. First, the Assembly may not, by means of an amendment, introduce into the Constitution any provision which would not be in conformity with the Federal Act. Second, article 16 bases the Constitution 'on the principles of democratic government' and provides that this basis 'shall not be amended'.

The Federal Act defines the powers of the Eritrean government and the federal government. In legislative writing it is often assumed that 'shall not' is different from 'may not', but distinction may not be historically well founded. However, in current common usage, 'shall not' is a command or order; 'may not' is used to indicate a measure of possibility. In Courts legal documents have often stated that there are certain aspects set in stone article allowing for some discretion. In this context, 'shall not' is conclusively prohibitive while 'may not,' although injunctive on the party it restrains, allows for some leeway, but only with the permission of someone which has the legal power to lift the injunction. In as far as that permission is not obtained the term 'may not' is as absolutely prohibitive as 'shall not'.

The Commissioner, the founder of the Constitution, gave indications about how seriously the term 'may not' in article 91 should be taken. In his final response, he first mentioned the fact that the Constitution of Eritrea is supposed to be based on the principles of a democratic government and include the guarantees contained in paragraph 7 of the Federal Act, which were fixed by the UN General Assembly. Indeed, it may be said that the

36 United Nations Commissioner in Eritrea (n 35 above) 129, para 622.
37 NR Tillman & SE Tillman 'A fragment on shall and may' (2009-2010) 50 American Journal of Legal History 455.
38 UN Commissioner's Final Report (n 35 above) 115, para 20.
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