Ratificatinn and Status of Treaties in Ethiopia

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The issue of the conclusion, ratification and status of treaties [1] is invariably dealt with in constitutional provisions. This statement applies to the constitutions of the socialist and capitalist states as well as to those of third world countries.

We shall examine the question of ratification and status of treaties in Ethiopia in the light of the above statement and the suspension of the Revised Constitution of 1955 of Ethiopia.

I. RATIFICATION OF TREATIES

Prior to the issuance of the historic Proclamation No. 1 of 1974, which did away with the regime of Emperor Haile Selassie, the issue of ratification of treaties was dealt with under Article 30 of the 1955 Revised Constitution of the Empire of Ethiopia. This Article reads as follows:

> The Emperor exercises the supreme direction of the foreign relations of the Empire. The Emperor accredits and receives Ambassadors, Ministers and Missions. He alone has the right to settle disputes with foreign powers by adjudication and other peaceful means, and provides for and agrees to measures of cooperation with foreign powers for the realization of the ends of security and common defence; He alone has the right to ratify, on behalf of Ethiopia, treaties and other international agreements, and to determine which treaties and international agreements shall be subject to ratification before becoming binding upon the Empire. However, all treaties of peace and all treaties and international agreements involving a modification of the territory of the Empire, or of sovereignty of jurisdiction over any part of such territory, or laying a burden on Ethiopian subjects personally, or modifying legislation in existence, or requiring expenditures of states funds, or involving loans or monopolies, shall, before becoming binding on the Empire and the inhabitants thereof, be laid before Parliament, and if both Houses of Parliament shall approve the same in accordance with the provisions of Articles 88 - 90 inclusive of the present Constitution, shall then be submitted to the Emperor for ratification.

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[1] The term "treaty" is used here to cover any agreement between Ethiopia and one or several states or international juridical persons that are the subject of international law.

The Article empowered the Emperor

(A) to ratify treaties or other international agreements on behalf of the Country; and

(B) to determine the types of treaties that need to be ratified in order to be binding on the Nation.

On 12 September 1974, a Proclamation was issued by the Provisional Military Administrative Council. This was Proclamation No. 1/1974 - the Proclamation which abolished the monarchy and laid down the cornerstone for the establishment of a socialist republic in a land where monarchs had been ruling since time immemorial. The Proclamation was issued in the *Negarit Gazeta*, 34th year

This is, without doubt, a historic Proclamation. But in this particular instance our interest in it lies not so much in its historic significance but in its impact on the ratification of treaties. There is no direct reference to treaty ratification in general in this Proclamation. But two articles, Articles 5(a) and 10, have a direct impact on the ratification and status of treaties.

Article 5(a) of the Provisional Military Administrative Council Establishment Proclamation provides:

> The Constitution of 1955 is hereby suspended.

The Article is simple and its message as unambiguous as could be. The Constitution is suspended. The effect of this sub-article on the ratification of treaties was that it made Article 30 of the Constitution[2] inapplicable to the period that follows the Revolution.

Some may feel that the gap created by the suspension of the Constitution with respect to ratification of treaties is filled by Article 6 of the same proclamation. Article 6 contains the following provision:

> The Armed Forces, the Police and the Territorial Army Council have hereby Assumed fully Government power until a legally constituted People's Assembly has approved a new Constitution and a govern ment is duly established.[3]

In the opinion of the author, this Article has no direct relevance on ratification of treaties. The message it heralds is that the Armed Forces, the Police and the Territorial Army have replaced the Government of the deposed Emperor. It does not specify the particular organ of the same body that is empowered to ratify treaties and the procedures of ratification.

The other Article of some relevance to the subject under consideration is Article 10 of the same Proclamation. This Article states, "All existing laws that do

[2]Article 30 has been cited and discussed above.

[3]The Provisional Military Government Establishment Proclamation No. 1/1974. *Negarit Gazet* Year 34, No. 1.

not conflict with the provisions of this Proclamation and with all future laws, orders and regulations shall continue in force."

The difficult task of sorting out, from amongst the many laws issued prior to the Proclamation under discussion, those that are inconsistent with or those that are not inconsistent with this Proclamation is left to the courts and the other members of the legal profession.

For our purpose, had there been any legislation on ratification of treaties other than Article 30, we would have studied it to find out whether it is still in force, or whether it has been suppended as inconsistent with this Proclamation. Unfortunately, however, the only relevant law on the topic is Article 30 of the Revised Constitution, and this Constitution has been expressly suspended. By no stretch of meaning or "migration" into the intention of the drafter, or of the legislator of Proclamation No. 1/1974, can we say that there was no intention to suspend Article 30 of the Constitution. This Article, together with the rest of the Articles of the Constitution, has been supended.

It may be of interest to note that Decree No. 1 on Courts, published on 12 December 1917 by the Soviets, was more or less similar to the provision cited above. Samuel Kchreov writes:

> Local courts had to pronounce their decisions and verdicts in the name of the Russian Republic, and were to be *guided in their decision and verdicts by the laws of the overthrown government only as far as these laws were not abolished by the Revolution and did not contradict revolutionary consciousness and revolutionary legal consciousness and the programs of Social Democratic and Social Revolutionary Parties*[4] (Emphasis supplied).

It is to be noted that the Provisional Military Administrative Council Establishment Proclamation was issued on and entered into force on 12 September 1974. Exactly three days later, another Proclamation, known as the "Definition of Powers of the Provisional Military Administrative Council and its Chairman Proclamation No. 2 of 1974",[5] was promulagated. This Proclamation contained eleven Articles, of which only Article 4 becomes our concern. This Article reads:

> The Council[6] has the power to ratify, on behalf of Ethiopia, treaties and other international agreements, and to determine which treaties and international agreements shall be subject to ratification before becoming binding upon the State. However, all treaties of peace and all treaties and international agreements involving a modification of the territory of the State or of soveregnty or jurisdiction over any part

[4] *S. Kcherov, The organs of Soviet Administration of Justice: Their History and Operation* (Leiden E.J. Drill) (1970) p. 24.

[5] *Negarit Gazeta*, Year 34, No. 2.

[6] The word "Council" refers to The Provisional Military Administrative Council.

of such territory or laying a burden on Ethiopian subjects or modifying legislation in existence or requiring expenditure of State funds, or involving loans or monopolies, shall, before ratification by the Council, be deliberated upon by the Council of Ministers, and the same shall be submitted to the Council for ratification.

The words of this Article seem to have some resemblance to the words of Article 30 of the suspended Constitution. Be this as it may, the following conclusion can be drawn from this Article:

(A) The Provisional Military Administrative Council has the power to ratify treaties on behalf of Ethiopia;

(B) The Provisional Military Administrative Council has the power to determine which treaties shall be subject to ratification before becoming binding on the State;

(C) The following treaties shall, before ratification by the Provisional Military Administrative Council, be deliberated upon by the Council of Ministers:

a. Treaties of peace;
b. Treaties involving modification of the territory of the state of sovereigntyor jurisdiction over any part of such territory;
c. Treaties laying a burden on Ethiopian subjects;
d. Treaties modifying legislation in existence;
e. Treaties requiring expenditure of state funds; and
f. Treaties involving loans or monopolies.

Exactly what happens to a treaty which falls under Category C above, but which has not been deliberated upon by the Council of Ministers, or to a treaty that has been deliberated upon by the Council but fails to get its approval, is not known. The Article states only that treaties of the type that have been mentioned in Category C must be *deliberated upon by the Council of Ministers and the same shall be submitted to the Provisional Military Administrative Council for ratification* (emphasis supplied).

This Proclamation, which sheds the badly needed light on ratification of treaties, was totally replaced by the "Redefinition of Powers and Responsibilities of the Provisional Military Administrative Council and the Council of Ministers Proclamation No. 110/1977." [7] What has the new Proclamation in place of Article 4 [8] of the Definition of Powers of the Provisional Military Administrative Council and

[7] Article 21 of this Proclamation provides:

"The Definition of the Powers and Responsibilities of the Provisional Military Administration Council and the Council of Ministers Proclamation No. 108/1976, the *Definition of Powers of the Provisional Military Administration Council and its Chairman Proclamation No.* 2/1974 *as amended*, and Articles 1 through 14 inclusive of the Ministers (Definition of Powers) Order No. 1 1943 as amended, *are hereby repealed* and replaced by this Proclamation" (emphasis supplied).

[8] Article 4 of Proclamation No. 2/1974 has been cited in full above.

its Chairman Proclamation No. 2/1974 ? Let us examine Proclamation No. 110/3977 for the answer.

Article 5 of this Proclamation defines the powers and duties of the Congress[9]. In sub-article 4 of this Article, it is stated that the Congress has the power and responsibility to „ratify, on behalf of Ethiopia, *basic economic, political, defence and joint defence treaties and international agreements*" (emphasis supplied).

Obviously, the organ that ratifies a given category of treaties has been designated by this sub-article. The effort made to demarcate treaties that need ratification from those that do not need ratification can be clearly seen. But let us put this sub-article under some test to find out if this has been a success. What are "basic economic, political or defence treaties" ? Or, on the other hand, what are the non-basic economic, political, and defence treaties ? Unlike most of our laws, this Proclamation contains no Article providing definitions, and thus we cannot resort to that section of the law to get clarification. Who determines whether a given treaty is basic or not ? What about treaties of "culture" ? Does a given "basic" treaty have to be deliberated upon by the Council of Ministers or any other organ (e.g. the National Revolutionary Development Campaign and Central Planning Supreme Council, for economic treaties), before it has to be ratified by the Congress of the Provisional Militry Administrative Council ? These questions are raised, not because as some people accuse us, lawyers love to raise questions, but because they are important and deserve to be answered.

The Article cited above does not help much in classifying treaties that need ratification. It only tells us who ratifies "basic economic, political, defence and joint defence treaties and international agreements."A simpler and, in the author's opinion, a preferable approach is to enumerate the type of treaties that need to be ratified by the Congress of the Provisional Military Administrative Council in line with Article 4 of the repealed Definition of Powers of the Provisional Military Administrative Council and its Chairman, Proclamation No. 2/1974. A possible interpretation of this phrase is that non-basic treaties do not have to be ratified at all to be binding on the state.

In the light of these questions, one wonders whether ratification is needed for the following :

(a) the treaties we entered into with many countries on the establishment of inter-governmental joint economic commissions ;

(b) the various treaties of friendship and co-operation between Ethiopia, and other countries ; and

(c) the numerous commercial treaties signed by the Ministry of Foreign Trade with its counterparts in other countries.

[9]The Provisional Military Administrative Council is composed of the Congress, a Central Committee and a Standing Committee. For details, read Article 2 of the same Proclamation.

The answer to the question of whether or not the above-mentioned treaties need to be ratified hinges on whether or not they are "basic". No one can take any stand on the issue before probing into those treaties, and even then an umpire may have to be called, if two reasonable people fail to agree on whether or not a given treaty is "basic".

How is this question handled in practice? This is what Ato Fisseha Yemer has to say:

> The existing practice is to effect the ratification of a treaty or agreement by examining the substance to determine its nature, in the event that the treaty contains no provision on ratification. But this rarely occurs. In nearly all treaties and agreements there is a specific provision requiring ratification. Ratification, as we all know, is effected by the legislature or any other organ having legislative power. So even if, in our opinion, the treaty may not be basic, we have to effect ratification by the Congress, since that is what the treaty requires. Failure to do so would mean the treaty would not enter into force between Ethiopia and the other party, since the other party will obviously demand that ratification take place by both parties. The solution to such problems would be not to include a ratification clause during the negotiating stage, if it is felt that the treaty is not that basic. The treaty would simply enter into force upon signature. We have tried to advise ministries not to include ratification clauses, in treaties or agreements which obviously are not basic.[10]

II. THE STATUS OF TREATIES

We will now move on to discuss the status of treaties in present - day Ethiopia.

From the very outset we have to point out that the word "status" as used in the heading here has two meanings. In one sense, it refers to whether or not a treaty is still valid. In another sense, it is intended to cover the question of whether or not a treaty that is still valid is superior or equal to our muncipal laws.

Since Ethiopia is, as a state, what it is today partly because of what it was in the past, we will throw our minds 12 years back and see what the legal regime on the issue was prior to 12 September 1974 - the day on which the regime of Emperor Haile Selassie was toppled and the Provisional Military Administrative Council assumed state power in Ethiopia.

Prior to the said date, the status of treaties was governed by Article 122 of the Revised Constitution, which provides:

[10]Interview with Ato Fisseha Yemer, Head of the Legal Department, Ministry of Foreign Affairs January 1983.

> The present revised Constitution, together with those international treaties, conventions, and obligations to which Ethiopia shall be a party, shall be the supreme law of the Empire, and all future legislations, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void.

Since ths Article is clear, at least for our purpose, not much needs to be said. Treaties entered into by Ethiopia were given equal standing with the Constitution, and were the supreme law of the land. Thus any present or futre legislation, act or judicial decision became null and void if it was inconsistent with treaties into which Ethiopia entered.

We have already seen that the Revised Constitution has been suspended by Article 5(a) of Proclamation No. 1/1974.

Can we say that since, by virtue of Article 122, all treaties were "the supreme law of the Empire", and since, according to Article 10 of Proclamation No. 1/1974, only those laws that are in conflict with the same Proclamation and future laws are rendered null and void, at least those treaties that do not fall in this category, that is to say treaties that are not declared inconsisistent with the said Proclamation, are still in force?

This brings us to the very interesting question of succession of treaties.

Does the Provisional Military Administrative Council succeed to all the treaties entered into by the regime whose actions and policies it has so vigorously and consistently criticised?

This is one area of international law in which differing views are expressed by different scholars. However, there seems to be a consensus that fundamental change of circumstances is a ground for termination or suspension of treaties. This is the doctrine of *rebus sic stantibus*, and, depending on the type of treaty, a change of government may be a fundamental change. There is something to this effect in the more or less universally accepted Vienna Convention on the Law of Treaties.[11] This Convention was signed by Ethiopia on 30 April 1970. The change

[11] Article 62. Fundamental change of circumstances:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the enclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   a) the existence of those circumstances contributed an essential basis of the consent of the parties to be bound by the treaty; and
   b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
   a) if the treaty establishes a boundary; or
   b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If under the foregoing paragraphs a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke the change as a ground for suspending the operation of the treaty.

that occurred in our country is not just a change of government. It is a change in which we see a very radical departure from the economic, social and political outlook of the former regime. A new society, with a new ideology and a new vision, is being built. In these circumstances, it is unreasonable to say that treaties of a military or political nature which oblige parties to exchange information in the field of military and intelligence remain in force. This would amount to demanding either or both parties to agree to a measure which is likely to lead to their ruin. It is, I think, to take care of such cases that Article 56 is included in the Vienna Convention on the Law of Treaties.[12] Before the close of this paragraph, a word of caution has to be given. Should the treaty contain a provision on denunication or withdrawal, that provision has to be complied with, for either party to be relieved of any obligation under the said treaty. The remarks made in this paragraph should not be taken as a way out from this obligation.

On the other hand, no one would dare to say that all treaties entered into by the former regime are not binding on the present Government. Our membership of the United Nations, the Organization of African Unity, and other international and regional organizations, all came out of or as a result of treaties entered into by the former regime.

The immediately preceding two paragraphs are included to point out to the reader that this question of status of treaties in the sense of whether or not they are still valid is a difficult one, and that a generalized answer cannot be given. Each treaty must be examined on its own merit, independently, and a stand taken on it. However, with the exception of the type of treaties mentioned above (those, that are arguably terminated because of fundamental change of circumstances) the author is of the view that it is more correct and practical to assume that all treaties entered into by the former regime in accordance with the relevant provision of the then existing legislation are still valid.

Having suggested an answer to whether the issue of treaties entered into by the former regime are valid, we will resort to the question of the status of these treaties in the sense of whether or not they are superior or equal to our municipal law.

We have seen that treaties entered into by the former regime in accordance with the Constitution's provisions had the status of supreme law. We have also seen that the Constitution's provision that gave treaties such an elevated place in Ethiopian law has, together with the Constitution, been suspended. So where do treaties stand in present - day Ethiopia?

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[12]Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal:

1. A treaty which contains no provision regarding its termination and which does not provide for denunication or withdrawal is not subject to denunciation or withdrawal unless:
   a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
   b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Some of the treaties entered into by the former regime on behalf of Ethiopia were published in the *Negarit Gazeta* in the form of Proclamations[13] or Decrees.[14] Some of the treaties were not published in the *Negarit Gazeta*, but all the legal formalities necessary to make them binding on the country have been complied with.

The Charter of the Organization of African Unity, the Phyto-Sanitary Convention for Africa and the rather numerous Loan Approval Proclamations, giving domestic legal status to loan agreements entered into with other countries and international financial institutions, can be cited as examples of treaties falling into the first category. These treaties have become part of our municipal law. The chance of survival of these treaties is the same as or similar to that of the laws issued by the now defunct government. They both have to be subjected to the same test; whether they "do not conflict with the provisions of Proclamation No. 1/1974".[15] If they do not conflict with this Proclamation, their continuance in force can hardly be questioned.

A serious difficulty is met with when we consider the case of a treaty that has been published in the *Negarit Gazeta*, i.e. a treaty that has become our municipal law and is in conflict with the provisions of Proclamation No. 1/1974. Article 10 of Proclamation 1/1974 obviously deprives such treaties of their status of being part of our internal or domestic law. An Ethiopian court faced with this problem will, in all probability, apply Article 10 of Proclamation No. 1 of 1974, and make the treaty inapplicable. But this is not of much significance at the international level. For, under Article 27[16] of the Vienna Convention on the Law of Treaties, domestic law is no defence for failure to discharge obligations under a treaty. But the issue of whether or not the present Government is relieved of its obligations under such treaties is not a simple one. The answer to this question very much depends on the content of the treaty. For our purpose, it must suffice to say that the theory of succession of treaties plays a decisive role on the resolution of this problem.

Let us now briefly examine the case of a treaty entered into by the former regime, a treaty concerning which all the fomalities necessary to make it binding on the Nation have been complied with, but for which approval was not published in the *Negarit Gazeta*. There is one very important difference between treaties that fall in this category and the treaties that have become municipal law (i.e. treaties that have been published as law in the *Negarit Gazeth*). Article 10 of Proclamation No. 1 cannot be raised as an argument against such treaties, because Article 10 only refers to *laws*. Because Article 122 of the Revised Constitution, which gave

[13] A "Proclamation" was a law passed by Parliament and approved by The Emperor in accordance with Articles 34 and 88 of The Revised Constitution.

[14] A "Decree" was a substantive law issued by The Emperor "in cases of emergency that arise when the Chambers are not sitting" (Article 92 of the Revised Constitution).

[15] This Article has been discussed above.

[16] *Article 27. Internal law and observance of treaties* "A party may not invoke the provisions of its internal law as justification for its failure to preform a trreaty."

treaties the status of superior law, is suspended together with the Constitution itself, and because these treaties are not published as law, they cannot be said to be inapplicable because of Article 10 of Proclamation No. 1'1974.

It is difficult to give a generalized opinion on this. Each treaty must be seen on its own merit. However, in the author's view, such treaties can only be denounced or withdrawn from if the right to denounce or withdraw can be established under Article 56 of the Vienna Convention on the Law of Treaties.

So much for treaties entered into by the former regime. But what is the status of treaties entered into by the present government, in the sense of their being superior or equal to our domestic law? The Provisional Military Administrative Council as the head of state and government, the National Revolutionary Development Campaign and Central Planning Supreme Council, Ministries and other government organizations have entered into numerous treaties with their counterparts in other countries.

For some of the treaties, approval Proclamations have been published in the *Negarit Gazeta*. For others no such Proclamations exist.

A possible effect of the issuance of laws approving treaties is to make treaties part of Ethiopian internal law. Assuming that this statement is palatable, one could argue that the status of treaties approved by Ethiopian law published in the *Negarit Gazeta* can only have the rank of the law that is used to approve it. It cannot be superior to laws having the same hierarchy. In the absence of any legal provisions to the contrary, this seems to be a logical conclusion.

The question of the status of treaties entered into by the new government for which approval laws have not been published in the *Negarit Gazeta* comes next. In the opinion of the author, it is logical to say that these treaties have to have a greater or lesser status than those concerning which approval Proclamations have been issued.

CONCLUSION

By now it is hoped that the reader sees the tender nerve of the problem. The need to lay down the types of treaties that need ratification is a matter of urgent necessity. Many ministries sign different agreements with their counterparts in other countries. Since our laws are, for all practical purposes, silent on the types of treaties that need ratification, the procedure to be followed after signature always becomes a subject of discussion. We have indicated at some length the inadequacy of Article 5(4) of the Redefinition of Powers and Responsibilities of the Provisional Military Administrative Council and the Council of Ministers Proclamation No. 110/1977 in solving the problem.[17] With respect to this, something needs to be done as quickly as possible. To say the least, something like Article 4 of the Definition of Powers and Responsibilities of the Provisional Military Administraive Council and its Chairman Proclamation No. 2'1974 has to be inserted

[17] This has been discussed above.

in the relevant part of the Redefinition of the Powers and Responsibilities of the Provisional Military Administrative Council and the Council of Ministers Proclama tion No. 110/1977.

With respect to the issue of the applicability of treaties entered into by the former regime to the present government, it must be assumed that, with the exception of treaties that have become obsolete because of fundamental change of circumstances, they are binding on the present government as well.

The status of treaties, i.e. whether they are superior to or equal to municipal laws, is usually dealt with by constitutional provisions. A comparative survey of the constitutions of some countries shows the following:

(a) treates are part of internal law and superior to internal law;
(b) treaties are part of internal law and equal to internal law;
(c) treaties are part of internal law and equal to federal laws, superior to state or provincial law;
(d) treaties are not part of internal law unless expressly incorporated by legislative action.[18]

To date we have no Constitution. For this and other practical reasons, it may be wiser not to take any stand on this issue now. It is the Constitution of the new Socialist Ethiopia, or a major law on treaties that is based on the said Constitution, that has to address itself to this question.

[18] *See generally, H. Blix (ed.), The Treaty Makers' Hand Book* (Oceana Publications, Inc. Almgri- *at &. Wiksell*) (1973), pages 20-30.