Is Publication of a Ratified Treaty a Requirement for its Enforcement in Ethiopia? A Comment Based on W/t Tsedale Demissie v. Ato Kifle Demissie: Federal Cassation File No. 23632

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1. The Case and its History

This case was first brought before a Woreda Court in 2005 in Bonga (Kafa Zone of the Southern Nations, Nationalities and Peoples State, SNNPS) where the deceased mother of the child, whose guardianship was sought, had her residence. The facts of the case show that first the father of the deceased applied to the Court to be declared the guardian and tutor of his grandson. While the case was being considered, the child's father, i.e., Ato Kifle Demissie, joined the case as an intervener. The Court held that the father of the child is the rightful guardian and tutor of the child according to the Family Code of the SNNPS, Proclamation No. 75/1996 (E.C.). After this decision was handed down, the paternal aunt of the child, W/t Tsedale Demissie, filed before the same Court an opposition as per Art. 358 the Civil Procedure Code stating that the child in question was brought up by her and her mother beginning from the time when the child was just 1 year and six months old. She further stated in her opposition that the father of the child had never cared for him for twelve or so years while she cared for the child all along by providing what was needed for his education, survival and development. She argued strongly that the history of the father of the child is such that he did not do anything for the child, and that it would be easy to deduce from this that he would not be a responsible guardian of the child in the future too. She urged the Court to change its decision that made the father of the child guardian and tutor and instead declare her the child's guardian and tutor.

The father of the child who was granted the custody argued in response that according to the law[1] the surviving parent is the guardian and tutor of the child. The father argued that since the opposition petitioner is the aunt of the child she could not be granted the custody while he is alive. In its decision given in February 2006 (in File No. 29/98), the Court reasoned that according to Art. 235(1) of the Family Code of the SNNPS, there is no way in which the aunt would be granted the custody of the child while the father of a child is alive. The Court further reasoned that it cannot be normally presumed that the aunt could be a better guardian of a child than his father, and that it would be an utter disregard of Art. 235 of the Family Code of the SNNPS to revoke the guardianship of

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[1] It is interesting to note that both the father of the child and the opposition petitioner, who were Addis Ababa residents, cited the provisions of the Federal Family Code of 2000 to support their pleadings while the Court simply disregarded it and settled the case based on the Family Code of the SNNPS.

the father and give the custody of the child to his aunt. The Court concluded that the aunt's claim is not supported by law and rejected the claim of the opposition petitioner.

The petitioner appealed from this decision to the Kafa Zone High Court (File No. 01001). This Court also affirmed the decision of the lower Court saying that there is no ground to reverse or vary the decision of the lower Court. The Court passed its decision without even calling up on the other party to the dispute, i.e., the father of the child to respond to the appeal. The application of the petitioner to the Cassation Bench of the Supreme Court of the SNNPS (File No. 14275) was also rejected as inadmissible as the Court found no error of law committed by the lower Courts.

2. The Decision of the Cassation Bench of the Federal Supreme Court

The Cassation Bench of the Federal Supreme Court (Cassation Bench) accepted the petition by W/t Tsedale Demissie in the case under discussion in March 2006 and passed its judgment in November of the same year.[2] The father of the child was directed by the Cassation Bench to present his counter-argument but did not do so thereby forfeiting his right to be heard. The Cassation Bench stated in its reasoning that the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) in its Art. 36(2) provides that in all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child. The Cassation Bench went on to state:

> In addition to this, the UN Convention on the Rights of the Child – one of the Conventions which Ethiopia has ratified in 1992 – and which has become the integral part of the law of the land by virtue of Art. 9(3) [sic] of the Constitution provides under its Art. 3(1) that courts as well as all other organs that give decisions on matters pertaining to children must give primary consideration to the interest and wellbeing of children.[3]

The Cassation Bench further reasoned that it is something well known and accepted that regarding the interest and wellbeing of children, no one may be given primacy over their parents. Because of this, many countries' laws, ours included, normally contain the principle that in the event of the death of one of the parents, the surviving parent would become the legal guardian and tutor of the child. The Cassation Bench said further that because of this principle, both Federal and state family laws of Ethiopia contain express provisions recognizing the primacy of parents as guardians and tutors of their children.

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[2] The Children's Legal Protection Centre (CLPC)of the African Child Policy Forum gave the petitioner free legal aid including preparation of written submissions starting from the Kafa Zone High Court all the way to the Federal Supreme Court. In fact this author participated as a panellist in a panel discussion that was held in February 2008, organized by CLPC on the effects and ramifications of the decision on the implementation of the Child Rights Convention.

[3] Pp.2-3 of the Decision; translation by the author.

However, the Cassation Bench also reasoned that although there are such express provisions in our Federal and state family laws to the effect that parents shall be the guardians and tutors of their children, these express provisions shall be put into effect only if the parent to be granted guardianship and tutorship of his or her child is such that he or she works for the interests and wellbeing of the child as provided for in the Ethiopian Federal Constitution. The Bench Further stated:

> .... In this regard judges at any level of courts must, when they consider matters affecting children, in addition to other laws take into account the mandatory provision on the best interest of the child in Art. 36(2) of the Constitution. Any decisions and conventional (customary) practices given in contravention of this shall doubtlessly be rendered to have no effect.[4]

In its operative reasoning regarding the case at hand, the Cassation Bench said that the courts of the SNNPS, when they were looking into the guardianship issue, failed to see beyond the black letters of the law and consequently failed to ensure the best interest and wellbeing of the child as provided in the Federal Constitution. The Cassation Bench further pointed out that particularly the Kafa Zone High court had stated in its decision that the father of the child came forward to demand the guardianship of the child without visiting, bringing up, and caring for the child for 12 or so years but gave a decision to remove the child from the home where he was brought up with care and was living in tranquility without even asking for the opinion of the child in the matter. The Cassation Bench found that this decision did not take into account the interest and wellbeing of the child. The Cassation Bench emphatically concluded that the decision given by the lower courts, by simply looking at the literal words of the provisions of law and without insightfully taking into account the purpose and spirit of the law, is found to be against the FDRE Constitution as it is prejudicial to the interest and wellbeing of the child. Consequently, the Cassation Bench reversed the decisions and rulings of all the three Courts of that SNNPS that were involved in this case, and granted guardianship and tutorship to the petitioner, i.e., W/t Tsedale Demissie.

3. Comment

This case raises some interesting constitutional issues that are relevant both for the legal practice in the area as well as for the academia. In the facts of the case and the decision of the Cassation Bench presented above, at least two important constitutional questions are brought to the fore: 1) whether or not publication of a ratified international agreement is a legal requirement before such an agreement becomes enforceable in Ethiopia; and 2) the position of Ethiopian courts vis-à-vis enforcing the FDRE Constitution in general and the fundamental rights and freedoms in particular. In what follows, I shall briefly treat each of these constitutional questions (with more focus on the first one) on the backdrop of the decision of the Cassation Bench.

[4] Pp 3-4 of the Decision; translation by the author.

3.1. The issue of publication of ratified international agreements

Whether publication of ratified international agreements in the official law gazette is a legal requirement for the treaty to enter into force or not relates to the issue of whether a state is a 'monist' or a 'dualist'.[5] There is a lot of variation among the states that could be put within a monist camp in terms of the requirement of publication for the legal validity of a given ratified treaty. It is generally true that states with civil law tradition consider international agreements as part of the national legal system once such agreements are ratified by the rightful national bodies. However, there are differences on additional requirements to make the treaties that are ratified enforceable before domestic courts and other institutions. In Brazil for example, ratified international instruments become a rule of the domestic legal system after they are published in the official journal of the country.[6] The same is generally true with the Central African Republic, Chad, Chile, Cyprus, France, Guinea, the Netherlands, Panama, Portugal, Rwanda, Slovakia and Syria where ratification should be followed by publication or promulgation for the treaties to become part of the domestic law of the respective states.[7]

On the other hand, countries such as El Salvador, Germany, Japan, Jordan, Lebanon, Libya, Lithuania, Mexico, Slovenia, Sudan, Switzerland and USA make treaties integral part of the domestic law upon ratification without other additional legal requirements to be met.[8] But one should not confuse the act of publication or, as the case may be, promulgation of ratified treaties in the first of the two groups of states discussed above with the act of 'transformation' which take place in states with 'dualist' legal systems. In dualist legal systems, the re-enactment or, as it is also

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[5] This is a traditional categorization of states into the two camps based on the nature of the relationship that exists between international law and municipal law in their legal systems. Accordingly, 'monist' states are those that consider international law and domestic law to be part of a unified legal system, 'often characterized by the primacy of international norms', while dualist states consider international law and domestic law to be separate legal systems. See M. Scheinin, 'International Human Rights in National Law' in R. Hanski & M. Suksi (eds.), An *Introduction to the International Protection of Human Rights: A Textbook* (Turku/Abo: Gummerus Kirjapaino Oy, 2004), p. 418. See also a very succinct discussion on the two theories by John H. Jackson 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' in *86 Am. J. Int'l L. (1992).*

[6] Christopher Harland, 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents' in *Human Rights Quarterly 22 (2000),* pp. 207-208.

[7] See generally Id.

[8] Id. The general placement of states into two – those publishing and those not publishing ratified treaties – may be simplistic, and a closer look at the legal systems of each of the states may bring out some distinctions even among the states placed within one category. For example, in Switzerland while publication is said to be not required, if the treaty in question creates obligations on individuals, publication would be required. See generally Andrew Z. Drzemczewski cited in Ibrahim Idris, 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' in 20 *Journal of Ethiopian Law* (2000), p.122.

known, the 'transformation' of the treaty in question through a legislative act is a validity requirement for it to be domestically enforced, whereas in the case of the monist, transforming the treaty law is not a validity requirement but just the publication of it.

When we turn to our own system, the requirement or otherwise of publication of a ratified treaty for its domestic enforcement before Ethiopian national institutions such as courts of law remains to be one of the controversial issues in the area. For the sake of grasping the points at issue clearly, we shall start by dividing up the arguments into three: the first position holds that by virtue of Art. 9(4) of the Federal Constitution, the mere act of ratification suffices to bring a treaty into force domestically without any further steps needed, including a publication of it in the official law gazette of the Federal Government. The second position espouses that a ratified treaty whose notice of ratification is published in the official law gazette should be considered to be the integral part of the law of the land, and the publication of its full text is not a legal requirement for it to be invoked before domestic bodies such as courts of law. The last position in short is the argument that publication of the full text of a ratified treaty is a requirement for that treaty to become part of the law of the land just like other 'laws' which are enacted by the Federal Law maker.

As stated above, the first position takes a sort of pure 'monist' view in this regard and argues that upon ratification, treaties automatically become the integral part of the law of the land.[9] The publication of a ratified treaty, according to this view, is an important act in itself but should by no means be taken as a validity requirement. The legal basis for this position as stated above is Art. 9(4) of the FDRE Constitution which says 'All international agreements ratified by Ethiopia are an integral part of the law of the land'. The argument goes that there is no additional requirement attached to ratification by the FDRE Constitution for ratified treaties to become 'integral part of the law of the land' and we should not add one.

The second view takes a middle ground as briefly described above. Its main contention is that so long as the notice of its ratification is published in the official law gazette, the publication of the full text of the treaty in question should not be the matter of legal requirement. Both the first view and the second view draw distinction between publication as a validity requirement and publication as needed for accessibility of the treaty law. Both views subscribe to the idea that publication of a ratified treaty serves the purpose of accessibility. But the two positions at the same time differ in that the second one considers the publication in the official law gazette of notice of ratification as mandatory while the first position does not.

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[9] The views (all of the three) we speak about are not extensively documented in research or otherwise, and it is not possible to give concrete examples of those, but see Id., pp.124-129; Girma Amare, cited in Id.; see also Gebreamlak Gebregiorgis, 'The Incorporation and Status of International Human Rights under the FDRE Constitution' in Girmachew Alemu & Sisay Alemahu (eds.) *Ethiopian Human Rights Law Series,* Vol. 2 (2008), pp.42-45.

The third position, as stated earlier, furthers the idea that publication of the full text is a legal requirement. Proponents of this position use both the FDRE Constitution and other laws to make their case. One such legal basis is Art. 71 of the FDRE Constitution.[10] Art. 71 of the Constitution, which provides for the powers and functions of the President of the Republic, in its Sub-Art.(2) stipulates that 'he [the president] shall proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples' Representatives in accordance with the Constitution'. The proponents of this view argue that since the above-cited provision of Art. 71(2) 'is expressed in a mandatory way' publication of a ratified treaty would be a constitutional requirement.[11] They also use Proclamation No. 3/1995 as another legal basis. This Proclamation establishes the Federal *Negarit Gazeta as* the official law gazette of the Federal Government. Art. 2(2) of Proclamation No.3/1995 states: 'All Laws of the Federal Government shall be published in the Federal Negarit Gazeta', while Art.2 (3) of the same proclamation provides that: 'All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazeta'.

This author believes that of the three positions discussed above, the first one is the most acceptable position to hold based on the Ethiopian Constitution. To begin from the making history of the FDRE Constitution, the relevant Minutes of the Constituent Assembly show that the idea of the requirement of publication was never discussed as a legal issue. During the making of the FDRE Constitution, the discussion in this area was rather totally on other matters such as whether treaties ratified before the coming into life of the Constitution should continue to be binding on Ethiopia; whether it would be necessary to include express terms that declare domestic laws that go against ratified treaties as having no effect; and whether loan agreements entered into by the previous government for the purchase of armaments should be expressly excluded from binding Ethiopia or not.[12] It seems to me to be possible to conclude from this that ratification of treaties was considered to bring upon Ethiopia all the obligations emanating from the treaty – internationally as well as nationally – without any additional legal actions. It should be taken that the single act of ratification by the House of Peoples' Representatives has two effects. The first one is that Ethiopia would be bound by the treaty under international law while the second is the treaty ratified henceforth becomes the integral part of the law of the land by virtue of Art. 9(4) of the FDRE Constitution.

For those who are persuaded by the second and/or the third positions described above, I present here briefly why I think those positions are untenable. As regards the third position, their main legal bases are stated above to be Art. 71 of the FDRE Constitution and provisions of Proclamation No. 3/1995. To say that 'since the stipulation made in Art. 71(2) of the FDRE Constitution is mandatory, publication of ratified treaties should also be mandatory' is a misunderstanding of the content of the provision cited.

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[10] See Ibrahim Idris (note 8 above), p. 125.
[11] Id.
[12] See *Minutes of the Ethiopian Constituent Assembly*, Vol.2 (November 1994, Addis Ababa).

The correct understanding of the cited provision should be that the FDRE Constitution here tells us that the president shall discharge the functions of his/her Office (emphasis added). This is absolutely different from saying that treaties ratified should be published or proclaimed in the law gazette. When we turn to the second ground based on Proclamation No.3/1995, I like to begin by saying that whatever may be the merits of the argument based on the latter law, we cannot use the provisions of a proclamation to challenge the contents of the Constitution. We have stated clearly earlier that Art. 9(4) does not imply any requirement other than ratification. Therefore, even if one may be convinced that the provisions of Proclamation No. 3/1995 (cited above) are to the effect that ratified treaties have to be published for them to be enforceable, this shall be considered as a requirement not provided for under the FDRE Constitution.

Moreover, I do not think that we can interpret the relevant provisions of Proclamation No. 3/1995 as requiring publication. There is simply no indication in those provisions to the effect that publication of laws in the Federal *Negarit Gazeta* is a validity requirement. These provisions rather aim at establishing the Federal *Negarit Gazeta* as the official law gazette of the Federal Government (Art. 2(2)), and their main aim is for evidentiary purpose such that a person who ascertains that a law is published in the *Negarit Gazeta* will be required to adduce no further proof about the existence of the law in which case the burden of proof shits to the other party (see Art.2 (3)).

The second view is a bit problematic to establish. Let me state once again that constitutionally speaking any type of publication is not a validity requirement under the Ethiopian Constitution. But even when we look at the prevailing practice, there is no consistency at all. To cite some specific cases, the notice of ratification or accession of some treaties such as the Child Rights Convention (CRC)[13], The African Charter on Human and Peoples' Rights[14], and the African Charter on the Rights and Welfare of the Child[15] have been polished in the Federal *Negarit Gazeta*. However, there is no notice of such ratification or accession published in the case of the International Covenant on Civil and Political Rights (acceded to in 1993), the International Covenant on Economic, Social and Cultural Rights (acceded to in 1993), and the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (acceded to in 1994). Therefore, if we pursue the view that only the treaties whose notice of ratification has been published would be regarded as the integral part of the law of the land, we will risk exclusion of some critically important human rights treaties.

When we look into the decision of the Cassation Bench of the Federal Supreme Court in the case under consideration, this author believes that it has clearly taken a position on the matter by endorsing the view that ratification alone makes a treaty integral part of the law of the land as opposed to the publication of a treaty. Having stated that the CRC is one of the treaties ratified by Ethiopia, the Bench went on to cite directly a provision in the CRC (on the best interests of the child) to determine the applicable

[13] Proclamation No. 10/1992.
[14] Proclamation No. 114/1998.
[15] Proclamation No. 283/2002.

legal rules to settle the case at hand.[16] The general reasoning of the court (the *obiter dicta*) gives a good basis to hold that all ratified treaties, just like the CRC, do become the source of law in Ethiopia.[17] This is believed to officially, at least for the judiciary in Ethiopia, settle the argument in favour of the first position we discussed earlier in this commentary. [18]

3.2. The Role of Courts in the Enforcement of the Constitution

Another contribution of the decision of the Federal Supreme Court Cassation Bench in this case is the application of the provisions of the FDRE Constitution in a case between private parties that pertains to one of the fundamental rights and freedoms protected in the Constitution. It is particularly striking to note that the Cassation Bench did so in a situation that borders setting aside a law (this time a state law) whose black letter provisions sanction clearly the course of action endorsed by the lower Courts. The Cassation Bench reasoned that 'judges at any level of courts must, when they consider matters affecting children, in addition to other laws take into account the mandatory provision on the best interest of the child in Art. 36(2) of the Constitution'.[19] It further stated that any decisions and conventional (customary) practices given in contravention of the Constitution shall be rendered to have no effect.[20]

The above exercise by the Cassation Bench is considered to be of great importance by this author because it helps in turning around what seems to be generally a hands-off approach by our courts at all levels when it comes to settling disputes on the basis of the Constitution. The behavior of the courts is not in fact groundless: it comes from the fact that the FDRE Constitution declares constitutional interpretation shall be done by the House of the Federation, not of courts. Although I myself agree that in some cases it is very difficult to draw the fine line between constitutional interpretation (or settlement of constitutional dispute) and implementation or enforcement or application of the Constitution especially when we deal with the constitutional text, I do also believe that this does not happen all the time. The decision of the Cassation Bench under review took a very instructive huge step forward for the rest of the courts to follow suit.

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[16] See the direct translation of the decision in quote under section II above.
[17] Id.
[18] This decision of the Cassation Bench is particularly important now because of Proclamation No. 454/2005 which makes the interpretations of the Bench to have a binding effect on all Federal and state courts in future similar cases.
[19] See the case briefed under section II above.
[20] Id.

4. Conclusion

Through the analysis of Cassation File No. 23632, attempt is made to show in the above commentary that the issue of publication of ratified treaties is controversial in Ethiopia. It has also been shown that states of the world that even seemingly belong to the 'monist' camp diverge when it comes to the publication of treaties ratified. The three positions that are generally taken by theorists and practitioners in Ethiopia, including judges, have been discussed in this review. I have also argued that of the three positions, the one which maintains that publication in any form is not a validity requirement for domestic application of treaties in Ethiopia aligns with the sense of the FDRE Constitution both from its relevant wording as well as from the understanding of the makers of the Constitution. The decision of the Cassation Bench in File No. 23632 is believed to be a correct reading of the FDRE Constitution. It is therefore hoped that henceforth the controversy around this issue will arise no more.