ADDIS ABABA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

COLLEGE OF LAW AND GOVERNANCE STUDIES

Treaty-Making Power and Procedure in Ethiopia

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A Thesis Submitted in Partial Fulfillment of the Requirements of Master's Degree of Law (LLM) in Human Rights Law

November, 2020

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Approval Sheet

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PREPARED BY: Milka Demeke

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Declaration

I, declare that this thesis is my original work and all sources are acknowledged duly by the author and has never been submitted to any institution.

I have read this thesis and approved it for Examination

Supervisor: Getachew Assefa (PHD)

Acknowledgement

Prima facie, I would like to thank Almighty God for everything he has done throughout my life.

I am sincerely grateful to my advisor Dr Getachew Assefa Woldemariam for his critical constructive advice and patience. Without his guidance I cannot think of completion of this thesis.

My special and deepest gratitude also goes to kaleab Azeze for his countless support throughout the thesis.

I would also like to send my gratitude to Ato Abdi Jibril Ali for his support, cooperation am truly grateful.

My gratitude also goes to Ato Mohammed Habib and Ato Derje Zeleke (Associate professor) for their helpful advice and support.

I am also thankful for the help I was offered in the institutions at the time of data collection process. My special thanks goes to W/ro Lemelem and Ato Hayleselasise Suba for their cooperation during the interview.

Last but not least, I would like to express my deepest gratitude to my families for their unceasing encouragement and support throughout writing this thesis. THANK YOU

Abstract

Following the demise of the Military regime, the national treaty process was arguably regulated by an outdated treaty proclamation ('Proc. No. 25/1988'). This proclamation is incompatible to the institutional arrangement in the 1995 constitution ('FDRE constitution'). Under this backdrop, recently, a new treaty proclamation called International Agreement Making and Ratification Proclamation ('Proc. No. 1024/2017') is promulgated. This thesis aims to determine how this piece of legislation tailors the national treaty making process—in line with the FDRE constitution and the federal form of government. Hence, both theoretical analysis and personal interviews (with the informed officials) were conducted.

The result shows that, Proc. No 1024/2017 clearly ordained all the important treaty issues—which were generally indicated in the FDRE constitution. In addition, this proclamation provides for an elaborate treaty making process that participate regional units. At this point, the researcher suggested a further inquiry—with regards to the feasibility of the underlying stipulations of the proclamation.

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Acronyms

EPRDF -Ethiopian People's Revolutionary Democratic Front

FDRE -Federal Democratic Republic of Ethiopia

HOF- House of Federation

HoPR- House of Peoples Representatives

MOU -Memorandum of Understanding

PDRE-The People's Democratic and Republic of Ethiopia

PP -Prosperity Party

UN-United Nation

VCLT – The 1969 Vienna Convention on the Law of Treaties

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CHAPTER ONE: INTRODUCTION

1.1Background

Any treaty-negotiating state has to freely express its consent to a given international agreement—before the latter becomes binding on the former.[1] On top of this rudimentary principle, it has to be noted that there are domestic legal processes governing treaty making (from initiation up to the incorporation of treaties). The domestic legal process regulating treaty making is intimately related with the respective constitution, legal tradition and form of government.[2]

However, in Ethiopia, the domestic legal process—tailored for a different Constitution and form of government—has been operative for an extended period of time. The repealed Proclamation to Provide for Treaty Making Procedure ('Proc. No. 25/1988') was adopted during the Military regime (that established a unitary form of government), but arguably, this proclamation has been operative even after the promulgation of the FDRE Constitution and the entrenchment of a federal form of government.[3]

Unsurprisingly, there is an apparent discord between the institutional arrangement in the FDRE Constitution and the Proc. No. 25/1988. Article 55(12) of FDRE Constitution generally stipulates that treaties are subject to legislative approval. In contrast, the repealed Proclamation classifies treaties into two: treaties requiring legislative approval and treaties requiring the approval of the now defunct Council of the State.[4] Accordingly, on basis of this Proclamation, the following treaties do not need legislative approval: "Treaties of mutual cooperation on matters of technical nature falling within the competence of government offices and treaties meant to implement prior basic treaties." [5]

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[1] Andrew T. Guzman, 'The Consent Problem in International Law' (2011) 5 <https://escholarship.org/uc/item/04x8x174 > accessed 27 March 2020

[2] Committee of Legal Advisor on Public International law , 'Expression of consent by a State to be bound by treaty: Analytical Report and Country Report' (Council of Europe 2001) <https://rm.coe.int/168004ad95/> accessed 27 November 2019 21-29

[3] Report on Draft Article on International Agreement Making and Ratification Proclamation 8

[4] Proclamation to Provide for Treaty Making Procedure, Art 6(1)(2), Proc. No.25, Neg. Gaz., year 48th, no.5

[5] ibid

Article 45 of the FDRE Constitution envisages a parliamentary system. In such system, the president assumes ceremonial authorities; and usually has no role in treaty negotiations.[6] Accordingly, Article 55(12) of the FDRE Constitution also implicitly implies to mandate treaty negotiations to the executive organ (the Council of Ministers and the Prime Minster).[7] In contrast, the Proc. No. 25/1988 (adopted on the backdrop of a presidential system) vests the president with vital roles in treaty negotiations and conclusions.[8]

As indicated earlier, the Proc. No. 25/1988 was adopted on the backdrop a unitary form of government. In this form of government there is no devolution of power. All powers are concentrated at the center. Hence, it is safe to say, this proclamation could not possibly envisage the involvement of regional units in the treaty making process.

1.2 Literature Review

Domestic literatures on the area of domestic treaty making are relatively meager when compared to the the area in the international arena. The first publication, dealing with treaty makings in Ethiopia, is authored by Aberra Jembere.[9] The purpose of the paper is to demonstrate the significance of the promulgation of the 1955 revised constitution—with respect to the national treaty making practices. Hence, it began its inquiry on treaty making power: On basis of the constitution, who are/is the competent authority to sign and/or ratify international agreement?

The paper has identified different competent authorities. These authorities could conclude treaties on behalf of Ethiopia—after fulfilling all prior requirements.[10] In this respect, the paper also iterates the constitutional requirement of legislative approval.[11] For certain identified

[6] Committee of Legal Advisor on Public International law (n 2) 31-33

[7] The Constitution of the Federal Democratic Republic of Ethiopia (FDRE constitution), 1995, Art 55(12) Proc. No.1, Neg. Gaz., year 1, no.1

[8] Proclamation to Provide for Treaty Making Procedure (n 4) Article 5(1)(2)(1)

[9] Aberra Jembere, 'Treaty Making Power and Supremacy of Treaty in Ethiopia' (1970) 7 Journal of Ethiopian Law 409

[10] ibid 410-412

[11] ibid 413-414

treaties, legislative approval is mandatory.[12] These treaties need to be backed by legislative action, to assume domestic effect.

The other issue discussed in the paper is the status of treaties in Ethiopia. Based on the provisions of the 1955 revised constitution, the author attempts to locate the position of treaties in the "hierarchy of laws" in Ethiopia.[13] In addition, the paper assesses the status of treaties which are concluded prior to the promulgation of the constitution.[14]

Following the fall of the Imperial regime, the 1955 revised constitution was suspended. To capture the treaty making process—during this suspension period—an article was published. The article is written by Shifreaw Wolde Michael.[15] At its beginning, the paper examines the fate of treaties concluded in the previous regime. Thereafter, it discusses the proclamations[16] (adopted after the suspension of the revised constitution) that, inter alia, sought to regulate treaty making. In this regard, the paper clarifies two important issues: (a) which provisional government organs are competent to perform treaty actions—including signing and ratifying treaties, on behalf Ethiopia (b) which treaties are subject to additional domestic procedures (to be precise, deliberation upon by the Council of Ministers).[17]

After the EPRDF (now, PP) took power, a comprehensive article—on treaty making in Ethiopia—is prepared by Getachew Assefa.[18] This paper, inter alia, attempts to present the national treaty making process—in light of the FDRE constitution. Most importantly, it dwells on three important issues: (a) whether all treaties concluded by the executive are subjected to legislative approval, (b) how does treaties got incorporated into the Ethiopian legal system, (c) the role of regional units in treaty making process. Nevertheless, as Getachew himself admitted,

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[12] ibid

[13] ibid 418-426

[14] ibid

[15] Shiferaw Woldemichael, 'Ratification and Status of Treaties in Ethiopia' (1986) 13 Journal of Ethiopian Law 157

[16] Proclamation No. 2/1974, Proclamation No. 110/1977

[17] Shiferaw (n 15) 159-160

[18] Getachew Assefa, 'The Place of International Law in the Ethiopian Legal System' in Zeray Yihedego, Melaku Geboye Desta and Fekermarkos Merso (eds) *Ethiopian Yearbook of International Law 2016* (Springer International Publishing 2017) 61

the provisions of the FDRE constitution do not provide unequivocal answers to these important issues.[19]

The researcher has significant motives for conducting this research. The First is, all of the publications regarding the treaty making process of Ethiopia did not look at the international agreement making and Ratification procedure proclamation 1024/1017. they have focused on prior legislations including the FDRE constitution. This research has aimed to explore this proclamation in line with its contribution to filling the gaps of the constitutional provisions of treaty making provided under the FDRE Constitution. Therefore, this research adds up to existing knowledge. Additionally, it also encourages further researches to be done on the practicality of the areas.

1.3 Statement of the problem

In Ethiopia, treaty making has a long historical pedigree.[20] The country is also party to Vienna Convention on law of treaties 1969 (VCLT). Following the overthrow of the (1974-1991), Ethiopia has adopted the FDRE Constitution and also transited from a unitary to a federal form of government. However, the proclamation to provide for treaty making Proc.no 25/1988 (promulgated during the Military regime that regulated the treaty making process) has been operative even after the enactment of the FDRE constitution.

However, this created discord between the two institutional arrangements which recently led to the promulgation of a Proclamation known as International agreements making and Ratification Procedure Proclamation Pro.No 1024/2017 to have compatible domestic treaty law—with the underlying new developments.[21]

Although, The FDRE constitutions has constituted significant treaty provisions, the constitution had chasm regards to some substantial issues. As also indicated on earlier publication, the constitution has not explicitly put which treaties are subject to legislative approval it only stated explicitly that the HoPR can ratify treaties according to Article 55(12). Not only that, the

[19] ibid 72-77

[20] Ibrahim Idris, 'The Place of International Human Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' (2000) 20 Journal of Ethiopian Law 113, 114

[21] Report on Draft Article on International Agreement Making and Ratification Proclamation (n 3)

constitution hasn't clarified the issue of publication of treaties as there has been a serious of debates on this matter. In addition, the constitution explicitly gave treaty making power to be monopoly of federal states as stated in article 51(8) (barred the participation of regional units).

Against this backdrop, Hence, the thesis would inquire to explore the contribution of the proclamation 1024/2017 —in the filling of the underlying "constitutional gap" concerning treaty making.

1.4 Research Questions

The thesis attempts to answer the following questions—in light of Proc.No. 1024/2017

1-Are all treaties (concluded by the executive) subjected to legislative approval?

2-How do treaties incorporate into the domestic legal system? Is publication mandatory?

3-What are the roles of regional units, during treaty making?

1.5 Objectives of the Research

The study provides a critical analysis of Proc. No. 1024/2017 in terms of various issues. First, it will assess the Proclamation's elaboration on the roles of competent organs in the treaty making process. Second, it will attempt to clarify how the Proclamation approaches domestic issue of incorporation of treaties into the domestic legal system. Third, the study will assess—as the country embraces federalism—the Proclamation's stance with regards to the role of regional units in the treaty making.

1.6 Research Method

The research will use both primary and secondary data. With regards to the former, different foreign and domestic legislations, Minutes of the Proclamation, the draft report of the proclamation will be used. In addition, interviews with informed officials will be conducted. On the other hand, with respect to secondary data, the research work will rely on the following sources: books authored by renowned scholars (in the field of international law), journals, websites and research papers.

1.7 Thesis Organization

The thesis is organized into four chapters. Chapter one (this chapter) introduces the chapter and provides the structure of the paper. Chapter two assess the different steps involved in the conclusion and adoption of treaties—based on the domestic laws of selected countries. Chapter three is devoted to the analysis of the International Agreements Making and Ratification Procedure Proclamation No. 1024/2017—in terms of its contribution to the existing domestic legal process, governing treaty makings. Chapter four provides the conclusion of the study.

CHAPTER TWO: TREATY MAKING PROCEDURE UNDER DOMESTIC LAW

2.1 Introduction

There are various definitions of treaty.[22] However, the idiosyncratic feature of a treaty—that distinguishes it from other similar instruments such as Memorandum of Understanding ('MOU')—is its binding nature.[23] In the past times, this binding agreement was limited to regulating certain relations between states (as treaties' only domains were: rules of warfare and diplomatic relations)[24] However, in the present days, treaties have expanded to regulate various 'bilateral and multilateral'[25] relationships amongst States and international organizations.[26]

During the treaty making process, the selection of competent organs (for the task of conclusion of treaties) is left to the domestic legal systems.[27] In this respect, different states have adopted different approaches.[28] In addition, different steps involved in treaty makings are also regulated by domestic legal systems.

This chapter discusses the different steps involved in treaty making under the Kenyan and the Egyptian treaty laws and practice. The Kenyan legal system mainly reflects the Westminster tradition in the treaty making process, while the Egyptian system is influenced by both Westminster and Continental traditions. The justification behind choosing Egypt and Kenya is because these countries have mixed legal traditions (Egypt elements of common law, Islamic and civil law: Kenya based on English common law as well as civil law and the country's customary

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[22] Paul Reuter, *Introduction to the law of Treaties* (Jose Mico and peter Haggenmacher trs, Routledge 1995) 29

[23] Enzo Cannizzaro (ed), *The present Future of Jus cogens* (Sapienza Universita Editrice 2015) 12

[24] Rebecca M.M Wallace, International Law (4th edn, Sweet & Maxwell 2002) 34-38

[25] Bilateral treaties are agreements which are concluded between two international contracting parties; meanwhile, multi-lateral treaties are concluded by more than two international contracting parties. See: Deolu, Fawehinmi., 'Treaties and Contemporary International Law' <https://www.academia.edu/7109539/treaties_and_contemporary international law > accessed on 16 November 2019. See also: Claude Schnker, *Practical Guide to International Treaties* (Swithzerland Fedral Department of Foregin Affirs 2015) 4-7

[26] Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann (eds*), Making Treaties Work: Human Rights Environment and Arms control* (Cambridge University press 2007) 3 see also: Jan Klabbers, *The Concept of Treaty in International law* (Kluwer Law International 1998) 48

[27] Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 908

[28] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 178

law)[29] us that of Ethiopian legal system since it has been shaped by different legal traditions.[30] Additionally, there geographic location was also taken under consideration. Hence, this chapter will serve as a resourceful backdrop—for the main theme of the research.

2.2 Full Power for Negotiation and Signing of Treaties, Credentials for Participation in International Conferences

Treaty-making refers to the process starting from negotiation up to conclusion of a given international agreement.[31] The domestic legal mechanisms aimed at regulating this process are not identical. Each legal system have its own unique treaty making process—as compatible to its government form , legal system, economic capacity and geographic location.[32]

On behalf of a state, a person may negotiate or conclude a treaty if (a) she holds full powers, or (b) if, from practice of the given states or from other circumstances, it can be assumed that she enjoys full power.[33]These alternative requirements are meant to ensure state representative that her counterpart has the necessary qualification for performing a given act related to treaty conclusion.[34] With regards to 'full power', the 1969 Vienna Convention on Law of Treaties 1969 ('VCLT') has provided the following definition.

Article 2 (1) (c) of VCLT reads:

> "A document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the to be bound by a treaty, for accomplishing any other act with respect to a treaty."

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[29] https://en.m.wikipedia.org/wiki/List_of_national_legal_systems

[30] Muradu Abdo *Legal History and Traditions* **(**Justice and Legal System Research Institute 2000) 245

[31] Franziska Sucker, 'Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'? 417,418

[32] Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds) *National Treaty Law and Practice* (Martinus Nijhoff 2005) 7

[33] Wallace (n 24) 36

[34] Ulf Linderfalk, *On Interpretation of treaty: A modern international law as expressed in 1969 Vienna convention the Law of treaties* (Springer 2017) 136

The reference to the "competent authority" indicates that, it is up to the domestic legal systems to designate which organ will issue full power. According to the Egyptian treaty practice, the Ministry of Foreign Affairs is the one designated to issue (sign) full powers.[35] In fact, the documents of full powers are made by the Legal and Treaties Department of Ministry of Foreign Affairs.[36] Needless to say, these documents are to be utilized by officials and Ministries that could not sign international agreement—by mere virtue of their authorities.[37] By the international law, Heads of states, governments and foreign ministers ('The Big Three') are considered to possess full powers by the virtue of their official function.[38]

The Kenyan treaty law entrust the Cabinet Secretary to issue full powers.[39] What does the "Cabinet Secretary" refers to? This position could be defined in terms of its function: the Cabinet secretary is entrusted to provide different services to a Cabinet of Ministers (as one organ of the Cabinet office).[40]

On the other hand, it should be noted that, credential is an instrument (similar to full powers) that is used as an evidence for authorization of plenipotentiaries, in the treaty making process.[41] Indeed, credential has less of a value—as compared to "full powers"—in terms of the authority they entrust to the named plenipotentiaries.[42] Nonetheless, it is very essential during multilateral treaty conference.[43] However, both the Kenyan and the Egyptian treaty laws are silent with regards to credentials.

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[35] Nabl Elaraby, Mohammed Gomaa, and Lania Mekhemar, National Treaty Law and Practice: Egypt in Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds) *National Treaty Law and Practice* (Martinus Nijhoff 1977) 235

[36] ibid

[37] Mustefa Isa, 'Treaty Making in Egypt' 2008 4(1) American University Law Review 12, 28

[38] Oliver Dorr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law Treaties A Commentary* (Springer 2012) 129

[39] Peter Maguwani, 'Kenyan Treaty Law and Jurisprudence' [2012] Santa Clara School of Law 1, 14

[40] ibid

[41] Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2007) 56

[42] ibid

[43] ibid

2.3 Evaluation of Treaties

The initial step of treaty making in the international forum is the negotiation stage.[44] In this phase, discussions surrounding the proposed treaty would takes place among states officials and other experts.[45] Indeed, the outcome of this discussion, a proposed treaty, will not be binding automatically. It has to pass the domestic evaluation procedure. This procedure is devised in order to assess the harmony of the proposed treaty with, inter alia, the national interest.[46]

Hence, evaluation of treaties has a paramount importance—in terms of balancing different interests. For instance, it is noted that, some investment treaties are inclined more on protecting the interest of the foreign investors—but, have less concern on the protection of the human rights (of local workers hired by the investors).[47] Hence, it is crucial to evaluate treaties—prior to further treaty actions on the international plane.

In Egypt, all proposed agreements (prior to signature) have to be evaluated by the Permanent Committee for the Drafting and Revision of Treaties and International Agreements.[48] This Committee is composed of officials representing the ministries—that have interest on the given treaty subject matter.[49] In addition, it is chaired by the director of the Legal and Treaties

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[44] Paul C. Szasz, *Environmental Change and International Law*: *New Challenges and Dimensions* (UNU, 1992) s 2 (B)(2)

[45] Tiyanjana Maluwa, 'International Law-Making in the Organization of African Unity: An Overview' (2000) 15 African Journal of International and Comparative Law 201, 207-208

[46] Australian practice could be taken as an example see: New Zealand Law Commission R45 or Parliamentary Paper E 31AG, *The Treaty Making Process Reform and the role of the parliament* (Wellington 1997) 89-93

[47] M. Sornarajah, T*he International Law on Foreign Investment* (Cambridge University Press 2010) 225

See also: S. Ariel Aaronson and JP Chauffou, 'The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?' (World Trade Report 2011 Forum)

< http://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm#fntext3> accessed June 12 2019); Luke Eric Peterson, *Human Right and Bilateral Investment Treaties: Mapping the role of human right law with in The investors state arbitration (*International Centre for Human Rights and Democratic Development 2009*)24-26*

[48] Elaraby, Gomaa, and Mekhemar (n 35) 234

[49] ibid 235

Department of the Ministry of Foreign Affairs.[50] It is to be noted, however, that the Committee could not provide a binding opinion; its role is limited to mere consultations.[51]

On the other hand, in Kenya, the evaluation task is entrusted to the Cabinet.[52] In contrast to the Egyptian approach, the Kenyan law (explicitly) provides the standards by which the evaluation is to be carried out.[53] Accordingly, some of these metrics are presented as follows:

- Whether the proposed the agreement is in harmony to the Constitution
- Whether the proposed agreement promotes "Constitutional values and objectives"
- National Interest Test
- Appraisal of the Compliance Cost

2.4 Singing of Treaties

The voluntary feature of treaty is not shared by other sources of international law. [54] For example, international customary law does not need an explicit consent of states—for its formation.[55]

As it turns out, a state would carry out certain activities before consenting to a given treaty.[56] Most importantly, a state would ascertain the final treaty text—before deciding to express their consent to be bound by it.[57] Eventually, the state would indicate its consent to be bound by a

[50] ibid

[51] Isa (n 37) 24

[52] Republic of Kenya office of the Registrar of Treaties 'Kenya treaties <https://www. treaties.mfa.go.ke/> accessed 20 May 2020

[53] Treaty Making and Ratification Act No. 24/2012, Article 7

[54] Liam Murphy, *What Makes Law – An Introduction to the Philosophy of Law* (Cambridge university Press 2014) 179. See also: Rudiger Wolfrum, 'Source of International Law' [2011] MPEPIL http://opil.ouplaw.com accessed 22 March 2019

[55] Alina Kaczorowska, *Public International Law* (4th edn 2010) 92

[56] Francois Stewart Jones 'Treaties and Treaty Making' (1897) 12 Academy of Political Science 420

[57] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhaoff 2009) 168

given treaty. Commonly, a state consent is communicated through signature or ratification or accession.[58] At this section, we will dwell on signature.

According to domestic law of states, states might allow either simple signature or signature subject to ratification.

As a rule, the Egyptian legal system envisages simple signature only; it does not recognize definitive signatures.[59] What is the difference between these two types of signatures? A simple signature, by itself, does not express consent to be bound by treaty (although it entails certain legal consequences), while definitive signature is viewed as an ultimate expression of consent to a given treaty.[60] Under this backdrop, the Constitution of Egypt vests the President with the authority to sign international agreements.[61] However, this mandate has been delegated to the Ministry of Foreign Affairs and accredited Ambassadors.[62]

On the other hand, the Kenyan treaty law appears to recognize definitive signature—as it could be inferred from Article 2 (1) of the Treaty Making and Ratification Act. This provision defines "signatures" as follows: "[It] means an act whereby the State expresses its **willingness to consent to the text of a treaty…"** (N.B: In Kenya, an international agreement could be signed by the President and other officials (upon production of full powers).[63]

2.5 Ratification of Treaties

As indicated earlier, in Egypt, all signed agreements are (as a rule) subjected to "ratification". According to the Egyptian treaty law and practice, "ratification" is construed as a lengthy domestic procedure, whereby different organs—including the parliament—take part. However, at this point, it should be underscored that such characterization of the ratification process as part of domestic proceedings (involving the parliament) is a "misconception".[64] Strictly speaking,

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[58] Treaty Section of the Office of Legal Affairs, *Treaty hand book* (United Nation 2012) 8

[59] Elaraby, Gomaa, and Mekhemar (n 35) 235

[60] Curtis A. Bradley 'Treaty Signature' <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3088&context=faculty_scholarship>accessed 29 May 2020.

[61] Constitution of Arab Republic of Egypt 1980, Article 151

[62] Elaraby, Gomaa, and Mekhemar (n 35) 237

[63] Maguwani (n 39) 19

[64] Aust (n 28) 103

ratification is an international act (used to express a consent to be bound to treaty) to be performed before the international plane, by a duly authorized state representative. [65] Nonetheless, for the sake of convenience, the thesis will also use the "inaccurate" reference of the term "ratification" (as a domestic proceeding involving the parliament).

In Egypt, the ratification process begins after the submission of the draft agreement to the Legal and Treaty Department.[66] This department is expected to prepare an explanatory memorandum (helpful to clearly fathom the draft agreement), and forward both these documents to the Council of Ministers.[67] Upon the approval of the Council, the draft agreement will be presented before the Parliament (People's Assembly).[68] At this point, it is vital to determine the extent of the mandate of the Parliament.

In the Westminster tradition, the role of the Parliament (during treaty making process) is not as such substantial.[69] Treaties, according to this tradition, do not have any legislative effect by themselves; hence, making of these agreements are "legitimately treated as Executive function."[70] Incidentally, the Parliament's authority is limited to be notified (that a given international agreement is concluded).[71]

As already indicated, the Egyptian legal system contains feature of both Westminster and Continental traditions. However, with regards to the underlying treaty issue, it resembles the Continental tradition. [72] According to Article 151 (1) of the Egyptian Constitution, a published treaty would have a legislative effect—without any further transformation act.

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[65] Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar publishing 2016) 46

[66] Elaraby, Gomaa, and Mekhemar (n 35) 236

[67] ibid

[68] ibid 237

[69] John Harribgton 'Scrutiny and approval the role for Westminster style parliament in Treaty Making' (2006) 55 The International and comparative Law Quarterly 121, 121-122. See also: Inquiry into the Commonwealth's Treaty Making Process (Australian Human Right Commission 2012) www.humanrights.gov.aau accessed June 12 2019)

[70] ibid

[71] ibid

[72] Isa (n 37) 18

Needless to say, in Continental tradition, parliamentary approval is essential—so as not to compromise the principle of separation of power.[73] Accordingly, in Egypt, the parliament has to approve the draft agreement (submitted to it by the Council of Ministers).[74] However, there are exceptions to this rule. International agreements meant to complement or implement an existing treaty are not subjected to parliamentary approval.[75]

On the other hand, the Kenyan treaty law and practice is imbued by Westminster tradition.[76] For that matter, in Kenya, the role of the Parliament (National Assembly) is restricted to mere "consideration" of the proposed agreement which is subjected to ratification.[77] At any rate, it should be remarked that the Kenyan treaty law provides us with an accurate definition of the term "ratification". Article 2 (1) of the Treaty Making and Ratification Act defines ratification as follows: "[It] means the **international act** by which the State signifies its consent to be bound by a treaty and includes acceptance, approval and accession where the treaty so provides."

2.6 Approval and Accession of Treaties

Before directly delving to the Egyptian and Kenyan treaty law/practice, it seems important to provide a rudimentary definition of an "approval" and "accession". An approval is one way of expression of consent to be bound to treaty, and it is also appears to be analogous to ratification—in the sense that the former might be used to bind a state to treaty which is subjected to approval.[78]

Accession is also another means of expression of consent (which is very similar to that of ratification).[79] However, ratification is done by the states, which has signed the treaty text after

[73] Committee of Legal Advisor on Public International law (n 2) 53

[74] Elaraby, Gomaa, and Mekhemar (n 35) 236

[75] ibid

[76] Republic of Kenya office of the Registrar of Treaties (n 52)

[77] ibid

[78] Codification Division of the United Nations Office of Legal Affairs, *Treaty hand book Part III* (United Nation 2013) 92

[79] Kolb (n 65) 49

fruitful negotiations; whereas, the allowance of accession is a practice by which a state that do not took part in the negotiation would be a party to the ensued agreement.[80]

Hence, in Egypt, the rules and procedures—that are meant for ratification process—are also (equally) applicable upon approval proceedings.[81] The same is true in the Kenyan treaty law.[82] Both the Kenyan and Egyptian treaty laws do not make distinctions between ratification and accession, in terms of regulations.[83]

2.7 Reservation to Multilateral Treaties

By inserting reservation, a state party could 'opt out' from the legal effects of identified treaty provisions.[84] Apparently, reservation could not be made in bilateral agreement.[85] Such agreements (involving only two parties) have a feature of contract; hence, all the terms shall be agreed—so that the agreement will assume binding effect.[86] On the other hand, reservation is allowed to be made to multilateral agreements. Indeed, the whole purpose of reservation is, inter alia, related with growing number of state parties to treaties.[87]

In Kenya, a proposed reservation has to be included in the draft agreement as one of its provision.[88] Hence, a given reservation would be subjected to the ordinary domestic

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[80] Judi Wangari 'Treaty Making process under International Law' <http://www.gresham.ac.uk=675432=traety_making > accessed on 28 May 2020

[81] Isa (n 37) 20

[82] Republic of Kenya office of the Registrar of Treaties (n 52)

[83] Elaraby, Gomaa, and Mekhemar (n 35) 38; see also Maguwani (n 39) 22

[84] Fjorda Shqarri 'Reservations to Treaties, Prohibited Reservations and some Unsolved Issued Related to Them' (2015) 6 Mediterranean Journal of Social Sciences 97

[85]Jana Mafteia, ComanVarvara and vasilica Nergut 'The Reservation to Treaty' European Integration Realities and Perspectives [2012] 161,163 <https://www.researchgate.net/publication/231814774> accessed on 16 November 2019

[86] ibid

[87] Roslyn Mololey, 'Incompatible Reservations to Human Right Treaties severability and the problem of state consent' (2004) 5 Melbourne Journal of International Law See also: Lauren A. Marsh, 'Restoring Equilibrium: Maximizing State Consent Through a Modified Severability Regime' Temple Int'L & Comp. L.J. [2015] 89, 97 < http://classic.austlii.edu.au/au/journals/MelbJIL/2004/6.html> accessed on 16 November 2019

[88] Treaty making Ratification Act (n 53) Article 8 (4)

procedures—surrounding treaty ratification.[89] On the other hand, in Egypt, there are special rules aimed at reservations. The Legal and Treaties Department of the Ministry of Foreign Affairs is to be consulted in the formulation of reservations. [90]In addition, this department is expected to prepare the instruments of reservations.[91] According to the practice of Egypt reservation is assigned to be the competence of the executive without involving the parliament.

2.8 Entry into Force, Provisional Application of the Whole or Part of Treaties

The issue of Entry into force of a treaty at is primarily international matter to be determined by the negotiating states.[92] If there is no such an agreement, it is provided that a given treaty shall enter into force upon unanimous consent. [93] On the other hand, provisional application is more complicated procedure.[94] Hence, unlike the issue of entry into force, different municipal law has explicitly attempted to tailor how it will be carried out.[95]

With regards to provisional applications, there are two approaches—worldwide. [96] Under domestic legal system of states some exclude provisional applicability of treaty while others consider it permissible. More often, states which allow automatic implementation of treaties, also accept provisional application as a rule.[97] On the other hand, in Westminster states, provisional application might not be allowed—since it is subjected to the constitutional procedures (surrounding the adoption of treaties).[98] In this respect, both the Egyptian and the Kenyan treaty law/practice appear to adhere to the Westminster tradition. Since in both countries, provisional application is subjected to constitutional procedures (such as prior ratifications).[99]

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[89] Maguwani (n 39) 23

[90] Elaraby, Gomaa, and Mekhemar (n 35) 237

[91] ibid

[92] Shaw (n 27) 925

[93] ibid

[94]Committee of Legal Advisor on Public International law (n 2) 71-72

[95] ibid

[96] Committee of Legal Advisor on Public International law (n 2) 59

[97] ibid

[98] ibid

[99] Elaraby, Gomaa, and Mekhemar (n 35) 238; Maguwani (n 39) 23

2.9 Publication and Registration of Treaties

Article 15 (2) of the Kenyan Treaty Making and Ratification Act stipulates that the Cabinet Secretary is responsible—for publication of a "record of all ratified treaties", on two newspapers. On the basis of this provision, all treaties which are ratified are subjected to publication. However, it does not indicate whether a publication of a mere notification (that a certain treaty is entered into force) or a publication of the entire content of a given treaty is required.

Similarly, the Egyptian treaty law does not address this specific issue.[100] Nevertheless, in contrast to its Kenyan counterpart, it does indicate the specific newspaper—it is the *Official Gazette*—through which a ratified treaty would be published.[101]

Before delving to the Egyptian and Kenyan treaty practice—with regards to registrations, it is important to refer to the UN Charter. Article 102 of this Charter stipulates that all international agreements shall be registered before the United Nations Secretariat. In this respect, in Egypt, it is the Legal and Treaties Department of the Ministry of Foreign Affairs which is responsible for registering an agreement (before the United Nations Secretariat).[102] However, in Kenya, a specific organ with the underlying responsibility is not identified.[103]

2.10 Implementation of Treaties

For a treaty to be implemented, a competent organ that will be in charge of implementing the treaty has to be designated. Different municipal laws have dealt with the aforementioned issues in different ways.[104] Some legal systems centralizes the jurisdiction of the treaty implementation (under single body), while other systems entrust the task to an office interested to the given treaty subject matter.[105]

In Kenya, the implementation of treaties is not centralized; rather, it is entrusted to State department deemed to have an interest on the given treaty subject matter.[106] Yet, the Registrar of

[100] Republic of Kenya office of the Registrar of Treats (n 52)

[101] Elaraby, Gomaa, and Mekhemar (n 35) 239

[102] ibid

[103] Maguwani (n 39) 29

[104] Hollis, Blakeslee and Ederington (n 32) 12-14

[105] ibid

[106] Republic of Kenya office of the Registrar of Treaties (n 52)

Treaties monitors the implementation of treaties by the concerned State department.[107] On the other hand, in Egypt, the implementation of treaties is centralized under the Legal and Treaties Department of the Ministry of Foreign Affairs.[108]

Finally, in order to ensure the implementation of treaties, planning is imperative. A typical plan for implementation of treaties contains, inter alia, the schedule of the implementation, organizational measures and financial commitment.[109] However, both the Egyptian and Kenyan treaty laws are silent regarding these issues.

[107] ibid

[108] Elaraby, Gomaa, and Mekhemar (n 35) 240

[109] Hollis, Blakeslee and Ederington (n 32) 12-14

CHAPTER THREE: TREATY MAKING POWER AND PROCEDURE IN ETHIOPIA

3.1 Introduction

In the previous chapter, we have discussed the different steps involved in the conclusion and adoption of treaties under the Kenyan and the Egyptian treaty laws and practices. These legal systems are imbued by different legal traditions (although they share the same continent). Hence, we have noted certain difference between these municipal laws.

In this chapter, the national treaty law of Ethiopia will be assessed in light of Proc. No. 1024/2017. This Proclamation is promulgated on 7 July 2017.[110] As the needs of a society change over time, the legislation will also be changing along with it.[111] In this regard, it was the adoption of the FDRE Constitution and the establishment of federal form which created discord on institutional arrangement with proc. No 25/1988 which later on necessitated the promulgation of the Proclamation.[112]

3.2 Treaty Making in Ethiopia: Historical Perspective

Treaty making is not novel for Ethiopia. Instead, this country has a long historical pedigree with regards to treaties.[113] Hence, all of the previous Constitutions of Ethiopia—the 1931, the 1955 and the PDRE Constitution—contain provisions dealing with treaty making.

The 1931 Constitution, the first Constitution of Ethiopia, exclusively vests the Emperor with the authority 'to negotiate and ratify all kinds of treaties.'[114] But it was reported that, seldom, the Emperor used to share this prerogative, with the Ministry of foreign affairs.[115] In 1943, the involvement of the Ministry (during treaty making process) was further strengthened by an Imperial order. The order proclaims the delegation of Emperor's power to negotiate treaties, to

[110] International Agreement Making and Ratification Procedure Proclamation 2017, Preamble, Proc. No.1024, Neg. Gaz., year 23rd, no.55 See its preamble

[111] <https://www.reference.com/world-view/purpose-legislation-e5bffd6e833dfb11> accessed on 18 April 2020

[112] Report on Draft Article on International Agreement Making and Ratification Proclamation (n 3) 10

[113] Ibrahim (n 20) 114

[114] Constitution of 1931, Article 14

[115] Getachew Assefa 'The Making and Status of Treaties in Ethiopia as Envisaged by the 1994 Constitution of the Federal Democratic Republic of Ethiopia: A Comparative Approach' (1996) (AAU, Unpublished LLB thesis) 17

the Ministry of Foreign Affairs.[116] Indeed, the ratification of international agreements was still reserved for the Emperor.[117] On the other hand, the role of the parliament appears to be limited to the 'right to be informed'—when a treaty is to be ratified by the Emperor.[118] As discussed earlier, the Kenyan treaty law and practice is imbued by Westminster tradition were the role of the Parliament (National Assembly) is restricted to mere "consideration" of the proposed agreement.[119]Such limited role of a parliament is a feature of Westminster traditions.[120]

Due to internal and external factors, the replacement of the 1931 Constitution became unpreventable. Hence, eventually, the 1955 Revised Constitution of Ethiopia was promulgated—with much more detailed provisions on the issue of treaty making.[121] According to this Constitution, the Emperor retains the authority 'to ratify treaties'.[122] Nevertheless, not all treaties were subjected to ratification. On the basis of Article 30, treaties are classified into the following categories: treaties that do not need 'ratification'; treaties that need ratification; and treaties subjected to parliamentary approval, before ratification. Indeed, the Constitution also enumerated the kinds of treaties that would need approval by the parliament (prior to ratification).[123]

Following the 1974 revolution, the 1955 Revised Constitution was suspended indefinitely. The PDRE Constitution, the successor of the suspended Constitution, was promulgated in 1987—after a long delay.[124] The PDRE Constitution vests the president with the power to conclude treaties, and the Council of the State, a standing body of the *National Shengo* (the parliament), with the authority of approving treaties.[125] These constitutional stipulations were further detailed

[116] ibid 18

[117] ibid

[118] Getachew (n 18) 61 68

[119] Republic of Kenya office of the Registrar of Treaties (n 52)

[120] Robert B. Stewart 'Treaty Making Procedure in the United Kingdom' (1938) 32 The American Political Science Review 655,658-659

[121] ibid

[122] Constitution of 1955, Article 30

[123] ibid

[124]Getachew (n 18) 69-71

[125] Ibrahim (n 20) 118-120 see also The Constitution of the People's Democratic Republic of Ethiopia 1987, Art 82 Art 86 Proc. No. J1 Neg. Gaz., year 47, no.55

by the subsequent Proclamation—Proclamation to provide for Treaty-Making Procedures No. 25/1988. Most importantly, this Proclamation was noted for its classification of treaties into:

(a) International agreements which need the authorization of the Council of Minister ('treaties which fail under the competences of the government office and treaties those implementing basic treaties')[126] (b) International agreements which need the authorization of the Council of state ("basic political and economic treaties, and treaties that include ratification provision").[127]

3.3 Treaty Making under the FDRE Constitution

The FDRE constitution contains provisions dealing with treaty making power. Article 55(12) of the constitution stipulated that the HoPR (the parliament) is responsible for "ratifying" international agreements which are concluded by the executive. This constitutional provision appears to provide division of treaty making powers in Ethiopia (by giving the HoPR to ratify treaties and by giving the executive organ to negotiate and conclude treaties). At this point, however, a question might be raised whether all international agreements are subjected to legislative approval.

The FDRE constitution does not explicitly identify types of treaties which are not subjected to legislative approval. In other words, there is no mention of treaties which would have domestic effect with no parliamentary involvement. Nevertheless, the reading of Article 77(12) of the constitution imply that the executive might be "in trusted" by HoPR with the responsibility to enter into executive agreements (international agreements which doesn't seek legislative approval).[128] So, does the new treaty proclamation recognize executive agreement? Inter alia, this issue would be dealt in this chapter.

3.4 Definition of Treaties in Ethiopia

Generally speaking, a term used to refer the title of an instrument is not decisive as to its status—though the nomenclature might connote some technical attributes.[129] Accordingly, it is submitted that the term 'international agreement' is very generic; meanwhile, the term 'treaty' is often

[126] Proclamation to Provide for Treaty Making Procedure (n 4) Article 6

[127] ibid Article 7

[128] Getachew (n 18) 61 73

[129] Dr.Yubaraj Sangroula, 'International Treaties: Features and Importance from International Law Perspective'(2010) < www.researchgate.net/publication/314454376> accessed 27 November 2019

reserved to written agreements.[130] However, this assertion fails to concur with the national treaty laws of Ethiopia (as it could be inferred from the section of definitions).

The repealed treaty Proclamation (No. 25/1988) uses the term 'treaty' and defines it as follows:

Article 2 sub art.6

> "Treaty means an agreement in **written form**…"

On the other hand, Art 2(7) of the International Agreements Making and Ratification Procedure Proclamation No. 1024/2017 uses the term "international agreement" and defines it as follows:

> International Agreement means a bilateral or multilateral agreement governed by international law and **signed** between another state or three or more states or an agreement concluded between Ethiopia and one or more international organization.

As it could be inferred from the abovementioned provisions, both terminologies ('treaty' and 'international agreement') imply a same instrument—with no difference in form. Hence, in this thesis, for the sake of convenience, these terminologies are used interchangeably.

3.4.1 Full power for Negotiation and Signing of Treaties, Credentials for participation in international conference in Ethiopia

As indicated earlier, the FDRE constitution entrust the executive to negotiate treaties. In this regard, as discussed in the previous chapters, issuance of full powers is deemed to be the foundation whereby negotiations could ensue.[131] The production of full power ensures a state representative that her counterpart has the necessary qualification for performing a given act related to treaty conclusion.

According to Proc. No. 1024/2017, full power shall be issued by the Ministry of Foreign Affairs, and have to be signed by the Prime Minister.[132] In this regard, an agent of governmental department (empowered to enter into international agreements) have to hold an appropriate full

[130] ibid

[131] Wallace (n 24) 234

[132] International Agreement Making and Ratification Procedure Proclamation (n 110) Article 7 (1)

power, to negotiate and sign treaties on behalf of Ethiopia.[133] However, it should also be noted that, there are persons—by mere virtue of their official functions—that could perform "all acts related to treaty conclusions."[134] In accord to this international principle, Article 6 (1) of the proclamation iterates that the Prime Minister and the Foreign Minister could negotiate and conclude international agreements without having to produce full powers.

In addition, Article 6(3) of the proclamation allows dispensation of full powers during the signing of international agreements if the Prime Minister is attendant. Since such practice is used by Ethiopia for an extended period of time.[135] Indeed, such dispensation of full power is envisaged in the Vienna Convention.[136]

However, Proc. No.1024/2017 does not provide any provisions dealing about credential. As already indicated, this document is a vital instrument during multilateral-treaty conferences. Nonetheless, the issue of credentials was neither discussed during the drafting process of the Proclamation (as it could be inferred from the reading of the Minutes).

3.4.2 Evaluation of Treaties in Ethiopia

Proclamation No. 1024/2017 provides provisions meant for an evaluation of a proposed agreement. According to Article 4 sub art 2, the attorney general office shall evaluate a proposed agreement that requires new legislation (for its coming into effect). In this respect, the aim of evaluation is to avoid legal discord.

On the other hand, the Ministry of Foreign Affairs is mandated to evaluate all proposed agreements—in terms of the national interest test (before the latter is forwarded to the parliament).[137] This particular requirement is considered to be one of the main "pre-commitment procedures of democratic States".[138]

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[133] ibid Article 6(2)

[134] Wallace (n 24) 236 see also: Gunther Doekerthe, *Treaty -Making Power in The Commonwealth of Australia (*Martinus Nijhoff 1996) 104

[135] Report on Draft Article on International Agreement Making and Ratification Proclamation (n 3) 9-10

[136] The 1969 Vienna Convention on the Law of Treaties (VCLT) Article 7(1)(b)

[137] International Agreement Making and Ratification Procedure Proclamation (n 110) Article 8 sub art 1

[138] Kurt Taylor Gaubatz, 'Democratic States and Commitment in International Relations' in Beth A. Simmons and Richard H. Steinberg (eds.), *International Law and International Relations* (Cambridge University Press 2006) 44

In the past, there was a widespread view that questions the ability of democratic states to enter into commitments (agreements).[139] The basis of this skepticism lies on the perception that depicts democratic state as an entity controlled "inconstant commons".[140] Nevertheless, recent studies and prominent thinkers have indicated that, democratic states, instead, have features that are suitable for international commitments.[141] In this regard, Machiavelli, a renowned philosopher, has written:

> Confederation are dissolved for the sake of some advantages, and in these republics abide by their agreements far better than do princes. Instances might be citied of treaties broken by princes for a very small advantage, and of treaties which have not been broken by a republic for a very great advantage.[142]

To be precise, what makes democratic states suitable for international commitments? One of the main features of such states is the existence of "multiple levels of democratic domestic politics".[143] Hence, foreign policy preference is separated from the leader preference. The former is tethered with the "national interest" and public approval. As result, the international commitment will actually be deep entrenched—as it accords with the interest of the majority.[144] Therefore, the underlying evaluation—based on 'national interest'—enhances Ethiopia's commitment to international agreements. Hence, such a requirement is not only beneficial for a given state; rather, it is also important for the international community as a whole.

After the evaluation proceedings, a declaration of consent might ensue. In this regard, domestic laws provide who is entitled to express the consent of the state to be bound to a treaty.[145] As already indicated in chapter two, signature and ratification are the common ways of expression of consent before international plane.

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[139] ibid

[140] ibid 47

[141] Gaubatz (n 138) 43

[142] ibid 47 -54

[143] ibid

[144] ibid

[145] Committee of Legal Advisor on Public International law (n 2) 22

3.4.3 The Signing of Treaties in Ethiopia

Article 8 (2) of the proclamation states that, the signing of international agreements—which are inscribed in Amharic—shall be determined by regulation. This provision is however different from the Amharic version. The Amharic states that '**የሁለትዮሽ ስምምንቶች**…' explicitly which might connote to mean that the provision exclude multilateral treaties. contrary, according to the intention of the legislatures in the minute of the proclamation, this provision is put to signify the importance of inscribing agreements in the working language. The discussion on the minute also use the term '**ስምምንቶች**...' in general without any distinction among bilateral and multilateral treaties and indicates the importance of the provision in the treaty making process.[146] However, the regulation is yet to be pronounced.

The other pertinent issue during signing/conclusion of treaties is the role of regional units. Domestic regulation of treaty making is a subset of a state's foreign policy. A federation, based on its foreign policy, could allow its constituent units (political subdivisions of a state) to participate in foreign relation activities, including treaty making. In this regard, a constituent unit might involve in foreign affairs in two ways: (a) by having a seat in the second chamber, or (b) by "constituent diplomacy" (which is more independent form of involvement in foreign affairs).[147]

> "constituent diplomacy is a means by international activities of a foreign-policy character undertaken by the constituent governments (e.g., states, provinces, cantons, and *Länder*) and local governments (mostly municipalities) of federal countries and decentralized unitary states"[148]

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[146] Minutes on International Agreement Making and Ratification Procedure Proclamation 9

[147] John Kincaid, 'Foreign Relations of Sub-National Unit and Constituent Diplomacy in Federal Systems, Subtheme Papers' (Forum Federations)
<http://www.forumfed.org/pubs/stg.kinkaid > accessed 19 April 2020

[148] John Kincaid 'comparative observations on the international activities of constituent governments' in Ferran Requejo (eds), *Foreign policy of Constituents' units at the beginning of 21st century* (Barcelona 2010) 15

Nowadays, constituent diplomacy is "blooming" across nations.[149] This record is attributable to two main factors. The first factor is connected with the rapid decentralizations of foreign relation competence.[150] Meanwhile, the other factor is the impact of globalization.[151]

The supporters of the underlying decentralizations claim that there are several disadvantages with centralized foreign relation competence. One of such disadvantages is the risk that the central government might—under the guise of foreign affairs—infringe upon the power of constituent units by entering into treaties—on matters which are constitutionally assigned to the latter.[152] Indeed, this risk is not groundless.

In Ethiopia, for instance, the federal government has been engaged in concluding international agreements—on areas which are made the competence of the constituent units.[153] In this regard, one author has described the situation as follow;

> As the treaty analysis demonstrates the federal government concluded bilateral and multilateral treaties which may affect the power and interest of the regional governments. Some treaties are concluded on the residual powers of constituent units. There are also some treaties like double tax avoidance treaties the subject matter of which may affect the exclusive powers of the regional governments. Concurrent powers of the region are also subjected to international agreements. Therefore all forms of power allocated to the regional government are touched and affected by the treaty making power of the federal government.[154]

Even worse, such infringement could have a domino effect. Usually, each constituent unit would have different socioeconomic priorities (within the span of their jurisdiction). Hence, these

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[149] Tsefaye Assefa 'Federalism in Ethiopia and Foreign Relations: Regional States Diplomacy' (2012) 3:1 Oromia Law Journal 6-9

[150] ibid

[151] ibid

[152] Kincaid (n 147)

[153] Yeheyis G/Tsadik 'The Role of Constituent Unites in Foreign Affairs in Ethiopia' (AAU, unpublished M.A Thesis 2016) 57

[154] Zelalem Eshetu, 'Treaty Making Power under the Ethiopian Federal System: A Comparative Study' (Ethiopian Civil Service University, unpublished LL.M Thesis 2012)

priorities will be disregarded, if the central government enters into international agreement—without allowing the participation of constituent units, in the process.[155]

As indicated earlier, the international backdrop is another reason for the blooming of constituent diplomacy. As we all know, we are in the era of globalization. This period is marked with a tendency for integration of goods and peoples across the whole world. Inter alia, this tendency has changed the perception of political process.[156] As the field of international plane is expanding and becoming more proximate, the constituent units of a state are pushing for more opportunities to participate in foreign relations.[157];, Within this aura, peoples of constituent units are also becoming aware that, they are better versed in promoting their respective cultures (to the world), and also in attracting international investors (through promotion of their favorable business environment).[158] Hence, in particular, constituent units are pushing their demands for involvement in making of treaties on the underlying matters.[159]

The Ethiopian case cannot be different from other federations, in this regard. The FDRE Constitution provides for a federal form of government.[160] In this type of government, power is shared between the federal government and the states. However, Article 51 sub art 8 of the FDRE Constitution exclusively grants the foreign relations competence (including treaty making) to the federal government. Hence, the HoF (the second chamber) appears to be the only remaining medium through which the regional units could participate in foreign affairs. Nonetheless, this house does not have a mandate to decide on issues of foreign policy.[161]

So, why does the FDRE Constitution thwart any possibility of involvement of constituent units in treaty negotiation and conclusion? Don't such participations have some advantages for Ethiopia? In fact, they have numerous importance. For instance, the constituent units usually seek to communicate and even reach to formal deals with their respective Diasporas (in wide

[155] Kincaid (n 147)

[156] Brian Hocking, 'Regional Government and International affairs: Foreign Policy Problem or Deviant Behavior?' (1986) 41:2 International Law Journal 480-485

[157] ibid

[158] ibid

[159]Tsefaye (n 149) 16

[160] Constitution of the Federal Democratic Republic of Ethiopia 1995 (n 7) Article 1

[161] ibid Article 62

varieties of matters including investments, health and etc.).[162] Besides that, taking into account the close kinship between people in peripheral of Ethiopia and a neighboring country,[163] it would be wise if the respective constituent units were to be formally consulted when the federal government enters into international agreement with the given neighboring country.[164]

The actual practice is quite different from what the FDRE Constitution envisages.[165] There is a *de facto* recognition of both regional states' participation in foreign relations of the federation and 'constituent unit diplomacy'. [166] With regards to the former, more often, the regional states senior officials would represent Ethiopia in meetings with neighboring countries, in boundary related issue.[167] On the other hand, with respect to constituent diplomacy, the regional states often seek to reach "sister-city agreements" with their foreign counter parts.[168] In fact, these activities of the regional states are carried out under the close supervision of the federal government.[169] Under the backdrop of this "de facto recognition", four of the regional states [170]are hesitant to involve in foreign relations at all.[171] Meanwhile, the other states, which decide to pursue foreign relations, lack the appropriate legal and policy framework.[172]

Two arguments might ensue here. The first is disregarding the *'de facto*' practice and dooming it as unconstitutional since it contradicts with the explicit provision of the constitution which has solely granted the power to conclude treaties to the federal states. On the contrary, supporting the '*de facto'* recognition as having a positive significance regards to developing the constitution itself.

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[162] Tsefaye (n 149) 23

[163] For example, we could cite the blood relationship that exists between the indigenous of Gambella and the neighboring South Sudan.

[164]Tsefaye (n 149) 23

[165] ibid 27-34

[166] ibid

[167] Tsefaye (n 149) 91

[168] ibid

[169] ibid

[170] Benishangul-Gumuz, Gambella, Afar and SNNP

[171] Tsefaye (n 149) 40

[172] ibid

As adherent to the significance of participation of regional unit in the treaty making process and also the blooming era of constituent diplomacy throughout the world, the researcher also holds the stance of the second argument. Its precarious to be stagnant and trying to keep the time in harmony with the constitution. Instead we should permit such practice to grow our constitution so that it could be in harmony with the current time.

So, what is the approach of the International Agreements Making and Ratification Procedure Proclamation with regards to the roles of regional states? Does it transpose the "de facto recognition" into "de jure recognition"? Or, does it completely outlaw "constituent unit diplomacy" and their involvement in foreign relations of the federation (citing the Constitution)?

Article 5 of the Proclamation regulates the underlying issue. Accordingly, the sub article 1 indicates that the federal government may authorize a government official of a regional state to sign a given international agreement that meant to implement a ratified international agreement. The importance of this provision was questioned, during the drafting stage.[173] The response of the drafting committee is presented as follow;

> …after the conclusion of corporation treaties, what would usually follow is the signing of sister-city agreements. In such agreements the involvement of the regional states is imperative. In fact, according to the FDRE Constitution, the signing of international agreements is reserved for the federal government. Nevertheless, since the country has a federal form of government, the involvement of regional states is inevitable during implementation of such agreements.[174]

According to the aforementioned statements, the fact that the country adheres to a federal form of government necessitates the participation of the regional state in implementation of certain ratified agreements. In addition, Article 5 sub art 2 of the Proclamation requires prior consultation of regional states before the signing of international agreement whose implementation needs "administrative support of the regional states". This provision is meant for establishing a system whereby the view of the regional sates—on such international

[173] Minutes on International Agreement Making and Ratification Procedure Proclamation (n 146) 5

[174] ibid 7-8

agreements—could be gained.[175] To sum up, it could be said that the Proclamation has transposed the de facto recognition—with respect to constituent unit diplomacy—into de jure recognition. By virtue of Article 5 sub 1, regional states could *legally* sign sister-city agreements with their foreign counter parts (under the backdrop of cooperation treaty concluded between the federal government and a given foreign country).

On the other hand, the Proclamation seems to define the situations whereby the regional sates could have a role in foreign relations of the federation.[176] Accordingly, the role is set to be forwarding informed opinion with regards to treaties which requires the administrative support of the regional sates for their implementation. Nevertheless, till now, there hasn't been a single occasion wherein a regional unit was invited—at a given treaty making process—so that it could forward its informed opinion.[177]

3.4.4 Ratification of Treaties in Ethiopia

It is indicated that, the role of a given legislature is interlinked with the effect of a treaty in the respective domestic legal system.[178] If a treaty by itself entails modification of the existing domestic laws, the involvement of parliament (in the treaty making process) will be significant (it has to approve the agreement). Apparently, such role of parliament is necessitated to vindicate the principle of separation of powers.[179] On the other hand, if the treaty by itself could not have domestic effect, the involvement of parliament will be very minimal.[180]

From the careful reading of the FDRE Constitution and the Minute of the International Agreements Making and Ratification Procedure Proclamation, it could be surmised that, Ethiopia requires parliamentary approval as a rule. Article 9 sub art 4 of the FDRE Constitution stipulates that, "all international agreements ratified by Ethiopia are an integral part of the law of the land." Hence, this stipulation makes it clear that, treaties—upon the approval of the parliament—would

[175] Report on Draft Article on International Agreement Making and Ratification Proclamation (n 3) 2

[176] International Agreement Making and Ratification Procedure Proclamation (n 110) Article 5(2)

[177] Interview with Ato Hayleselasise Suba Legal Directorate under the Ministry of Foreign Affairs (September 14, 2020)

[178]Committee of Legal Advisor on Public International law (n 2) 52-57

[179] ibid

[180] ibid

have legislative consequences. In other words, the constitution envisages self-executing treaties: treaties which do not need complementary instrument (it might be primary or secondary legislation) for domestic application.

Article 10 of the International agreements making and Ratification Procedure Proclamation is titled "ratification of international agreements". During the drafting stage, there was a sub article, within this provision, which states that certain consensus—such as MOU—shall not be subjected to legislative approval. However, after "massive oppositions", this sub article was erased.[181] The opposition was based on the claim that the draft sub article will "erode the Constitution".[182] Those who opposed the draft sub article argued that the Constitution subjects all treaties to a legislative approval—with no distinction. They have also rebuked the draft sub article to be superfluous.[183] They indicated that the ratification of the underlying consensuses (with no prior involvement of the parliament) could be assumed from the reading of Article 20 (1) of the Proclamation—which provides that the Council of Minster may issue regulations necessary for the implementation of the Proclamation.

The drafting committee was adamant on its stance that the proposed draft sub article would not contradict or compromise the FDRE Constitution. The committee has elaborated that, MOU are not legally binding; hence, there exclusion will not infringe upon the constitutionally bulwarked authority of the parliament.[184] Nonetheless, at last, the committee has relented, for sake of avoidance of confusions. It admits that the insertion of the underlying draft sub article—under the section named "Ratification of International Agreement"—might give an unintended sense of contradiction with the FDRE constitution.[185] It was agreed that the special treatment of consensus (non-binding agreements such as MOU) was to be inscribed in a separate provision. As a result, Article 18 of the Proclamation—titled "other documents"—indicates that such consensuses do not need legislative approval.

[181] Minutes on International Agreement Making and Ratification Procedure Proclamation (n 146) 4-10

[182] ibid 8

[183] ibid

[184] ibid 9

[185] ibid 9-10

Hence, the above mentioned discussions (carried out during the drafting of the Proclamation 1024/2017) clearly indicated that all treaties, in which Ethiopia is signatory, are subjected to legislative approval. We have observed a stern opposition (during the discussions) directed toward a sub article which, allegedly, appears to envisage that some treaties might not need legislative approval. The remonstrance was accepted, and the sub article was to be erased. Taken together, in Ethiopia, there are no exceptions: all treaties have to be presented before parliament so that the former might assume domestic effect.

On the other hand, as already indicated on chapter two, an approval is also one way of expression of consent to be bound by a treaty. The repealed Proclamation implies that approvals should be used with regards to treaties that do not require the involvement of the parliament (for it coming into effect). [186] In contrast, the International Agreements Making and Ratification Procedure Proclamation do not recognize this means of expression of consent.

Accession is also another way of expression of consent to be bound to a treaty—which is very similar to ratification. Hence, Proc. 1024/2017 subjects accession to all the provisions that regulates the ratification procedure. [187] This approach is similar to that of Egyptian and Kenyan treaty laws.

3.4.5Reservation to Multilateral Treaties in Ethiopia

In the International Agreements Making and Ratification Procedure Proclamation, there are only two sub articles dealing with the issue of reservation. The first provision iterates the definition of reservation. [188] The other sub-article is found under the provision titled "Ratification Proclamation". Accordingly, this sub article states that the ratification proclamation shall incorporate reservations made to international agreement.[189]

According to the law the parliament shall "incorporate the reservation on the ratification proclamation" yet, the law fails to clear the cloud on weather it can initiate the reservation. For instance, It's clear that the parliament has more involvement than just mere consultation from the executive about the reservation.

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[186] Proclamation to Provide for Treaty Making Procedure (n 4) Article 6 and 7

[187] International Agreement Making and Ratification Procedure Proclamation (n 110) Article 11 (4)

[188] ibid Article 2(12)

[189] ibid Article 11 (4)

what is missing is the '*Degree of the power of the parliament'* The proclamation is also salient on the role of the executive in reservation of treaties. The practice shows that reservation might be initiated by Ministry of Foreign Affairs and is made by the parliament (its approval is needed), this reflect less of the Westminster tradition . [190]

3.4.6 Provisional Application of the Whole or Part of Treaties in Ethiopia

since the country embraced automatic implementation of treaties[191], we might surmise that provisional application is accepted as rule. However, this is not enough. There are more questions to be answered. Most importantly, to what extent the executive could decide on its own authority to provisionally apply a treaty.[192] Is the executive allowed to unitarily decide on this issue, with no parliamentary approval? States (that allow provisional application, as a rule) have legislation that addresses such procedural queries. [193] Nevertheless, in this respect, the Proclamation is silent.

3.4.7 Publication and Registration of Treaties in Ethiopia

According to Article 9(4) of the FDRE Constitution, "ratified" treaties are considered to be an integral part of the law of the land. Hence, constitutionally speaking, it seems that a publication of treaties is not a requirement (for their domestic effect). Moreover, the fact that the country does not have a firm habit of publishing treaties seems to strengthen the underlying assumption.[194] In this respect, one scholar has also written as follows:

> ….[T]here is no notice of […] 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,

[190] Interview with Ato Hayleselasise Suba Legal Directorate under the Ministry of Foreign Affairs (September 14, 2020) seealso: Committee of Legal Advisor on Public International law (n 2) 68

[191] Constitution of the Federal Democratic Republic of Ethiopia 1995 (n 7) Article 9 sub 4

[192] Kolb (n 65) 57

[193] Committee of Legal Advisor on Public International law (n 2) 72

[194] Getachew Assefa, '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' 23 Journal of Ethiopian Law (2009) 162, 168

> 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.[195]

Nevertheless, there is an opposite assertion. On the basis of article 71 (2) of the FDRE constitution, some authors argues that publication is mandatory precondition for the domestic effect of international agreements.[196] This provision states that the president shall proclaim ratified international agreements in the *Negarit Gazeta*.

So, does the promulgation of the new treaty proclamation solve the aforementioned constitutional debate? Article 11 sub art 1 of the Proclamation requires the parliament to promulgate a ratification proclamation "for an international agreement it ratifies". Which international agreements are subjected to legislative approval? As already discussed, in this regard, the minutes of the new proclamation give us an important clue. To be sure, the researcher has posed the question to the Ministry of Foreign Affairs.

This is what W/ro Lemlem has to say: "All international agreements—except those which aren't legally binding and which do not intend to be regulated by international law—are subjected to legislative approval".[197] So, how could we identify weather a given agreement is binding (governed under international law) or nonbinding? Different countries have different preference on how to manifest their intention to conclude non-binding agreements.[198] Ethiopia adheres to the practice of including express provisions as to the status of the given agreement.[199] For example, in the MoU (signed between Ethiopian and Turkey) there is a provision, under the title of "Legal status and Other Agreement", which reads as follow:

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[195] ibid

[196] Ibrahim (n 20) 125-126

[197] Interview with W/ro Lemelem Trans Boundary Resource Affairs Directorate under the Ministry of Foreign Affairs (September 14, 2020)

[198] Aust (n 28) 33

[199] Interview with W/ro Lemelem Trans Boundary Resource Affairs Directorate under the Ministry of Foreign Affairs (September 14, 2020)

> The MoU Provides for the intention of the Parties to cooperate in the designated areas and does not give rise to obligation under international law. The Parties will implement this MoU in accordance with their domestic laws.[200]

Although such agreements are not binding they are used as "expressions of solidarity" and "willingness to cooperate".[201] In any rate, the important conclusion is that, all international agreements have to be published—since all 'international agreements' are subjected to legislative approval. Indeed, we might inadvertently pronounce non-binding agreement (consensuses such as MoU) as 'international agreements/treaties' (even w/ro Lemelem does so). At the end of the day, however, non-binding agreements *are not* treaties/international agreements.[202] In fact, countries prefer non-binding agreements—because of, inter alia, the absence of formalities surrounding the process of treaty-making. [203] Usually, a non-binding agreement (such as MoU) will be effective upon signature without any addendum procedures (including presentation before parliament and publication). [204]

On the other hand, the parliament has the power to determine the content constituting the ratification proclamation.[205] Hence, the parliament should attach the whole treaty text in the ratification proclamation—when it deems necessary that all of the provisions have to be communicated to the citizens.[206] In other situations, a mere indication that "such and such treaty is ratified" seems to be enough.

In any rate, a question might still be raised about the fate of treaties which are not published. Since, in actual court cases, judges have been applying ratified treaties—which were not published in *Negarit Gazeta.*[207] However, Article 19 (2) of Proc. 1024/2017 might help in clearing the haze. This provision stipulated that, "**no** […] **practice** shall, in so far as it is inconsistent with this Proclamation may be applicable with respect to matters covered under this

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[200] ibid

[201] ibid

[202] International Agreement Making and Ratification Procedure Proclamation (n 110) Article 2(7)

[203] Aust (n 28) 45

[204] ibid

[205] International Agreement Making and Ratification Procedure Proclamation (n 110) Article 11 sub 2

[206] Report on Draft Article on International Agreement Making and Ratification Proclamation (n 3) 2-3

[207] Getachew (194) 169

Proclamation". Accordingly, the previous practice of applying treaties which have not been published in *Negarit Gazeta*, shall not be raised as an excuse—for allowing international agreements to assume domestic effect, before publication.

On the other hand, as already discussed in chapter two, a treaty shall eventually be registered before the Secretariat of the United Nations. In this respect, some municipal legislation opts to iterate this international principle, while others haven't included the issue.[208] The Proclamation is among the latter group .

3.4.8 Implementation of Treaties

In this respect, Article 11 (3) of the International Agreements Making and Ratification Procedure Proclamation implies that it is the mandate of the parliament to designate the implementing organ. Therefore, it could be said that there is no centralized jurisdiction over treaty implementation. Any government organ could be selected by the parliament (no restriction is indicated).

The Proclamation also contains procedures for ensuring the implementation of international agreement. According to article 13 (2), the designated government organ, in cooperation with the Ministry of Foreign Affairs, have to submit a biannual report to the Council of Ministers on the implementation of international agreement.

As already indicated on chapter two, planning the implementation is an additional mechanism which is meant to ensure the implementation of a given treaty. A typical plan for implementation of treaties contains, inter alia, implementation schedule and financial commitments.[209] However, the International Agreements Making and Ratification Procedure Proclamation do not provide any provision related with such issues.

[208] Aust (n 28) 345

[209] Hollis, M.R. Blakeslee and Ederington (n 32) 15

CHAPTER FOUR- CONCLUSION

The FDRE constitution contains provisions dealing about treaty making process. Unsurprisingly, these are general stipulations. More precisely, the constitutional provisions do not provide unequivocal answers to the following vital treaty making issues: (a) whether all treaties concluded by the executive are subjected to legislative approval (b) how does a treaty get incorporated into the Ethiopian legal system (c) the role of regional units in treaty making process. Against this backdrop, recently, a treaty proclamation No.1024/2017 is promulgated. Indeed, this proclamation has contributed in the filling of the underlying constitutional gap concerning treaty making.

There has been academic debate weather all treaties are subject to legislative approval. The proclamation appears to ordain that all treaties have to be presented before parliament for approval. At the same time, the proclamation implied—in the phase of incorporation—all treaties have to be published. In this regard, another research might be necessary to inquire the feasibility of these legal requirements.

The FDRE constitution does not envisage the involvement of regional units in foreign relations. Nonetheless, there was de facto recognition of both (a) regional states participation in foreign relations of the federation and (b) constituent diplomacy. Indeed, these activities were limited. For instance, with respect to constituent unit diplomacy, the states were mostly engaged in signing sister-city agreements. The new proclamation has legalized such transaction. Such legal recognition—which is also in touch with the reality—is instrumental in filling the existing lacuna, in the regulation of treaty making.

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