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Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of the Ethiopian Constitution*

Tsegaye Regassa†

Abstract

This article wrestles with the question of how to bridge the gap between constitutional design and constitutional practice. By implying that the legitimacy of constitutions, along with constitutionalism and efficacy, contributes to the effort to bridge the gap between design and practice, it makes an inquiry into the meaning, sources, and components of constitutional legitimacy. It proposes the need for a process-content-context analysis in order to determine the legitimacy of constitutions. In the examination of the making and legitimacy of the Ethiopian Constitution by using the aforementioned analysis, it contends that the weak 'original' legitimacy that the constitution commands can be redeemed through an emerging 'earned' or 'derivative' legitimacy that can be generated through a number of redemptive constitutional practices among which fidelity to the constitution, especially by the founding generation, stands out as pivotal.

1. Introduction

How do we bridge the gap between constitutional design and constitutional practice? Asked in a more conventional tone familiar among legal scholars, this question can be reframed as follows: how do we reconcile the disparity between the law and the practice? A related question is also the question of how to design a constitution that is legitimate so that, in practice, the gap between law and practice is narrowed, if not entirely filled.

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*An earlier and shorter version of this article was presented at a conference on "Constitutionalism and Human Security in the Horn of Africa" organized by the Inter-Africa Group on 7 August 2008 in Addis Ababa, Ethiopia. The article has benefitted from the reactions from the audience at the conference, especially from those submitted by the discussant, Ato Getachew Assefa, who pointed out the weakest points of the original paper. I am grateful to all of the participants who asked interesting questions and contributed their insightful comments. I am particularly grateful to Ato Getachew who read the piece meticulously and gave me his comments because of which this article, now thoroughly revised, I hope, is better than it looked in its original form.

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These questions all point to the issues of constitutionalism. Needless to say, in the context of Africa in general and Ethiopia in particular, the question of how to bridge the gap between constitutional law and constitutional practice is very important. The question is evocative of concerns with constitutionalism. Constitutionalism and constitution writing is gaining salience in recent years[1]. Interest in writing or rewriting constitutions is on the rise[2]. This is even truer in post-conflict societies, in societies that emerged out of protracted conflicts where the tragedy and subsequent trauma of violent conflicts still reverberate[3]. In such societies, constitutions come primarily (and more immediately) as instruments of truce, as a peace document, or a pact between warring factions[4]. They come as a tool of conflict resolution, a tool of peace making/peace keeping for the present

[1] This salience dispelled the 'constitution-scepticism' that pervaded the era preceding the 1990s. After the collapse of the Soviet Union and the authoritarian regimes in former 'Eastern Bloc' countries, interest in constitutionalism became especially acute in those countries. This also became a pattern in other countries who sought constitutional renovation elsewhere. See Bruce Ackerman, The Future of Liberal Revolution. New Haven, CT: Yale University Press, 1992 for a description of how, with the liberal triumph, constitutionalism became once again prominent. For the salience of constitutionalism and interest in it in the West itself, see for instance, James Fleming, *The New Constitutional Order and the Heartening of Conservative Aspirations*, Fordham L. Review, Vol. 75 (2006) p. 537. See also Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Ambition*, Harvard. Law Review, Vol. 113, p. 29, (1999). See generally also Cass R. Sunstein, Designing Democracy: What Constitutions Do. New York and Oxford: Oxford University Press, (2002).

[2] This is the case in post-communist East and Central Europe. It is also the case in Africa. In Africa, Namibia, South Africa, Uganda, Ethiopia, Eritrea, Puntland (or Northern Somalia) all engaged in constitution-making since 1991.

[3] Afghanistan and Iraq come readily to the mind. But there are others in Africa such as Eritrea, Somalia, Rwanda, Ethiopia, and others. Some commentators, such as John Markakis—who links constitutions to struggles for power among contending political actors, beginning with the bourgeoisie and the monarchs of 18th century Europe--observe that "constitution-making follows the end of foreign and civil wars." See John Markakis, *Federalism and Constitutionalism in the Horn of Africa* in: Constitutionalism and Human Security in the Horn of Africa (Proceedings of a Conference). Addis Ababa: Inter-Africa Group, (2007), p 49.

[4] As such, they stand in contrast to contracts among peoples and between them and their governments. When constitutions are viewed only as pacts, they tend to be an agreement between conflicting factions rather than as covenants among the peoples that these factions say they represent. They mark deals between self-proclaimed representatives of their supposed constituencies. In such circumstances, they serve as an inter-elite "treaty" rather than as an inter-popular covenant that binds a polity together.

and of peace building for the future. They serve as an instrument of conflict transformation[5].

The making and legitimacy of constitutions is of pivotal significance in such societies. At least, it is as important as it is in societies that are being constituted anew as fresh polities. Of course, even in old post-conflict societies, to the extent that they view the post-conflict moment as a moment of rupture and a radical break with the past, because the constitutions mark the remaking of polities, the making and legitimacy of constitutions continue to be as pivotal as they are anywhere else. This is no different in Africa, where recent years witnessed the rewriting of post-independence constitutions in such a way that they can redeem an authoritarian past or they can heal the conflicts that emerged as a consequence of that authoritarian past[6].

Writing or rewriting of constitutions is not a rare phenomenon in Africa. What is rare is implementation, at least to the satisfaction of most of their peoples. The quest for more constitutional practice is what is often called for, more than the quest for a new constitutional writing[7]. But it is a truism that implementation rests not on the beauty of the constitutions written but on the commitment to give effect to the letter and spirit of the constitutions.

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[5] As instruments of conflict resolution, they mark the end of an overt and violent conflict. As tools of conflict transformation, they mark the beginning of new relations on the basis of mutual understanding of what led to the conflict in the first place and in such a way that it can guarantee the protection of the interests that were at stake.

[6] Rwanda is a good example of this. But the recent constitutional 'negotiations' in Kenya, and the interest in amending the constitution in Zimbabwe can also be mentioned as part of the quest for 'redemption' through a constitution.

[7] An-Naim points to this problem of the rift between law and practice in Africa when he pointed out the fact that "the vast majority of first constitutions were actually either suspended or radically altered by military usurpers or single party states within a few years of independence." He attributes this problem to the salience of constitutions without constitutionalism in general, but he also specifically points to the historical fact that the constitutions and the concept of the nation state that they espoused are more externally imposed (be it "voluntarily received", as it was the case in Ethiopia, or otherwise) than evolving "out of the lived experiences and cultural values of African societies" thereby stunting indigenous growth. Abdullahi Ahmed An-Naim (ed), Human Rights Under African Constitutions: Realizing the Promise for Ourselves. Philadelphia: University of Pennsylvania Press, (2003), p. 14.

In the context of Ethiopia, the issue of the making and legitimacy of constitutions is no less important. Although Ethiopia has adopted a new constitution in 1995[8] and has been trekking on the way to implementing it, the legitimacy of the constitution is not without controversies that surround it. There were times when it was said that the constitution is nothing more than the program of the party in power.[9] There were also political parties who sought, if elected, to amend a number of provisions of the constitution[10]. These arguments were only symptomatic of a larger question, the question of legitimacy of the constitution. These questions unveiled the fact that the constitution's legitimacy is not an entirely decontested 'truth'. The question of legitimacy gains importance in Ethiopia also because, as in all other federations, the existence of a legitimate, supreme, and rigid constitution is a vital component of the federal experiment.

This paper is primarily about the making and legitimacy of constitutions. It is about the relation that making and legitimacy have to constitutional implementation. It is about the

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[8] The Constitution was adopted in the constituent assembly on the 8th of December 1994. It came into "full force and effect" as of the 21st of August 1995. (See the Proclamations [issued] to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/ 1995, *Federal Negarit Gazeta* , Year 1, No.1. for this.) Consequently, I refer to the FDRE Constitution as the 1995 constitution throughout this piece. Jon Abbink makes an interesting observation that "[t]he Constitution was published on 12 December 1996, with the imprint '21 August 1995' (the date of inauguration of the FDRE)" although "the reason for the delay is not known." Jon Abbink, *Ethnicity and Constitutionalism in Ethiopia,* Journal of African Law*,* Vol. 41, (1997), p. 166, FN 24.

[9] This is a sentiment shared by many "opposition" politicians. On the wake of the 2005 election, a senior but retired member of the Tigray People's Liberation Front (TPLF) said, in an interview with the Voice of America (Amharic Service), that the constitution is nothing more than TPLF Program, TPLF being a core, founding, and still dominant member of the coalition of ethno-nationalist political organizations broadly known as the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF).

[10] The Coalition for Unity and Democracy (CUD) has had a manifesto in which it maintained that there are provisions of the constitution it seeks to change should it assume power. The ones oft-referred to were article 39(1) (on the right of ethnic groups to secession) and article 40 (3) (on the right to state ownership of land).One notes the fact that these sentiments and interests (one identifying the constitution with the TPLF program and the other calling for the amendment of the core aspects of the constitution)--while can be seen as positive engagements that help enhance the dynamism of the constitution thereby changing it into a 'living constitution'--are both a manifestation of a type of discontent with at least some aspects of the content of the constitution. The discontent, I argue, is a mirror of the lack of original legitimacy that the constitution suffers from.

link between constitutional design[11] (making) and constitutional practice (implementation).The assumption is that the right approach in the making helps foster legitimacy. A better or 'optimal' degree of legitimacy fosters better enforcement. The making and legitimacy better foster fidelity to the constitution. Fidelity makes the constitution not only a "basic law, or a higher law," but "our law"[12]. This in turn helps us engage in the enterprise that Jack Balkin calls redemptive constitutionalism (or redemptive constitutional interpretation[13]).

In this paper, I seek to address myself to the following set of questions: What does constitutional design (the making of constitutions) involve? What does it take to design a legitimate constitution? What are the steps involved? What are the factors that help ensure better constitutional implementation (the practice)? How does the making impinge on the process of redemptive constitutionalism? Of course, all these questions are addressed by drawing from the recent experience of Ethiopia. Thus I will discuss, albeit in an outline format, the making and legitimacy of the Ethiopian Constitution.

I will address these questions in the following order. Following this introduction, in section two, I will discuss the issue of what constitutional design involves. In the third section, I will deal with the issue of what factors foster good constitutional practice. Thus, an attempt will be made to identify the factors that contribute to the effective implementation of constitutions. In section four, I discuss descriptively, the making of the Ethiopian Constitution. In this section, I will also explore the issue of legitimacy of the Ethiopian Constitution. In section five, I discuss the issue related to fidelity to the

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[11] The terms "constitutional design" and "constitution designing" might evoke different notions. Thus the former might be used to refer to the content of the constitution whereas the latter might be used to refer to the process of constitution-making. In this article, both terms are used interchangeably only to refer to the process of constitution-making. For the content, the term "structure" or just "content" is used.

[12] Jack Balkin, *Original Meaning and Constitutional Redemption*, Yale Law School, (Public Law Working Paper No. 140) 24 Constitutional Commentary 1 (2007).

[13] Ibid. Also, see generally his "Abortion and Original Meaning" (Yale Law School Public Law and Legal Theory, Working Paper No. 119), August 2008, esp. pp. 5, 70.

constitution to see whether redemptive constitutional practice (and interpretation) can help better enforce not only the rules of, but also the values and principles behind, the constitution. In section six, an attempt will be made to draw some conclusions.

2. Constitutional Design: What Does It Involve?

Designing a constitution is "more than the arid preparation of a constitutional document."[14] Depending on *the "character" of the polity* for which it is designed, and the model of constitution we adopt for the purpose, the process of constitutional design might take different forms. Often the process involves the structuring or restructuring of the political landscape of a nation. Often it happens at a rapturous moment (signalling a rupture too), a "constitutional moment"[15]. In old polities that have had a chequered past, a new written constitution serves as an instrument that synthesizes both change and continuity, with an accent on the change[16]. In a polity that has a history that current political actors seek to contradict (perhaps because they have supposedly suffered from it)[17], constitutional drafting marks a break with the past.

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[14] Daniel Elazar, *Constitution-making: The Pre-eminently Political Act*, available at http://www.jcpa.org/dje/articles3/constisramer.htm as visited in August 2008. See also Elazar's article with the same title in: Keith G. Banting and Richard Simeon (eds), The Politics of Constitutional Change in Industrial Nations: Redesigning the State. London: Macmillan, (1985), pp. 232-248. See also his Federalism and the Way to Peace. Queens: Center for Inter-governmental Relations, 1994, pp.11-13.

[15] Joseph Weiller, The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays. Cambridge: Cambridge University Press, 1999. P.3. See generally also Andras Sajo, Limiting Government: An Introduction to Constitutionalism. Budapest and New York: Central European University Press, 1999.

[16] This is partly because the continuity is maintained unconsciously to, among others, preserve the core identity, alias the 'national character', of the country, to reaffirm its territorial expanse, to affirm the traditional sources of legitimacy, etc.

[17] This is often the case in countries where history, owing to the multiplicity of historical narratives, is contested, and where revisionist historiography becomes dominant among the makers—as a consequence of which the past is doomed to be thrown away. One can see a typical example of this in the salience of ethno-nationalist histories in Ethiopian and Eritrean nationalist histories in the course of the making of the Ethiopian transition to the 1995 constitution and Eritrean independence respectively.

With regard to 'national character', Daniel Elazar[18] identifies three types of polities, namely 1) those formed through conquest; 2) those formed through evolution; and 3) those formed through design, i.e., 'reflection and choice'.[19] The first category of polities is exemplified by authoritarian and imperial polities that are wielded together by force. In such polities, power is concentrated and structured *hierarchically* at the top of the *pyramid* of which is the (executive) leader. Power is centralized. In such systems, constitutions are often viewed as a *grant* given to the people by the rulers[20]. Consequently, the process of constitution making is relatively easier in this system than in the other two categories of polities. The legitimacy of the exercise of governmental power emanates from the use of force which, under a constitution, is only given a legal basis. Legitimacy of governmental power rests outside of the text of the constitution, often in the efficacy in the mobilization and utilization of military skills[21]. Legitimacy[22] of the constitution rests not on the consent of the people but rather on the political will of

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[18] Daniel Elazar, Federalism and the Way to Peace. Queens: Center for Intergovernmental Relations, 1994, Chapters I and II. See also his "Constitution-making: The Pre-eminently Political Act" pp.2-5

[19] Elazar identifies the three types of polities following the tack of Alexander Hamilton in the Federalist Papers (No.1). See A. Hamilton, James Madison, and John Jay, The Federalist Papers (No.1) (eds C. Rossiter and C. Kesler). New York: Mentor, 1999, p. 1. For Elazar's reference to *The Federalist* No.1, see his Exploring Federalism. Tuscaloosa: University of Alabama Press, 2006 (1987), p.2.

[20] Note however that even in polities where constitutions are more like a contract than a grant, the people "give" themselves a constitution. Consider the example of India and Ireland in this regard. The preamble of the Irish Constitution of 1937 reads as follows: "We the people of Eire, do hereby adopt, enact *and give to ourselves this constitution.*" The Indian Constitution, apparently following the tack of the Irish example, reads: "We the people of India,... in our Constituent Assembly, ... do hereby adopt, enact, *and give to ourselves this constitution.*" Note the idea of the people being the self-giving sovereign here.

[21] Ugo Mattei refers to the importance of the military effectiveness (in the war for independence) of the Eritrean People's Liberation Front (EPLF) as the source of legitimacy, as distinct from a democratic process typified by election or a constitution (which has never been signed into force anyway). See Ugo Mattei, *Patterns of African Constitution in the Making (*unpublished paper presented at the International Conference on African Constitutions at the University of Bologna, 27 July 1998), p. 12, for example, where he says: "In Eritrea elections have been promised but never actually carried on. They have been felt useless. Legitimacy of the leadership is grounded elsewhere, typically in the war. Generally speaking traditional legitimacy and skilful use of force are still the leading legitimating factors in Africa." See the same paper published in **C**ardozo Electronic Law Bulletin (1999) available at: http:www.jus.unitn.it/Cardozo/Review/Constitutional/Mattei.html.

[22] When such is the case, the country becomes an example of a system with a constitution but without constitutionalism. See M.P.Jain, Indian Constitutional Law, (4th ed, 1994). Agra/Nagpur: Wadhwa and Company, Pp.3-4, which is instructive on the distinction between constitutions and constitutionalism.

the rulers or the extent to which the constitutional texts validate the politico-military sources of legitimacy in the country. The authority of the constitutions is compromised to that extent. At best, they will only have an asserted authority in such systems[23].

Returning to Elazar's categories of polities, the second category, the category of those formed *through accident* are *organic polities* that came to be what they are through a long gradual process of history. Constitutions are often made through imperceptible processes, mostly in conventions and incremental legislative enactments and habits. The legitimacy of the constitution and of the power of government rests in these invisible threads of tradition. The constitution-making process does not manifest any rupture. There is hardly a memorable 'constitutional moment' one can out rightly point to. The constitution evolves invisibly. Change happens silently. Nevertheless, the constitution (which is often unwritten) has an exerted authority that binds everyone principally because the vast majority of the people know the "constitution" by heart, or if they are late comers to the polity—like most immigrant communities in the West---,they acquiesce in it.

The third category is a category of polities *formed by design*, i.e., through popular reflection and choice. These are polities in which people, at least theoretically, come together to form the polity and determine the nature, function, and operation of their core governmental structures. In such polities, the making of constitutions involves a (constitutional) choice to be made among negotiating partners. The end result of the process is a written text which is often made fundamental (i.e., constitutive of the governmental institutions) and supreme. The written constitution that emerges out of this process serves, again at least theoretically, as a contract that binds not only the government to the people but people to people. Popular consent is a key factor in these kinds of polities both in the formulation and in the amendment of the constitution.

[23] Walter Murphy distinguishes between constitutions' *asserted* and *exerted* authority to refer to the authority they claim on the one hand and the authority that they actually have on the other, respectively. See his, *Constitutions, Constitutionalism, and Democracy,* in Greenberg et al (eds) Constitutionalism and Democracy: Transitions in the Contemporary World. New York: Oxford University Press, *(*1993), pp. 7-12.

Popular and democratic legitimacy is vital. Participation in the process ('coming to the table of covenant' can be used as a useful metaphor here) is important.

From among these kinds of polities, the ones in the third category are the ones in which the need for a rational legitimacy is predominant. In countries formed through the instrumentality of force, both the government and the constitution hardly need legitimacy apart from the force that created the polity in the first place. In organic polities, the making of the constitution is an unconscious activity. In polities founded by design, however, one needs to make sure that the *process*, the *content*, and the *context* are all optimal for the adoption of the text of the constitution. In other words, the makers should agree on the both the process that led to the production of the constitutional text and the substance of its content. They also must agree on the socio-cultural and political context in which they anticipate the text to apply. Furthermore, they must agree on the values, causes, ideals, and aspirations they seek to promote by/and in the polity they are establishing. Finally, they must agree on the frame they lay down for the government that they seek to set up and run.

In order to achieve these, countries may choose one or more models of constitutions. Elazar[24] identifies five major models of constitutions that are made use of the world over, namely: 1) Constitution as frames of government and protectors of rights (such as those of Anglophone North America); 2) Constitution as code (such as those in Continental Europe and India); 3) Constitution as a revolutionary manifesto (such as those in former Soviet bloc countries and former Yugoslavia); 4) constitution as a political ideal (such as those in Latin American and African countries); and 5) Constitution as adaptation of ancient tradition (such as those in the UK, Israel, Iran)[25].

[24] Elazar, "Constitution-making: the Pre-eminently Political Act", supra *note* 14.

[25] One might add Imperial Ethiopia in the fifth category.

The first two models continue to operate in their home countries, sometimes even having to be transplanted elsewhere[26]. Interest in the third model is subsiding or has subsided since the collapse of the Eastern Bloc countries as most of their constitutions have been replaced by either one of the first two models or by a creative amalgam of values extracted from both. The fourth model is tempered (and often overwhelmed by the drift to the first model) but seems to linger both in Latin America and Africa[27]. The fifth model continues to operate in the UK and Israel[28].

While the choice of the models depends on the objective the makers seek to achieve through the instrumentality of the constitution, the socio-political, cultural, and economic context they are in, and the ideals the makers seek the constitution to embody and immortalize, etc; a country's constitution making process will vary depending on the model adopted. Thus if one chooses one of the first two models, then the process will involve a written constitutional text that serves either as a (general and brief) frame of government or a (detailed, often lengthy) manual of government. (The more the choice tilts to the continental European model, the more the making process ends up becoming an exercise in technical legal professional elegance and finesse whereas the more it tilts toward the Anglophone American model, arguably the less preoccupation with technical legal professional elegance and finesse.[29]) The consequence of having to adopt a written

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[26] Ugo Mattei, a comparativist, observes that the American model—being the strongest of the first category of constitutions—is the most transplanted one. See his *The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions*, Cardozo Electronic Law Bulletin (1995) available at http://www.jus.unitn.it/cardozo/Review/constitutional/Mattei2.html. See also his contribution to Elisabetta Grande (ed), Transplants, Innovation, and Legal Tradition in the Horn of Africa. Torino: L'Harmattan, (1995), ch 3, pp. 111-129. But it is also important to stress that the continental (constitution-as- code) model, especially the German one, is also borrowed and adopted in some East and Central European countries that emerged out of a communist past. It is further important to note that due, in large part, to the globalization trend (especially because of the intensified interconnection through electronic publications), there seems to be a convergence of frames of mind among intellectuals from countries of these varying models.

[27] It is not uncommon for one to hear people quip that the constitution is "an expression of aspirations" even in Ethiopia whose constitution tends to have adopted the first model.

[28] The debate on whether Israel needs to adopt a written constitution and break with its traditionally unwritten but adaptive constitution continues unabated.

[29] One can also conjecture that the more professional, the less political the process becomes.

constitutional text is to methodically and circumspectly determine the mode of preparing the draft, deliberating upon the draft, adopting the draft, and finally ratifying the draft so adopted. This in turn leads us to the steps involved in the designing of a written constitution.

Generally, scholars classify the steps in constitutional design into two: that of *drafting* and *ratification*[30]. More technically, the mechanics of constitution-making might involve three or four steps, namely that of: a) drafting; b) deliberation; c) adoption; and d) ratification. If constitutions have to serve as an instrument of founding a polity by design and if it has to generate a moral, sociological, and legal legitimacy that backs them in the long run, we need to note the following few points.

First, the *drafting process*[31]-- owing to the central significance the question of who should be the makers of the constitution as well as who is in and who is not in the polity---must be inclusive[32] of the choices of the dominant actors. The drafting body so constituted, as a technical body, must be accommodative of all the concerns and be able to capture the visions of all the stakeholders. As a technical work, it benefits from being non-political, although it is often difficult to be politically neutral at such a juncture in the history of a nation. The existence of pre-existing principles on which the "founders" agree upon will aid the drafters by serving as guiding sign posts to the progress of its work[33]. Thus there needs to be an agreed upon terms of reference. Needless to say,

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[30] See, for example, Rais A. Khan and James D. McNiven, An Introduction to Political Science (3rd ed, 1990). Scarborough, Ontario: Nelson Canada, who say "The process of enacting a written constitution is composed of two separate activities: the formulation of the draft and its ratification by the people" at pp. 148-149.

[31] Drafting is often done by an executive body, or a legislative/deliberative body of a pre-constitutional moment. Or it might as well be by a body specially convened to do the drafting. See Khan and McNiven , supra *note* 30, p.149.

[32] Louis Aucoin, a member of the drafting team of the Iraq Constitution is reported to have said: "inclusiveness is key and if the constitution making process is dominated by a particular political faction, it is doomed from the start." (Lecture at the Fletcher School of Law, 2006?).

[33] Such was the case in South Africa where 34 principles were agreed upon by all the parties involved to be heeded to in the making of the final constitution under the 'certification' power of a Constitutional Court

drafting being primarily a technical work, technical professionalism predominates the process at this stage[34].

Secondly, the *deliberation stage* must be broad-based (and thus inclusive), participatory, free, and a two-way traffic. Thus, all the relevant political actors and other stakeholders must be engaged. People must have the basic freedom to speak their mind (and so the pre-political right of expression must be guaranteed), to organize themselves, and be able to participate in the making process. They should also be allowed to make an in-put. As so often is sadly the case, it should not be a process in which the elite rather condescendingly 'educate' the mass[35]. The popular discussion can be done in the form of seminars, workshops, symposia, etc. After such a discussion, a representative group might also discuss the document as enriched by the popular discussion before it finally submits it to adoption by a constitutional assembly or through a popular referendum that ratifies afterwards depending on the process agreed upon for the adoption and ratification.

Thirdly, the *adoption* of the draft document must be done by a body that is fairly representative of all the political actors and other stakeholders. Thus the election that leads up to the constitution of such a constitutive body, the mandate of such a body, and the degree of openness, freedom, and vitality with which such a body makes its deliberations are key to the making of the constitution. Such an institution may complete its task when it approves the draft submitted to it for deliberation. Or it may itself

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that pre-existed the constitution itself. See Alexander Johnston, Sipho Shezi, and Gavin Bradshaw (eds), Constitution-Making in the New South Africa. London and New York: Leicester University Press, (1993), especially pp.1-12; and 54-66, on the earlier part of the constitution-making process, but see also Rights and Constitutionalism: Introduction to the New South African Legal Order (Van Wyk, et al, eds). Lansdowne/Oxford: Juta &Co/ OUP, (1995).

[34] At this stage, among other things, a search for a constitutional ingenuity tried and tested elsewhere is sought. Comparison, a search for an analogue, adaptation of foreign institutions, doctrines, and principles is undertaken. The adaptability and transplant-ability of the same is also explored.

[35] Mattei refers to the process of popular discussion the Eritrean constitution makers had with the people on the draft prepared by the Commission as one in which the former were teaching the latter in a manner that is patronizing. See his "Patterns of African Constitutions in the Making", supra *note* 21, p.9.

complete the process of constitution making when by its adoption of the draft also ratifies it, on behalf of the peoples of the country, as a final constitutional document. If the latter is the case, the members of the constitutional assembly become the founders of the polity. But countries may choose to require a further step.

The fourth stage then will be *ratification* through popular referenda or through the interposition of the legislative assemblies of the units that constitute the larger polity intended to be established through the new constitution. The latter happens if there are units that ante-date the constitution or the polity that the constitution seeks to create.

For the *content* of a constitutional text, drafters might be dependent on a diverse array of sources. The easier choice, but not necessarily the most appropriate and the most effective, will be *borrowing and transplantation* from other countries or the rich realm of international (human rights[36]) law[37]. This guarantees international recognition, acceptance, and the possibility of securing fund (in the form of loans, aid, or otherwise).The other choice is to look to *traditions* of a country, the only problem being that if a polity wants to break with its traditions and chart a new track for itself, there is little we can take from the tradition. A yet other option is to look into the *experiences* (of the immediate past) that led to the process of constitution-making. This option, of course, runs the risk of excessive politicization of the document that will be produced. Often, an *eclectic combination of choices* is done without being glibly syncretistic. But it needs to be underscored that, no matter which choice we make, we need to look into the *social,*

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[36] In more recent years, the guarantee of fundamental (human) rights and freedoms is considered the *sine qua non* of legitimacy of constitutions as a result of which constitution making has to be mindful of them. Borrowing is the traits of the 'have not's: laws flow from dominant systems to less dominant ones. Or so says Alan Watson, Legal Transplants: an Approach to Comparative Law (2nd ed, 1993). Athens, GA: The University of Georgia Press

[37] Note that borrowing and transplantation require a rich capacity to adapt the 'borrowed' values, institutions, doctrines, etc. It also requires compatibility of the host country to the borrowed 'commodity'. Note further that Pierre Legrand argues that transplantation is impossible as we can't borrow the mindset, or the *mentalité*, even when we can transpose the norms, the institutions, and the concomitant procedures, doctrines, etc. See generally Pierre Legrand, *The Impossibility of "Legal Transplants"* Maastricht Journal of European and Comparative Law, Vol. 4, (1997), pp.111 et seq.

moral, cultural, political, and even religious fabric of the society as we contemplate on what should (not) go into the content of the constitution. It is also necessary that we check if the economic facility to back the system is available, or will be available in the long run.

Needless to say, one also needs to make an assessment of the context in which the constitution is anticipated to operate so that it will not be culturally alienated. The constitution needs to be careful in how it deals with traditional sources of legitimacy (such as religion, tradition, or even force), especially in polities where the legal system manifests layers of legal orders (such as the rule of traditional law--alias customary law--, the rule of political law, or the rule of professional law)[38].

As has been hinted at earlier on, constitution making is more than concocting a constitutional text. Indeed, as Elazar says, "constitution-making involves the embodiment of the constitutional traditions of the body politic in appropriate binding rules of the game that properly reflect the polity model, basis, and socio-economic distribution of power."[39] This impels us to be very methodical about the choices we make as to the models of the polity and its constitution, the processes of its making, the substance of its content, and the context in which it applies.

It is important to note that if the process is flawed, the content is hardly looked into. Often, the "baby is thrown with the bathwater". In such circumstances, as I shall argue later, original legitimacy becomes weak. Derivative (or earned) legitimacy—that which is

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[38] I am indebted to Mattei for this classification of legal families in his "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" American Journal of Comparative Law, Vol. 45, (1997) P. 5. According to Mattei, the *rule of professional law* is that which is dominant in the Western legal tradition where the legal professionals (judges, lawyers, etc) "control" or influence the politicians. The *rule of political law* is one that is dominant in the developing countries, countries in transition, where the politics subordinates the law and the former "controls" or influences the latter. The *rule of traditional law* is one in which religious or customary traditions dominate. Most countries of the East such as Japan, China, and large parts of Africa and Latin America are in this category.

[39] Elazar, *supra note*, 14, p.13.

derived from content cum practice (hence derivative) --alone comes to the aid of saving the system. Original legitimacy is absent often because makers do not enjoy a perfect 'constitutional moment'. Often transitions are tumultuous, full of turmoil (perhaps the last stage of an age old conflict, or war) marked by instability, confusion and depression[40], poverty, foreign occupation[41], international pressure, a rigid time line[42], etc.

In these moments, leadership is in dire need. Factions abound. Ambitions are raucous. Political pull and push seems to be commonplace. The passing and the abiding are indistinguishable. Sobriety is rare. Social 'adolescence' tends to be on the rise. The orthodoxy of the victors seeks to gain ground to establish itself as the hegemonic idea in the country. The orthodoxies of the vanquished seek to survive often subverting the new and threatening that, without it, the nation collapses. It is thus important to note that constitution-making, happening as it does in imperfect moments (not to say in the worst of times), is a difficult process that demands creativity, skill, and patience. More importantly, it is a non-ideal time during which an attempt is made to embellish the text by taking note of the crisis situation it is emerging out of while also keeping an eye on designing a project to build a 'more perfect' polity[43].

3. Constitutional Practice: What Factors Determine It?

Constitutional practice, the process of applying a constitutional text to 'real life' situations of a polity, may generally be viewed as the function of the factors that went

[40] Mainly because of the division and polarization between the victors and the vanquished.

[41] Such is the case, for instance, in the case of Iraq since 2004 until the time the new constitution has been in the making.

[42] The transition may have a deadline at which time it must exit the realm by letting the new constitution fill the void. One recalls the transition in Ethiopia to see how the two year time limit for the transition has pressurized the process of constitution-making from 1992 to 1994.

[43] One cannot help thinking about the challenge of law being caught between apology and utopia. For the tension of this type in international law, see Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2nd ed, 2006). Cambridge: Cambridge University Press, especially chps. 1 and 2.

into the constitutional design. But it is more. Often, it is assumed that ratification of a constitutional text spells the culmination of constitution-making process. However, in reality, it is not hard to realize that constitutional practice is partly an extension of constitutional design. In a sense, it is a continuation of the design. For in the process of implementation, constitutions are interpreted, reinforced, reinterpreted, and re-created. (In a sense then, the making of a constitution is a continuous process that never ends.)

The extent to which the design is 'right' of course will have an impact on what the constitutional practice will turn out to look like. If there is a basic agreement on the question of who the makers are (and the extent to which they are representative of the peoples, actors, and groups of a country); on what process the making ought to go through; on what the core contents of the text of the constitutions should look like; and on the extent to which the text has to resonate well with the socio-cultural moorings or contexts, then there will be the likelihood that the process of constitutional practice will go smoothly.

But what are the factors that determine constitutional practice? An interplay of multiple factors contribute to a good constitutional practice. Legitimacy and the entrenchment of constitutionalism can be mentioned as one of the most important factors. The existence of sufficient degree of separation between the constitution and the day to day politics, the dominance of the idea of autonomy of law from politics, the existence of a vibrant positive constitutional culture, the socio-cultural relevance of the content of the constitutional text, the degree of effectiveness and efficiency of constitutional institutions, efficacy (compliance by officials and obeisance by the majority of the public), etc contribute to implementation of constitutions.

But all these factors can be made to fall under the three rubrics of 'legitimacy', 'constitutionalism', and 'efficacy'. The term legitimacy connotes *acceptability*. It is about popular *recognition and acceptance*. It refers to the *belief* among a large number of

people that the constitutional text needs to be obeyed by all[44]. As Wiarda says, in relation to legitimacy of governments or their exercise of power, it is "a wide spread acceptance"[45] of a system. Often, regime legitimacy may be rooted in the political culture of a polity, the "community-held beliefs, feelings, and values that influence political behaviour"[46] which in turn depends on "the knowledge of the way in which the system operates, its personnel and its policies."[47] Traditionally, the three types of legitimacy that Weber identified as "traditional", "charismatic", and "rational", are considered to be, by far, the most descriptive of the sources of regime legitimacy[48].

Shively identifies four major sources of regime legitimacy, namely the capacity of the system to deliver results (e.g. physical security, security from external aggression, economic security, national pride, etc); habit of obedience (not knowing how to behave otherwise, especially when the country is new and loyalty to the founders is the norm); connection to the religion or ethnicity of the majority of the people; or the procedure of decision-making (e.g. democracy)[49]. Legitimacy of a system is also tied to consensus. Consensus, "acceptance of a given political system"[50]—addressed as it is to "the basic rules that define, establish, limit, and channel political power"[51]-- converts "power into

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[44]W. Phillips Shively, Power and Choice: An Introduction to Political Science (6th ed, 1999). Boston: McGraw Hill, P.136.

[45] Howard J. Wiarda, Introduction to Comparative Politics: Concepts and Processes. Belmont, Ca: Wadsworth Publishing Company, (1993). P. 87.

[46] Michael Curtis, "Introduction" in Introduction to Comparative Government by Michael Curtis et al (eds). New York: Harper & Row, (1985), P.6. Curtis further says that political culture also depends on the "ability of people to participate in the political process." Ibid.

[47] *Ibid.*

[48] See generally Max Rehinstein's Max Weber on Law in Economy and Society (2nd ed, 1954) (Trans. By Edward A Shils). Cambridge, MA: Harvard University Press.

[49] W. Phillips Shively, *supra* note 44, pp-137-138.

[50] Bernard E. Brown and Roy C. Macridis, Comparative Politics: Notes and Readings (8th ed, 1996). Belmont, C: Wadsworth Publishing Company. P. 86.

[51] *Ibid.*

authority, and the legal enactments emanating from the government into legitimate orders".[52]

There are varying conceptions of legitimacy. Often, these varying conceptions have led to confusion in relation to the term. Four conceptions of legitimacy may be readily identified: legitimacy as a democratic process; legitimacy as a legal authority; legitimacy as reliability (to produce a just and fair decision); and legitimacy as based on a public reason rooted in shared common humanity. The unclarity over these conceptions and the fact that the concept of legitimacy itself is undertheorized has contributed to the confusion. The many misconceptions and the confusion aside, the legitimacy of constitutions remains to be an issue of key significance.

Constitutions' legitimacy is assumed to emanate ultimately from the sovereignty of the people who, at least theoretically, are the makers. But more particularly, what makes a constitution legitimate? To this question we now turn. The legitimacy of a constitution is rooted in the moral, legal, and sociological foundations. Richard Fallon Jr., for example, argues that while the legitimacy of a constitution is often sought in the legal propriety of its making, a fuller understanding can only come when we explore its sociological and moral bases[53]. As Bilgin argues, "[l]egitimacy of a constitution... requires a genuine social acceptance, where the relevant public reveres and honours both the political intention and expression behind the constitution and legal forms and foundational institutions instituted by the constitution."[54] One can thus maintain, concurring with Calvert, that a constitution's legitimacy comes from its appropriate framing, the authority

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[52] *Ibid.*

[53] Richard H. Fallon, Jr, *Legitimacy and the Constitution,* Harvard Law Review, Vol. 118, No. 6 (2005), pp.1789-1853.

[54] M. Bilgin, *Democratic Legitimacy and Constitutions*, (paper presented at the annual meeting of the Law and Society Association, TBA, Berlin, Germany, July 2007.Unpublished manuscript.)

it commands, the justification it carries, the legality it endows, and the consent it refers to[55].

Constitutions' legitimacy is a matter of degree, not a matter of absence or presence[56]. Over time, legitimacy might have its own ebb and flow. Those constitutions which are born in the context of an overwhelming consensus that engendered the participation of all sectors of the population, and has as a result developed a content that is entirely compatible with the socio-cultural and political context might have a strong *original legitimacy*. Often it is said that no constitution obtains such a strong legitimacy in its formative years. It takes a while until the honour, reverence and allegiance that converts a constitution into a 'scripture' of a sort emerges. But constitutions also gain a legitimacy that emerges as their clauses are implemented to the satisfaction of most of the members of the polity. This kind of legitimacy is an *earned legitimacy*, legitimacy that is derived from a consistent application, and so one derived from fidelity to the text (hence *derivative legitimacy*). This implies to us that we cannot take legitimacy for granted. While those constitutions with a deficit of original legitimacy might earn a derivative legitimacy over time, it is also possible that those with strong original legitimacy might gradually lose it when the constitution's authority is compromised through defiance that goes unpunished.

The second important category of factors for an effective constitutional practice, which is closely related to legitimacy, is the entrenchment of *constitutionalism*. Broadly, constitutionalism can be viewed as a principle that limits the exercise of power through the instrumentality of a constitution that serves as a constraint[57]. Constitutionalism is

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[55] H. Calvert, British Constitutional Law. London: Blackstone Press, (1985), P.35.

[56] Shively , *supra note* 44 above, argues that such is the case for regime legitimacy. p. 137

[57] See Walter Murphy, *Constitutional Interpretation as Constitutional Creation*, (paper given at UC, Irvine, November 1, 2000) on the meaning of *constitutionalism* and its difference from *constitutionism*, which is a mechanical adherence to a constitutional text. One also notes the fact that constitutionalism is not synonymous with constitution although the former often includes the latter. See, M.P. Jain, Indian

more than a dogmatic application of the letter of the constitution. Being also rooted in the wider culture, it requires a mindset of a citizenry who assert their rights under the constitution to tame power; a belief in one's constitutional institutions; and a trust in the fundamental fairness of the constitutional process. For this, apart from the 'right' institutional and structural framework[58], civic education (which political scientists refer to as 'political socialization'[59]) is of help. The extent to which constitutions are divorced from political action (which they seek to control and regulate), and the bigger issue of the autonomy of law from politics is an aspect of the extent to which constitutionalism is entrenched.

The third category of factors relate to the *efficacy* of the constitution. This relates to the capacity to command obedience. This, to a large extent, depends on the strength of the constitutional (and generally, state) institutions. The degree of autonomy, political-neutrality, and effectiveness of such institutions as constitutional interpreters (be it a court or otherwise) are all very important. These things in turn depend on (and contribute to) the extent to which the constitution has an *exerted*, i.e., operative, authority, as opposed to that which is merely *asserted*. The extent to which officials are willing to comply with constitutional norms and the people are willing to obey them is key to the efficacy of the constitutional system. But one now notices how obviously this points back to the issue of legitimacy and constitutionalism.

4. The Making and Legitimacy of The Ethiopian Constitution

Constitutional Law, (4th ed, 1994). Agra/Nagpur: Wadhwa & Co, Pp. 3-4 where he says: "A country may have a 'constitution' but not necessarily 'constitutionalism'".

[58] Separation of powers, rule of law, judicial independence/autonomy, human rights, separation of state and political parties, free media, and others are said to constitute the structural/institutional requirements of constitutionalism.

[59] See Khan and McNiven, *supra note* 30, pp.58-59, 71; Curtis et al (eds), *Introduction to Comparative Government*. New York: Harper& Row Publishers, 1985, pp.6-7; Shively, *supra* note 44, pp 137. They all refer to the concept of 'political culture' referring to the work by Gabriel Almond & Sydney Verba, The Civic Culture, Princeton: Princeton University Press, (1963) who in turn classify cultures into 'parochial', 'subject', and 'participant'.

Ethiopia has had four major written constitutions in the 20th century alone[60]. The first two written constitutions (the second is supposedly only a revised version of the first) of 1931 and 1955 were both Imperial *grants* to the ("beloved") people of Ethiopia. The third, the 1987 PDRE Constitution, was more like a *revolutionary manifesto* with socialist overtones in its fundamental values and was, at least theoretically, made by the "Working Peoples of Ethiopia"[61]. Ethiopia, being an old polity principally formed through military conquest and incorporation of vast lands with diverse peoples with equally diverse linguistic and cultural identities into the Ethiopian empire[62], the source of legitimacy of state power has never been a written constitutional text. It is often said that the key sources of legitimacy in Ethiopia's past were force (conquest, military expansion), religion (i.e. Orthodox Christianity), and tradition (i.e. 'right' genealogy)[63]. Both in the 1974 revolution and in the drift to a half-hearted liberal constitutionalism in the 1990s, there was a declared intent to break with this past and set the country on a 'republican'

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[60] This is without considering the Draft Constitution that was prepared after revising the 1955 constitution on the eve of the 1974 revolution which overtook the process; and the Transitional charter of 1991 which, being the "supreme law of the land"(art 18), served as the interim constitution for the time from 1991-1995. This is also without considering the set of public law legislations that governed the pre-constitutional days of the Derg.

[61] The Preamble of the PDRE Constitution opens with the words: "We the working People of Ethiopia,...". The Constitution of the Peoples' Democratic Republic of Ethiopia. *Negarit Gazeta*, Proc. No. 1/1987 (September 1987).

[62] This fact implies that in Elazar's scheme, Ethiopia is a polity formed by force; but it is also important to note that the traditional core of highland Ethiopia (which is associated with Tigray and Amhara states today) manifested a character of organic polities with a "constitutional culture" that has evolved in myths of Biblical proportions, that also tied the kingdom and its administration to the Solomonic dynasty in a general consonance with a Judeo- Christian tradition.

[63] Ugo Mattei, *The New Ethiopian Constitution: First Thoughts on Ethnic Federalism and the Reception of Western Institutions,* in Elisabetta Grande (ed), Transplants, Innovation, and Legal tradition in the Horn of Africa. Torino:L'Harmattan, (1995), pp. 111-129. This is also in line with the official titles of the supposedly "Solomonic" Ethiopian Emperors which goes, roughly, as follows; "Conquering Lion [marking might, or force] of the Tribe of Judah [marking genealogy and tradition], Elect of God [marking the vital importance of religious anointing to qualify for the throne], ...[the coronation name], King of Kings, Emperor of Ethiopia."

road with a socialist and a liberal touch, respectively, to the democracy that was to be experienced.

The 1995 Constitution (and the Transitional Charter that preceded it) was especially keen on bringing about a rupturous break with the hitherto dominant mode of organizing the polity as a centralized unitary form of government with no recognition to the ethno-linguistic groups that constitute the demographic whole of the Ethiopian polity. It was nothing less than a total restructuring[64].This is mainly because of the recognition of the ethnic diversity and the valorisation of the same by converting the old oppressed ethnic groups into sub-national sovereignties[65].The process culminated in the adoption of a written constitution that envisages the establishment of a federal, secular, human-rights sensitive, democratic republic that is constituted of explicitly ethno-nationalist sub-national units[66]. But what does the process that led to the Constitution look like? How was the Ethiopian Constitution of 1995 made? What kind of legitimacy does it command? We now turn to these questions.

Historical Backdrop. The making of the Ethiopian Constitution had its beginnings in the transitional period which lasted from 1991 to 1995. During this period the public life was governed by the Transitional Period Charter, a brief document of no more than 20 articles

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[64] Perhaps it is in recognition of this restructuring that Wendy James and Donald Donham entitled their re-edited book (now with Esei Kurimoto and Alessandro Triulzi), Remapping Ethiopia: Socialism and After. Oxford/Athens, OH/Addis Ababa: James Currey/ Ohio Univ Press/ AAU Press, (2002). (The first edition was entitled, The Southern Marches of Imperial Ethiopia: Essays in History and Social Anthropology**,** Cambridge: Cambridge University Press, 1986.) Apparently prompted by this, Gunther Schlee's recent article, *Redrawing the Map of the Horn: The Politics of Difference,* Africa, Vol. 73, No.3 (2003), pp. 343-368) also echoes this restructuring. This is not to suggest that there aren't critics who say not much has changed at all, or if there is any change, it is one for the worse. See, for example, Minassie Haile's, "Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's"—*Cucullus non Facit Monachum*" Cardozo Journal of International an Comparative Law, Vol. 13 (2005)

[65] This is done by primarily guaranteeing their right to self-determination in the Transitional Charter in 1991 (article 2) and by extending sovereignty to them in the 1995 constitution (art 8) in addition to reaffirming their right to self-determination (in the now famous/ infamous [?] art 39).

[66] This can be gathered from the constitution's provisions: art 1 (on the name and its federal structure), art. 11 (on secularism), art 8. (on democracy), arts 10 and 13-44 (on human rights), and others.

which served as the interim constitution. The Charter was more like a *pact* negotiated between ethno-nationalist liberation fronts that, through armed struggle, toppled the regime in power until May 1991[67]. As such, it was primarily a peace document, an accord. But it was also more. It aimed at rebuilding the country and restructuring the state democratically[68]. It also sought to mark a break with the past and usher in a new chapter (of respect for human rights, equality, and self-determination, rescue from subjugation, etc) in the history of Ethiopia[69]. The establishment of peace and stability, the ensuring of just peace, the dismantling of the repressive institutions of the preceding regime, and the urge to transit to a democratic order[70] were the major goals intended to be achieved through the Charter.

The Charter readily recognized both individual rights and freedoms (under art 1) and group rights (of "nations, nationalities, and peoples") to self-determination (art 2)[71]. After setting the foreign policy principles of the transition (arts arts 3-4) and acknowledging the right of sub-national entities to directly forge a relation with foreign relief institutions (art 5), it ventured to form a government with a unicameral legislature called "Council of Representatives [hereinafter COR] (with a maximum of 87 members composed of liberation fronts and other organizations) and an Executive organ (made up of a Council

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[67] The fronts posed as "the peace loving and democratic forces". (See the preamble of the Charter, paragraph 6.)

[68] Paragraph 1 of the preamble.

[69] Paragraph 2, Preamble.

[70] This evokes the memory of the twin efforts at de-nazification and democratization of West Germany on the aftermath of WWII as a prelude to the making of the Basic Law. See Donald Kommers, "The Government of West Germany" in Michael Curtis et al (eds), Introduction to Comparative Government. New York: Harper & Row Publishers, (1985) p. 197.

[71] The UDHR was directly endorsed. Civil and political rights such as freedom of association, expression, assembly were explicitly mentioned and guaranteed (art 1). The now divisive issue of the right to secession was tempered by conditions that need to be fulfilled before a group can assert its right to "independence". (Art 2(3)). The conditions are denial, abrogation, or abridging of the rights to identity, culture, history, language, and self-administration. In the words of the Charter (art 2(C)), the right to independence is exercised "when the concerned nation/nationality and people convinced that the above rights are denied,, abridged, or abrogated."

of Ministers and a Head of State acting as a Chairman of the Government) (arts 6-9). Thus a quasi-parliamentary government was set up[72]. More importantly, it envisaged the establishment of a Constitutional Commission [hereinafter Commission] entrusted with the task of drafting a constitution (arts 10-11). Thus the Commission was to prepare the draft and submit it to the Transitional Council of Representatives, who on adopting it, was to present it to the people for discussion. The final draft that is prepared after such a popular discussion was to be adopted by a constituent assembly to be elected for this very purpose (but in accordance with the provisions of the final draft of the Constitution)(art 11).

The Charter went on to state that the transitional government will engage in the rebuilding of war-ravaged infrastructure (art 15), according "special consideration to hitherto neglected and forgotten areas" (art 16), and making efforts to dispel inter-ethnic mistrust and hatred (art 17). The Charter also had arrogated supremacy unto itself (art 18) thereby making itself an interim constitution of a sort. The government formed through the Charter oversaw the drafting of the constitution by statutorily forming the constitutional commission in 1992[73].

It is interesting to note, incidentally, that the Charter was not strong on the matter of courts, their competence, and their role in managing the 'constitutional' equilibrium[74] and that of regional self-governments[75]. It also omitted the issue of charter interpretation. Of

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[72] The COR had the power to make laws and "oversee the work of the Council of Ministers" (art 9).This suggests the paramountcy of the COR thereby rendering it sovereign. This, however, is tempered by the strong power asserted, *de facto*, by the Chairman, alias called officially 'The President' of the country.

[73] Constitutional Commission Establishment Proclamation No. 24/1992 was instrumental in this regard.

[74] There is only one sub-provision for courts in art 9(f) of the Charter which reads as follows: "*The council of Representatives shall...provide for the administration of justice on the basis of the Charter; the Courts shall, in their work, be free from any governmental interference with respect to items provided for in Part One, Article One of the Charter* [i.e., civil and political rights of individuals]." This clearly says little, if any, on whether the courts have the power to engage in 'constitutional' interpretation. Note that it cannot adjudicate cases related to the right to self-determination (under article Two).

[75] The matter of regional self-governments was legally dealt with later in the "National/ Regional Self-Government Establishment Proclamation No.7/1992".

course, for a constitutional instrument of a modest objective (of primarily establishing peace and stability and charting out the route the transition is to take), that should not be taken as too big an omission.

The Making of the Constitution. The process of the making of the 1995 Constitution was principally guided by the provisions in the Transitional Charter. According to the Charter,

> "The Council of Representatives shall constitute the Constitutional commission to draw up a draft constitution. The Constitutional Commission shall submit to the Council of Representatives the draft Constitution."(Article 11)
>
> "Upon adoption of the draft constitution by the Council of Representatives the constitution shall be presented to the people for discussion. The final draft shall be presented for adoption in the constituent assembly to be elected pursuant to the final draft of the Constitution."(Article 12)

These two provisions guided and permeated the constitution making process in Ethiopia. One notes that the issue of the composition of the drafting commission was not detailed in the Charter. One also notes the important role the COR is anticipated to play in the deliberation on the constitutional draft, in addition to its role of establishing the Commission, deciding on the commission's budget, and overseeing its activities.

In 1992, the Constitutional Commission was legally established. Proclamation no. 24/1992, alias "Constitutional Commission Establishment Proclamation", was adopted by the COR. Physically placed in the premises of the Institute of Ethiopian Nationalities[76] (as per article 3), the Commission had the mission of preparing the draft, submitting the same to the COR, presenting the draft as adopted by the COR to the people, incorporating the comments in the final draft as may be deemed necessary, and finally submitting the final draft to the Constituent Assembly (art 4). The tasks (under art 5) included drafting

[76] One cannot help to note that this was also the place where the PDRE Constitution of 1987 was drafted, and speculate on whether there is more continuity than we normally assume.

the text, conducting seminars, symposia, and educational discussions (perhaps with a view to creating the 'festive mood' that attends a 'constitutional moment'), disseminating the draft Constitution to the public, gathering comments (especially from the regions and districts[77]), explaining the draft to the public in the course of the discussions, preparing the final draft, submitting periodic reports to the COR, and others. Moreover, the Commission was given the mission to prepare the draft "*in conformity with the spirit of the Charter*" (art 4). It was obvious that the constitution was meant to be an instrument of advancing the aspirations of those who negotiated the Charter. To that extent, then, it was the extension, a natural historical outgrowth, of the Charter.

The Commission was organized in such a way that it has a 29-members General Assembly (GA), an Executive Committee, and various other (expert) committees (art 6). The composition of the GA was as follows (as per art 7): 7 members from the COR, 7 members representing various political parties, 3 members from Trade Unions, 2 members each from three professional associations (of Teachers, Lawyers, and Health Professionals)[78], 3 members from the Ethiopian Chamber of Commerce, and 3 members representing women[79]. It was not clear if political parties represented in the COR were also to be part of the GA thereby doubling the representation of the dominant party in the COR. The GA was granted the powers and duties vested in the Commission (art 8). So the GA was a proxy for the Commission. The Chairs (both the Chief and the Deputy) and the Secretary of the GA were to be appointed by the COR, and, indeed, were so appointed.

[77] It is interesting that art 5(5) says that the commission has "to receive comments from national/regional and Woreda councils on the draft constitution". This was perhaps meant to make sure that the exercise is not going to take merely a top-down approach.

[78] One wonders why only these three professional associations are singled out for participation in the constitution-drafting process.

[79] It is unclear as to how, and from where, these representatives of women are to be selected.

Steps in the Making. Like it is the case wherever a constitution-making is pondered, the making of the Ethiopian constitution underwent the stages of *drafting, deliberation, adoption, and ratification*. More or less in a manner the proclamation dictates, the drafting process was accomplished in the Commission. In the Commission, as observed by Meaza Ashenafi,

> "debates were lively. The chairperson of the Commission encouraged decisions by consensus, though it was not always possible to reach a unanimous decision. The diversity of the Commission members meant that a great number of interests were represented. Informal lobbying and negotiations were part of the process. Nonetheless, *the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the ruling party, always dominated when an issue came to a vote, as it had the largest delegation."*[80] *(*Italics added.)

In the course of producing the draft, the Commission also consulted a large number of foreign and local experts.[81] In an attempt to benefit from comparison, other countries' constitutions were also referred to[82]. Concept papers that outline various alternatives (of principles, institutions, and systems of government) were prepared and disseminated to the public for discussion[83]. Nevertheless, Meaza concludes, "this should not give the

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[80] Meaza Ashenafi, Ethiopia: Processes of Democratization and Development, in Abdullahi Ahmed An-Naim (ed) Human Rights Under African Constitutions. Philadelphia: University of Pennsylvania, (2003), p. 32. Meaza Ashenafi was an associate (albeit informally) of one of the technical sub-committees (or committee of experts) at the time of the drafting of the constitution. Hence, this information on the inner workings of the Commission.

[81] *Ibid.*

[82] *Ibid.*

[83] *Ibid*. This effort was often aided by, Inter-Africa Group (IAG), a Civil Society Organization active in the process. The IAG helped organize a number of workshops and symposia and published the papers presented in the course of the proceedings. They also published, inter alia, an interesting resource book in Amharic on the old constitutions of Ethiopia (from 1931 to 191) as an Occasional paper in 1993.The title is Ethiopian Constitutions: 1931-1991. Addis Ababa: Inter-Africa Group, 1993. The corpus of the book has, among others, the proclamation that announced the (re)union of Eritrea with Ethiopia, the 1952

impression that the process was fully participatory. Those who were not sympathetic to the transitional government and were dismissive of the whole process did not take part in the consultation; they believed that participation would be "legitimizing" the process. Another group, which was not politically active, was not interested."[84] Meaza is not clear as to which ("other") group was uninterested. The point stands, however, that the process was not fully participatory.

In a similar vein, James C.N. Paul observes that

> "there was little meaningful public participatory debate, especially debate focused on devolution versus ethnic federalism, let alone sovereignty or self-determination. [...], opposition parties withdrew. Instead of debating the content of the constitution, they denounced the legitimacy of the whole project. Just as the EPRDF controlled the Constitutional Commission's work, so it controlled the election, and then the deliberations, of the Constitutional Assembly."[85]

Paul also refers, albeit only tangentially, to the fact that, on assumption of power, the TPLF was instrumental in "establishing an essential foundation for a federal Constitution, creating de facto one-party rule, marginalizing Amhara and Oromo opposition, and liquidating the Eritrean problem."[86] Paul, however, observes that "in view of the

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Constitution of Eritrea, the draft ("abortive") constitution of 1974, and the Proclamation on the ascendancy of the Provisional Military Administrative Council (the Derg) to power.

[84] Meaza Ashenafi, *supra note* 80.

[85] James C.N. Paul, "Ethnicity and the New Constitutional Orders of Ethiopia and Eritrea," in Yash Ghai (ed), Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States. Cambridge: Cambridge University Press, (2000), p. 189.

[86] *Ibid*, p.187. The issue of exclusion of the numerically dominant Oromo and Amhara groups from the constitution-making process is more boldly spelt out by Ugo Mattei who points to the weak popular support the constitution could galvanize among these groups. In his own words, he says, "none of the political and ethnic forces which make the opposition to [...] (EPRDF) had participated in the Constitutional making. All opposition parties, most important, those representing the Amhara and Oromo groups (38 and 35 % respectively) withdrew from the electoral competition. The new constitution is therefore supported politically and ethnically only by the Tigrayan minority which counts less than 10 % of the population." Mattei, *supra* note 63, p. 114.

Constitution's content, it seems regrettable that the processes for making it were so flawed"[87]. It is interesting to note, as shall be argued later, that the content of the Constitution--in spite of the "flaws" associated with the making--is what warrants the project of redemptive constitutional practice.

The draft was subsequently presented to the COR in 1994, and there the first phase, the phase of *drafting*, was completed. At the COR, there was a lengthy discussion on every provision of the draft[88] for almost a month. Most of the sessions of the discussion and the (at times spirited debates) were nationally televised. The discussion was informative in many ways[89]. After the draft was deliberated upon and was eventually adopted by a majority vote in the COR, it was presented by the Commission to the public. Thus, discussions were staged in the *Kebeles*[90]. At the end of the public discussions[91], the second phase, the phase of deliberation, was closed although a new discussion, meant only for adoption, is yet to start in the Constituent Assembly.

The third phase, the phase of *adoption* of the draft Constitution (as enriched by comments from the COR and the people, much less by the latter), started immediately upon the

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[87] Paul, *supra note* 85, p. 189.

[88] There is a voluminous body of compilations of the minutes of the meetings of the COR on the constitution for those of us who would like to learn about the substance of the discussion and about who said what. The details described rather copiously, I assume, are rather staggering. See TGE, *Minutes of the 94th Regular Meeting of the Council of Representatives, April-May, 1994* (Amharic). Addis Ababa: TGE, COR, 1994.

[89] To most of my contemporaries, there was much more fun than something that determines the destiny of the polity for years to come.

[90] In Addis Ababa, school premises were used for the popular discussions. The turnout was low. Interest was at its minimum for a constitutional deliberation. (This is in part based on personal observation of the situation in the Summer of 1994).

[91] Regarding the process of the discussions that led to the adoption of the constitution, John Markakis observes that it was "largely unanticipated", and followed "a brief but intensive period of publicity to mobilize support." He goes on to say that, because the process was rushed, "it is fair to say that not many Ethiopians who live in the countryside have a clear notion of what federalism means, or had the opportunity to express an opinion on its merits. There was simply no time to form a national consensus on the legitimacy of the new political system." See his *Federalism and Constitutionalism in the Horn of Africa*, *supra* note 3, p. 58.

election of the members of the Constituent Assembly. The discussion in the Constituent Assembly was also lengthy. The discussions ended with the adoption of the final draft submitted by the Commission to the Constituent Assembly apparently after incorporating the comments in December 1994. With it ended the third phase and the formal process of constitution-making in Ethiopia. One can take the adoption by the Constituent Assembly as a form of *ratification* of the Constitution by the people albeit only indirectly through their representatives. Consequently, unlike it is the case in other systems, there wasn't a popular ratification of the constitution through *referendum*[92].

Who are the makers? Formal legal analysis aside, who are the real makers of the Constitution? Who are the key actors involved at the drafting, deliberation, and adoption stages of the constitution-making process in Ethiopia? The question of who, the 'political question' (a la Rorty[93]) is important in constitution-making perhaps because, as Elazar says, constitution-making is the "pre-eminently political act"[94]. The answer to the 'who' question requires a substantive research into the identity, the political affiliation, and the educational orientation, etc, of the members that constituted the GA of the Commission, the COR, and the Constituent Assembly. This is not undertaken in the research leading to the writing of this paper. But one can conjecture as to the political-party composition of the COR and the Constituent Assembly; at least one can state without exaggeration that the EPRDF was a dominant partner in both institutions, and so in the entire process[95].

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[92] Ratification through popular referendum, it is argued, would bolster the degree of popular support the constitution now commands. But given the general lack of the festive mood attendant to constitutional moments, and the fact that the process was rather speedy, as Markakis observed, one wonders if the referendum, apart from allowing one more opportunity for participation, could result in a different content.

[93] See generally Richard Rorty, *Who Are We?: Moral Universalism and Economic Triage*, Diogenes, Vol 44 (1996), pp. 5-15.

[94] Elazar, *supra note 14*.

[95] See Meaza, *supra note 80.* See also Markakis, *supra note* 3. This is partly the cause of the discontent seen among some political corners. Not entirely unexpectedly, the discontent undermined legitimacy.

Content of the Text. The Constitution that was so adopted, the FDRE Constitution, came into force in 1995. When it did, it set up a federal polity that imitated the trend to decentralization during the Transitional period. True to the "spirit of the Charter", the rights of "nations, nationalities, and peoples" to self-determination were reaffirmed in article 39 of the FDRE. "Nations, Nationalities, and Peoples" were granted sovereignty (art. 8). It sought to redesign the symbols (e.g. the name[96], flag[97], and anthem[98]) in such a way that they resonate well with the new dispensation. The Constitution recognized equality of all languages but maintained Amharic as a working language of the Federal Government (art 5)[99]. It enshrined the principles of ethnic sovereignty, constitutionalism and constitutional supremacy, human rights, secularism, and transparency and accountability of government as the basic pillars of the constitutional system (arts 8-12). It recognized human rights extensively (arts 13-44). It established a federal political system of nine units and an autonomous city administration of the federal capital (arts 46-52). It established a parliamentary system of government (arts 45; 53-68). It organized a strong executive body composed of a Prime Minister, Council of Ministers, and Ministries who operate under a sovereign parliament and a President who has a

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[96] Article 1 says: that "Federal Democratic Republic of Ethiopia" is the official name.

[97] Article 3 (2) requires that the emblem reflect the *hope of* 'nations, nationalities, and peoples' and religious communities to live in *equality and unity*. (The stress on *equality* and *unity* can, in retrospect, be seen as an attempt to address the concerns of both the South and North in Ethiopia—the South generally specializing in the rhetoric of equality (fear of oppression) and the North generally in the rhetoric of unity (fear of disintegration). This division of rhetorical specialization is explored further in Tsegaye Regassa, "Learning to See through Others' Lens: Issues of Self-determination in Ethiopia [unpublished manuscript: 2007, available with the author, forthcoming].) Art 3(3) declares that states, too, can have their own flags.

[98] Art 4 requires that the national anthem be reflective of the common destiny, the ideals of the constitution, the commitment to live in a democratic order.

[99] In this, the constitution marked more continuity than change, as already in the PDRE Constitution of 1987, at least formally speaking, all languages were granted equality, and Amharic was the working language of the federal government. But note also the difference between Amharic being the working language all over the country on the one hand and its being the working language of the Federal Government. For a detailed discussion on this see Aberra Degefa, *The Scope of Rights of National Minorities under the Constitution of the Federal Democratic Republic of Ethiopia*. Addis Ababa: Faculty of Law (Constitutional Law Series, Vol. I), Addis Ababa University Press, (2008). See also his, *Equal Recognition of All Ethiopian Languages: Some Observations Concerning the Broadcast Media*, Jimma University Law Journal, Vol. 1, No 2 (2008), pp. 223-245.

predominantly ceremonial role (Arts 69-77)[100]. A largely non-legislative upper house that is in charge, among other things, of constitutional interpretation (aided by a Constitutional Inquiry Council) is established (art 62; 82-84)[101]. A three-tiered, dual system of federal and state judiciaries is set up (arts 78-81). A set of policy objectives and directive principles that serve as the conscience of the system are also incorporated in arts 85-92. Provisions on emergency powers (art 93), finances, expenditure and revenue responsibilities (arts 94-100), and amendment (104-105) were included. The ideally non-partisan institutions of the Auditor General (101), the National Election Board (102), Population and Census Commission (103) were all established.

In many ways, the Constitution is like other constitutions of the world. Its major distinctive features are its recognition of secession, its unique process of constitutional adjudication, the use of ethno-linguistic criteria as the predominant basis of carving the states that constitute the federation[102], the little, if any, involvement of the upper house in legislation, its ready recognition of indigenous and religious law systems on matters related to personal and family issues[103].

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[100] This is not to underestimate the significant role of the Office of the President in filling potential power vacuum in times of constitutional/electoral crises that leads to dissolution of Parliament. See Tsegaye Regassa, "Beyond and Above the Heat of Politics: The Office of the President of the Republic in the Ethiopian Constitutional System" (Unpublished manuscript: 2007, available with the author, forthcoming).

[101] This is perhaps an Ethiopian novelty in the realm of contemporary constitutional design.

[102] Jon Abbink, *supra note* 8, p. 166, maintains that "The main clauses of the Ethiopian Constitution, which make it *certainly a very original document*, refer to ethnicity and the federal order." While, in deed there is a degree of boldness and novelty (much more the former than the latter) to the constitution in this regard, one notes that the former Soviet Union and the Federal Republic of Yugoslavia had a more or less similar arrangement—and to this extent, the originality fades.

[103] See Tsegaye Regassa, *Ethnic Federalism and the Right to Self-determination as a Constitutional Legal Solution to the problem of Multi-ethnic Societies: The Case of Ethiopia*, (Unpublished LL.M Thesis: Faculty of Law, University of Amsterdam, 2001) for details on the distinctive features.

Mattei[104] charges that the Constitution is "a new wall made of old imported bricks"[105] He argues that regrettably, squandering the opportunity to be "a frontrunner of a new and ripe African Constitutional tradition", Ethiopia attempted to "import the strongest [i.e., American] version of the Western conception of the rule of law."[106] Moreover, he argues that if we stamp out all the references to Ethiopia in articles 1, 28, 32(1), 39, 40, 41, 44, 47, etc, it will be revealed that the constitution can be a model "apt to fit all [...] realities".[107] Furthermore, in a manner that smacks of condescending attitude, he comments that the Constitution evokes the implication that there is an intellectual dependence on the West and a blunt form of cultural imperialism that pervades the state of affairs in post-colonial Africa[108]. Consequently, he sees nothing new in, or autochthonously Ethiopian about, the Constitution except the provisions on prohibition of applying the statute of limitations for offence of genocide (art 28) and the right to secession (art 39(1)). He asserts that the rest of the corpus of the text is a mere transplantation (from the US, UK, Germany, Scandinavia, and international human rights law). He is thus sceptical of the applicability of such a transplanted law in a legal and cultural context that does not resonate well with the 'imported' values[109].

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[104] Ugo Mattei, *supra note* 63, p.112. He further charges that there is hardly a reason to be sure that the wall will be solid because "given the bricks of which it is made, there is not much to be optimistic about" (p.113) in this regard. He also says that this is "an academic constitution" (p.116). Further on (on p.117), he observes that "the treasure hunt for typically Ethiopian (or even only African) provisions gives indeed meagre results" thereby making the constitution suitable "for a European or for a Northern American country" only by deleting some provisions that make explicit reference to Ethiopia (e.g. arts 32(1), 40(5), 41, 44; arts 8, 28, 39 (1), 40, 62(1), 78 (5), etc).

[105] *Ibid.*

[106] *Ibid.*

[107] *Ibid*, p. 115.

[108] *Ibid*, pp. 112, 113, and 118.

[109] That they do not resonate well with each other is more an assumption than an empirically validated claim. Mattei, *supra* note 63, pp.6-7 refers to the tolerance and even formal recognition of customary and religious laws in arts 34(5) and 78(5), respectively, as "rather braggy" because the power between official and unofficial law is not balanced enough to allow the latter to be effectively applied.

Mattei's criticism of the content of the Constitution as inappropriately imported can be countered by, among other things, reference to the fact that modernity has had a disproportionately imbalanced geographic reach as a consequence of which, to a large extent, there is the lure of modernity among the countries of the global South. In these latter countries, borrowing is thus ubiquitous. Given that centuries of colonization in the wider Africa and decades of modernization-driven imitation of the West in Ethiopia, most of the autochthonous traditions are either stunted or on the wane receding into non-existence[110]. In the course of the colonial encounter, "customary" laws are often viewed as the underdeveloped "primitive", "other" laws that are anachronistic and unfit to the age of political correctness in constitution writing[111]. This state of affairs is further reinforced by the fact that constitution-makers hardly enjoy a perfect 'constitutional moment' as a result of which borrowing—conscious or unconscious—comes in as a handy aid. If constitution-writers are to be blamed, therefore, they can be blamed not for borrowing, but for borrowing inappropriate principles, institutions, and structures or doing so when the circumstances in the host country do not warrant it. Adoption and adaptation of other systems in a way that fits in the host system and serves the purposes that the latter seeks to achieve is not only practically necessary but also morally appropriate. Mattei's indication of the excessive (and in his view unjustified) borrowing, coupled with Markakis's list of the hallmarks of recent years' African constitutionalism[112] driven primarily by (at times absurd) political correctness, alerts us to

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[110] See C.M. Zoethout, M.E. Pietermaat-Kros, and P.W.C. Akkermans (eds), Constitutions in Africa: The Quest for Autochthonous Principles. Deventer: Gouda Quint, (1996), for reflections on the dilemma of constitutionalism in Africa. But see also Asmarom Legesse's Oromo Democracy: An Indigenous African Political System (*full ed*). Trenton, NJ/Asmara: The Red Sea Press, (2006) for a tightly argued defence of the thesis that there is an autochthonous constitutional tradition in Africa typified by the Oromo of Ethiopia and the Horn.

[111] Markakis, *supra note* 3, p. 52, identifies political correctness as the hallmark of African constitutions adopted in the 1990s.

[112] *Ibid*, pp.51-52. The hallmarks of the new constitutionalism in Africa include a small, mainly, administrative state, free market and privatization, structural adjustment, foreign funded civil society, election, multipartism, weak executive accountable to parliaments, innumerable human rights institutions, and (sometimes absurd) political correctness (that forces the state to recognize the rights of minorities, women, children, the aged, the sick, the disabled, etc and to provide for services such as health, education,

the dangers of crafting constitutions of merely academic significance. The Ethiopian Constitution, judged by the criteria discussed above and seen in the light of the practice following its adoption, makes Mattei's claims rather exaggerated and empirically unsupported.

Legitmacy. As has been hinted at earlier on in section three, legitimacy can be assessed in the light of the constitution-making *process*, the *content* of the text, and the compatibility of the text to the *context*. The making process, which—as indicated earlier-- was dominated by the EPRDF, has resulted in a discontent among some political factions in Ethiopia. The discontent has affected the level of popular acceptability the Constitution commands. The fact that there was little popular participation at the time of the deliberations (which can be explained by a number of reasons[113]) and the consequent lack of active engagement with the process has also contributed to the lack of original legitimacy.

The *content* is not often debated. But at least among academic and some political circles, some provisions are raised as politically divisive and to that extent as rendering the legitimacy of the Constitution contested. The recognition of secession[114], the adoption of ethnically oriented federal set up (the use of ethno-linguistic criteria of state

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employment, and to care for the environment) that doesn't resonate well with the immense economic challenges the states in Africa languish under.

[113] Apathy; lack of knowledge among many members of the public; confusion which resulted from disillusionment with the *Derg*; uncertainty about who is the genuine representative of the peoples; lack of a credible leader behind whom to rally; fear of disintegration of the country; disaffection that resulted from difficulty of life that also stemmed from the dismemberment of the large national army; the sense of 'loss' of Eritrea after so many years of sacrifice in the past and with no say about the future in the present; economic difficulty; internal instability, especially after the withdrawal of the Oromo Liberation Front (OLF) from the pact that formed the Transitional Government (and the consequent despair that spread among many Oromos); the falling of ethnic politics into disrepute among the urban elites who still commanded immense cultural power (and the consequent silent withdrawal of engagement with the process); lack of consensus, trust, and toleration; etc, may all have contributed to the lack of intense participation in the constitution-making process.

[114] Art. 39(1).

formation)[115], the fact that a political body, i.e., the House of the Federation, is the ultimate arbiter of constitutional disputes, and not the courts[116], the issue of state ownership of land[117], etc are a few of these[118].

More often, the questions raised are about the lack of commitment to implement the constitutional values, principles, and rules. The alleged (factually true or merely perceived) violations of the Constitution create an intense discontent. Such a discontent is one that emanates from the gap between constitutional law and constitutional practice, or between design and implementation. This discontent presses the uninitiated citizen into disowning the Constitution *in toto* thereby enhancing and deepening the sense of lack of legitimacy.

Irrespective of the fact that most of the values are imported ones, there is hardly a risk of cultural incompatibility that delegitimizes the constitutional system. What critics of transplantation (such as Mattei) tend to neglect is the changing reality of the host legal system, the fact that while there is a sub-culture of the rule of traditional law (in countries such as Ethiopia), the dominant culture at least in the formal-urban legal system and among the informed voting public is friendly to (if not enthusiastic supporters of) transplanted values such as human rights, constitutionalism, and democracy, etc. In the age of hyper-technologized flow of information and television, the lure of modernity should not be underestimated.

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[115] Arts. 46 and 47

[116] Arts 62 cum 82-84

[117] Art 40(3)

[118] Political parties such as the Oromo Federalist Democratic Movement (OFDM) seek to see a *Presidential form of government* installed in the constitution. Others seek to see a *proportional representation system of election* to be adopted. Some people also raise the issue of why the number of times the Prime Minister runs for office is not fixed in the constitution as important. Questions as to whether it is proper to allow forming political parties on ethnic lines is also raised, but I think this latter concern is extra-constitutional.

One needs to reiterate that legitimacy is a matter of degree, not of absence or presence. Its original form cannot be absolute[119]. Rather, it starts with a weak degree of *original* legitimacy that grows and expands through time depending, of course, on the extent of an entrenched and entrenching constitutional practice. This growing form of legitimacy is a *derivative legitimacy* that the constitution earns (hence, also *earned* legitimacy) in the course of post-adoption constitutional practice. Earned legitimacy is dependent, to a large extent, on the extent of fidelity of the practice to the text, values, and principles of constitution[120]. To the extent our practice departs from the text, values, and principles of the constitution, "infidelity" sets in and to that extent even earned legitimacy is weakened. The result of weak earned legitimacy is disaffection of a higher order as it is the result of a lived experience that witnessed the failure to deliver a constitutional promise. While there is no gainsaying that the Ethiopian Constitution had a weak original legitimacy, over time it has gained a degree of derivative legitimacy. One sign of this is the increasing involvement of many (opposition) political parties in elections over the years and the progressively broader participation of the public in the same[121]. On the

[119] This is because no constitution galvanizes total moral, social, and legal acceptability at the time of the making. Reason: there are no perfect constitutional moments that enable the makers to guarantee a perfect process, a totally perfect document that is agreeable to all, or that is perfectly in tune with the context of the polity. The fact that the constitution making enterprise is an inexorably political one makes the process contested, the content more of a compromise (and hence less than ideal), and the context disputed and subject to interpretation.

[120] See Jack Balkin, *supra note* 12.

[121] Since 1995, more and more (opposition) political parties demonstrated willingness to take part in elections even when they were quick to point out that they have reservations on some clauses of the constitution. The climax of this progressive interest in constitutional engagement both of the parties and of the voting public is the election of 2005. Another sign is the growing number of cases of constitutional disputes submitted to the House of Federation and the Council of Constitutional Inquiry. The cases range from that of identity and self-definition to a quest for self-government, statehood, individual right to interpersonal equality and collective right to one's 'own' law. See Getahun Kassa, *Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System*, Afrika Focus, Vol. 20, No. 1-2 (2007), pp.88-93 for a selective review of the cases disposed off by the HoF.

other hand, there is equally no gainsaying that the practice has manifested a number of shortcomings that severely undermine earned legitimacy[122].

Consequently, owing to the lack of original legitimacy and the discontents created by the gap between the law and the practice, there is a consequent weak exerted authority of the Constitution, which makes one wonder if the environment is congenial to constitutionalism. One also wonders, following the tack of Mattei[123], if "the armed men will obey the unarmed men", if the politicians will have a reason, an incentive, to obey the judges.

Constitutionalism, the "theory that accepts the necessity of ... limited government"[124], is a device for taming government, even a democratic government[125]. It is often characterized by elements such as: a supreme constitution, independent judiciary with a judicial review power, rule of law, separation of powers, checks and balances, fundamental rights, and others.[126] Formally speaking, the Ethiopian system is marked by the existence of a

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[122] There are numerous reports of unconstitutional violations of human rights, especially by international organizations. The post-election crisis of 2005 has also indicated that we need to make a conscientious effort not to backtrack on our constitutional commitments, as there is a lot about the legitimacy not to be taken for granted.

[123] Mattei, *Supra note 21*, p. 12

[124] Walter Murphy, James Fleming, and Sotorios Barber, American Constitutional Interpretation (2nd ed, 1995).Westbury, NY: The Foundation Press, p.3. See also Andras Sajo, Limited Government: Introduction to Constitutionalism, Budapest/New York: CEU Press, (1999), who defines constitutionalism as "the restriction of state power in the preservation of public peace", p.9.

[125] Andras Sajo, *supra note* 124, pp. 49-68.

[126] The elements of constitutionalism that recur in the discussion on the subject include, apart from those mentioned above, due process of law binding procedure of law-making. See Bo Li, *What is Constitutionalism?* Perspectives, Vol. 1, No. 6, 2008(?), p.2. Louis Henkin enumerates the following: 1) Government according to the constitution; 2) separation of powers; 3) sovereignty of peoples (or democratic governance); 4)constitutional review; 5) independent judiciary; 6) bill of rights; 7) controlling the police; 8) civilian control of the military; 9)no, or limited, state power to suspend the constitution or its parts. See Louis Henkin, *Elements of Constitutionalism,* (Unpublished manuscript, 2000) in Bo Li, p. 3. In a similar vein, M. P. Jain gives us the following "principles and norms which promote constitutionalism in a country": a written constitution; independent judiciary with judicial review power; doctrine of rule of law;

supreme written constitution (art 9), a democratic government formed through elections (art 8 cum arts 54-60; 72-77)[127], sanctity of fundamental rights and freedoms (art 10 cum arts 13-44), and independent judiciary (art 78). Rule of law is also recognized in the preamble (paragraph 1) although, being primarily the function of independent judiciary, its existence (or not) is to be established only empirically in the light of the judicial practice. The system of government being a parliamentary one where fusion of powers is predominant, there hardly is separation of powers that resembles the kind in presidential systems. Given the fact that the ultimate interpreter of the Constitution is a non-judicial body, i.e., the House of Federation, Ethiopia has a unique "form" of constitutional review that can hardly be named "judicial review". In practice, the task of review is undertaken by the House of Federation. Owing to the fact that very few cases have been disposed off by the HOF thus far[128], whether the review system is robust enough to restrict the power of government and protect the (individual) rights of citizens is rather dubious. This and other imperfections in the area of human rights protections[129] seem to suggest that constitutionalism is weak[130] in Ethiopia.

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separation of powers; free elections to legislatures; democratic government; fundamental rights of the people; and federalism. M. P. Jain, Indian Constitutional Law (4th ed, 1994). Agra/ Nagpur: Wadhwa and Co., p. 4.

[127] One readily notes the fact that none of the three elections held 1995, 2000, and 2005 were reported to be entirely free and fair by all parties involved. The political campaigns that led up to the 2005 election were reported to be free in a manner that was unprecedented in the country's history but the post-election crisis that emerged along with the contestation of the results of the election marred the whole process. It also led to the scepticism that there is a hope for a free and fair election hence forth. The April 2008 election held to elect district representatives and to replace those who boycotted Parliament in the aftermath of the 2005 post-election crisis was uncontested as the major opposition parties refused to take part.

[128] See Getahun Kassa, *supra note* 121 on the cases dealt with in the HOF.

[129] Note for example the fact that the special human rights institutions (i.e., the Human Rights Commission and the Institution of the Ombudsperson) are legally established in 2000 but became operational in 2005. To date, they haven't fully ensconced themselves in the system to be able to promote, monitor, and protect human rights. Note further the recent reports on Ethiopia's human rights performance such as that of the Human Rights Watch, *Collective Punishment: War Crimes and Crimes against Humanity in the Ogaden area of Ethiopia's Somali Regional State* (2008) and *Why am I Still Here?: The 2007 Horn of Africa Renditions and the Fate of those Still Missing"* (2008).

[130] Optimists would say that constitutionalism is at its infancy in Ethiopia.

It is important to note that when constitutionalism is weak, so is efficacy of the constitution. When such is the case, a stronger call for constitutional fidelity is only warranted. Now we turn to the discussion of the notion of fidelity with a view to exploring its potential for a redemptive constitutional practice which, if successfully done, can not only strengthen constitutionalism but also generates a derivative legitimacy. Constitutionalism so strengthened and legitimacy so generated, it is hoped, can in turn help fill the gap between constitutional design and constitutional practice.

5. Constitutional Fidelity: Basic Law, Higher Law, and Our Law

Jack Balkin[131] says that three things are pivotal for the effective implementation of a constitution, namely that the constitution is (or is perceived to be) a basic law, a higher law, and "our" law[132]. Writing about the US constitution from a decidedly American perspective, he says:

> A successful constitution [...] must simultaneously serve three functions: It must be *basic law* [,] a framework for governance that allocates powers and responsibilities. It must be *higher law* [,] a source of aspiration and a reflection of values that stand above ordinary law and hold it to account. And it must be *our law, an object of attachment that we see as the product of our collective efforts as a people. Viewing the Constitution as our law involves a collective identification with those who came before us and those who will come after us. The Constitution as our law constitutes us as a people that extends over time. This collective identification is a constitutional story that allows us to regard the Constitution as our own even if we never officially consented to it*[133]. (Italics added.)

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[131] Jack Balkin, *supra note* 12.

[132] Ibid, Jack Balkin says that when the constitution becomes 'our 'law, it (re) constitutes the polity by linking the generations past to the generations to come in the interpretive process of the present.

[133] *Ibid.*

These three elements are necessary as an expression of fidelity. Constitutional fidelity is necessary for the effective implementation of a constitution. Constitutional fidelity, conformity of our actions, decisions, and practices to the letter and spirit of the constitution, is a means to an end, the end being the achievement of constitutional legitimacy[134]. Frank Michaelman, also writing from an American perspective, says that there are four models of fidelity to choose from namely, the rightness model, the posterity model, the wisdom model, and the we-the-people model[135].The *rightness model* suggests that the constitution is legitmation-worthy because its contents have moral rightness, the goodness of the ideas in the constitution,[136] as a consequence of which it calls us to loyalty to the text of the constitution. The *posterity model* offers that the constitution is legitimation-worthy because of the need to defer to the framers as a unique generation that the new generation of citizens identify with as their forbears. This calls us, the new generation, to a resort to the constitution's authorship to invoke legitimacy[137]. The *wisdom model* insists on the assumption that the framers "were men of superior political wisdom, dedication, and public spirit."[138] Hence, the urge to exert fidelity to their understanding or intentions regarding the meaning of the text of the constitution. The *we-the-people model* suggests that fidelity to the constitution means fidelity to "the political fellowship of the ...people understood as a communion-in-self-government that spans the generations"[139]

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[134] See Frank Michaelman, *Fidelity and Legitimacy*, (Paper presented at a conference of the American Constitution Society for Law and Policy, July 2007.). PP 1-2.

[135] *Ibid*, p. 3.

[136] *Ibid*. It is interesting to note that in Michaelman's scheme, legitimacy is "justified enforceability", and thus to call a law legitimate is to "announce a judgement that you and I are justified in demanding everyone's compliance with that law without having to prove, or even claim to believe in, the genuine first order merits of that law as right, fair, good, just, efficient, prudent, and so on." P.2.

[137] *Ibid*, p.4.

[138] *Ibid.*

[139] *Ibid*, p.5

In a similar vein, Erwin Chemerinsky maintains that fidelity needs to be directed to the *text*, the *goals* of the constitutional provision, the *precedents and historical practices* that unfolded after the adoption of the constitution, or the *contemporary needs* of the society in which the constitution is being applied[140]. Robin West wants us to look to the political or legislated constitution (in the American context, chiefly to the reconstruction era amendments, for example) to stress what we ought to be fidel to[141]. Common in all the above mentioned models and "objects" of fidelity is the need for conformity of our interpretation and practice to the constitution by a constant going back, a recourse, to the text, its authorship, and the wisdom generated by the authors and subsequent precedents and practices, or the union created by the constitution, or/and the ever changing needs of a changing society.

Through such going back, through such fidelity, decisions (both the creative and interpretive ones)—that is, the legislative and judicial ones—can contribute to the 'production' of derivative legitimacy. This, in turn, fosters the efficacy of the constitution. Efficacy reinforces the strength and independence of constitutional institutions. In time, this 'emancipates' the constitutional legal institutions from subservience to the politics. This process further entrenches constitutionalism. The end result, as Mattei suggests, will be that "the armed men" will at last "obey the unarmed ones."[142]

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[140] Erwin Chemerinsky, *Constitutional Interpretation for the Twenty-first Century*, (Paper presented at the Conference of the American Constitution Society for Law and Policy, July 2007), pp, 1, 4.

[141] Robin West, *Constitutional Fidelity and Democratic Legitimacy* (paper presented at a conference of the American Constitution Society for Law and Policy, July 2007), p 1. Apparently, it is this preference to the political (or the popular) constitution that makes her call for a more constitutionally attentive legislature and a more constitutionally responsible voting public.

[142] See Ugo Mattei, *Three Patterns of Constitution in the Making*, p.12, where he asks rather cynically, "why should the armed man obey the [courts]?" given the fact that the courts command neither the purse nor the sword. In Ethiopia, the fact that the ultimate constitutional arbiter is the HoF, a political body, does not readily warrant such a prompt independence of constitutional law from politics. But on the other hand, because the HoF enjoys a better degree of trust from the political offices (at least in the era of EPRDF dominance), it provides a wider opportunity for doing a more aggressive work of redemptive constitutional interpretation. Redemptive constitutional practice thus can have a ready-made institutional articulation through the HoF cum the CCI.

What does fidelity require? In simple terms, as has been hinted at repeatedly, it requires faithfulness[143] to the constitutional text, or to the intention of the framers, or to the values and principles undergirding the constitution, etc[144]. In the Ethiopian context, this faithfulness needs to be practiced at various levels, namely at the legislative level (where supposedly political fiat, or will, predominates), at the adjudicative level (where supposedly reason predominates), and at the electoral level (where voters' interest and passion predominates). A constitutionally attentive legislator, a constitutionally informed interpreter, and a constitutionally responsible voting public are a *sine qua non* to constitutional fidelity[145]. The question arises, however: how can we be expected to be faithful to a constitution that lacks original legitimacy? The question, reframed, is: how can fidelity exist when legitimacy is dubious?[146] The question suggests that legitimacy is necessary for fidelity. But fidelity must be looked at as a means, and legitimacy must be looked at as an end. Fidelity has the potential not only of generating a (derivative) legitimacy but also of redeeming the deficit of (original) legitimacy that was caused by a flaw in the process of the making of the constitution. The answer to the question, then, is: through (more) faithfulness[147]. More fidelity bolsters a redemptive constitutional

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[143] Prior to fidelity, there must be a faith in the legitimacy of constitutions. That, apparently, takes a leap on the part of the faithful. So even when there is no reason that evidences the existence of original legitimacy, we just want legitimacy into existence and remain true to it. Or so I understand Jack Balkin as saying.

[144] Jack Balkin, rightly, restricts faithfulness to the text and its values and principles, not to the framers' expectations. *Supra note* 12. See also his *Abortion and Original Meaning*, *supra note* 12, for an elaborate discussion of why the framer's original intent or expectation should be discarded.

[145] Robin West, *supra note* 141, p.1.

[146] Balkin's call for redemption through recourse to the principles of the constitution that connects the present generation to the past and future generations, *supra* note 12 and West's call for a more political, or amendment- oriented, or "legislated" constitution for a new constitutional vision, *supra* note 141, are instructive here.

[147] Exerting more faithfulness is easily done when the generation of the framers are still active in the public life of Ethiopia. The government of EPRDF (which is still in power), being the predominant force behind the making of the constitution, has the responsibility of applying the utmost fidelity to the constitution—through an aggressive act of implementation—so that, through such acts it can help the constitution garner an earned legitimacy thereby redeeming the fractured original legitimacy. In practice, this means, among other things, for the EPRDF to concede temporary losses for the sake of a better stability of the constitution

practice[148]. Such a practice helps bridge the gap between constitutional design and constitutional practice.

6. Conclusions

By way of conclusion, let me attempt to answer the questions I raised at the beginning of this paper. That constitution making is more than a mechanical act of producing a written text is noted. That it involves a careful choice of constitutional models befitting the core character of the polity is also underscored. In polities founded by design (be it those emerging out of a conflicted past or otherwise), the notion of popular consent is important. In post-conflict societies, the constitution serves as a peace document that makes, keeps, and builds peace thereby transforming conflict into a positive reconstitutive force. In such societies, the design of the constitution is as important as, if not more important than, its practice. All the relevant political actors, all the sectors of the concerned public, and all the stakeholders must come to the 'table of covenant' as they seek to make their constitution. They also must be able to participate in the process and to express their consent freely so that they develop a sense of trust and confidence not only in the process but also in the outcome. Exercise of choice is needed for constitutional design. A contractarian perspective is important.

The design of a constitutional text involves the practical stages of drafting, deliberation, adoption, and ratification. At all these stages, inclusiveness, participation, and a 'bi-directional traffic', in short, *consent*, are needed. Who is involved at the drafting, deliberation, adoption and ratification stage (and who is excluded at one or more of these

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the strength and durability of which, incidentally, is the greater victory for the generation of EPRDF members who helped frame the constitution.

[148] Redemptive constitutional practice requires not only constitutional *fidelity* (especially by the founding generation), but also constitutional *reinvention through a positive (re)interpretation and/or amendment*; responsible *legislation* that contributes to *constitutional "correction"*; and *wise use*, by a constitutionally informed electorate, *of new constitutional moments* offered to them in times of election, referenda, etc. For a more elaborate discussion of the modes of redemptive constitutional practice, see Tsegaye Regassa, "When Beginnings are Fractured: Toward a Redemptive Constitutional Practice in Ethiopia," forthcoming).

stages) determines (the perception of) whose constitution it is, and to that extent, determines its legitimacy. Legitimacy, having a moral, legal, and sociological founding, can come about from the acceptability that the constitution obtains from the vast majority of the people. This is because, of course, in principle, ultimately legitimacy emanates from the sovereignty of the people. For legitimacy, the process must be (democratically) acceptable, the content must be able to capture the principles, ideals, aspirations, and goals of the majority of the people, and the context in which it applies must be optimally compatible to the values in the content.

The implementation of a constitution depends to a large degree on legitimacy, entrenchment of constitutionalism, and efficacy of the constitutional system. Legitimacy determines the authority of the constitution. This in turn impinges on constitutionalism, the principle of limited government whose activities are guided and constrained by the constitution. Efficacy, which is rooted in compliance (of officials) and obeisance (by the people), comes depending on, *inter alia*, the strength, autonomy, and neutrality of constitutional institutions. The interplay of the three creates a congenial environment for a better constitutional practice.

In Ethiopia's history, constitutional legitimation of power was rare. Historically, legitimacy is endowed on a regime by force, religion, and tradition. The polity was a product of an amalgam of force and evolution. The first two written constitutions of the 20th century (of 1931 and 1955) were more like a grant from the rulers to the ('beloved') people. Their authority was more symbolic (of modernization) and merely asserted, not exerted. The third (1987) was more like a revolutionary manifesto. It was also a grant with an asserted supremacy and authority. The 1991 Transitional Charter and the FDRE constitution sought a rapturous break from this tradition. They sought 'to restructure the state and democratize the government'. Having this as a historical background, the FDRE Constitution was made in the time between 1992 and 1995.

The process of the making of the FDRE Constitution had its roots in the Transitional Period. The Charter set the tone. The Transitional Government oversaw the process. A Constitutional Commission statutorily established by the Transitional Government prepared the draft and submitted it to the legislature of the time (known then as the Council of Representatives). The draft was discussed in detail in the legislature for about a month (from 12 April-10 May1994) and was adopted before it was presented for popular discussions. The discussion often looked more like 'educating' or explaining. Subsequent to the discussion and formation of a constitutional assembly in 1994, it was further discussed in the Assembly before it was finally adopted in December 1994 to come into force in August 1995.

Because the drafting, discussion, and adoption was overseen by the Transitional government which was dominated by the EPRDF, to that extent, the original legitimacy of the FDRE is undermined. Among comparative legal scholars, the content of the Constitution being predominantly a result of indiscriminate transplantation, has no local legitimacy, i.e., does not resonate well with autochthonous traditions in Ethiopia. The constitutional system being part of the legal tradition that is termed as 'rule of political law', where law is subordinate to politics, the constitution commands minimal authority and efficacy among the Ethiopian public. (Or, so they argue.) One also notes that while conceding that original legitimacy is weak, the system needs to make the effort that, through aggressive implementation, the constitution *earns* its own (*derivative*) legitimacy. For this, fidelity to the constitution is needed. Constitutional fidelity must be seen as means to bringing about constitutional legitimacy. This in turn leads to an exercise in what scholars call 'redemptive constitutional practice'. The interpretive institutions play a pivotal role in calling us all to fidelity so that the constitution, in the words of Jack Balkin, is not only a 'basic' law, or a 'higher' law, but 'our' law, thereby reconstituting the Ethiopian polity. But the point needs to be stressed: between constitutional design and constitutional practice stands a gap that needs to be filled. That gap can be filled only through legitimacy, constitutionalism, and efficacy. For this,

redemptive constitutional practice, conducted mainly through the instrumentality of constitutional fidelity, can be helpful.

Defining the Minimum Core Obligations-Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa

Mesenbet Assefa*

Abstract

The Minimum Core obligations as stipulated by the Committee on Economic, Social and Cultural Rights under the General Comment 3 on the nature of states parties' obligations has been one of the most important articulations that set the scene for judicial enforcement of socio-economic rights at least on theoretical grounds. This notion is significant in that it intends to avoid the complacency of states on realizing socio-economic rights based on the rhetorical ground of "progressive realization". It seeks to establish a floor right where states can not justify failure to meet the most essential levels of socio-economic rights. Nevertheless, the meaning of the minimum core has been controversial both in terms of its theoretical basis as well as its judicial application.

This article seeks to look into both the theoretical approaches as well as the conundrums involved in the judicial application of the concept. In making such inquiry the writer has dealt with notable literatures and case laws on the notion of the minimum core. Principally, the article focuses on analyzing the two landmark decisions of the Constitutional Court of South Africa and to a lesser extent that of the Supreme Court of India and the Constitutional Court of Columbia. In doing so, the writer believes that judicial adherence to the notion of the minimum core is essential for the enforcement of socio-economic and that this is feasible in the current legal discourse.

Introduction

In recent years the jurisprudence of socio-economic rights has generated a lot of academic writings and jurisprudential debates both nationally and internationally. One of the reasons for such academic curiosity is the fact that it is the *unexplored* and fresh area of international human rights law. Many of the substantive rights of the International Covenant on Civil and Political Rights (ICCPR) to a large extent have been defined by the Human Rights Committee. This has been possible largely due to the rich jurisprudence that it has been able to generate both from the state reports that it receives and the individual complaints mechanism. Apart from this, regional human rights supervisory mechanisms such as the European Court of Human Rights have had a

significant contribution. The lack of strong nexus between the implementation of civil and political rights and resource constraints coupled with their clearer articulation has helped in the general development of the jurisprudence on civil and political rights and their application both domestically and internationally.

This is not true, however, in the case of socio-economic rights. Until very recently the international community has not been able to adopt an optional protocol that would enable the Committee on Economic, Social and Cultural Rights (CESCR) to receive individual complaints from states parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] Efforts are being made to correct this historical asymmetry by adopting an Optional Protocol to the ICESCR which would enable it to receive individual complaints from its states parties. Nevertheless, the legacy of this historical asymmetry has been the lack of jurisprudence on socio-economic rights that could serve as a benchmark for the implementation of the substantive rights domestically. One of the most difficult articulations of the CESCR has been the notion of minimum core obligations. As an exception to the general obligation of states to realize socio-economic rights progressively, states parties have the obligation to implement minimum core obligations immediately. Yet, there have been difficulties in articulating what constitutes minimum core of each of the rights enshrined in the covenant. The series of general comments adopted to elaborate the contents of the rights though useful, fail to give a definitive answer to our query of the minimum core.

Apart from the General Comments of the Committee and other international human rights instruments, the South African Constitutional Court provides a unique opportunity to understand some of the normative framework provided in the ICESCR and the application of the substantive rights domestically and some of the conundrums involved

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[1] General Assembly Resolution A/RES/63/117 of Dec. 10, 2008. The protocol can be accessed at http://treaties.un.org/doc/Publication/CTC/Ch_IV_3_a.pdf .

in this regard. Although some countries have incorporated socio-economic rights as justiciable in their constitutions, the experience of South Africa is significant in the discussion of minimum core obligations.[2] This is due to the fact that the constitutional Court of South Africa has dealt with socio-economic rights claims of individuals and has been able to generate a robust jurisprudence in this regard, including the notion of minimum core obligations. The purpose of this article is to show some of these international and national jurisprudential developments on defining the meaning of the minimum core and some of the challenges of such kind of articulation in the general discourse of socio-economic rights.

1.1. General Obligations of States Parties in the Enforcement of Socio-Economic Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[3] outlines the major obligations of states parties in relation to the protection and promotion of socio-economic rights. In general, states parties have three major obligations in relation to socio-economic rights; these include the obligations to respect; obligation to protect and obligations to fulfil.[4]

The obligation/duty to respect requires states parties to the ICESCR to refrain from interfering with the enjoyment and exercise of socio-economic rights. It imposes an obligation to abstain from interfering with individuals/people's rights. The prohibition of the state from interfering with the enjoyment of socio-economic rights may relate to a law or conduct.

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[2] See for example the Constitutions of Colombia and India in this regard.

[3] International Covenant on Economic, Social and Cultural Rights adopted by GA Resolution 2200A (XXI) of Dec. 16, 1966 entered in to force January 3, 1976.

[4] See the Maastricht Guidelines on violations of Economic, Social and Cultural Rights Jan. 26, 1997 para. 6.

The duty to protect on the other hand requires states parties to prevent violation of human rights by third parties. While the obligation to respect is passive in its nature, obligation to protect is pro-active and calls up on states to remove those obstacles perpetrated by private parties on the enjoyment of socio-economic rights. To do this, a state is required to undertake legislative, administrative and other measures, including the provision of effective remedies so that the poor and vulnerable part of the population will not be adversely affected by more powerful actors such as the state itself, landlords, banks, companies etc.[5]

The duty to fulfill, which is the most controversial issue, requires states to take positive measures to ensure that people who lack access to socio-economic rights are provided with these rights at state expense. There are two dimensions of the duty to fulfill. The first duty relates to the obligation of the state to assist individuals and communities to gain access to socio-economic rights. This includes adopting appropriate policies and legislation that facilitate and regulate access to socio-economic rights. The second is a duty to provide these various goods and services directly whenever an individual or group is unable to gain access to these things through the resources at its disposal.[6]

International human rights law, nevertheless, does not demand automatic fulfillment of socio-economic rights to individuals. The ICESCR states that states have only the obligation to provide socio-economic rights progressively.[7] Obviously, the articulation of progressive realization was motivated because of the resource constraints of states to realize fully socio-economic rights. However, the ICESCR also provides for immediate application and implementation of the rights enshrined in the covenant. These include, no-discrimination, [8] the duty to take steps to start the implementation of the rights[9] and "a

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[5] *Ibid.*

[6] *Ibid*, para. 6 &7.

[7] Art. 2(1) ICESCR.

[8] Art. 2(2) ICESCR.

minimum core obligation to ensure the satisfaction of, at the very least, minimum essential level of each of the rights".[10]

1.2. Minimum Core Obligation Under International Law

Before considering the experience of the South African Constitutional Court on the notion minimum core obligations, it is important first to lay down the meaning of minimum core obligations under international law as provided in General Comment 3 of the CESCR. A sound understanding of the minimum core obligations at the international level will be important to lay down the groundwork of this paper.

The CESCR is the most authoritative body that interprets the normative content of the provisions of the ICESCR. Although the CESCR has not been able to receive individual complaints from nationals of member states, it has been able to develop important benchmarks on the nature of the rights and obligations enshrined in the ICESCR through the General Comments that it adopts periodically. So far the CESCR has given 15 general comments that have clarified the contents of the rights incorporated in the ICESCR and the nature of states parties' obligations in respect of the covenant. General comment 3 in detail elaborates the nature of state parties' obligations that is provided in Article 2(1) of the ICESCR. The Committee stated that thorough extensive experience gained through the examination of state reports;[11]

> …a minimum core obligation to ensure the satisfaction of, at the very least minimum essential levels of each of the rights is incumbent up on every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the covenant.

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[9] Art. 2(1) ICESCR.

[10] Committee on Economic, Social, and Cultural Rights, *General Comment 3* (1990) para 10.

[11] *Ibid*.

A closer look at the wordings of General Comment 3 shows that the requirement of minimum core obligations is a qualified one, i.e., there are certain conditions that must be met before a state is said to have failed to meet its minimum core obligations.

The first requirement is that of a numerical one. According to the General Comment, for a state to be in violation of its obligation of minimum core, there has to be a significant number of people who are deprived of essential services. What constitutes a *significant number of people* is difficult to establish and it is virtually impossible to put a fixed number to it. However, the CESCR in its subsequent general comment has resolved the ambiguity of the above requirement by stating that the minimum core establishes a right which can be claimed by all people.[12] Thus, the state has the obligation to realize its core minimum obligations as a matter of individual right.

The second and more important requirement is similar to the general case of any socio-economic right, i.e., 'any assessment as to whether a state has discharged its minimum core obligations must also take into account of resource constraints applying within the country concerned.'[13] Even if this may sound similar to that of the general requirement of progressive realization in Article 2 of the ICESCR; it is different in terms of the qualified nature of the obligation. According to the General Comment, to justify failure of a state to meet its minimum core obligations to lack of available resources, 'it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[14]

Accordingly, at the heart of the concept of minimum core obligations is the establishment of a *prima facie* violation of the covenants obligations by a state party who fails to fulfil the minimum core. It has a tremendous probative role in terms of putting enormous

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[12] Committee on Economic, Social and Cultural Rights, *General Comment 15* (2003) para. 44 (c).

[13] Committee on Economic Social and Cultural Rights, *Supra note* 10.

[14] *Ibid.*

burden on the state to prove the failure of the state to fulfil its minimum core obligations. It thus shifts the burden of proof from the applicant who alleges the violation of his rights to that of the state.

The significance of the minimum core obligations cannot be overemphasized. The minimum core is an essential element of any right without which the right risks losing its substantive significance as a right. It provides a minimum threshold below which standards should not fall. It emphasizes that it is unacceptable for any human being to live without basic resources to maintain his survival.

The minimum core concept seeks to establish 'a minimum legal content for the notoriously indeterminate claims of economic and social rights'.[15] By adopting a minimalist rights strategy, it focuses towards the severest forms of material deprivation that have to be addressed as a matter of urgency. The ICESCR itself has interpreted the minimum core as a presumptive legal entitlement, a non-derogable obligation and an obligation of strict liability.[16]

1.3. Determining the Content of The Minimum Core- Theoretical Perspective

One of the most difficult tasks of the articulation of the minimum core obligation has been determining their content. Although the CESCR has stated that the fulfilment of minimum core obligations of essential food stuffs, essential primary health care, basic shelter and housing or the most basic forms of education is incumbent on all states, it has not yet come up with sufficient standards to provide definitive benchmarks for the content of these rights.

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[15] KG Young, *The minimum core of economic and social rights: a concept in search of content,* Yale Journal of International Law Vol. 13 *(2008)* p. 113.

[16] Compare General Comment 3 para. 10 with General Comment 14 (2000) and the CESCR, substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: poverty and the International Covenant on Economic, Social and Cultural rights U.N.Doc.No.E/C.12/2001/10 may 10, 2001.

Most of the endeavour for establishing the minimum core, however, has been more theoretical than practical. Young's approach encompassing international, regional and national jurisprudence and scholarly works demonstrates three approaches to understanding the notion of the minimum core. The First approach- essence approach, tries to locate the minimum content of a right relating it with the protection of liberal values such as dignity, equality and freedom and the basic needs of survival. The consensus approach locates the minimum core in the minimum consensus reached with respect to socio-economic rights. Lastly, the obligations approach seeks to situate the minimum content of a right in terms of the obligations raised by the right rather than the right itself.

1.3.1. The Essence Approach

This approach seeks to establish the essential minimum of each right. It views the right's core content as part of 'the intrinsic value of each human right… [containing] elements… essential for the existence of that right as a human right.' Young in this regard states,[17]

> It is the absolute, inalienable and universal crux, an 'unrelinquishable nucleus that is the *raison d'être* of the basic legal norm, essential to its definition, and surrounded by the less securely guarded elements.

According to the essence approach, the core of the right is seen as the most basic feature and thus the foundation for its fulfilment. David Bilchitz for example, illustrates that at the core of the right to housing lies the right of the individual to be provided with shelter. According to him, this minimum core right flows from the right to be protected from exposure to outside elements, which in turn finds its basis on one's ability to survive.[18] The jurisprudence of the Inter-American Commission also demonstrates the connection

[17] Young, *Supra note* 15 p. 1.

[18] D Bilchitz, Poverty and fundamental rights: the justification and enforcement of socio-economic rights (2007) p. 198.

between rights of survival and basic needs which are vital for personal security.[19] In a more recent decision, the Indian Supreme Court in the case of People's Union for Civil Liberties v. Union of India and Others contextualized the right to food under the right to life.[20] The Court rejected the arguments of the respondents on the non-availability of resources and found that the right to food was blatantly violated. In another case, in the case of Paschim Banga Khet Mazdoor Samity v. Stat of West Bengal and Anor, [21] the Indian Supreme Court reiterated the link between the right to health as implicit in the right to life.

Many scholars, particularly in relation to the South African Constitutional jurisprudence have also tried to link the concepts of human dignity[22] and equality[23] as a mechanism for supplementing the enforcement of socio-economic rights. Their propositions are innovative and helpful in strengthening our arguments for the enforcement of socio-economic rights in general. This, however, may give the wrong impression that socio-economic rights are not self-standing rights that are suited to judicial enforcement. Young also points out that there are often competing values and that from the notions of survival, life, dignity, different cores can be found for each specific right. For example, an interpretation of the right to education is linked heavily with freedom while an interpretation of the right to health relies more on dignity.[24]

1.3.2. The Consensus Approach

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[19] Inter-American Commission on Human Rights, *Annual Report OEA/Ser.L/V/II.50, doc.13 rev 1*, at 2 (1980) www.iachr.org/annualrep/79.80eng.6.htm

[20] People's Union for Civil Liberties v. Union of India and Others, Supreme court of India, writ Petition Civil No. 196 (2001).

[21] Pachim Bunga Khet Mazdoor Samity v. State of West Bengal AIR SC 2426(1996).

[22] See S Liebenberg, *The value of human dignity in interpreting socio-economic rights*, South African Journal of Human Rights Vol. 21 (2005) p. 1.

[23] PD Vos, *Grootboom, the right of access to housing and substantive equality as contextual fairness,* South African Journal of Human Rights Vol. 17 (2001) P. 259.

[24] Young , *Supra note* 15 p. 14.

The consensus approach rather than focusing on what the normative minimum of each right should be, focuses on where consensus has been reached in the content of the minimum core. According to this approach, the minimum core content is the 'right's agreed up on nucleus'.[25] Thus, elements outside of the core translate to the plurality of the meaning and some of the disagreements surrounding the right.

The consensus approach states that a wider agreement on what constitutes the core content of each of the socio-economic rights can be build by the evolving jurisprudence of states and the CESCR. However, due to the lack of individual complaints procedure under the ICESC, the CESCR has not been able to enrich the content of the minimum core obligations through its jurisprudence. Currently, efforts are being made to integrate the complaints mechanism through the adoption of an optional protocol. The lack of judicial enforcement of socio-economic rights in domestic judicial systems except in few countries such as South Africa has further complicated the problem.

It is, however, interesting to note that the CESCR has been able to develop some important benchmarks to determine the content of the minimum core through state reports that it receives and the ensuing general comments that it periodically gives.
Although the consensus approach has not yet come up with a universal benchmark to define the minimum core content, it is significant in enriching the normative content of the minimum core progressively. Its focus on consensus also confers legitimacy for the enforcement of minimum core rights both internationally and nationally through constitutional litigation.

1.3.3. The Minimum Obligation Approach

This approach tries to correlate the minimum obligations to that of the concept of minimum core. The focus on duties required to implement the minimum core rights is aimed at analyzing realistic, institutionally informed strategies for the protection of

[25] *Ibid*, p.15.

rights. It also tries to avoid the dichotomy of negative rights and positive rights by stating that both civil and political rights as well as economic, social and cultural rights have correlative duties to refrain from and perform certain acts. By doing so, it tries to make a point that the negative duties to refrain from are not more important than the positive duties.[26]

Nevertheless, this approach even further complicates the problem in the sense that rather than focusing on developing the content of the minimum core rights it focuses on the obligations of states in wider terms. Although it helps in setting benchmarks on what steps should be taken to implement the minimum core rights, it doesn't help much in defining the content of the minimum core rights as it focuses on wider obligations of states to implement these rights.

Thus, none of the above theories provide a concrete benchmark for determining the content of the minimum core contents of the right to essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education. In this regard other scholars also state that Young's approaches suffer from normative difficulties and make it judicial applications of the concept problematic.[27]

Yet, the above approaches are significant in narrowing down the definition of the minimum core to a limited range of possibilities at least in a theoretical sense. Moreover, thanks to the work of the CESCR, there are already some important benchmarks as to what constitutes the minimum core of the specific rights. For example, the CESCR in its general comment on the right to food has emphasized on the right of individuals to be free from hunger.[28] This becomes at least the base line where by the minimum core of the right to food can be established. The CESCR in its general comment on the right to health

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[26] *Ibid* p. 20.

[27] Joie Chowdhury, *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights-a Comparative Perspective*, (Unpublished) (2009) p. 4. ; Cited based on the permission of the author.

[28] Committee on Economic and Social rights, *General Comment 12* (1999) para. 17.

has also stated that states have a minimum obligation on the provision of essential drugs as defined under the World health Organization (WHO) Action Plan on essential drugs.[29] Apart from these international standards, it is also proper to deal with more concrete legal issues that have surfaced in relation to the minimum core in the course of deciding cases by taking the experience of the constitutional Court of South Africa.

1.4. The Approach of the Constitutional Court of South Africa on the Notion of Minimum Core Obligations

Since the constitutional change that took place in the country in 1994, South Africa has taken a path of socio-political transformation with an active Constitutional Court at the pinnacle of the judicial system. South Africa is one of the few countries in the world that has justiciable socio-economic rights in its constitution. The Constitutional Court (CC) has dealt with four major cases dealing with socio-economic right claims by individuals. While adjudicating these claims the CC has made it clear that it will not shy away from such cases because of their budgetary implications. A more critical question that is usually raised rather is thus, how does the Constitutional Court enforce socio-economic rights claims in a given case.[30]

Despite its courageous move in incorporating socio-economic rights as justiciable bill of rights in its constitution, South Africa has not yet ratified the ICESCR. Although South Africa is not yet a party to the ICESCR, the reasons behind the rejection of some aspects of the jurisprudence generated by the CESCR does not appear to flow from such lack of international commitment. It is rather based on the CC's own normative conception of the

[29] Committee on Economic, Social and Cultural Rights, *General Comment 14* (2000) para. 12 (a).

[30] *Grootboom & Others v Government of the Republic of South Africa,* Case CCT 11/00 (October 4, 2000) para. 20.

nature of the obligations that socio-economic rights engender.[31] The CC is also caught up between the need to discharge its obligation of applying socio-economic rights on one hand and the need to maintain separation of powers by taking due cognizance of the legislative and executive branches of government on the other hand.

Although there are some scholars in support of the CC's position,[32] one of the major criticisms against the Constitutional Court has been its rejection of the notion of minimum core obligations, which is provided in the General Comment 3 para. 10 of the CESCR.[33] Some have pointed out two major reasons for the Court's rejection of the notion of minimum core obligations of the CESCR. First, they contend that the determination of what constitutes a minimum core obligation will be difficult in case the court adopts such a standard given the limited information the court has and the diverse needs of society. Secondly, they also state that the Court is not politically and institutionally equipped to deal with claims that would have arisen had they adopted this standard. The article will try to scrutinize the validity of these contentions by discussing the normative content of the minimum core obligations in international law first and raising important philosophical and legal questions.

The CC has declined to accept the concept of minimum core obligations in its landmark decision of *Grootboom.*[34] The court first stated that it would not be possible to determine the minimum core of the right of access to adequate housing because of the diversity in

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[31] M Pieterse, *A benefit- focused analysis of constitutional health rights* (unpublished) PHD thesis University of Witwatersand (2005) p. 121, Cited in C Mbazira 'Enforcing economic, social and cultural rights in the South African Constitution as justiciable individual rights: the role of judicial remedies' (unpublished) PHD thesis University of Western Cape (2007) p. 151.

[32] See for example, Karim Lehmann, *In defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core,* American University International Law Review Vol. 22 (2006) p. 163; See also Mark S. Kende, *The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics*, Connecticut Journal of International Law Vol. 19 (2004) p. 617.

[33] See Marius Pieterse, Eating Socio-Economic Rights: *The Usefulness of Rights Talk in Alleviating Social Hardship Revisited,* Human Rights Quarterly, Vol. 29 (2007) p. 796.

[34] *Grootboom & Others, Supra note* 30.

the needs and opportunities for the enjoyment of the right.[35] Secondly, in the case of Treatment Action Campaign (TAC) the CC was skeptical about its competence to deal with claims that would have arisen had they adopted the minimum core standard.[36] The article will try to scrutinize the validity of these arguments in the subsequent sections.

1.4.1. The Difficulty of Determining the Minimum Core

In the *Grootboom* the CC while explaining the difficulty of defining the minimum core of the right to housing stated:[37]

> It is not possible to determine the minimum threshold for the progressive realization of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right….

In dealing with the specific case the court rather proceeded to deal with the case by stating that the question to be answered in the circumstances was whether the state has taken *reasonable steps*[38] to realize the right to housing as provided in Section 26 of the Constitution. According to the CC, the only thing that could be drawn from the concept of the minimum core obligations was its significance in serving as a factor in assessing the reasonableness of the measures taken by the state in particular circumstances.[39]

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[35] *Ibid* para. 33.

[36] *Minister of Health v Treatment Action Campaign Case* CCT 8/02 (July 5, 2002) para. 35.

[37] *Grootboom & Others. Supra note* 30 para 32.

[38] In the context of the Constitutional Court's approach, the standard of reasonableness has evolved in determining socio economic rights clams.

[39] *Grootboom & Other, Supra note* 30 para 33.

Similarly, in the *TAC* the argument of the *amici curiae* to persuade the CC to adopt the notion of the minimum core based on S 27(1) & 7(2) was unsuccessful.[40] The *amici* argued that the minimum core right is not subject to limitations of resource constraints and progressive realization under S 27(2). It stated that S 27(2) is not exhaustive of the state's positive duty to fulfil; it supplements the unqualified core minimum obligation of the state in S 27(1) to ensure basic levels of the socio-economic rights of individuals. The court rejected these arguments and stated that S 27(2) defines and limits the full extent of the positive obligations imposed by S 27(1).[41]

The major shortcoming of the CC in adopting the reasonableness review and rejecting the minimum core is that it discarded the possibility of individuals to claim immediate delivery of goods and services from the state. It made clear that Sections 26 and 27 confer no direct entitlement to socio-economic rights claims; they only entitle individuals to require the government to adopt a reasonable program.[42]

David Blichiz criticizes the court's characterization of the minimum core in *Grootboom* as one involving complex questions to define the content of the obligation in the presence of diverse needs and opportunities for the enjoyment of socio-economic rights by different groups. According to him, the CC failed to distinguish the 'invariant universal standard' that must be met in order for an obligation to be fulfilled and the different methods that can be used to meet the constitutional obligation.[43] The minimum core obligations incorporate 'the standard of socio-economic provision necessary to meet

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[40] Compare Section 27 (1) Everyone has access to …. and Section 27 (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

[41] *Minister of Health*, *Supra note* 36 para 35.

[42] Grootboom para 41 & 95; TAC para 32-39 & 123.

[43] D Blichitiz, *Giving socio-economic rights teeth: the minimum core and its importance*, South African Law Journal Vol. 118 (2002) p. 487.

people's basic needs' which are the universal preconditions necessary for human survival.[44]

Blitchitz's criticism of the court's reasoning, particularly referring to the diverse nature of people's needs and opportunities is sound. Because, the minimum core seeks to establish universally applicable standards that are aimed at providing individuals the minimum threshold of socio-economic rights for their survival in spite of socio-economic differences among them and the difference in their needs. The logic behind this is that to live below these deplorable conditions is something that has to be avoided. It also aims at prioritizing the states obligation in the fulfilment of socio-economic rights.

The CESCR has been able to develop some important benchmarks for determining the core elements of the right to food, health, education and shelter. Thus, these international standards can be adapted to the South African context to elaborate on the concept of the minimum core in particular and Ss 26 & 27 in general. For example, in its general comment on the right to adequate food the CESCR *inter alia* stated 'violations occur when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger'.[45] Thus, at the core of the right to food lies the right of the individual to be free from hunger and reciprocally the duty of the state to ensure this. In similar vein, one could also assert that at the core of the right to housing lies the right of the individual to be provided with shelter. Shelter forms the minimum core of the right to housing. This is also consistent with the principle of constitutional interpretation in the sense that whenever there are vague areas which need to be elaborated the constitution dictated that they be interpreted in reference to international law.[46]

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[44] *Ibid*, p.488.

[45] Committee on Economic and Social rights, *Supra note* 28.

[46] See S 39(1)(b) of the Constitution of the Republic of South Africa.

The CC could also have referred comparative jurisprudence of socio economic rights, specifically with respect to the minimum core to give content to it. Apart from the experience of the Indian Supreme Court we saw above, the Constitutional Court of Columbia is indispensable in the discussion of the concept. The Columbian Constitutional Court has taken a bold step by explicitly adopting the concept of the minimum core. In arriving at this conclusion the Court defined the minimum core in conformity with the various interpretations given by the CESCR with respect to socio-economic rights. Several cases of the Court reaffirmed the minimum core of socio-economic rights such as the right to health and the right to housing in accordance with the interpretations of the CESCR.[47] In a more recent case the Court decided, it reiterated its commitment to the minimum core and thereby ordered a dramatic restructuring of the Country's health system.[48] One of the most interesting aspects of this decision is that when pronouncing the right to health, the court made a distinction between an essential minimum core of the right to health, which was immediately enforceable and other elements of the right to health that are subject to progressive realization taking into account resource constraints. Accordingly, the Court ordered the provision of a wide range of goods and services including viral load tests for HIV/AIDS and medication of anti-retroviral drugs and cancer medications to be effected immediately.

1.4.2 The Political And Institutional Competence Of The Court In Adopting The Minimum Core

The political and institutional competence of courts to adjudicate socio-economic rights claims has been questionable in different countries. The South African CC has, however, taken a bold step by stating that it has the competence to deal with socio-economic rights

[47] Constitutional Court of Columbia CC Decision T-859 (2003); CC Decision T-025 (2005; *CC Decision T-585* (2006).

[48] Constitutional Court Of Columbia, *CC Decision T-760* (2008).

claims on the basis of the constitutional provisions and hence the justiciability of socio-economic rights is not questionable.[49]

A closer look at the competence of the CC to adjudicate socio-economic rights particularly, referring to the minimum core and the enforcement of individual rights claims seem to suggest that it is somehow ambivalent about its position.

When it comes to the specific case of minimum core obligations, the CC in *TAC* stated that 'it was not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum standards… should be'.[50] It also stated that 'it is impossible to give everyone access to the core service[s]'.[51]

The article has tried to highlight some of the difficulties involved in defining the content of the minimum core and hence will not delve again in to that. Here the article will rather focus on the *competence,* i.e. whether the CC has the institutional ability and power to articulate the content of the minimum core.

The CC is the highest judicial body that has the power to interpret the provisions of the constitution and to settle constitutional disputes. Under this broad constitutional power, it has the competence to interpret the contents of the constitutional provisions dealing with socio-economic rights. Thus, it has the ultimate constitutional power to elaborate on these constitutional provisions.

It seems that the CC has shied away from its inherent role of giving meaning content to the constitutional provisions with respect to the notion of the minimum core. The fact that the CC has been reluctant about its role of giving meaning to the minimum core is inconsistent with its role as an ultimate interpreter of the constitution. Although

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[49] Ex Parte Chairperson of The Constitutional Assembly: *In Re Certification of The Constitution of The Republic of South Africa* (1996) (4) SA 744 (CC); (1996) (10) BCLR 1253 (CC) Para 78.

[50] *Minster of Health*, *Supra note* 36 para 37.

[51] *Ibid*, para 34.

determining the minimum core is a difficult task, it could have drawn from international law and national jurisprudence of other countries to elaborate on the normative foundation of the concept.

The other, and probably the most important criticism that is forwarded against the CC's rejection of the minimum core is its failure to use this notion as a means of shifting the burden of proof from the claimant to that of the respondent state. As Blichitiz has pointed out, the minimum core is not an absolute standard but it rather seeks to establish a situation where fulfilment of the core obligations may be genuinely impossible. By establishing a *prima facie* violation of the minimum core, the general comment puts a heavy, but not impossible burden on the state to show that its resources are demonstrably inadequate to meet these needs. It is just a means for prioritizing the state resources to address the needs of people whose survival is threatened.[52] In this way also the minimum core becomes instrumental in ensuring 'practical justiciability' of socio-economic rights.[53]

In the constitutional context the CC could have used the notion of the minimum core in Ss 26(1) and 27(1) or alternatively a first constitutional inquiry of the provisions in Ss 26(2) and 27(2) which states 'within available resources' to apply to the minimum core obligations. The state could have also used the general limitation clause in S 36 to demonstrate that it has made every effort to satisfy the minimum core and its failure to do so is due to lack of resources.

Moreover, the CC could have adopted the notion of minimum core without engaging in extensive discussion of what their precise content is. Some point out that the acceptance of the concept of the minimum core obligations does not require the CC to define the

[52] Blichitiz, *Supra note* 43 p.17.

[53] Liebenberg, *Supra note* 22 p. 21.

basket of goods and services that must be provided.[54] It could have avoided the temptation to define the minimum core of each right and define the general principles underlying the notion on case by case basis. For example, one component of the minimum core of the right to food is freedom from hunger; to ensure this however, the Court can give discretion to the state to have different policy options such as whether to grant cash grants, food vouchers, or the direct delivery of food parcels to people affected. This is an illustration in which the functions of courts is compatible with the principle of separation of powers and can balance criticisms that courts have no institutional competence to deal with such cases by giving discretion to the specific mechanisms of implementation.

The question of institutional competence of courts can also be attacked from a different angle. Of course, courts may not have the institutional competence to deal with all issues that are presented to them. How do they deal with election disputes, corruption charges, insanity defenses (of which they have no professional competence)? It is through the help of expert or professional evidence that they establish the factual and legal issues that help them in the determination of their final findings. Similarly, even if socio-economic rights claims particularly with respect to the minimum core may involve difficult legal and factual issues, this can be solved through expert evidence and getting the necessary information which are vital for the court to determine the legal and factual questions raised. In this regard, Joie Chowdhury also states that when Courts are overburdened with the task of evaluating the factual circumstances of a case, a support system could be devised similar to that of the Special Rapportuer of the UN system. Through such support systems, national courts can get technical assistance on different thematic issues, including the minimum core obligations.[55]

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[54] M Pieterse, *Coming to terms with judicial enforcement of socio-economic rights,* South African Journal of Human Rights, Vol. 20 (2004) p .383.

[55] Chowdhury, *Supra note* 27 p. 22.

The argument that the CC is not politically equipped to deal with rights claims if it had adopted the minimum core relates to the wider skepticism about socio-economic rights claims adjudication in general. This argument is related with the traditional notion of separation of powers where each branch of the government-the legislature, executive and judiciary has distinct functions. Other authors have also suggested that because the minimum core concept incorporates substantively defined minimum content of socio-economic rights, there is a fear that it may drastically alter the separation of powers that exists between courts and other branches of government.[56]

In an interesting article, Marius Pieterse explains some of these controversies by stating that we need to redefine the notion of separation of powers in the present context where courts have become more progressive and vigilant in their adjudications.[57] Moreover, as the Constitutional Court has constitutional basis of the right and competence to deal with socio-economic rights, the argument questioning the political competence of the courts is shallow. As a constitutionally empowered court it has the competence to deal with the adjudication of socio-economic rights and defining the ensuing legal concepts that may flow from them such as the notion of minimum core obligations.

Furthermore, although the responsibility to ensure socio-economic rights is the primary obligation of the nation state, it must be clear that the fulfilment of socio-economic rights is also the responsibility of the international community. The CESCR has stated that the term "to the maximum of its available resources" in Article 2 of the ICESCR refers to both the resources available within a state and those available from the international community.[58] Thus, it is logical to contend that a state can justify its failure to fulfill its minimum core obligation as well as the general obligations of progressive realization. Although this is something that has been framed in the international context, there is no

[56] See FB Cross *The error of positive rights*, University College of Los Angeles Law Review, Vol. 48 (2001) p. 857.

[57] Pieterse, *Supra note* 54.

[58] Committee on Economic, Social, and Cultural Rights, *Supra note* 10 para 13.

reason why this may not be used to justify failure to fulfill minimum core obligations in the domestic sphere. This would also reduce the tension between the compelling demands for the realization of the minimum core and the practical difficulties that need to be acknowledged if a state can demonstrate that it has made every effort both locally and internationally. This is significant in that courts would be vigorous enough to adopt the notion of minimum core obligations as there are wider opportunities for the state to realize socio-economic rights and if not its justification for failing to do so.

Conclusion

Socio-economic rights adjudication can have significant consequences in improving the livelihood of people who are in desperate need. One of the most important aspects of ensuring this is through judicial adherence to the minimum core in resolving socio-economic rights claims of individuals and groups.

The article has highlighted the intricacies involved in defining the minimum core both from domestic and international perspectives. Nevertheless, it is important to note that despite the existing challenges, there are important benchmarks that can help us adopt judicial adherence to the notion of the minimum core. The series of general comments of the CESCR and jurisprudential developments evolving in different countries illustrate that there is at least the normative basis to adopt judicial adherence to the minimum core. While there are Countries that have openly accepted the minimum core such as those of Columbia and in an implicit manner such as in India, the South African Constitutional Court has explicitly rejected the notion of the minimum core in two of its leading cases.

The rejection of the notions of the minimum core obligations by the CC seems to be motivated by two major reasons. First the Court stated that it was impossible to determine the substantive content of the minimum core. While this has been the major difficulty in the articulation of the notion of the minimum core in national jurisdictions and the CESCR, there are at least some benchmarks that the Committee has been able to articulate in its various General comments. The CC could have used these benchmarks to define the contents of these rights, i.e. the right to housing and the right to health in

particular. Moreover, the CC could have also adopted the notion of the minimum core without engaging in extensive discussion on determining their content by linking them with the notions of survival, life, dignity and equality which are the foundational values of the Constitution itself. But more importantly, it could have consulted to comparative jurisprudence of other countries such as Columbia and India which have openly adhered to the notion of minimum core obligations.

The argument that the CC is not institutionally and politically equipped to deal with claims that would arise had it adopted the minimum core obligations falls under the general skepticism towards socio-economic rights adjudication. First one has to be clear about the fact that as reaffirmed by the CC itself the adjudication of socio-economic is not to be compromised because of resource implications. More importantly, the adoption of the minimum core does not entitle an automatic entitlement of socio-economic rights; it only requires the state to give the utmost priority in fulfilling basic needs of individuals. The minimum core obligation has a probative role in the sense that it shifts the burden of proof from the claimant to that of the state to show that it has used all its available resources as a matter of priority. The questionability of the CC's competence to adjudicate claims based on minimum core is not tenable in that as in many areas judges are not expected to know everything. Yet, for determining factual circumstances that may require economic, social, health and broader policy related issues, they can be supported by expert evidence. In light of the foregoing discussions, it can be said that the rejection of the CC the notion of minimum core obligations was a 'lost opportunity' to adjudicate the highly difficult and indeterminate content of socio-economic rights in concrete and practical terms.

HIV Testing From an African Human Rights System Perspective: An Analysis of the Legal and Policy Framework of Ethiopia

Mizanie Abate*

Abstract

Since the first HIV infection in Ethiopia was detected in 1984, the Government has responded by adopting laws and policies. The laws and policies, inter alia, stipulate the manner in which HIV testing shall be conducted. This article examines whether the legislation and policies pertinent to HIV testing are compatible with basic human rights principles as inculcated in the African regional human rights conventions. The author argues that voluntary testing and counseling and routine testing, as long as they are properly implemented, are in harmony with human rights principles. However, the author also argues that mandatory testing of prospective employees is contrary to human rights norms. Compulsory HIV testing of accused sexual offenders, although incompatible with human rights principles, it is argued that it can be justified on legitimate public interest.

1. Introduction

HIV/AIDS remains the leading epidemic in the world even if recent statistics show that the global percentage of people living with HIV has stabilized since 2000.[1] Globally, there were an estimated 33 million people living with HIV in 2007. Sub- Saharan Africa remains most heavily affected by HIV, accounting for 67% of all people living with HIV and for 72% of AIDS deaths in 2007.[2] In the same year, 980,000 people were living with HIV/AIDS in Ethiopia.[3]

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[1] UNAIDS, *Report on the Global AIDS Epidemic*, http://www.unaids.org/en/KnowledgeCentre HIVData/GlobalReport/2008/2008_Global_report.asp last, visited on January 4, 2009.

2 *Ibid.*

3 *Ibid.*

The HIV/AIDS pandemic poses the greatest threat to Africa's efforts to achieve its full potential in the social, economical and political spheres.[4] Cognizant of its devastating consequences, various mechanisms have been designed to address the issue of HIV/AIDS in Africa. Of these mechanisms, HIV testing has long been a focal point for those committed to the struggle against AIDS.[5] This is because the information that is provided by an HIV-test is crucial if an individual is to: protect himself or herself from exposure to situations that create risk because her or his immune system is compromised; protect others by avoiding the types of contact implicated in transmission of the virus; notify others with whom he or she has had contact of their exposure; make informed reproductive decisions including whether to continue or terminate the pregnancy; decide whether or not to breast-feed; and avail himself or herself of early treatment, including monitoring of immune system function.[6]

Testing for HIV has, however, become one of the thorniest aspects of a health debate that is fraught with human rights implications.[7] This article seeks to explore the laws and polices of Ethiopia in respect of HIV testing and to analyse whether they are in compliance with its obligations stipulated under African human rights instruments. In order to address this issue, the article is comprised of six sections. This section introduces the article. The second section attempts to highlight the types of HIV testing. Section three explores African human rights norms relevant to HIV testing. Section four briefs the HIV testing policies and legislation of Ethiopia. Then, section five tests whether these laws and policies comply with human rights as incorporated in the African human rights system. Finally, the sixth section draws conclusions on the issues explored in the article.

2. Types of HIV Testing

[4] S. Gumedze, HIV/AIDS and human rights: The role of the African Commission on Human and Peoples' Rights, African Human Rights Law Journal, Vol. 4, No.2, (2004), p.181.

[5] Canadian HIV/AIDS Legal Framework, *Outcomes of the symposium on HIV testing and human rights*, http://www.genderhealth.org/pubs/testing_symposium.pdf, last visited on October 4, 2007. See also Kevin M D EN Cock et al, *A serostatus-based approach to HIV/AIDS prevention and care in Africa*, http://www.thelancet.com /journals/lancet/article/PIIS0140673603149069/fulltext, last visited on March 4, 2008.

[6] Voluntary Counselling and Testing, UNAIDS Technical Update, May 2000, *Best practice collection*, p.6. See also T. Stein, The social welfare of women and children with HIV and AIDS: Legal protections, policy and programs (1998), p.90.

[7] The South African Institute of International Affairs, *Special Feature*: *States, AIDS experts tests boundaries of HIV testing*, http://www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=403 last visited on Octobr4, 2007.

The most general manner in which it can currently be determined whether a person is infected with HIV is through blood tests for the presence of antibodies to HIV.[8] As can be gathered from the practice in various countries, there are four types of blood testing. These are: client-initiated HIV testing and counseling (VCT); routine testing or provider initiated testing and counseling (PITC); mandatory HIV testing (screening); and compulsory HIV testing.

VCT involves the following three elements (often referred to as the 3C principles): pre-and post-test counseling, informed consent, and confidentiality of test results. One of the basic features of the VCT approach is that it is the individual, not the health system that initiates action; she or he receives counseling and testing services only after having made an active decision to seek out a VCT service and be tested.[9] The other distinctive feature of the VCT model is that it requires extensive pre- and post-test counseling.

According to the PITC approach, as recommended by UNAIDS/WHO[10], HIV testing is recommended by health care providers to persons attending health care facilities as a standard component of medical care. People are tested unless they clearly opt out and refuse to be tested. It is emphasized that, like VCT, PITC is voluntary and the 3 C principles – informed consent, counseling and confidentiality – must be observed. Unlike VCT, however, in the case of PITC, clients or patients receive only essential pre-test information about HIV, and there is greater emphasis on post-test, rather than pre-test counseling.[11]

Mandatory testing is defined as testing that would occur as a condition for acquiring a particular status or receiving a service or other benefit, such as donating blood, immigrating to certain countries, marriage, joining the military or as a precondition of other kinds of employment.[12]

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[8] South African Law Commission, *Fourth Interim Report on Aspects of the Law Relating to AIDS: Compulsory HIV Testing of Persons Arrested in Sexual Offence Cases* (2000), Para 3 (26).

[9] WHO/UNAIDS, *Guidance on Provider –Initiated HIV testing and counselling in the Health Facilities*, http://whqlibdoc.who.int/publications/2007/9789241595568_eng.pdf, last visited on August 12, 2007.

[10] *Ibid.*

[11] In some countries, the pre-test counselling is totally excluded. For example, the United States of America Centers for Disease Control released new recommendations in September 2006calling for routine testing; the right to decline testing is supposed to remain, but CDC now recommends eliminating pre-test counselling. See Canadian HIV/AIDS Legal Network, *Supra Note* 5.

[12] Canadian HIV/AIDS Legal Framework, *Supra Note* 5.

International agencies working on HIV and public health authorities continue to reject mandatory testing as unethical and a violation of human rights and ineffectual in public health terms.[13]

'Compulsory testing,' also known as 'involuntary testing,' is defined as testing without a voluntary element — i.e., without informed consent- at the behest of someone or some institution other than the person tested and, in some cases, with neither the fact of having been tested nor the result communicated to the person tested.[14] As with mandatory testing, the UNAIDS and WHO have entirely rejected compulsory testing on the grounds that it is unethical, violates human rights and is ineffectual in public health terms.[15] It is, however, maintained in some countries mainly in two areas, namely in cases of occupational exposure and accused or convicted sexual offenders.

3. African Regional Human Rights Standards Applicable in the Context of HIV Testing

A rights-based approach to HIV testing as envisaged in various guidelines and policies issued by Joint United Nations Programme on HIV/AIDS (UNAIDS), World Health Organisation (WHO) and other UN pertinent organs[16] requires that HIV testing should, in principle, be undertaken in conformity with the 3C principles.[17] The 3C principles are grounded in a number of human rights as inculcated in various African human rights conventions.

On the African continent, the African Charter on Human and Peoples' Rights (ACHPR),[18] adopted in 1981, is the principal instrument for the promotion and protection of human and peoples' rights.

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[13] WHO/UNAIDS*, Supra Note* 9.

[14] Canadian HIV/AIDS Legal Framework, *Supra Note* 5.

[15] WHO/UNAIDS, *Policy Statement on HIV Testing*, http://www.who.int/hiv/pub/vct/en/hivtestingpolicy 04.pdf, last visited on August 25, 2007.

[16] OHCHR/UNAIDS, *HIV/AIDS and Human Rights International Guidelines: Second International Consultation on HIV/AIDS and Human Rights*, http://whqlibdoc.who.int/publications, last visited on August5, 2007, para 28 and 31 (b); and UNAIDS/WHO, Supra Note 15. Such principles are also reaffirmed by the May 2007 provider-initiated guideline for HIV testing. See UNAIDS/WHO, Supra Note 9. A rights based approach to HIV testing is also recognised at African regional level. This can be discerned from resolutions and declarations that have been adopted under the auspices of the African Union (AU) and its predecessor Organisation of African Unity (OAU) that makes explicit reference to human rights protection and promotion as one of the strategies designed to combat HIV/AIDS.

[17] I*bid.*

[18] African Charter on Human and Peoples' Rights /ACHPR in Short/ adopted in June 1981 and came into force in October 1986. All AU members, including Ethiopia, are State Parties thereto.

It does not, however, make specific reference to HIV/AIDS.[19] Surprisingly, the African Charter on the Rights and Welfare of the Child (ACRWC),[20] adopted nearly ten years later, in 1990, does not also make any reference to HIV/AIDS.[21] It is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Women's Protocol)[22] that mentions, albeit in superficial way, HIV/AIDS.[23] Given the fact that women in Africa are highly affected than men by the epidemic, the Women's Protocol should have included detailed provisions to sufficiently address the problem.

The fact that these regional human rights instruments do not make explicit reference to HIV/AIDS does not mean that their provisions are not applicable in the context of HIV testing. In fact, their substantive provisions are flexible and relevant enough to address human rights in the context of HIV testing. The following sub-sections discuss these relevant human rights.[24]

3.1 The Principles of (Right to) Non-Discrimination and Equal Protection of The Law

The principle of non-discrimination is entrenched in both Article 2 of the ACHPR and Article 3 of the ACRWC. The grounds of discrimination enumerated either in the ACHPR or ACRWC do not, however, expressly outlaw discrimination in the context of HIV testing or on the grounds of HIV status. But it can safely be argued that the term 'other status' in both documents can be construed to include prohibition of discrimination on this ground. This argument is supported by article 60 of the ACHPR which allows the African Commission or any other organ that will be involved in the implementation of the Charter to look beyond the Charter in interpreting the norms laid down by the Charter. To this effect, the norms developed by various treaty monitoring bodies and special organs

[19] The Commission's amended guidelines on reporting, however, require states to report on issues concerning HIV and AIDS and Commissioners consistently highlight this aspect as part of their questions to state delegates. See F. Viljoen *The obligation of governments in a time of HIV/AIDS,* Interights Bulletin, Vol.15, (2005) p. 49.

[20] African Charter on the Rights and Welfare of the Child adopted in July 1990 and came into force in November 1999.

[21] It is only within the Guidelines on State Reporting to the African Committee on the Rights and Welfare of the Child (2003) that mention is made of HIV/AIDS. See para 21 (g) of the Guidelines which provides 'States Parties are requested to provide relevant information …in respect of children who need special protection on account of being in risky or vulnerable conditions and situations, such as street children or HIV/AIDS orphans'.

[22] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in July 2003 and entered into force in November 2005.

[23] *Ibid*, Art. 14.

[24]The writer does not believe that the rights discussed in this section are the only rights relevant to HIV testing. In view of the principle of indivisibility and interdependence of rights, other rights may in one way or another be related to testing. The discussion, however, is confined to those rights that have a direct and practical relevance to testing.

of the UN are relevant.[25] The UN Commission on Human Rights declared that the term 'other status' used in several human rights instruments 'should be interpreted to include health status, including HIV/AIDS' and that discrimination on the basis of actual or presumed HIV/AIDS status is prohibited.[26] In the same manner, the Committee on the Rights of the Child pointed out that the grounds of discrimination under Article 2 of Convention on the Rights of the Child (CRC) include discrimination on the basis of HIV/AIDS.[27] On the basis of this interpretation, the term 'other status' as used under Article 2 of the ACHPR and Article 3 of the ACRWC prohibits discrimination on the basis of one's HIV status.

3.2 The Right to Work and Freedom Of Movement

These two rights should be seen in connection with the principle of non-discrimination discussed above. This is because their actual and potential violation springs from prohibition of the enjoyment of the rights purely on the basis of HIV status or by putting HIV testing as prerequisite to the enjoyment of these rights to certain groups of persons. A separate discussion on how these rights are subject to invasion in the context of HIV testing is undertaken below.

The ACHPR recognizes the right to work, stipulating that 'every individual shall have the right to work under equitable and satisfactory conditions'.[28] Thus, the prohibition against discrimination in respect of employment and occupation on the basis of HIV status could be deduced from the cumulative reading of Article 15 and 2 of the ACHPR. Even if there are no cases that have been decided by the African Commission in this respect, there are groundbreaking domestic court decisions.[29] Two of these cases are briefly discussed below.

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[25]The phrase 'provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members', in Article 60 of the ACHPR, can be interpreted to mean general comments of treaty monitoring organs and resolutions of specialised organs of the UN, such as the UN Commission on Human Rights (now the Human Rights Council). The same result could be also reached by interpreting Article 46 of the ACRWC. All CRC, International Covenant on Civil and Political Rights and International Covenant on Economic and Social and Cultural Rights are ratified by Ethiopia. See http://www.ohchr.org/english/countries /ratification/index.htm, last visited on September 1, 2007.

[26]UN Commission on Human Rights Resolution 1996/44 and Resolution 1995/21 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

[27]Committee on the Rights of the Child, *General Comment No. 4, Adolescent health and development in the context of the rights of the child* (2003) para.6.

[28] ACHPR, *Supra Note* 18, Art 15.

[29] *Hoffmann* v. *South African Airways*, Case CCT 17/00 (2000); 2001 (1) SA 1 (CC); 2000 (11) BCLR 1235 (CC); *N v Ministry of Defence* (2000) ILJ 1999 (Labour Court of Namibia, Case No.: LC 24/98); *MX* v. *ZY*, AIR 1997 Bom 406 (High Court of Judicature, 1997); and *JRB et al.* v. *Ministry of Defence*, Case No. 14000, Supreme Court of Justice of Venezuela (Political-Administrative Bench) (1998). It is argued that domestic judicial decisions of African countries

In Hoffman v South Africa,[30] the appellant applied for employment as a cabin attendant with South African Airways. Although he qualified for the said job as per the other criteria of selection, the pre-employment blood test showed that he was HIV positive. As a result, he was informed that he could not be employed for the job he was seeking. The appellant challenged the constitutionality of the decision of South African Airways not to employ him. The Constitutional Court, on the basis of the right to equal protection of the law and non-discrimination of Article 9 of the South African Constitution, decided that 'there can be no doubt that South African Airways (SAA) discriminated against the appellant because of his HIV status'.[31]

In another case decided in the Labor Court of Namibia,[32] the applicant, N, was a former member of the national liberation struggle in the South-West Africa People's Organization who had received military training while in exile. In September 1996, he sought to enlist. As part of that process, he was tested for HIV. Two weeks later, he was informed by a Namibian Defense Force medical officer that he had tested positive and, as a result, would not be accepted by the Force. The applicant argued that the Namibian Defense Force had breached the 1992 *Labor Act* (section 107) which prohibited discrimination in employment 'in an unfair manner'. Being convinced by the argument of the applicant, the Court held that 'the applicant's exclusion from the Namibian Defense Force solely because of his HIV status amounted to 'discrimination in an unfair manner', contrary to the *Labor Act*'.

These decisions have demonstrated that exclusion of job seekers from employment solely on the basis of their HIV status amounts to unfair discrimination.

The various aspects of freedom of movement are provided in Article 12 of the ACHPR. Freedom of movement within and freedom to return to an individual's country of origin or residence guaranteed under Article 12 applies to 'every person' which includes aliens and stateless persons. This freedom, as it applies to

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may be used as interpreting guides for the provisions of the ACHPR. This can be implied from article 61of the ACHPR which provides that '[t]he Commission shall also take into consideration, as subsidiary measures to determine the principles of law...legal precedents'.

[30] Hoffmann v. South African Airways, Ibid. The African Commission has the possibility of interpreting the reference to 'African practices' and 'legal precedents' in Article 61 as allowing it to rely on the decisions of domestic African Courts

[31] *Ibid,* para.29.

[32] N v Ministry of Defence, *Supra Note* 29.

aliens, may, however, be exercised provided that an individual abides 'by the law'.[33] The Commission is yet to establish the contents of these rights, and to interpret the circumstances under which the rights could be limited. On the basis of WHO and UNAIDS Guidelines, any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travelers, are discriminatory and cannot be justified by public health concerns.[34]

The right to seek and obtain asylum in other countries, as laid down in Article 12 (3) of the ACHPR, may be enjoyed in accordance with laws of those countries and international conventions. No international instrument prescribes HIV testing as a precondition to seek and obtain asylum. With respect to the limitations that may be provided by national laws, it would be appropriate to have a look at of the jurisprudence of the African Commission. In the only case that the Commission had the opportunity to decide on this matter,[35] it held that Article 12(3) 'should be read as including a *general protection of all those who are subject to persecution*, that may seek refuge in another state'.[36] (Emphasis added) Hence, it is submitted that refusal to grant asylum solely on one's HIV status or putting HIV testing as a condition to grant asylum is discriminatory and a flagrant violation of Article 12.

3.3 The Right to Physical Integrity, Respect For Dignity and Privacy

The right of every individual to respect for his/her physical integrity is recognized under article 4 of the ACHPR and Article 4 (1) of the Women's Protocol. The recognition of this right is of crucial importance from the perspective of HIV testing. This is because it is generally interpreted as a right to the protection of the body from any violation not freely consented to, such as the removal of an organ from a living person.[37] From the view point of this interpretation, the relevant prohibitions ensuring protection of the right to physical integrity can be construed as prohibiting HIV testing without the informed consent of the individual.

[33] O. Nmehielle, The African Human Rights System: Its Laws, Practice, and Institutions (2001), p.114.

[34]UNAIDS/OHCHR, International Guidelines on HIV/AIDS and Human Rights: Consolidated Version (2006), Para 127. For the applications of restrictions to rights, see a detailed discussed under the sub-section 'limitations of rights'.

[35]Organisation Mondiale Contre la Torture and others v Rwanda (2000) AHRLR (ACHPR 1996).

[36] *Ibid*, para. 30.

[37] F. Ouguergouz, The African Charter on Human Peoples' Rights: A comprehensive Agenda For Human Dignity and Sustainable Democracy in Africa (2003), p.102.

The right to respect for one's dignity inherent to a human being is protected both in article 5 of the ACHPR and Article 3 of the Women's Protocol. At this juncture, it must be borne in mind that 'there is some sort of convergence between the objects of the right to physical integrity and dignity'.[38] In both instruments, the individual's (women's right in the case of the Women's Protocol) right to respect of the physical integrity of his/her person, although explicitly recognized, can, in fact, also be inferred from dignity.[39] 'Human dignity is the source of the person's innate rights to freedom and to physical integrity'.[40]Thus, the right to respect for the dignity of the person, one aspect of which is the right to physical integrity, also protects a person against non-consensual HIV testing.

The right to privacy is another right relevant to HIV testing. While the ACRWC explicitly recognizes the right to privacy under Article 10, the ACHPR and the Women's Protocol do not. The precise content of the right to privacy within the ACRWC has not, however, yet been dealt with. Utilizing Article 46 of the ACRWC as a stepping stone, it is, nonetheless, possible to give content to it. Both UNAIDS/WHO Consolidated Guidelines on HIV/AIDS and Human Rights[41] and the General Comment of the Committee on the Rights of the Child[42] confirmed that the right to privacy encompasses the obligation to seek informed consent to HIV testing and ensure confidentiality of HIV test results.

Although the right to privacy is not explicitly guaranteed in the latter two regional documents, it may be implied from other rights expressly recognized therein. In this respect, it is appropriate to examine the decision of the African Commission in *Social and Economic Rights Action Centre and Another v Nigeria*.[43] In this case, the African Commission held that the rights to housing and the right to food (although not expressly guaranteed in the Charter) are implicit in the Charter.[44] It went on and held that the combined effect of three corollary rights, namely, the right to property, to heath

[38] *Ibid*, p.90.

[39] *Ibid.*

[40] I.Currie *et al,* The Bill of Rights Handbook (2005), p.273.

[41] UNAIDS/OHCHR, *Supra Note 34*, para 119.

[42] Committee on the Rights of the Child, General Comment No. 3, HIV/IADS and the rights of the child (2003), para 24.

[43] Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).

[44] *Ibid,* para. 63.

and to protection of the family is to constitute the right to housing.[45] In the same way, it is submitted that even if the right to privacy is not explicitly recognised in the ACHPR and the Women's Protocol, it can be implied from other rights recognised therein. Both the ACHPR and the Women's Protocol recognize the right to physical integrity and the right to respect for one's dignity. As has been shown above, these rights protect the individual from coercive HIV testing. The analysis of the right to privacy also shows that it requires HIV testing to be carried out only with the informed consent of the individual concerned.[46] It is argued, therefore, that as long as the right to body integrity and respect for one's dignity are incorporated, the right to privacy is implicitly protected in these rights.

3.4 The Right to Enjoy the Best Attainable State of Health and Information

Article 16 of the ACHPR is less elaborative than Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in terms of acknowledging the right to best attainable state of health. Although it, in general terms, requires States Parties to take the necessary measures to protect the health of the people, it does not spell out the specific measures that states are expected to take. Unlike the ACHPR, the ACRWC has articulated the right to health in a more clear way, putting the specific obligations of States Parties in detail.[47] The Women's Protocol is relatively the best regional instrument in addressing the right to health in the context of HIV/AIDS. It, *inter alia*, expressly requires State Parties to protect and promote the right of women to self protection and to be protected against sexually transmitted infections, including HIV/AIDS.[48]

While the right to highest attainable standard of health is recognized in all the three regional treaties, there is yet no clear jurisprudence from their monitoring organs that specifically links them to HIV testing. In such a scenario, it is appropriate to resort to ICESCR, CRC and Convention on the Elimination of All Discrimination Against Women (CEDAW) and general comments of their monitoring organs. What can be concluded from these instruments and their interpretations by their monitoring organs is that the right to health, as recognized in the ACHPR, ACRWC and the

[45] *Ibid*, para 60.

[46] UNAIDS/OHCHR, *Supra Note 34*, para 119. See also Committee on the Rights of the Child ,*Supra Note* 42, para.24.

[47] African Charter on Rights and Welfare of the Child, *Supra Note* 20, art 14.

[48] Protocol, *Supra Note* 22, art 14 (1) (d).

Women's Protocol, requires consensual HIV testing and confidentiality of test results.[49] Along with freedom of information,[50] it also requires testing to be accompanied by pre- and post-counseling.[51] In relation to confidentiality of HIV testing results, it is appropriate to read Article 16 of the ACHPR and Article 14 of the ACRWC together with Article 14(1) (e) of the Women's Protocol. The latter inculcates 'the right to be informed…on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS.' This provision, in effect, infuses a limitation against the confidentiality of test result of the sero-positive partner by entitling the other partner to know his/her HIV status.[52] The justification for such a limitation is pretty clear; it is to protect the other partner from HIV infection.

3.5 Limitations of Rights

With few exceptions,[53] the exercise of most of the rights of the ACHPR and ACRWC is subject to specific article-based limitations. Moreover, all rights of the individual recognized in the ACHPR are subject to the general limitation clause under Article 27 (2). Although it is not as explicit as the ACHPR, Article 31 of the ACRWC imposes a similar general limitation. The inclusion of duties on the child in Article 31 of the ACRWC is not to enforce them against the child (as no complaint mechanism allows complaints against individuals) rather to show that the right of the child may be restricted in discharging his or her duties.

The general limitation clauses and article-based limitations that specify the grounds of limitations have a relatively less restrictive effect in that once the content of the restricting clause is ascertained, states cannot go beyond that and encroach the right. The real danger comes from claw-back clauses[54] that do not clearly specify the grounds of restrictions. A typical example of such limitation can be seen in Article 12 (1) of the ACHPR which states that 'every individual shall have the right to freedom of movement and residence within the borders of a State provided *he abides by*

[49] Committee on Economic, Social and Cultural Rights General Comment No. 14, The right to highest attainable standard of health (2000) paras12(c) , 12(d), 16.

[50] Freedom of information is recognised in article 9 (1) of the ACHPR and article 7 of the ACRWC.

[51] UNAIDS/OHCHR, Supra Note 34. See also Supra Note 49, para.12 (b).

[52] Such limitation is included in the Women's Protocol taking into consideration the existing reality that women are more vulnerable to HIV/AIDS than men. It is argued, however, that the limitation should be applicable to men as well in view of the principle of equality and non-discrimination provisions of the ACHPR and Article 60 of the same.

[53] In addition to the economic, social and cultural rights, these exceptions include Art. 5 and 7 of the ACHPR.

[54] In the context of ACHPR, the phrase 'claw-back clauses' has been used to generally refer to those provisions of the Charter that tend to limit some of the rights guaranteed under the Charter. See Nmehielle, *Supra Note* 33, p.165.

the law'. (Emphasis mine) From this, it is clear that freedom of movement can be limited by the law. In absence of any reference to certain interests which the law is supposed to protect, such kinds of limitations may open the door to unwarranted limitations. States are the lawmakers and the most frequent violators of human rights. In view of this fact, attaching these limitations amounts to putting human rights under the mercy of the very institution which attacks them.[55] What worsens the situation is that such clauses even go further than derogation clauses in the sense that 'they permit a state, in its almost unbounded discretion, to restrict its treaty obligations and endanger the rights' therein.[56]

Cognizant of the adverse effects of such open-ended limitation clauses, the African Commission has developed a strict interpretation of these clauses. In doing so, the Commission invoked Article 27 of the ACHPR in support of its argument. In its view 'the only legitimate reasons for limitations to the rights and freedoms of the Charter are found in Article 27(2)',[57] which stipulates that the right under the Charter 'shall be exercised with due regard to the right of others, collective security, morality and common interest'.[58] It went to state that 'the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained'.[59] In another communication, the Commission remarked that Article 27 (2) is the only legitimate reason for limitations to the rights and freedoms of the Charter,[60] which in effect amounts to including other article-specific limitation clauses within the ambit of Article 27(2).

4. HIV Testing Legislative and Policy Framework of Ethiopia

The second section highlighted the definition and specific features of different models of HIV testing. Against this background, the present section summarizes the nature of these models of testing as included in domestic legislation and policies of Ethiopia.

4. 1 Legislative and Policy Framework in Ethiopia

[55] *Ibid.*

[56] *Ibid.*

[57] Media Rights Agenda and others v Nigeria (2000) AHRLR (2000) (ACHPR 1998) para 68.

[58] *Ibid.*

[59] *Ibid*, para.69.

[60] Prince v South Africa (2004) AHRLR 105(2000) (ACHPR 2004) para 43.

Since the first HIV infections in Ethiopia were identified in 1984, and the first AIDS cases were reported in 1986,[61] HIV/AIDS increased rapidly in the country.[62] To address this, the Government of Ethiopia has responded by establishing institutions[63] in charge of coordinating the efforts to combat the epidemic. Adoption and implementation of polices, strategies and legislation that regulate the efforts have also been made part of the response. The following sub-sections summarise the policies, strategies and legislation that are relevant to HIV testing.

4.2 The 1998 Policy on HIV/AIDS

The 1998 Policy on HIV/AIDS[64] is a comprehensive policy that dedicates a few paragraphs to HIV testing.[65] Paragraph 3 (2) lays down the principle by saying 'testing and counseling shall be voluntary and shall be encouraged along with counseling devices'. The Policy incorporates two exceptions to the voluntary nature of testing. The first of these two exceptions is for HIV screening for job recruitment purposes, where the nature of the occupation (pilots - civil aviation and air force) 'justifies' to doing so.[66] The other exception occurs for the testing of blood donors.[67]

The policy also affirms confidentiality of testing results.[68] PLWHA shall, nevertheless, be encouraged through repeated counselling to accept the need for notifying his/her sero-status to others (spouse, friends, and family).[69] In cases of altered state of consciousness or of difficult cases where a person refuses to notify after adequate counselling and his/her partner is at risk of infection,

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[61] Lisa Garbus, *HIV/AIDS in Ethiopia*, http://www.etharc.org/amhara/Asset/Dowloadables /Ethiopia %20AIDS% 20Policy%20Analysis.pdf, last visited on September 12, 2007.

[62] As the Ministry of Health of Ethiopia, 2004 showed, with an estimated 1.5 million people living with HIV/AIDS and a national prevalence rate of 4.4% (12.6% urban and 2.6 rural), Ethiopia was one of the countries hardest hit by HIV/AIDS epidemic. Cited in Ethiopian Strategy Plan for Intensifying Multi-Sectoral HIV/AIDS Response (2004-2008).

[63] In 1985 (before the first AIDS case had been officially diagnosed), the government of Ethiopia established a national task force to address prevention and control of HIV/AIDS. In September 1987, the government established an HIV/AIDS department within the Ministry of Health. In 2002, the government established the National HIV/AIDS Prevention and Control Council by Proclamation No.276/2003, See Gabrus, *Supra Note* 61.

[64] Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia (1998).

[65] The Strategic Framework for the National Response to HIV/AIDS in Ethiopia 2000-2004 replicates provisions of the 1998 Policy on HIV/AIDS with respect to HIV testing and hence it is not discussed.

[66] Policy on HIV/AIDS of FDRE, *Supra Note* 64, para 3(3).

[67] *Ibid*., paras 3.5 and 3(6).

[68] *Ibid*., para 8(1).

[69] *Ibid*., para 5 (5).

based on the circumstances, the endangered partner has the right to directly access the information regarding the sero-status of the partner.[70]

4.3 The 2007 Guidelines for HIV Counselling and Testing in Ethiopia

As pointed out in the introductory part of the Guidelines,[71] one of the main aims of adopting these Guidelines is to scale up HIV testing. Scaling up of HIV testing is justified by the development of affordable and effective medical care for people living with HIV. The Guidelines encompass detailed provisions on the requirements of consent, counseling and confidentiality both in VCT and PITC.

According to paragraph 1(1) of the Guidelines, informed consent for testing shall be obtained in all cases, except in mandatory testing. People should be encouraged to seek, but not coerced into, testing. To ensure genuine consent, counselors should make sure that clients adequately understand benefits, implications and consequences of testing.[72]

As is the case with consent, the Guidelines state that 'adequate pre- and post-test counseling shall be offered to all clients'.[73] In provider-initiated testing and counseling, the pre-test session consists of education or information to individuals, couples or groups, and should be brief and focus on the benefits of testing and services available.[74] Unlike pre-test counseling, post-test counseling should be provided in person.[75] The form of the post-test counseling session depends on the test result, and is often brief in provider-initiated testing.[76]

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[70] *Ibid*, para 5 (6).

[71] Federal HIV/AIDS Prevention and Control Council /Federal Ministry of Health, *Guidelines for HIV Counselling and Testing in Ethiopia* (2007).

[72] *Ibid*, para 3(2)(2).

[73] When para 1(1) is read together with para 3.2, it tells us how adequate the counselling should be. It is provided that the counselling must enable clients to understand and make informed decisions on whether to be tested for HIV, and to understand the results and facilitate future planning.

[74] Federal HIV/AIDS Prevention and Control, *Supra Note* 71, para 3(2) (1).

[75] This paragraph must be read in conjunction with paragraph 1(1) which encourages couples to be counselled, tested and receive results together.

[76] Federal HIV/AIDS Prevention and Control, *Supra Note* 71, para 3(2) (4).

Client confidentiality will be maintained at all times. Results can be shared with other persons only at the client's request or agreement.[77] It is the client's decision to learn the test results, which should never be issued in a public area, but in private, in a session alone or as a couple.[78]

The Guidelines allows two exceptions for confidentiality of testing results. Firstly, in cases where testing is ordered by a court of law, results should be communicated directly to the appropriate authority.[79] Secondly, (sexual) partner notification shall be encouraged in cases where one partner receives the results alone. When a client fails to disclose positive status to his/her partner for any reason, however, the endangered partner has the right to know the positive partner's HIV status.[80]

As mentioned above, the Guidelines, aside from VCT, introduced PITC. PITC refers to HIV testing and counseling that is recommended during treatment by health care providers. Individuals may specifically decline to undergo HIV testing after having received pre-test information, without such decision affecting their clinical care. PITC is voluntary and the 3C principles–informed Consent, Counseling and Confidentiality– must be observed at all times.[81]

For clients with symptoms or signs of illness possibly attributable to HIV and women[82] during pregnancy and labor, it is a basic responsibility of health care providers to recommend HIV testing and counseling as part of routine clinical management. PITC also aims at identifying unrecognized or unsuspected HIV infection in persons attending health facilities. Providers may therefore recommend HIV testing and counseling to patients who do not exhibit obvious HIV-related symptoms and signs.[83]

[77] *Ibid*, para 1(1).

[78] *Ibid*, para 3(2) (3).

[79] *Ibid.*

[80] *Ibid.*, paras 1(6) and 3(2) (8).

[81] *Ibid*, para 2(1) (2).

[82] As cross-referred to by para 3(4) (4), women receiving counselling and testing in antenatal clinic settings should be managed according to the 2007 National Guidelines which is discussed in the next sub-section.

[83] Federal HIV/AIDS Prevention and Control, *Supra Note* 71, paras 2 (1) (2) and 1 (3).

Mandatory HIV testing is, in principle, prohibited.[84] It is permissible only in exceptional cases by order of a court of law. Mandatory testing will also be done on all voluntary blood, tissue and organ donors before transfusion or transplantation.

4.4 The 2007 Guidelines for Prevention of Mother-to-Child Transmission of HIV in Ethiopia

Similar to the 2007 Guidelines for HCT in Ethiopia, informed consent, pre- and post-counselling and confidentiality of testing results underpin the 2007 Guidelines for Prevention of Mother-to-Child Transmission (PMTCT) of HIV in Ethiopia.[85] Provider-initiated routine counseling and testing using the opt-out approach is recommended for all clients seen within the context of maternal care (i.e. antenatal, labor, immediate postpartum). This means that HIV testing is offered as a routine component of standard maternal health care. The client is given pre-test information in a group or individually on HIV/AIDS and PMTCT and told that routine antenatal laboratory tests will include an HIV test unless she says 'no', which shall be clearly communicated. The provider must also inform the client that she has the right to say 'no' (to opt out), and this decision by no means affects the services she will get from the health facility.

4.5 Legislation

There is no specific legislation in Ethiopia addressing HIV/AIDS in general and HIV testing in particular. A few proclamations, however, incorporate provisions on HIV testing. The first of these proclamations is the Federal Civil Servants Proclamation No.515/ 2007. In prohibiting pre-employment mandatory testing in civil service institutions, Article 13 (1) of this Proclamation states that '[t]here shall be no discrimination among job seekers or civil servants in filling up vacancies because of their ethnic origin, sex, religion, political outlook , disability, *HIV/AIDS* or any other ground' (Emphasis added). While the Proclamation provides for production of a medical certificate as a pre-condition for candidates who qualify for a job, it unequivocally states that the medical certificate does not have to include an HIV test result.[86] The Proclamation also prohibits HIV testing of civil service employees.[87]

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[84] *Ibid*., para. 1 (1) and 2 (1) (3).

[85] Federal HIV/AIDS Prevention and Control Council /Federal Ministry of Health *Guidelines for Prevention of Mother-to-Child Transmission of HIV in Ethiopia* (2007) paras 5 (3) (2) cum 1 (2).

[86] Federal Civil Servants Proclamation, 2007, Art.17, Proc. No.515, Fed. Neg. Gaz., Year 13, No.15.

[87] In this regard, Article 63 (1) of the Proclamation states that '[a]ny civil servant shall have the obligation to take medical examination, with the exception for HIV/AIDS, when required by the government institution on sufficient ground related to the service'

The second proclamation is the Labor Proclamation,[88] which prohibits HIV testing of employees that fall under its scope of application, notably workers in private business companies and profit-motivated government enterprises.

Moreover, Article 34 of the 1961 Criminal Procedure Code of Ethiopia is interpreted as allowing compulsory testing of accused sexual offenders.[89] This article states that:

... where an investigating police officer considers it necessary, having regard to the offence with which the accused is charged, that a physical examination of the accused should be made, he may require a registered medical practitioner to make such examination and require him to record in writing the results of such examination. Examination under this Article shall include the taking of a blood test.

5. Analysis

This section goes to the crux of the matter and analyzes whether the laws and policies of Ethiopia applicable to HIV testing are compatible with the relevant human rights norms in the African human rights system.

As discussed earlier, HIV testing should comply with three inter-woven principles, namely, both pre-test and post-test counseling, informed consent and confidentiality of test results.[90] These principles are grounded in African human rights norms, such as the right to physical integrity, the right to privacy, the right to highest attainable standard of health, and the right to freedom of information. Thus, any model of HIV testing that is conducted in breach of one of the 3C principles is a violation of the human rights which these principles seek to safeguard. The right to equal

[88] Labour Proclamation, 2003, Proc. No. 377, Fed. Neg. Gaz., Year 10, No.12. Article 14 (2) (d) states that '[i]t shall be unlawful for the worker to, except for HIV/AIDS test, refuse to submit himself for medical examination when required by law or by the employer for good cause'.

[89] This can be understood from decided cases in the Federal High Court as can be exemplified by the case of *Public Prosecutor v Tesfaye Mamo*. The justification given for compulsory testing of rape offenders is that the result of the HIV test is important to determine with which specific offence the offender should be charged and sentenced. If the test result reveals that the accused is positive, the charge is amended to attempted murder. If, on the other hand, his or her test shows negative result, the case will continue as rape. The cases are cited in Selamawit Tesfaye, *The Legality of Mandatory and Compulsory HIV Testing under the Ethiopian Legal System*, (unpublished, 2004, LL.B Thesis, Addis Ababa University, Addis Ababa), pp.98-99.

[90] OHCHR/UNAIDS, Supra Note 16, Para 28 and 31 (b). Such principles are also reaffirmed by the May 2007 PITC Guidelines.

protection of the law[91] and non-discrimination[92] are also violated when HIV testing is utilized as a condition for the enjoyment of rights or where it results in differential treatment or violations of other human rights.[93]

5.1 VCT

As the three 3 C principles are at the heart VCT model of testing, it is possible to draw a general conclusion that the VCT policies of the countries under the case study are compatible with the relevant human rights norms of the African human rights system.

5.2 PITC

In addition to VCT, the HIV/AIDS policies and strategies of Ethiopia incorporate PITC at least as a supplementary model of HIV testing. The policies and the strategies also lay down guidelines that health care providers are supposed to follow while applying the PITC services. In all cases, the guidelines emphasize that, like VCT, the three 3C principles shall be observed. There are, however, three areas of concern for human rights that should be discussed in detail.

First, as discussed earlier, unlike the VCT model, testing is initiated by the provider, not by the client in the case of PITC. People are tested unless they expressly opt out of testing.[94] Commentators warn that PITC could in practice amount to mandatory testing which is a violation of human rights.[95] Such concern arises from the fact that the skewed power relationship between health care worker and patient, particularly in developing countries, could cause the patient to be intimidated into testing.[96]

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[91] Art. 3 of the ACHPR.

[92] Art. 3 of the ACHPR and Arts. 2 and Art. 3 of the ACRWC.

[93]The term 'other status' in both Article 2 of the ACHPR and Article 3 of the ACRWC can be construed to include prohibition of discrimination on this ground. For such interpretation, see n 25 and 26 above.

[94] Federal HIV/AIDS Prevention and Control, Supra Note 71, para 2 (1) (2).

[95] Phillip Nieburg, *Expanded HIV testing: Critical gateway to HIV treatment and prevention requires major resources, effective preventions,* http://usinfo.state.gov/gi/img/assets/5096/expandedhivtestingpdf, last visited on October 17, 2007. See also K. Kenyon *Routine HIV testing: A view from Botswana*, Health and Human Rights: An International Journal, Vol.8, (2005), p. 22.

[96] Aids Law Project, *Different models of HIV testing: What are the considerations in South Africa?* http://alp.org.za.dedi20a.your-serverco.za/images/upload/HIVTesting Paper Final.pdf, last visited on November 24, 2007.

It is submitted that so long as the policies and the strategies in Ethiopia are effectively implemented, there is a very narrow possibility for those concerns to materialize. The HIV testing and counseling policies clearly provide that persons wishing to opt out must be reassured that such a decision will not result in the loss of services beyond HIV care. Moreover, the guidelines unequivocally impose a duty on health service providers to clearly communicate to the patient that he or she has an absolute right to refuse testing. Besides, so as to avoid ignorance and incapacity in the implementation of the PITC services, the policies and the strategies incorporate training programmes for heath care providers.[97] If all these policies are put into practice, the concern that PITC would lead to human rights violations should not become a reality.

Second, while it is admitted that PITC has the potential to increase uptake of HIV testing, concern has mounted regarding human rights violations of PLWHA, the most notorious and serious violation being discrimination.[98] The concern here is that route testing, unless accompanied by confidentiality of testing results, would subject PLWHA to stigma and discrimination by those who are aware of the outcome of testing. Although Ethiopia is not an exception regarding the threat of stigma and discrimination against PLWHA, the recognition and implementation of confidentiality of test results, as included in its policies and strategies (with few exceptions), will contribute to minimize the problem. Moreover, it is believed that if more people get tested and know their HIV status (as a result of their PITC policies) and benefit from affordable treatment, it is more likely that the levels of stigma and discrimination will decrease.[99]

The third concern pertains to the counseling aspect of the PITC model. One area in which PITC differs from VCT is in so far as it replaces fully-fledged individual counseling by simplified pre-test information which may be undertaken in a group. This is also the case in PITC in Ethiopia. The

[97] Para 4 (4) Federal HIV/AIDS Prevention and Control Council, Supra Note 71, provides that counselling and testing providers shall receive standard comprehensive training enabling them to provide counselling, constitute a professional association and do rapid testing under close supervision of lab personnel. It continues to provide that the training curriculum for all categories of counsellors must include 1. Overview of HIV/AIDS and comprehensive prevention, care and treatment information 2. Principles of HIV counselling 3. Techniques and implementation of the rapid HIV test 4. Couple and child counselling 5. Program management/coordination and supervision, referrals, monitoring and evaluation related activities, such as record keeping and reporting formats 6. Provider-initiated approach for health professionals.

[98] Moises Russo, *Opt out testing: Moving forward*, http://www.rhrealitycheck.org/blog/ 2007/ 06/28/opt-out-hiv-testing-moving-forward, last visited on July 6, 2007.

[99] Open Society Institute, *Routinising HIV testing in low- and middle-class countries: Background paper*, http://www.soros.org/initiatives/health/articles_publications/publications/routinizing_20061213/routinizing_20070601.pdf, last visited on November 24, 2007.

2007 Guidelines for HCT in Ethiopia provide that in PITC, the pre-test session consists of education or information to individuals, couples or groups, and should be brief and focus on the benefits of testing and services available.[100]

The issue here is whether the replacement of pre-test counseling with the so-called individual or group pre-test information poses a threat to human rights, which would not result in the case of pre-test counseling. There are two reasons why the writer of this article does not think so. First of all, due to extensive awareness raising programmes about the nature, means of transmission, ways of prevention and treatment of HIV/AIDS, public awareness of HIV/AIDS is now high in Africa, including in Ethiopia.[101] This renders the need for extensive pre-test counseling unnecessary. In fact, extensive pre-test counseling consumes unnecessarily the time of health care providers and the resources of health care facilities. This, in turn, has the effect of reducing the number of people able to be tested and, thereby, the number of people who will benefit from treatment, care and support. This does not, however, mean that people should be tested without the required information. In this regard, as discussed earlier, the relevant guidelines of Ethiopia clearly enshrine the minimum pre-test information that the health care provider is bound to communicate. The health care provider must provide a simplified form of pre-test counseling that allows people to understand the benefits and risks associated with HIV testing, the voluntary nature of testing as well as the right to refuse testing.

5.3 Mandatory HIV testing

As defined previously, mandatory testing may occur as a condition for some status, service or other benefit. Ethiopia incorporates aspects of mandatory HIV testing in its HIV testing policies. In general, mandatory testing is allowed in Ethiopia where there is a court order to that effect.[102] Particularly, two specific areas are indicated as exceptions. First, mandatory testing is allowed for job recruitment purposes where the nature of the occupation (pilots- civil aviation and air force) justifies doing so.[103] Second, mandatory testing will also be done on all voluntary donations of blood, tissue and organ donors before transfusion or transplantation.[104]

[100] Federal HIV/AIDS Prevention and Control Council, *Supra Note* 71, para.(3) (2).

[101] Open Society Institute, *Supra Note* 99.

[102] Federal HIV/AIDS Prevention and Control Council, *Supra Note* 71, para 1 (1) and 2(1) (3).

[103] Policy on HIV/AIDS of the FDRE, *Supra Note* 64, para 3(3).

[104] Federal HIV/AIDS Prevention and Control Council, *Supra Note* 71, para 1 (1) and 2(1) (3).

Mandatory testing, unlike compulsory testing, does not totally disregard the 'consent' of the individual subject to test. The individual has the 'option' to avoid the test under the pain of losing the status, service or other benefit to which HIV testing is attached as a condition. Strictly speaking, it is the circumstance (status, services or other benefit to which testing is prescribed as a prerequisite) that compels the individual to undergo the test. The likelihood of this happening is high. For instance, a person desperately seeking a job is likely to submit to the pre-employment test attached to the job. Thus, even if there is some element of 'consent' in mandatory testing, such consent is, by no means, a free and full one.

As a result, this particular model of testing, as envisaged in HIV/AIDS Policies of Ethiopia, is a violation of the right to physical integrity and privacy, both of which prohibit HIV testing without the free and full consent of the individual. As the testing relates only to specific categories of people, it is also a violation of the right to equal protection of the law and freedom from discrimination. If this is so, the next issue worth consideration is whether the violation of these rights is a justifiable limitation within the meaning of Article 27 (2) of the ACHPR.

The justifiability of mandatory HIV testing of donors of body tissues (blood and organs) before transfusion or transplantation is self evident. It has a legitimate public health rationale of protecting those who will receive the tissues. If the blood or organ is not tested before transfusion or transplantation, there is a high risk for the donee to be infected with the virus.

What is problematic is that the 2007 Guidelines for HTC in Ethiopia permit mandatory testing where there is a court order to that effect. In the absence of clear guidelines, this provision gives the court an absolute discretion to determine who should be tested and in what situation testing should take place. Such unlimited judicial discretion opens a room for arbitrary limitations on human rights. This problem is fuelled by the lack of clear indications in the Guidelines as to which court shall exercise jurisdiction on this matter. Of course, in the absence of clear indication to that effect, it is possible to say that all courts, including the lowest courts in the country, have jurisdiction in such matters. In most cases, the lowest courts of Ethiopia are, however, staffed by inexperienced and unskilled judges[105] who may not properly articulate the balancing of different interests in

[105] Girmachew Alemu, *Apology and Trials: The Case of the Red Terror in Ethiopia*, African Human Rights Law Journal, Vol.6, (2006), p. 78.

determining whether mandatory testing may be ordered in a particular context. In short, it suffices to say that such broad power on the part of courts is a potential threat to illegitimate human rights violations.

As has been mentioned above, the Ethiopian 1998 Policy on HIV/AIDS also expressly allows HIV screening test for job recruitment purposes where the nature of the occupation requires doing so.[106] It seems on the basis of this provision that Ethiopian Airlines, in practice, orders those who apply for pilot positions to undergo screening for HIV before being employed.[107] Two justifications for such a policy are forwarded. First, HIV/AIDS causes 'brain disorder', which may bring about cognitive or judgment impairment that renders HIV positive persons unfit for the job. The second ground is purely financial. That is, the company needs to hire individuals who can reliably serve the company for a long period, which HIV positive persons may not be able to do.[108]

Do these justifications hold water in the light of Article 27 (2) of the ACHPR which stipulates respect for the right of others, collective security, morality and common interest as the only grounds for limitations to the rights in the Charter? It is submitted that the financial justification upon which the mandatory testing of prospective pilots rests does not fit any of the criteria and is, hence, unjustifiable for two reasons. Firstly, the justification does not work in the contemporary HIV/AIDS treatment era where PLWHA can live long as uninfected people. The idea that the life expectancy of PLWHA is short rests on the mistaken belief that equates HIV/AIDS with death. Secondly, it is in the public interest to strengthen community support, economic support (including employment) and non-discrimination for PLWHA. If PLWHA are discriminated against and are not assisted, they may contribute to the underground transmission of the disease. Thus, in order to halt the spread of HIV/AIDS, supporting PLWA must be one of the strategies to battle HIV/AIDS.

There is no jurisprudence from the African Commission in this respect. Cases of a similar nature are, however, dealt with in domestic courts. As mentioned earlier, in *Hoffman v South African Airways*, the applicant challenged the latter's refusal to employ him as a cabin attendant because of his HIV positive status. South African Airways defended its action, *inter alia*, on the basis of the undue costs of training Hoffman, given his short life expectancy (because of his HIV positive

[106] Policy on HIV/AIDS of the FDRE, *Supra Note* 64, para 3 (3).

[107] Interview with Dr. Saba Teklu, a medical examiner in the Ethiopian Airlines, on 16 April 2004, cited in Selamawit, *Supra Note* 89.

[108] *Ibid.*

status). In its reasons for judgment, the South African Constitutional Court did not comment directly upon the Airway's arguments as to the undue costs of training Hoffman due to his life expectancy. In view of the decision of the Court against South African Airways, however, one can deduce the unacceptability of this argument.

In another employment case[109] outside the air transportation setting, Justice Tipnis of the High Court of Judicature of Bombay rejected an employer's argument that it ought to be entitled to refuse to employ HIV positive persons on the ground that the disease was 'most likely to assume serious proportions in due course', imposing significant financial and administrative costs. The employee in question was asymptomatic and the evidence established that it would be at least 8-10 years before he developed AIDS. Justice Tipnis stated:

In our opinion, the State and public Corporation like respondent No. 1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. The most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest to refuse to employ HIV infected persons. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such case.[110]

Thus, the justification of the Ethiopian Airlines not to employ HIV positive people as pilots is not only absurd in view of the existence of life-prolonging ART, but also against the overall public interest.

The other justification given by the Ethiopian Airlines is a bit controversial and, thus, requires separate treatment. It is said that since HIV/AIDS affects the mental faculty of HIV positive people, they cannot make prompt and appropriate operational decisions in critical situations. There is a fear

[109] Hoffmann v. South African Airways, *Supra Note* 29.

[110] *Ibid*., para 56.

that as a result of mental problems, life and property may be endangered. The underlying consideration behind this limitation can be considered as respect for the rights of others (which in this case may include the right to life and the right to property of the passengers and the crew of the Airlines) which is one of the grounds of limitations under Article 27 (2) of the ACHPR. The question is however: Does the mere contracting of HIV/AIDS render the HIV positive person incapable of performing operational duties that are expected of any 'normal' pilot?

In answering this question, the *Hoffman* case is in point. The evidence adduced before the Court established that Hoffman was able to perform the work of a cabin attendant competently, despite his HIV positive status. On the basis of this evidence, the Court held that Hoffman's HIV status alone was not determinative of his fitness for service as a cabin attendant and was not a reasonable basis upon which to reject his application for employment.[111]

Although the unfitness of HIV persons was raised as a defense for refusal to employ HIV positive people, decisions of courts have affirmed that HIV status alone is not a determinative factor for fitness. In this light, the HIV/AIDS policy of Ethiopia that allows pre-employment mandatory testing and the pre-employment HIV testing practice of the Ethiopian Airlines are contrary to the right to privacy, bodily integrity and freedom from discrimination of a person subject to such testing. Moreover, the limitations imposed by these policies and practices cannot be justified under Article 27 (2) of the ACHPR.

5.4 Compulsory HIV testing

As defined earlier and as its very name implies, compulsory testing is defined as testing without informed consent and at the request of someone or some institution other than the person tested. An aspect of this specific type of testing is, however, retained in Ethiopia.

Article 34 of the 1961 Criminal Procedure Code of Ethiopia is also interpreted as allowing compulsory testing of accused sexual offenders.[112] It is ordered before the accused is convicted. The purpose of compulsory testing is to gather evidence for the purpose of prosecution. That is, if the accused is found to be HIV positive after testing, the original charge of rape will be amended to

[111] *Ibid*., para 15. Similar decision was given in Labour Court of Namibia in N.V. Ministry of Defence (Namibia).

[112] Selamawit Tesfaye, *Supra Note* 89, pp. 98-99.

attempted murder.[113] The existing cases do not, however, address the issue of whether the same will happen where the victim of the rape is already HIV positive.

Since the testing of the accused is done without the consent of the person subject to the test, compulsory HIV testing of accused or convicted persons and the disclosure thereafter of the test results would represent a considerable intrusion into the right to privacy and bodily integrity of such persons, as contained in various African instruments. Given the fact that the testing is undertaken on a specific category of people, it is also an encroachment of the right to equal protection of the law and freedom from discrimination. These rights are not, however, absolute, and other interests listed in Article 27 (2) of the ACHPR may justify or necessitate their limitation.

It is submitted that the limitations to the rights to privacy, bodily integrity, equal protection of the law and freedom from discrimination (as a consequence of compulsory testing), for the purpose of securing evidence either for prosecution or sentencing purposes, meets the legitimate limitation grounds in Article 27 (2) of the ACHPR. The information regarding HIV status is, in general, necessary for the effective prosecution of crime or imposing appropriate sentence according to the gravity of the offence.[114] Prosecution of criminals and imposing appropriate penalties proportional to the offence committed are, in turn, crucial measures for the prevention of crimes.[115] If a person who transmitted HIV/AIDS, knowingly or unknowingly, is not prosecuted and duly punished, there is no way that the criminal justice system will deter potential perpetrators from giving effect to their malicious criminal activities. Thus, the ultimate purpose of securing evidence for prosecution or sentencing is the prevention of crimes.

Finally, it must be borne in mind that limitations must be absolutely necessary for the advantages which are to be obtained.[116] In the issue at hand, the limitation is legitimate only if there is no other way in which the HIV status of a person accused or convicted can be ascertained than by taking a

[113] *Ibid.*

[114] South African Law Commission, Supra Note 8, para 7(11) (2). As discussed in sub-section 4.2.4, the information regarding HIV status is useful not only for prosecution and sentencing purposes, but also for the ascertainment of the sero-status of the victim of the crime and to apply PEP to minimize the risk of HIV transmission (as exemplified by the South African Criminal law (Sexual Offences and Related Matters) Amendment Bill (B50B-2003)). In Ethiopian context, nevertheless, its purpose is confined to the prosecution of the perpetrator.

[115] Although prevention of crime is not specifically mentioned as a legitimate ground of limitation of rights, the term 'common interest' under article 27 (2) of the ACHPR is broad enough to include prevention of crimes.

[116] *Media Rights Agenda and others v Nigeria*, *Supra Note57*, para 69.

blood sample from that person and testing it for HIV antibodies. Thus, if the HIV status of the individual can be gathered from his previous testing results, subsequent compulsory testing of accused or convicted persons would be an illegitimate invasion and, thus, a violation of human rights.

6 Conclusion

A rights-based approach to HIV testing means that HIV testing shall be undertaken in compliance with the 3C principles, i.e. involving, both pre-test and post-test counselling, informed consent and confidentiality of test results.

The 3C principles have a clear foundation in African regional human rights documents. The right to the highest attainable standard of health, the right to freedom of expression, the right to privacy, the right to physical integrity, the right to equal protection of the law, freedom from discrimination and the right to respect for one's dignity are the core rights upon which the 3C are based. Thus HIV testing should be undertaken in conformity with these rights. These rights are not, however, absolute, thus, they may be subject to limitation to promote and protect the rights of others, for collective security, morality and the common interest.

The study has explored the compatibility of HIV testing related policies and legislation of Ethiopia with the aforementioned human rights norms. The discussion has revealed that the VCT model accords with human rights principles. The PITC model of testing may, nevertheless, easily lead to human rights violations unless it is cautiously implemented. To prevent this from happening, Ethiopia, should, as stated in its policies, create and strengthen the necessary mechanisms to closely monitor and evaluate implementation. More specifically, it should provide the appropriate training to health service providers and ensure that patients, in practice, receive the required pre-test information and have an absolute right to refuse testing.

As mandatory testing is undertaken without the free and full consent of the individual, the study has argued that it is a violation of human rights, unless such violation is a justifiable limitation of the rights. In view of this, the 2007 Guidelines for HTC in Ethiopia that authorizes courts to order mandatory testing opens a 'Pandora's box' for human rights abuses. Thus, this provision should be totally removed. Likewise, the Ethiopian 1998 Policy on HIV/AIDS, which expressly allows HIV screening for job recruitment purposes, violates human rights which informed consent seeks to

safeguard. It is believed that HIV status alone cannot be determinative of fitness for service of the job seekers. This Policy, therefore, imposes unjustifiable limitations upon the human rights of job seekers. Hence, it should be repealed. However, compulsory testing of accused sexual offenders (as applied on the basis of the Criminal Procedure Code of Ethiopia) was argued to be a justifiable limitation under Article 27 (2) of the ACHPR.

Finally, it must be noted that having good policies and legislation does not, by itself, guarantee protection of human rights in HIV testing. HIV screening of insurance applicants in Ethiopia is done despite clear laws and polices prohibiting them. Thus, considerable efforts have to be exerted to ensure that the policies and laws are implemented, in practice, both in private and public spheres.

The Pedagogical and Social Utility of Introducing Clinical Legal Education in Ethiopian Law Schools: Rethinking Beyond the Curricular Reform

Desta Gebremichael Gidey*

Abstract

This article examines the multifaceted significance of clinical legal education. It explores the typologies and modalities of clinical legal education and the role clinical legal pedagogy plays in promoting active student learning and integrating theoretical knowledge with the practical life of the legal profession in societal context. The article holds that the inclusion of clinical related courses in law schools' curriculum is not sufficient by itself. Clinical legal education requires active engagement of the student in resolving actual societal problems under the close supervision of clinical teachers. In addition to determining what courses to be taught in a clinical setting, it is highly crucial to have a clear guidance on the ways these clinical courses are to be taught in a progressive manner. Clinical legal pedagogy needs a special arrangement in terms of the student-teacher ratio, instructional resources, and a suitable socio-legal environment. Thus, this article inquires on the pedagogical and non-pedagogical problems that should be addressed so that clinical legal education can be employed meaningfully in Ethiopian Law Schools.

Introduction

Curricular reform is a recurring issue for many law schools all over the world. It goes without saying that the law school curriculum should be responsive to socio-legal, economic and political dynamism. Under the auspices of the Ministry of Capacity Building, the Government of the Federal Democratic Republic of Ethiopia launched a National Comprehensive Justice System Reform Project (herein after JSRP) in 2002.[1] The JSRP included, among other things, legal education as one of its pillars of reform.[2] The Reform [Document] on Legal Education and Training in Ethiopia (hereinafter the Reform Document) identified major weaknesses in the then Ethiopian law schools curriculum such as lack of responsiveness manifested by, among

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[1] Reform on Legal Education and Training in Ethiopia (Draft), June 2006, p.6

[2] *Ibid.*

others things, the absence of courses consciously designed to emphasize the centrality of good governance, democratization, economic development and social justice; lack of sufficient number of skill oriented courses; lack of adequate courses on professional ethics; and lack of local relevancy in terms of course content, design and mode of delivery.[3] With regard to the teaching methodology too, the Reform Document further pointed out, major weaknesses such as the dependency on lecture based, less interactive mode of teaching and the failure to apply problem solving methods.[4]

In order to remedy the above mentioned problems, the Draft Reform Document came up with a number of standards that define, among other things, the objectives, curriculum, delivery and assessment of Ethiopian law schools.[5] Accordingly, the production of graduates with legal knowledge and skills that enable them to serve the country with critical, analytical and creative ability as well as professional responsibility is set among the primary objectives of law schools.[6] In order to meet these objectives, the curriculum is revised; new theoretical and skill oriented courses are incorporated in the list of core and elective courses. The LL.B programme is also extended from four years to five years study. Concerning the course delivery methods, the Reform Document requires law schools to focus on experiential, participatory, practice oriented and problem based learning.[7]

However, beyond the incorporation of skill oriented courses in the curriculum and the general call for adopting the experiential, participatory, practice oriented and problem solving teaching methodology, there is no clear, coherent and comprehensive guideline on how and by whom the clinical related courses are to be designed, taught and assessed. There are also constraints far beyond the curricular reform that should be further tackled. So, as the main focuses of its inquiries, this article examines the striking features and goals of clinical legal education in part

[3] *Ibid.* p. 14

[4] *Ibid.* p. 16

[5] See *Ibid.* pp.54- 61

[6] *Ibid.* Standard 4(b), p. 61.

[7] *Ibid.* Standard 23(1), p. 61.

one and further investigates the pedagogical and social utility of introducing the clinical model of legal education in Ethiopian law schools in part two. Last but not least, part three of the article discusses some of the major challenges that should be dealt with so that the clinical models of legal education can be introduced in Ethiopian law schools in a sensible manner. The article ends up by providing some ways forward. The author is of the opinion that this article will have a modest contribution in familiarizing and sensitizing prospective clinical teachers and policy makers with the nature and significance of clinical legal education and its unique demands.

I. An Overview of Clinical Legal Education

A. The Meaning and Features of Clinical Legal Education

It seems uneasy to provide a single universally applicable definition of the term clinical legal education. As one writer rightly noted, "there is no one-size-fits all pedagogy for clinical education."[8] Since there are different models of clinical programs, there is no generally accepted definition or description.[9] Having this in mind, for the purpose of this article, attempt is made to provide some widely accepted definitions of the term clinical legal education.

In an article co-authored by two scholars, the term "clinical legal education" is defined as a "legal-practice based method of legal education in which law students assume the role of a lawyer and are required to take on the responsibility, under supervision, for providing legal services to real clients."[10] In a similar vein, Professor David McQuoid-Mason and Professor Robin Palmer defined the term "Clinical legal education … as experiential learning whereby law students gain practical skills and deliver legal services in a social justice environment."[11]

[8] Meredith Ross, *Who?? What??-- Should Law School Clinics be Focused on Client Populations or Substantive Law Areas?" (draft) University of Wisconsin Law School Frank J. Remington Center*, 9/19/05, p. 19, Available at: http://www.law.ucla.edu/docs/1321275102005ross_meredith_clientpopulations_of_substantive_law_are_.pdf (Accessed**:** 20/04 2009)

[9] New York State Judicial Institute Partners in Justice: *A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar, Introduction to Clinical Legal Education*, (May 9, 2005), p. 7. Available at*:* http://nycourts.gov/ip/partnersinjustice/Clinical-Legal-Education.pdf (Accessed: 20/04/ 2009)

[10] Mary Anne Noone &, Judith Dickson, *Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers*, 127 Legal Ethics, 4(2), (2001),p.13,Available: http://www.aals.org/profdev/clinical2003/dickson.pdf (Accessed: 22/04/2009)

[11]David McQuoid-Mason & Robin Palmer, *African Law Clinicians' Manual* (Draft Discussion Document), 2007, p. 10.

'Broadly defined,' according to Andreas Bücker and William A. Woodruff, 'clinical legal education is teaching lawyering skills and values through experiences that require the student to "do like a lawyer" rather than to just "think like a lawyer."'[12] Robert Condlin also provided the following definition:

> Clinical legal education is defined typically as instruction in *interpersonal skills* (e.g., interviewing, counseling*)* and *professional ethics* (the moral principles that regulate the behavior of lawyers in role) in the context of student in *fieldwork* (representation of actual clients with live cases in law offices created by law schools for this purpose) under the *supervision* (systematic, critical analysis of student work) of a lawyer/law teacher."[13] Each one of the emphasized elements is important, and the absence of any one weakens the claim that instruction is clinical.[14]

He further noted quoting Gray Bellow: 'Clinical Legal Education is also commonly described as a new teaching methodology the components of which are: "1) student assumption and performance of recognized roles within the legal system; 2) teacher reliance on this experience as a focal point for intellectual inquiry and speculation; and 3) motivational tensions which arise out of ordering the teaching-learning process in this way."'[15]

From the various definitions cited above, one can safely infer some common features of clinical legal education. First and foremost, clinical legal education is a method of teaching.[16] "At its most basic level," according to Andreas Bücker and William A. Woodruff, "clinical legal

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[12] Andreas Bücker & William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences*, G e r m a n L a w J o u r n a l, Vol. 09, No. 05 (2008), pp. 593-94, available at: http://www.germanlawjournal.org/pdf/Vol09No05/PDF_Vol_09_No_05_575-618_Articles_Bucker%20and%20Woodruff.pdf (25/05/2009)

[13] Robert Condlin, *The Moral Failure of Clinical Legal Education*, pp. 317-18, available at: http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1295&context=fac_pubs (Accessed: 25/05/2009).

[14] *Ibid.* p.318.

[15] *Ibid.* p.319.

[16] New York State Judicial Institute Partners in Justice, *Supra note* 9, p.14, citing *Report of the Committee on the Future of the In-House Clinic*, Journal of Legal Education, Vol. 42, p. 511 (1992).

education is a method of training law students by putting them in situations where they must apply the legal theory, principles, and doctrines they have studied in the classroom setting."[17] Among the principal aspects of that method are these features: students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problems in role; the students are required to interact with others in attempts to identify and solve the problems; and, perhaps most critically, the student performance is subjected to intensive critical review.[18] Being a method of teaching, clinical education involves experiential learning.[19]

Clinical legal education "is primarily concerned with the process of learning from actual experience, learning through taking action (or observing someone else taking action) and then analyzing the effects of the action."[20] As an authority noted " [a]ll clinical teaching involves some form of experiential learning that can be described in a three-step process: 1) the student learns to formulate an action plan; 2) the student enacts that plan through a structured experience; and 3) the student reflects about the experience and modifies future action accordingly."[21] According to Elliott S. Milstein, "the core idea of clinical legal education is that teaching students while they are in professional roles is an essential component of professional education."[22] Clinical legal education is thus an interactive, collaborative and practice oriented method of teaching and learning.

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[17] Bücker & Woodruff, *supra note* 12, p. 578.

[18] New York State Judicial Institute Partners in Justice, *supra note* 9.

[19] Roy Stuckey, Teaching with Purpose: *Defining and Achieving Desired Outcomes in Clinical Law Courses: A (draft) paper prepared for the Sixth International Clinical Conference: "Enriching Clinical Education*," (September 22, 2005), p.34, UCLA/IALS, October 27-30, 2005, Lake Arrowhead, California. Available at: http://www.law.ucla.edu/docs/stuckey.roy_-_teachingwithpurpose.pdf (Accessed: 22/04/2009)

[20] Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning To Learn From Experience Through Properly Structured Clinical Supervision*, Maryland Law Review, Vol. 40, p. 285 (1981), quoted in *Ibid.* pp. 34-35.

[21] Kimberly E. O'Leary, *General Issue: Article: Evaluating Clinical Law Teaching-Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method,* available at: http://www.cedha.org.ar/docs/doc131-eng.htm, (26/05/2009), citing Don Peters, Address at the Midwest Clinical Teaching Conference (Fall 1996)).

[22] Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations, Papers from the La Pietra Conference of International Legal Educators*, Journal of Legal Education, 2001, Association of American Law Schools, p.7, available at: http://www.aals.org/nlt2004/Milstein.pdf (Accessed: 22/04/2009)

As was noted earlier, there are different models of clinical legal education. Andreas Bücker and William A. Woodruff categorized "clinical or experience based legal education as simulation, live client (in-house) clinics, or externships."[23] Quoting Roy Stuckey, they further noted:

> The basic differences between them are: "in simulation-based courses, students assume professional roles and perform law-related tasks in hypothetical situations; in in-house [live client] clinics, students represent clients or perform other professional roles under the supervision of members of the faculty; and in externships, students represent clients or perform other professional roles under the supervision of practicing lawyers or they observe or assist practicing lawyers or judges in their work."[24]

These three categories of clinical teaching methods can be utilized in complement or as alternative to train law students with practical lawyering skills. An important question that can be raised here is that, as a matter of policy choice, which category of clinical legal education is preferable? With regard to the answer to this question, there are different opinions. Stefano Moscato quoted authorities who argued in favor of simulated clinical legal education as follows:

> 'Because most clinics' live-client cases provide neither varying contexts nor the opportunity for performing increasingly more complex tasks, Binder and Bergman advocate the use of simulations as the "ideal vehicle for providing repeated opportunities for practice and feedback in a variety of factual settings that promotes conceptual understanding and thus transfer." They also point out that relying on live-client work alone makes it unlikely that students will confront an adequate range of common problems and receive adequate intermittent feedback to achieve transfer,

[23] Bücker & Woodruff, *supra note* 12, p. 594.

[24] *Ibid.*

> and that time ideally suited for tackling complex tasks often is lost at the expense of routine tasks easily learned in practice that inevitably arise during litigation.'[25]

Challenging the above cited argument, which favors simulated legal clinics to live-client clinics, Stephen Wizner and Jane Aiken forwarded their opinion in favor of live-client (in-house) clinics as follows:

> We wonder why we devote time to fictional simulations and skills training, when the lessons we seek to teach through these methods might be taught equally as well, and certainly more realistically, by devoting that time to the preparation and handling of actual cases for real clients. We wonder whether students and clinical teachers devote time to student journals and to engaging in guided reflection about how students and clients experience their personal interactions, at the expense of actually representing clients and handling cases. We wonder whether law school clinics could not increase the provision of legal services they provide to low-income clients and communities without impairing, and perhaps even enhancing, students' educational experience. We wonder whether law school clinics should not increase students' learning through doing, and decrease the time and effort they devote to learning about doing.[26]

Another important question that should be raised here is that which one of the clinical models/categories mentioned above is appropriate to Ethiopian law schools? As Professor David McQuoid-Mason and Professor Robin Palmer nicely noted:

> The provision of legal services and access to justice is the driving force for the establishment of law clinics in most African countries. Universities in Africa are

[25] David A. Binder & Paul Bergman, *Taking Lawyering Skills Seriously*, Clinical Law Review, Vol.10. (2003), pp. 202-204, quoted in Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, pp. 4-5 (footnote) Available at: http://www.l aw.ucla.edu/docs/mo scato__stefano__teaching_foundational_clinical_lawyerin_.pdf (Accessed: 20/04/ 2009)

[26] Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access To Justice*, Fordham Law Review, (2004) p. 1006, available at: https://www.nycourts.gov/ip/partnersinjustice/teaching-and-doing.pdf (Accessed**:** 20 April 2009)

> often surrounded by a sea of poverty and cannot afford the luxury of running purely simulated clinical legal education programs as is sometimes done in the developed world.[27]

As will be presented in the subsequent subsection, clinical legal education has dual purposes. That is, facilitating the development of student lawyering skills and professional values through experiential learning on the one hand and promoting access to justice to indigent people on the other. Thus, the live-client clinical model seems appropriate to Ethiopian law schools as it can promote both goals without sacrificing one to the other. It is argued that '[b]y helping students fulfill the profession's responsibility towards those who cannot afford counsel, and by working to further the cause of justice, "real-client" clinics teach students the best values of the profession.'[28] As two authors suggested, "community service" should be "an element of our definition of clinical legal education and should be seen as integral to the achievement of the educational goals described above."[29] This should be the case for law schools operating in developing countries like Ethiopia where there are a great number of people who are in desperate need of free legal assistance.

B. The Objectives of Clinical Legal Education

There are different opinions concerning the objectives of clinical legal education. For some writers the development of students' lawyering skills and professional values are the primary objectives of clinical legal education. For example, Roy Stuckey opined quoting Robert M. Gagne as follows:

> The overall objective of legal education should be to teach students how to resolve legal problems.[30] "Educational programs have the important ultimate purpose of

[27] McQuoid-Mason & Palmer, *Supra note* 11, p. 36.

[28] *Southern Christian Leadership Conference, et al. v The Supreme Court of The State of Louisiana*, No. 99-30895, In the United States Court of Appeals for the Fifth Circuit, p. 10, Available At: http://www.aals.org/documents/sclc.pdf (Accessed: 25/05/2009)

[29] Noone & Dickson, *Supra note* 10, p. 14.

[30] Stuckey, *Supra note* 19, p. 21.

> teaching students to solve problems."[31] The core function of lawyers is to help people and institutions resolve legal problems,[32] therefore, the central goal of legal education should be to teach students how to resolve legal problems.[33]

For others the promotion of access to justice through the rendition of legal service to the community in general and to indigent people in particular should be the overriding objective of clinical legal education. According to Stephen Wizner and Jane Aiken, "[e]verything else that clinicians did would be seen as a secondary objective", that is, the "primary focus of both our teaching and our doing" should be subordinated towards the promotion of "access to justice for unprivileged and underserved clients and communities".[34] Still for some other writers both the educational and access to justice components are integral and defining elements of clinical legal education.[35] This integrated approach to clinical legal education seems widely supported by many clinical education authorities.

As Frank S. Bloch noted, the three widely shared goals of clinical legal education are professional skills training, experiential learning, and instilling professional values of public responsibility and social justice.[36] Clinical courses expose students not only to lawyering skills but also the essential values of the legal profession: provision of competent representation; promotion of justice, fairness, and morality; continuing improvement of the profession; and professional self development.[37] According to Keith A. Findley, the report prepared by the American Bar Association, ABA in short, *MacCrate Report,* included a Statement of Fundamental Lawyering Skills and Professional Values that students ought to possess upon

[31] Robert M. Gagne, The Conditions of Learning and Theory of Instruction (1985) p.195quoted in *Ibid*. p.23.

[32] Stuckey, *Supra note* 19, p. 23.

[33] *Ibid.*

[34] Wizner & Aiken, *Supra note* 26.

[35] Noone & Dickson *Supra note* 10.

[36] Frank S. Bloch, *Access to Justice and the Global Clinical Movement*, Journal of Law & Policy [Vol. 28:111], p. 121, Available at: http://law.wustl.edu/Journal/28/Blochbookpages.pdf, (Accessed: 22/04/2009)

[37] Noone & Dickson, *Supra note* 10, p. 10, citing American Bar Association Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development - An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 207-21 (1992*) [MacCrate Report]).*

graduation.[38] These included problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and resolution of ethical dilemmas.[39]

Keith A. Findley further reproduced a summary of the "nine goals of clinical education" identified by the Association of American Law Schools (AALS) Committee on the Future of the In-House Clinic[40] in 1992 as follows:

1. Developing modes of planning and analysis for dealing with unstructured situations as opposed to the "pre-digested world of the appellate case;"
2. Providing professional skills instruction in such necessary areas as interviewing, counseling, and fact investigation;
3. Teaching means of learning from experience;
4. Instructing students in professional responsibility by giving them firsthand exposure to the actual mores of the profession;
5. Exposing students to the demands and methods of acting in the role of attorney;
6. Providing opportunities for collaborative learning;
7. Imparting the obligation for service to clients, information about how to engage in such representation, and knowledge concerning the impact of the legal system on poor people;
8. Providing the opportunity for examining the impact of doctrine in real life and providing a laboratory in which students and faculty study particular areas of the law; and
9. Critiquing the capacities and limitations of lawyers and the legal system.[41]

[38] Keith A. Findley, the Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education (Draft), p. 4 , citing *Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. Sec. Legal Educ. & Admissions to B. xi [MacCrate Report].
Available: http://www.law.ucla.edu/docs/findley__keith_-_pedagogy_of_innocence.pdf (Accessed: 26/05/2009)

[39] *Ibid.* pp. 4-5.

[40] *Ibid*. p. 5, citing Report of the Committee on the Future of the In-House Clinic, Journal of Legal Education, Vol. 42, pp. 512-17 (1992).

In a nutshell, clinical legal education serves multifaceted goals; enhancing the development of student lawyering skills, inculcating professional values of public responsibility in the future generation of lawyers and promoting the right to access to justice of indigent citizens. Professional skills and values are taught and at the same time indigent clients receive access to justice through clinical programs. In this way, clinical programs meld legal theory with lawyering skills, and students learn lawyering values by providing legal assistance to clients who would otherwise lack access to justice.[42] Of course, as Frank rightly noted, the ways in which clinical legal education contributes to improving access to justice depends to some degree on what role law students can play.[43] Clinical programs in which students can represent individual clients function much like a traditional legal aid office.[44] That is, students can render voluntary legal aid services of various ranges to under privileged people. This is possible, however, only in those countries where local rules allow students to practice as lawyers.[45]

C. The Historical Development of Clinical Legal Education

This subsection mainly focuses on providing a brief description of the evolution of the clinical model of legal education in American law schools. The main reason is that, in relative terms, the development of clinical legal education in the US is said to be more rapid and extensive than in any other country. The other reason is the dominant role American Professors played in teaching and the development of the curriculum of the then Haileselassie I (now known as Addis Ababa) University Faculty of Law (Ethiopia) in the 1960s and 1970s.[46] The Addis Ababa Law School has inherited some pedagogical features from the then American counterparts. The pedagogy inherited by Addis Ababa University Law Faculty from the American law professors is further

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[41] *Ibid*. citing William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, Akron Law Review, Vol.28, pp.471-73 (1995).

[42] Noone & Dickson, *Supra note* 10.

[43] Bloch, *Supra note* 36, p. 121.

[44] Stuckey, *Supra note* 19, p. 25.

[45] Bloch, *Supra note* 36, p. 129.

[46] See Thomas F. Geraghty & Emmanuel K. Quansah, *Reform of Legal Education in Ethiopia: The Ethiopian Experience in the Context of History, the Present, and the Future,* Journal of Ethiopian Law, Vol. XXII No. 1, (July, 2008), p.66.

replicated to the newly established Ethiopian law schools through the graduates of Addis Ababa University. Therefore, the author is of the opinion that focusing on the evolution of clinical legal education in the US in this small volume of article would have more informative value to Ethiopian law schools.

These days, the clinical model of legal education is widely expanding all over the world.[47] According to Andreas Bücker and William A. Woodruff, "[c]linical legal education is not new."[48] Indeed, it may be said that clinical legal education actually existed prior to the rise of the study of law as an academic discipline.[49] Aspiring lawyers in Colonial America qualified to practice law by either participation in one of England's Inns of Court, hiring on as an apprentice to a practicing lawyer, or through the study of the classical legal treatises of the time.[50] It is further noted that both the Inns of Court and the apprentice method were the two most popular routes to law practice that involved working under the supervision of lawyers in the day-to-day practice of law.[51] While the scope of the experiences encountered, the degree of supervision, and the meaningfulness of the training experience varied tremendously, the method of training was, essentially, work with a practicing lawyer and learn by assisting in the case at hand.[52] However, it has to be noted that clinical legal education in its modern sense is different from the type of trainings mentioned here. Clinical legal education this time is taught not as a substitution but as an integral part of the theoretical and doctrinal law school courses.

Concerning the inception and development of the clinical model of legal education in its modern sense, different literatures give much credit to American law schools. As Steven K. Berenson asserted, there is a rough correspondence between important dates in the chronology of the

[47] See generally McQuoid-Mason & Palmer, *Supra note* 11, p.16.

[48] Andreas Bücker & William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences* - Part I/II, 9 German Law Journal No. 5 (1 May 2008), available athttp://www.germanlawjournal.com/article.php?id=956 (25/05/2009).

[49] *Ibid.*

[50] Ibid. citing Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, Washington University Law Quarterly,Vol.59, pp.601-602 (1982).

[51] *Ibid.*

[52] *Ibid.*

development of civil legal aid in America and important dates in the development of clinical legal education.[53] 'For example, just as the origins of the modern legal aid office can be traced to the founding of the New York Legal Aid Society in the late Nineteenth Century," Berenson noted, "most historians locate the first law school clinical program in a "legal dispensary" operated by students at the University of Pennsylvania School of Law in 1893.'[54] "The first for-credit, law school clinical programs that approximated the model used presently by in-house clinical programs appeared in the late 1920s and early 1930s education."[55] These were initiated by John Bradway, the first being a six-week experimental program at the University of Southern California Law School the second was a similar, but larger scale program that Bradway was invited to set up at Duke University following the success of his first such program.[56]

Of course, the development of clinical legal education in America has passed through two historical periods.[57] The first historical wave of clinical legal education began in the early part of the twentieth century, shortly after the casebook method emerged in the late 1890's as a popular route to preparing for a career in law.[58] While the casebook method was gaining wide acceptance, law students at several law schools in the late 1890's and early 1900's established volunteer, non-credit "legal dispensaries" or legal aid bureaus to provide hands-on opportunities to learn and practice lawyering skills and legal analysis, and also to serve a social justice mission by providing legal assistance to those unable to hire attorneys.[59]

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[53] Steven K. Berenson, *A Primer for New Civil Law Clinic Students on the History and Development of Legal Aid and Clinical Legal Education In America and Common Issues That Have Arisen*, p. 13, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=steve_berenson (26/05/2009)

[54] I*bid.*, pp. 14-15, citing Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, Tennessee Law Review, Vol. 64, p.1103 (1997); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, Akron Law Review, Vol. 28, p.467 (1995)

[55] *Ibid.* pp. 4-5.

[55] *Ibid.* pp. 14-15.

[56] *Ibid*, citing Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, Tennessee Law Review, Vol. 64, p.1104 (1997))

[57] See generally New York State Judicial Institute Partners in Justice, *Supra note* 9.

[58] *Ibid.* p. 1.

[59]*Ibid.* P.3, citing John S. Bradway, *The Nature of a Legal Aid Clinic*, Southern California Law Review, Vol.3, p.174 (1930); Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, Tennessee Law

According to Patricia Mell, for most of the twentieth century, the legal academy and the practicing bar did not agree upon what type of curriculum best prepared students for the practice of law.[60] Christopher Columbus Langdell, dean of the Harvard Law School in 1870, is credited for introducing the case method, or the Socratic method of teaching to the American law school. As inheritors of Langdell's methods of teaching law students, traditional legal educators before the 1980s emphasized teaching broad legal doctrine and analysis, not specific specialties or practical skills.[61] When the American Bar Association first established its standards for approval of law schools in 1921, it rejected a clinical (apprenticeship) component and mandated a three-year law school without an apprenticeship.[62] So, the development of clinical legal education before the 1960s was stagnant.

During the second wave of clinical legal education - a period spanning from the 1960's through the late 1990's - clinical legal education solidified and expanded its foothold in the academy.[63] The factors that contributed to this transformation included demands for social relevance in law school, the development of clinical teaching methodology, the emergence of external funding to start and expand clinical programs, and an increase in the number of faculty capable of and interested in teaching clinical courses.[64] Perhaps the most powerful of these factors was the *zeitgeist* of the 60's, which produced "student demands for relevance."[65] In 1965, proponents of clinical experiences in law school noted the demands for relevance in legal education and "a desire on the part of a significant number of law students to help make the law serve the needs of

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Review, Vol. 64, pp.1102-03 (1997); William V. Rowe, *Legal Clinics and Better Trained Lawyers - A Necessity*, Illinois Law Review, Vol.11, p.591 (1917).

[60] Patricia Mell, *Crossing the Bar--Law Schools and Their Disciples, Crossing the Bar-The Column of the Legal Education Committee* , available at: http://www.michbar.org/journal/article.cfm?articleID=141&volumeID=12 (Accessed: 26/05/2009)

[61] *Ibid.*

[62] Ibid, citing Elihu Root, *Report of the Special Committee to the Section of Legal Educators and Admissions to the Bar of the American Bar Association*, 1921 ABA Sec. Legal Educ & Admissions to the Bar).

[63] New York State Judicial Institute Partners in Justice, *Supra note* 9, p. 8.

[64] *Ibid.*

[65] *Ibid.*

the poor."[66] These clinical programs provided representation to indigent clients with a myriad of legal problems.[67]

While student demands for relevance in the law school curriculum and the social ferment of the 1960's played an important role in spurring the growth of clinical programs, it was the development of a clinical teaching methodology that was critical in solidifying the place of clinical legal education in the law school curriculum during the period running from the 1970's through the present.[68] Clinical scholarship started to burgeon during the 1970's and early 1980's.[69] Until the mid-1970's, there was no common understanding of what was meant by clinical legal education and no serious effort was made to construct a vocabulary for discourse.[70] In the 1970's and 1980's, Bellow and others started to construct a "common vocabulary of discourse on educational issues."[71] By focusing on clinical education as a method, clinicians began to explore what clinical teachers were and should be doing, how clinical teaching methodology could be infused throughout the law school curriculum, and what the purposes and goals of clinical teaching should be.[72]

Equipped with a "common vocabulary" and a generally accepted definition of a methodology, scholarship about clinical teaching blossomed in the latter part of the 1980's and throughout the 1990's.[73] During this period, and in large part because of this scholarship, clinical legal education gained a more permanent place in law schools. The emergence of a critical mass of teachers interested in thinking and writing about clinical methodology also led to the founding in 1994 of the *Clinical Law Review* under the auspices of the Clinical Legal Education Association

[66] Charles E. Ares, *Legal Education and the Problem of the Poor*, Journal of Legal Education, Vol.17, p.310 (1965), quoted in *Ibid.* P. 9.

[67] New York State Judicial Institute Partners in Justice, *Supra note* 9, p. 9.

[68] *Ibid.* P. 12.

[69] *Ibid.*

[70] *Ibid.* pp. 12-13.

[71] *Ibid.* p. 13.

[72] *Ibid.*

[73] *Ibid.* p. 14.

(CLEA), the American Association of Law Schools (AALS), and New York University School of Law (serving as the host school).[74]

Since the second wave of clinical legal education, the American Bar Association (ABA) has recognized the importance of clinical legal education in the law school curriculum and promulgated a Model Student Practice Rule to facilitate the growth of clinical courses in American law schools.[75] "Real-client" clinics for academic credit are well established at nearly all of American law schools.[76] The most recent data collected by the Committee on In-House Clinics of the AALS Section on Clinical Education indicates that there are real-client clinics at 183 law schools in the United States.[77] The American Bar Association (ABA) formally recognizes that experiential learning is an essential part of a legal education and that clinics are effective settings to teach the skills and values central to the practice of law.[78] ABA accreditation standards now provide that each law school "*shall* . . . offer instruction in professional skills."[79] Further, the ABA accreditation standard for the core curriculum states that each law school "*shall* offer live-client or other real-life practice experience."[80]

With regard to the historical development of clinical legal education in Ethiopian law schools, there is scant documented evidence. As Professor David McQuoid-Mason and Professor Robin Palme noted, the Addis Ababa University Faculty of Law had a legal aid clinic in the 1970s which closed down after the overthrow of Emperor Haileselassie by the 1974 revolution.[81] In 2004, a Legal Aid Center was established in Mekelle University Law Faculty with the primary purpose of promoting clinical legal education and access to justice to the indigent members of

[74] *Ibid.*

[75] Southern Christian Leadership Conference, *Supra note* 28, p.16.

[76] *Ibid.* p. 6

[77] *Ibid.*

[78] *Ibid.* pp. 6-7.

[79] ABA, Standards for Approval of Law Schools (1996) (Standard 302(a)(iv)), quoted in *Ibid.*, p.7.

[80] *Ibid.*

[81] McQuoid-Mason & Palmer, *Supra note* 11, p. 24.

the community. Since then, the Legal Aid Center of Mekelle University Law Faculty has been engaging in the promotion of clinical legal education to students of the law faculty and in the provision of free legal assistance to disadvantaged members of the community. With the help of funds obtained from Action Aid Ethiopia and Open Society Justice Initiative, the Mekelle University Law Faculty Legal Aid Center has offered clinical legal education to hundreds of law students, rendered free legal assistance to thousands of indigent people, conducted capacity building trainings to justice organs operating at the lower administrative units of the National Regional State of Tigray, organized many different seminars and workshops. However, it can be said that the center was giving much more focus to community service than clinical legal education.

From the 23rd to the 24th of February 2008, the Mekelle University Law Faculty Legal Aid Center in collaboration with Action Aid Ethiopia and the Justice and Legal System Research Institute organized a national workshop of Ethiopian Law Schools in Mekelle City. The purpose of the workshop was, among other things, to raise awareness on clinical legal education and to establish a National Network of Ethiopian Law Schools Clinics. Deans and/or other representatives from the Law Faculties of Mekelle University, Haramaya University, Addis Ababa University, Bahir Dar University, Gondar University, Jimma University, Hawasa University, St. Mary University College, Alpha University College, some members of the Curriculum Implementation Committee of the Justice and System Legal Research Institute and representatives of Action Aid Ethiopia had participated in the two days workshop. The workshop participants held a thorough discussion on the typologies and significances of clinical legal education.

At the end of the workshop, an ad hoc committee was established with a mandate to facilitate the establishment of the National Network of Ethiopian Law Schools Clinics. As a prerequisite for the establishment of the National Network of Ethiopian Law Schools Clinics, the participants agreed to establish legal aid clinic in their respective law schools. Because at that time, except in Mekelle University Law Faculty and Bahir Dar University Law Faculty, there was no formally established legal aid clinic in the other participating Law Schools. In July 2008, a follow up meeting was convened in the Justice and System Legal Research Institute Office, Addis Ababa.

Representatives from Addis Ababa University Law Faculty, Mekelle University Law Faculty, Bahir Dar University Law Faculty, Gondar University Law Faculty, Haramaya University Law Faculty, St. Mary University College Law Faculty and Alpha University Law Faculty attended the meeting. The main agenda of this meeting was to discuss whether each of the participating Law Schools has established a Legal Aid Clinic in their respective Law Schools as per the understanding reached in the Mekelle National Workshop. From the information exchange made during the meeting, the author came to learn that despite some undergoing efforts in almost all the participating law schools, there was no new formally established legal aid or comparable law clinic except that of the Mekelle University and Bahir Dar University legal aid clinics established in 2004 and 2005 respectively.

Despite the absence of formally established Legal Aid Clinics, there have been some attempts made by almost all Ethiopian Law Schools to expose students to the practical life of the legal profession through the modality of externships and community services. Jimma University Law Faculty can be taken as a typical example in involving students in community service, although it has not yet established a legal clinic. Some professional organizations, for example, the Ethiopia Bar Association (EBA) and Action Professional Aid for the People (APAP) have also been involved in the provision of legal aid service to the poor in Addis Ababa in collaboration with Addis Ababa University Law Faculty. Few Addis Ababa Law Faculty students get the opportunity to be involved in the legal aid services sponsored by EBA and APAP.

However, at this juncture it has to be noted that the establishment of Law School Clinic is of paramount importance for the proper administration and sustenance of clinical legal education. Generally, it is safe to say that clinical legal education is at its infant stage in almost all Ethiopian Law Schools.

II. The Pedagogical Utility of Clinical Legal Education in Ethiopia

In the outset, it is important to make a distinction between the question what subject should be taught and how it should be taught. The focus of this section is the latter. Needless to say, pedagogy focuses upon the methodology or the process of learning and the objective is to

determine the best ways to facilitate good teaching-learning process.[82] Having this in mind, this section tries to present briefly what good teaching methodology in legal education in general is and the role of clinical legal education in particular.

What is good teaching methodology? There are plentiful academic debates concerning the teaching/learning strategies of higher educations in general and law schools in particular. As a study conducted across three faculties (law, education and science) of the Queensland University of Technology (Australia) reveals, good teaching is "a student centred, humanistic pedagogy which positions the learner as an active participant in, and determinant of, their own education, and which places learning at the heart of good teaching problematic."[83] According to Belinda Carpenter and Gordon Tait, the "calculus of good teaching is not deemed to be primarily a function of the successful production of measurable learning outcomes (i.e. pass grades); it could rather best be assessed through the ability of a good teacher to develop interest, curiosity and ideas in students."[84] Citing another authority, they further noted: "Good teaching is teaching that helps students to learn. It promotes active engagement with the subject matter, motivation to learn, desire to understand, independence, confidence and sustained effort."[85] The general aims of program in higher education include 'the development of students' intellectual and imaginative powers, their understanding and judgment; their problem solving skills; their ability to communicate.' [86]

As J.D. Vermunt noted, "[i]nstruction does not lead to learning automatically. The learning activities that students employ determine to a large extent the quality of the learning outcomes

[82]See Chapter 1: *Legal Education and Critique*, pp. 201-203, available at: http://eprints.qut.edu.au/15910/2/02whole.pdf (25/05/2009).

[83] Belinda Carpenter & Gordon Tait, *The Rhetoric and Reality of Good Teaching: A case study across three faculties at the Queensland University of Technology*, p. 197, available at Stable URL: http://www.jstor.org/stable/3448066 (Accessed: 12/04/2009).

[84] *Ibid.*

[85] *Ibid.* P. 193, citing Griffith Institute for Higher Education 1994, p.67

[86] Council of National Academic Award, U.K., quoted in *Ibid.* p. 196

they achieve."[87] J.D. Vermunt identified three categories of learning activities; cognitive, affective and metacognitive or regulative[88]. He further explicated the three learning activities as follows:

> Cognitive processing activities are those thinking activities that people use to process learning content. They lead directly to learning results in terms of knowledge, understanding, skill and so on. Examples are: looking for relations among parts of the subject matter (relating), distinguishing main and minor points (selecting), thinking of examples (concretizing) and looking for applications (applying). Affective learning activities are directed at coping with the feelings that arise during learning, and lead to an emotional state that may positively, neutrally or negatively affect the progression of a learning process. Examples are motivating oneself, attributing learning results to causal factors, attaching subjective appraisals to learning tasks and getting blocking emotions under control. Metacognitive regulation activities are directed at regulating the cognitive and affective learning activities and therefore indirectly lead to learning results. Examples are: orienting on learning task, monitoring whether the learning process proceeds as planned, diagnosing the cause of difficulties and adjusting learning processes when needed.[89]

For J.D. Vermunt "learning and instructional activities can be seen as images of each other and that, they may be described in similar terms."[90] In this regard, J.D. Vermunt related the striking attributes of the categories of learning activities cited above to instructional activities: "What teachers do to teach people something can be described in the same terms; they explain the relations among learning content, provide examples, show how a theory may be applied in

[87] J.D. Vermunt Metacognitive, *Cognitive and Affective Aspects of Learning Styles and Strategies: A Phenomenological Analysis,* (1996), p. 25, available at URL: http:/www.jstor.org/stable/3447707 (Accessed: 12/04/2009 06).

[88] *Ibid.* p. 26.

[89] *Ibid.*

[90] *Ibid.*

practice, motivate students, and plan, monitor and evaluate the learning processes of students."[91] Good teachers, then, provide context-based learning opportunities, allow students to direct themselves and provide different kinds of learning environments[92].

Then what is the pedagogical significance of the clinical model of legal education in promoting "progressive education", that is, "a student centered humanistic pedagogy which positions the learner as an active participant"? As was mentioned earlier in this section, progressive student centered learning involves the cognitive, affective and metacognitive or regulative learning activities.[93] All clinical students are involved at all the three "domains" of learning: the cognitive domain (increasingly complex sorts of understandings and analytical processes), the affective or feeling domain (values, attitudes, and beliefs), and the psychomotor or performance domain (complex patterns of physical or motor activity such as lawyering activities).[94] Thus, clinical pedagogy is intended to teach students to be reflective practitioners, lifelong learners who know how to learn from experience. Throughout students' time in a clinic, they are asked to evaluate themselves, analyze their experiences, and articulate what they have learned about themselves, about their abilities, about the validity of the assumptions underlying their strategic predictions, about the lawyering process, and about the justice system.[95]

Similarly, according to Roy Stuckey, experiential learning is especially beneficial to students because it gives them the opportunity to be actively involved in their own education and it has positive effects on their motivation, attitudes towards the course, willingness to participate in class, ability to ask insightful questions, and acquisition of knowledge and skills.[96] Roy Stuckey

[91] *Ibid.*

[92] O'Leary, S*upra note* 21.

[93] See Vermunt, *Supra note* 87; Stuckey S*upra note* 19.

[94] Stuckey, *Supra note* 19, p. 36 citing Kenneth R. Kreiling, *Supra note* 20

[95] Milstein, *Supra note* 22, P.9, citing Donald Schon, Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions, (San Francisco, 1987); Susan L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, Clinical Law Review, Vol. 3, p. 299 (1997).

[96]Stuckey, *Supra note* 19, p. 36.

further noted, "[o]ptimal learning from experience involves a continuous, circular four stage sequence of experience, reflection, theory, and application."[97]

Clinical education is, thus, said to be pedagogically preferable for adult education. As Kimberly E. O 'Leary noted "adults learn best when faced with questions that arise in real-life experiences followed by opportunities to answer and reflect upon those questions."'[98] "It is axiomatic in learning theory that when cognitive studies are accompanied by active engagement in their application to concrete problems, a likely result is fuller comprehension, better retention, and apter recall of the cognitive material."[99] According to Frank S. Bloch, adult learning theory generally claims that "(1) Learning should be through mutual inquiry by teacher and student…; (2) emphasis should be on active, experiential learning…; (3) learning should relate to concurrent changes in the students' social roles…; and (4) learning should be presented in the context of problems that students are likely to face…."[100] That, essentially, is the clinical model.[101]

The other strength of "clinical legal education" is that it serves as a vehicle to "offer students the chance to integrate theoretical knowledge of law… learnt in the classroom, with the everyday experience of legal practice and the legal system."[102] As an authority remarked, "[i]f a presentation is so abstract and divorced from any genuine legal problem as to offer nothing

[97] *Ibid.* p. 35.

[98] See Kimberly E. O 'Leary, *Evaluating Clinical Law Teaching—Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method*, Northern Kentucky Law Review, Vol. 29, p.495 (2002), quoted in Findley, *Supra note* 38, p. 26.

[99] Frank I. Michelman, *The Parts of the Whole: Non-Euclidean Curricular Geometry*, 32 Journal of Legal Education, Vol.32, pp. 353-54 (1982), quoted in Findley, *Supra note* 38, p. 26.

[100] Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, Vanderbilt Law Review, Vol. 35, pp.333-34 (1982), quoted in Findley, *Supra note* 38, p. 26.

[101] Findley, *Supra note* 38, p. 26.

[102] Noone & Dickson, *Supra note* 10, p. 15, citing S. Campbell, `*Blueprint for a clinical program'* The Journal of Professional Education, Vol. 9, No.2, p. 122(1991)).

toward its solution, it is theoretical. It may also be bad theory." [103] "The point of theory," Professor Robert Gordon claimed "is to clarify and inform practice."[104] When it does, the two are not antagonistic, but complementary.[105] "[A]n important part of clinical teaching is", there fore, " to help students understand the importance of articulating theories of practice and to provide them with information, models, and frameworks that will enable them to develop espoused theories of action against which their actual performances can be compared."[106] The integration of theory with practical skill is highly important to the legal practitioner, otherwise, as one writer noted:

> "Mere acquisition of legal knowledge in law schools is of little value to a practitioner because that knowledge (a) can only be a tiny part of the whole (b) can be understood only superficially (c) is easily forgotten or only partially or inaccurately remembered (d) is rarely needed in practice in the form in which it is learned (e) is likely to be quickly outmoded and thus dangerous to rely on and (f) is of little use where new problems arise to be solved."[107]

Clinics teach students how to reflect on the practice of law, how to integrate the doctrines learned in traditional classes into practice, how to formulate hypotheses and test them in the real world, how to approach each decision creatively and analytically, and how to identify and resolve issues of professional responsibility.[108] Clinical legal education brings a more realistic, from-the-ground up perspective on law practice to students through the use of actual

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[103] Graham C. Lilly, *Law Schools without Lawyers? Winds of Change in Legal Education, Virginia Law Review*, Vol. 81. No. 5 (Aug., 1995), pp. 1421-1470, p. 1431, available at URL: http:/www.jstor.org/stable/1073507 (Accessed: 07/03/2009).

[104] *Ibid.*

[105] *Ibid*.

[106] Stuckey, *Supra note* 19, p. 39.

[107] P. Wesley Smith, Neither a Trade nor a Solemn Jugglery: Law as Liberal Education' in The Future of Legal Education and the Legal Profession in Hong Kong, (ed. R. Wacks, 1989), quoted in Julie Macfarlane, *Look Before You Leap: K'nowledge and Learning in Legal Skills Education*, p. 299, available at Stable URL: http://www.jstor.'org/stable/1409907 (Accessed: 12/04/2009).

[108] Southern Chri'stian Leadership Conference, S*upra note* 28, p. 9, (citing Anthony Amsterdam, *Clinical Legal Education – A 21'st Century Perspective*, Journal of Legal Education, Vol. 34, p.612 (1984).

or simulated experiences as the primary teaching tool.[109] When actual experience forms the basis of clinical teaching, the complexities of the "real world" and its influence on all of the actors in the legal system greatly enrich the students' learning.[110] Students who experience these methods in law school know how to learn from their experiences in practice throughout the rest of their legal careers.[111]

In short, clinical legal education has superior pedagogical utility in enhancing students' reflective learning through interactive and collaborative models of teaching-learning process and in supplementing, integrating and contextualizing the abstract theoretical and doctrinal knowledge learned in traditional classes with practical professional skills, values and societal realities**.** Law school clinics provide unique educational opportunities for students to integrate professional skills and values into an actual practice setting[112]. **"**Certainly," according to Andreas Bücker and William A. Woodruff, "the clinical setting facilitates the development of lawyering skills, but it also requires the student to not only consider how legal theory or doctrine actually applies in a concrete situation, but to actually plan how to apply an abstract legal rule to an actual situation, and to execute the plan. Thus, clinical legal education, much like clinical medical education, puts the classroom theory into actual practice."[113]

III. Social Utility of Clinical Legal Education in Ethiopia

As was mentioned earlier, clinical legal education has academic and service components. That is, students are exposed to the real life of the profession while rendering different ranges of legal service to unprivileged members of the society. Thus, the provision of community legal service is an inseparable component of clinical legal education. The service may range from community legal literacy, counseling, preparation of petitions and memorandum, up to individual court representation and public interest litigation. It may be said that the primary obligation to provide

[109] Bloch, *Supra note* 36, p. 122.

[110] *Ibid.*

[111] Southern Christian Leadership Conference, *Supra note* 28, pp. 8-9.

[112] *Ibid*., p. 10, citing Bloch, *Supra note* 100, pp. 347-48.

[113] Bücker & Woodruff, S*upra note* 12, pp. 578-579.

legal services to the poor resides with the government, and to a lesser extent, with the legal profession, not with law schools.[114] It may be for this reason that Article 27(6) of the Ethiopian Higher Educations Proclamation (Proc. No. 531/2003) stipulates that it is the right of the academic staff to render community services.

However, law schools can assume some obligation to contribute to the solution of the crisis in access to justice, and it seems obvious that the obligation is best accomplished by law school clinics assisting low-income individuals and communities that are underserved or have particular difficulty in obtaining lawyers because of the nature of their legal problems.[115] The role of law schools in this regard becomes important especially in countries like Ethiopia where the capacity of the government to offer free legal aid services is very limited, where there is acute shortage of legal practitioners and there are millions of underserved people who are in desperate need of free legal assistance. As a research conducted in 2007/08 by the author of this article jointly with two other academic colleagues[116] of the Mekelle University Law Faculty reveals, in the National Regional State of Tigray where there were more than 4 million people during the research period, there were only fifty three licensed practicing lawyers and three public defense lawyers. The practicing lawyer per capita was 0.00001325, which approximated to one practicing lawyer for 75472 people and the public defense lawyer per capita was 0.00000075, which approximated to one public defense lawyer for 1.33 million people. Except perhaps in big towns, the situation in Ethiopia might not be too far from this reality. Therefore, this empirical evidence shows how important the involvement of law school students in filling the gap and promoting access to justice to indigent people may be.

According to authorities, the involvement of law students in pro-poor community legal services increases awareness on the part of law students of the needs of the poor and oppressed.[117]

[114] Wizner & Aiken, *Supra note* 26, p. 997.

[115] *Ibid.*

[116] Desta, G/michael, Mihretab G/meskel, & Zelalem Tsegaw, *Access to Legal Representation: Assessment of the Major Challenges and Prospects with Special Emphasis to Criminal Cases in Mekelle and Its Vicinities*, A Research Sponsored by Mekelle University, Law Faculty, Legal Aid Centre, (unpublished, 2008), p. 45.

[117] Wizner & Aiken, *Supra note* 26, p. 998.

Exposure to a social justice mission within a guided practice setting provides students not only with a key linkage between their legal education and their practical competence, but also with the intellectual foundation for a long-term engagement with the advancement of social justice.[118] Legal education plays an important role in socializing the next generation of lawyers, judges, and public policymakers.[119] So, as gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central social priority.[120]

IV. Rethinking Beyond the Curricular Reform: Ways Forward

The incorporation and integration of clinical courses in the law schools curriculum is, indeed, appreciable as it is one step forward. However, if clinical courses are to be effectively administered, first and foremost there should be a conceptual and methodological clarity concerning the range of courses that may be labeled as clinical and on the way how, by whom and to whom these clinical courses are to be taught and assessed in a sequential and coherent manner. Otherwise, as Julie Macfarlane rightly noted:

> Without an informed debate over terms of reference for the design and development of skills programmes – criteria for deciding what should be taught, how it should be taught, and how it should be assessed – there is a danger that the many programmes to be developed … will be poorly construed, unclear in their aims, and consequently confusing to students.[121]

The clinical courses incorporated under the newly revised Ethiopian law schools curriculum do not seem free from the danger cited above. As can be inferred from the course offering breakdown designed for regular LL.B. program, one can list many clinical related core

[118] Rose Voyvodic & Mary Medcalf, *Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor*, Journal of Law & Policy, Vol. 14, (2004), p. 114, available at: http://www.cleaweb.org/artman/uploads/september2005newsletter.pdf (Accessed: 20 April 2009).

[119] Deborah L. Rhode, Access to Justice, P.193 (2004), quoted in Wizner & Aiken, *Supra note* 26, p. 997.

[120] *Ibid.*

[121] Julie Macfarlane, *Look Before You Leap: Knowledge and Learning in Legal Skill Education*, (1992), p. 294, Available at URL: http://www.jstor.org/stable/1409907 (Accessed: 12/04/2009).

courses,[122] in addition to the bundles of elective clinical courses that students are required to choose from.[123] A couple of questions can be raised regarding the importance and sequence of some of the core and elective clinical courses. For example, should Legal Research Method be taught for first year students whereas Legal Writing to third year students? In other words, are not writing skills prerequisite for successful engagement in research activities? Are the clinical courses to be taught in a real-life practical setting or in simulated exercises? What value would the 12 Credit-hours Externship add to students who successfully complete the other core and optional clinical courses in real- life clinical settings? What different roles are the students expected to play in their externship placement? How and by whom are they going to be supervised and assessed? These and other related questions can be raised in relation to the newly revised Ethiopian law schools national curriculum.

However, as was indicated earlier, the concern of this article is not on what clinical courses should be taught; it is rather on how these courses should be taught- the pedagogical aspect. Hence, leaving the subject matter related questions aside, the author tries to point out some pedagogy related concerns that need to be addressed so that the clinical model of legal education can be effectively and efficiently employed by Ethiopian law schools as a method of teaching professional skills and values. So, what follows is a brief presentation of the main practical challenges and ways forward for addressing them.

1. Teaching strategy: so far, there is no clear national guideline on how and by whom those bundles of clinical related courses included in the Law Schools curriculum should be taught. As was mentioned in the introductory part, the Reform Document puts a general "standard" requirement that calls upon Ethiopian law schools to adopt experiential, participatory,

[122] Such as Legal Research Methods (3 Cr.hrs, Year I, Semester II); Law of Civil Procedure I (3 Cr.hrs, Year II, Semester II); Law of Civil Procedure II (3 Cr.hrs), Law of Criminal Procedure (3.Cr.hrs), Legal Writing (2 Cr.hrs) (year III, Semester I); Legislative Drafting, Pretrial & Trial Advocacy (2 Cr.hrs each, Year III, Semester II); Appellate Advocacy & Appellate Moot Court, Legal Profession & Ethics (2 Cr.hrs each, Year IV, Semester I) and Externship (12 Cr.hrs, Year V, Semester II).

[123] Alternative Dispute Resolution (ADR) 2 Cr.hrs, Moot Court (thematic) 2 Cr.hrs (Year IV, Semester II); Seminar in Current Legal Topics (2 Cr.hrs), Clinical Program on Child Rights (3 Cr.hrs), Clinical Program on Domestic Violence (3 Cr.hrs), Clinical Program on Family Law (3 Cr.hrs), Clinical Program on HIV/AIDS (3 Cr.hrs), Clinical Program on Restorative Justice (3 Cr.hrs), Clinical Program on Rights of Prisoners' (3 Cr.hrs) (Year V, Semester I).

practice oriented and problem solving teaching methodology. But what does these mean in the clinical courses? As was stated repeatedly, the clinical model is one of the best strategies to employ these teaching methodologies. But beyond incorporating clinical related courses in the curriculum and putting the above mentioned teaching methodologies as general standard requirements for all law courses, nowhere does the Reform Document mention the term clinical model of legal education. As was discussed earlier, clinical courses can be taught in simulated situation or real life settings such as in-house clinic and externship. But in terms of its pedagogical and access to justice utility, in-house (live-client) clinic is argued to have superseding advantages over the other clinical models.[124] So, the writer earnestly recommends that law schools should establish in-house clinic in their respective university so that they can employ the real-client clinic to expose students to the real life lawyering and promote access to justice.

2. Students-clinical teacher ratio: the establishment of in-house clinics is not sufficient by itself. Clinical legal education requires active student engagement in real life settings under the close supervision of clinical law teachers. As the practice in American law schools show, clinical law faculties are required to closely supervise and assist students with case preparation, review their work, accompany them to court and observe and evaluate the students' performances.[125] Clinical teachers, Stephen Wizner and Jane Aiken noted how burdensome their responsibilities are as follows:

> We teach substantive law and practice. We teach about systems and institutions. We spend hours with students, individually and in groups, in classes, supervisions, and less formal conversations, helping them understand what they are seeing in the "real world"; helping them recognize, acknowledge, and deal with their feelings about their clients and their clients' legal problems; and talking about case selection, analysis of client problems, ethical issues, and how to deal with clients and adversaries effectively. We spend time mooting students in preparation for court

[124] Wizner & Aiken, *Supra note* 26, p. 1006.

[125] Southern Christian Leadership Conference, *Supra note* 28, citing Clinical Legal Education: Report of The AALS-ABA Committee on Guidelines for Clinical Legal Education (1980) (Guideline Vii).

> appearances, administrative hearings, negotiations, and other client representational activities; and reading and editing their written work on behalf of clients. All of these time-consuming activities are what define us as clinical teachers.[126]

This complex, time-consuming and burdensome engagement requires the restriction of students-instructor ratio to the minimum possible. The person in charge of this responsibility should also have the requisite practical knowledge so that s/he can effectively supervise and critically evaluate students in the real life setting. So, understanding the unique nature of clinical legal education, law schools should restrict the students-clinical faculty ratio to not more than 20:1 and devise standards for assigning qualified clinical teachers as supervisors. The placement of students in law schools should also take into account the human and material capacity of law schools to offer clinical legal education to the desired quality.

3. Clinical Legal Education Manual: in order to run clinical legal education in a coherent and systematic manner, Ethiopian Law Schools should adopt a Clinical Legal Education Manual. The manual should include, among others, the list of the courses that should be taught in a clinical setting; the logical sequence of such clinical courses; the qualification of clinical teachers, the teaching and placement strategies or modalities; the clinical teacher – student ratio; and the modalities of assessment of students' learning and performance. Law Schools can adopt their own Clinical Legal Education Manual individually or they can jointly adopt a National Clinical Legal Education Manual. The manual to be adopted can serve as a guide for clinical teachers in designing the syllabuses of clinical courses. The preparation of the syllabus of each of the clinical courses without having a general and comprehensive guideline is susceptible to unnecessary repetition and redundancy. So, the Manual should provide a guide for integrating and maintaining progressive linkage between the different clinical courses.

4. Student Practice Rules. As was mentioned in the previous parts of this article, in-house (live client) clinic has many pedagogical and social advantages over simulated clinic. But the problem is that live-client clinic can be employed in situations where law students are issued with special

[126] Wizner & Aiken, *Supra note* 26, p. 1005.

license to render various ranges of free legal assistance to indigent people. In Ethiopia, there is no student practice rule that allows law students to render free legal assistance to the poor, just like lawyers do, under the close supervision of their clinical teachers. Practicing law is made the monopoly of licensed lawyers. In the middle of this situation, it is difficult to run live-client clinics in Ethiopia. This is another important issue that the concerned authorities should urgently address. In this regard, it is possible to consider the good practices of the American law schools. Recognizing the importance of clinical legal education in the law school curriculum, the American Bar Association (ABA) promulgated a Model Student Practice Rule that allows senior law students to represent indigent people in civil, administrative and criminal cases.[127] Taking this best practice into account, the writer calls up on the concerned Federal and Regional Authorities to come up with Student Practice Rules that allow senior law students of Ethiopian law schools to render legal assistance in civil, administrative and criminal cases to indigent people. Otherwise, the inclusion of many clinical courses in the curriculum and the establishment of in-house (live-client) clinics in law schools will not have meaningful significance. Pending the adoption of student practice rules, law schools may employ simulated clinical models and externship placements.

5. Integrating Law Schools Curriculum with National and Regional Justice Sector Training Programmes: what would be the status of the clinical courses to be taught to undergraduate students as part of the law schools curriculum? If a student successfully accomplishes the clinical courses, what will be his/her status right after graduation? To put it differently, should a student be required to take part further in the two years or less practical trainings that are currently administered by the Justice Sector Training Centers of the Federal and the respective Regional Governments? If so, would it not be a redundant and costly endeavor for both the student and the country? The writer is of the opinion that five years undergraduate practice oriented study at law schools and additional two years or even a year and half practical training right after graduation is too costly for both the country and the student who is required to partly finance his/her education as per the current higher education policy. In many European countries, undergraduate students are required to complete three years studies in law schools and additional one up to two

[127] *Ibid.* P. 6.

years practical trainings outside Law Schools. The writer, therefore, recommends that students who accomplish the five years practice oriented study in their respective law schools should be exempted from the additional two years practical trainings administered by the Federal and Regional Justice Sector Training Centers. Otherwise, in addition to being a costly endeavor for the country, students might not have the motivation to actively engage in the different clinical courses at the undergraduate level. So, the existing law schools curriculum should be revisited and integrated with the justice sector training programmes undertaken in the country.

6. **Involving Law School Instructors in Practicing Law**: if law instructors are expected to teach their students the theories, doctrines and practices of law in an integrated manner, they should be allowed to involve in the practice of law so that they can familiarize themselves to the real life and impact of the law on society and contribute their share in the development and refinement of the laws. Thus, for law instructors to produce competent, practicing lawyers, the system should allow them not only to "think like lawyers" and debate in the ideal world of universities but also to "do like lawyers" in the practical world of the profession.

As per Article 5(3) of the Federal Courts Advocates Licensing and Registration Proclamation, "[a] license may not be issued to a person who has another permanent job."[128] Whether teaching can be regarded as a permanent job of untenured law school instructors for the purpose of this article is a moot issue. The practice in Ethiopia in this regard is different from Region to Region. Some Law School instructors, for instance, in Addis Ababa; in the Southern Nation, Nationalities and Peoples Region; and in the National Regional State of Amhara are allowed to practice law. But in some Regions, for instance, in the National Regional State of Tigray, law instructors are not allowed to practice law. The Regional Courts Advocates Licensing and Registration Proclamation of the National Regional State of Tigray prohibited the issuance of advocacy license to government employees.[129] However, the author wonders whether prohibitions of this type are made in the interest of justice in general and the reform endeavors made to improve quality of legal education in particular.

[128] Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000, Fed. Neg. Gaz., year 61, No. 27

[129] See Tigray Regional Court Advocates' Licensing and Registration Proclamation No. 156/2000, Article 4 (2) (f).

7. Budget: needless to say, as was thoroughly discussed earlier, clinical legal education is a costly but fruitful teaching methodology. Unlike the traditional lecture based teaching, clinical students are expected to actively engage in work placements in small groups to render real life legal services to low income people under the close supervision of the clinical teacher. Such engagement needs extra commitment and devotion not only in terms of time and expertise but also in terms of resources including money and equipment. So, the author recommends that law schools should allocate enough funds to their respective law clinics. As authorities opined rightly, this is not tantamount to demanding law schools "to fund clinics so that law faculty can engage in litigation."[130] "Rather, law schools" are required to "fund clinics because training students with real cases is an effective method to teach the theory and the practice of law, as well as the values of the profession."[131] That is, clinical legal education is integral to modern law schools' educational mission.[132] If this is the reason for the inclusion of many clinical related courses in the newly revised Ethiopian law schools curriculum, universities should consider the law clinics as part of the budget item of their respective law schools.

8. Strengthening Collaboration with Bar Associations. It is invaluable for law schools to create a viable collaboration with practicing lawyers and the Bar Associations. The massification of law schools student population coupled with the lack of experienced practicing lawyers in many of the young Ethiopian law schools is a great challenge for the successful running of clinical legal education. So, law schools should work in partnership with practicing lawyers and their professional associations so that the latter can fill the gaps in teaching clinical courses and provide placement opportunities for clinical students' in their firms/law offices. In this regard, Ethiopian Law Schools can get lessons from the United States Law Schools best practices. The US Law Schools, individually and/or collectively- through the Association of American Law Schools (AALS) work in collaboration with the American Bar Association (ABA) to improve

[130] Southern Christian Leadership Conference, *Supra note* 28, p. 4.

[131] *Ibid.*

[132] *Ibid.*

law schools graduate profile. Ethiopian Law Schools, too, may and should encourage qualified legal practitioners and their Bar Associations to take part in the promotion of quality clinical legal education. The incoming Association of Ethiopian Law Schools can play a great role in this regard.

Legal and Economic Glitches of Proclamation No. 639/2009

Mebrhatom Fitiwi *

Introduction

Law, which indulges certain desirable values and shapes society towards those values, is normative in its nature. Contract as a subject matter of law has its own normative values. Facilitating business transaction, protecting security of transaction, encouraging certainty, and predictability so that there are efficient economic transactions are the prominent characterizing purposes of contract law. Contract law like other laws shall also go in line with relevant constitutional provisions

Proclamation No. 639/2009 casts doubt if it actually encourages economic efficiency and if it is constitutional on the account of rule of law, separation of powers and independence of judiciary. This article attempts to examine and explore the proclamation, against economic purpose of contract and constitutional principles.

In doing so, the purpose of formal requirement and Formality of Contract of Mortgage under the Civil Code are discussed in the first part under formal requirement in general. Then, Economic and Legal glitches of proclamation No. 639/2009 covers formality under the amendment proclamation and its purpose, application of the amendment proclamation vis-à-vis the Civil Code, application of the amendment proclamation vis-à-vis res judicata, economic efficiency under the amendment proclamation, and Constitutionality of the Amendment proclamation.

1. Formality requirement in general

1.1. Form and its purpose

Form is the framework or observance, which juridical acts are articulated by, so that they can be recognized, enforced or given any other legal effect.[1] Written form, the instruments of writing,

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the number of witnesses, particulars to be included, publication, registration and signature are among the elements of form.

Formal requirements are warranted, among the different reasons, for their evidential, cautionary, channeling and protecting third parties purposes.[2] Contracts, which are made in writing, can be easily proved by producing the written contract. This is important when the details of the contract might be forgotten by the witness, [3] the probability of controversy is high taking objective circumstances in to account, and when the contract is for long period of time.

The evidential purpose of formal requirement lies in the need to strike a balance between transaction cost and probability of controversy to be proved.[4] Whether certain contractual relationship should be in written form, attested by two, three or more witness, notarized or registered shall take into account the transaction cost of doing so, the possibility of controversy and the vested interest in the contract.[5] High transaction costs, less magnitude of vested interest and less possibility of controversy, discourage formal requirements. The higher the interest incorporated in the contract is, the higher the possibility of erosion of trust and denial among the contracting parties is. It would be so reasonable to say that stringent formal requirement should be ordered when the possibility of controversy among the contracting parties is high owing to higher interest in the contract.[6] No formal requirement is expected in a contract of sale of a needle since the vested interest is low and it has high transaction cost compared to the benefit of the contract and there is less possibility of controversy with reference to sale of a

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[1] Fekadu Petros, *Effects of Formalities on the Enforcement of Insurance Contract*, Ethiopian Journal of Legal Education, Vol.1 No.1 (2009), pp 4-6

[2] *Ibid*

[3] *Ibid*

[4] Contracts which are more valuable and complicated like contracts in relation to land shall follow strict formality (see) Richard Stone, The Modern Law of Contract, Avialable at http://books.google.com.et/books?id (2009) p.. 22, See also the decision of the Cassation Division of the Federal Supreme Court in Guerfe Gebrehiwot V. Aberash Dubarige, File No. 21448.

[5] Staven Shavel, *Economic Analysis of Contract Law*, at http://www.nber.ogr/papers/w9696, May 2003, Events which have minimal importance and less probability of occurrence should not cause relatively higher transaction cost See also Allen and Cutter, Law and Economics, (3rd ed, 2000) pp. 88- 89

[6] Allen and Cutter, *Supra note* 5, P. 95

needle.[7]Indeed, formal requirement sometimes reduce transaction cost in contracts, like contract of adhesion.[8] This is because the form is prepared with the terms and stipulations without negotiation; the transaction cost of negotiation is minimized. In most other types of contract, however, there is cost of transaction, be it small or large, once form is required.

In addition to evidentiary purpose, form can also make contracting parties take the contract seriously and comply with necessary cautionary requirements. Formalities deter hasty, premature and ill-considered contracts.[9] This function of form is believed to be in the interest of the contracting parties and it deters their carelessness. The magnitude of the vested interest and transaction cost are not negligible in this function of form since no excess care is necessary for trivial things like sale of needle.[10] However, limiting the freedom of form of the contracting parties for the sake of cautionary function is moot if it is in line with the interest of the contracting parties.[11]

Furthermore, formality serves channeling function. Form is believed by certain scholars to signal the enforceable and non-enforceable promises.[12] When agreements fail to be made in a certain form, the parties do not have the intention of being bound. If they had the intention of being legally bound or legally binding someone, they could have done it in reliable formality. It avoids confusion between the expression of mere intention and legally binding promise as binding promises will be made in the specified form.

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[7] Shavel, *Supra note* 5. Events which have minimal importance and less probability of occurrence should not cause relatively higher transaction cost. Richrd Craswell, in his Contract Law: General Theories, argued that low probability of dispute discourage incurring transaction cost.

[8] Steven Peck, *Adhesion Contracts Beware of the Take It or Leave It,* available at http://www.californiabusinesslawyerblog.com/2009/12/a-standard-form-contract-somet.html (accessed on February 22, 2010)

[9]A.G. Guest (ed,) Chitty on Contracts, Vol. I, (1994), London, pp-263

[10] Fekadu, *Supra note* 1, p.' 5

[11]*Ibid,* p. 5

[12] *Ibid* p. 6 See also Guest, *Supra note* 9, p. 263

The other most important purpose of formal requirement especially registration with regard to mortgage contract is protecting the interest of third parties.[13] Owing to impossibility or high transaction cost of having information, contracts that affect third parties might be concluded.[14] People cannot have information about all contracts, which may affect them. It is impossible or difficult for someone to know whether there is contract about a house, which he wants to buy if formality with the purpose of providing information is not required. If a contract of sale of a house is valid without registration, there is no legal protection for other parties, who might buy the house again. Formality with the purpose of informing potential contracting parties[15] can, accordingly, relieve the negative externality of contract on third parties.

Negative externality cost can practically be more exemplified when one individual mortgages his property to several creditors for a debt more than its value. If a house worth Birr 300,000 is, for example, mortgaged to Alem, Abebe and Diriba a debt in the amount of Birr 300,000 each, the contract between Alem and the owner has negative effect on the right of Abebe and Diriba. Unless the first contract is registered, it might be burdensome to know that there is prior contract of mortgage or it might require high cost of having information about the unregistered contract. If it is possible at all, it can be made by assessing all the contracts, which are concluded before. Any of the mortgagees will inevitably be negatively affected, since they will lose Birr 600,000. Either all will share the loss or will shift to any of them. The contract of each of the mortgagee has negative externality cost on one another or any one of them.

Putting certain formal requirement on such contract of mortgage can regulate the possible negative externality cost of contract that spills over the third parties. Formality avoids the negative effect of a contract of mortgage on other potential mortgagees, buyers or other potential contracting parties if it is designed in a way that informs the other potential mortgagees or buyers that there exists an encumbrance on the object of contract. This can be easily achieved by making registration a mandatory formal requirement of mortgage contract. If the contract of

[13] Yohannes Heroui, *Registration of Immovables under the Ethiopian Civil Code: An Overview in Comparative Perspective*, Ethiopian Law Review, Vol.2, No. 2 (March 2008) p. 47

[14] Allen and Cutter, *Supra note* 5, p. 208

[15] Yohannes, *Supra note* 13, p.47

mortgage is registered, potential mortgagees and buyers will have the information about the existence of an encumbrance. This will help them choose either lesser right than the previous mortgagee or give up the contract.

1.2. Formality of Contract of Mortgage under the Civil Code

As formal requirement has multidimensional purpose, it has been put as an overriding element of contract once it is provided by law or the contracting parties. As a rule contracting parties have freedom of form. Article 1719 of the Civil Code states, *"Unless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree."* It is only if formality is provided for by law or stipulated by the contracting parties that formal requirement is an element of contract.

When the law requires certain formal requirement, it shall be complied with. Article 1719 (2) of the Civil Code shows that a contract, which is not made in a legally provided form, shall not be valid. Article1720 (1) of the Civil Code also shows that a contract, which is not made in a specified form, is considered as a mere draft. These provisions indisputably show that non-compliance of formal requirements (provided legally or by agreement) denies the contract legal effect. This is because a mere draft does not have the effect of contract. It does not create obligation between the contracting parties.

In conformity with this, there are certain provisions, which stipulate special formal requirements for the validity of certain contracts in the Ethiopian Civil Code and other codes. Article – 1723 of the Civil Code provides thus: "A *contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing and registered with court or notary*." Contract of mortgage is, according to this provision, required to be in writing and registered with court or notary. There have been controversies on whether registration under Article 1723 is a mandatory requirement since some courts decided that registration is not a validity requirement as far as it does not affect third parties pursuant to the special provision of Article 2878, which prevails over the general

provision of Article 1723.[16]The Supreme Court has decided that the registration requirement under Article 1723 is a mandatory requirement as it is different from the registration requirement provided under Art. 2878.[17] Article 1723 is about registration in court or notary while Article 2878 is about registration in register of Immovable.[18] The term registration employed under article 1723 is "misnomer"[19]. It should have been termed as authentication.[20] It can, therefore, be safely concluded that registration (authentication) in court or notary is a mandatory validity requirement for mortgage contract pursuant to Article 1723 of the Civil Code.

This seems to get its justification from the protection of third parties or avoiding negative externalities.[21] To the contrary it is contended that registration under Article 1723 aims at conservation not publicity[22] and protection of third parties. Article 1989, which prioritizes parties as of the date of authentication, shows, however, protection of third party under registration (authentication) of Article 1723. Be that as it may, Article 3045 (1) of the Civil Code also elucidates that a contract or other agreement creating mortgage shall be of no effect unless it is made in writing. It can be inferred from this that in addition to written form, registration under Article 3052 of the Civil Code is a mandatory formal requirement of contract of mortgage. The requirement of registration seems not only to protect third parties but also the contracting parties.

The protection of third parties through the requirement of registration is unequivocally put under Article 3057 (1) of the Civil Code. According to this provision, entry of registration after third party has acquired rights by registration or after an action for the attachment of the immovable is brought does not have effect. Neither does it after the mortgagor is declared bankrupt. Article

[16] See, the decision of Federal Supreme Court in Mulushewa Tefera et al.v. Habte Zerga et. al,as cited as Yohannes at *Supra note* 13. p.51

[17] I*bid*

[18] Yohannes, *Supra note*, 13, p. 47

[19] *Ibid*, p.58

[20] *Ibid*

[21] Fekadu, *Supra note* 1, p.4

[22] Yohannes, *Supra note* 13, pp. 31-68

3080 of the Civil Code, which ranks plural creditors according to the date of registration, is also typical indication of legislature's attempt for the protection of third party interests.

2. Economic and Legal glitches of proclamation No. 639/2009[23]

2.1. Formality under the Amendment proclamation and its Purpose

The House of Peoples Representatives has enacted an amendment proclamation, which makes registration by a court or notary not to be a validity requirement when the contract of mortgage is with banks or micro financing institutions. Art.2 of the Proclamation 639/2009 supplied for the addition of sub-article (3) to the existing art.1723 of the Ethiopian Civil Code. Sub-article (3) provides thus:

"Notwithstanding the provisions of sub-article (1) of this article, a contract of mortgage concluded to provide security to a loan extended by a bank or a micro-financing institution may not require to be registered by a court or notary".

The general purpose of this amendment proclamation is to make the law conform to the practice not the practice with the law. This can be inferred from the preamble which in part sates, "*Whereas the invalidation of the existing contracts of mortgage concluded under the prevailing practices of banks and micro-financing institutions for not being notarized, as provided in the Civil Code, may leave most of the existing loans unsecured with serious threat to the existence of the banks and micro-financing institutions and to the countries over all economies*"

According to this, it is the act of the banks and micro-finance institutions that were entering into contracts contrary to the Civil Code that necessitated an amendment. An amendment, which follows practice that clearly violates the law, is violation of the overriding principle of rule of law. It is practice, which should intransigently follow the law not the other way around. Laws may be enacted if they are justified and believed to be socially desirable taking into account

[23] Proclamation number 639/2009 refers to the Amendment proclamation which was enacted to add Sub article (3) to Article 1723 of the Ethiopian Civil Code.

different purposes. Enacting law to uphold wrong practices is not only contrary to the principle of rule of law but also drifts away from the responsive nature of law.

The preamble of the proclamation puts forward the purpose of the amendment of Article 1723 of the Civil Code to be avoiding the negative impact of the formality under the Civil Code on the efficiency of the loan provision service. The reason for the enactment of the amendment proclamation, as it can be inferred from the preamble, is to make the loan service made by the banks and micro-financing institutions efficient. Banks and micro-financing institutions are protected to give loan service efficiently at the expense of other efficiency. If banks are delivering efficient loan services it does not necessarily mean that the transaction of loan contract is efficient. In deed banks and micro-financing institutions may be protected so that they will earn profit. However, efficiency of loan contract requires among other things internalizing transaction cost by the parties to the loan contract, certainty, predictability and encouraging reliance[24]. There shall not be negative externality cost, which spills over other third parties if the loan contract shall be efficient. Efficiency of loan services by externalizing transaction cost or making third parties incur negative externality is not efficient. Even though there might be individual efficiency with reference to the bank or micro-finance, it is open for social inefficiency, which is required to be addressed as a purpose of formal requirement.

2.2. Application of the amendment proclamation vis-à-vis the Civil Code

Based on the justification, which favors only one party as indicated on the preamble, sub article (3) has been added to Article 1723 of the Civil Code under Article 2 of Proclamation. It is stated as: "*3/ Notwithstanding the provisions of sub-article (1) of this article, a contract of mortgage concluded to provide security to a loan extended by a bank or a micro-financing institution may not require to be registered by a court or notary".*

The central object of the proclamation is enshrined in this sub article. It protects banks and micro- finance institutions by making a contract of mortgage valid although it is not registered in

[24] Reliance is change of behavior depending on contract. If someone buys petroleum oil believing that he will have a car relying on contract of sale of car, this is reliance.

a court or notary. Close reading of this provision in line with other provisions of the Civil Code is perplexing if the unregistered (unauthenticated) contract of mortgage will have effect on third parties. It also casts doubt if it is in line with the normative rational of contract and formal requirement. Whether unregistered contract of mortgage, according to sub-Article 2 of proclamation, is binding only upon the contracting parties or it affects third parties is incomprehensible. Resorting to general contract provisions might lead someone to validly conclude that the provision is binding only on the contracting parties.

In principle contracts including mortgage contract will have effect only between the contracting parties without affecting third parties.[25] The provisions in the effect of contract back up the protection of third parties. Article 1731 connotes that a contract has the effect of law between the contracting parties. This provision indicates the incorporation of common law privity principle[26], which excludes the effect of contract on third parties. The incorporation of privity principle is also evident under Article 1952 (1), which states, "*Except in cases provided in this code, contracts shall produce effects only as between the contracting parties.*" This provision emphatically sets aside the effect of contract, including mortgage contract, on third parties.

Specially, Article 1989 (2) of the Civil Code shows that contracts may be "set up against third parties who acquire a right in respect of such thing as from the time their date is authenticated." Unregistered (unauthenticated) contract of mortgage concluded by banks or micro-financing institutions cannot be preferred to any authenticated contract according to the connotation of this provision.

Banks and micro-financing institutions without registered contract cannot be tantamount to preferred creditors as provided under Article 1990. This provision makes us refer to special mortgage provision. Close reading of special provisions of mortgage also supports the purpose of protection of third parties by providing registration as effective formal requirement. Article 3089

[25] Article 1675, denotes that the obligation created, varied, modified extinguished is effective between the contracting parties only.

[26]. S.Wheeler & J.Shaw, Contract Law Cases, Materials and Commentary, Oxford university press Inc, New York, (1995), pp.403-405. Privity Principle connotes that a contract shall not affect parties which are not parties to the contract.

of the Civil Code states, "*registered rights in rem on an immovable mortgaged shall not affect the mortgagee where such rights have been registered after the mortgagee has registered his mortgage*." The protection of third parties is strengthened by 1641 of Civil Code, which prioritizes the party whose rights are registered first in case of conflict between two registrations. The general contract provisions, which are applicable on contract of mortgage, and the special provisions of contract of mortgage elucidate that mortgage contract affect third parties as of registration not as of formation.[27]

Even though registration under Article 1723 and 1556 are different, their effect with regard to third party is similar. Early authenticated contract is preferred to later authenticated contract according to Article 1989 (2). Early registered contract of mortgage in the register of immovable is preferred to the ones registered later on. However, registration made according to Article 1556 is prioritized to registration (authentication) made in accordance to 1723.[28] This is because Article 1556 is about property rights and Article 1723 is about contractual rights.

Interpreting Article 2 of the amendment proclamation in conformity with general contract and contract of mortgage provisions also strengthens the purpose of contract in general and contract of mortgage in particular. Protecting banks and micro-financing institutions in such a way that they are preferred to other unsecured creditors and later secured creditors, who does not have information about the transaction with banks or micro-financing institutions, is against the purpose of contract in general and the purpose of mortgage in particular.

One of the basic purpose of contract is protecting certainty, predictability and thereby security of transaction. Contracting parties who entered into contract with reference to a mortgaged property shall be given information to help them predict the effect of their contract. Making registration an element of contract of mortgage can make this information available.[29] Giving priority right to

[27] Article 1989 and 1990 of the Civil Code

[28] See Article 1989 and 1990 of the Civil Code

[29] Yohannes, *Supra Note* 13 p. 47

banks and micro-financing institutions, at the expense of the right of third parties who acted without information about the previously formed contract of mortgage erodes predictability, certainty and security of transaction. Thus interpreting article 2 of the amendment proclamation in conformity with the purpose of certainty, predictability and security of transaction requires protecting uninformed third parties (contracting party who does not know the existence of other contract which might affect him) by denying priority right for unregistered contract of mortgage. Protecting the interest of third parties is also one of the purposes of contract law in general and contracts of mortgage in particular.[30] The possibility of mortgaging one property to more than one is surefire evidence of the possibility of negative impact of one mortgage contract on other mortgage contract with reference to one object of contract.[31] Registration can avoid the problem of third party interest that arises from the possibility of mortgaging one property to more than one party. Interpreting Article 2 of the amendment proclamation in conformity with the purpose of protecting third parties as a purpose of contract in general and mortgage contract in particular requires protecting of uninformed third parties by taking registration date as a reference time of prioritizing.

The general contract and contract of mortgage provisions, along with the purpose of general contract and contract of mortgage, lead us to conclude that Article 2 of the amendment proclamation states that a contract of mortgage with banks and micro-financing institutions is valid without registration leaving the right of the third parties intact. However, the above interpretation deviates from the derived intention of the legislature and renders the proclamation completely redundant. The intention of the legislature, as it can be inferred from the preamble to the proclamation, is to protect banks and micro-financing institutions from the existing unsecured loan. The protection of third parties does not seem to be its concern from the preamble. It is also impracticable to extend additional protection to banks and Micro-financing institutions without affecting the rights of third parties.

[30] Contracts that affect third parties should not be enforced and the legislature should regulate contracts that affect third parties. See Shavel, *Supra note* 5 p.20

[31] See the provisions of the Civil Code Article 3081ff.

It is plain fact that before the enactment of this amendment proclamation, the loan of banks and micro-financing institutions was secured by the assets of the debtors by the mere fact that there is loan contract. This right to attach the assets of the debtors does depend on the loan contract pursuant to Article 1988 of the Civil Code even though there is no contract of mortgage. In such circumstance, banks and micro-financing institutions are not secured creditors. They are considered normal creditors. Other creditors whose claim is secured by registered mortgage will be given priority. The banks and micro-financing institutions will share from the asset of the debtor equally with other unsecured creditors. The right of banks and micro-financing institutions to attach the assets of the debtor without affecting the rights of third parties existed before the amendment proclamation.

Article 2 of the proclamation cannot be effective without affecting third parties. Since protecting third parties within this proclamation is unlikely, making the right of third parties exception to Article 2 of the proclamation renders the whole proclamation inapplicable. Validating contract of mortgage without registration in a manner that does not prioritize the mortgagees is redundancy as the previously existing legal environment had such function. In no circumstance can the redundancy of this provision be the intention of the legislature.

If it were not to fetch further security for banks and micro-financing institution in a way they are preferred to other unsecured creditors (third parties) and equated to secure creditors (third parties), the existing legal environment without the proclamation would have been enough. Interpreting Article 2 of proclamation in away third parties are protected is not only against the intention of the legislature but also against positive canon of interpretation. Positive interpretation provided under article 1737 of the Civil Code does not allow interpretation, which renders provisions redundant. It rather requires interpretation of a provision capable of two meanings in a way it becomes effective. Protecting third parties within article 2 of the proclamation makes the provision redundant and ineffective. Indeed Article 1737 is a canon of interpretation applicable to contractual stipulations. Nevertheless, applying this on legal provisions with reference to contract is persuasive. This is because contractual stipulations are tantamount to law in their effect pursuant to article 1731.

Therefore, Article 2 of the amendment proclamation seems to either protect banks and micro-financing institutions at the expense of third parties or be redundant. Its redundant nature can be seen as wasting resources and perplexing the existing legal system in relation to that specific area. If it takes the other obnoxious feature, the provision can be commented on for its failure to protect certainty, predictability security of transaction and avoid negative externality of contract of mortgage with banks.

2.3. Application of the amendment proclamation vis-à-vis res judicata

The amendment Proclamation runs against not only the right created in mortgage contract but also the principle of res judicata. Article 3(2) of the proclamation reverses finally decided court judgments retroactively. Application of this provision seems to be against the principle of res judicata. It cannot be a justified ground for review according to the Civil Procedure Code since review is narrowly allowed when perjury, forgery, bribery and other similar acts are committed. Procedural application of this reversal effect of the amendment proclamation is, therefore, among the points of procedural controversies in the application of the proclamation into practice.

Article 5 of the Civil Procedure Code, precludes issues or suits which were heard and finally decided between the same or parties under the same title. Certain issues, which were not heard and decided, can also be precluded when certain conditions are met. Article 5(2) precludes any matter, which might and ought to have been made a ground of defense or attack in the former suit. This elucidates that the matters that are excluded by res judicata are not heard and decided, but they might and ought to have been raised. Possibility of being raised at the time of the former suit is a condition for the application of res judicata on matters, which were not raised, in the previous litigation.

Thus the scope of res judicata in Ethiopia in comparison to civil and common-law legal system is narrow. In common law legal system, res judicata is considered to have killed the cause of action.[32] A valid final judgment made by court having jurisdiction extinguishes the cause of

[32] Peter R. Barnett, Res judicata, Estoppels and Foreign Judgments, Oxford University Press, New York, (2001) pp.20-22

action.[33] No litigation is allowed based on the finally decided cause of action. The cause of action is replaced by judgment on which parties can rely to enforce their substantive rights.[34] Once a final court decision is given with regard to certain cause of a action, a matter which could not have been or ought not to have been ground of defense cannot be re-litigated if the cause of action is similar with the previously decided case. This is because the cause of action is killed.

In civil law tradition, a cause of action is precluded on the reason that the judgment made by competent court having jurisdiction is presumed to be correct.[35] It is this irrefutable presumption that precludes the cause of action. New facts may arise from the cause of action that the court was not aware of, however; the presumption is still irrefutable.[36] In both legal systems, the scope of res judicata extends to preclude a cause of action, which is finally decided.

In Ethiopia, however, as it has been seen, unless the issue or matter might or ought to have been made a ground of defense or attack, res judicata is not a bar.[37] It does not exclude issues that might not or ought not to have been a ground of defense or attack although it arises later from the same cause of action.[38] Article5 (2) excludes only issues that could have or ought to have been raised. The possibility of being raised at the former suit is a requirement to be barred by res judicata. Therefore, the cause of action survives if defense or attack could not have or ought not have been raised.

Cases that come under Article 3(2) of the proclamation are not barred by res judicata according to Article 5 of the Civil Procedure code. Article 5 (2) allows re-litigation if the issues might not or ought not to have been a ground of defense or attack at the formerly decided cases, which

[33] *Ibid*

[34] *Ibid*, See also Adane Kebede, Resjudicata as Employed in the Revival of Ethiopian Legal System upon the Culmination of Tigrean Sirit System, (un published thesis, Addis Ababa, Faculty of Law), pp. 63-65

[35] *Ibid p.* 67

[36] *Ibid*

[37] Article 5 (2) of the Civil Procedure Code

[38] *Ibid*

arise later from the same cause of action. The ground of defense or attack to validate already invalidated cases is Article 3(2) of the proclamation. The issue of law in relation to Article 3 (2) of the amendment proclamation might not or ought not to have been a ground of defense or attack in the cases decided before its enactment. This provision could not have or ought not to have been raised in the cases decided before the enactment of the proclamation. Therefore, finally decided court judgments, which can be re-litigated under Article 3(2) of the proclamation, are in line with the application of res judicata as employed under Article 5 of the Civil Procedure Code.

All the same, if the principle of res judicata employed in the Civil Procedure Code had not had any room for re-litigation, the proclamation would have prevalence effect for two reasons. First of all the proclamation is substantive law, which is enforced by procedural laws. Substantive laws prescribe rights and duties. The procedural laws are enacted to implement substantive laws. In no circumstance can procedural laws, in the Civil Procedure Code erode the substantive laws in Civil Code.[39] Therefore, when the principle of res judicata is in clear contradiction with substantive law, like Article 3(2) of the proclamation, the substantive law shall be given effect since procedural laws shall not deny effect the substantive laws.

Indeed substantive provisions can be found in procedural legislations and procedural provisions can be again found in substantive legislations. Article 3 (2) of the amendment proclamation is substantive in its nature because it validates previously invalidated contract of mortgage without saying anything about the procedure.

Moreover, the proclamation is later special law in that it was enacted after the enactment of the Civil Procedure Code. Res judicata in the Civil Procedure Code is prior general law. When later special law contradicts with prior general law, canon of interpretation dictates that the later law

[39] Tesfay Abate*, Material on Introduction to Law and Ethiopian Legal system,* Sponsored by the Justice and Legal System Research Institute, October 2008, p.153. You can see also Zekarias Keneaa, Arbitrability *in Ethiopia: Posing the problem*, Journal of Ethiopian Law, Vol. XVII, (December 1994), pp.-83-86.

prevails over the prior law.[40] Therefore, Article 3(2) of the proclamation can be applied even against the principle of res judicata, if res judicata were against Article 3 (2) of the proclamation.

2.4. Economic efficiency Under the Amendment proclamation

Efficiency is an economic term, which refers to maximizing utility (satisfaction) at least cost.[41] Economic analysis of contract can illustrate efficiency of contract rules more than any discipline. According to this interdisciplinary subject matter, contract law can facilitate efficient transaction by encouraging optimal cooperation, optimal commitment to perform, and optimal reliance, providing efficient default rules and regulating market failure of contract.[42]

The amendment proclamation runs against most of the purposes of economic analysis of contract. The misleading efficiency provided in the preamble suffers from inefficiency by the provisions, which result in negative externality cost, discouraging optimal cooperation, and optimal reliance.

Albeit the possibility of interpretation in line with the purpose of law, protecting banks and micro-financing institutions at the expense of third party interest erodes certainty, predictability and security of transaction. This is because the uninformed party who secured his claim by registered mortgage is being put behind the banks and micro-financing institutions suddenly since the contract of mortgage of banks and micro-financing institutions is not required to be registered in order to make information available. No parties other than banks and micro-financing institutions will be certain as to the effect of their contract of mortgage since they cannot have information about the encumbered rights of banks and micro-financing institutions. Nor will they be protected having regard to the date of registration.

[40] See Tesfay Abate, *Supra note* 39, p.103

[41] Allen and Cutter, *Supra note* 6, p. 10

[42] *Ibid,* pp.184-211

Erosion of certainty, predictability, and security of transaction have potential danger on optimal cooperation and optimal reliance.[43] No parties other than banks and micro-financing institutions will enter into a contract of mortgage for fear that the object is mortgaged to banks and micro-financing institutions without being registered. Or at least they are severely discouraged. Nor will they be motivated to enter into further contracts relying on their contract of mortgage.[44] Optimal cooperation and optimal reliance are, thus, to be eroded owing to the cumulative effect of exclusion of registration and trade-off effect on the interest of third parties.

Unprotected third party in the valid unregistered mortgage also depicts the failure of the law to regulate market failure.[45] The unprotected third party may suffer from the negative externality of unregistered contract of mortgage. The negative externality of unregistered contract of mortgage could have been avoided through regulating the contract by imposing the system of registration as a mandatory formal requirement at least when the interest of third party becomes an issue.[46] Failure to do so leaves market failure owing to negative externality unregulated and this is clear violation of efficiency, which is the purpose of contract.

The retroactive application of the proclamation has also similar clash with efficiency. Article 3(1) provided thus: "*The validity of any contract of mortgage prior to the effective date of this proclamation, to provide security to loan extended by bank or micro-financing institution, may not be challenged for not being registered by a court or notary in accordance with Article 1723 of the Civil Code.*"

The aforementioned provision revisits previous juridical acts and validates an invalid contract contrary to certainty, predictability and security of transaction. Commitment to cooperate would inevitably be discouraged in a way that results in erosion of certainty and trust on the existing

[43] Lain Maclein, *Uncertainty in commercial law,* Edinburgh Law Review, (2009), p.1

[44] Reliance or entering into further transactions requires high probability of performance as it can be seen in Allen & Cutter, *Supra note* 5, p.194

[45] *Ibid*, pp. 206-208

[46] Allen and Cutter, *Supra note* 5, p.20

laws. This is attributable to the possibility of enactment of laws that deny the effect of the existing laws as connoted obliquely in the aforementioned provision. No one can be sure if the effect of the existing law will not be reversed by an upcoming enactment. Lack of certainty on the existing laws makes the conclusion of predictable contract and relaying on the existing law difficult since the existing laws can be repealed in a way they are not effective as of their enactment. Lack of trust on laws erodes certainty about enforcement, security of transaction and thereby willingness for cooperation.[47]

Moreover, it erodes the economic merit of res judicata. Res judicata avoids backlog and delay, as it is a means of litigation preclusion. Res judicata excludes previously litigated cases. If previously determined matters and issues are allowed to be re-litigated, the number of cases in courts increases. The increment in the number of cases creates backlog and delay. Res judicata does not allow such re-litigation and there by avoid backlog and delay.

Backlog and delay actually affects access to justice and speedy trial and makes inefficient use of resource. When the number of undecided cases increases, the time required to decide one case also increases. This prevents others from bringing their case to the courtroom for fear that there is delay and thereby access to justice is prevented. Even though some of them might bring their case, those whose case is decided after long period of time owing to lack of res judicata, are also denied of the right to speedy trial. This is an unjust result as "justice delayed is justice denied".
In addition to backlog and delay, res judicata also avoids lack of certainty in business. If parties are not certain that their case, which is finally decided, will not revive, they will be reluctant to invest the capital which they obtain as a decree because if the judgment is reversed they may be required to pay back the money they invested. In addition to that their confidence in the court would be eroded in a manner it results in erosion of certainty, predictability and security of transaction.

[47] See Allen and Cutter, *Supra note* 5. p. 184, who asserts enforcement is an incentive for cooperation and lack of certainty about enforcement affect cooperation

Res judicata also protects individuals against multiplicity of litigation and promotes distributional justice.[48] In the absence of res judicata, certain party would re-litigate a case infinitely. The parties will repeatedly required to appear before the court for one case. Some others will not have access to justice or speedy trial due to delay attributable to re-litigation. Those who are re-litigating are consuming more court service and those who do not bring their case once are not, however, consuming even when they are justified to do so and this results in unequal consumption of court services.[49] Res judicata, by excluding previously decided cases, promotes equal consumption of court service. Equal consumption of court service promotes distributional justice, which has social values.[50]

It is sound to assert that individual consumers of court service are assumed to be rational. Accordingly, they want to maximize their benefit. They will choose re-litigation if profit is maximized. To maximize their profit of re-litigation, they are required to re-litigate it at minimum cost. They are also required to consider the probability of getting that profit. This is because no rational party is expected to choose re-litigation having greater risk of losing the case unless there is greater profit to make him gamble or carry that risk. The party generally considers the probability of the benefit and the amount of benefit on the one hand and the individual cost of litigation and probability of losing the case on the other.[51]

Individuals, however, weigh only their individual cost of re-litigation in deciding whether to choose re-litigation or not without considering social cost of re-litigation.[52] Therefore, the government is expected to assess social cost of re-litigation without relying on the economic assumption of rationality of consumers because court service consumers may choose re-litigation due to unnecessary feelings like retaliation and rage.

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[48] *Ibid PP.418-419*

[49] *Ibid*

[50] *Ibid*

[51] *Ibid,* see also Shavel, *Supra note* 5, p.9

[52] *Ibid,* pp.424-426

When social cost of re-litigation is more than social benefit of re-litigation, social benefit of re-litigation should be foregone and there should be res judicata. Social benefit of re-litigation and res judicata are considered to be two commodities; where one is foregone, it becomes opportunity cost of the other. Re-litigation (the opportunity cost of res judicata) has some values. Best example of it is correcting erroneous court judgments. When such judgments are corrected, persons who do not deserve deterring punishment will not be deterred. Those who deserve deterring punishment would be deterred. This would minimize accidents, breach of contract, promote business, and deter other wrong full acts. The incentive, which was given to those who do not deserve it, would be taken back and would be given to those who deserve it. This motivates socially desirable cases to be brought to courts.

Re-litigation to be socially desirable, its social benefit multiplied by its probability of happening should be greater than its social cost [benefit of res judicata].[53] Though the benefit of re-litigation may be high, it becomes, generally, negligible when it is multiplied by its lower probability. The benefits of res judicata are, however, high even when it is multiplied by its probability. Therefore, re-litigation is not justified, as its benefit multiplied by its probability is less than its cost [benefit of res judicata]. Res judicata is, however, justified as its benefits are greater than its cost or opportunity cost [benefit of re-litigation]. Therefore, res judicata should be preserved at the expense of its opportunity cost, the benefit of re-litigation, as it maximizes social benefit.

Article 3 (2) of the proclamation paves a way by which finally decided cases can be re-litigated. The provision denies effect for finally decided court decisions to invalidate a contract of mortgage on the ground that the contract was not registered in court or notary according to Article 1723 of the Civil Code. If previously decided cases shall be of no effect, re-litigation of such cases is inevitable. When previously decided cases are re-litigated the benefits of res judicata are forgone to get the benefits of re-litigation. Re-litigation of cases on the ground of Article 3(2) of the proclamation can be made without affecting Article 5 of the Civil Procedure

[53] *Ibid,* pp.418-419

Code. Even though its applicability in line with Article 5 might be contested, its application at any circumstance is beyond gainsay.

In this special circumstance, the possibility of reversal of the case to be re-litigated is relatively high when it is compared with other res judicata cases. This is attributable to the fact that the validating effect of Article 3(2) of the proclamation increases the possibility of reversal. The benefit of re-litigation is also expected to be high as the security of banks and micro-financing institutions will be protected. The cost of re-litigation is, however, very high since re-litigation denies the social benefit of res judicata. The re-litigation effect of Sub Article (2) of the proclamation is expected to result in backlog and delay, violate access to justice, violate the right to speedy trial, contravene distributional justice, erosion of certainty, predictability, and security of transaction and affect third party interest if it is to be effective against third parties. Therefore, the proclamation also takes away the social benefit of res judicata for the sake of efficiency of banks and micro-financing institutions.

2.4. Constitutionality of the Amendment proclamation

Serious constitutional issues can be raised with regard to the reversing effect of provisions. Article 3(2) by over-looking the separation of powers and independence of judiciary reverses court decision. The provision states: *"Any court decision, rendered prior to the effective date of this proclamation, to invalidate a contract of mortgage concluded to provide security to a loan extended by banks or micro-financing institution, for not being registered by a court or notary in accordance with article 1723 of the civil Code shall have no effect. Any such case pending before any court as of the effective date of this proclamation shall also be terminated."*

Separation of powers, as a constitutional principle, states that the legislature, executive and judiciary shall functionally and institutionally be separated.[54] Member of one of the governmental organ shall not be member of the other organs and one governmental organ shall

[54]Roddee, Anderson, Cristol, Introduction to Political Science, (2nd edition, ------), p.428

not perform the function of the other governmental organs.[55] Although members of the parliament can be members of the executive in parliamentary form of government, this feature of such form of government is an indication of fusion of powers.[56] The principle of separation of power does not, accordingly, allow the legislature to undergo judicial functions like interpreting laws and reversing any court decision.[57] Reversing final court judgment is clear judicial power as the court is left with no function to do. The legislature indeed can enact interpretational laws.[58] This power does not, however, empower the legislature the power to reverse an already finally decided court cases.[59] Check and balance is not extended enough to reverse court judgments. The legislature can check the court by amending laws not decisions. Enacting laws, which are applicable retroactively, to amending or reverse court judgment, contradicts both separation of powers and check and balance.[60]

When 3(2) of the proclamation is observed in light of Article 50 (2) of the Ethiopian Federal Democratic Republic (EFDRE) Constitution, its unconstitutionality, for it erodes separation of powers, is evident. Article 50(2) of the Constitution shows the existence of legislature, executive and judiciary. Institutional separation of powers can be inferred from this constitutional provision. The legislative organ is empowered only to enact laws and keep an eye on their implementation. The executive and judiciary are also empowered to do their respective constitutional function. They are separated not only institutionally but also functionally.

Article 55(1) clearly connotes that the house of peoples representatives "shall have power of legislation". The FDRE Constitution not only states the power of legislature but also the power of

[55] *C.*F Strong, Modern Political Constitution, *(197)2 pp. 211- 212*

[56] Roddee, Anderson, Cristol, Introduction to Political Science, Supra note 54, p.*122*

[57] Michael Allen and Brian Thomson, Cases And Materials on Constitutional and Administrative Law, (4th ed.----) p.*35*

[58] *John L. Hale And Robin Hale V. WellPoint School District Decision of Supreme Court of the State of Washington* No 80771-0, at http://www.courts.wa.gov/content/Briefs/ See also Tesfay Abate, *Supra note* 39, p.140

[59] Barnett*, Supra Note* 33, p.196

[60] See, the case of John L. Hale and Robin hale Versus WellPoint School District, Supra note 58. The court has decided that applying amendment laws in a way court decisions are reversed contravenes separation of powers.

courts. Article 79(1) clearly shows that judicial power is allotted to courts. In light of this Article 80(1) shows the highest judicial power is vested on federal Supreme Court. These two provisions cumulatively show judicial power is vested on courts and the highest power of courts is exercised by Supreme Court. The Constitution clearly elucidates the separation of powers institutionally and functionally. The reversing effect of the amendment proclamation without any legal ground is unconstitutional because it erodes the principles of separation of powers. [61]The judicial function of reversing judgments, which is finally exercised by the Supreme Court as enshrined in the constitution, has been snatched by the law-making organ.[62]

In connection with this the independence of the judicially is endangered owing to the effect of Article 3(2) of the proclamation on separation of powers. First and foremost, separation of power is threshold for independence of judiciary. It is if there are separate government organs that the independence of judiciary is discussed about.[63] In the absence of separation of power, the tenet of independence of judiciary and its standards cannot be issues of discussion. The existence of judiciary as an institution with distinct function is precondition for independence of judiciary. Any effect on separation powers is directly related to independence of judiciary. Article 3 (2) of the amendment proclamation transgresses separation of powers and erodes independence of judiciary to that extent.

Moreover, quashing court decision decided in accordance with the law retroactively erodes directly their independence and confidence in their profession. Empowering the court is one of the ways by which independence of judiciary can be secured. Implementing court orders and decisions are indications of independence of judiciary and judicial sovereignty.[64] Article 3 (2) denies enforcement of court decisions retroactively contrary to the principle of separation of

[61] Barnett, *Supra note* 32, pp.20-22

[62] *Ibid*

[63] *Ibid*,, page 35. Independence of judiciary is justified on its role of promoting liberty and liberty is also highly related to separation of powers according to the legal thinkers like Montesquieu.

[64] John Alder, Constitutional and Administrative Law (*1989),* p. 271

powers. If the legislature can amend previously decided court judgments, courts do not have the highest judicial power leave alone independence.[65]

Courts are required to "exercise their functions in full independence" and "to be directed solely by the law."[66] Denying effect to their decision retroactively without predictable reason connotes disapproval of their function and erodes the confidence of judges. Reversal of court judgment has unequivocal connotation of inefficiency in the reversed judgment. Courts, while their decision was in conformity with the laws, they are obliquely told that they had been inefficient in their decision. Moreover, it might connote that their function is nominal without effect in the absence of legislative will. Above all if their decision is subjected to reversal by the legislature, it is questionable if there can be circumstance where courts decide against clear will of the legislature and in accordance with the law because the legislature can reverse it by its law making power. No rational judges want to see the reversal of his judgment. The unconstitutionality of Article 3(2) of the amendment proclamation is also evident for its oblique impact on independence of judiciary as enshrined in the Constitution.

Erosion of independence of judiciary and public trust on courts has a negative effect on business transaction. Dependency of judges makes judicial decision unpredictable. Citizens will face difficulty of acting according to the law and possible court judgment since the possible court judgment is unpredictable to the extent of the dependency and can be changed by the legislature retroactively. Uncertainty and unpredictability of effect of laws and judicial decisions results in unsecured transaction.

Concluding Remarks

The role of law in development of one nation is pivotal. Contract law is among the leading subject matters of law aimed at enhancing development by encouraging efficient business

[65] Barnet *Supra note* 32*, p 20-22.*

[66] The Constitution of the Federal Democratic Republic of Ethiopia, Article 79(3)

transactions. This objective can be met by making contract laws responsive to certain principles and values.

Formality requirements are provided in a way they are responsive to the evidential, cautionary, channeling and protecting third parties purposes. Proclamation 639/2009 aims at protecting banks and micro-financing institutions on the guise of efficiency. Its application inconformity with the previously existing laws of formality retaining the intention of legislature behind the purpose of its enactment comes up with doubled-edged perplexity. Its application inconformity with the existing laws renders the proclamation entirely redundant. The other application of it results in negative externality, erosion of certainty, predictability and thereby erosion of security of transaction.

Owing to the negative externality, lack of certainty and predictability, the efficiency purposes of contract like optimal cooperation, reliance and regulating market failure are severely damaged. The problem of efficiency of contract is worsened by uncertainty and unpredictability attributable to the retroactive application of the proclamation and reversal of previous court judgments. The reversal of court judgment contravenes with the efficiency principles enshrined in the economic analysis of res judicata.

It is also unconstitutional since it erodes separation of powers and independence of the judiciary. The judicial function of interpretation and applying laws to specific cases is snatched away. This has an indirect effect on the independence of the judiciary. The reversal of previous court judgments also compromises independence of the judiciary since failure to implement court judgments directly erodes independence of the judiciary. Erosion of judicial confidence on their function and public trust on judges indirectly affects independence of judiciary.

The immense effect of lack of certainty, predictability and unsecured transaction can spill over to international transactions. Investors and actors of international transaction, inevitably consider legal certainty to decide to invest or make transaction. Taking these into account immediate repeal or amendment of proclamation 639/2009 is recommended.

ELEVATING THE BAR:

An Appeal for the Legal Profession in Developing Countries to Become Active in Contract Negotiations and for Legal Education to Embrace Training in Transactional Practice

Jay Gary Finkelstein, Esq.*

With the advent of the global economy, the nations of the world are becoming increasingly interactive and interdependent. No nation operates in isolation, most clearly demonstrated by the continuing global economic recession which is impacting both the developed and developing economies. While there was a time when the nations of the developing world may have been sheltered from certain global events, that time has passed. Many developing countries possess valuable resources necessary to the growing global economy, and developing nations are increasingly looking for assistance from developed nations and foreign corporations to obtain necessary components for, or investment in, growing developing local economies. With growing interdependence, coupled with increased international trade and the developing nations' growing needs for foreign exchange to obtain those components necessary to develop their local economies, developing nations find themselves increasingly involved in international business transactions.

The increase in potential international business transactions has occurred more rapidly than the development of the legal skills in many developing nations for handling the new wave of transactions. This is not particularly surprising, as legal education in most countries, including the developed nations, has been slow to adapt to changes in the legal world in which lawyers increasingly find themselves. Legal education world-wide, which has historically focused on statutory and litigation-based instruction, has not been designed to provide students with the skills necessary to function as effective transactional lawyers capable of negotiating and drafting workable business agreements.

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In developed countries, this void in legal education has generally been filled through on-the-job training in law firms, corporations and government where lawyers are engaged in the negotiations of business transactions. Through inclusion on legal teams involved in negotiations of business joint ventures, purchase agreements, supply contracts, licensing agreements, mergers, acquisitions, financings, and other significant business transactions, the lawyer develops background and experience in business negotiations, document preparation, and general elements of successful business transactions, including the business realities for which, and the business culture in which, each agreement is being crafted.

While this collaboration between formal and informal legal education has served as an effective, albeit imperfect, means of training transactional lawyers in developed economies, it is a system that meets significant obstacles in much of the developing world. In Ethiopia, for example, the legal profession historically has not generally been involved in business negotiations involving contract preparation. While lawyers are consulted in business disputes, i.e., business transactions that have gone awry and thereby landed in the courts or alternative dispute resolution contexts, lawyers are not generally consulted at the outset of a business negotiation to prepare the contractual agreements. Since teaching at law schools traditionally concentrates on learning through statutory analysis and legal precedent developed through dispute resolution[1], and since Ethiopian lawyers are generally not involved in the crafting of business agreements, the Ethiopian bar is neither trained in, nor exposed to practical experience in, the skills of negotiating and documenting business transactions. With the absence of formal training and the absence of experience and opportunity to learn through practice, the lawyer is ill equipped to assist in the structuring and negotiating of transactions.

This absence of educational and practical training focused on basic business negotiations skills places developing economies, and the businesses and governments involved in transactions

[1] This criticism is not limited to law schools in developing countries. For a summary and critique of various methods by which US law- schools have historically taught transactions, as well as a summary of much of the literature regarding such methods and alternatives thereto, see Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom,* Colombia Business Law Review, (2002), p. 475; *see also.* Stark Debra Pogrund. *See Jane Graduate. Why Can 't Jane Negotiate a Business Transaction?,* ST. JOHN'S Law Review Vol. *11* (1999), p. 477 The issue in developing countries is exacerbated by the absence of transactional practice by lawyers, so there is no exposure to transactional practice at all.

within such economies, at a distinct disadvantage at the very time that they are confronted with growing opportunities for international transactions. Local enterprises currently owned by governments are being privatized, infrastructure deals are being negotiated, raw materials are being sold, and other foreign investment is being attracted to developing countries, but these countries, including Ethiopia, often lack legal counsel with the training to guide the legal process for such transactions. Whether through the desire to appear receptive to foreign investment or the eagerness to access new markets for local industry or obtain needed infrastructure, financing, or other investment, the absence of trained legal negotiators leaves developing countries exposed to the very exploitation which such nations have long sought to overcome.

Negotiation of a business transaction is part art and part science. There are formal texts teaching the skills and describing the strategies that can train a lawyer or business person how to negotiate.[2] More than theoretical techniques, however, the negotiation of a business negotiation involves an in-depth understanding and assessment of the particular transaction, the nature of the respective parties, the goals that each party seeks to achieve from the transaction, and the range of alternatives and compromises that may be discussed in order to achieve the desired goals. No business transaction has a single potential outcome; many different results, each within a range of fairness acknowledged by the parties, are possible to address a particular objective. No transaction will occur unless both parties feel that a level of fairness has resulted from the negotiations. Nevertheless, parties may feel different levels of power or control within a particular situation which may affect their interpretation of their ability to negotiate or make demands, thereby altering the perception of what can be achieved and what is a fair result. Accordingly, a party that is not well trained to enter a negotiation may underestimate what can be achieved and accept less than an optimal result, even though that party perceives the concluded transaction as "fair." In other words, not fully appreciating the potential to be achieved from the negotiation, the party settles for less than could have been attained.

[2] One of the most renowned texts is, ROGER FISHER & WILLIAM URY. GETTING TO "YES": NEGOTIATING AGREEMENTS. Bruce Patron ed. (2nd ed. 1991)

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Psychology is a key component to every negotiation. It is critical to understand the respective party's perceptions of their power as they enter the negotiation, and how important the particular transaction is to each party. In many instances where a developing country is entering into a negotiation with a foreign party, it is the developing country, which is perceived as, and may perceive itself as, the weaker party. The developing country may appear to be eager to conclude the transaction, thereby weakening its negotiating position. In addition, the foreign party in the negotiation may either perceive itself as providing great benefit to the developing country or may sense it is the only party with whom a deal may be made. Consequently, the combined result is that the developing country enters the negotiation at a disadvantage, which may often result in a poorly negotiated result.[3] When combined with an apparent absence of experience in international negotiations, the perceived psychological differences may further impair the ability of a developing nation to attain favorable international agreements.

It is no secret that many developing nations have been victims of commercial exploitation.[4] This article is not intended to perform a detailed analysis of actual contracts entered into between developing nations and foreign partners, but it is safe to state that substantial business transactions, many involving valuable natural resources, have often resulted in little benefit for the contracting developing nation as a whole. The purpose of this piece is to advocate for developing nations taking an expansive view of such contracts and for legal education to train lawyers to be involved in business negotiations, thereby both expanding the role of the legal profession in contractual negotiations, generally, and with foreign parties in particular, and by taking a more informed, and possibly aggressive, approach to such agreements, achieving greater social benefits for the developing nation.

Each contract between a developing nation and a foreign partner starts with an objective. There may be something that will be sold (e.g., a raw material or an industry to be privatized), or a right will be granted (e.g., the opportunity to engage in a developed enterprise, such as a hotel),

[3] See, Jeswald W. Salacuse. *How Should The Lamb Negotiate With the Lion? Power In International Negotiations, in* NEGOTIATION ECLECTICS: ESSAYS IN MEMORY OF JEFFREY Z. RUBIN 87-99 (Deborah M. Kolb ed., 1999).

[4] There has also been other significant forms of exploitation through colonization, slavery, and cultural subrogation, but those are not topics to be addressed here.

or something may be purchased (e.g., the construction of a new road, hospital, or other public facility or infrastructure). Assuming that the government is involved in most of these negotiations, either directly as the seller or purchaser or, indirectly as a grantor of tax or other statutory rights or benefits to encourage and facilitate the transaction, each such contract is also an opportunity to garner additional economic, social and political benefits for the nation as a whole. No opportunity should be lost to include those benefits in each such agreement. Rather than a simple focus on the particular objective of the transaction at issue, all such contracts should be addressed through a framework of broad social considerations and should be used for economic advancement of the economy as a whole by including such items as local ownership participation through joint ownership, local employment requirements, technology transfer through training or broader support for educational initiatives, and other social benefits.

There is nothing novel about using contractual arrangements, particularly involving the government, to achieve broader social objectives, or "externalities." External requirements in contracts are commonplace in developed nations. Land use permits in the United States have often required that developers improve surrounding roads or build a social improvement (e.g., a school, a theater, low-income housing, or a community center) as a condition to obtaining other rights to development a commercial property. Government contracts in developed nations may include a requirement of participation by minority owned companies. These additional requirements are outside the actual business transaction, but their inclusion achieves social and political objectives and are part of the cost to be incurred by the other party for proceeding with the deal. As a result, the local economy and the broader populace benefits from the private or government transaction.

In developing nations, these additional contract requirements should include not only local ownership participation and possible civic improvements, but should also be focused on preserving and creating employment opportunities, accessing training for skilled and management positions, and obtaining technology transfer. Development projects should require employment of local labor, a privatization project may include requirements, in addition to some retained local ownership, that the acquirer introduce new training programs for workers or fund new housing or schools. These additional contract requirements could include opportunities for

local employees to serve as shadow managers and supervisors or receive training in the foreign entity's other operations through secondment opportunities or otherwise. Alternatively, if these concepts are not practical under the specific circumstances, a funding program for educational scholarships, a new university faculty chair, or even a new university building may be negotiated. The general funding or "pay to play" requirement may substitute where no particular "externality" is appropriate. With such requirements, the country is positioned to improve and modernize its economy by bringing new training, new technology and new opportunities; thereby deriving continued benefits from the negotiated transactions. The effort will also further involve foreign partners with the local economy so that there becomes a partnering effort that provides a continuity and mutuality of interest between the parties.

To avoid actual and perceived exploitation, negotiators in developing nations need to understand the power of negotiating external requirements in contracts and become creative in "the task." Perceived weak positions in negotiations may not be actual, particularly when involving raw materials, and many of the suggested additional requirements add minimal cost to a transaction, particularly when coupled with tax relief or other government-granted benefits. "Pay to play" is not a new concept, and savvy foreign partners will be familiar with this obligation from other negotiations.

A key element in moving toward improved contracts is to improve the training of negotiators. Lawyers can serve a key role as their general training provides background for skilled negotiation. Their experience in actual problems encountered through dispute resolution and the means for resolving such problems, including knowledge of problems caused by poor contract drafting which could have been avoided through better transactional structuring, provides valuable experience in anticipating problems and crafting agreements to avoid the disputes or to provide a more reasoned approach to their resolution. The lawyer experienced in negotiating settlements can readily apply such skills to negotiating and documenting agreements *ab initio*. The important point, however, is that legal training, and the legal profession, must embrace an expanded role for lawyers by actively moving towards the involvement in contract negotiations and not just contract disputes.

The legal profession, particularly in Ethiopia, is ready for this transition, and the need is acknowledged. The author has had the privilege of teaching introductory international business negotiations courses at Addis Ababa Law School, but was forewarned at the outset about the challenge of teaching negotiations where the legal profession is not generally involved in structuring business transactions and where law students are predispose to lecture classes and not class participation exercises. Nevertheless, the first class of LLM students at Addis Ababa Law School involved in the international negotiations training surpassed all expectations of enthusiasm and involvement in the subject matter, demonstrating the ability to address the task of moving the legal profession in a new direction. Conversations with faculty, students and members of the bar confirmed the need to move the legal profession towards active early involvement in negotiating business transactions. The legal community is ready; education and utilization must follow.[5]

The author has long advocated for enhanced legal transactional skills training in the United States where legal education has historically focused primarily on litigation-based learning. There has been recent movement in US law schools to add transactional based courses and new emphasis on practical aspects of legal practice.[6] Training in negotiations must be coupled with academic analysis of business transactions and their structures and components, as well as the techniques of drafting agreements.

Training in negotiations must include both theory and practice. Based on the author's experience, among the most effective means of introducing the concepts of negotiation while teaching the analysis, assessment and structuring of transactions is to utilize simulation exercises. The concept involves class lectures regarding the process of negotiating, including explanations and analyses of a detailed simulated fact pattern. After a general introduction of the simulation,

[5] It should be noted that new legal curriculums are being developed in Ethiopia. One such project is headed by Professor Norman Singer.

[6] See generally, Carol R. Goforth. *Use of Simulations and Client-Based Exercises in the Basic Course,* Georgia Law Review, Vol. 34, S51 (2000); Edith R Warkeutine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts,* JOURNAL OF LEGAL EDUCATION, VOL.50 (2000); Tina Stark, *Thinking Like a Deal Lawyer,* J. LEGAL EDUCATION VOL.54. (2004); Michael Bates Deakin, *Designing the Deal,* Harvard Law Bulletin. (Fall 2005).

including the party's interests in the transaction and their respective strengths, weaknesses and objectives, the class is divided into two teams, taught by two professors in parallel for the balance of the simulated negotiation. The teams identify the issues to be sought by their respective parties in the negotiation, prepare their strategies, assess the other side, negotiate face to face with the opposing team, analyze the results of each phase of the negotiation, and repeat the process through four rounds of negotiation. All students are given the opportunity to lead a negotiation to obtain the experience of being "front and center." The exercise absorbs the student in the negotiation process and encourages the utilization of all legal and practical skills to achieve a successful negotiated result. The class concludes with a joint analysis and evaluation of the experience. [7]

The principal elements of a negotiation are to understand the goals of the transaction, assess the strengths and weaknesses of the parties, anticipate problems, effectively manage the negotiation process, and prepare documents to avoid disputes, all while achieving the best negotiated results for the client. A simulation exercise, using a well-tailored set of facts that includes the problems, difficulties, challenges and dilemmas experienced in real negotiated situations involving developing economies, enables the student to engage in and experience the process by assuming the role of negotiator, identifying the issues, proposing solutions and obtaining and addressing reactions, all in a controlled environment where the student learns from, and no one suffer by, mistakes. In addition, the perspectives of the foreign partner are explored during the process, as well as the psychology underpinning such negotiations and alternative means for controlling and impacting the negotiation process. This "learning by doing" allows the teaching of theory while engaging in practice, thereby making the theory "real." The student learns through the effort of thinking and applying the law, which creates a memorable pedagogic result in a short period of time because the student has not only read and heard about the process but has *experienced* an actual negotiation, albeit in a controlled environment. With each step in the negotiation being analyzed and discussed in class, the process is both evaluated and de-mystified while it is

[7] For a full discussion of the simulation class, see, Daniel D. Bradlow and Jay Gary Finkelstein, "*Training Law Students to be International Transactional Lawyers – Using an Extended Simulation To Educate law Students about Business Transactions*," 1 Pepperdine J. Business, Entrepreneurship & the Law, Vol. 67 (2007).

ongoing, the nuances are reviewed and the strategy is crafted. The students quickly assume the personality of their roles in the simulation, and the negotiations between teams approximate closely the intensity of feeling and commitment one witnesses in actual negotiations among business parties. Similar to the medical student who conducts surgery on a cadaver to understand what will need to be done on the living patient, the law student who practices negotiating skills and techniques in a simulated environment is better prepared for dealing with the real business transaction.

The success of this method of teaching is confirmed by the reactions of students. As one student who recently completed a semester-long negotiations simulation class in the US commented: "Looking back on the [simulated] negotiations, I really do believe that we learned so much more about negotiations by doing it than by reading about it. You don't know how rules play out until you're face to face with the other side." And another student in the class confirmed: "The most important thing is that we learned the art of negotiating deals through doing it, not by reading a guide. A guide cannot cover every single issue in the negotiation process because sometimes unexpected issues come up. . . . In such situations, a good negotiator must be prepared and react in favor of his/her business' interests according to the new circumstances. . . . The purpose of the [simulated] negotiation process is to feel the adrenaline come up, which makes the whole process more exciting. It is much more intense when I am involved directly in the negotiations."

Based upon the initial efforts in using the simulation methodology for teaching negotiations at the Addis Ababa Law School, the success of the method and its potential for enhancing legal education in Ethiopia has been ratified by the response of Ethiopian students to the intense simulation exercise.[8] Two students from the class taught in 2008 are quoted below:

> Student A: "Up to now I personally understand and defined negotiation [as] an attempt to reach an [agreement with] the disputant party without the assistance of the [court]. I try to correlate negotiation with dispute resolutions. I [took] this course with such mind, but

[8] The class in Ethiopia was taught in an intensive, two week module using 10 class sessions of two to three hours each. While four face to face rounds of negotiation were maintained, the class would likely be improved by offering it over a longer period of time.

> . . . I was highly inspired with the lesson of business negotiation transaction. I found the course very interesting and moving the law profession from dispute resolution to the business transaction as dispute prevention mechanism.. . . I have learned more from this course [than] I have words to express."
>
> Student B: "I have seen . . . and experienced what negotiation is all about and the techniques and ways of coming into negotiation. This is really of great importance not only for my professional capacity but also for my daily life. . . . The way you mold us with the required skills of negotiation need to be praised. I believe we have acquired the fundamental skill in the field. Above all, the fact that the learning teaching process has been practice oriented is a great blessing to us since this is unusual in Ethiopia.. . . I can say that you have accomplished your mission successfully."

By focusing on training in law school, the lawyer can become an informed and effective negotiator capable of assessing potential business transactions and working to avoid problems and improving the performance of business agreements. Furthermore, being involved in sensitive negotiations of business transactions confronting developing nations, trained lawyers will help identify the externalities that can be requested and incorporated into business agreements and will understand how to test and evaluate responses to particular proposals. Rather than being concerned if a transaction may be derailed by overly assertive requests, the trained lawyer negotiator can press and measure responses, utilize multiple negotiation techniques and tailor positions while moving toward agreement. A new generation of lawyers has the potential to redefine the role of the legal bar and achieve better social results through their efforts.

In a nation where lawyers have traditionally been used principally in dispute resolution, the use of lawyers as negotiators of business transactions is likely to begin with the government. As the government moves toward increased use of lawyers in transactional matters, the business community will follow suit. And by avoiding problems through early involvement and careful drafting of agreements, courts will become less burdened and business will generally progress more smoothly.

In conclusion, there is a significant role for lawyers in developing nations to play in avoiding exploitation through skilled negotiation of transactional agreements. Achieving this role will require a new focus on teaching transactional law at universities and increased involvement of lawyers as negotiators of key business agreements. The legal profession will need to expand its focus from dispute resolution to early involvement in negotiating and documenting business agreements, which will also require the business community to acknowledge the need for lawyers to be so involved. Lawyers may promote this issue through interaction with clients (suggesting that a dispute could have been avoided if the lawyer had been involved earlier in the drafting of the agreement), but a major step forward would be through lawyers being involved in government contracting efforts. Everyone stands to benefit from the improved results in agreements that should inevitably follow from avoiding exploitative agreements. It is time for the legal profession to advocate for an expanded role in business negotiations and to demonstrate that it is ready to assume this responsibility.

Child Rights' Corner[1]

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መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

መዝገቡ ለሰበር ችሎቱ ሊቀርብ የቻለው የአሁኗ አመልካች የደቡብ ብ/ብ/ሕ/ክ/መ ጠቅላይ ፍ/ቤት በሰጠው ውሣኔ ላይ ባቀረበችው የሰበር ቅሬታ ማመልከቻ መነሻነት ነው፡፡ የአሁኑ ተጠሪ በቦንጋ ዙሪያ ወረዳ ፍ/ቤት የሕፃን ቢንያም ክፍሌ ወላጅ አባት ስለሆንኩ ፍ/ቤቱ ለሕፃኑ ሞግዚትና አስተዳዳሪ አድርጎ ይሾመኝ በማለት ያቀረበውን አቤቱታ ፍ/ቤቱ መርምሮ የሕፃኑን ሞግዚትና ኣስተዳዳሪ አድርጎ ሾሞታል፡፡ የአሁኗ አመልካች በፍ/ሕ/ሥ/ሥ/ቁ. 358 መሠረት የአሁኑ ተጠሪ ሕፃኑን ከመውለዱ በስተቀር ምንም ዓይነት እርዳታ አላደረገም፤ ተንከባክቦም አላሳደገም በማለት የተቃውሞ አቤቱታ ያቀረበች ሲሆን ተጠሪ ሕፃኑ ከእናቱ የሚወርሰውን ሀብትና ንብረት ፍለጋ እንጂ

[1] Mekelle University Law Journal /MULJ/, in cooperation with Children Legal Protection Centre of the African Child Policy Forum, dedicates this corner to child rights and aims to publish contributions helpful for the promotion and protection of child rights. It receives scholarly articles, case-studies, and case comments on areas relevant to child rights. For this issue, a decision by the Cassation Division of the Federal Supreme Court on child custody is reproduced.

ለሕፃኑ ጥቅም ብሎ ስላልሆነ ተጠሪ ሞግዚት እንዲሆን የተላለፈው ውሣኔ ተሽሮ በምትኩ እኔ አክስቱ ላለፉት 12 ዓመታት ተንከባክቤ ያሣደኩት ሞግዚት ሆኜ እንድሾም ይወሰንልኝ በማለት ያቀረበችውን መቃወሚያ የወረዳው ፍ/ቤት መርምሮ አባት ላለው ልጅ አመልካች የሞግዚትነት ጥያቄ ማቅረብ አትችልም በማለት መቃወሚያውን ውድቅ አድርጎ መዝገቡን ዘግቷል፡፡ ጉዳዩ በይግባኝ የቀረበለት የከፋ ዞን ከፍተኛ ፍ/ቤት የአሁኑ ተጠሪ ሕፃኑን እስከዛሬ ድረስ ሣያሣድግ አሁን እናቱ ስትሞት ላሣድግ ማለቱ ሀብትና ንብረት ፍለጋ ሊሆን እንደሚችል ለመገመት የሚያዳግት ቢሆንም የደቡብ ብ/ብ/ሕ/ክ/መንግሥት የቤተሰብ ሕግ አዋጅ ቁጥር 75/96 አንቀጽ 235/1 ከወላጆቹ አንዱ በሞት የተለየው ሕፃን በሕይወት ያለው ወላጅ ሞግዚትና አስተዳዳሪ እንደሚሆንለት ስለሚደነግግ የወረዳው ፍ/ቤት የአመልካችን ጥያቄ ውድቅ ማድረጉ ተገቢ ነው በማለት መልስ ሰጭን አስቀረቦ ሣያከራክር በፍ/ሕ/ሥ/ሥ/ቁ. 337 መሠረት መዝገቡን ዘግቶታል፡፡ የክልሉ ጠቅላይ ፍ/ቤትም የተፈፀመ መሠረታዊ የሕግ ሥህተት የለም በማለት የአሁኗን አመልካች አቤቱታ ውድቅ አድርጎታል፡፡

የሰበር ቅሬታ ማመልከቻው የቀረበው ይህንን ውሣኔ ለማስለወጥ ሲሆን ይህ ችሎት መጋቢት 6 ቀን 1998 ዓ.ም በዋለው ችሎት በዚህ ጉዳይ የሕፃን ቢንያም ክፍሌ አክስት የሆነችው የአሁኗ አመልካች ሞግዚት ለመሆን ያቀረበችውን ጥያቄ የሥር ፍ/ቤቱ ውድቅ ያደረገበትን የሕግ አግባብ ለመመርመር ሲባል መዝገቡ ለሰበር እንዲቀርብ ትእዛዝ ሰጥቷል፡፡ መልስ ሰጭም መጥሪያ ደርሶት መልሱን ባለማቅረቡ የጽሁፍ መልስ የማቅረብ መብቱ ታልፏል፡፡ ይህ ችሎት የሰበር ቅሬታ ማመልከቻውን ከሥር ፍ/ቤት ውሣኔ እና ከሕጉ ጋር በማገናዘብ መርምሯል፡፡ የኢፌዲሪ ሕገ መንግሥት አንቀጽ 36 ስለ ሕፃናት መብት ደንግጓል፡፡ በዚሁ አንቀጽ በንዑስ አንቀጽ 2 መሠረት ሕፃናትን የሚመለከቱ እርምጃዎች በሚወሰዱበት ጊዜ ሁሉ የመንግሥታዊ ወይም የበጎ አድራጎት ተቋማት እንዲሁም ፍርድ ቤቶችና የአስተዳደር ባለሥልጣናት ወይም የሕግ አውጭው አካላት የሕፃናትን ደህንነት በቀደምትነት እንዲያስቡ
በአስገዳጅነት ተመልክቷል፡፡ ከዚህ በተጨማሪ ኢትዮጵያ ካፀደቀቻቸው የዓለም ዓቀፍ ስምምነቶች መካከል የሕፃናትን መብት በሚመለከት 1984 ዓ.ም የፀደቀውና በሕገ መንግሥቱ አንቀጽ 9(4) መሠረት የሀገሪቱ የሕግ አካል የሆነው የሕፃናት መብት ኮንቬንሽን አንቀጽ 3(1) መሠረት ፍርድ ቤቶችም ሆኑ ሌሎች አካላት ሕፃናትን

የሚመለከቱ ጉዳዮች ላይ ውሣኔ ሲሰጡ የሕፃናቱን ጥቅምና ደህንነት በዋነኛነት መመልከት እንደሚገባቸው ተመልክቷል። እንደሚታወቀው የልጆቻቸው መብትና ደህንነት በማስጠበቅ ረገድ ከወላጆቻቸው የበለጠ ቅድሚያ ሊሰጠው የሚገባ ሰው ሊኖር ስለማይችል ሕግ አውጭው በመርህ ደረጃ የተቀበለው በመሆኑ በሕይወት ያለው አባት ወይም እናት የሕፃን ልጁ ሞግዚት እና አስተዳዳሪ አድርጎ የመሾሙ አሠራር አገራችንን ጨምሮ የበርካታ አገራት ተሞክሮ መሆኑ ይታወቃል። በዚህ መሠረት በፌዴራልም ሆነ በክልል የቤተሰብ ሕጎች ውስጥ ወላጆች ለሕፃናት ልጆቻቸው ሞግዚትና አስተዳዳሪ ስለመሆናቸው በግልጽ የተመለከቱ ድንጋጌዎች ያሉ ቢሆንም እነዚህ ድንጋጌዎች ተፈፃሚት የሚኖራቸው ሞግዚት ወይም አስተዳዳሪ የተባለው ወላጅ በሕገ መንግሥቱ እንደተመለከተው ለሕፃኑ ጥቅምና ደህንነት እስከሠሩ ጊዜ ድረስ ብቻ እንደሆነ ሊስተዋል የሚገባ ጉዳይ ነው። በሌላ አነጋገር በአባት ወይም በእናት የሞግዚትነት ሽፋን የሕፃናትን መብትና ደህንነት የሚጎዱ ወይም ሊጎዱ የሚችሉ ሥራዎች ሁሉ በዳኞች ቀሪ እና ፈራሽ ሊሆኑ የሚችሉበት አግባብ በሕጉ የተለያዩ ክፍሎች መገኘቱ ይህንኑ የሕፃኑን መብትና ጥቅም በዋነኛነት ለማስከበር የተደነገገ ነው። በዚህ ረገድ በየትኛውም ደረጃ የሚገኙ ዳኞች ሕፃናትን የሚመለከቱ ጉዳዮችን ሲመረምሩ ከዝርዝር ሕጎቹ በተጨማሪ በሕገመንግሥት አንቀጽ 36(2) በአስገዳጅነት የተቀመጠውን የሕፃናትን ደህንነት ከግምት ውስጥ ያስገባ ውሣኔ ላይ እንዲደርሱ የግድ ይላል። ይህን በመተላለፍ የሚሰጡ ማናቸውም ውሣኔዎችና ልማዳዊ አሠራሮች የሕገ መንግሥቱን ጎይለቃል የሚቃረኑ ስለሚሆኑ ፈራሽነታቸው የማያጠራጥር ነው።

ወደያዝነው ጉዳይ ስናመራ የክልሉ ፍርድ ቤቶች የሕፃን ቢንያም ክፍሌን ሞግዚትነት አስመልክቶ የቀረበላቸውን ጉዳይ ሲመረምሩ ከሕጎቹ ግልጽ ድንጋጌዎች ባሻገር ሕገ መንግሥቱ ያስቀመጠውን የሕፃኑን ደህንነትና ጥቅም የማስከበር መርህ ተግባራዊ ማድረግ ሲገባቸው በተለይ የአሁኑ ተጠሪ በዚህ ደረጃ የሞግዚትነት ጥያቄ ያነሣው ሕፃኑ ልጅ "ከእናቱ በውርስ ከሚያገኘው ንብረትና ሀብት ላይ ተካፋይ ለመሆን አስቦ ስለመሆኑ" የከፍተኛው ፍ/ቤት በውሣኔው ላይ ገልጾ ሕፃኑን ከመውለድ ውጭ ከአስር ዓመታት በላይ ዞር ብሎ ያላየውን፣ ያልተንከባከበውን፣ ያላሣደገውን እንዲሁም ፍላጎቱን እንኳን ያልጠየቁትን ሕፃን በሰላምና በእንክብካቤ ካደገበት ቤት አስወጥቶ በአሁኑ ተጠሪ ሞግዚትነት ሥር ይተዳደር ተብሎ የተደረሰበት መደምደሚያ የሕፃኑን

ደህንነትና ጥቅም ያላገናዘበ ነው፡፡ የሥር ፍ/ቤቶች ከሕጎቹ ግልጽ ቃላት ባሻገር የሕጎቹን ዓላማና መንፈስ በቅጡ ሣያጤኑ የአንቀጾቹን ግርድፍ ቃላት ብቻ በመውሰድ ሕገ መንግሥቱን በሚጋፋና የሕፃኑን መብትና ደህንነት በሚጎዳ አኳኋን የሰጡት የሞግዚትነት ውሣኔ መሠረታዊ የሕግ ስህተት ያለበት ነው ብለናል፡፡

<u>ው ሣ ኔ</u>

- የደ/ብ/ብ/ሕ/ክ/መ/ ከፋ ዞን የቦንጋ ዙሪያ ወረዳ ፍ/ቤት ታህሣሥ 17 ቀን 1998 ዓ.ም በመዝገብ ቁጥር 29/98 እንዲሁም የክልሉ ከፍተኛ ፍ/ቤት በየካቲት 21 ቀን 1998 ዓ.ም በመ/ቁ. 01001 በተጨማሪ የክልሉ ጠቅላይ ፍ/ቤት መጋቢት 1 ቀን 1998 ዓ.ም በመ/ቁ. 14275 የሰጡዋቸው ውሣኔዎችና ትእዛዞች ተሽረዋል፣

- የሁኗ ተጠሪ ወ/ሮ ፀዳለ ደምሴ የሕፃን ቢንያም ክፍሌ ሞግዚትና አስተዳዳሪ ሆና ሕፃኑ ከሟች ወላጅ እናቱ ከወ/ሮ ፋንታዬ ኃ/ሚካኤል የሚያገኘውን ማናቸውም የውርስ ሀብት ተረክባ ሕፃኑን በመልካም አስተዳደግና ደህንነት ተንከባክባ እንድታሣድገው ተሾማለች፡፡

- መዝገቡ ያለቀለት ስለሆነ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

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