

DEPARTURE OF ETHIOPIAN FAMILY LAWS: THE NEED TO REDEFINE THE PLACE OF SOCIETAL NORMS IN FAMILY MATTERS

Mulugeta Getu Sisay*

“No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation.” *Emperor Haile Sellassie I*¹

Abstract:

Most legal theorists agree that law is the ‘mirror of society’ and its purpose is ‘maintenance of social order’. This so called mirror-theory underlines that the basic source of law is social values and interaction, and the state should not blatantly ignore societal values and impose aspirational laws. Unfortunately, Ethiopia has taken measures to modernize the country through legislative reforms including by abolishing selected aspects of customary family institutions in 1960 and 2000. As a result, important values of the society have been overlooked in the official family laws and that separate the law from the community. Betrothal, one of the long established practices of Ethiopians, is totally ignored by the federal family law and has become an extra-judicial act. Similarly, though customary way of family dispute settlement is recognized under the FDRE Constitution, the family law barely empowers it thereby eliminating its functions and importance. Equally, the law that obliges adoption agreement to be in written form, parties to appear before court of law and secure approval of the relation, is believed to be mechanical and contrary to societal practices. As a result, the family laws have been considered by many as a poor adoption of foreign practices that ignore societal values and long-proved customary institutions. The author, however, argues for “a multilayered approach to family regulation [that] builds on the notion that many families have a complex identity and experience, shaped and defined by many different cultural, legal, and political ties.” Indeed, the manuscript presents that there are sufficient reasons to argue for greater accommodation of indigenous legal tradition (cultural and religious diversities) in Ethiopian family laws.

Keywords: adoption, arbitration, betrothal, custody, family, mirror, society, spouses

I. INTRODUCTION

Law is a dynamic developing social institutions and changes with the change of circumstances – social, political, economic, physical environment etc. - in the society it governs.² African laws are essentially “an integral part of their culture” and reflected its

* Mulugeta Getu Sisay, LL.B., LL.M., Asst. Professor of Law at Haramaya University College of Law. The author is grateful for the additional incites and comments provided to him by the two anonymous reviewers that has helped to further shape the manuscript. The author could be reached through mulugetagetu23@yahoo.com.

¹ ABBA PAULOS TZADUA & PETER L. STRAUSS (EDS.), *THE FETHA NEGEST: THE LAW OF THE KINGS*, (Carolina Academic Press, Durham, North Carolina, 1st edition, 1968), at preface at v. Reciting Conquering Lion of the Tribe of Judah Haile Sellassie I Elect of God, Emperor of Ethiopia, 29th of August, 1968. The book was translated to English from Geez.

² Abiola Ayinla, *African Philosophy of Law: A Critique*, *JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*, Vol. 6:147 (2002).

cultural diversities.³ African traditional institutions, however, had been systematically and gradually eliminated during colonization and in the process of anti-colonial movement which finally resulted in a massive reform on customary laws.⁴ In addition, African legal systems are under the influence of the introduction of foreign legal systems due to globalization and transplantation, urbanization and the growth of money economy.⁵

Though Ethiopia did not experience European colonial rule, there were analogous process of interference with Ethiopian customary institutions in different times under the disguise of modernization and territorial expansion.⁶ Ethiopia together with Tunisia are mentioned as the top two African countries to make radical measures “to abolish legislatively carefully selected aspects of customary law” while recognizing and enforcing customary laws continued in other African nations after independence with a varied degree of adjustment.⁷ This ongoing process of interface between the traditional institutions and alien/modern principles reached our time, and continued to characterize current legal studies. In this era of interface, it is unconceivable to expect Ethiopian laws, including family laws, to become the perfect mirrors of the society or reflect the custom and values of the society it governs.⁸ Though there are considerable number of scholars who argue that law should mirror its subjects, other – advocates of legal transplants or law and development - argue that laws reflect uniformly accepted values and should be used flexibly.⁹

This Article, then, asks questions and scrutinizes to what extent Ethiopian official family laws, especially the federal law, is the mirror of prevailing practices and to what extent these laws do contribute to the maintenance of social order. Generally, the author argues that important values of the society have been overlooked in the official family laws and that separate the law from the community, and advocates for reincorporation of customary laws in the official laws or juridical recognition of some customary practices.

It starts with a literature analysis of the relation between law and society and looks from ‘mirror’ theory and ‘legal transplants’ points of view. With a view to making the picture of family laws very clear, Section III of the Article proceeds with a historical accounts and development of the body of laws that regulate family matters in Ethiopian history. Accordingly, the place of customary laws and the *Fetha Negest* in family relations, the 1960

³ TASLIM OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW*, (Manchester University Press, UK, 3rd ed.) (1972); See also *Id.*

⁴ BAHRU ZEWDE AND DIEGFRIED PAUSEWANG (EDS), *ETHIOPIA: THE CHALLENGE OF DEMOCRACY FROM BELOW* (United Printers, Addis Ababa, Ethiopia) (2006), at 17-18.

⁵ BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY*, (Oxford University Press) (2001), at 112.

⁶ BAHRU, *supra* note 4, at 17-18. Bahru mentions that the incorporation of the Southern part of the country under the administration of Menelik II in the late 19th century marked the interface between the native and alien institution. That seems the starting point of the interface but never become the final and decisive moment. A more influential and successful, to say, interface was experienced in the 20th century, especially during the codification periods of 1960s and which is still an ongoing process.

⁷ Paul Kuruk, *African Customary Law and the Protection of Folklore*, COPYRIGHT BULLETIN, Vol. XXXVI, No. 2 (2002), at 6-13. In other instances, South Africa and Namibia are mentioned in their efforts of constitutionalizing group rights thereby preserving culture through education and language and to have unwritten customary law treated as legally binding. See Lona N. Laymon, *Valid-Where-Consummated: The Intersection of Customary Law Marriages and Formal Adjudication*, 10 S. CAL. INTERDIS. L.J. 353 (2001).

⁸ TAMANAHA, *supra* note 5, at 1.

⁹ Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, CORNELL INTERNATIONAL LAW JOURNAL, Vol. 44:209 (2011); John Gillespie, *Towards A Discursive Analysis Of Legal Transfers Into Developing East Asia*, INTERNATIONAL LAW AND POLITICS, Vol. 40:657 (2008).

Civil Code, the Federal Revised Family Code [RFC here after], states' family laws and constitutions are briefly discussed. Section IV through V of the Article appraise selected family institutions in line with the prevailing custom and norms of the society. Accordingly, the long-practiced institutions of betrothal [known as *metechachet* by its Amharic equivalent], family arbitration [known widely as *shimigillina* by its Amharic equivalent] and adoption [widely known as *gudifecha* by its Afan Oromo equivalent] and child custody are thoroughly assessed. Finally, brief conclusion and remarks look to issues for the future.

The manuscript predominantly takes doctrinal – and of course exclusively qualitative – approach but with some empirical evidences that are obtained from practitioners through in-depth interview to corroborate the theoretical frameworks. Literature review that are commonly applied in (legal) history research are widely employed to unearth legislative history, present legislative frameworks and comparative experiences.¹⁰ Literature review also assisted to set the framework for analysis: ‘mirror’ theory and conceptual underpinnings of the different family institutions discussed below. Scope wise, the primary focus of this study is the federal RFC and the in-depth interviews were made with ‘purposively’ selected federal court judges and practitioners, most of whom were family bench judges. The semi-structured interview protocol was designed in a way that the informants could tell both their professional and personal experiences on the issues. These qualitative empirical data are analyzed through thematic analysis methods¹¹ to help examine the social setting, how those using the institutions make sense of them and utilities of existing laws.¹² Apart from federal laws, on few occasions comparisons with- and references to- seven state family laws and practices are made whenever necessary.

II. ‘MIRROR’ THEORY: HOW FAR SHOULD LAW REFLECT SOCIETY’S VALUES?

Despite the differences among legal theorists regarding how law should be defined, the form that it takes, the criteria for its existence and validity, its relation to morality, whether it represents coercion or consensus, whether it need or need not be attached with state etc, most agree on the common proposition that “law is the mirror of society, which functions to maintain social order”.¹³ This so-called “mirror theory” provides that “[l]egal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect

¹⁰ Ciarán Dunne, *The place of the literature review in grounded theory research*, INTERNATIONAL JOURNAL OF SOCIAL RESEARCH METHODOLOGY Vol. 14, No. 2, 111–124 (2011), at 113-114.

¹¹ CATHERINE DAWSON, PRACTICAL RESEARCH METHODS: A USER FRIENDLY GUIDE TO MASTERING RESEARCH TECHNIQUES AND PROJECTS, (UBS Publishers, UK) (2002), at 119; LORAIN BLAXTER, CHRISTINA HUGHES & MALCOLM TIGHT, HOW TO RESEARCH (Open University Press, 4th Ed, USA.) (2010), at 235.

¹² JODY MILLER & BARRY GLASSNER, The ‘inside’ and ‘outside’: Finding realities in interviews, in David Silverman (ed), QUALITATIVE RESEARCH: THEORY, METHOD AND PRACTICE, (Sage Publication, 2nd edn, 2004), at 126; see also ROBERT LOUIS KAHN & CHARLES F. CANNELL, THE DYNAMICS OF INTERVIEWING: THEORY, TECHNIQUE, AND CASES, (4th ed. Wiley Publisher, the University of Michigan, USA) (1957), at 149; BRUCE L. BERG, QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES, (4th ed. A Pearson Education Company, USA,) (2001), at 66; and CATHERINE MARSHALL & GRETCHEN B. ROSSMAN, DESIGNING QUALITATIVE RESEARCH, (4th ed. Sage Publications, California) (2006), at 101. These works demonstrate that interview is the most feasible and powerful tool to understand the complicated social world, institutions and obtain data about professional experiences.

¹³ TAMANAHA, *supra* note 5, at 1; Catherine Piché, *The Cultural Analysis of Class Action Law*, JOURNAL OF CIVIL LAW STUDIES, Volume 2. Issues 1, 101-145 (2009), at 11; For a review of the debate see also ALAN WATSON, THE NATURE OF LAW (1977); DAVID NELKEN, Towards a Sociology of Legal Adaptation, in ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001); OSCAR CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005).

what is happening in their own societies.”¹⁴ This theory has two mutually supportive components: ‘law is the mirror of society’ and ‘purpose of law is maintenance of social order’. The prominent advocates of this theory are the two prominent American scholars, Brian Tamanaha and Lawrence Friedman. It was also said that the great Ancient Greek philosophers, including Plato and Aristotle, believed that the fundamental function of law is the maintenance of social order or an orderly maintenance of an idealized social status quo.”¹⁵ Tamanaha argued that ‘unless law is imposed from the outside by an alien power, a society’s law will reflect its patterns of life and morality’¹⁶. He further said

*The very fact that law mirrors society, it is often said, is what makes law effective and legitimate in functioning to maintain social order. Because law reflects and bolsters prevailing social norms, the bulk of behavior conforms to these norms without the need for legal sanction, allowing law to conserve resources and maintain efficacy...The citizenry view the norms enforced by law as their own products, reflecting their way of life, manifesting their consent. Law, in turn, claims that citizens owe it obedience because it is doing their work, preserving their norms, constituting their way of life, keeping their order, allowing them to pursue their projects and enjoy life in safety and security.*¹⁷

Similarly, the well-known sociologist of and historian of American law, Lawrence Friedman, continually argued that American law relates to American society, and then is mirror of society.¹⁸ He once wrote that “It [American law] takes nothing as historical accident, nothing as autonomous, [and] everything as relative and molded by economy and society.”¹⁹ He persistently argued that social forces shape legal order of any type including family law which he said is ‘a product of society, and it reflects, in its general contours, the social structure, social practice and social debates within its society’.²⁰ Jenkins also argues that the fact that law is a reflection of society is what renders it effective in the maintenance of social order.²¹

A great deal of socio-legal scholars agree that ‘law is made by the society around it, and that it necessarily reflects the complexity of social relationships’.²² Even those who disagree about how closely law mirrors society don’t at least dispute that law is a product of social interaction; in the contemporary jargon, it is “socially constructed.”²³ If it is not the exact mirror now, law that comes out of social interaction should slowly mold compliance and

¹⁴ Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65 (1996).

¹⁵ TAMANAHA, *supra* note 5, at 11.

¹⁶ IREDELL JENKINS. *SOCIAL ORDER AND THE LIMITS OF LAW*. Princeton, N.J.: Princeton University Press, (1980) cited by TAMANAHA, *supra* note 5, at 2

¹⁷ Brian Z. Tamanaha, *Law And Society*, St. John’s University School Of Law, Legal Studies Research Paper Series, Paper #09-0167, February 2009, also available at <http://ssrn.com/abstract=1345204/>

¹⁸ LAUREN EDELMAN, *Lawrence Friedman and the Canons of Law and Society*, in *LAW, SOCIETY, AND HISTORY: THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN* (Robert W. Gordon & Morton J. Horowitz eds.) (2011); James L. Huffman, *From Legal History to Legal Theory: Or Is It the Other Way Round?* 40 TULSA L. REV. 579 (2005).

¹⁹ John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, GA. J. INT’L & COMP. L. Vol. 41:637 (2013), at 651.

²⁰ LAWRENCE MEIR FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW*, (Harvard University Press, London, England) (2004).

²¹ TAMANAHA, *supra* note 5, at 3.

²² Marina Kurkchyan, *Perceptions of Law and Social Order: A Cross-National Comparison of Collective Legal Consciousness*, WISCONSIN INTERNATIONAL LAW JOURNAL, Vol. 29, No. 2 (2012).

²³ *Id.*

behavior to turn into ‘mirror’ at a later stage of its development. On the other hand, very good characterization of the social interactions (including dynamics) and converting it into law are pivotal to the success of law.

The mirror theory has been challenged, however, notably by Alan Watson and his legal transplants theory.²⁴ Watson argues that “the laws of one society are primarily borrowed from other societies; these laws are developed by transplantation of legal rules between legal systems, or by elaboration and application of existing legal ideas to other systems by analogy to new circumstances.”²⁵ Watson’s theory that law is insulated or autonomous from its society were criticized by later works of Otto Kahn-Freund, Tamanaha, Edelman, Friedman, Jenkins and other critical legal studies movements.²⁶ Iredell Jenkins, for example, argued that “legal reform of social institutions is likely to fail if the reform is not consonant with society’s habits and goes beyond the scope of legal resources.”²⁷ Similarly, Tamanaha criticized the ‘legal transplants’ as the source of law and claimed that “the social ordering capacity of such laws are negligible”²⁸ and it undermines the legal pluralism.²⁹

Tamanaha and other supporters of the ‘mirror’ theory also acknowledged that the official law declared by states or courts are not necessarily a mirror of the society it purportedly governs, and abandoned examples where law and social life diverge. According to Tamanaha such mismatch occurs ‘when massive legal transplant happen, an overarching political authority enacts a uniform law to govern diverse populations, or when the norms of one group receive official sanction to the exclusion of the norms followed by other groups in the society.’³⁰ As we shall see from the forthcoming discussion, I argue that Ethiopian family laws have suffered from one of those instances where state laws have tried to sanction a uniform terms for significantly diverse citizenry leaving the later with no option of respecting it. Accordingly, scholars retreat that “rule of law presupposes pluralistic society of diverse religious, social, and political groups coupled with a shared belief among the members in the ‘subjectivity’ of values and hence public officials must remain neutral on questions of the ‘best’ way to live.”³¹

It is of course naivety to challenge the dynamic nature of family laws. As the ‘mirror’ theory itself explains, family law should frequently respond to societal values and changes, or in the words of Friedman, ‘should evolve with society’.³² We have witnessed that substantially in the past where family law has taken the twist from simple primitive to complex relations;

²⁴ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed., University of Georgia Press) (1993).

²⁵ *Id.*

²⁶ Piché, *supra* note 13; Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 MOD. L. REV. 1 (1974). See also, Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 12 (1998). It was of course criticized by comparative law advocates as well. See Cairns, *supra* note 19.

²⁷ John T Valauri, Book Review of Iredell Jenkins’s ‘*Social Order and the Limits of Law*’ Princeton, N.J.: Princeton University Press (1980), DUKE LAW JOURNAL, Vol. 1981:607 (1981), at 611.

²⁸ TAMANAHA, *supra* note 5, at 7.

²⁹ Brian Z Tamanaha. *Understanding Legal Pluralism: Past to present, local to global*. SYDNEY LAW REVIEW, Vol. 30: 374 (2008) http://sydney.edu.au/law/slr/slr30_3/Tamanaha.pdf. Accessed on Sep. 2015.

³⁰ TAMANAHA, *supra* note 5, at 7.

³¹ [], Theories Of Law: Natural Law, Legal Positivism, The Morality of Law Dworkin's "Third Theory of Law" Legal Realism and Critical Legal Studies, available at University of Trento, Faculty of Jurisprudence www.jus.unitn.it/users/patterson/course/topics/materiale/analyticjurissupplemental.pdf. Accessed on Sep. 2015.

³² FRIEDMAN, *supra* note 20, at 6.

from ‘status’ to ‘contract’ based family; moving slowly away from communal (society) influence to private (individualistic) management of marriage.³³ Yet in the course of all those dynamism, one should not blatantly ignore societal values and impose aspirational laws – especially in family law that regulates highly guarded and sacred institution.

In the upcoming sections of this manuscript selected institutions of Ethiopian family law are analyzed by taking mirror-theory as the framework.

III. DEVELOPMENT OF ETHIOPIAN FAMILY LAWS: BRIEF DESCRIPTION

Marriage and the resulting family relationship is the naissance of the community and statehood.³⁴ Marriage and family practices around the world are embedded in a rich matrix of cultural norms, generated by legal rules, religious traditions, and social expectations. Marriage is understood as an important cultural expression and social construct in most non-Western cultures and the crossover between its cultural meaning and legal framework is inevitable. Hence, more than cementing sacred relation and status between the spouses, marriage creates ‘an institution’ where mutual relation and bonds among the vast members of the spouses’ family emerges.³⁵

In more diverse societies like Ethiopia the range of normative variation expands, and individuals may face contrasting opportunities and constraints from official and unofficial norms of family behavior. Marriage is multifaceted with its private and public features; privately arranged but with far reaching public impact calling for state or societies intervention.³⁶ After considering one of the African communities, the Melanesian, Malinowski concluded that “marriage establishes not merely a bond between husband and wife, but it also imposes a standing relation of mutuality between the man and the wife’s family.”³⁷ Thus, the laws that regulate this institution have to be crafted with proper care and due cognizance of the prevailing customary norms and beliefs of its subjects.

Coming to Ethiopia, in several personal matters, including family, *Fetha Negest*,³⁸ and customary and religious laws were prevalent before the coming of the 1960 Civil Code.³⁹

³³ *Id.*

³⁴ For instance Mbiti considers African marriage, in particular, as the focus of existence and he said that “Marriage is a drama in which everyone becomes an actor or actress and not just a spectator. Therefore, marriage is a duty, a requirement from corporate society, a rhythm of life in which everyone must participate. Otherwise, he who does not participate in it is a curse to the community, he is a rebel and law-breaker, he is not only abnormal but ‘under human’. Failure to get married means that the person has rejected society and society rejects him in return”. See JOHN S. MBITI, *AFRICAN RELIGION AND PHILOSOPHY* (New York: Praeger) (1969), at 133.

³⁵ JONATHAN HERRING (ED.), *FAMILY LAW: ISSUES, DEBATES, POLICIES* (Willian Publishing, UK) (2001), at 3. It is noted that marriage as a ‘status’ or ‘contract’ is debatable and treated differently different jurisdiction. Some argue that it has both contract and status character due to the interest of state and society to its protection and maintenance. Yet in Ethiopia its ‘status’ characteristics are more visible. See also Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, UNBOUND, Vol. 6:1 (2010); Janet Halley, *What is Family Law?: A Genealogy Part I*, YALE JOURNAL OF LAW & THE HUMANITIES, Vol. 23 (2011): Issue 1, Available at: <http://digitalcommons.law.yale.edu/yjlh/vol23/iss1/1/>; Lana B. Singer, *Legal Regulation of Marriage: From Status to Contract and Back Again? In Strategies to Strengthen Marriage: What Do We Know? What Do We Need to Know?* Washington, DC, Family Impact Seminar, June 23-24, 1997. p. 129-134. Available at www.digitalcommons.law.umaryland.edu Accessed on Sep. 2015.

³⁶ STUART BRIDGE, *Marriage and Divorce: the regulation of intimacy in* Jonathan Herring (ed.), *FAMILY LAW: ISSUES, DEBATES, POLICIES* (Willian Publishing, UK) (2001), at 10.

³⁷ BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY*, (Littlefield, Adams and Co.) (1926), at 35. The Melanesian community lives in the Trobriand Archipelago, North East of New Guinea.

³⁸ *Fetha Negest* is the ancient laws of Ethiopia introduced to the nation in the mid of 15th century during the reign of Emperor ZereYacob. The code has three parts regulating spiritual affairs of the Ethiopian Orthodox

Fetha Negest was prevalent dominantly in the Northern Christian communities and around the palace together with the customary laws of the community, whereas customary laws were widespread in the vast majority of the country.⁴⁰ Almost every ethnic group has its own customary laws to regulate many aspects of family relations like ways of creating the relation, identity of spouses, consent of families and spouses, bride money or dowry, marriageable age, etc.⁴¹ But commonly, the laws were the reflection of the overall values of the community in a sense that every community member were loyal to the norms and disregard of the same were rebuked with severe social sanctions.⁴²

The *Fetha Negest* is a codex regulating both secular and religious matters. The fact that marriage relation is exclusively regulated in the secular part of the codex under Chapter 24 demonstrates the place marriage has in the heart of the law.⁴³ Many matters are regulated under the codex, including, conditions of betrothal and marriage (e.g. marriage age and consent of spouses), acts to be performed during marriage, rights and duties of spouses and families, grounds and effects of divorce etc. The *codex* also inspired many of the modern laws and some customary practices.⁴⁴

The 1960 Civil Code is one of the six codes of the time which, *inter alia*, regulate family matters.⁴⁵ Pioneered by the 1955 Revised Constitution, that extended special protection to family,⁴⁶ and the Universal Declaration of Human Rights, many of the then existed novelties were incorporated in the Civil Code. Yet, the issue whether the provisions of the Civil Code were reflections of the then Ethiopian society has been a point of argument since then. Rene

Church (ecclesiastic law chapter 1-22), Civil Matters (chapter 23-51) and Succession matters (the appendix). See Peter H. Sand, *Roman Origins of the Ethiopian 'Law of the Kings' (Fetha Nagast)*, at xxxix in the preface of 2nd edn of FETHA NEGEST, *supra* note 1.

³⁹ ABERRA JEMBERRE, *LEGAL HISTORY OF ETHIOPIAN – 1434 – 1974: SOME ASPECTS OF SUBSTANTIVE AND PROCEDURAL LAWS* (Rotterdam: Erasmus Universiteit and Leiden: Afrika-Studiecentrum) (1998), at 77.

⁴⁰ *Id.*, at 76.

⁴¹ For instance, consent of spouses is not a pre-condition in most of the customary laws of many ethnic groups like *Amhara*, *Tigreans*, *Gurage*, *Kunama*, *Kefecho*, *Afar*, and *Somali* and some in *Oromo* while marriage is initiated by the future spouses in *Anuak*, *Wolaitta*. See *Id.*, at 76.

⁴² See, ABERRA, *supra* note 39, at 76.

⁴³ Chapter 24 entitled as “Betrothal, Dowry, Marriage and Dissolution of Marriage” runs from section 826 to 987. See Sand, *supra* note 38, at xli.

⁴⁴ Submitting family disputes of any kind to religious fathers or priests were the only ways of settling disputes during the days of *Fetha Negest* but now only an alternative. In addition, the 1930, 1957 penal laws, the 1960 civil code and to a certain degree the family laws of the time are influenced by this law codex. See PHILIPPE GRAVEN, *AN INTRODUCTION TO ETHIOPIAN PENAL LAW: ARTS. 1-84 PENAL CODE*, (Faculty of Law Haile Selassie I University and Oxford University Press, Addis Ababa-Nairobi) (1965) providing an elaborating explanation on the importance of the codex while drafting the 1957 Penal Code; ABERRA, *supra* note 39, at 194-225; see also Zuzanna Augustyniak, *The Genesis of the Contemporary Ethiopian Legal System*, Studies of the Department of African Languages and Cultures, No 46, pp. 101-115, (2012) ISSN 0860-4649; For *Fetha Negest's* contribution on the educational system see MESSAY KEBEDE, *RADICALISM AND CULTURAL DISLOCATION IN ETHIOPIA, 1960-1974*, (University Rochester Press, USA) (2008); and Aselefech G/Kidan Tikuye, *The Role of Ethiopian Orthodox Church in the Development of Adult Education: The Case of Ye'abnet Timhirt Bet*, (2014) Master's degree thesis submitted to AAU; for its theological account NEGUSSIE ANDRE DOMNIC, *THE FETHA NAGAST AND ITS ECCLESIOLOGY: IMPLICATIONS IN ETHIOPIAN CATHOLIC CHURCH TODAY* (Peter Land AG Publishers, Switzerland) (2010).

⁴⁵ Articles 198-338 and 550-825 of the CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No 165/1960, NEGARIT GAZETA, 19th Year No. 2, [here after CIVIL CODE].

⁴⁶ Article 48 of the 1955 Revised Constitution of Ethiopia reads that “The Ethiopian family, as the source of the maintenance and development of the Empire and the primary basis of education and social harmony, is under special protection of the law.”

David, the drafter of the code, claimed that given unwritten and diversified customary laws of the nations, he had incorporated as much norms as possible from customary laws to mold modern civil law jurisprudence.⁴⁷ On the other hand, other scholars argue that due to the notion of modernizing Ethiopia by westernizing/modernizing its laws and the little experience the drafter had over the customary norms of Ethiopians, many of the valued societal values had been ignored by the code.⁴⁸ But for years the official laws of the state and unofficial laws of the community were competing to get the upper hand one over the other. Perhaps, the customary laws were dominating family matters even in the presence of a contrary stipulation under the official law.⁴⁹ Given the literacy level of the community and absence of stronger state machineries to indoctrinate the citizenry, one expects there to be discrepancy between law and practice opening up the way for customary norms to dominate personal matters and relations.

Next, the *Derg* regime did not bring substantial changes to the laws and pre-existing practices except with some matters like according better protection to women.⁵⁰ Hence, the civil code was in place though a stronger constitutional provision that guaranteed full consent of a man and a woman during conclusion of marriage, equal rights of spouses in all family relations and state's duty to protect marriage institution were introduced in later times: 1987.⁵¹

Important provisions aimed at the protection of family, women and children are the integral part of the 1995 constitution, in addition to expressly integrating international human right documents to the system.⁵² The protection extended to family relations, equality of men and women in conclusion of marriage, administration of family matters, and during dissolution of marriage; consideration of the best interest of the child on matters he is involved; and protection of adoption are some of them.⁵³ The frequent mention of equality of men and women in all family relations arises, according to Fassil Nahom, "from the need to combat traditional practices based on customary or religious notions prevalent in segments of the society, whereby women are systematically discriminated against."⁵⁴ It is true that all over

⁴⁷ See, ABERRA, *supra* note 39, at 200. Dr. Aberra mentions instances like recognizing three ways of marriage celebration (religious, customary and civil); reasons and conditions of divorce; attainment of majority at 18 for both, though woman can marry at 15 and emancipate from minority; illegalizing of marriage among blood relation; outlawing of polygamy; equal treatment of 'legitimate' and 'illegitimate' child; and introducing equality between spouses though the husband is still the head of the family and decide their common abode, etc. More importantly, George Krzeczunowicz mentions betrothal, marriage, maintenance as well as family arbitration provisions being highly influenced by the local custom. See ANTONY ALLOTT & GORDON R. WOODMAN (EDS), PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS, (Foris Publication, Dordrecht, Holland) (1985), at 207.

⁴⁸ ALULA PANKHURST & GETACHE ASSEFA (EDS), GRASS-ROOTS JUSTICE IN ETHIOPIA, THE CONTRIBUTION OF CUSTOMARY DISPUTE RESOLUTION (Centre Francais d'Etudes Ethiopiennes, Addis Ababa) (2008), at 4-6.

⁴⁹ The registration requirement of many of the family aspects (including marriage, divorce, birth, marriage contract, adoption etc), family name, equality of spouses, marriageable age etc are only few of the provisions overridden by contrary traditional practices.

⁵⁰ The author believes that family relations were regulated by the civil code before and after the enactment of the constitution (1987). Hence, the constitution was not followed by body of laws that amend the family provisions of the civil code.

⁵¹ Article 37 of the 1987 PDRE CONSTITUTION. [Proclamation No1/1987].

⁵² Article 13 of the 1995 FDRE CONSTITUTION integrated UDHRs, International Covenants On Human Rights and other international instruments to which the state is signatory with the fundamental rights and freedoms stated in chapter III of it [Proclamation No 1/1995 here after 'FDRE CONSTITUTION'].

⁵³ See, Articles 34, 35 and 36 of the 1995 FDRE CONSTITUTION.

⁵⁴ FASSIL NAHOM. CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT, (New Jersey and Asmara: The Red Sea Press, Inc) (1997), at 137.

the world, women are exploring ways to challenge and redefine cultural and religious norms in ways that reflect a commitment to gender equality.⁵⁵

On the other hand, with the view of accommodating customary and religious values pertaining to family relations, the constitution has recognized marriages concluded under customary and religious systems.⁵⁶ More importantly, settlement of family and personal disputes according to religious or customary laws and practices are acknowledged if the disputing parties have fully consented to it.⁵⁷

Since then, seven of the nine states⁵⁸ and the federal government have issued their own respective family laws though states' law in most respects are the replica of the federal Revised Family Code [RFC] enacted in 2000 for the federally administered cities of Addis Ababa and Dire Dawa.⁵⁹ The Revised Family Code, highly inspired by women and children right advocates, has made substantial changes to the preexisting Civil Code and customs, and is believed to have incorporated the modern and universally accepted values of the time.⁶⁰

This body of law which was highly enthused by human right groups indeed attained, with some reservation, its objectives.⁶¹ The breakthroughs from the earliest laws, *inter alia*, include abandonment of betrothal, limiting the role of family arbitrators; and protecting the interest of the child especially during divorce and adoption.⁶² However, as we can see below, under the pretext of human rights, many of the valued interests of the community have been repeatedly ignored. Needless to say, when drafted, the RFC is meant not only to regulate family matters in the two federally administered cities of Addis Ababa and Dire Dawa but also to be a model for states in adopting their own family laws.⁶³ Hence, though literally its jurisdictions are

⁵⁵ Justice Richard J. Goldstone, *Women, Children, and Victims of Massive Crimes: Legal Developments in Africa*, 31 *FORDHAM INT'L L.J.* 285 (2007). Available at: <http://ir.lawnet.fordham.edu/ilj/vol31/iss2/5>; Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 *FORDHAM INT'L L.J.* 289 (2007). Available at: <http://ir.lawnet.fordham.edu/ilj/vol31/iss2/1>.

⁵⁶ Ethiopia does not seem to be the only country to recognize the customs of its indigenous population. For instance, it is mentioned that 25 *U.S.C.* 371 allows for the recognition of Native American marital customs that would otherwise be legally invalid. See Laymon, *supra* note 7.

⁵⁷ Article 34 (4) and (5) and 78(5) of the 1995 FDRE CONSTITUTION

⁵⁸ Except Afar and Ethiopian Somali Regional States, the rest seven states of the federation, i.e. Amhara, Oromia, Tigray, SNNP, Benshangul, Gambella and Harari have enacted their own family laws after the promulgation of the federal Revised Family Code. In Ethiopian Somali the Ethiopian Civil Code of 1960 as a statutory, and customary (Xeer) and Sharia laws operate simultaneously. Berihun Adugna Gebeye, *Women's Rights and Legal Pluralism: A Case Study of the Ethiopian Somali Regional State*, *WOMEN IN SOCIETY* Volume 6, (2013) ISSN 2042-7220 (Print) ISSN 2042-7239 (Online). Afar has the same practice.

⁵⁹ Soon after the promulgation of the constitution, the power of enacting family law was at issue where House of Federation called to decide that states can enact family laws of its own and the federal government for its administration cities of Addis Ababa and Dire Dawa. Constitutional Inquiry Raised Regarding Promulgation of Family Law and Decision of the House of the Federation (April 2000).

⁶⁰ The Ministry of Justice worked the draft in consultation with human right advocacy groups like Ethiopian Women Lawyers Association [EWLA], and the Women's Affairs Standing Committee of the House of Peoples' Representative.

⁶¹ Mulugeta Tadesse mentions achievements observed due to the withering of the powers of family arbitrators like accelerated and qualitative decisions on divorce and related matters as opposed to delayed and illegal decisions that had been made by family arbitrators. *Mulugeta Tadesse, ex-Federal High Court Assistant Judge in Family Bench and now private practitioner, interviewed on February 11, 2010.*

⁶² Many can be mentioned, like judicial declaration of paternity; recognizing non-marital cohabitation [irregular union]; equality among spouses in personal effects of marriage like head of the family, management of the family, establishment of common residence, personal as well as common property and its administration etc.

⁶³ መሐሪ ረዳኤ፣ የተሻሻለውን የቤተሰብ ሕግ ለመገንባት የሚረዱ አንዳንድ ነጥቦች፣ ቅጽ 1 ፣ 1995 ዓ.ም.፣ [MEHARI REDAE, SOME POINTS IN UNDERSTANDING THE REVISED FAMILY CODE, Vol. 1, 1995 EC, Amharic Version], at 6.

limited to these cities, practically it significantly influenced laws of states. Accordingly, the RFC has to be understood as a law regulating multicultural societies of the nation.

According to Ann Laquer Estin, “a multilayered approach to family regulation [which] builds on the notion that many families have a complex identity and experience, shaped and defined by many different cultural, legal, and political ties” is vital.⁶⁴ Indeed, this article presents that there are sufficient reasons to argue for greater accommodation of indigenous legal tradition (including cultural and religious diversities) in family laws,⁶⁵ though some fear that the accommodation of cultural differences may be incompatible with the traditional values of democracy.⁶⁶ Below is the evaluation of selected family institution of betrothal [*metechachet*], family arbitration [*shimigillina*], adoption [*gudifecha*] and child custody. Though it is not viable to conclude that the inhabitants of the two cities or the Ethiopian society have subscribed to similar practices and norms, significant degree of uniformity are observed in some family institutions discussed below and help to evaluate the interface between official laws and customary practices.⁶⁷

IV. BETROTHAL

Betrothal, also known as engagement or *fiancer*, is defined as “an agreement between the future spouses to get married in the future.”⁶⁸ The *Fetha Negest* also acknowledged betrothal as “a pledge of marriage and a pre-marriage promise” accompanied with declaration to the public by different means.⁶⁹ Very importantly, this law book requires that betrothal to be initiated only for a person who is certain to marry either by sending elders or letter to the lady’s family, or by his guardians if he is below the marriageable age.⁷⁰

Likewise, the Civil Code defines the same as “a contract of betrothal is a contract whereby two members of two families agree that a marriage shall take place between two persons, the fiancé and the fiancée, belonging to these two families.”⁷¹ A close look at the other provisions of the Civil Code exhibits the other key features of betrothal which, *inter alia*, includes mandatory consent of betrothed couples;⁷² betrothal distinguished from a simple promise of marriage exchanged between two persons; existence of rituals or declaration to the

⁶⁴ Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449 (2009), at 452; see also *Id.*

⁶⁵ Perhaps the arguments whether or not law should reflect the custom and morals of the society or should lead the society [together with its custom] to a determined value level never been ended. See, TAMANAHA, *supra* note 5, at 27.

⁶⁶ ASPASIA TSAOUSSI & ELENI ZERVOGIANNI, *Multiculturalism and Family Law: The Case of Greek Muslims*; in Katharina Boele-Woelki & Tone Sverdrup (eds.), *EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW*, European Family Law Series (Intersentia; Antwerp, Oxford, Portland) (2008), at 209.

⁶⁷ Uniformity in this sense, however, does not mean absolute conformity and submission of Ethiopians to a single customary law. In addition, the important nature of customary laws, i.e. *diversity* due to factors like language, proximity, origin, history, social structure and economy, and *dynamicity* where its rules change from time to time to reflect changing social and economic conditions, are duly considered. See, Kuruk, *supra* note 7, at 6.

⁶⁸ See, MEHARI, *supra* note 63, at 8; and Draft RFC article 8[Under the Ministry of Justice, Unpublished]

⁶⁹ See, Section 869 of Chapter 2 of the *Fetha Negest* [included under the old Ethiopian law compilation of THE EMPIRE OF ETHIOPIA, METS’HAFE HIGIGAT ABEYIT, (Birhanena Selam Pr. Press) (1962 EC), here after *Fetha Negest*] [translation mine].

⁷⁰ *Id.*, Chapter 24, Sections 826, 841, 866, 898 and ff.

⁷¹ Article 560(1) of the Civil Code.

⁷² Article 565 of the Civil Code.

public, concluded for short or limited span of time;⁷³ and payment of compensation (for the expenses incurred in connection with the betrothal and moral damages) during breach of the betrothal contract by the defaulting party.⁷⁴ Hence, betrothal becomes a public acknowledgment of the couple's right to spend time together – sometimes ‘chaperoned’, offers his future bride and families gifts and spend time with one other’s family by contemplating marriage.

As marriage has wider features of alliance not only between the spouses but also between groups of kin,⁷⁵ so does betrothal. As a result, betrothal and marriage have sometimes been used by families for different purposes: for creating amicable relation between families in feud, seeking an alliance with other family groups, and sometimes in consideration of a debt.⁷⁶ It also opens the door for adult arranged or forced marriage where teenagers get married without their consent, and more importantly a girl to a man whom she does not prefer.⁷⁷ According to some writers, the fact that the consent of the families of each of the future spouses are required under the civil code is the reflection of such practice which might go against the interests of the future spouses.⁷⁸ Though the Civil Code stipulated that betrothal shall have no effect unless the betrothed couples consented; the freedom to express once consent is unlikely to exist when they are under the influence of their families, elders and the community in general.⁷⁹ However, the practice where family members play a significant role in arranging marriage, as long as the final decision remains with the prospective bride and bridegroom, should be unobjectionable.⁸⁰

During the drafting process of the RFC, provision were included to maintain betrothal without compromising the interest and full consent of the future spouses, which, however, was totally eliminated from the final document.⁸¹ Among the reasons given for the elimination were the established fact that the agreed betrothed couples could not be forced to get married and couples could get married without concluding betrothal.⁸² More importantly, it was said that in view of Ethiopia’s cultural diversities, retaining betrothal in the law as a uniform practice would not serve any meaningful purpose.⁸³ The drafters argued that the institution does not deserve such a high regulation by the official laws since it does not add any

⁷³ Article 570 of the Civil Code gave the power of determining the duration of betrothal to the contracting parties. However, in default of that, six months’ time from declaration of intention to get married by one of the spouses is provided by the law.

⁷⁴ Articles 560 – 576 of the Civil Code.

⁷⁵ LUCY MAIR, *AFRICAN MARRIAGE AND SOCIAL CHANGES* (Frank Cass & Co.Ltd, London) (1969), at 4.

⁷⁶ *Id.*, at 4.

⁷⁷ Prashina J. Gagoomal, *A Margin of Appreciation for Marriages of Appreciation: Reconciling South Asian Adult Arranged Marriages with the Matrimonial Consent Requirement in International Human Rights Law*, 97 *GEORGETOWN LAW JOURNAL* 589 (2009).

⁷⁸ MEDHANIT LEGESSE, *MAJOR CHANGES MADE BY THE REVISED FAMILY LAW OF 2000 REGARDING WOMEN'S RIGHTS AND THE NEED TO ENHANCE AWARENESS OF THE SOCIETY* (Ababa University Press, Addis Ababa) (2008), at 33; and MEHARI, *supra* note 63.

⁷⁹ *See, Id.*, at 33.

⁸⁰ Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 *MD. L. REV.* 540 (2004). The role of families under arranged marriage, which is common everywhere like in Africa and India, and forced marriage is significantly different. The decisive decision making power remains in the couples in the former while they have no power in the latter.

⁸¹ The Draft Revised Family Code presented by the Ministry of Justice, Articles 8-17 (unpublished).

⁸² MEHARI, *supra* note 63, at 9.

⁸³ TILAHUN TESHOME, *Ethiopia: Reflections on the Revised Family Code of 2000*, in *INTERNATIONAL SURVEY OF FAMILY LAW* 153 (Andrew Bainham ed., 2002 Edition), at 6; *see also* MEDHANIT, *supra* note 78, at 34.

meaningful value to married couples nor to the society. The drafters, however, did not deny the existence of the practice within the society and said that its exclusion from the law would not illegitimize the traditional practice as long as it honors constitutional provisions.⁸⁴

Most of the interviewed judges expressed their disappointment by the exclusion of betrothal from the RFC. Philipos Aynalem, ex-Federal High Court Judge, argued that laws should maintain ‘agreed values of its subjects’ as its supreme source, and ‘regulation of social behaviors’ as its purpose.⁸⁵ He noted that betrothal is widely practiced in urban life late alone in rural areas and is a juridical act that demands legal protection by the family law as long as it is not contrary to the laws of the nation. Philipos regretted that the very importance betrothal has to the society and the couple and their families are all ignored. Likewise, Goshye Damtaw, ex-Federal First Instance Court Judge, said that as marriage is the reflection of customary values of the spouses and the society, official laws should acknowledge such customs.⁸⁶ He understood the practices in the capital Addis Ababa, long renowned as ‘little Ethiopia’, as the reflection of the whole Ethiopian community and its cultural diversities. Besides, he argued, betrothal is a widely practiced custom across different communities apparent in the city and all over the country as a kick off to marriage where the spouses will remain affiliated to each other’s behavior.

According to these experts, denying legal recognition to this valuable institution amounts to doing away with the rights of its subjects, and would make the law ‘poor adoption’ of foreign practices than a reflection of the society it purports to regulate. Goshye categorically stated that it will be difficult for him to give any legal effect to betrothal relation if such a case appears before him. Evident in the current discussion is that the law overlooked juridical effects of betrothal, like costs incurred during the betrothal festival, gifts offered to one another, and informal transactions entered between them concerning the acquisition or improvement of property, and moral damages sustained by the spouses during breach of the promise.

On the contrary, Yoseph Aimiro, ex-Federal High Court Judge, is believes that though the RFC does not regulate it, such arrangement could be considered as ordinary contractual relation and subject to general contract provisions of the law.⁸⁷ Given the special nature of the betrothal contract, the role it plays in the society and its extra-legal social effect, regulating betrothal by the general contract provisions of the civil code does not bring life in to the institution. Primarily, betrothal is not an agreement of proprietary nature (Article 1675 of the Civil Code) to be regulated by general contract provisions and would not guarantee the society with full protection of such juridical act from imprudent actors. The regional family laws,

⁸⁴ MEHARI, *supra* note 63, at 10, [translation mine]. The international experience envisages betrothal as a highly recognized institution in many communities like Africans, Muslims, Christian and Jewish though recognition by law is not strong enough. It is noted that the Convention on the Elimination of All Forms of Discrimination against Women, [adopted on Dec. 18, 1979, 1249 U.N.T.S. 13] under art. 16(2) prohibited only child betrothal.

⁸⁵ Philipos Aynalem, ex-Judge in Federal High Court for many years, and now private practitioner, interview conducted on February 13, 2010.

⁸⁶ Goshye Damtaw, ex-Judge in Federal First Instance Lideta Brach Family Bench for 7 years, on February 15, 2010.

⁸⁷ Yoseph Aimiro, ex-Federal High Court Judge in its 1st Instance Jurisdiction *Lideta* Bench and now private practitioner and parttime lecturer at Addis Ababa University School of Law, Interview conducted on February 11, 2010.

nonetheless, have made a departure from the RFC by recognizing betrothal and according protection to it without contravening the constitutional principles.⁸⁸

Though betrothal is slowly eliminated from modern (western) laws, different jurisdictions have devised mechanisms of protecting parties' interests involved in the relation. England has modified its laws in 1970 to give protection only to properties created during betrothal relation by extending the laws enacted for resolving property disputes between spouses to engaged couples.⁸⁹ This Act also entitles a claim against all gifts made during the engagement relation except the engagement ring which is presumed to be an 'absolute gift' unless the giver rebuts this and show that it was in fact conditional.⁹⁰ However, gifts from third person to the engaged couple should be treated as unlawful enrichment. In USA, most states have abolished the law that awards punitive damages for breach of betrothal mentioning its excessive use and blackmailing operation. As regards property questions, the criterion of unjust enrichment is generally applied in those states.⁹¹ Yet in handful of states breach of betrothal is still considered as a cause of action for claiming damages under their Heart Balm Laws.⁹²

In Egypt, similar to Ethiopian legal system, there are limited circumstances under which there may be legal consequences for withdrawal of betrothal promises. To such effect Egyptian Court of Cassation has ruled that "moral or material injury in conjunction with withdrawal from the promise to wed (by either party) may constitute tort and not contractual breach".⁹³ Yet only in rare cases that damages are awarded in a civil suit when the applicant can prove harm resulting from a broken betrothal.⁹⁴ Hence, Egyptian families have designed a legal fiction by insisting the fiancé to sign a commercial document like a post-dated check or a trust receipt – which result in criminal misdemeanor charges for breach and civil liability of repaying the amount or items listed – as a surety that he attends the wedding preparations in good faith.⁹⁵ Christine described the situation as 'regrettable' because such legal fiction has transformed the betrothal relation into commercial transactions by masking the real intention of the act, and hence curtain autonomy of parties.⁹⁶

Jurisdictions have adopted different laws that suit their needs. It was possible both to accord legal protection of the betrothal and protect modern values of consent and equality of spouses that the new RFC asserts to protect. Legal plurality and not withdrawing legal

⁸⁸ See, for instance, Article 11 and of Tigray [Proclamation No 33/91 EC], articles 9-18 of Oromia [Proclamation No 83/2003], article 1-11 of Amhara [Proclamation No 79/1995 EC], articles 8-19 of Benashangul-Gumuz [Proclamation No 63/1998 EC], and article 123 of SNNP family laws.

⁸⁹ Law Reform (Miscellaneous Provisions) Act 1970, CHAPTER 33, Section 1 and 2.

⁹⁰ Law Reform (Miscellaneous Provisions) Act 1970, CHAPTER 33, Section 3; See also REBECCA PROBERT, *FAMILY LAW IN ENGLAND AND WALES*, (Kluwer Law International Publishers, Netherlands) (2011).

⁹¹ But there are handfuls of states that consider circumstances like age, occurrence of pregnancy and fault in determining outcomes. Some states also have stipulations for recovery of properties including gifts made during betrothal relations.

⁹² Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, Vol. 24:365 (2012); No more Balm for the Broken-Hearted? CHICAGO DAILY LAW BULLETIN, Vol. 161 No. 19, Wednesday January 28, 2015. Only the states Illinois, Hawaii, Mississippi, Missouri, New Hampshire, New Mexico, South Dakota and Utah still permits such causes of action – broken relation or breach of promise.

⁹³ Christine Hegel-Cantarella, *Kin-to-Be: Betrothal, Legal Documents, and Reconfiguring Relational Obligations in Egypt*, LAW, CULTURE AND THE HUMANITIES, 7(3) 377–393 (2011) DOI: 10.1177/1743872110383354, at 391.

⁹⁴ *Id.*, at 379.

⁹⁵ *Id.*, at 378.

⁹⁶ *Id.*, at 392.

protection to existing practices should have been the solution for such diversified customary practices.

V. FAMILY ARBITRATORS

Customary dispute settlement systems that often uses the elders as a dynamic machinery “is widespread and found spatially almost ubiquitously throughout the country and has worked historically in the absence of the state justice system as well as where it exists in the past and in the present.”⁹⁷ Submitting dispute of any kind to arbitrators, which are mostly composed of elderly people, is one of the most respected tradition and valued instrument for securing peace and stability within the society.⁹⁸

True in other parts of Africa, elders (*shimagelles*) are respected as trustworthy mediators all over Ethiopia because of their accumulated experience and wisdom.⁹⁹ Their roles in conflict resolution of any kind, *inter alia*, include representing important shared values, pressurizing or directing disputants, making recommendations, giving assessment and conveying suggestions on behalf of a party.¹⁰⁰ As Brock-Utne stated, “the elders from a family, clan, state or neighbor see their traditional objectives in conflict resolution as moving away from accusations and counter-accusations, to see the heart feelings and to reach a compromise that may help to improve future relationships”¹⁰¹ True in family matters, during customary dispute settlement process, relationships are given prime attention, and the aim would be to improve future relationships, mend the broken or damaged relationship, rectify wrongs, restore justice, ensure the full integration of parties into their societies, and to adopt the mood of co-operation.¹⁰²

Hence, the Fetha Negest, which is the indigenized translation based on the imported biblical and Romano-Byzantine tradition,¹⁰³ determined marriage disputes whatsoever to be submitted to the elderly priests, and then to the head of the local church.¹⁰⁴ These priests, who are considered as the guardian of the institution, are the one who had celebrated and pronounced the conclusion of the betrothal and/or marriage by a ritual taken place in the church.¹⁰⁵ Therefore, family disputes were submitted to socially responsible, highly respected and extremely experienced persons who know the local custom and practice very well, understand the relation and root cause of the conflict and believed to bring about peace and stability for the spouses and the community at large.

Likewise, the Civil Code formalized the traditional system and established the Council of Family Arbitrators composed of persons who have witnessed the conclusion of marriage or betrothal, or in their absence persons elected by the spouses, or in spouses’ failure by persons

⁹⁷ ALULA & GETACHEW, *supra* note 48, at 1.

⁹⁸ AYALEW GETACHEW, CUSTOMARY LAWS IN ETHIOPIA: A NEED FOR BETTER RECOGNITION? A WOMEN’S RIGHTS PERSPECTIVE (Copenhagen: Danish institute for human Rights) (2012).

⁹⁹ ALULA & GETACHEW, *supra* note 48; Birgit Brock-Utne, *Indigenous Conflict Resolution In Africa*, A draft presented to the week-end seminar on indigenous solutions to conflicts held at the University of Oslo, Institute for Educational Research 23 – 24 of February 2001, at 11; Francis Kariuki, *Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities* (2015) available at <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0>; Accessed on Nov. 2015.

¹⁰⁰ Brock-Utne, *Id.*, at 10

¹⁰¹ *Id.*, at 8

¹⁰² *Id.*, at 8-9

¹⁰³ ALULA & GETACHEW, *supra* note 48, at 1.

¹⁰⁴ FETHA NEGEST, *supra* note 1, at Section 24.

¹⁰⁵ *Id.*

appointed by court.¹⁰⁶ Family arbitrators, as they may be close relatives of the parties, were believed to take the necessary responsibilities and patience to avoid misunderstandings and preserve the marriage relation; and if not, pronounce divorce without much trouble.¹⁰⁷ In addition to working for the integration and co-existence of the spouses in the course of their marriage, the family arbitrators have first instance jurisdiction over much of family disputes including dispute over betrothal; dissolution of marriage by death; hear and decide over divorce whatsoever; decide over provisional measures like maintenance, administration of children and common property; and also pecuniary and other effects of divorce.¹⁰⁸ The parties, however, can appeal to court of law on extended grounds like corruption of the arbitrators, fraud in regard to third persons, or illegal or unreasonable decision of family arbitrators.¹⁰⁹

The RFC, however, made critical changes to this institution by limiting its power, making it optional and to function under high court supervision in case of divorce.¹¹⁰ Regarding divorce, the family arbitrators may only be called to reconcile the spouses within a month time if the spouses prefer, and cannot decide over divorce and related matters like maintenance, custody of children.¹¹¹ Likewise, after the court pronounced the divorce, the decision over the conditions of divorce can only be referred to arbitrators up on the full consent of the parties; otherwise, it will be entertained by the court. Yet, disputes arising out of marriage other than divorce shall be decided by arbitrators chosen by the spouses, whose decision is appealable to court of law.¹¹²

Therefore, one can notice that family arbitrators who once play a significant role in the family integration are devoid of its original place, and neglected in a very important family matter, i.e. divorce. Concerns raised against the institution by the drafters and the community during the drafting process, *inter alia*, include subjecting spouses to professional arbitrators who make money out of it; secrecy of marriage relation was not maintained as meetings were held in churches and other public areas; delay of decisions for sake of per-diem; arbitrators were non-lawyers and unable to decide according to the law; and taking away the power of regular courts.¹¹³ In addition, facts like the problem of enforcing the awards of family arbitrators as they are informal adjudicatory panels with no enforcing machinery, and bribing arbitrators by the economically advantaged male to the prejudice of women were presented to show that the institution were not functioning as expected.¹¹⁴

It is apparent as well that there were strong oppositions to the withering away of the institution during the drafting process. The latter group underlined, among other things, the importance of retaining successful customary practice and social figure in giving effect to the constitutional rights of settling family and personal matters with customary and religious

¹⁰⁶ See, Arts 725 – 734 of the Civil Code

¹⁰⁷ MEHARI, *supra* note 63, at 101-102.

¹⁰⁸ See, Articles 666 – 669, 692- 696, 722-726,

¹⁰⁹ See, Art. 736 of the Civil Code. There is, however, regarding the conceptual and practical distinction between arbitration, mediation, ‘*shimgilina*’ and ‘*yegiligil daginet*’ in Ethiopia. Fekadu Petros, *Underlying Distinctions between Alternative Dispute Resolutions (ADR), Shimgilina and Arbitration*, MIZAN LAW REVIEW Vol.3 No.1: 105-133 (2009).

¹¹⁰ See, Articles 108-122 of RFC.

¹¹¹ Arts. 82(5), 83, 113, 117 of RFC.

¹¹² Art. 118 of RFC.

¹¹³ MAHARI 1, *supra* note 33, at 103-104.

¹¹⁴ *Id*, at 69.

dispute settlement mechanisms, and relieving courts from case congestion and delay of family matters.¹¹⁵ More importantly, participants during the drafting process made the distinction between the institution and individuals who are nominated as arbitrators, and called for changes in the combination or otherwise of the arbitrators instead of eliminating the institution.¹¹⁶ Regarding the legal illiteracy of the elderly arbitrators, some argued that arbitrators need not be lawyers for appeal to courts were allowed similar to other *quasi* dispute settlement system: social courts and administrative tribunals.¹¹⁷

Finally, according to the drafters, the RFC has tried to accommodate the concerns of all these competing groups primarily by dividing marriage disputes in to two, i.e. divorce and dispute arising out of marriage. It empowered arbitrators over the later and court and court supervised arbitration over the former. Secondly, it empowered both spouses to decide the nomination of arbitrators and determination of the arbitral process.¹¹⁸ Similar provisions are observed in states' family law except Tigray where social courts are empowered to entertain all family matters.¹¹⁹ Whether the stipulations of RFC are sufficient to enforce the constitutionally recognized rights of spouses to submit their family and personal matters to customary and religious institutions is debatable.¹²⁰

Philipos believed that customary dispute settlement mechanisms are recognized by the constitution though the RFC takes away the right of the community and powers of publicly recognized peace makers.¹²¹ According to him, there is nothing wrong in recognizing family arbitration as an alternative to courts, like Shari'a courts. And the RFC should have strengthened the institution to rectify the weaknesses of earlier practices, like by requiring court supervision, determining time limitation for the disposition of the case, etc. Philipos strongly opposes bringing family cases to court as it further antagonizes spouses, open room for the involvement third parties, discloses private matters to the public, and makes preserving the relation an impossible task. He added that divorces pronounced by family arbitrators, who are very close to the relation and much cautious for the continuation of the marriage, and agreed up on by the spouses should have been recognized by courts.¹²²

¹¹⁵ *Id.*, at 104.

¹¹⁶ በኢ.ፌ.ዲ.ሪ የሕ/ተ/ም/ቤ/ የሴቶች ጉዳይ ስሜን ኮሚቴ፣ የተሻሻለው የቤተሰብ ሕግ አዋጅ ቁጥር 213/1992 ዝርዝር ዝግጅት ሰነድ፣ 1994 [FDRE HPRs Women's Affair Standing Committee, Proceeding of the Preparation of RFC No 213/2000, Amharic Version, translation mine]፣ at 148 and 196-199.

¹¹⁷ *Id.* One of the very famous national figure and elder of the country, Fitawrari Amede Lemma, strongly supported the retention of family arbitrators and as an alternative he proposed elderly, experienced and local judges to preside family bench.

¹¹⁸ MEHARI, *supra* note 63, at 105-106, and Arts 118, 119-122 of RFC.

¹¹⁹ See Article 140 of Tigray, Articles 105 and 108 of Oromia, Articles 128-133 and 88 – 95 of Amhara and Articles 137-146 of Benshangul-Gumuz family laws. It is noted that the jurisdiction of entertaining all family matters are given for *Wereda* courts, equivalent in hierarchy with federal first instance courts but higher than social courts.

¹²⁰ Article 34(5) and 78(5) of the FDRE Constitution where the former reads as “*This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.*”

¹²¹ Philipos Aynalem, *supra* note 85.

¹²² Now courts tend to recognize and give legal effect to ‘*de facto* divorce’, divorce which were not pronounced by court but apparent from other evidences. Most parties that appeared before court stated that they separated “under mutual consent and having settled their cases with family arbitrators”. See Filipos Aynalem, ሳይፋቱ (ዲፋክቶ) ፍቺ (De facto Divorce), MIZAN LAW REVIEW, Vol. 2, No. 1: 131-132 (2008); Mehari Radaa, JOURNAL OF ETHIOPIAN LAW, Volume XXII, No.2, p 37-45, December 2008; and Dejene Girma Janka, *Tell Me*

It is true that, according to many scholars, regular court litigation is not well designed to deal with very important, intimate, emotional and psychological aspects of family disputes like divorce.¹²³ Moreover, regular court process also seems to encourage and exacerbate a sense of bitterness and irreconcilability between the disputing spouses, and create a battlefield.¹²⁴ As De-Jong observes “in the process everyone is prejudiced: the divorcing parties and their children are emotionally shattered and the state ends up with ongoing family problems which may well require intervention sooner or later.”¹²⁵ However, if family arbitrators are allowed to function well, it could offer many advantages including reducing the financial and emotional costs of legal proceedings, maintaining relationship and improving communication among spouses.¹²⁶

This line of argument is supported by Goshye who claimed that family arbitrators are in a better position than courts to understand the situation in the marriage, the character of the spouses, the values of the spouses and the community in which the spouses live.¹²⁷ He is of the opinion that the absence of family arbitrators contributed to the current increase in divorce cases as reconciling spouses once they appear before court was proven to be extremely difficult. Goshye argues that there should be apparent distinction between actors of the institution and the very institution. ‘How would the performance level of the actors define the existence of long standing institution?’ he asks.

The interviewed legal practitioners argue that the previous family arbitrators should have been preserved with more flexible status and court supervision as is true in other countries. For instance, in Israel judges sitting in Rabbinical (Jewish) or Shari’a (Muslim) courts are appointed according to a state-defined selection process, and are subject to closer scrutiny’.¹²⁸ According to Yoseph, the current arbitration envisaged under RFC is toothless and is hardly assisting the system in bringing about the desired harmony and peaceful coexistence of family members. Some also propose that the law should make referring family cases to arbitration (or mediation) mandatory and empower arbitration (or mediation) on a wider range of matters.¹²⁹ Mandatory family mediation or arbitration is witnessed widely elsewhere. To mention some,

Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division, JIMMA UNIVERSITY JOURNAL OF LAW, Vol. 2, No. 1 (2009).

¹²³ Madelene De-Jong, *An Acceptable, Applicable and Accessible Family-Law System for South Africa, Some Suggestions Concerning a Family Court and Family Mediation* (1993), at 1-3, available at <http://www.mediators.co.za/articles/familycourt.pdf/>; see also Julien D. Payne, *Family Conflict Management and Family Dispute Resolution on Marriage Breakdown and Divorce: Diverse Options*, REVUE GÉNÉRALE DE DROIT, (1999/2000) 30 R.G.D. 663-687 (2000), at 1, available at <http://id.erudit.org/iderudit/1027763ar/>.

¹²⁴ *Id.*

¹²⁵ *Id.*, at 1-3.

¹²⁶ See Tarekegn Tafesse, *Effects of Traditional Family Arbitration and Legal Divorce on Divorcees and Their Children: The Case of Boloso Sore Wereda, Wolaita Zone, Southern Ethiopia*, A Thesis Submitted to the Graduate School of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Social Work, Addis Ababa University, June 2015.

¹²⁷ Goshye Damtaw, *supra* note 86.

¹²⁸ AYELET SHACHAR, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, in LEGAL PLURALISM, PRIVATIZATION OF LAW AND MULTICULTURALISM; THEORETICAL INQUIRIES IN LAW, Vol 9: 573, (the Berkeley Electronic Press) (2008), at 582.

¹²⁹ See, De-Jong, *supra* note 123, at 9-10. Regarding mandatory arbitration/mediation, De-Jong argued that “it is desirable so that anyone who has to experience the pain of family breakdown should benefit from the advantage of mediation.” De-Jong tried to equate such with legislation that obliges motorists and passengers to wear seatbelts or that forces motor-bike riders to wear crash helmets. Hence, even disputants who were originally unwilling to submit their cases to mediation will benefit out of the process.

the Family Courts of Australia will not hear the case unless parties passed through the mandatory non adversarial family dispute resolution which is available at local level by government and private providers.¹³⁰ In Canada, though non-adjudicatory family dispute settlement is not a mandatory requirement, statutory regulation manifest that court litigation should be viewed as a last resort in family disputes.¹³¹ Some jurisdictions in USA chose to make family mediation mandatory while in Quebec parties will be required to attend the mediation information session.¹³²

In our case it seems that the state, that established special dispute settlement tribunals for matters like labor and tax, has undervalued the importance of family matters. Hence trying to resolve the most sensitive and emotional family matters by courts is not the wisest approach especially when we witness that court entertain family matters only when divorce is requested.¹³³ Scholars advise to move towards social realities¹³⁴ and understanding conflict as non-isolated social events.¹³⁵

Likewise, Nicodimos remembers the lobbying put up by women and children's rights advocacy groups during the drafting of the RFC which were believed to manifest the most democratic practices and end the injustices suffered by these groups.¹³⁶ However, he believes that due to poor adoption and emotional decisions during the drafting process, women are proved to be the losers in the absence of family arbitrators. Nicodimos adds that the new law has accelerated divorce cases under the pretext of accelerated justice thereby provoking emotional, economic and parenting crisis.¹³⁷ It also brought emotional and mechanical divorce decision that did not consider extra-judicial element of marriage, and accelerated property divisions.¹³⁸ In traditional family arbitration, however, "social importance of conflict is key consideration, consensus seeking is the approach, and much patience is the strategy" that lastly brings about effective and long lasting solidarity.¹³⁹

Different from the RFC and other state family laws, jurisdiction over all family disputes are given to social courts in the Tigray family law. To such stipulation interviewed judges similarly responded that family dispute is a private and local matter and its administration should also be left to local institutions. Possibly these local officers/social court judges would be in a better position to understand the best interest of the disputants and local custom. This also seems to be a compromised approach compared to the two extremes, i.e. giving unlimited

¹³⁰ Becky Batagol, *Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution*, 8 QUEENSLAND U. TECH. L. & JUST. J. 24 (2008), at 25.

¹³¹ See Payne, *supra* note 123, at 2.

¹³² Noel Semple, *Mandatory Family Mediation and the Settlement Mission: A Feminist Critique*, CANADIAN JOURNAL OF WOMEN AND THE LAW, Volume 24, Number 1 (2012), at 210-211.

¹³³ This is the strictest interpretation adopted by most judges for Article 118 of the RFC that empowered arbitrators first instance jurisdiction on all disputes arising out of marriage except divorce. The fact that family arbitrators as an institution hardly exist and courts decline to have first instance jurisdiction forced spouses to petition divorce including for a trivial disputes which would have been reconciled by arbitrators.

¹³⁴ Ineba Bob-Manuel, *A Cultural Approach To Conflict Transformation: An African Traditional Experience*, *Term Paper*. Written for the course: "Culture of Peace and Education" taught at the European Peace University Stadtschlaining Austria. Fall 2000.

¹³⁵ Brock-Utne, *supra* note 99, at 8.

¹³⁶ Nicodimos Getahun, ex-Judge in Federal High Court, and North Gondar and North Showa (Amhara Regional State) and now private practitioner, on February 13, 2010,

¹³⁷ See Payne, *supra* note 123, at 3.

¹³⁸ Nicodimos Getahun, *supra* note 136.

¹³⁹ Brock-Utne, *supra* note 99, at 12.

power to family arbitrators (Civil Code) and withering its power (RFC). Goshye added that judges in a court are not always familiar with every local value, and even if the judge knows the custom, the law may not recognize such practice. For instance, 'Yemeher Genzeb' is the amount of money due during marriage but that should be returned during divorce, if any, in some traditions. Judges however, tend to ignore it due to absence of legal recognition, but those within the community knows how to treat it.¹⁴⁰

In addition to customary institutions, religious courts are given the mandate in the 1995 constitution for adjudicating family and personal matters.¹⁴¹ Thus, religious and customary courts recognized by the state could apply their own religious or customary substantive laws while states would determine the procedural laws.¹⁴²

Historically speaking, the ecclesiastic court of Ethiopian Orthodox Church and *Shari'a* courts were functioning in Ethiopia though the former had only brief existence. In 1942 ecclesiastic courts of Ethiopian Orthodox Church were established in the level of High and Supreme Court in Addis Ababa with a jurisdiction over, *inter alia*, matters related to religious marriage and to hear appeal from the diocesan ecclesiastic courts.¹⁴³ The hearings before such court were required to be presided by three judges, and apply *Fetha Negest* in substantive matters and unwritten customary laws in procedural matters.¹⁴⁴ Likewise, *Shari'a* courts were established by law in 1942, though they were functioning *de facto* before that,¹⁴⁵ and reestablished recently to entertain family related disputes.¹⁴⁶ As an alternative family dispute settlement mechanism, *Shari'a* courts are required to secure express consent of the disputants before adjudicating the matter,¹⁴⁷ and apply the state civil procedural law and any substantive Islamic law.¹⁴⁸ It is all said that "the qualified recognition of the religious tribunal by the secular state may ultimately offer an effective, non-coercive encouragement of egalitarian and reformist change from within the religious tradition itself."¹⁴⁹ More should be done to allow regulated interaction between religious and secular sources of law, so long as the constitutional rights remains firmly respected.¹⁵⁰ This could be done by allowing the establishment ecclesiastical courts to deal with personal including family matters.¹⁵¹

¹⁴⁰ Julie Macfarlane, *Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with the Formal Legal System*, CARDOZO J. OF CONFLICT RESOLUTION, Vol. 8:487 (2007), at 493.

¹⁴¹ Article 34(5) and 78(5) of the FDRE CONSTITUTION.

¹⁴² FASSIL, *supra* note 54, at 139.

¹⁴³ Article 10 of Decree No 2/1942 Establishment of Ethiopian Orthodox Church Ecclesiastic Court, NEGARIT GAZETTE, Year 2 No 3.

¹⁴⁴ ABERRA, *supra* note 39, at 227 and 230.

¹⁴⁵ Hillina Tadesse, *The Shari'a as Regards Women*, BERCHI Vol. 1.2 (2001), at 117-158;

¹⁴⁶ Ethiopia, 'Proclamation to Provide for the Establishment of Naiba and Kadis Councils,' Proclamation No. 62/1944. NEGARIT GEZETA 3, No. 62, 1944.

¹⁴⁷ Article 4 of Federal Courts of Sharia Consolidation Proclamation No.188/1999, FEDERAL NEGARIT GAZETTE, 6th Year No. 10, Addis Ababa -7th December, 1999.

¹⁴⁸ There are different interpretations of Islamic laws (schools of thoughts). However, Ethiopian laws does not determine the school of thought that the Ethiopian Shari's courts should follow and is considered as a gap left to be filled soon by many. See Hillina, *supra* note 145.

¹⁴⁹ SHACHAR, *supra* note 128, at 602.

¹⁵⁰ *Id.*, at 575.

¹⁵¹ For more on ecclesiastical courts and extended importance see Mulugeta Getu, Belaynew Ashagrie & Alemayehu Yismaw, *Establishing an Ecclesiastical Court for the Ethiopian Church: the Need and Importance*, JOURNAL OF THE ETHIOPIAN CHURCH, Issue. 2 (2012).

Despite their vigorous involvement in the lives of many and presence of stronger constitutional recognition, bureaucracies have restricted the importance and utilities of religious and customary laws and tribunals.¹⁵² Hence, the role of customary and religious dispute resolution needs revisiting and their mandate, relationships and interactions with the formal judicial structure should be reconsidered to enhance local level justice delivery while ensuring the protection of human rights, notably those of women, children and minorities.¹⁵³ Equally important is that “if a resolution by a religious or customary tribunal falls within the margin of discretion that any secular family-law judge would have been permitted to employ, there is no reason to discriminate against that tribunal solely for the reason that the decision-maker used a different tradition to reach a permissible resolution.”¹⁵⁴

Elders, *shimagelles*, in arbitration have wider range of experience on family matters, respect and trust in the society, and wisdom and patience of handling antagonized family disputants, which the courts do not. Hence, referring divorce cases only to courts goes against this very important social reality. The writer is of the opinion that arbitrators may disfavor the interests of vulnerable groups which, of course, is the salient features of other customary practices too.¹⁵⁵ However, rectifying the wrongs by adopting the practice in line with the core constitutional values and taking the dynamic nature of customary practices is not all impossible.¹⁵⁶ In view of the utilities it would offer to the society, retaining the institution outweighs abolishing it.

Hence, restructuring the institution of family arbitrators in a way that would respect rights of disputants, enhance quality of awards, allow the process to be more flexible to respond to changing circumstances and cultural norms should be considered. One way of doing this could be making family arbitration or mediation compulsory before resorting to courts. This is what the ‘protective function’ of family law should do.¹⁵⁷ Alternatively, a family court could be established at a local level with the power of entertaining divorce and many other family disputes. Such court will feature both social and judicial components and be a more inquisitorial and less formal forum and the parties will have a greater say and control in the decision making process.¹⁵⁸ Moreover, tribunals like religious, customary and family courts could go beyond the natural role of courts - adjudication of disputes - to proactive management of family matters and a “rehabilitative” or “problem-solving” process, and restructuring family relationships.¹⁵⁹

¹⁵² ALULA & GETACHEW, *supra* note 48, at 2.

¹⁵³ *Id.*

¹⁵⁴ SHACHAR, *supra* note 128, at 602.

¹⁵⁵ BAHRU, *supra* note 4, at 8.

¹⁵⁶ For instance, the customary laws of Guraghe, *Kicha*, has been adopted by accommodating changing circumstance and require couples to make HIV/AIDS test before concluding Betrothal and again before marriage, and during the unification of separated couples. See, Guraghe People’s Self-Help Development Organization, *Kicha: Guraghe Customary Law Revised*, September 2000 EC [Amharic Version, translation the author], Article 4 Section 3.

¹⁵⁷ Estin, *supra* note 80. The ‘protective function’ of the family law is evident everywhere, for instance, in determining age limitation, effecting consent of spouses, subjecting marriage contract under close state supervision, determining pecuniary effects of the relation, etc.

¹⁵⁸ De-Jong, *supra* note 123, at 5-9. The experience in Australia, for instance, shows that family courts should be lower courts with the view of making it socially responsible as well as accessible.

¹⁵⁹ John Lande, *The Revolution in Family Law Dispute Resolution*, 24 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 411 (2012), at 431.

Finally, I would like to quote Ann Laquer Estin and say, “the process [settling family disputes] is most successful where it is built on a dynamic conception of families and cultures that recognizes both tradition and change, respecting diversity and religious norms without losing sight of the core values of the legal system and the democratic state.”¹⁶⁰

VI. ADOPTION AND CHILD CUSTODY

In Ancient Egypt and Rome, adoption used to be made by the consent of both parties in the existence of witnesses and families of both. It had been primarily a means to procure heirs, to transfer wealth, and to circumvent the laws of intestate succession.¹⁶¹ Adoption in Ethiopia is commonly known by its equivalent ‘*gudifecha*’ in *Afan Oromo* and ‘*yetut lij*’ or ‘*yemar lij*’ in Amharic.¹⁶² In Ethiopia, adoption was undertaken for different reasons including to get someone to look after them when they get older (especially those unable to give birth), for charity (like the one takes place by monks), for creating kinship between families.¹⁶³ Though the 1960 Civil Code tried to formalize the institution, for instance, by requiring compulsory court approval and protection of the best interest of the child,¹⁶⁴ it has been overridden by the long lasting traditional practices.¹⁶⁵

In this respect, the RFC does not differ from its predecessor in many respects; for instance, it does not prescribe a special form for the adoption agreement though it requires court approval.¹⁶⁶ However, this requirement of court approval impliedly obliges parties to make the agreement in a written form.¹⁶⁷ Not surprisingly, regional family laws also require court approval, thereby making proof of adoption impossible without providing such approval records.¹⁶⁸ Besides, Oromia, whose customary practice is believed to have inspired the national practice and RFC, family law recognized traditional adoption but require mandatory court approval.¹⁶⁹ Here comes the issue whether or not requiring court approval for local level adoption, as if it is the only protector of adopted child, is the reflection of community’s

¹⁶⁰ See, Estin, *supra* note 80.

¹⁶¹ Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29 (2005).

¹⁶² መሐሪ ረዳኢ፣ የተሻሻለውን የብተውብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ ቅጽ 2፣ 1999 ዓ.ም.፣ [MEHARI REDAE, SOME POINTS IN UNDERSTANDING THE REVISED FAMILY CODE, Vol.2, 1999 EC, Amharic Version], at 84 & 85. The Tigrian family law used the term ‘*yemar lij*’ as an alternative to ‘*gudifecha*’ in its Amharic version.

¹⁶³ *Id.*

¹⁶⁴ Arts 803-805 of the Civil Code.

¹⁶⁵ MEHARI, *supra* note 162, at 85.

¹⁶⁶ Articles 180-196 of RFC. The approach taken by the RFC is the best interest of the child and the court is determined to be the appropriate institution to look after it and enforce constitutional rights.

¹⁶⁷ MAHARI, *supra* note 162, at 90, and the Federal High Court has taken the same opinion in file no 03814.

¹⁶⁸ See, Articles 199-211 of Oromia, Articles 205 of Amhara and Articles 204-220 of Benshangul-Gumuz family laws.

¹⁶⁹ Article 211 of Oromia Family Law [Proclamation No 83/2003].

interest.¹⁷⁰ It is, however, not arguable that Ethiopia's international obligation, as rightly explained by the Federal Supreme Court, requires court supervised foreign adoption.¹⁷¹

Philipos Aynalem said that the mandatory requirement is creating social chaos, and is destabilizing family relations.¹⁷² According to him, recognition should have been accorded to customary ways of adoption like that of the *Oromos*, which is held in a public ritual,¹⁷³ and proof of the existence of adoptive relation or registration of local administration should be sufficient to prove the status. Besides requiring court approval procedures might deter intra-country adoption and may defeat social relations based on mutual interpersonal trust.¹⁷⁴

Goshye, nevertheless, said that dispute over adoption often arises after the death of the adoptive families and also long after the adoption had been celebrated.¹⁷⁵ Accordingly, proving adoption by other forms like bringing witnesses and showing status of adoptive relation were becoming difficult. Hence, according to Goshye, for the best interest of the adopted child and timely disposition of inheritance disputes, the law is right in requiring adoption to be approved by court. But he agreed that the law goes contrary to the local traditions and did little to change the practice, and suggested that customary adoption should be allowed to continue with registration of the same in a local administrative unit.

This line of argument brings into table the two most challenging issues raised in the recognition of customary laws and withering its role: evidentiary standards and public policy.¹⁷⁶ Laymon argues that the extra weight given to written evidence in formal courts results in a burden of proof that the vast majority of cultural norms are unable to meet since customary law is, by definition, unwritten.¹⁷⁷ Hence, if we want to recognize customary practices of adoption, we will be required to redefine the evidentiary standards and notoriety of the custom, i.e. practices witnessed by experts or elders of the community or evidence of the ritual.

¹⁷⁰ The RFC recognized two kinds of adoption (local and foreign) and subjected it to different requirements. See Articles 193 and 180-196. The discussion under this paper, however, is only about local adoption, especially with in the same community. It is, however, important to mention that intercountry adoption is the subject of international laws, in addition to RFC's concern, where treaties like the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) will be called. See also Benyam D. Mezmur, *From Angelina (To Madonna) To Zoe's Ark: What Are the 'A-Z' Lessons for Intercountry Adoptions in Africa?* 23 INT'L J.L. POL'Y & FAM. 145 (2009).

¹⁷¹ Fransuwiss Poster Vs Dukman Venno and Barbouthe Letteteya, Federal Supreme Court, Cassation Bench, File No. 44101 (1 March 2010) Vol. 10, p. 40; See also Federal Supreme Court, Cassation Bench, File No. 52691 (30 April 2010) Vol. 10, p. 72. Child Rights Convention, which Ethiopia has signed, requires adoption to be authorized by competent authority. Art. 21 of United Nations. "Convention on the Rights of the Child." Treaty Series 1577 (1989): 3 (hereafter CRC)

¹⁷² Philipos Aynalem, *supra* note 85.

¹⁷³ See Ayalew Duressa, *Guddifachaa: Adoption Practice in Oromo Society with Particular Reference to the Borana Oromos*, A thesis submitted to the school of graduate studies Addis Ababa University, June 2002 Addis Ababa, [Unpub], at 103.

¹⁷⁴ Though they are not conclusive, especially intra-country/local adoption, a total of 2,760 inter-country and 130 intra-country adoptions between 1999/2000 and 2002/2003 are reported. See Seyoum Yohannes & Aman Assefa, *Harmonisation of laws relating to children Ethiopia*, THE AFRICAN CHILD POLICY FORUM, at 26.

¹⁷⁵ Goshye Damtaw, *supra* note 86.

¹⁷⁶ Laymon, *supra* note 7. The public policy argument against the formal recognition of some customs are meant to protect the vulnerable or minorities, like women and children, or morals of the public or merely to meet international obligation.

¹⁷⁷ *Id.* For instance, courts usually give more evidentiary weight for documents like marriage certificate, prenuptial or betrothal agreements, and written agreement/acknowledgement of adoption than for witnesses' testimony.

Similarly, who should take custody of children during divorce is the other contentious issue. In old times, where traditional male dominance was evident, custody of children was left for the fathers' determination. However, current developments tend to favor the interest of the child than considering the socially dominance situation of the fathers marking the movement from paternal patriarchy to judicial patriarchy and maternal preference.¹⁷⁸ Well informed by such trend, the Civil Code, the 1995 constitution and RFC protected the best interest of the child and maternal preference.¹⁷⁹ The maternal preference clause in the Civil Code is intentionally avoided in the RFC which stated parameters to be used for such determination, i.e. the income, age, health, and condition of living of the spouses as well as the age and interests of the children.¹⁸⁰

Hence, one might say that the RFC made the determination more flexible though still courts are favoring the mother than the father for custody of children without stating the reasons thereof.¹⁸¹ The RFC, however, left a wider room for customary values of the community, regarding custody, maintenance and related issues, to be given effect in courts. Yoseph mentions instances where the close relatives of spouses are favored to take custody of the children in the existence of the parents though the RFC does not speak so.¹⁸² A close look at the important provisions of the RFC demonstrates that only spouses will be called to take custody of children during divorce which seems too mechanical and impracticable in some exceptional circumstances when parental-custody does not enforce the best interest of the child.¹⁸³ Such happens when, for instance, the children were not originally under parental custody, the spouses are not in a condition to ensure the interest of the children, the spouses are thoughtless for the children, and at the same time other close relatives are willing and in a better situation to look after the children. It is not uncommon to witness that traditionally children are reared by their grandparents and sometimes by uncle and aunt more sympathetically than their parents.

In *W/t Tsedale Demissie vs Ato Kifle Demisse* case the Woreda Court in Bonga Area of Kafa Zone of Southern, Nations, Nationalities and Peoples Regional State (SNNPRS) gave the father (respondent Ato Kifle) custody rights over paternal aunt of the minor (applicant *W/t Tsedale*). The applicant opposed the decision stating that the father has failed to provide the child with necessary care. But she was told that the law does not allow the aunt to be granted custody while the father is still alive. Finally, the Federal Supreme Court Cassation Division reversed the decisions of lower courts by noting that the literal adherence to the words of the law that gives priority to parents for child's custody¹⁸⁴ should be interpreted to serve the best

¹⁷⁸ Wondwossen Demissie, *Implementation Problems of Revised Family Code*, BERCHI, Issue 6 (2007), at 29.

¹⁷⁹ Articles 681 of the civil code determined that custody and maintenance of children shall be determined solely by considering the interest of the child, and unless there exists "a serious reason for deciding otherwise, the children shall be entrusted to their mother up to the age of five years."

¹⁸⁰ Art 113(2) of RFC.

¹⁸¹ Wondwossen, *supra* note 178, at 30-32.

¹⁸² Yoseph, *supra* note 87.

¹⁸³ Art. 113 of the RFC. Art. 9 of the United Nations. "Convention on the Rights of the Child." Treaty Series 1577 (1989): 3 (hereafter CRC) requires State Parties to ensure that a child shall not be separated from his or her parents against their will except for their best interests like when abandonment by parents occur, and Arts. 659 and 574 of the Revised Criminal Code of Ethiopia criminalizes the act.

¹⁸⁴ Article 235(1) of Family Code of Southern Nations, Nationalities and Peoples Regional State, Proclamation No.75/1996 which is similar with Art. 113 of the RFC.

interests and well-being of children as mentioned in Art. 36(4) of FDRE Constitution and Art. 3 and 9 of CRC.¹⁸⁵

After looking the important provisions of the RFC, some considers it as poor adoption of foreign practices and does not give legal effect to valuable local practices, which in effect creates distrust among family members.¹⁸⁶ It, for instance, tries to take each and every relation under the supervision of court by ignoring the social reality. Goshye on the other hand considers RFC as an advanced document which goes and aspires beyond the horizon of the society. The writer however believes that it is unattainable to try to bring justice from the top by promulgating such kind of law before transforming the societal practices to the expectation of the law. But I agree with what Carl Schneider has called the ‘protective function’ of family laws and do not advocate for abolition of state laws on the subject.¹⁸⁷

VII. CONCLUSION

The RFC is believed to have been advocated by human rights groups, mostly by women and children’s rights advocates, and inspired by the modern principles of equality. Yet under the pretext of promoting modernity and equality between men and women, many of the innate societal norms and values are disregarded. Turning blind eyes to betrothal, withering the institution of family arbitration and abolishing customary forms of adoption are only few of them. The RFC generally tried to bring every family relation under the supervision of state and makes the relation to be regulated by mechanical state laws. Although the constitution promises to recognize the customary laws of the indigenous populations,¹⁸⁸ the formal recognition usually falls short of accommodating the cultural meaning embedded in indigenous customary laws. I argue that at the time of drafting RFC, the nature of law to reflect the customary behavior and the present state of human relation were overridden by the other failed purpose, i.e. to reform the society through legal measures. However, the author believes that such struggle in reforming society like redefining women's status within their cultural communities should not be at the expense of valuable culture, but through reforming the traditional institutions themselves.

One of the long established practices of Ethiopians, betrothal, is totally disregarded by the RFC though all the regional family laws have recognized it. I have tried to show that legal fictions were designed to rectify damages sustained during the engagement (Egypt), punitive damages were recognized (some US States), and pecuniary interests created during the relation are protected (US and England). Ethiopian legal system remained blunt on it as neither the law nor the practices inform us the existing remedies so far.

More importantly, though customary way of family dispute settlement is recognized under the constitution, the RFC that was expected to give effect to it, barely empower it thereby eliminating the functions and importance of the institution of family arbitration. As

¹⁸⁵ W/t Tsedale Demissie Vs Ato Kifle Demisse, Federal Supreme Court, Cassation Bench, File No. 23632 (6 Nov 2007) Vol. 5, p. 188. On another time, the Cassation division has even turned the guardianship request of the mother and gave it to the aunt to protect the best interest of the child. W/ro Etsegenet Eshetu Vs W/ro Salamawit Negussie, Federal Supreme Court, Cassation Bench, File No. 35710 (Vol. 8, p. 243) See also Fasil Mulatu and Rakeb Messele, *Impact Assessment Report on the Draft National Child Policy of Ethiopia* (2011), Center for Human Rights, Addis Ababa University, January 2014.

¹⁸⁶ Philipos Anyaleme, *supra* note 85.

¹⁸⁷ Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992).

¹⁸⁸ Article 34, 78 and 91 of the FDRE CONSTITUTION.

courts are the only authorities to decide over divorce cases, the society is left to abide by the mechanical provision which, at the end, according to interviewed federal judges, accelerated family dissolution. The literature and most interview judges called for renewed efforts of revitalizing alternative locally available mechanism – preferably family mediation or arbitration – to deal with family matters.

The provision of the RFC that regulate adoption agreement and child custody are the other segment which is believed to be mechanical and contrary to societal practices. Accordingly, both RFC and regional laws require adoption agreement to be in written form, parties to appear before court of law and secure approval of the relation. Yet instead of court documents, celebration of the adoption rituals, proof of adoptive relation or administrative record should be recognized for local level adoption.

Similar with the broader global trend, Ethiopia experienced shifts in the law where family has been privatized; it has shifted toward a focus on the individual rather than the family as an entity; it draws increasingly on contractual rather than moral discourse; it is less hierarchical and more concerned with gender equality,¹⁸⁹ but much earlier than the transformation of Ethiopian families in reality. As a result, the RFC has been considered by many as a poor adoption of foreign practices that ignore societal values and long-proved customary institutions. Incredibly, regional family laws, believed to be very close to the society and inspired by societal needs, did not give much effect to the prevailing customary practices of their own people except recognizing betrothal.

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¹⁸⁹ Estin, *supra* note 80.