

Introducing a New Scheme: Incorporating Suppression of Identity Clause as a Limitation to the Principle of Open Justice in Ethiopian Procedural Laws

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Abstract

The principle of open justice requires all court proceeding to be held in open court. Among other things, it requires the disclosure of the identity of the parties to the public. However, under certain circumstances, the disclosure of the name and address of a party to litigation defeats justice. There are times where the disclosure of litigant's identity may expose a party to discrimination, evasion of fundamental private interest, or even deny the right to access to justice. For these reasons, several countries introduced the tool of suppression of identity clause: a mechanism that enables parties to litigate a case in pseudonym and anonymous address. Nevertheless, in Ethiopia, this procedural mechanism is not recognized. Even though the country recognized several limitations to the principle of open justice, including, trial in camera, gag order, and prior restraint of non-publication on media, the Country has not recognized the tool of suppression of identity clause as a limitation to this principle. Even if there are Constitutional rights and principles that justify the incorporation of this scheme, the Country has no rules to implement this tool in its regular courts. Therefore, this article argues for the

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necessity of incorporating the tool of suppression of identity clause into Ethiopian laws.

Introduction

Have you ever thought of litigating through a pseudonym and anonymous address? Being Mr. /Mrs. X with an address XXX? Of course not, for many Ethiopians. Nevertheless, its necessity as a limitation to the principle of open justice is not questioned in many jurisdictions.

The principle of open justice incorporates a wide notion ranging from the right to public trial to the public's right to access trial documents, so that the public can scrutinize the function of courts.¹ It requires the administration of justice to be done in public. However, this does not mean the principle is absolute. The principle has several limitations, including, trial in camera, gag order, suppression of identity clause and prior restraint of non-publication on the media.

In Ethiopia, the latter limitations, except the tool of suppression of identity clause, are recognized as limitations to the principle of open justice. This article, therefore, argue for the incorporation of the tool of suppression of identity clause under Ethiopian procedural laws. It propounds, constitutionally guaranteed rights and principles call for the incorporation of this limitation. The article briefly discusses the meaning, justifications and limitations of the principle in Ethiopian courts.

¹ The principle of open justice is not restricted to court functioning. Rather, it requires all justice machineries, including, the police, quasi-judicial authorities and other law enforcement agencies to administer their function openly. However, in this article the discussion is restricted to court functioning's. *See* FDRE Constitution, Article 12.

The article consists of three sections. Section I surveys the legal landscape of open justice and its limitations under Ethiopian laws. Section II explains the meaning of suppression of identity clause and its necessity to incorporate it in Ethiopian laws. Following, section III pinpoints some notable experiences of countries and provide for hypothetical scenario to cement the argument for the incorporation. Lastly, there will be a conclusion.

I. The Principle of Open Justice and Its Limitations in Ethiopian Laws

The principle of open justice is central to the principle of rule of law² and a requirement of due process³ that require the administration of justice to be made in public.⁴ The concept entrusts the public and the media with the right to attend all court hearings and report proceedings fully and contemporaneously.⁵ Indeed, a range of rights and freedoms under the FDRE Constitution supports this principle. Among these is the right to fair trial,⁶ the freedom of expression⁷ and the principle of rule of law.⁸

² Judicial Studies Board, et al, Reporting Restrictions in the Criminal Courts at 6 (unpublished, 2009), online at <www.jsboard.co.uk> (visited Aug 5, 2011).

³ J. Jacob, *Civil Justice in the Age of Human Rights* at 6 (Ashgate Publishing Company 2007).

⁴ S. Bradford, et al, Providing Anonymity to those Accused of Rape: An assessment of evidence at 3 (unpublished) online at <www.justice.gov.uk/publications/research.htm> (visited Aug 3, 2011).

⁵ Human Rights Committee, *General Comment No.32*, 19th Session, at ¶29, CCPR/C/GC/32 (2007).

⁶ The right to public trial, one of the multifaceted entitlements under the right to fair trial is recognized among other laws, under Article 20(1) of the FDRE Constitution, the Civil Procedure Code and Federal Courts Proclamation No. 25/1996. Note that, under Civil Procedure Code also Articles 180 and 264 that require a judgment to be rendered in an open court and witnesses to be heard in an open court respectively are indications for the recognition of the right to public trial on civil cases.

⁷ The right to freedom of expression under Article 29(1) of the FDRE Constitution promotes open justice. The right gives individuals and the media the right to access information held by government organs, *including courts* (emphasis added). The Constitution further affords freedom of press and mass media under Article 29(3) with a view to ensure access to

Nevertheless, the principle has its own limitations, which are the outcomes of yet equally fundamental principles that their chief objective is to secure justice. Open justice can be restricted where the need for limitation is convincingly established; that is, where limitation is necessary, proportional and does not affect the essence of the principle. In this regard, in Ethiopia, open justice is restricted for reasons of public order, privacy, public morality and the interest of justice.⁹ The devices Ethiopian laws employ to limit open justice include, trial in camera, gag order and prior restraint of non-publication on the media.

A. Trial in Camera

Trial in camera is a limitation to open justice. It is a limitation that refers to conducting proceedings in exclusion of all or part of the public from attending a hearing.¹⁰ Note that trial in camera is justified only at times where a hearing of a case in public would frustrate or made impracticable the administration of justice.¹¹

information to the public. Moreover, the right to freedom of expression entitles individuals and the media the right to impart information gathered from courts. Courts also have no justification to restrict individuals and journalists right to impart information they gathered from courts while the law allows access to trial facts. The public has the right to receive information as the corollary function of journalists that access trial facts. In other words, if the government restricts the right to impart information in such a way, it is not only the right of the imparter (attendant) of the information that is to be violated, but also the right of all others to receive the information.

⁸ FDRE Constitution, preamble at ¶ 1. The principle of open justice is a requirement of due process. It is proved to be a central component of the principle of rule of law. In this regard, the principle of rule of law is a central component in the foundation of the Constitution.

⁹ See FDRE Constitution: Article 20(1); Federal Courts Proclamation: Article 26(2).

¹⁰ Bryan A. Garner, ed, *Black's Law Dictionary* (West Publishing Co. 2006).

¹¹ Judicial Studies Board, et al, at 7 (cited in note 2).

In Ethiopia, the FDRE Constitution,¹² Federal Courts Proclamation¹³ and the ICCPR¹⁴ recognized trial in camera as a limitation to the principle of open justice. Article 20(1) of the FDRE Constitution recognizes it in lucid terms by providing:

“In criminal trials a court may hear cases in a closed session with a view to protecting the right to privacy of parties concerned, public morals and national security.”

Note that, the Constitution expressly recognizes conducting trials in camera only in criminal proceedings.¹⁵ Nevertheless, this does not mean that the FDRE Constitution does not recognize trial in camera in civil matters. A closer look into Article 37(1) of the Constitution further ensures the recognition of trial in camera in civil proceedings. The provision guarantees everyone the right to bring a justiciable matter to a court of law and get an effective remedy. In this regard, the African Commission on Human and People’s Right on *Dawda Jawara v. The Gambia* held that, the right to effective remedy requires the provision of an effective procedural guarantee to institute a court proceeding.¹⁶ Among those is a procedure that guarantees the protection of the right to privacy¹⁷ and access to justice. Where a case affects a fundamental private interest of a party or if fair trial is going to be jeopardized when a proceeding is held out of camera, the right to get an effective remedy requires a proceeding to be held in camera. This is because,

¹² FDRE Constitution, Article 20(1).

¹³ Federal Courts Proclamation, Article 26(2).

¹⁴ ICCPR, Article 14.

¹⁵ Trial in camera is explicitly referred under the Constitution only under Article 20 that deals with criminal matters.

¹⁶ *Dawda Jawara v The Gambia*, Comm. Nos. 147/95 and 149/96, 2000 ACHPR ¶35 (May 11, 2000).

¹⁷ Normally all trials affect the right to privacy of litigants. But, this does not mean that all trials must be held in camera for the protection of the right to privacy. Fundamental concepts of justice such as fair trial overcome holding trial in camera. In other words, such fundamental rights advocate for open justice. However, when the private interest at stake is a more fundamental the principle of open justice itself advocate for trial in camera.

first, if trial in camera is denied, individuals may restrain from vindicating their rights in a court of law for fear of evasion of their fundamental private interest.¹⁸ This will in turn drastically affect the right to access to justice. Second, under some circumstances, publicity of trials may impair honest provision of evidence and create bias.¹⁹ This will then affect the right to access to justice that stands for the right to get an effective remedy. Accordingly, the interpretation of Article 37(1) of the FDRE Constitution makes it clear that incorporation of trial in camera in civil trials.

In general, Ethiopian laws recognize the exclusion of all or part of the public from attending a hearing of a case, both in civil and criminal trials where the interest of justice requires so.²⁰

B. Gag order on Trial Participants

Gag order is another limitation to the principle of open justice; a restraint that prohibits parties from releasing information they gather in trial. It is a restraint on lawyers, witnesses, court personnel and others directly involved with the trial from making any extrajudicial statements outside the court setting, including the press.²¹

¹⁸ J. Morris, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases*, 44: 3 Boston College Law Review, 923 (2003).

¹⁹ See *id.*

²⁰ In addition to the Constitution, Article 26(2) of the Federal Courts Proclamation recognized trial in camera both in civil and criminal trials. It allows a trial to be held in camera, for public safety, state security and public decency. Moreover, several international human rights instruments ratified by Ethiopia, such as the ICCPR and the Banjul Charter recognized trial in camera as a limitation to open justice.

²¹ Morris, 44: 3 Boston College Law Review at 907(cited in note 18).

In Ethiopia, the procedural rules in force are silent about the incorporation of gag order. However, the Criminal Code²² pinpoints the incorporation of this concept in the legal system. The Criminal Code under Article 450 punishes a person for disclosing facts that come to his/her knowledge in the course of proceeding, where such information is declared secret by a court.²³ In other words, the latter provision deals with gag order. It forbids all parties involved in the case from discussing any aspect of the case with, both the media and the member of the public. This shows the incorporation of gag order on trial attendants, where the court believes the secrecy of a fact is necessary.

Nevertheless, gag order may not prohibit a party from disclosing the name and the compliant or the defense made, or for witnesses from disclosing the name and the title of the suit. This is because the construction of the procedural codes does not give any room for such restriction. First, the Codes require a party to institute a claim indicating the name and address of the parties to litigation.²⁴ In addition to this, a critical provision under the Civil Procedure Code is that, it requires the defendant to appear in the first hearing with his statement of defense after s/he receives the compliant made against him/her. Through all these stages, the Codes never set a procedure to call parties and witnesses, and order them to keep the secrecy of any fact in a case. At the same time, it is obvious that the parties disclose such information to others. This makes the name of the parties, and the allegations a public knowledge. The only exception left, therefore, is the hearing of evidence. Therefore, gag order under Article 450(1) of the Criminal Code looks to be effective only in the hearing of evidences.

²² The Criminal Code of the Federal Democratic Republic of Ethiopia (2004), Federal Negarit Gazeta, 9th of May, 2005, Addis Ababa (hereinafter Criminal Code).

²³ Criminal Code, Article 450(1).

²⁴ Civil Procedure Code, Article 80.

C. Prior Restraints of Publication on the Media

Prior restraint of non-publication on the media refers to the prohibition of declaring or announcing information to the public using any mass media communication.²⁵ Such restrictions could be either statutory or discretionary in nature.²⁶ Moreover, such restraint of publication on media could be either short term or long term.

In Ethiopia, prior restraint of non-publication on the media is provided under Article 451(2) of the Criminal Code.²⁷ The cumulative reading of Articles 451(2) and 435 of the Criminal Code punishes a person that publishes any information or court document, including the contents of a judgment that is forbidden by law or by the order of the court not to be published.²⁸ This provision is furthermore in line with the FDRE Constitution and Mass Media Proclamation.²⁹ Moreover, the Code is open in granting a court the power to

²⁵ Garner (cited in note 9).

²⁶Bradford, et al (cited in note 4). Statutory reporting restrictions are those restrictions that explicitly restrict non-publication under certain circumstances. They are absolute and do not give any discretionary room for the court to allow publication. On the other hand, discretionary restrictions give a court or any competent authority to decide on the prohibition of non-publicity. In general, both types of restrains are designed to serve one of the following purposes: (1) to protect children, victims and vulnerable witnesses, and (2) to ensure that media coverage does not create a risk of serious prejudice to a case by unduly influencing judges. As Justice Black expounded it, "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." Therefore, at times the court may lose fairness following publications a restrain must be made on publication. *See also* High Profile Criminal Cases, Cornell Law Review at 2.

²⁷ Criminal Code, Article 451.

²⁸ The English version of Article 451(1) uses the word "publishes" instead of "publicizes" or "communicates". This seems the provision is restricted to print media. However, under the law the word "publish" is used to represent the word "communicate". This is further supported by the Amharic version of the Code. The Amharic version provides ‘ ‘በሌላ ግዜ ለሌላው ግለሰብ ገልጾ መግለጽ...’ ’ The phrase “መግለጽ” or its equivalent “communicate/discloses to another” extend the application of the provision to medias other than the print media. *See also* Garner, (cited on note 9).

²⁹ FDRE Constitution, Article 29(6); Freedom of Mass Media and Access to Information Proclamation (2008), Federal Negarit Gazeta, 4th of December 2008, Addis Ababa.

restrict either short term or long-term media reporting on trial facts, orders and decisions. Relying on Article 435 of the Criminal Code, a court can prohibit the publication of a trial fact after a case has been disposed.³⁰ The reading of this provision gives the impression that a court may prohibit the publication of a trial fact after a case has been disposed.³¹

II. Filling the Gap: Incorporating the Tool of Suppression of Identity Clause

In the previous section, I have illustrated the non-incorporation of the tool of suppression of identity clause under Ethiopian laws. However, a deep insight into the recognized limitations to the concept of open justice necessitates the incorporation of this tool. The limitations incorporated as a limitation to the latter principle have their own peculiar drawbacks that incapacitated them from protecting the rights of litigants in, a high profile criminal case, under the threat of discrimination and victims of a sexual offence. The rights of such litigants can be effectively protected if the tool of suppression of identity clause is incorporated under Ethiopian laws. This section, therefore, illustrates the meaning, justification and importance of suppression of identity clause as a limitation to the principle of open justice.

(Hereinafter Freedom of Mass Media and Access to Information Proclamation), Articles 4(2) and 12(1).

³⁰ Article 541(2) of the Criminal Code makes a cross reference to Article 436 of the same Code.

³¹ Article 451(2) of the Criminal Code provides “publication forbidden- by the order of the court is punishable...”

A. Anonymity/Suppression of Identity Clause: General Overview

In ordinary parlance, anonymity refers being not named or identified.³² Under procedural laws, also the meaning of anonymity is similar. Under procedural rules, anonymity or its related term pseudonym refers to a tool used to suppress the identity of a person; it is a tool where a person presents itself before law enforcement agencies with a fictitious name and anonymous address.³³ In other words, where a party presents before a court anonymously, no one can identify him/her. He will have a fictitious name and address where no one can track him/her with his/her name or address. It is only the organ that gave such name and address or another organ entrusted to the coded information of the party that can identify and track the real identity of the party to litigation. This is what we call anonymity or suppression of identity clause.

The procedural rules of various countries allow parties to engage in litigation anonymously under exceptional circumstance.³⁴ While doing so, they conduct the trial in a closed session, and oblige trial attendants, including, witnesses, parties to litigation and the judge from disclosing the name and address of the anonymous party.³⁵ Through this, the tool secures the confidentiality of the identity of a party allowed to litigate through fictitious name and anonymous address. This has a special importance if a party to litigation may

³² -----(1986), *Webster's Ninth New Collage Dictionary*, Merriam-Webster INC., Massachusetts.

³³ W. Matheson and A. Smith, *Becoming Jane or John Doe: Can Civil Litigants Use a Pseudonym to Protect Their Privacy?*, 7:7 Canadian Privacy Law Review, 81 (2010)

³⁴ Morris, 44: 3 Boston College Law Review at 923(cited in note 18). Witnesses and accusers are also rarely allowed to engage in the system with a pseudonym or anonymously. However, the scope of the article is limited to parties to litigation. Therefore, the writer will not focus on accuser and witness anonymous participation in litigation. For the latter See Criminal Procedure Code, Article 14 and Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation No. 699/2010.

³⁵ Bradford, et al, at 4 (cited in note 4).

suffer an irreparable harm if s/he litigates through his/her genuine name and address.³⁶

Now it is important to note that, the writer is not saying that the adverse party in the litigation should not be aware of the identity of the anonymous party. It is obvious that the adverse party cannot properly vindicate its right without knowing the proper identity of the other party. The adverse party's knowhow is necessary for the proper implementation of the due process clause under the Constitution. For this reason, the adverse party knows the real identity of the anonymous party to litigation. However, this adds another obligation on the adverse party. S/He will be obliged to keep the name and address of the anonymous party secret. If s/he discloses the name or address of the anonymous party, s/he will face both civil and criminal liability.³⁷ Even more, where the disclosure of his/her own identity may certainly cause jigsaw identification of the anonymous party, the adverse party will in addition be obliged not to disclose its own identity.³⁸

Furthermore, the anonymous party may be compelled to disclose his/her identity to witnesses. This is because most testimonies are ineffective if the witness is not aware of the identity of the parties to litigation. Therefore, the identity of the anonymous party may be disclosed to witnesses where the

³⁶ The Canadian legal system employs a three tire test before allowing a party to vindicate its right anonymously. These are; (1) whether there is a serious issue to be tried; (2) the likely hood of irreparable harm; and (3) the balance of convenience.

³⁷ Bradford, et al, at 4 (cited in note 4).

³⁸ Jigsaw identification refers to a situation whereby the identity of a person protected by suppression of identity clause can inadvertently disclosed because of the disclosure of the name and/or address of the other party to litigation without any breach of law. For example, if a case refers to the name of a defendant, a father that rapes his daughter. The victim will be identifiable to the public, without any violation of the law. This is what we call jigsaw identification.

disclosure of the identity of the litigant is necessary for giving a proper testimony.³⁹

Again, a witness that is aware of the identity of the anonymous party for the interest of justice will be obliged to protect the secrecy of the identity of the suppressed party. Moreover, where the disclosure of the name of any other participant of the litigation, including, witnesses may cause a jigsaw identification of the anonymous party, courts are obliged to order participants in the litigation to engage in a suit through a pseudonym and anonymous address.

From what is illustrated above, one can easily understand that suppression of identity clause has its own unique features that distinguish it from gag order and trial in camera. While the rest of the limitations does not limit trial attendants from disclosing the identity of a party, including, the name and address of a party to litigation, suppression of identity clause keeps the name and address of the party confidential. Through this, it aids justice by keeping the identity of parties to litigation secret where the interest of justice so requires.

B. The Non-Incorporation of Suppression of Identity Clause under Ethiopian Laws

Both the Civil Procedure Code and the Criminal Procedure Codes of Ethiopia do not incorporate the tool of suppression of identity clause. This can be explained from different angles. Among those, the rules related to the

³⁹ In some instances, the identity of the anonymous party might not be necessary for properly testifying. For instance where the testimony relating a defense of *alibi* is given to a party whose identity is disclosed mostly disclosing the identity of the litigant has no use.

institution of proceedings and the rules which govern what follow can best explain the non-incorporation of the tool of suppression of identity clause.

In the Civil Procedure Code, the names and full addresses of the plaintiff and the defendants are required to be explicitly mentioned in pleadings.⁴⁰ The model formats of pleading included in the first schedule of the Code also require the same.⁴¹ Moreover, the Code provides no exception to this rule. Failure to incorporate the full name and address of a party to litigation in a statement of claim, or defense will result automatic rejection of the pleading for technical insufficiency.⁴² Due to this, the Code gives no room for the incorporation of the tool of suppression of identity clause, even through interpretation.

The same is true for the Criminal Procedure Code. Article 111(1)(a) of the Criminal Procedure Code requires every criminal charge to contain the name of the accused.⁴³ Furthermore, this rule is strengthened in the forms of charge provided in the schedule contained at the back of the Code that require the name and address of the accused to be incorporated in a charge.⁴⁴ The same

⁴⁰ Civil Procedure Code, Article 222(1)(c) and Article 241(1). *See also* R. Sedler (1968), *Ethiopian Civil Procedure* at 171 (Haile Sellasie I University, Addis Ababa). The same is true at the first hearing of the suit. At this stage the court is required to examine the identity of the parties pursuant to the information provided in the pleadings before it proceed to the merits of the allegations.

⁴¹ Civil Procedure Code, Article 80(2). Note that, the Civil Procedure Code requires a pleading to be written in a form nearly as possible found in the first schedule.

⁴² Civil Procedure Code, Article 229(a) and 238(1).

⁴³ In Ethiopia, petty offences can be prosecuted without a charge. Nevertheless, this does not mean parties engaged in petty offence litigation can suppress their identity. The principle of open justice, which is the core component in judicial proceedings, requires parties to petty offence litigation to present themselves in an open court through their name and address. Furthermore, if one sees both the gravity of the offence and the intensity of the interest involved in petty offences there is no strong justification to conduct petty offence trials through a pseudonym and anonymous address.

⁴⁴ Note that, the forms of charge shall comply with the requirements at schedule two of the Criminal Procedure Code.

holds true at times of private prosecution also. This all shows the absence of any exception to the rule of disclosure to the parties name and address in Ethiopian Courts. In other words, the tool of suppression of identity clause is given no place in Ethiopian procedural laws.

C. Constitutional Rights and Principles that require the Incorporation of Suppression of Identity Clause under Ethiopian Laws

Previously, it was indicated that Ethiopian procedural laws have no room for litigating through a pseudonym and anonymous address. This makes our procedural rules short of a necessary limitation essential to enforce various constitutional rights and principles, such as the right to access to justice, the right to privacy and the principle of the best interest of the child.

1. The right to access to justice

The first constitutional right that requires the incorporation of the tool of suppression of identity clause for its effective enforcement is the right to access to justice. This right entitles everyone the right to bring a justiciable matter before a court of law, and obtain a decision or judgment.⁴⁵ It entrusts every person the right to bring a justiciable matter before a court of law and access an effective remedy.⁴⁶ For this, it necessitates the presence of a procedural mechanism that enables individual's access to a trial court⁴⁷ without any fear of discrimination or publicity of their confidential information.⁴⁸ At times, where litigating a right in an open court exposes a

⁴⁵ FDRE Constitution, Article 37(1).

⁴⁶ *Dawda Jawara v The Gambia*, Comm. Nos. 147/95 and 149/96, 2000 ACHPR ¶35 (May 11, 2000).

⁴⁷ See *id.*

⁴⁸ UNAIDS, *HIV Related Stigma, Discrimination and Human Rights Violations: Case Studies of Successful Programmes* at 63, UNAIDS/05.05E (2005).

party to discrimination or discloses its confidential medical record, a victim may restrain from taking its case to a court of law.⁴⁹ This makes individuals forfeit justice for core values of living with the society. For this reason, the right to an effective remedy requires a procedural mechanism that enable such persons vindicate their right anonymously or through a pseudonym, so that they can effectively access justice. In other words, the right to access to justice under Article 37(1) of the Constitution calls for the introduction of suppression of identity clause under Ethiopian law.

2. The right to privacy

The right to privacy is a fundamental right recognized in the FDRE Constitution.⁵⁰ The right normally incorporates both entitlement and freedom.⁵¹ The entitlement component of the right incorporates the right to keep one's private matters confidential.⁵² On the other hand, this component imposes a duty to confidentiality on organizations and persons that have access to the confidential information of a person.⁵³

Normally, when a person sues or is sued in a court of law, his privacy is always affected regarding the concern under dispute.⁵⁴ However, this does not mean all trials shall be confidential and secret.⁵⁵ This is because, under normal circumstances, the principle of open justice overweighs the right to privacy for the effective enforcement of the right to fair trial and due process

⁴⁹ See *id.*

⁵⁰ FDRE Constitution, Article 26.

⁵¹ UN Committee on ICESCR (2000), *General Comment 14 on the Right to Health* ¶8 (UN Doc E/12/20000/4).

⁵² Canadian AIDS Society (2004), *Disclosure of HIV Status after Currier: Resources for Community Based AIDS Organizations* at 7-3 (Canada).

⁵³ See *id.*

⁵⁴ Matheson and Smith, 7:7 *Canadian Privacy Law Review* at 81 (cited in note 32).

⁵⁵ M. Sepulveda, et al, *Universal and Regional Human Rights Protection: Cases and Commentaries* at 319 (University for Peace 2004).

of law.⁵⁶ Nevertheless, under exceptional circumstances, a special private interest may outweigh the principle of openness, so that it requires a proceeding to be held without disclosing the identity of a party to litigation.⁵⁷ Especially, where a suit relates to sexual offences between family members, breach of medical records, such as, records that show a party's positive HIV/AIDS status and medical malpractice, the right to privacy may outweigh the right to openness.⁵⁸ This is because most of the times the disclosure of the parties' identity in such suits, in addition to the evasion of the parties' privacy, fuel stigma, discrimination and stress on vulnerable groups, including, children and persons living with HIV/AIDS (hereinafter PLHIV).

3. Best interest of the child

Article 36(2) of the FDRE Constitution requires all court actions concerning children to primarily take into consideration the best interest of the child.⁵⁹ Consequently, the best interest of the child requires the adoption of special measures to protect children.⁶⁰ According to this principle, a child's welfare is a paramount consideration when everything else is weighed in a court of law.⁶¹ The interest of the child is a trump card in every decision of a court. In addition, anything that fundamentally affects the child's wellbeing requires a careful consideration in any court process. Therefore, according to

⁵⁶ See *id.*

⁵⁷ Morris, 44: 3 Boston College Law Review at 923(cited in note 18).

⁵⁸ See *id.*

⁵⁹ See also African Charter on the Welfare of the Child, Article 4.

⁶⁰ Office of the United Nations High Commissioner for Human Rights, *CCPR General Comment No. 16 on the Right to Privacy*, 32nd Session at ¶ 1, 04/07/1989 (1989).

⁶¹ K. Schilling and M. Fisher, *Privacy and Open Justice in the Family Courts – Part 2* at 2 (unpublished), online at <http://nt4992.vs.netbene_fit.com/resources/pdf/Privacy_in_the_Family_Courts_Part_2.pdf> (visited Oct 12, 2011).

this principle, where disclosing the identity of a child in litigation would frustrate the future upbringing and personality of a child it requires courts to allow a child to engage in the system anonymously through his/her legal representative. Even, sometimes, if disclosing the identity of his/her legal representative or the opposite party may certainly make known the identity of the child, the principle requires the suppression of the identity of the minor's representative or the identity of other parties to the litigation. Otherwise, compelling the child or his representative to vindicate a right through his/her real name and address at times, where such order would have a violent effect on the upbringing of the child would be denying a child his right under Article 36(2) of the Constitution. Therefore, impliedly, Article 36 of the FDRE Constitution requires the incorporation of suppression of identity clause under the Country's procedural rules.

III. Suppression of Identity Clause in Action: Experiences of Foreign Jurisdictions

Countries recognized the tool of suppression of identity clause for the prevention of harm and the protection of the innocent. They allow a party to litigate in a pseudonym if they find out that he might face an irreparable harm if he litigates in his real name and/or address. Following, in this section, I will examine some of the practical applications of the tool of suppression of identity clause. In doing so, this section navigates the experiences of other countries with a special emphasis on discrimination-related suits. Moreover, the necessity of the tool from the perspective of crimes of transmitting a disease is analyzed from the perspective of Ethiopia. This will help one understand the practical significance of the tool in the Ethiopian legal system.

A. HIV/AIDS Related Discrimination: the Indian Experience

Suppression of identity clause is one mechanism for protecting litigants from discrimination. At times where instituting a proceeding by exposing the real identity of a person to the public may expose him/her to discrimination countries can effectively use the tool of suppression of identity clause to protect him/her. For instance, if one sees the Indian experience, persons discriminated against on the account of their HIV positive status can vindicate their right through a pseudonym and anonymous address.⁶² Experiences also show that, in India, workers who have been discriminated against and lost their jobs on account of their HIV positive status vindicate their right using the tool of suppression of identity clause.⁶³ This is because Indian courts take into account that numerous studies which have proved that people living with HIV/AIDS are often afraid to go to court to vindicate their rights for fear of their HIV status will be disclosed to the public at large, and that they will suffer discrimination.⁶⁴

It is for this reason, the UNAIDS also recommended countries to enact a law that enable PLHIV and those vulnerable to HIV infection claim their rights through a pseudonym and anonymous address.⁶⁵ The same is true in England.⁶⁶ In *X v. Y* the English Court of Appeal held that preserving confidentiality of hospital records overweigh the public interest in *open justice* (emphasis added), because people living with HIV must not be

⁶² S. Metha and K. Sodhi, *Understanding AIDS: Myths, Efforts and Achievements* at 142 (A.P.H Publishing Corporation 2004).

⁶³ UNAIDS, at 63 (cited in note 48).

⁶⁴ See *id* at 64.

⁶⁵ Metha and Sodhi, at 142 (cited in note 62).

⁶⁶ Courts and Justice in the Era of HIV/AIDS: Introduction to the Workshop, Judiciary of Zambia, Zarain, Lukasa, Zambia, *12, (unpublished, 2007), online at <www.hcourt.gov.au/assets/publications/...justices/kirbyj/kirby_jj_15feb07.pdf> (visited July10, 2011).

deterred from seeking appropriate testing and treatment.⁶⁷ Through this, India and England are able to protect PLHIV from discrimination and ensure their right to bring violations before a court of law. Lastly, it is not hard to concede that the tool of suppression of identity clause may also have an enormous contribution to protect the right of persons vulnerable to discrimination and ensure justice in Ethiopian courts.

B. Suits that may entail Discrimination: the US Experience

An important case that employs the tool of suppression of identity clause is the *Doe v. Stegall* case before the United States Fifth Circuit Court of Appeal.⁶⁸ In the case, the plaintiff, a mother of two minor children obliged to practice a daily religious observance in the county's public schools against their interest, brought the case on behalf of her minor children.⁶⁹ In the case, fearing the harassment and violence directed against her family, following the institution of the suit, the mother sought the court to keep the proceeding anonymously.⁷⁰ In other words, she prayed the court to proceed through a fictitious name and anonymous address. Following this, the court holds, suppressing the identity of the mother and her children does not obstruct the public's view of the issues involved in the case or the court's process of resolving the dispute.⁷¹ That the fairness of the proceeding is not lost when one party is involved in the lawsuit under a fictitious name under exceptional circumstances and allow the proceeding to proceed anonymously for the protection of the family from violence and discrimination.⁷² It allows the mother to litigate on the name "Doe" which is anonymous.

⁶⁷ See id.

⁶⁸ Morris, at 922(cited in note 18).

⁶⁹ See id.

⁷⁰ See id.

⁷¹ See id.

⁷² See id.

This case precisely shows the importance of suppression of identity clause at times where discrimination is inevitable if the identity of a party to litigation is disclosed.

C. Crimes relating to the Transmission of Diseases

The right to privacy of individuals requires the medical records of individuals, including, victims, witnesses and defendants to be kept confidential. Recent practices also show laws in some jurisdictions employ the mechanisms of suppression of identity clause on crimes related to transmission of a disease.⁷³ Even, the Ethiopian Criminal justice system allows reporting of crimes anonymously under exceptional circumstances.⁷⁴ However, the Code neither recognizes anonymous parties to litigation. Of course, anonymous prosecutor is not imaginable in the Ethiopian Criminal Justice System.⁷⁵ Nevertheless, the writer believes, anonymous defendants should be there, especially, where a case concerns transmission of a disease.

As far as my belief is concerned medical records of persons, accused of transmitting a disease shall be kept confidential unless they are found guilty. This is because a suspect accused of transmitting a disease is presumed

⁷³ In England the name and address of a victim of a sexual offence is not disclosed to the general public except at times where the victim consents for the disclosure. This measure is taken by taking in to consideration the harm and distress caused by publicity could discourage complaints from reporting sexual offences and anonymity could help ensure perpetrators doesn't escape prosecution.

⁷⁴ Criminal Procedure Code, Article 12.

⁷⁵ In the Ethiopian criminal justice, the government represents the victim in litigation. Therefore, the recognition of anonymous Prosecutor has no significance. Even, if we see private prosecution, it is allowed under exceptional circumstances. It is recognized for non-serious crimes. This shows the minimal importance of the concern and the unnecessary challenge to recognize suppression of identity clause for the protection of Private Prosecutors.

innocent until proven guilty.⁷⁶ Where, he should not suffer by the disclosure of his medical record before he is found guilty of the crime s/he is accused of. Therefore, this can only be achieved through, the tool of suppression of identity clause.

If the tool of suppression of identity clause is not enforced in Ethiopia courts, it is hard to secure the confidentiality of medical records of a victim before conviction. The existing procedural devices under Ethiopian law cannot protect the confidentiality of the defendants' medical records. Both trial in camera and gag order does not keep the medical records of the accused confidential. This is because, first, these limitations do not exclude the media and the public's right to access trial documents after the case is once disposed. Moreover, these limitations does not prohibit the attendants of the litigation, i.e., witnesses, judges, the adverse party and other court officials from disclosing the name of the parties and the title of the suit. By the same token, the Media can report the latter facts while the case is pending. Therefore, both of the mechanisms in the Ethiopian justice system are not solutions for the confidentiality of medical records of criminal defendant. Therefore, the necessity of suppression of identity clause in trials related to transmission of a disease is hardly inescapable for the protection of the innocent.

Conclusion

The principle of open justice and its exceptions, such as, trial in camera and gag order are recognized and enforced in Ethiopia. However, one crucial limitation to the principle, suppression of identity clause, is not incorporated in the Ethiopian legal system. In many jurisdictions, suppression of identity

⁷⁶ FDRE Constitution, Article 20(1).

clause is an effective means to secure individual's right to access justice. Where a party's right to access to justice (due to, for example, fear of harassment, discrimination or stigmatization, or fundamental private matter) is to be undermined by open justice, an exception which allows a party to litigate in a pseudonym and an anonymous address is needed. However, under Ethiopian law this crucial procedural tool, which is an exception to the principle of open justice, is missing. For instance, take persons whose confidential medical record is breached, those unlawfully dismissed of their work merely due to their HIV positive status where no one around them knows about their medical record. They all need suppression of identity clause for the proper enforcement of their right. Therefore, Ethiopia indubitably needs to incorporate the tool of suppression of identity clause for the protection of the rights of its subjects.