

Sewing Slits of the Laws: A Critics on Criminalizing Negligent Acts of Transmitting HIV and Constitutionality of Compulsory Testing for HIV/AIDS in Criminal Proceeding of Ethiopia

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Abstract

It is obvious in criminal cases proofing beyond reasonable doubt is expected from public prosecutors. In addition, the judge cannot create the crime by analogy. In my experience as a public prosecutor on North Shoa and also Special Zone around Finfine of Oromia, Ethiopia, for almost three years (2008-2011), I have seen that where there is legitimate criminal investigation, there is a legitimate fruits of investigation for framing the criminal charge. Thus, I realized that the issues of criminalizing the negligent of HIV and the existences of divergent views among the criminal procedure of 1961, the 1998 Policy on HIV/AIDS and 2007 Guidelines for HIV Counseling and Testing in Ethiopia. Therefore, this Article examines why proofing the criminal case beyond reasonable doubt is difficult when negligent acts of transmitting HIV has been criminalized. It also explore slits of the laws which in turn create legal black hole with regarding to the order of compulsory testing for HIV or other communicable human diseases in the criminal proceeding of Ethiopia. It also checks over the constitutionality of compulsory testing for HIV and the organ of government which is trustworthy and impartial to give such order in the criminal cases. Throughout these critics I will examine all the problems as to the Constitutional standards and some international policy concerns with regarding compulsory testing for HIV/AIDS.

Keywords: HIV/AIDS, the Policy, Epidemic, a Venereal disease, Communicable human disease, Federal Democratic Republic of Ethiopia (FDRE)...

1. Introduction

AIDS is an epidemic which is caused by virus named human immunodeficiency virus (HIV). It has been recognized in Ethiopia since the mid of 1980s. Since then, HIV/AIDS is one of the greatest challenges in social, economical and political spheres of the country. Furthermore, the previous study shows that HIV/AIDS is one of the greatest challenges facing the world in the 21st century. The study also shows that HIV/AIDS remains one of the greatest development and social justice challenges of our time.¹ It is an emergency of an unprecedented nature.² Thus, Ethiopia has formulated and implemented the Policy on HIV/AIDS since 1998. The core aim of this Policy is to protect the rapid prevalence of the HIV/AIDS and to realize the human rights of persons living with HIV/AIDS from social discrimination and stigma.

Majorities of the victims of HIV are the groups of community who can contribute more in the social, economical and political spheres of the country. To tackle the prevalence of HIV/AIDS and to protect the rights of persons living with this epidemic from social discriminations and stigma, Ethiopia has formulated a comprehensive policy on HIV/AIDS in 1998.³ Thus, the policy framework has contributed big roles in prevention, control and management on HIV/AIDS. However, the policy remains elusive with regarding to the compulsory testing of HIV/AIDS in the criminal justice system of the country.

Since the expanding of urbanization, the increasing levels economic hardship, increased mobility due to labour migration, and better educational and trading opportunities are becoming the increasing factors for the expansion of HIV/AIDS,⁴ the existences of strong legal bedrock is expected to criminalize the non-disclosure of HIV/AIDS. Thus, 2004 is the year in which the legislative organ of Ethiopia comes out with new and comprehensive criminal code as pursuant to Article 55 (1) of the Constitution of the FDRE of 1995. The new criminal code has extensive legal provisions with regarding to the criminalization of HIV/AIDS non-disclosure. The history of the criminalization of HIV non-disclosure is very recent and young in legislative measures of Ethiopia. However, the relevant provisions of the new criminal code do not refer to HIV/AIDS specifically. The provisions of treat the acts of transmitting HIV/AIDS in similar manner to other 'Communicable Human

¹ HIV/AIDS policy and strategy update: 2013-2016

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² Implementing the ILO Code of practice on HIV/AIDS and the World of work: an education and training manual, 202, P.11

³ See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, ETH HC4.490.1. P6

⁴ HIV/AIDS in Ethiopia an epidemiological synthesis, made by Ethiopia HIV/AIDS Prevention & Control Office (HAPCO) and Global HIV/AIDS Monitoring and Evaluation Team (GAMET), for World Bank Global HIV/AIDS Program, 2008, P. 19

diseases,¹ and also uses synonymous name like ‘venereal disease’ (Article 628(b), Article 629(2b)), ‘an epidemic’ (Article 514 (2c) under heading spreading of human diseases), and ‘communicable human disease’ (Article 522(1), Article 620 (4)). In my opinion, using these generic words in laws to treat HIV/AIDS may save the persons living with this epidemic from societal discriminations and trauma.

Moreover, what motivates me to conduct this Article is the criminalization of negligent transmission or spreading of communicable human diseases under the new criminal code of Ethiopia and the contradiction of the 1961 criminal procedure and the 1998 Policy on HIV/AIDS of Ethiopia. Therefore, in this Article I will examine, criticize and forward my suggestion and possible solutions to the above mentioned slits of laws from the policy. Moreover, I will check over the following problems and legal slits. These are:

- Is criminalizing the negligent acts of transmitting HIV/AIDS meet the purpose of justice to prevent, protect the prevalence of HIV and deter the persons living with HIV not to transmit HIV unintentionally? How can the justice personnel order the suspected person to undergo a compulsory testing?
- Are there any contradiction among Constitutional standards, article 34 of the 1961 Criminal Procedure code, and Section 3 of the Policy on HIV/AIDS of Ethiopia with regard to compulsory HIV/AIDS testing?
- What if the suspected criminals refused to undergo testing for HIV/AIDS? Who is competent to force them to have compulsory testing?
- What if the suspected criminal refused to undergo the blood test? Can the judge take presumption in criminal cases to be convinced as the suspected criminal is the actual person who transmits HIV/AIDS?
- Which organ of government is deemed partial to order the suspected criminal to undergo a compulsory HIV testing in criminal case? Investigative police officer? The Public Prosecutor? Or the Judge of the courts law?

In country like Ethiopia which is in a real fight to eradicate poverty which in turn fuels the prevalence of HIV, the legislations and policy enacted on HIV/AIDS must fit with the Constitutional standards of the 1995 Constitution of Ethiopia. Thus, the legislature is expected to sew all the slits existed between the legislations and the 1998 Policy on HIV/AIDS of Ethiopia. This Article has two parts. Part I: Criminalizing negligent acts of transmitting HIV/AIDS under Criminal Code of Ethiopia, Part II: Slits of the laws on compulsory testing for HIV/AIDS in criminal cases, under the 1961 Criminal Procedure and Code, the 1998 Policy on HIV/AIDS of Ethiopia, and the Constitutionality of compulsory testing for HIV/AIDS.

Part I: Criminalizing Negligent Acts of Transmitting HIV/AIDS under Criminal Code of Ethiopia

2. Negligent Acts of Transmitting HIV/AIDS

As I have mentioned above, it is necessary to realize that HIV/AIDS is not only a health problem, but also a development problem. However, the primarily concern of the Policy on HIV/AIDS of Ethiopia is not to criminalize the person living with HIV, but primarily focuses on safeguarding of the human rights of persons living with HIV/AIDS and to reinforce the implementation of effective measures to prevent and control the spread of HIV/AIDS.² Ethiopia has no special legislation that regulates the transmission or exposition of HIV/AIDS. It is the 2004 criminal code of Ethiopia which has punitive provisions that criminalize the non-disclosure of HIV/AIDS. However, the Policy on HIV/AIDS of Ethiopia says nothing with regarding to the criminalization of HIV/AIDS non-disclosure.

Ethiopia takes a legislative measure in criminalization HIV/AIDS non-disclosure, exposure and transmission in its current criminal code.³ Thus, the criminal code criminalizes both intentional and negligent acts of HIV non-disclosure. The relevant provisions in this code do not refer to HIV specifically in the name but it is clear that HIV/AIDS falls under the category of communicable human disease, venereal disease, and also epidemic diseases. Thus, the provisions of the current criminal code of Ethiopia treat the acts of transmitting HIV in the name of transmitting other communicable human diseases.⁴ And the provisions of the criminal code become elusive to briefly list out the types of diseases which can be considered as communicable diseases, venereal diseases, and diseases which are an epidemic.⁵ This seems to save the persons living with those diseases from stigma,⁶ as well as social discrimination.

¹ Criminal Code of Ethiopia, Proclamation No.414/2004. Article 514

² See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, Section IV (1). Under Section II: Introduction: paragraph 12 & 13, the policy emphasize the concern of the 1998 Policy on HIV/AIDS of Ethiopia is to prevent the prevalence of this disease as much as the resource of the country permitted. In addition, there are also mechanisms by which the country can create joint fight on HIV along with international NGOs. The other concern of the Policy is to protect and realize the human rights of persons living with HIV/AIDS from social discrimination and stigmatizations.

³ See Criminal Code of Ethiopia, Proclamation No. 414/2004

⁴ See Criminal Code, Article 514

⁵ See Criminal Code, Article 628(b) , and Article 514 (2(c))

⁶ See the UNAIDS BEST PRACTICE COLLECTION: HIV - Related Stigma, Discrimination and Human Rights Violations, Case studies of successful programmes, April 2005, P.4. It is clear that stigma can lead to discrimination and other violations of human rights which affect

Moreover, my critic focuses on article 514(3) of the 2004 Criminal Code of Ethiopia which criminalizes the negligent acts or unintentional acts of transmitting or spreading communicable human diseases (HIV/AIDS). Thus, it is expected from the legislature to develop positive laws to treat such unintentional transmission or spreading of HIV/AIDS, rather than enacting the punitive laws. However, there is contradiction between punitive laws and positive laws to realize criminal justice and prevention of transmission of HIV/AIDS.¹ Furthermore, the UNAIDS also urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.² Prevention programmes should include *positive prevention* efforts which empower people living with HIV to avoid transmitting HIV to others, to voluntarily disclose their positive status in safety, avoid new sexually transmitted infections, and delay HIV disease progression.³ Therefore, it is expected from the government to advertise the positive prevention efforts to tackle the prevalence of HIV/AIDS in collaboration with persons living with HIV/AIDS rather than criminalizing unintentional transmission of these diseases to others. In my opinion positive laws are more protective than punitive laws in relation with cases like HIV/AIDS. Thus, let me check over some of the criminalized negligent or unintentional acts of transmitting or spreading HIV/AIDS under article 514 (3) of the FDRE Criminal Code of 2004.

2.1. Transmitting HIV to Sexual Partner

I have no comment on criminalizing intentional transmission or spreading of HIV/AIDS, but my argument focuses on the provisions of new criminal code of Ethiopia that are criminalizing negligent transmission of HIV. For instances, there is a circumstances when the person who may negligently spreads or transmits a communicable human disease shall punished in imprisonment or fine.⁴ It is obvious that HIV/AIDS may transmit or spread negligently to another person in sexual partnership. However, the person may not know that s/he was HIV positive or fear to make blood test or by believing as both of them are HIV free in sexual partner cases. Moreover, it is real that many people do not learn their HIV status, either because of lack of counseling and testing services,⁵ or because they are afraid to be tested due to negative consequences, such as discrimination or violence, which might arise from a positive diagnosis. Thus, people may unknowingly transmitting HIV and expose other to be infected by the disease.

For instances, *'ABEBE is a boy friend of ZENEBU. He loves her but fears to make blood test when she has asked him. However, on one unfortunate day they had make sex willingly. Since then they began to live together for almost three months as on and off sexual partner. However, after three months ZENEBU recognized that she has been infected by HIV/AIDS because of ABEBE hide the fact of his HIV status. Then she accused Abebe for such negligent transmission of HIV to her.'* Thus, in this hypothetical case it is difficult to know the real source for the transmission, except with the availability and help of medico-legal professionals. Moreover, in such circumstances there may a chance when HIV may be to the suspected criminal himself may be infected by HIV from his sexual partner or from the person he has raped. It is difficult for the Public Prosecutor to prove such cases beyond reasonable doubt in the absence of trained medical doctors in crime investigation (S. P. Garg, Karuna Jindwani, Keshav Singh, Vidya Garg, 2013).⁶ However, there are no medico-legal professionals in criminal investigation in criminal justice of Ethiopia. Criminalizing these kinds of negligently transmission of HIV will achieve either criminal justice or prevent HIV transmission, since many marginalized groups and uneducated people may be prosecuted innocently or in a wrong manner.⁷ Moreover, in my opinion

the well-being of people living with HIV in fundamental ways.

¹ See, the Global Criminalization Scan: Country Assessment, 2011, P.7. Punitive laws have a negative impact on achieving universal access to HIV prevention, treatment, care and support. They include laws that criminalize unintentional transmission of HIV. Whereas, positive laws have an enabling impact on policies and programmes aimed at achieving universal access.¹ They include laws and policies that prohibit discrimination on the basis of real or perceived HIV infection.

² See UNAIDS POLICY BRIEF: Criminalization of HIV Transmission, August 2008, P.1 In its Policy Brief the UNAIDS, also has stated that such extension of criminal liability beyond cases of deliberate or intentional HIV transmission to reckless conduct should be avoided. Such broad application of the criminal law could expose large numbers of people to possible prosecution without their being able to foresee their liability for such prosecution.

³ See 2006 Political Declaration on HIV/AIDS General Assembly Resolution 60/262 Article 20 paragraph 25, where governments "Pledge to promote, at the international, regional, national and local levels, access to HIV/AIDS education, information, voluntary counseling and testing and related services, with full protection of confidentiality and informed consent, and to promote a social and legal environment that is supportive of and safe for voluntary disclosure of HIV status."

⁴ Criminal Code of Ethiopia 2004: Section I- CRIMES AGAINST PUBLIC HEALTH. Article 514(3)- Spreading of Human Diseases

⁵ See AIDS in Ethiopia, Sixth report made by Federal Ministry of Health/ National HIV/AIDS prevention and control office, P.51

⁶ S. P. Garg, Karuna Jindwani, Keshav Singh, Vidya Garg; Review Research Paper Role of a Medical Doctor at Scene of Crime: *J Indian Acad Forensic Med. Jan-March 2013, Vol. 35, No. 1, P. 66*. For any criminal case to be proved beyond reasonable doubt to the satisfaction of the courts of law, a thorough and methodical criminal investigation is the foremost requirement. However, the criminal justice policy of Ethiopia has no room for the trained medico-legal professionals. The normal medical doctors are only responsible under criminal proceedings of Ethiopia to make report to the court regarding the results of the crime after the order has been given by the court or investigative police officer. Therefore, it is hard to say there is prove beyond reasonable doubt for such negligent transmission of communicable human diseases in the absence of medico-legal professionals in the criminal proceedings.

⁷ UNAIDS POLICY BRIEF: Criminalization of HIV Transmission, 2008, P.3. Extending criminal liability beyond cases of deliberate or

criminalization of negligent acts of transmission or spreading HIV/AIDS is not only create unfair justice by throwing innocents under sticks of the laws, but also violate the human rights of the people living with HIV/AIDS.¹

In Ethiopia many couples are simply live their life in an irregular union. The Revised family code of Ethiopia also has a legal provision which legalize their union as husband and wife without concluding a formal marriage by religion, according to their custom or before an officer of civil status.² However, there is no provision under the 2000 Revised Family code of Ethiopia which set HIV testing as compulsory criteria to allow the conclusion of formal marriage. In addition, no provision is found under the Revised Family Code, as a mandatory requirement to order the sexual partners or people living as husband and wife in irregular union to make HIV test before living together or to give recognition for such kids of union. Rather, the Revised Family Code has a legal provision which uses a disease that does not heal or that can, be genetically transmitted to descendants, as a ground of fundamental errors to invalidate the marriage.³ The relevant provision of the Code never mentioned HIV in name, but uses the generic word ‘a disease that does not heal or can be transmitted genetically.’ Thus, these diseases can be HIV/AIDS too. Thus, the Revised Family Code is using such grounds only to make marriage invalid, but not to criminalize the negligent acts in relation with such unhealed diseases. Moreover, there is no data with regarding to these kinds cases in country wise. Thus, I would like to forward my suggestion that further study is required on this topic. In addition, it is expected from the legislature to patch this legal black hole in order to prevent the prevalence of HIV through such sexual partnership or irregular union by giving a due care for the human rights of person suspected of transmitting HIV/AIDS negligently or unintentionally to his/her sexual partner or person living with as irregular union.

2.2. Transmitting HIV to Emergency HealthCare Workers

As mentioned above, the problem may also arise when the person who did not knows as he is living with HIV may also expose the person (s) providing the emergency health care services or emergency first aid to the source person he himself.⁴ For instance, *‘SOLOMON is working on emergency cases at one of Hospital found in Ethiopia. One day he was working on emergency case resulted from a car crash in which AHMED was a victim of the crash too. However, SOLOMON has recognized as he has infected by HIV/AIDS three months later after because of he gave such treatment and medication for AHMED who know nothing about his HIV status before.’*

From this hypothetical case one can understand that that people may do not like to learn their HIV status, either since they do not have access to secret and confidential voluntary blood test for HIV/AIDS and counseling or because of they are afraid to make blood test due to fear of social discrimination and stigma which in turn might create sense of isolation and spirit of revenge on them. Thus, it is difficult to criminalize these kinds of negligent or unintentional acts of transmitting of HIV/AIDS. Previous study also shows that it is expected from heal workers or medical practitioners to take precautions while treating and medicating their patients. Hence the bases of this study are international guidelines on HIV/AIDS and Human Rights of persons living with the virus.⁵ Study shows that the aim of Concern’s HIV/AIDS policy aim is to empower the target group to minimize their vulnerability to, and risk of, HIV infection and to minimize the impact of AIDS on those infected and affected by it.⁶ In doing so, to achieve the needed goal prevent the prevalence HIV criminalizing such unintentional or negligent acts of transmission is not a solution, but incorporating HIV/AIDS into emergency response work as far as practical; and Adherence to international standards throughout our HIV/AIDS work.

intentional HIV transmission – to reckless conduct – should be avoided. Such broad application of the criminal law could expose large numbers of people to possible prosecution without their being able to foresee their liability for such prosecution

¹ See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, Section III(2.5)

² See Revised Family Code of 2004: Chapter seven, Article, 98. This article defines irregular union is the state of fact which is created when a man and a woman live together as husband and wife without having concluded a valid marriage.

³ Proclamation No. 213/2000, the Revised Family Code, Federal Negarit Gazeta Extra Ordinary Issue, No.1/2000, Chapter one, Conclusion of marriage, Section I, Article 13(3(b)).

⁴ See Criminal Code of FDRE Article 522(2)

⁵ See Guideline 3 20 (g). The International Guidelines on HIV/AIDS and Human Rights advises that public health legislation should authorize, but not require, that health professionals decide, on the basis of each individual case and ethical considerations, whether to inform their patients’ sexual partners of the HIV status of their patient. Such a decision should only be made in accordance with the following criteria.

- The HIV-positive person in question has been thoroughly counseled.
- Counseling of the HIV positive person has failed to achieve appropriate behavioral changes.
- The HIV positive person has refused to notify or consent to the notification of his/her partner(s).
- A real risk of HIV transmission to the partner(s) exists.
- The HIV-positive person is given reasonable advance notice.
- The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice.
- Follow up is provided to ensure support to those involved, as necessary.

⁶ Concern Worldwide- HIV /AIDS Policy: Approved by Council April 2003 , P.5

Moreover, rather than criminalizing the negligent or unintentional transmission of HIV/AIDS, it is expected also from health care workers to protect themselves from exposure to HIV in health care setting by getting training on the precautions against all blood borne pathogens, including HIV/AIDS. Furthermore, the 1998 Policy on HIV/AIDS of Ethiopia has such position to equip the health workers to get awareness and uses other lawful mechanism not to be infected by the virus when diagnosing the patient rather than criminalizing unintentional or negligent transmission of the virus. Thus section 4(2) of the Policy says *'health care workers in health care settings shall be trained and be given the necessary support to adhere to universal sterilization and disinfection precautions.'*¹ Therefore, criminalization of the negligent acts of a person who does not know his HIV status, under the provisions of the current criminal code of Ethiopia, for his HIV/AIDS non-disclosure, is far from reality to protect the rights of person living with HIV and prevention of the disease itself.

2.3. Transmitting HIV to Victim of Rape/ Related Crime

The new criminal code of Ethiopia has extensive laws on the crime of rape. Thus, it is mentioned under this code that the crime of rape can be committed when a man compel a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance.² Thus, as to the wording of the code the rapist must be a man and the victim of the rape must be a woman. However, article 621 of the Code has also the ground in which a woman can be accused and may be punished with rigorous imprisonment not exceeding five years for compelling a man to sexual intercourse with herself. Thus, in the crime of rape there is lack of consent on behalf of the victim(s). That means consent nullifies these crimes. Rape brings significant health problems to the victims. Most importantly, it can lead to transmissions of STDs, including HIV/AIDS.

With regarding to women the Constitution of FDRE provides them the right to enjoy protection from crimes of raping.³ Thus, the provision of the Constitution obliges the state to enforce women's rights to eliminate all forms of violence against them. In addition, under the title 'Injury to Sexual Liberty and Chastity,' the criminal code has a provision which criminalized the acts communicable disease which has been transmitted to the victim because of such rape. The code obliged the justice personnel to use its other relevant provisions concurrently.⁴ It is clear from article 620 of the Criminal Code that the act of rape is intentional. But in the rape crime it is difficult to say the act of transmitting the communicable disease is intentional. Thus, article 620(4) of the code remains elusive with regarding to intent or negligence on behalf of the rapists to transmit the communicable disease. From the wording this provision which says 'relevant provisions of this Code shall apply concurrently', the public prosecutors can frame the charge against the suspected criminals under article 514 concurrently along with crime of rape, but not as an aggravating circumstances. Furthermore, it hard to know whether the intention of the rapist is to rape a woman or to infected her with HIV/AIDS or both? Thus, unless and otherwise prior evidences are there about the HIV status of the rapist or there is an indication as the person is HIV positive prior to the commission of the crime of rape. Thus, as I have mentioned above it is difficult to know the real source of the disease, especially in the criminal jurisdiction where the medico-legal medical practitioners are non-existent.

For instance, see the following hypothetical case:

'TADESE is a model farmer living in countryside. He did not know as he is HIV positive because of he did not made blood test. However, he has committed a crime of rape on AYISHA the woman which is too beautiful among women living in his village. Likewise him, before the commission of such rape crime AYISHA also did not make any blood test. Then after three month AYISHA recognizes that as she becomes HIV/AIDS positive because of crime of rape done on her by TADESE. Then she filled a suit against him.' So, how one can knows that the real intention of the rapist in this kinds of cases. Moreover, the previous literature also seriously enshrined that the inappropriate or overly-broad application of criminal law to HIV transmission creates also a real risk of increasing stigma and discrimination against people living with HIV,⁵ thus driving them further away from HIV prevention, treatment, care and support services. Therefore, it is expected from the legislature of Ethiopia to expand programmes which are alternative to criminalizing the negligent acts of transmission or spreading HIV/AIDS to reduce its expansion as well as to realize the human rights of persons not knowing his HIV status.

2.4. Transmitting HIV in Homosexual and other Indecent Acts

In most western societies, homosexual conduct, if limited to adults and carried out in private, is no longer

¹ See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, Section 4(2)

² See Criminal Code of FDRE Article 620

³ See Proclamation No.1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, Year 1 No.1, 1995, Article 35(4)

⁴ See the FDRE Criminal Code of 2004, Article 620 (4)

⁵ See UNAIDS POLICY BRIEF: Criminalization of HIV Transmission, August 2008, P.3

regarded as morally so blameworthy that it deserves the attention of the criminal law.¹ However, the case is quite different in the criminal jurisdictions of Ethiopian courts. The current criminal code of Ethiopia criminalized both consented types of homosexual and involuntary homosexual acts between the persons of same sex.² Thus, whoever performs with another person of the same sex a homosexual act, or any other indecent act, is punishable with simple imprisonment under the criminal code of the country.

Moreover, with regard to transmitting communicable diseases, the rigorous provision which shall inflict the punishment of rigorous imprisonment from three years to fifteen years, where, the suspected criminal subjects his victim transmits to him a venereal disease with which he knows himself to be infected.³ Whether it is voluntary or involuntary act of homosexual, it is clear under this provision as the suspected criminal has an intention to transmit the communicable through such homosexual deed. Thus, as to this provision, the previous HIV status of the suspected criminal is expected to know his intent to transmit HIV/AIDS or transmitted diseases. The question is what if the person may not know his HIV status before, but only to have same sex? However, this provision remains elusive with regarding to his negligence. Whereas, knowing the person's HIV status and as he has transmitted HIV to the victim is not concurrent unlike the crime of rape,⁴ but only to aggravate the circumstances.

In the case of homo sexual crime also it is difficult to know the real source of HIV/AIDS. Therefore, it needs further evidences of professionals and medico-legal medical professionals to convince the mind of the judges beyond the reasonable doubt. Therefore, except mentioning the aggravating circumstances of the transmission of venereal disease to another person through homo sexuality, Article 630 (2(b)) remain elusive too regarding whether transmission such venereal diseases is intentional or negligently.

2.5. General Critics on Criminalizing Negligent or Unintentional acts of HIV transmission

Most people who transmit HIV either do so not knowing they are infected or not knowing they are transmitting HIV because of virus reasons. The reasons may be because of fear of discrimination and social stigma. Thus, in my opinion, criminalizing HIV transmission is justified only when individuals purposely or maliciously transmit HIV with the intent to harm others. In such cases, the application of criminal law is warranted. Therefore, in my opinion, to extend application of the criminal law to cases where people are negligent or reckless, but do not act with the purpose to harm another person, would be bad public policy.

Here in under, prosecute the suspected criminal under the notional concurrences (article 620(4) and article 514), or negligent acts of transmitting communicable human diseases as mentioned under article 514(3) of the 2004 FDRE Criminal Code, there is no clear legal guidance whether the suspected person is (was) a person who is living in a high risks of HIV infection or not. Group of people such as gay men, sex works, and people who use drugs can be called as a people who are living in a 'high risks' of HIV infection.⁵ In addition, both the 1998 policy on HIV/AIDS, the 2007 Guidelines for HIV Counseling and Testing of Ethiopia remain elusive to prescribe the circumstances in which the person may transmit HIV or Communicable human diseases in unintentional manner. Furthermore, there is no procedural key provision under the 1961 Criminal Procedure Code, to give procedural guidance to entertain in criminalization of unintentional HIV/AIDS transmission.

However, unlike the above mentioned provisions of the FDRE Criminal Code, with regarding to transmission of HIV/AIDS, the Sexual Offences Act of Kenya is more illustrative. For instances, the Sexual Offences Act of Kenya more describe the probability of criminalizing the transmission of HIV by saying that '...who is and is aware of being infected with HIV...'; and '...take all reasonable measures and precautions to prevent the transmission of HIV to others.'⁶

Moreover, some study also shows that instead of applying criminal law to cases beyond malicious intent and actual transmission, states should focus on empowering people living with HIV to seek HIV testing, disclose their status, and practice safer sex without fear of stigma and discrimination.⁷ Thus, it means countries should not criminalize unintentional HIV exposure or transmission, but instead, they should take positive steps to increase evidence-based HIV prevention and treatment efforts. As I have mentioned above, it is hard for Public Prosecutors to proof the cases of unintentional transmission of HIV/AIDS beyond reasonable doubt in realization of the legal obligation to convince the mind of the judge. Thus, it is obvious that there is a visible slits of laws, procedures and policies with regarding to illustration of how unintentional acts of transmission of HIV can be criminalized, the positional benefits or risks to criminalize such unintentional acts in realization of the prevention

¹ For instances, in Britain, where a statute of 1967 abolished the criminality of this type of homosexual behaviors, the matter was fully discussed in the Report of the Wolfenden Committee, which recommends the abolition of the offence by a majority of twelve to one.

² See the FDRE Criminal Code of 2004, Article 629, Article 630 and Article 631 respectively.

³ See the FDRE Criminal Code of 2004, Article 630 2(b))

⁴ See the FDRE Criminal Code of 2004, Article 620(4)

⁵ HIV Testing: Evolution of HIV testing policy and technology in Canada, Canadian HIV/AIDS Legal Network, 2007, P.1.

⁶ ACT NO. 14 of 2006 - HIV and AIDS Prevention and Control Act of Kenya, Part IV - Testing, Screening and Access Health Care Services, 2009, Article 24(1(a&b)), P.10

⁷ See 10 Reasons to Oppose Criminalization of HIV Exposure or Transmission: Priscilla Misihairabwi-Mushonga, Zimbabwe, 2007, P.10

of the prevalence of HIV/AIDS and on how to protect the human rights of person living with HIV.

In general, article 620(4) cum article 514 and article 514(3), which are by means of “omission,”¹ criminalize unintentional acts of transmission of HIV, may result for failure to get an HIV test and for not knowing one’s own self status, and indirectly seem legal provisions which are making testing of HIV/AIDS obligatory. In my suggestion, though the legislature and the policy makers may think that criminalization of negligent or unintentional acts of transmission of HIV/AIDS may deter the person not to transmit it or reduce its transmission, but in my opinion, I strongly believe applying these provisions of criminal code for such unintentional acts may not incapacitate, rehabilitate or deter offender as the philosophy of other criminal punishments. Thus, it is expected from the legislature to patch or sew the slits that exist in the Criminal Code, Criminal Procedure and the concerns of the 1998 Policy on HIV/AIDS of Ethiopia. In addition, the 2007 Guidelines for HIV Counseling and testing must over checked with regarding to the protection of the rights of persons who do not know or fear to know their HIV status. Therefore, I will to recommend the legislature must work to harmonize the criminal laws along with the Policy on HIV/AIDS by sewing their slits by striking the balance between controlling the prevalence of HIV and the protection of human rights of person who do not knowing their HIV status for many reasons.

Part II: Slits of the Law’s on compulsory testing for HIV and Constitutionality of such testing in Criminal Proceeding of Ethiopia

3. Slits of the Law’s on Compulsory Testing for HIV

The administration of the criminal justice system tries to strike a balance between the search for truth and the fairness of the process. To this ends, the 1995 Constitution of FDRE government have a legal articles which are serving as a watch tower and standards in examinations of other subordinate laws and the individuals and impose various legal burdens on the state. Article 9(1) of the FDRE Constitution says *‘The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.’*² Based on the allegation received police are duty bound to investigate the crime.³ However, now day by means of the Business Process Re-engineering (BPR) the investigative police officers are working along with public prosecutors to investigate criminal acts.⁴

3.1. Under the 1961 Criminal Procedure

Prior to the 1961 of the Criminal Procedure Code, there was no systematic body of legislation in the field. Only a few proclamations enacted early during the post Liberation era were in existence.⁵ However, it has also civil law inclination; the code has been mainly influenced by common law legal system. Moreover, the lacunas or legal black holes can be observed with the detail discussion of the different subject matters covered in the code. Thus, its drafting is undergoing, the present courts of the country is using the provisions of this code. These could be because of the delaines of the legislature to amend immediately to amend this code along with the 2004 new criminal code of the country. Among these lacuna lack of the provision dealing with setting aside the previous given judgment is the one.

Furthermore, Ethiopia enacted comprehensive criminal policy in 2011. This policy also emphasize that the with regarding to the social, economic and political life of the modern Ethiopia, the laws enacted previously laws lag behind from the scope of current criminal justice system; lacks transparency, and have fundamental legal black holes when checked over by the 1995 FDRE Constitution.⁶ As I have mentioned above, in the criminal justice not having comprehensive procedural laws which fits the modern philosophy of criminal justice and medico-legal personnel who are well trained on investigations of crimes starting from crime scenes, it is difficult to realize the human rights of suspected criminals. Lacks of these may ;develop the learned trend in most criminal justice proceedings, not to reject evidences obtained through coercion, not to presume the suspects to be presumed innocent until proved guilty by the court of law, and to realize the principle of convincing the minds of the judges beyond reasonable doubts. Thus, in such slits of the laws which deviates from the updated policies makes the miscarriage of justices which may in turn create the room of blame game among the professionals of justice organs.

¹ See the FDRE Criminal Code of Ethiopia, 2004, Article 620(4) , Article 514 and Article 514(3),

² Proclamation No.1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, Year 1 No.1, 1995, Article 9(1).

³ Criminal Procedure Code of the Empire of Ethiopia, 1961, Proclamation no 185, Neg. Gaz., No 1. Art. 11 -17

⁴ Ministry of Justice & Region Justice Bureaus (Justice Sectors) Five Years: (2010/11-2014/15) Strategic Plan, P.14

⁵ Stanley Z. Fisher, *Ethiopian Criminal Procedure: A Source Book*, (Addis Ababa: Haile Sellassie I University, 1969), pp. ix-xii.

⁶ የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ፡ ፍትሕ ማኒፊጎቲር፡ □□□□ 25/2003 □□□ □□□I. Can be accessed on; <http://ethcriminalawnetwork.com>. This policy is to make administration of criminal justice very responsive, transparent and faire in realization of the human rights of the suspected criminals as to the wordings of the Constitution. In addition, it is this policy which obliged the investigative police officers to work jointly with public prosecutors. However, the justice personnel are using still the lag behind criminal procedure of 1961, which cannot walk with the provisions of the 1995 of FDRE Constitution.

Moreover, when come to the point at hand, the criminal procedure has legal provision which have the implication to compel the accused of crime to make blood test. In civil cases like vaccination and other medical examinations the law compels any persons to undergone such medical examinations for the public interests.¹ This article reads as follows:

Art. 34(1). - Physical examination

*'Notwithstanding the provisions of Article 20 Civil Code where an investigating police officer considers it necessary, having regard to the offence with which the accused is charged, that a physical examination of the accused should be made, he may require a registered medical practitioner to make such examination and require him to record in writing the results of such examination. Examination under this Article shall include the taking of a blood test.'*²

This legal provision have authorize the investigative police officer to send the accused to a registered medical practitioner to know the status of the accused in relation with communicable human disease which can be transmitted through blood. That the reason why this legal provision says, such physical examination is obligatory and shall include blood test as mentioned above. However, this legal provisions is remain silent with regarding to the precaution with which such blood testing may be carried to respect the dignity and human rights of the accused person.

It obvious, that the consequences of HIV testing for those who test positive remain serious personally, socially and legally. Thus, counseling is important to help mitigate the most negative consequences of disclosing HIV status. However, this law is also elusive with regarding what makes the investigative police officer to compel the accused to undergo such examination of blood test after the commission of the crime. This law also uses the non-mandatory word 'may'³ to give order for examination of blood test of the victim of the criminal act with the consent at a registered medical practitioner. Thus, the wording of this provision is truly depart from the primarily concern of the Policy on HIV/AIDS of Ethiopia. It says nothing about the care in ordering such order of blood test to know the status of the suspected criminal or the accused of committing crime. Therefore, this law makes HIV/AIDS testing of the accused without having such room for the above mentioned lacunas and without giving a due care for the human rights of the accused. Thus, the provision inclines toward the respecting of the right of the victim of crime, while ignoring the human rights of the accused. However, except the critical medical evidence of trained medico-legal practitioner which can convince the minds of legal eagles beyond reasonable doubt, it is difficult to know the real transmitter of HIV and become the victim in crime of rape and related crimes. Moreover, the concern of criminal justice is not only to realize the rights of the victim, but also to protect the rights of the accused of crime. Hence, article 34 of the criminal procedure code of Ethiopia is clearly has divergent view toward this philosophy and concerns. Thus, it is expected from the legislature to sew this slits of laws and also the executive organ of the government must create awareness of justice personnel toward the realization of the rights of victim of crime and protection of the rights of the accused persons since the country has an international obligations in domestication of international legal instruments for which it is signatory.⁴ Moreover, the current criminal justice's policy of Ethiopia, gives the power to investigate criminal acts for both the police investigators and the public prosecutors jointly.⁵ Thus, as to the policy framework they have obligation to use the power prescribed under article 34 of criminal procedure code jointly for the same objective. Thus, where he considers it necessary, having regard to the offence with which the accused is charged, an investigating police officer,⁶ along with public prosecutor,⁷ can order the compulsory HIV/AIDS testing of the suspected criminal to a registered medical practitioner and collect the result in writing from the said medical practitioner. The criminal procedure code allow and gives the power to order the accused to undergo compulsory HIV/AIDS testing for police investigating officer, whereas, the policy on HIV/AIDS do not allow such compulsory testing and gives it for no one.

¹ Proclamation No. 165 of 1960, The Civil Code of The Empire of Ethiopia, Negarit Gazeta, Extra Ordinary Issue, 19th year No.2. Article 20. It is clear that even if the person may refuse to make or undergo such medical examination in civil cases one can take presumption, however, such kinds of taking presumption is not possible in criminal cases.

² Criminal Procedure Code of Ethiopia: PROCLAMATION No.185 OF 1961; Chapter 2. - Police Investigation, Article 34(1).

³ See Criminal Procedure Code of 1961, Article 34(2)

⁴ See FDRE Constitution of 1995, Chapter Three: Fundamental Rights and Freedom, Article 13(2). This article says: '*The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.*'

⁵ See the Amharic Version of the FDRE Criminal Justice Policy of 2011, Section 3.3(a), P.18. This document can be accessed on <http://ethcriminalawnetwork.com>

⁶ See Criminal Procedure of 1961, Article 34(1)

⁷ See the Criminal Justice Policy of Ethiopia, 2011, Section 3.3(a), P.18. The Ministry of Justice & Region Justice Bureau s (Justice Sectors) has issued five years (2010/11-2014/15) strategic plan on July 2010. Under this strategic plan, they have explained that 'during the previous strategic plan term criminal investigation, by the police and the public prosecutor, was not effectively undertaken so as to meet dead-lines of the standard time. There had been backlog of works. Due to this, citizens' constitutional right was not ensured. Citizens' used to spend on ample-time without responses to their cases. To curb these problems and to earn credibility from the state and the public, the police and the public prosecutors had to study the BPR (Business Process Re engineering) in correlation. P.24

Question: What if the suspected criminal or the accused refuse the order to make blood test of his HIV/AIDS status?

Article 34(1) of the 1961 of the Criminal Procedure Code of Ethiopia says nothing about refusal of making such compulsory or mandatory blood test. This law also never clarifies as whose authority to give such compulsory HIV testing in criminal cases. However, this law says ‘*where an investigating police officer considers it necessary,*’¹ such compulsory blood test can be ordered. Thus, the law remains elusive whether the investigative police officer can give such order? Or fill the claim for such order before the court of law with sufficient causes? Thus, this law does not answer these questions. As to the above heading, another critical question is what if the accused refuse to take such blood test when orders? Do the police or the judge take presumption as the accused is the real source for transmitting the said disease in the criminal conduct? I think to answer these questions; one has to know the philosophy of criminal law. For instance, the new criminal code of Ethiopia clearly prohibits creation of crime by analogy. Thus article 2(3) - which deals with the principle of legality says, ‘*the Court may not create crimes by analogy.*’²

In my opinion the competent concerned organ which is impartial to realize the right of the accused is the court of law. Thus, the justice can be deemed fair if and only if the judges may order the accused to take such compulsory HIV testing with all the precautions and care in counseling the person going to undergo blood test as mentioned on the 1998 Policy on HIV/AIDS of Ethiopia. In addition, without the contradiction of the provisions of the FDRE Constitution, it is expected from the legislature to take legislative measure which make such compulsory HIV testing is lawful and respect the human rights of the accused. It is clear this legal slits can be sewed only in taking such legislative measures, but not by such outdated provision of criminal procedure code of the 1961 of Ethiopia.

The provisions of both criminal code and criminal procedure have such slits with regarding compulsory blood testing. Thus, for an intentional transmission of HIV/AIDS to uninfected individual it is expected from the legislature to take legislative measures with regarding to criminalization of such acts and determination of the competent concerned and impartial authority to order those suspected criminals or accused persons to undergo compulsory HIV/AIDS testing. However, it is expected from the legislature to avoid the provision which criminalize the negligent acts or unintentional HIV transmission.

In addition, under FDRE Constitution the evidences that are obtained through coercion from arrested person have no value.³ In addition, as to the wording of the Constitution, even during preceding the accused person has the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against himself.⁴ Thus, any compulsory deed that may make on the arrested person by investigative police officer to testify about him in force is invalid. Rather, it is the court of law that can order even for compulsory HIV/AIDS in criminal cases in a manner that may respect the human rights of the suspected criminal. However, the rights of suspected criminals are not exclusive or out of limitation. Such right can be limited by public officials or by courts of law in some compelling circumstances and in accordance with specific laws enacted to safeguard the prevention of crime or the protection of health, public morality or the rights and freedoms of others.⁵

Moreover, in doing so the suspected criminals or the accused persons for the cases brought against him for transmitting HIV or communicable human diseases in sexual related offences have the rights to be counseled and represented by lawyers of their choices either in their own expenses or even as the case may be by the state expenses.⁶ Hence, all the legislations and guidelines that must enacted or issued by the competent concerned authorities of the county in accordance with these Constitutional legal bedrocks and both the regional states and federal tiers of the legislature or officials have the legal duty to uses the Constitutional legal bedrocks as a parameter to take legislative measures, to enact laws, directives or guidelines with regarding to controlling and prevention of HIV/AIDS. Therefore, it is expected from the 1998 Policy on HIV/AIDS and the 2007 Guidelines for HIV Counseling and Testing to fulfill the above mentioned fundamental principles to make the criminalization of unintentional transmission of HIV and to make compulsory testing of HIV/AIDS in criminal cases constitutional.

¹ See, Criminal Procedure Code of Ethiopia, Article 34(1)

² The Criminal Code of the Federal Democratic Republic of Ethiopia: Proclamation No.414/2004, Article 2(3).

³ See the 1995 FDRE Constitution: Chapter three, Fundamental rights and freedom, Article 19(5). This article says that ‘*Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.*’

⁴ See the 1995 FDRE Constitution: Chapter three, Fundamental rights and freedom, Article 20(3).

⁵ Proclamation No.1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, Year 1 No.1, 1995, Article 26(3)

⁶ Proclamation No.1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, Year 1 No.1, 1995, Article 26(3)

3.2. Under the 1998 Policy on HIV/AIDS of Ethiopia

As I have mentioned above, it is now more than two decades since the HIV/AIDS epidemic started in Ethiopia. Thus, the country responded to the HIV/AIDS epidemic as early as 1985. Furthermore, the FDRE Constitution is mentioning in a clear language that the State has the obligation to allocate an ever increasing resource to provide to the public health. In doing so, under its heading of mentioning the powers and functions of the Federal Government, the Constitution has mentioned as ‘the government shall have the duty to establish and implement national standards and basic policy criteria for public health.’¹ Thus, it is obvious that to the extent the country’s resources permit, policies shall aim to provide all Ethiopians access to public health. Thus, Ethiopia comes out with comprehensive Policy on HIV/AIDS in 1998. This policy has framed not only to regulate the prevalence of HIV, but also to save the persons living with HIV/AIDS from social discriminations and stigma.

A national HIV/AIDS Policy was approved in 1998 with the objective of providing an enabling environment for the prevention of HIV and mitigation of the impact of AIDS.² Thus, this Policy is based its roots on two basic premises. These are the prevention and control means,³ of HIV/AIDS. By prevention means taking appropriate measures to stop the transmission of HIV to uninfected individuals. These appropriate measures include the policy measures and legal measures. In my opinion, the legal measures in turn may include the criminalization of HIV/AIDS non-disclosure where the real source of the virus may know his HIV status. Furthermore, the control means monitoring the incidences of HIV/AIDS so as to abate the impact of disease in the community. This includes the provisions of medical treatment for opportunistic infections and psycho-social support people living with HIV/AIDS. Among the measure that has taken by the legislature is the formulation of 1998 Policy on HIV/AIDS of Ethiopia. Thus, the policy has legal provision which is dealing with HIV testing, and screening.⁴ In addition, the policy strictly is mentioning that HIV and screening shall be under taken by health institutions which are organized for the purpose of testing and screen with permit of such tasks.

Here under my critics I only want to check over the divergent view or slits that exists the policy itself and the law that criminalize the acts of transmitting or spreading communicable human diseases (i.e. HIV/AIDS), and also article 34(1) of the 1961 Criminal Procedure Code of Ethiopia which allows the police to send the accused to a registered medical practitioner for blood test. However, the Policy has no provision or section which allows the compulsory testing of HIV/AIDS in criminal proceedings.

Moreover, HIV Counseling and Testing (HCT) is the key entry point to prevention, care, treatment and support services, where people learn whether they are infected, and are helped to understand the implications of their HIV status and make informed choices for the future. With regarding the testing and screening of HIV, the 1998 Policy on HIV/AIDS of Ethiopia advocates as it shall made by health institutions which are organized for the purpose of testing and screening HIV. And also such testing must be made with a full consent and shall be encouraged along with counseling services.⁵ Thus, to be beneficial counseling and testing must be voluntarily: people should be encouraged to seek but not be coerced into testing, only with full understanding of associated benefits, implications and consequences.⁶

HIV testing without consent is almost never justified. However, the 1998 Policy on HIV/AIDS of Ethiopia has some exceptional circumstances in which mandatory HIV testing and screening is allotted. The Police justify compulsory HIV testing only for two exceptional circumstances. The policy mentioned to be recruited for the job of pilots-civil aviation and air force such mandatory HIV testing is expected since the nature of the occupation requires it to do so.⁷ In addition, the Policy emphasizes that all donated blood shall be screened prior to transfusion. Therefore, the Policy only advocates for mandatory testing and screening for these two cases. However, the policy speaks no where about compulsory or mandatory testing in criminal law cases. Though, I strongly believe that the court of law can give an order of compulsory HIV/AIDS testing in criminal law cases for the benefits of public and to prevent the prevalence of the communicable human diseases, the 1998 Policy on HIV/AIDS says nothing with regarding compulsory HIV/AIDS testing. However, some countries like Kenya have enacted the Sexual Offences Act to criminalize the intentional HIV/AIDS transmission and

¹ Proclamation No.1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, Year 1 No.1, 1995, Article 51 (2) and 90(1).

² Government of the Federal Democratic Republic of Ethiopia. 1998. “Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia.”

³ See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, Section II, P.24.

⁴ See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, Section 3.

In a joint policy statement, UNAIDS and WHO recommend distinguishing the following types of HIV testing: (1) voluntary testing (also referred to as client initiated testing) with pre- and posttest counseling; (2) diagnostic HIV testing whenever a person shows symptoms that are consistent with HIV-related disease or AIDS; (3) routine offer of HIV testing by health care professionals for patients assessed for sexually transmitted infections, for pregnant women, and for asymptomatic people in settings where HIV is prevalent and antiretroviral treatment is available; and (4) mandatory HIV screening of all blood that is destined for transfusion or the manufacture of blood products.

⁵ See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, Section 3(1 and 2).

⁶ Guidelines for HIV Counseling and Testing in Ethiopia: Federal HIV/AIDS Prevention and Control Office Federal Ministry of Health, July 2007, P.10

⁷ See Policy on HIV/AIDS of the Federal Democratic Republic of Ethiopia, August 1998, Section 3.3

incorporate the compulsory testing under the act.¹

In addition, though the government of Ethiopia comes out with comprehensive Guidelines for HIV Counseling and Testing in 2007 to scale up the HIV testing.² The guideline mentioned that HIV is a blood-borne pathogen readily spread by blood transfusion or tissue/organ transplantation; therefore it is mandatory to test blood or tissue for HIV before transfusion/transplantation/grafting. As to the guideline, compulsory HIV testing can only be performed for specific reasons with individuals or groups when requested by the court. Mandatory screening of donated blood/organ/tissue is required prior to all procedures involving transfer of body fluids or body parts, such as artificial insemination, corneal grafts and organ transplant. It is clear that in all cases of compulsory HIV testing, individuals shall be informed of test results. Moreover, the guideline mentioned that mandatory HIV testing is a violation of human rights, only permissible in exceptional cases by order of a court of law. Thus, donors should be specifically informed about HIV testing of donated blood/organ/tissue.³

However, as I have stated above, likewise the Policy on HIV/AIDS of Ethiopia, the Guidelines for HIV Counseling and Testing enacted in 2007 by the country says nothing about the compulsory HIV/AIDS in criminal law cases. The Guideline advocates only the specific cases in which the court may order such compulsory cases of donation of blood, tissue and the like. However, the day to day practices of the judges of the court is tight with criminal cases which are related with rape and sexual offences. Therefore, both the 1998 Policy on HIV/AIDS and the Guideline for HIV Counseling and Testing of 2007, remain elusive with regarding compulsory testing of HIV/AIDS in criminal cases.

In addition, both the Policy and the guideline say nothing about the right to be represented by the lawyers of their choice in any criminal cases that may instituted against them. It is clear that people who are accused of transmitting HIV/AIDS or communicable human diseases need not only the counseling of medical personnel, but also they need legal counselor for the criminal cases they may be accused of. Moreover, for not having such legal counseling and being prosecution for unintentional transmission of HIV/AIDS or Communicable human disease the suspected criminals may result for psychological discrimination and stigmatization. Thus, stigma and discrimination undermine the ability of individuals and communities to protect themselves. The fear of stigma and discrimination also discourages people living with HIV from disclosing their HIV infection, even to family members and sexual partners.⁴ Therefore, in implementing the 2007 guideline, the 1998 policy and any of court interpretations the concerned public officials have to commonly found enough to encompass the concern of controlling and prevention of the prevalence of HIV/AIDS by respecting the human rights of persons that may living in a high risks of HIV infection and persons that are accused of transmitting HIV/AIDS.

Furthermore, though I believe in the availability of compulsory HIV/AIDS testing in laws and in policy as to the manner which respects of the human rights of the suspected criminals for transmitting communicable human diseases to others, but the policy and the guideline remain elusive. The 1961 Criminal Procedure Code of Ethiopia by its side has a legal provision which seems to authorize the investigative police officer to order the accused person with sexual offences to registered health institutions. The 1995 FDRE Constitution also on its side has strong messages for all lawmakers and law enforcers to protect the human rights of the arrested and accused persons. Therefore, there is a clear slits of laws which needs to be sewing. Therefore, it is expected from the legislature to come with uniform legal standing with regarding to compulsory HIV/AIDS testing in criminal cases to realize the concern of the police which is to prevent the prevalence of HIV and to protect the human rights of persons living with HIV/AIDS.

3.3. Constitutionality of Compulsory Testing for HIV/AIDS

The 1995 Constitution of Federal Democratic Ethiopia is legal bedrock for all domestic laws of the country.⁵ All laws, polices and decisions of any organ of state shall be check over within the range of the Constitutional eyeshot. Article 51(3) of the Constitution of FDRE, provides the Federal Government of Ethiopia with the power to establish and implement national standards and basic policy criteria for public health. Thus, article 90(1) of the same Constitution also mentioning as the policies shall aims to provide all Ethiopians the right to access to public health. This provision obliged the states to realize social objectives in the area of health care to the extent

¹ ACT NO. 14 of 2006 - HIV and AIDS Prevention and Control Act of Kenya, Part IV - Testing, Screening and Access Health Care Services, Article 13(3) *Date: 2009, P.10. See Article 13(3). 'Notwithstanding the provisions of subsection (1), a person charged with an offence of a sexual nature under the Sexual Offences Act, 2006 may be compelled to undergo an HIV test.'*

² See Federal HIV/AIDS Prevention and Control Council /Federal Ministry of Health, *Guidelines for HIV Counseling and Testing in Ethiopia* (2007)

³ Federal HIV/AIDS Prevention and Control Council /Federal Ministry of Health, *Guidelines for HIV Counselling and Testing in Ethiopia* (2007).

⁴ UNAIDS BEST PRACTICE COLLECTION/ HIV-Related Stigma, Discrimination and Human Rights Violations: Case studies of successful programmes, 2005, P.5

⁵ See Article 9(1) of the 1995 Ethiopian Constitution which provides: 'The constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this constitution shall be of no effect.'

the country's resources permit.

However, this provision does not have any obligatory ground over the state to take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right. But article 12(2)(c) of the ICESCR recognizes that prevention, treatment and control of epidemic, endemic, occupational and other diseases are one of the steps to be taken to realize the right to health. It clear that the Ethiopia's obligation to take reasonable legislative and other measures must accordingly is targeted at both preventative and curative health care services. Moreover, the country has the obligation to formulate the policies to make the necessary health care services accessible and available to everyone. However, the right of access to health care services is qualified by the term progressive realization. In addition, this right is also qualified by resource availability.¹ Among the policies on the right to access is the 1998 Policy on HIV/AIDS of Ethiopia is the one which more focused on how to control and prevent the prevalence of HIV within the scope of giving a due respect of the human rights of persons living with HIV/AIDS.² The Policy moreover advocates for the voluntary testing for HIV. However, as to the 1998 Policy on HIV/AIDS of Ethiopia, mandatory HIV testing is a violation of human rights, only permissible in exceptional cases such as the mandatory testing is allowed for job recruitment of being purposes where the nature of the a pilots- civil aviation and air force and also be done on all voluntary donations of blood, tissue and organ donors before transfusion or transplantation.³

Furthermore, there are no indicators provisions under both the Constitution and the 1998 Policy on HIV/AIDS with regarding the obligatory provisions for testing HIV/AIDS or other communicable human diseases in criminal cases. UNAIDS has recognized that voluntary counseling and testing for HIV/AIDS is a critical entry point for prevention and care of the infection.⁴ In spite of the aforementioned policy framework in respect of voluntary HIV testing, there are still the expected circumstances which are facing the day to day works the judges as such compulsory testing for HIV is undeniable facts and the existing policy or guidelines must have a system of compulsory HIV testing in criminal cases too. In my opinion, I believe that there should be compulsory HIV testing of persons charged or suspected of having committed a sexual offence during which HIV may have been transmitted. It also supports the right of alleged victims of such offences to be informed of the HIV test results.⁵

However, the order of such compulsory testing must base on a balancing of the rights of the victims of sexual violence against an arrested suspect's rights of privacy and bodily integrity. Thus, in criminal case that there is a compelling ground under the FDRE Constitution for curtailing the latter's rights in order to enable his accuser to know his H IV status.⁶ As above mentioned, there are a clear divergences among article 34(1&2) of the 1961 criminal procedure of Ethiopia, the provisions of the new criminal code, and the 1998 Policy on HIV/AIDS of Ethiopia, from the eyeshot of the Constitutional standards. Thus, the matter of compulsory testing for HIV/AIDS in criminal cases which is to ensure the public interests is becoming elusive with regarding the existences of visible law or policy as well as on how, when, and whom are allowed to give the compulsory order of testing for HIV in such cases. Moreover, in my suggestion, it is expected from legislations, the policy and the guidelines to solve the greatest challenges that may faces the justice personnel on the constitutionality of compulsory testing for HIV/AIDS or other communicable human diseases in criminal cases. In addition, the policy framers have to solve the ambiguous views of whose power to give an order of compulsory testing HIV in criminal cases and the procedure of giving such order. It must create a chance to the public health workers the ground to apply for a court order when a person has breached a standing legal duty set out in public health law.

4. Conclusion

Under the current criminal investigation of Ethiopia, the public prosecutors and investigative police officer are working on crime investigation starting from the crime scene. Thus, to curb the problems of delays of cases, to ensure fair and speedy criminal proceedings the police and the public prosecutors are working in co-relation.⁷ Moreover, it is expected from the legislature and policy framers to check over the followings slits of laws and policies.

- Article 514(3) of the new criminal code which criminalizes the negligent acts of communicable human diseases or HIV/AIDS is not illustrative with regarding the group of people that may prone for such kinds of

¹ The Constitution of FDRE, 1995, Article 90(1)

² The Policy on HIV/AIDS of Ethiopia, 1998, P.23

³ The Policy on HIV/AIDS of Ethiopia, 1998, Section 3.3; 3.5 and 3.6

⁴ Voluntary Counselling and Testing. UNAIDS Technical Update. May 2000. *Best Practice Collection*. 6.

⁵ The Criminal Procedure Code of Ethiopia, 1961, Article 34(2)

⁶ The Constitution of FDRE 1995, Article 26(3). This Article says '*Public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.*'

⁷ Ministry of Justice & Region Justice Bureaus (Justice Sectors) Five Years (2010/11-2014/15)/ Strategic Plan "Justice in a Changed Management, Employees and Institution," 2010, P.24

prosecution.¹ In addition, there must be a procedure which save people living in high risks of HIV infection zone (i.e. gay men, sex workers and drug addicted people) from the stick of this provision, and create demarcation line between intentional and unintentional transmission of HIV. Otherwise, such gross blame game for unintentional acts of transmission of HIV may results for the prosecution of many more people and overburdened the rooms of the courts with cases. Due to lack of technologies and trained medico-legal professionals, these issues remain unsolved under Ethiopian criminal justice.² In such a case it is difficult to say the purpose of punishment hits its destiny. Thus, in my suggestion it is expected from the government to uses alternative mechanisms to criminal prosecution.

- In addition, compulsory testing of HIV/AIDS or blood tests which is mentioned under article 34(1) of the Criminal Procedure of 1961:
- did not mentions as any efforts primarily to get consents from the accused in the criminal cases
 - does not leave room for the counselors to advice the accused and to take any care in such compulsory testing;
 - does not look toward the potential benefits or risks of compulsory HIV testing and protection of human rights of untested person. The court is impartial to give such compulsory order when it is needed. Thus, the court may give an order for such forced HIV/AIDS testing only if the person who filled such application needs for justice, been exposed to a bodily substance as a result of being a victim of crime; or while providing emergency health care services or emergency first aid to the source person; and police officers are also eligible to apply for testing orders to the court of the law.³ It is true in the case of Ethiopia, the Constitution advocates to bring all justifiable matters to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.⁴ However, what article 34(1) of Criminal Procedure Code is talking about is different, and
 - there is a legal slits which needs to be sewing in between article 34(1) of the Criminal Procedure Code and article 19(5) and article 20(3) of the 1995 FDRE Constitution.

Furthermore, the 1998 Policy on HIV/AIDS and the 2007 Guideline for HIV Counseling and Testing remain elusive with regarding to the compulsory HIV testing in criminal cases. However, its availability is expected in strict senses only to realize public interests. Therefore it is expected from the legislatures to sew these slits of laws, policy and guideline in relation to compulsory HIV testing in manner which fit the Constitutional standards.

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¹ See the FDRE Criminal Code of Ethiopia,2004, Article 514(3)

² An interview made for Dr.Kahalid, a specialist Doctor at Dill Chorra Referral Hospital and lecturer at Dire Dawa University School of Medicine, on 20 August, 2016, 2:30 PM

³ Government of Saskatchewan. News release: Mandatory testing legislation proclaimed, 17 October 2005, on-line via www.gov.sk.ca/news/.

⁴ See the FDRE Constitution of 1995, Article 37(1)