THE LAW OF AFFIRMATIVE ACTION IN ETHIOPIA: A FRAMEWORK FOR DIALOGUE

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Introduction

It has been more than two decades since affirmative action (AA) was recognized in the FDRE Constitution.[1] The recognition has arguably underscored the urgency to accelerate the equality of the marginalized, discriminated and those subjected to historical injustice. General for immediate application, the provisions of AA in the FDRE Constitution have required the issuance of policies and laws that would allow implementation in specific instances. Hence, following the Constitution, few ordinary laws and policies on AA have been issued. Several international human rights instruments with both obligatory and permissive clauses of AA have been ratified. What is then AA (and its measures) in Ethiopia arising from these laws and instruments? That is the core issue of this article. By making a comparative analysis of national laws, international instruments, and where necessary the literature, the article provides the national legal framework of AA to assist dialogue on the subject.

By exploring the normative framework, the article seeks to achieve the following objectives: to outline the normative framework of AA, to initiate dialogue among policy makers on the implementation and reform of AA, to clarify ideas and programs of AA that may enrich the dialogue, and to lay a foundation for future empirical research presently lacking in the practice of AA in Ethiopia.

With these objectives in mind, the first section of the article provides skeletal definition of AA, which will be further elaborated in subsequent sections. Drawing on international and national instruments, sections 2 and 3 will outline the laws of AA in Ethiopia. Because of their significance to Ethiopia's human rights law, international human rights instruments adopted by Ethiopia

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[1] This is not to mean that the FDRE Constitution is the first to recognize AA in Ethiopia. For example, Article 36 of the 1987 Constitution of the Peoples' Democratic Republic of Ethiopia provides for AA for women to ensure equal participation of women with men in political, economic, social, and cultural affairs, particularly in education, training, and employment.

will be explored together with the Constitution and some ordinary national laws providing for AA. Sections 4 to 7 will explain the main components of AA: the temporary nature of AA, target groups for AA, and measures of AA. After a brief outline of arguments against and in favour of AA, the remaining sections will explore the role of the state, private sectors, and empirical evidence in the law and practice of AA. Finally the article will provide conclusions and recommendations that may be useful in the dialogue of AA in Ethiopia.

At the outset it should be clear that the article does not deal with implementation of AA. Two reasons have contributed: first, as already indicated, legal analysis is the principal objective of the article. To assess the existing legal framework, one need not consider the actual application of AA. But this is not to say that practices in AA are no use for normative analysis. This evokes the second reason, which is lack of national empirical research outputs on AA. Evidence on implementation of AA is rare to come by. As a result, general statistics and hypothetical facts as necessary are used to illustrate points under consideration.

1. What is Affirmative Action

1.1 Definition

The meaning of AA has not always been clear as it appears at first. In the existing literature, several reasons have contributed to the misunderstanding concerning AA. One major source of misunderstanding has been the existence of diverse laws and policies under the same name AA. As Professor Appelt puts it, the uncertainty about AA comes mostly "from the vast array of often inconsistent practices and policies that fall under that rubric."[2] For example, a diligent effort by a government to reach out potential minority employees through notices targeting this group may be considered AA equally with the government's attempt to reserve a percentage of available positions to the same group. Conversely, the use of a variety of terms for similar AA laws and practices has also been another factor adding to the ambiguity of AA. Using the term *temporary special measures* for policies and practices that are almost the same with measures of *affirmative action* is an example (see Section 1.3). Likewise, the use of a term for a program of AA as synonymous with the whole AA is another reason adding to the confusion. For example, the use of

[2] Erna Appelt, *Affirmative Action: a Cross-National Debate* in Erna Appelt and Monika Jarosch (eds.), Combating Racial Discrimination: Affirmative Action as a Model for Europe (2000), p.8

"quota" in place of AA, when actually quota is just one rare form of AA, typifies this misunderstanding. Indeed this latter characterization of AA as quota is sometimes a deliberate distortion by some opposed to AA. Instead of providing thoughtful treatment of AA, some tended to label AA as quota making AA incorrectly appear a contradiction to merit.[3]

With the aim of identifying the general content of AA for later sections of this article, which will clarify this confusion, a working definition of AA is necessary. As a matter of fact, various definitions are attributed to AA. For this article, two general definitions, which the writer believes are comprehensive enough for a dialogue in AA, are presented:

> Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.[4]
>
> and
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> AA can be defined as attempts to make progress towards substantive rather than merely formal equality of opportunity for those groups such as women or racial minorities that are currently underrepresented in significant positions in society by explicitly taking into account the defining characteristics – sex or race – which have been the basis for discrimination.[5]

Though worded differently, the definitions provide elements of AA that substantially coincide. The joint reading of these definitions provides a fairly complete list of key components forming AA. These key components are *measures*, the *temporary* character of these measures, *underrepresentation* as a cause for AA, *groups* targeted by laws and practices of AA, and substantive or effective *equality* as the final aim of AA.

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[3] See Section 8.2 below on the argument based on merit.

[4] Marc Bossuyt, Prevention of Discrimination: The Concept and Practice of Affirmative Action, UN Doc E/CN.4/Sub.2/2002/21, para.6. This is a report submitted by Mr. Marc Bossuyt, Special Rapporteur on AA, in accordance with Sub-Commission Resolution 1998/5. It may be taken as fairly representing the theory and practice of AA in the world. In the report, the Special Rapporteur has expressly acknowledged the "substantive replies" by more than 20 governments for a list of questions on theory and practice of AA, which the Special Rappoteur took into account in the preparation of the report. There were also consultations with international organizations and non-governmental organizations that may have enriched the report.

[5] Appelt, cited above at note 2, p.8

For the sake of preliminary understanding, *measures* refer to legislative or other actions in economic or social affairs, which allow a positive advantage such as attending a university education or getting employment or business opportunity.[6] *Temporary* nature dictates the provisional nature of AA that ends with the expiry of a specified duration or the achievement of a goal. *Target groups* are those identified on the basis of sex, ethnicity or any other factor to benefit from measures of AA. *Underrepresentation* as a basis for AA indicates the existence of unjust situation where social and economic benefits are not equitably distributed. For example, a one-to-ten representation of women-to-men in the highest executive positions in a government may be an unfairly disproportionate representation for women. Substantive e*quality* or equality in law and in fact is the objective AA. Whether in employment, business opportunity, or political decision making, *equality* is the final aim of measures of AA. These components will be analyzed at length in subsequent sections of this article after outlining the legal framework of AA. However, the relationship of equality and AA, which is at the heart of any dialogue on AA, will be noted in the remaining paragraphs of this section.

1.2 Equality and Affirmative Action

It is possible to imagine an ideal situation where all humans are equal; not just in constitutions or ordinary laws; not only in education or in parliamentary seats; not only in government or international organizations; equality in all aspects of life: social, economic, and political. It is also easy to imagine different traits of humanity, irrespective of which all are equal: sex, race, skin colour, etc; not only in law but in practice; not only in private but also in public life. Not only in such an ideal state but even in the less so ideal, the concept of AA may not exist. AA is called for when there are troubles with equality; when equality for some becomes illusive; when inequality becomes pervasive. In other words, the objective of AA is achieving equality for those whose situation is unequal.

There are three aspects of the relationship between equality and AA that should be noted. The first relates to the factual and causal relationship between equality or its absence and AA. What this means is inequality or the absence of equality usually triggers or causes measures of AA. Once introduced, moreover, AA aims at or causes equality. In other words, inequality or lack of equality is a necessary, though not sufficient, condition for policies and practices of AA. Likewise, practices and policies of AA cause, though not necessarily, equality. This means that if measures of AA are extensively

[6] Sections 4 - 6 of the article will discuss temporary nature, target groups and underrepresentation, and measures.

applied, after some time it is likely that equality will be achieved. Hence, under normal circumstances, there is a linear relationship between inequality, AA, and equality: widespread inequality leads to AA, which leads to equality.

The second relationship, which is in a way normative, is on the face of inequality and discrimination, the principle of equality in legal and political instruments implies measures of AA. What does this mean? Since it is an important ingredient for later discussions, this relationship requires further elaboration. Take the example of a hypothetical state where inequality is rampant and women in government employment share only 30% – out of which 90% are employed in menial work – when actually in terms of size of workforce and qualification women constitute 50%.[7] From this it is easy to see how women are underrepresented in government employment. Again it is easy to argue that this inequality requires some corrective action. The principal corrective action may be to enshrine the principle of equality in major political and legal instruments such as constitutions as modern day constitutions widely do. Now, the question for the instant discussion is whether this equality principle in those instruments implies AA. It is such an equality clause in constitutions that is usually used to justify as well as attack measures of AA. Equality as a basis of denial of AA will be considered later (see Section 8). For now the focus will be on equality as the basis for AA.

Normally when the principle of equality is enshrined, the state is required to take measures ensuring equality. One possible argument is that such measures are measures of implementation of *strict* equality without favouring any group in all situations, ruling out AA. But there are two problems with this *strict* equality: first is whether treating everybody equally is really equality. This issue is at least relevant where for example there is a clear difference in physical or other traits of persons treated equally. Take for example the situation of a person with disability; apply the criterion of *strict* equality in employment, which obliges not to favour anyone; avoid any positive measures of providing assistive technology and see if the person is treated equally. This is a point made by CERD when it has considered the meaning of non-discrimination. According to CERD, "[t]he term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other

[7] This illustration is close to Ethiopian experience. According to the 2008 civil service statistics, 67% of employees are men while 33% are women. Even within this percentage, women are found in the low paying, non-professional, and non-decision-making jobs in the civil service. Federal Civil Service Agency, 2007/8 Civil Service Human Resources Statistics, *Hidar* 2002 E.C

words, if there is an objective and reasonable justification for differential treatment."[8] On the contrary, CERD notes, "[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect" as discriminatory it is "the unequal treatment of persons whose situations are objectively the same."[9] What is interesting here is CERD's equation of *equal* treatment with *unequal* treatment depending on circumstances.

The second problem, which is more relevant to the discussion here, is that the strict equality argument seems to naively ignore the systematic or structural nature of discrimination, which sometimes remains unaddressed by the strict equality principle. Of course there is little disagreement as to the importance of strict equality. It requires formal equality and its diligent enforcement. But why is it, for example in Ethiopia, after decades of declaration of equality, satisfactory results have yet to be achieved in terms of equity in business, employment or political decision making among different ethnic groups? Taking particularly the case of Ethiopian women, why is it at least after 20 years of declaration of equality between women and men, the state does not yet have equal (rather equitable) level of representation of women in business, employment or decision making? Two generally accepted explanations may be tendered: first is strict equality is not implemented, which is likely to be right and implementation has to be pursued; and second, the non-discrimination is systematically rooted and strict equality may not efficiently combat the systematic discrimination; hence additional or affirmative measures are necessary.

The second explanation is mostly the rationale when equality is used as a basis for AA. As long as systematic discrimination bars the achievement of equality of those discriminated despite strict enforcement of equality, AA is necessary. What this means is that the sophistication of some forms of discrimination has to be appreciated before rejecting AA as negating the principle of non-discrimination. Although some forms of discrimination such as direct discrimination can easily be tackled, other forms of discrimination are subtle

[8] CERD, General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination, UN Doc CERD/C/GC/32, 24 September 2009, para8. CERD is the Committee on Elimination of All Forms of Discrimination established by the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD), Article 8
[9] Id, para8

and eliminating them through strict or formal equality may not be effective.[10] This has been the concern of the CESCR when it outlined the direct and indirect forms of discrimination.[11] Direct discrimination in CESCR's understanding is discrimination based on prohibited grounds such as political opinion, for example where employment in an educational institution is denied because of one's political opinion.[12] Of interest here is the indirect discrimination, which:

> refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.[13]

Hence, behind the extension of the principle of equality to embrace AA lies the idea of *de facto* equality. This means that instead of a mere formal equality – both enactment and implementation of *strict* equality – equality has to be seen in the *results*. In its explanation of "equality and non-discrimination as the basis of special measures", CERD has also asserted that the equality clause of ICERD "combines formal equality," which is strict equality, with "substantive or de facto equality,'' which is equality in results.[14]

Arguing for the normative and implied relationship between equality and AA should not diminish the importance of express provisions of AA in major legal and political instruments in states such as Ethiopia. In an express direction of AA, the legal questions are settled and governments are required to enact ordinary laws and policies on AA. However, such express provisions of AA as will be explained later are limited in their application; and resort to the principle of equality from time to time to justify AA may be inevitable.

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[10] To some extent, the method of combating direct discrimination in Ethiopia is not clear. Take for example a private employer which has the policy of direct discrimination against say a specific ethnic group. Assuming that the employer has a significant share in the labour market, do employees have the procedure to institute a suit against the employer, who has been practising direct discrimination?

[11] CESCR is the Committee on Economic, Social and Cultural Rights, established by the UN Economic and Social Council, with the mandate to monitor the implementation of the ICESCR. Economic and Social Council Resolution 1985/17

[12] CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para10

[13] Ibid

[14] CERD, General Recommendation No. 32, cited above at note 8, para6

Moreover the understanding of AA as an extension to equality will normally preempt many of the objections against AA that are based on the principle of equality. Once AA is understood as part of the principle of non-discrimination, it will be logically impossible to reject measures of AA on the ground of discrimination.

One final aspect of the relationship between equality and AA, which is obvious but often overlooked, is the complementary nature of AA to measures of strict equality. The idea of *strict* equality is mostly relevant to laws and policies on *formal* equality and non-discrimination. But it is also relevant for AA because AA is intended to supplement measures of *strict* equality. Imagine a situation where a certain group, minority or not, has never been represented in some professions. Despite the rhetoric of equality, private and government institutions deny education and employment to this group. Now the question is about the role of AA to ensure equality of this target group. In this hypothetical situation, there is clearly a gross violation of the inherent right to equality. With such policies and practices, AA is hardly meaningful. As it should be known, deep-rooted violations, if any, of the equality principle in Ethiopia as elsewhere will obviously foreclose the utility of measures of AA.

1.3 Terms for Affirmative Action

The use of terms in connection with AA has not been consistent. Complete understanding of AA requires clarity of terms used. In the international sphere, "AA" was widely used at the now defunct Commission on Human Rights, whose sub-commission appointed a Special Rapporteur for the "task of preparing a study on the concept and practice of *affirmative action*"[15] (Emphasis added.) The Special Rapporteur, in discharging his responsibility, has used the term "affirmative action" after noting the existence of terms like "positive discrimination", "positive action", "preferential policies", "reservations", "compensatory or distributive justice", "preferential treatment."[16] Because the study was conducted to assess laws and practices of AA throughout the world, it is possible to assume that these terms fairly reflected what was in the laws and policies world-wide. Moreover, the practice of using either of these terms world-wide is generally acknowledged by UN human rights committees. CEDAW, for example, recognizes that states use terms like "affirmative

[15] Sub-Commission on Prevention of Discrimination and Protection of Minorities, The concept and practice of affirmative action, Sub-Commission Resolution 1998/5
[16] Bossuyt, cited above at note 4, para5

action", "positive action", "positive measures", "reverse discrimination", and "positive discrimination".[17]

From the review of international as well as national laws and practices, useful observations may be made. In international law, "temporary special measures" or simply "special measures" is the preferred term in place of AA. This is borne out of use of terms in international human rights instruments and the jurisprudence of UN human rights committees. CEDAW, acknowledging the various terms in national laws and practices and admitting its previous use of other terms, applies "temporary special measures" as used by Article 4(1) of CEDAW.[18]

Regarding "positive discrimination" and "reverse discrimination", both terms have been criticized as inappropriate and have been more or less abandoned.[19] Obviously "positive discrimination" is a contradiction in terms; hence its use should be discouraged.[20] "Reverse discrimination" on the other hand is a term used by opponents of AA to misrepresent the idea of AA and to portray AA as discriminatory and as such its use has to be resisted.[21] "Positive action" has been widely used in Europe.[22] The only limitation identified to affect the recurrent use of "positive action" is its extended meaning in international law that requires a state to take a *positive action* compared to the obligation to *abstain from action*.[23] Other than this limitation, the use of "positive action" in place of AA raises no objection.

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[17] CEDAW, General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004), para17

[18] Id. The report by the Special Rapporterur also states that "affirmative action is generally referred to in international law as special measures". Bossuyt, cited above at note 4, para 40

[19] Hanna Beate Schopp-Schilling, *Reflections on a General Recommendation on Article 4(1) of the Convention on the Elimination of All Forms of discrimination against Women* in Boerefijin, Ineke et al (ed.), Temporary Special Measures: Accelerating *de facto* Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women (2003), p.22

[20] CERD, General Recommendation No. 32, cited above at note 8, para12

[21] In his investigation of cases of AA in US Courts, Kellough identifies 'reverse discrimination' against 'nonminority males and sometimes nonminority women' as a basis for suits against AA. J. Edward Kellough, Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice (2006), p.12

[22] Schopp-Schilling, cited above at note 19, p.22

[23] Ibid

The other terms like "preferential treatment" and "reservations" as will be explained later are mere forms of AA and cannot be substitutes for AA. From forms of AA, quota deserves additional clarification. First, quotas, as explained elsewhere, are just forms of AA. Second, "quota" has been strongly opposed by critiques of AA, creating the negative sense of the term. For example in the US, the highest court is said to have expressed hostility towards quotas.[24] Hence the use of this term requires care.

Which term for Ethiopia? Unsurprisingly, the use of terms in Ethiopia is likewise diverse.[25] The list of terms in Ethiopia include: "Affirmative measures" (for women),[26] "special assistance" (to Nations, Nationalities, and Peoples), "affirmative support" (to regional states), "equitable representation" (of Nations, Nationalities and Peoples), "preference" (for employment), "affirmative action" (Ministry of Women, Children and Youth Affairs-MWCYA, Ministry of Education, and Growth and Transformation Plan-GTP), "special admissions procedures" and "remedial actions" (in Higher Education). From these, it is clear that the use of terms of AA in Ethiopia is far from consistent. It is also clear that the term "affirmative action" is frequently used in Ethiopia indicating that, at least in normative instruments, "affirmative action" is preferred. Hence in a generic sense, "affirmative action" seems appropriate. But some other names such as "special admissions procedures" representing one or another form of AA may be used with indication that they are forms of AA and not synonymous with AA.

2. International Human Rights Law

Two formal sources of AA having national relevance are noted: international and national. The national framework will be sketched in the next section. In this section, a brief summary of international human rights law will be made. Since the aim is to provide the context in which national laws on AA are understood, the discussion is limited to international instruments having legal force in Ethiopia, i.e. those ratified instruments that have become the law of the land.

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[24] Ashutosh Bhagwat, *Affirmative Action and Benign Discrimination*, in Vikram David Amar and Mark V. Tushnet (eds.), Global Perspectives in Constitutional Law (2009), p.113

[25] See Section 3 on the laws of Ethiopia, using several terms for AA.

[26] Although the use of 'AA' in the Amharic versions like in the English is mixed, *ye-de-gaf er-mi-ja* or *liyu digaf* seems frequent. But in using this term, which literally means *supportive action*, the undesirable connotation that those benefiting are weak needing *support* may appear. Either *re-tua-wi er-mi-ja* or *liyu er-mi-ja* may be preferred.

As indicated in the previous section, the right to equality requires measures of AA, wherever is necessary. As a result, provisions of equality and non-discrimination in international law incorporate measures of AA as long as those measures are necessary to ensure "effective equality". Since all major human rights instruments Ethiopia has ratified recognize non-discrimination and equality as fundamental principles, AA or "temporary special measures" as often called in international law are required under these instruments, including ICCPR, ICESCR, CEDAW, ICERD, and CRPD.

The non-discrimination clause of the International Covenant on Civil and Political Rights (1966) (ICCPR) has long been considered the source of AA although the instrument itself has not expressly provided for AA. Explaining the scope of the principle of equality or non-discrimination in ICCPR,[27] CCPR[28] has pointed out that "the principle of equality sometimes requires States parties to take *affirmative action* in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[29](Emphasis added.)

ICESCR, like ICCPR, does not have express provisions for AA. But its provisions of equality and non-discrimination are believed to incorporate AA. The general non-discrimination clause, the equality of women and men, the equality of all in employment, and the equality of all in education are considered to embrace AA wherever necessary.[30] In CESCR's interpretation of these non-discrimination and equality provisions, the importance of AA has frequently been highlighted. CESCR in its explication of the principle of non-discrimination has brought to notice the obligation of States parties "to adopt

[27] The non-discrimination principle of ICCPR provides the obligation of a State Party (such as Ethiopia) "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' (Article 2(1) of ICCPR)

[28] CCPR (Committee on Civil and Political Rights) is the Human Rights Committee empowered to monitor the implementation of ICCPR. Its interpretation of ICCPR is widely accepted. ICCPR, Article 28

[29] CCPR, General Comment No. 18, para10

[30] Article 2 (1) of ICESCR guarantees that ICESCR's rights are "exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Articles 3, 7, and 13 of ICESCR also provide the equality of women and men in the enjoyment of all economic, social and cultural rights, equality of all in employment, and equality of all in education, respectively.

special measures" in efforts to eradicate "substantive discrimination."[31] Relating to the right to education, CESCR asserts, "[t]he adoption of *temporary special measures* [meaning AA] intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination."[32] After noting the inadequacy of the "principles of equality and non-discrimination" to ensure "*de facto* or substantive equality for men and women," CESCR places AA as part of states' obligation *to fulfill* their obligation to ensure equality of men and women.[33]

Despite lack of an express provision of AA, the discussion so far has presented compelling evidence that AA is implied in equality provisions. However, in addition to such implied provisions of AA, measures of AA in various names and forms are expressly provided in international law. CEDAW is one of the several international agreements dealing expressly with AA.[34] In addition to its equality and non-discrimination clauses, where it calls for all "measures required for the elimination of such discrimination in all its forms and manifestations"[35], CEDAW has expressly provided for AA:

> Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[36]

ICERD, designed to eliminate racial discrimination, does the same, expressly recognizing AA.[37] Article 1(4), which explains the scope of "discrimination", recognizes AA to guarantee equality of certain "racial or ethnic groups or

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[31] CESCR, General Comment No. 20, cited above at note 12, para9

[32] CESCR, General comment No. 13: The Right to Education (art. 13), para32

[33]CESCR, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), paras15-21

[34] Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW)

[35] CEDAW, last preambular paragraph

[36] CEDAW, Article 4(1)

[37] Article 1(1) of ICERD (the International Convention on the Elimination of All Forms of Racial Discrimination (1965)) defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

individuals" where needed as compatible with the prohibition of racial discrimination. Going further, Article 2(2) imposes an obligation on States Parties to take "special and concrete measures" to guarantee equality of "certain racial groups or individuals" where "circumstances so warrant."

Another instrument worth noting is the Convention on the Rights of Persons with Disabilities (2006) (CRPD). CRPD's general principles of non-discrimination and equality, "full and effective participation and inclusion", "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity", and "equality of opportunity" in all likelihood justify various measures of AA.[38] Moreover, Article 5(4) maintains that "specific measures" including AA "necessary to accelerate or achieve *de facto* equality of persons with disabilities" are not discriminatory measures under CRPD. There is another express provision of AA in connection with the right to work and employment. After recognizing equality at work of persons with disability, an obligation is imposed on states to "promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures."[39]

One more instrument having significance for AA is the ILO Non-Discrimination Convention. This convention is particularly important since employment – its subject – is an area where AA is frequently practiced. To its credit, ILO, having recognized the importance of non-discrimination in employment, has made "the elimination of discrimination in respect of employment and occupation" one of the four "fundamental principles and rights at work".[40] The non-discrimination convention provides for elimination of discrimination in employment and occupation including vocational training.[41] Two general qualifications to the scope of the meaning of non-discrimination are provided. The first is a legitimate exclusion or preference that should not be considered discrimination:

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[38] CRPD, Article 3 and 5(1)&(2)

[39] CRPD, Article 27(1)(h)

[40] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, the International Labour Conference (Eighty-sixth Session, Geneva, 18 June 1998), Article 2. The other three fundamental principles of labour are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; and the effective abolition of child labour.

[41] ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111), Articles 1 and 2

> Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."[42]

The second qualification, which is more relevant to the instant discussion, is that a member state is permitted to authorize special measures where such measures are required.[43] In either case, AA is authorized by this Convention.

3. National Laws[44]

Before sketching AA in national instruments, the types of instruments considered here have to be noted. While the discussion in this article is mainly about legal instruments – namely to the FDRE Constitution and ordinary laws – it is important to note that AA is not limited to those instruments. Various national policies and strategic plans provide for AA. The example of GTP should be mentioned. The GTP, in connection with higher education, expects institutions of higher education to develop "schemes for the provision of affirmative actions for those who need additional support, (such as females, youth with disabilities, emerging regions, etc) such as, [sic] special admission criteria, tutorial support and scholarship opportunities."[45] Moreover, in capacity building and good governance, GTP envisions AA "to enhance the participation of women at *Woreda* and *Kebele* level."[46] Although this and other policy instruments have embraced AA, they are not discussed in this article. The intention is neither to exclude nor to diminish their importance. On the contrary, if effectively used, these instruments may drive the implementation as well as reform of existing laws of AA. However, the meaning in reality of GTP and other national policies in their different forms and fields of AA is not

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[42] Id, Article 1(2)

[43] Id, Article 5

[44] Apart from the FDRE Constitution and federal laws having national relevance, national regional states based on the FDRE Constitution may issue measures and policies of AA of enormous significance in accelerating equality within their territory. Although this article mainly reviews federal laws, arguments raised in this article are mostly valid for regional states. This is because many of the legal instruments reviewed for this article validly apply to regional states. Moreover, all the constitutions of regional states have provisions on AA that emulate the FDRE Constitution. For example, Article 35(3) of the Constitution of Oromia National Regional State and Article 35(3) of the Constitution of the Amhara Naitonal Regional State provide similar statements of AA to women.

[45] Federal Democratic Republic of Ethiopia, Growth and Transformation Plan: 2010/11 – 2014/15, 6.1.4, last paragraph.

[46] Id, 7.1.1, para4

yet clear. Moreover, to the writer's knowledge, apart from existing laws on AA, it is not clear if the measures envisioned in those policies have ever been acted upon.

3.1 The Constitution of the Federal Democratic Republic of Ethiopia

In a national context, AA is usually a constitutional issue. Like in international human rights instruments outlined in the previous section, two general categories of sources of AA are identified: equality provisions and express statements of AA. The right to equality for all, the equality of women in general, and the equality of women in marriage, property relations, and employment are all provisions of equality that may trigger measures of AA wherever is needed.[47] What this means is the government may issue and justify measures of AA in the areas of equality identified. For example in connection with land administration, to rectify historical deprivation of land possession by women, the federal government may take AA and target women in the allocation of new land or redistribution.

In addition to the equality provisions appearing in different parts, there are express provisions of AA in the FDRE Constitution. The first such provision is in connection with the special protection to women:

> The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.[48]

Another express provision of AA in the Constitution is under national economic objectives, providing for Government's duty of "special assistance to

[47]FDRE Constitution, Article 25 reads, "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status." Sub-Articles 1, 2, 7, and 8 of Article 35 provide for equality of women in general, equality of women in marriage, equality of women in property relations, and women's equality in employment, respectively.

[48] FDRE Constitution, Article 35 (3)

Nations, Nationalities, and Peoples least advantaged in economic and social development".[49]

Owing to the implied (in the equality provisions) and general (in express provisions) nature of AA in the Constitution and the country's international human rights obligations, the enforcement of AA in Ethiopia depends substantially on the existence of specific AA laws and practices. As a result, few ordinary laws have been introduced with specific measures for implementation. The following sub-sections provide a review of ordinary national laws regarding AA.

3.2 Federal Executive Organs Enabling Laws

In the Proclamation that determines the "powers and duties" of executive organs of the federal government, each executive organ is empowered to provide two categories of AA, one relating to "regional states eligible for affirmative support" and two relating to "persons with disabilities and H.I.V AIDS victims". All Ministries of the Federal Government in their areas of jurisdiction are required to "provide assistance and advice to regional states, as necessary; and provide coordinated support to regional states eligible for affirmative support."[50] They are also required to "create, within … [their] powers, conditions whereby persons with disabilities and H.I.V AIDS victims benefit from equal opportunities and full participation."[51] Since these Ministries constitute almost what is usually identified as the executive, the implications of these overarching powers should not be underestimated. The benefit here is that these organs have the discretion to issue directives and policies in their areas of responsibility ensuring extensive application of AA.

In addition to these cross-cutting measures of AA, some ministries are also empowered to provide AA in their own sectoral activities. The Ministry of Defense is given "the powers and duties to…ensure that the composition of the national defense forces reflect equitable representation of nations, nationalities and peoples."[52] This equitable representation signifies the possibility of AA towards recruitment of members from least represented "nations, nationalities, and peoples" to the defense forces. MWCYA has also the power to design a mechanism "for the proper application of women's right to affirmative actions

[49] FDRE Constitution, Article 89 (4)
[50] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, Article 10 (1) (e)
[51] Id, Article 10(5)
[52] Id, Article 13 (3)

guaranteed at the national level and follow the implementation of same" and to "ensure that due attention is given to select women for decision-making positions in various government organs."[53] Under the first clause, MWCYA may monitor how women exercise their rights under existing laws of AA. This responsibility may be discharged if MWCYA prepares standards for adoption by all concerned for use in documentation of implementation of AA. What is problematic probably is the second. What can MWCYA do to ensure due attention is given in empowering women in decision-making, especially given the parallel relations among government organs? Probably making studies and presenting suggestions, goals, and so on may be contemplated.

3.3 Higher Education Laws

Together with employment, higher education is the most widely practised area of AA. Given the role of university degrees for employment, this may not be surprising. The Ministry of Education, which is centrally managing admissions to government universities accounting 83% of all university admissions in the country, is empowered to "ensure that student admissions and placements in public higher education institutions are equitable."[54] The higher education law also expressly provides for "special admissions procedures for disadvantaged citizens to be determined by regulation of the Council of Ministers and to be implemented by directive of the Ministry."[55] Since the Ministry is solely responsible for placement nation-wide, its role in enforcing AA should not be lightly taken. Even in the future when public institutions are allowed to

[53] Id, Article 13 (3) and Article 32 (7) and (8). In the repealed legislation *the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005*, Article 29 (5) empowers the Ministry of Women's Affairs to "submit recommendations on the application of affirmative measures in order to promote the participation of women in economic social and political affairs by taking into account the oppression they faced for centuries as a result of inequality and discrimination." Compared to this repealed law, the new law omits any reference to "oppression they faced for centuries." Is this omission intentional? Assuming it is, what implication does the omission have in the law and practice of AA for women in Ethiopia? Legally speaking the omission does not have much of an impact as long as the historical reference is maintained in the Constitution.

[54] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, Article 28(7). According to the educational statistics of 2010/11, government higher educational institutions account for 83% of all undergraduate and postgraduate admissions in the Country. FDRE Ministry of Education, Education Statistics Annual Abstract 2010-11, p.59

[55] Higher Education Proclamation No. 650/2009, Article 39(4)

administer admissions directly, the Ministry will have the power to determine, among others, "eligibility for admission, including entitlement to affirmative action."[56] Other special measures to "physically challenged students" are recognized in the law though many of these measures are permanent measures instead of AA.[57]

3.4 Federal Civil Service Law

Another significant area for AA in Ethiopia is employment in the federal civil service. In its principles of non-discrimination "among job seekers or civil servants in filling vacancies'" and merit-based filling of vacancies, the law for federal civil service provides preference to "female candidates," "candidates with disabilities," and candidates from "nationalities comparatively less represented in the government office" in "recruitment, promotion and deployment."[58] There are four aspects of this law that should be emphasized here: first, the principle of non-discrimination is enshrined; second, employment is merit-based; third, AA is applied at all stages of employment relations –at the time of employment, promotion and deployment; and finally, three categories of (potential) employees are identified to benefit from AA – namely women, persons with disability and members of nationalities less represented.

3.5 Laws on Persons with Disability

Another law covering employment-related AA is the law that deals with the employment of persons with disabilities. The law entitles a person with disability to recruitment, promotion, placement, and transfer in employment or participation in training without discrimination.[59] In its strongest anti-discrimination provisions, the legislation bars from application "[a]ny law, practice, custom, attitude or other discriminatory situations that impair the

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[56] Id, Article 39(6)

[57] Id, Article 40. The term *Physically Challenged Students* is not defined. However, since the Amharic uses similar terms as persons with disability, the term should be used interchangeably with persons with disability. Permanent obligations of institutions recognized in the Proclamation include ensuring to the extent resources permit ease of physical access, provision of educational 'auxiliary aids' including in building design, computers and other infrastructures, and ensuring to the extent necessary and feasible academic assistance, including tutorial sessions, exam time extensions and deadline extensions.

[58] Federal Civil Servants Proclamation No. 515/2007, Article 13

[59] Right to Employment of Persons with Disability Proclamation No. 568/2008, Article 4(1)

equal opportunities of employment of a disabled person…"[60] More forceful is also the outlawing of the "selection criteria which can impair the equal opportunity of disabled persons in recruitment, promotion, placement, transfer or other employment conditions."[61] The legislation also outlaws as discriminatory "the absence of a reasonable accommodation," which deprives equality of opportunity to a person with a disability.[62] There are two qualifiers to these prohibitions: the "inherent requirement of the job" and "measures of affirmative action", which are not discriminatory under the law.[63] The law also provides a compulsory AA "where a person with disability acquires the necessary qualification and having equal or close score" in candidacy for recruitment, promotion, placement, transfer, or participation in training.[64]

One special aspect of this legislation, unlike other national laws, is that its application goes beyond the public sector to include the private. However, its coverage of the private sector may need supplemental legislation defining the extent of AA permitted and required. While the implementation of these measures in the civil service is easier owing to the existence of a directive, the framework for implementation in the private sector needs to be worked out by concerned organs particularly the Ministry of Labour and Social Affairs. Other than those compulsory, voluntary measures of AA are also permitted. Accordingly "affirmative actions taken to create equal employment opportunity to persons with disabilities" are not discriminatory.[65] There is also another clause of AA that recognizes the multiple challenges of women with disability. The provision imposes a responsibility on employers to take "measures of affirmative action to women with disability taking into account their multiple burdens that arise from their sex and disability," of which an employer may be excused where the measures impose "an undue burden."[66]

3.6 Election Laws

The importance of women's participation in decision making through candidacy in political organizations and holding of legislative seats needs no argument. Election laws in Ethiopia, though negligible one may argue, have provided a form of AA. In the law dealing with registration of political parties, the number of women candidates nominated by a political party is placed as a

[60] Id, Article 5(1)
[61] Id, Article 5(2)
[62] Id, Article 5 (3)
[63] Id, Articles 4(3), 2(4) and 4(1)
[64] Id, Article 4(2)
[65] Id, Article 5(4)
[66] Id, Article 6 (1)(b)

factor (along with the number of seats and candidates nominated) for assistance by government to political organizations.[67] It arguably gives an incentive to political organizations to promote women for candidacy and political positions. While the outcome of it all is not clear, this may be strengthened through additional and sincere goals and timetables by the government to ensure for example women's participation in the highest elected executive offices.

4. Temporary Nature of Affirmative Action

Almost all instruments of AA reaffirm AA as a temporary measure that must be stopped as soon as substantive or *de facto* equality is achieved. For example, ICERD provides that the special measures "shall not be continued after the objectives for which they were taken have been achieved."[68] Hence, the temporary nature of AA raises no issue. Never the less, the question of how temporary is temporary is far from clear. How long should AA stay in the system of human rights protection, a decade, 25years or a century? This is important because the end of the duration, assuming there is a predetermined one, brings an end to measures of AA. But for those seeking a timeframe for the expiry of AA, an easy answer is not available. Explaining the temporary nature of AA, instead of a predetermined duration, CERD recognizes the "functional and goal-related" nature of AA, meaning that it is the achievement of the objective of *de facto* equality rather than any specific duration that determines the termination of AA.[69] The implication is that until such equality is achieved, measures of AA should be maintained regardless of the length of time the measures have been in place.[70] CEDAW on its part expects special measures to last "for a long period of time".[71] In determining this duration, CEDAW applies the criterion of "functional result" and not "predetermined

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[67] Revised Political Parties Registration Proclamation No. 573/2008, Article 45(1) and (2). The same is provided in the Procedure for Determining the Apportionment of Government Financial Support to Political Parties Regulation Number 5/2009 issued by the National Electoral Board of Ethiopia. Article 15 sets "the number of female candidates nominated by the party" as one of the criteria in the determination of the financial assistance to political organizations.

[68] ICERD, Article 1(4)

[69] CERD, General Recommendation No. 32, cited above at note 8, para27

[70] Although a predetermined duration for AA is unlikely, it is not non-existent. For example, the Indian system of AA originally was set for 20 years, though the duration was extended. On this see Sowell, Thomas, Affirmative Action around the World: An Empirical Study (2002) p.23

[71] CEDAW, General Recommendation No. 25, cited above at note 17, para20

passage of time" as the final test for termination of AA.[72] "Temporary special measures", CEDAW recommends, "must be discontinued when their desired results have been achieved and sustained for a period of time."[73] This apparent expansive interpretation of the duration by CEDAW embraces two criteria: the achievement of desired results and sustainment of those results for a certain period of time. The first may need empirical data of the results though the cost of ascertaining is likely to be enormous and common knowledge and other indicators may be useful. The second is also worth noting since even after the achievement of results, sustainment is another factor determining the duration.

The FDRE Constitution, unlike the international instruments, does not explicitly provide either a definite time framework or a reference to goals based on which measures of AA are terminated. While providing the justification for AA, i.e. "the historical legacy of inequality and discrimination", the Constitution does not indicate a situation that should terminate AA. Wordings of the ordinary laws outlined in the previous section are not any different. Three alternative conclusions can be drawn. First, it was an oversight by the drafters of the Constitution; hence termination on reasonable grounds namely achievement of equality is possible. Second, owing to the generality of AA in the Constitution, it is the function of ordinary laws such as proclamations and regulations to work out the details including the duration of temporary measures. However, since they have not yet worked out on the issue, ordinary laws have not been successful in the determination of temporary nature of AA. Third, AA is permanently mandated and unless the Constitution is amended, women who are expressly entitled to AA in the Constitution can always demand AA. However, considering the interpretative functions of international instruments and given those instruments are part of the law of the land, the functional approach of AA should be adopted. Once equality is achieved, AA must be terminated. Since AA opposes the principle of equality, where *de facto* equality prevails, maintenance of AA after attainment of equality of results will be discriminatory.

5. Target Groups and Underrepresentation

Measures of AA are directed at a group of individuals that benefit from AA laws and policies. In the report on AA, the Special Rapporteur on AA has identified this group as "a certain target group composed of individuals who all have a characteristic in common on which their membership in that group is

[72] Ibid
[73] Ibid

based and who find themselves in a disadvantaged position."[74] Two defining factors are emphasized: the group's common characteristics and the disadvantaged position in which the group finds itself. Regarding the first, the Special Rapporteur highlights innate and inalienable characteristics "such as gender, colour of skin, nationality or membership of an ethnic, religious or linguistic minority" as the usual markers of the target group.[75] Accordingly, women, black people, immigrants, poor people, persons with disability, veterans, indigenous peoples, racial groups, and minorities are said to be among the target groups in the world-wide policies and practices of AA.[76]

Of course this does not mean that all these groups claim AA in any given state. Nor does it mean that the state at any given time is willing and able to target all of these groups for AA. The second criterion plays decisive role: whether these groups are disadvantaged. It is when these groups find themselves in a disadvantaged position that AA becomes relevant. While underrepresentation is clearly a sign for AA, disagreements arise on whether underrepresentation *per se* should entitle one or another group to AA.[77] Generally two arguments are forwarded. The first is that the cause of existing underrepresentation has to be traced to past discrimination and it is only afterwards that AA can be used as a tool to achieve equality. The second argument, compatible with the purpose of AA, is that underrepresentation irrespective of past discrimination is adequate to entail AA. In CEDAW's opinion, for example, such evidence of past discrimination is not necessary. Admitting the usual effects of AA to remedy consequences of past discrimination, CEDAW affirmed that member states' obligation "to improve the position of women to one of *de facto* or substantive equality with men exists irrespective of any proof of past discrimination."[78] Likewise CERD indicated that "it is not necessary to prove 'historic' discrimination in order to validate a programme of special measures" placing the emphasis on "correcting present disparities and on preventing further imbalances from arising."[79]

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[74] Bossuyt, cited above at note 4, para8

[75] Ibid

[76] Ibid

[77] Determination of the situation of underrepresentation itself is not easy. For example in what situation should one consider that women are underrepresented in the civil service? Is it the percentage of women employees, or is it the average wages of women, or is it the type of labour? Is the women's representation across sectors including the private sector for example relevant in the determination of underrepresentation?

[78] CEDAW, General Recommendation No. 25, cited above at note 17, para18

[79] CERD, General Recommendation No. 32, cited above at note 8, para22

As a matter of historical factors, resources, and democratic governance, states usually restrict the application of AA policies to a limited number of target groups. In the US, for example, AA policies have been primarily based on race and sex.[80] In Europe, while race-based AA policies are rare, few European countries have gender-based AA policies.[81] In India, AA policies have been adopted to "untouchables", "Scheduled Casts" and "Scheduled Tribes".[82] In South Africa, AA policies are designed to benefit black South Africans.[83] But this selection of target groups does not necessarily mean that it is easy for states to pick target groups. States usually find it difficult to determine which target groups deserve which forms of AA. Identification of those groups "sufficiently disadvantaged" to merit AA is usually a contentious issue.[84]

Once the target group such as a minority group is determined, identification at individual level in actual implementation of a particular measure of AA may sometimes pose challenges. The challenges of individual level identification are two: one is whether the criterion of disadvantaged position should be used also at an individual level; or to rephrase it, should an individual in the target group, who is much better off than members of the group non-targeted, benefit from AA?[85] The second is identifying characteristics may not perfectly fit to the individual case at hand. For example, in the identification of a minority ethnic group, one may apply the criteria of language, custom and social practices. But when it comes to an individual level identification, membership of an individual with a parent from a target group and another parent from a non-target group poses difficulty. The general wisdom for individual identification is self-identification unless the contrary is justified.[86]

Coming to Ethiopia, the target groups are: women, "Nations, Nationalities, and Peoples (NNPs) least advantaged" for social and economic assistance,[87] "disadvantaged citizens" for higher education, persons with disabilities for

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[80] Anita L. Allen, *Can AA Combat Racial Discrimination? Moral Success and Political Failure in the US* in Erna Appelt and Monika Jarosch (eds.), Combating Racial Discrimination: Affirmative Action as a Model for Europe (2000), p.8, p.24

[81] Bhagwat, cited above at note 24, p.114

[82] Id, pp.112-3

[83] Id, pp.103-4

[84] Bossuyt, cited above at note 4, para9

[85] For arguments on whether AA sometimes favours those better off and fails those worse off, see Section 8.1

[86] CERD, General Recommendation No. 32, cited above at note 8, para34

[87] That is the term used in the Constitution where it says: Government shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development (Article 89(4))

employment and education, and "nationalities comparatively less represented in the government office" for the civil service. While the group constituting women is clear, problems may be expected in further identification of other target groups. Regarding NNPs, there are regulations issued by the federal government to determine entitlement to assistance by the federal government. They are identified as less developed regions involving Regional States of Afar, Somali, Gambela, Beneshangul Gumuz, and pastoralist areas n Oromia and SNNPs Regions.[88]

6. Measures of Affirmative Action

From literature on the law and practice of AA, three aspects of measures of AA are identified.[89] The first relates to the formal source, namely legislative, policy, or other measures providing for AA. The second relates to fields of measures, which relate to spheres such as social, economic, or political measures that are subjected to AA. The third relates to forms of measures such as training, preferential treatment or quota. Brief overview of these three with remarks on the situation of Ethiopia will be presented in this section.

6.1 Source

In terms of formal sources of AA, CEDAW identifies "legislative, executive, administrative and other regulatory instruments, policies and practices" as possible sources of AA. [90] Measures of AA may also stem from "negotiated administrative directives and guidelines or on voluntary programs."[91] Hence constitutions, parliamentary statutes, administrative directives, executive orders, policy instruments, administrative guidelines, administrative agreements, and voluntary commitments could all potentially be sources of AA. Probably the only legal restriction on sources is hierarchical observance of superior laws. This particularly concerns constitutionality of some measures of

[88] The Council of Ministers Regulation for the Establishment of Federal Board to Provide Affirmative Support for Less Developed Regions Regulation No. 103/2004, Article 2(1)

[89]According to CERD, for example, *Measures* include "the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments." CERD, General Recommendation No. 32, cited above at note 8, para13

[90] CEDAW, General Recommendation No. 25, cited above at note 17, para22

[91] Schopp-Schilling, cited above at note 19, p29

AA. Since a constitution is the highest authority, measures of AA authorized by other sources need to comply with the constitution. Never the less this restriction is quiet moot for two reasons. First, in most cases, constitutions expressly provide and proactively promote measures of AA and non-compliance with constitutional restrictions is unlikely. Examples of constitutions that expressly provide for AA include the South African Constitution and the Constitution of India, where unless these constitutions are amended, compliance by subsidiary laws of AA is easy to meet.[92] The second is as pointed out elsewhere, measures of AA are implied by principles of equality and non-discrimination, which are the hall-marks of any modern constitution. This means that under normal circumstances, measures of AA are either required or permitted by constitutions; hence non-compliance by ordinary instruments in relation to measures of AA is unlikely. However this should not obscure the fact that in exceptional cases and in some countries where equality is allegedly achieved, some measures of AA not expressly provided by constitutions are routinely challenged.

In Ethiopian context, the FDRE Constitution, proclamations, regulations, directives, and policies have all served as sources of measures of AA. Although there is no legal challenge presented on the constitutionality of some areas of AA for which explicit reference is not made, it is possible to inquire the constitutional basis of some measures of AA. For example, what is the constitutional basis to grant preferential treatment in higher education for the "disadvantaged citizen"? Or as strange as it seems, would it be unconstitutional for example if the government comes with the policy of quota in higher education and reserves 25% of admission to students coming from say schools outside cities? Such kinds of questions should be seen in light of the relationship between the principle of equality and AA. As stated all along, AA is part of the equality principle. Measures of AA to accelerate the equality of a disadvantaged group are likely to fall under the principle of equality in the FDRE Constitution.

From the overview of AA laws in Ethiopia, conspicuously missing probably are voluntary commitments, either by government organs or private entities. Private entities will be noted in a later section. Voluntary commitments by the government can be measures by any government body to increase the participation of a target group through for example a numerical goal. This is

[92] Constitution of the Republic of South Africa (1996), Article 9(2) and the Constitution of India (1949), as amended by Constitution (First Amendment Act) 1951, Article 15(3) & (4); and Articles 16(4) and 16(4)(A) of Constitution of India (1949), as amended by the Constitution (Seventy-Seventh Amendment Act), 1995

probably relevant for government organizations such as public enterprises, which are left out of many of the existing measures of AA. A government's voluntary commitment for example to increase the percentage of women CEOs (in public enterprises) or ministers to 35% in the next 10 or 20 years may be imagined as a commitment that will have an impact on efforts in the promotion of equality of women.

6.2 Fields

Generally speaking, the fields of application for AA are as diverse as social life itself. For example CEDAW considers AA to affect all areas of life including "the political, economic, social, cultural, civil or any other field."[93] Likewise CERD envisions "all fields of human rights deprivation" to be areas of AA.[94] But this does not mean that governments are eager to enact AA in all areas of human life. Employment and education are widely practiced fields of AA. Expansion of business opportunities to target groups is another area. AA in political activities has also been considered crucial in accelerating the *de facto* equality of target groups.

In Ethiopian context, the fields of AA are mostly in education and employment. Political participation is recognized to an extent, which is little more than nominal. But questions may arise if the coverage of fields is adequate to bring equality of those targeted. AA to women, which is expressly provided in the Constitution, may be illustrative. The purpose of the measures of AA, according to the Constitution, is to ensure equality in "political, economic and social life". This indicates the extensiveness of the envisioned measures of AA that may be taken to ensure equality of women. However, existing measures of AA have failed to cover major areas of underrepresentation of women in agriculture (land use for example), business opportunities, and higher decision making.

6.3 Forms

To understand forms of AA, one should imagine laws of AA not as a single universal measure to be applied to all fields and in all situations. Rather they are better envisioned in a spectrum of measures, ranging from measures that resemble mere enforcement of strict non-discrimination to those extreme ones such as quotas where a certain percentage of benefits are reserved to target groups. Professor Allen provides a list of programs and policies amounting to

[93] CEDAW, General Recommendation No. 25, cited above at note 17, para18
[94] CERD, General Recommendation No. 32, cited above at note 8, para33

AA.[95] Drawing on this list and other relevant literature on forms of AA, the following measures[96] fairly capture the range of varied forms of AA:

a) Efforts to keep track of the numbers of target groups such as minorities within an organization [a preliminary form of affirmative action].[97]
b) Vigorous implementation of equality, ensuring the equal and fair treatment of the target groups; for example, screening rejected women applicants for employment checking if any discriminatory practice has occurred, or allowing a special mechanism of complaints against unfair treatment of women or target groups;[98]
c) Efforts that emphasize recruitment and outreach activities designed to increase the diversity of applicant pools;[99]
d) Special training programs to target groups, which could be for university admission, employment or promotion;
e) Allocation of resources for the benefit of target groups, for example allocation of special funds for a training of a target group or creating employment opportunity;
f) Establishment of numerical goals and timetables, for example a state setting a goal to increase the percentage of women parliamentarians to 35% within 10 years and acting accordingly;[100]

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[95]Allen, cited above at note 80, p.5.

[96] The list of measures here leaves out Professor Allen's one particular measure on AA, which is about "[p]olitical empowerment measures, including efforts to create political districts in which a majority of the eligible voters are racial minority group members capable of electing minority candidates to state, local and federal offices." The list has also benefited from forms of AA enumerated in the recommendations of international human rights committees. Forms of AA CEDAW identifies include allocation of resources, preferential treatment, targeted recruitment, hiring and promotion, numerical goals connected with time frames, and quota systems. CEDAW, General Recommendation No. 25, cited above at note 17. For political and public life it also identifies measures "including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies." CEDAW, General Recommendation No. 23 (16th session, 1997): Article 7 (political and public life), para15

[97] This set of measures is adapted from Kellough, cited above at note 21, p. 6

[98] Adapted from Bossuyt, cited above at note 4, para73

[99] Kellough, cited above at note 21, p. 6

[100] On this item in the list see also Frances Raday, *Systematizing the Application of Different Types of Temporary Special Measures under Article 4 of CEDAW* in Boerefijin, Ineke etl (ed.), Temporary Special Measures: Accelerating *de facto* Equality of Women

g) Preferential treatment, including in employment, schooling and business opportunities. The preference may be from equally qualified, few points' preference or more – generally referred to weak or strong forms of preference respectively;
h) 'Set-aside' programmes, reserving a percentage of business opportunities to the benefit of target groups; this principally relates to government contracts/projects, which can be allocated based on the participation of target groups;[101] and
i) Quotas: theoretically it can be anywhere between zero to 100% although the increase in percentage would likely increase the resistance to measures of quota; quotas are usually reserved for governmental positions such as parliamentary or executive.

The list is not exhaustive. The items in the list may also overlap. Before commenting on the relevance of these measures to Ethiopia, the controversy surrounding these measures of AA should first be noted.

6.4 Controversial Forms of AA

Although not immune to criticism, the above list, created for the sake of clarity in the discussion of measures, may indicate the direction of controversy involving AA. When one moves from the first item to the next until one reaches the last, one can experience incremental discomfort with each item in the list, quota causing the most uneasiness. For example, it is unlikely for one to oppose items 'a' to 'c'. Depending on whether the person is in favour or against AA, the uneasiness with the other items increases as the person goes downward in the list. According to the Special Rapporteur on AA, measures which he calls "affirmative fairness" and "affirmative mobilization", roughly corresponding to 'a' to 'e' in the list, do not give rise to controversy, as opposed to measures what he calls "affirmative preference", corresponding to the remaining items in the list.[102] This finding is shared by many scholars. For

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under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women (2003), p. 43

[101] "Set-asides" in the US are "measures awarding a predefined percentage of public contracts to minority-owned businesses, minority meaning blacks, Hispanics, Asians, Native Americans, Eskimos and Aleuts, and women." Daniel Sabbagh, A Strategic Perspective on Affirmative Action in American Law (2007), at Note 68

[102] Bossuyt, cited above at note 4, para7. Special measures are called measures of "affirmative mobilization" when, "through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a social good, such as a job or a place in an educational institution." Measures of AA are called measures of "affirmative fairness", when "a meticulous examination takes place in order to make

example, in the US context, the most controversial forms are awards of employment or education or business opportunity on a preferential basis to target groups such as recognized minority groups.[103] However, unlike the categorization by the Special Rapporteur, who seems to suggest that a preference to equally qualified is as controversial as quota (implied in the "affirmative preference category"), a distinction has been made between "weak" forms of preferential treatment in which members of a target group with equal (or substantially equal) qualification are preferred and "strong" forms of preferential treatment in which a preference is made to members of target groups with less qualification.[104] What this means is that "weak" forms of AA attract less controversy than "strong" forms of AA. Hence quota forms of AA are the most controversial. For example in the US, even presidential candidates are said to have campaigned against quotas.[105] This does not mean that other countries have not adopted quotas as AA. For example the Indian system of AA is said to rely substantially on quotas.[106]

Why are some forms of preferential treatment controversial and others not? Three explanations to be discussed later are usually given. The first relates to the general objection to AA: because preferential treatments depend on "a characteristic, such as race, gender, or caste, that is otherwise a forbidden ground for discrimination."[107] In other words, one may find it difficult to accept the legitimization of treatments based on factors such as race, which have been long condemned for violating equality and non-discrimination. The second is because of the preferential treatment, members of non-target groups are losing benefits in employment, education, etc. The third is because preferential measures seem to oppose qualification or merit by granting benefits to less qualified.

Apart from the controversy, two ideals of equality are said to provide general guidance on the choice of forms of AA by states: equality of opportunity and

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sure that members of target groups have been treated fairly in the attribution of social goods, such as entering an educational institution, receiving a job or promotion." The Special Rapporteur uses "Affirmative Preference" to include preference among equally qualified, preference to less qualified, goals and quota. Bossuyt, cited above at note 4, paras72-77.

[103] Allen, cited above at note 80, p.24

[104] Schopp-Schilling, cited above at note 19, p.30

[105] Allen, cited above at note 80, p.32. Presidents Ronald Reagan and George Bush in the US are said to have campaigned on express opposition of AA "quotas".

[106] Bhagwat, cited above at note 24, p.113

[107] Id, p.102

equality of results.[108] What this means is that where equality of opportunity is the preferred ideal, AA measures expanding the opportunity of the target groups, for example measures from "a" to "e" are chosen whereas the equality of results dictates all forms of AA including "strong" forms of AA.

Which forms of AA are pursued in Ethiopia and what is the extent of the controversy surrounding AA? Potentially all measures of AA may be lawfully adopted in Ethiopia. This is because international agreements allow and sometimes require the adoption of all measures necessary to bring not mere equality of opportunity but also equality of results *or de facto* equality. Hence the Constitution's human rights provisions that have to be interpreted in line with international law should generally permit any of the measures including the strong forms of AA. However, judging from the review, Ethiopia has not extensively applied many of the forms of AA identified in this section. It is doubtful if ever measures of "affirmative fairness" and "affirmative mobilization" have been issued. The preferential treatments in the civil service and higher education seem to be "weak".[109]

Regarding controversies, to the writer's knowledge, there is not any major objection against any of the laws of AA in Ethiopia. A number of assumptions may be made: the first is that the measures are not known. The second is that the measures are very few to attract controversies at national level. The third is that the laws are not meaningfully implemented to invite any objection. The fourth is that the nature of the measures is "weak", which attracts little objection.

7. Other Special Measures

A distinction has to be made between measures of AA and other positive or special measures that have some resemblance to AA. Examples of such measures include:

- The rights of women to non-identical treatment with men on account of women's biologically determined needs such as special measures protecting maternity;[110]

[108] Bossuyt, cited above at note 4, para31

[109] In the civil service, for example, the preference is only 3 points out of 100. Federal Civil Service Agency, Directive on Employment of Federal Civil Servants, 2007/08

[110] CEDAW, Article 4 (2); also CERD, General Recommendation No. 32, cited above at note 8, para15

- Measures to enforce the rights of minorities to enjoy their own culture, language and religion;[111]
- Measures to protect the rights of indigenous peoples, including the right to land traditionally occupied;[112]
- Positive measures such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.[113]
- Measures to ensure to persons with disabilities access to the physical environment, to transportation, to information and communications;[114]

As indicated above, these measures are provided in various international instruments and the jurisprudence arising therefrom, especially of CEDAW, CERD, and CRPD. Three principal features of distinction are usually suggested. The first feature is the temporary nature of AA while these special measures are in most cases permanent. The second feature lies in the purpose of the measures: while measures of AA are to accelerate and achieve equality, the other special measures aim at differential treatment of features that are meaningfully different.[115] The third feature is that those special measures are

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[111] CERD, General Recommendation No. 32, cited above at note 8, para15

[112] Ibid

[113] CESCR, General Comment No. 20, cited above at note 12, para9

[114] Extensive list of special measures for persons with disabilities are provided in the CRPD. The obligations of states in favour of persons with disabilities identified in CRPD include measures: to ensure access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas; to provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public (Article 9); to ensure personal mobility with the greatest possible independence by: (a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost; (b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost; (c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities; (d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities (Article 20).

[115] That is an argument used by CEDAW in connection with the Convention's categorization of measures of AA and other special measures. According to CEDAW, while the purpose of affirmative measures is "to accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to

better understood in terms of special rights belonging to a group of people rather than special measures associated with the right to equality.[116]

The points raised in the previous paragraphs are relevant to Ethiopia. In Ethiopia as well, those special measures are different from measures of AA in ways explained. Those special measures are provided in the Constitution and various other ordinary laws. Some of them are:

- Maternity leave;[117]
- Ethiopian peasants' right to land and Ethiopian pastoralists' right to free land for grazing and cultivation;[118]
- Special representation of minority Nationalities and Peoples, who shall have at least 20 seats in the HPR and the representation of each Nation, Nationality, and People by at least one vote in the House of Federation.[119]
- Provision of appropriate working and training materials for persons with disability;[120]

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effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation,' the objective of others special measures is to provide 'for non-identical treatment of women and men due to their biological differences." CEDAW, General Recommendation No. 25, cited above at note 17, paras 15 and 16

[116] CERD, General Recommendation No. 32, cited above at note 8, para15

[117] FDRE Constitution, Article 35(5)

[118] FDRE Constitution, Article 40 (4)and (5)

[119] FDRE Constitution, Articles 54(2) (4) and 61(2). "Territorial, cultural, political" and other measures that benefit minority nationalities are considered by some to be measures of AA. For example, for the now defunct USSR, a historian, borrowing the term AA from the US practice, used the *Affirmative Action Empire* to identify the Soviet Union, owing mostly to the state's extensive AA policies regarding the maintenance of national (in ethnic sense) territories, promotion of national languages and elites, and recognition and support for national culture through measures such as education and employment. The historian also identifies the USSR as the first country in world history to introduce AA programs for national minorities. Terry Martin, The Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923-1939 (2001), pp10-19

[120] The Right to Employment of Persons with Disability Proclamation No. 568/2008 provides several specific measures aimed at enhancing the participation of persons with disabilities in employment. Worth noting are Article 6, which provides for employers' obligations to (a) take measures to provide appropriate working and training conditions and working and training materials for persons with disability; (b) take all reasonable accommodation … to women with disability taking into account their multiple burden that arise from their sex and disability; and c) shall assign an

Finally, while treatment of such special measures is out of the inquiry of this article, it should be stated that generally these special measures are obligations under international and Ethiopian national laws and as such are binding. Moreover, it should be noted that differential treatments, whether measures of AA or not, are not against the principles of non-discrimination and equality "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate."[121]

8. Arguments for and against Affirmative Action

At the outset, questions may arise as to the relevance of arguments for or against AA in this article, particularly for Ethiopia where AA is constitutionally mandated. First, the understanding of AA is superficial without understanding the arguments. Second, particularly relevant to Ethiopia where forms of AA are few and national awareness is in doubt, policy makers need to understand these arguments in order to act on AA to a sufficient degree. As the review of national laws indicates, measures of AA in Ethiopia are very limited in a sense that various forms and fields of AA are left out of normative instruments. Agricultural sectors (where overwhelming majority of the population and target groups live), private sectors, business opportunities, and decision making positions are not treated in existing measures of AA. Arguments presented here will help in the construction of further AA policies and laws, where needed. Third, clarity in the arguments will facilitate genuine and diligent implementation of existing laws on AA.

8.1 Arguments For

Depending on the fields and forms of AA, various arguments are provided in support of AA. The following are commonly made.

Remedying Past Discrimination The argument here is that a systematic discrimination practiced for ages in the past has caused an unjust situation; and to correct this unjust situation compensation presented by AA is crucial.[122] Taking the case of a minority target group, for example, the target group in the past has been subjected to widespread discrimination through denial of decision making, employment, education, business opportunity, and so on.

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assistant to enable a person with disability to perform his work or follow his training. Employers may be exempted from the first two if there is undue burden, while exemption is not granted for the third (Article 6(2)).

[121] CCPR, General Comment No. 18, para13

[122] Bossuyt, cited above at note 4, para17

Owing to such discrimination, the group now finds itself substantially underrepresented in schools, in employment, and so on and unable to equally compete owing to lack of skills. To correct such underrepresentation, measures of AA are necessary. This argument is implicitly provided in FDRE Constitution, for example, which states, "[t]he historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures."

Diversity There are variants of arguments based on diversity. The first is that diversity by itself enhances the fields of AA such as business, employment and education.[123] What this means is ensuring participation of the target groups such as women and minority would increase productivity, creativity, efficiency, and so on in employment, education and other areas where measures of AA are applied. The other argument rests on recognition of the value of diversity *per se,* i.e. "differences should be valued, and that organizations should be managed in a way that allows people from all backgrounds to succeed."[124] This argument can be extended to apply to the right of everyone for fair participation in a democratic society, probably without resorting to evidence for any increase in productivity. The objectives of higher education in Ethiopia such as promotion of democratic culture and multicultural community life and fairness in the distribution of public institutions may be related to arguments relating to diversity.[125]

Social Utility This argument proposes that AA is not simply for the benefit of individuals who may have obtained preferential treatment for employment or admission or any other advantage. But measures of AA also benefit the target group as a whole in various forms. Better service to a target group by professionals from this group, better understanding of interests of the target group by officials from this group, role-model impact of AA to other members of the target group, and reduced stereotypes are some of the social benefits of AA.[126] The social benefits of this argument may be randomly stated taking the example of a hypothetical woman that has benefited from AA: A woman-doctor provides enhanced service to the reproductive medical needs of women; a woman parliamentarian (congresswoman) will serve women better; a woman business executive inspires young woman; and a successful woman professor will reduce stereotypes that women are not up to university professorship.

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[123] Allen, cited above at note 80, p.24
[124] Kellough, cited above at note 21, p.68
[125] Higher Education Proclamation, Article 4(8) and (9)
[126] Bossuyt, cited above at note 4, paras22-24

8.2 Arguments against AA

AA has never been without objection.[127] But in understanding the arguments against AA, it should be admitted that opponents of AA do not flatly reject all forms and fields of AA. For example, there are not many in literature denying the desirability of "affirmative mobilization" such as providing training opportunities for minorities or women to qualify for admission in education or employment. Rather, arguments against AA usually target "strong" forms of preferential treatments and quotas.

Equality and Non-discrimination

Principal arguments against AA are rooted in AA's alleged contradiction to the principle of equality and non-discrimination. The argument is that since measures of AA are against the principle of equality, they should be illegal. This position is reflected in the US and Europe, where in some cases their highest courts have struck down measures of AA as having violated the principle of pure equality.[128] Three challenges to this argument may be raised. The first relates to the meaning of equality. The meaning of equality AA espouses is the meaning of substantive equality or equality of results. If that is the case, the principle of equality should embrace measures of AA as long as in practice the target group is disadvantaged. The second is that AA is mostly provided with the principle of equality making it compatible or at least a legitimate exception to equality.[129] The third argument is that *pure* equality advocated by critiques of AA, which is mostly about *formal* equality, does not

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[127] It should be understood that arguments against AA are made not only by those 'non-preferred' groups such as men or majority ethnic groups. Some members of target groups have also made strong arguments against AA. For example, it is not all women that favour AA. Carol Bacchi, *The Practice of Affirmative Action Policies: Explaining Resistances and How These Affect Results* in Boerefijin, Ineke etl (ed.), Temporary Special Measures: Accelerating *de facto* Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women (2003) p.86

[128] Raday, cited above at note 100, p.42

[129] A separate provision for AA with equality principle should not mean that the principle of equality does not inherently include measures of AA. CEDAW, for example, "views the application of these measures [temporary special measures] not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms." CEDAW, General Recommendation No. 25, cited above at note 17, para18

satisfactorily answer structural and indirect instances of discrimination.[130] For example in Ethiopia, it is possible to suspect that many employers have stereotypes towards women, who may be wrongly perceived to be better housewives than civil servants. As a result, interview points assigned to women candidates in the situation of *equal* employment opportunity may reflect such prejudices resulting in lower points to the woman candidate than the man with almost same qualifications. Then would not it be fair to the woman to be considered for measures of AA to tackle such structural discrimination as long as she has obtained substantially equal number of points?

Two-Class Theory

Arguments surrounding the objection to two-class theory of AA are presented from two sides: from the side of the target group (such as minorities and women) and from the non-preferred group (such as nonminority or men). Within the target group, as they exist now, AA measures tend to benefit those that are least disadvantaged. Studies indicate that "it is the most fortunate segment of the groups designated as beneficiaries who seem to get the most out of affirmative action measures."[131] What this means in Ethiopia for example is that AA measures for women in the civil service or higher education benefit the least disadvantaged of women such as city women or women coming from affluent families. The most disadvantaged of women such as rural women or women in poor families benefit the least out of AA. Hence instead of helping, AA measures leave out those least advantaged, a fact that diminishes the moral force of AA.

For the non-preferred, AA measures tend to harm those least advantaged in the non-preferred group. This means that AA "makes victims of innocent nonminority," or innocent men or any innocent member of a non-preferred group.[132] Consider in Ethiopia a man from a poor family, who has never benefited from past structural discrimination or injustice and whose education is poor owing to his family's situation. This is the man who is likely to lose in the implementation of AA instead of the man with a better upbringing, probably associated with his families' past connections with regimes that had systematically discriminated against women.

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[130] Structural discrimination "encompasses all kinds of measures, procedures, actions or legal provisions which are, at face value, neutral as regards race, sex, ethnicity, etc., but which adversely affect disadvantaged groups disproportionately, without any objective justification." Bossuyt, cited above at note 4, para19

[131] Id, para11

[132] Kellough, cited above at note 21, p.88

These arguments based on two-class theory are not mostly against measures of AA. The concerns raised seem legitimate and, if those concerns are addressed in existing measures of AA, the arguments may lose currency.

Stereotyping

It is argued that strong preferential treatment may "lead to the claim that individuals who are promoted by this method are incompetent, thus perpetuating stereotypes."[133] Three concerns are raised against this argument. The first concern, which is similarly shared by those espousing this argument, is that AA does not create stereotypes. Stereotypes existed independently and before measures of AA. The stereotypical assumptions against women or minority or other groups existed long before the introduction of measures of AA. The second concern is whether there is empirical evidence to support that measures of AA reinforce stereotypes. Wrongful identification of beneficiaries of specific measures of AA as incompetent or weak may be just the expression of existing stereotypes instead of stereotypes allegedly reinforced by AA. The third concern is, even assuming AA reinforces stereotypes, it may be doubtful if it ever nears close to the benefits of AA.

Merit and Qualification

Naturally the question of qualification and merit arises in affording advantages on the basis of race, sex or another similar ground: less qualified people getting employment, education, and other opportunities. This opposition comes from the idea of meritocracy by which social positions have to be obtained through merits, namely education, skills, intelligence, and so on.[134] But the idea that AA sacrifices merit is not wholly true. The starting point for AA is merit. It is not that a member of a target group joins university education from 9th grade or joins a civil service with no certificates when actually the position requires a university degree. While there is no proponent of AA who advocates the application of AA without fulfilling the minimum criteria for admission to school or employment, in most cases beneficiaries are granted employment where their qualification or merit substantially is similar to the non-target group. The Ethiopian case is a typical illustration. Moreover, "qualifications and merits" sometimes may be biased against minorities and women, without genuine link to the opportunity at hand.[135] For example, in a locality where minorities are unemployed, requiring a professional degree for a position of

[133] Raday, cited above at note 100, pp. 41 and 42

[134] On critical insights on mmeritocracy, see Stephen J. Mcnamee and Robert K. Miller, The Meritocracy Myth (2nd ed, 2009)

[135] CEDAW, General Recommendation No. 25, cited above at note 17, para23

daily labour may be suspicious. Likewise meritocracy should not be all. For public and political offices, for example, "factors other than qualification and merit, including the application of the principles of democratic fairness and electoral choice, may also have to play a role."[136] It is true that merit becomes a real concern where mere quotas or similar forms of AA are used in areas where qualification alone is decisive. But to avoid such problems, strong forms of AA are mostly applied to "political representation, public appointments" or similar other programs while retaining the weak forms to "economic activity, credit, employment and educational opportunity."[137]

The above arguments for and against AA validly apply to the situation of Ethiopia. Unfortunately the writer has little evidence if the measures of AA in the Constitution and ordinary laws were informed by these arguments during deliberations. In any case, AA to a certain degree is provided in the Constitution and needs little justification for its implementation. But as is argued at the beginning of this section, the arguments would be useful in executing, consolidating, expanding, and reformulating AA measures in the Constitution and other ordinary laws. The importance of these arguments in raising the awareness of government organs tasked with implementing policies, target groups, and other stakeholders should not also be underestimated.

9. Obligations of the State and the Politics of Affirmative Action

Generally government's obligations in relation to AA may be viewed in terms of the nature of measures: self-executing and non-self-executing.[138] The self-executing measures of AA are those that could be readily enforceable by administrative, judicial, and quasi-judicial organs of the state. These are measures in Ethiopia found in ordinary laws of the civil service, election, and persons living with disability. The task here is to implement those legislations through awareness raising, monitoring the actual execution of the measures, assessing progress and so on.

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[136] Ibid

[137] Raday, cited above at note 100, p. 42

[138] "Self-executing" refers roughly to a legal instrument (or a provision), which is "effective immediately without the need of any type of implementation action"; Garner, Bryan A (ed.), Black's Law Dictionary (7th ed.) p.1364. While the nature of legal instruments as self-executing and not is controversial, the classification here is used loosely.

Under the non-self-executing measures of AA fall measures that are expressly or impliedly provided in the Constitution and international instruments such as CEDAW, ICERD, ICCPR, and ICESCR. The question is: is there a legal obligation on the state to issue specific enabling laws to implement these non-self-executing measures? The answer to this question is mixed. In international human rights instruments, especially where measures of AA are implied such as in ICCPR and ICESCR, it is the state's *discretion* to take measures of AA if it so chooses. CESCR, for example, indicates that states "are *encouraged* to adopt temporary special measures" and that "such measures are *not* to be considered *discriminatory*"[139] (Emphases added.) A different position is the position taken by CEDAW and CERD, which indicate that taking measures of AA is obligatory. Applying contextual interpretation to its founding instrument, CEDAW "considers that States parties are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's de facto or substantive equality."[140] Similarly CERD affirmed "the mandatory nature of the obligation to take such measures."[141]

In relation to the FDRE Constitution, the legal obligation to issue specific measures is twofold. In connection with express provisions of AA policies, the government is under obligation to enact laws of AA. For example, the Constitution's entitlements to women for AA must require the state to act and enact since it is the state's obligation to respect and enforce the Constitution. In connection with implied AA measures, however, the state's discretion plays crucial role. As is argued by Kellough, "[a]ny finding that preferential affirmative action is constitutionally permissible does not mean, however, that a government organization must implement such a policy. It simply means that government has the opportunity to do so if it chooses."[142]

But throughout these non-self-executing measures of AA lies the assumption that the state is committed to act. But what if the state is permitted to act but does not and, more important, what if the state is obligated under international or constitutional laws to act but does not? Here brings the issue of AA in politics. The article's consideration of AA in terms of legal framework should not obscure the crucial importance of politics in the life of AA. In other words, as far as target groups of AA are concerned, the role of the law to implement

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[139] CESCR, General Comment No. 16, note cited above at 33, para36
[140] CEDAW, General Recommendation No. 25, cited above at note 17, para24
[141] CERD, General Recommendation No. 32, cited above at note 8, para30
[142] Kellough, cited above at note 21, p.128

non-self-executing measures of AA either in the Constitution or international instruments is very much limited.[143] As argued by Kellough, measures of AA "were as much the product of political machinations as they were the result of a commitment to justice."[144]

This is to say that if normative measures of AA are said to be inadequate in Ethiopia such as in dearth of coverage of forms and fields of AA, it is more to the political "machinations" to find a solution. Those interested parties including women and other groups may need to press policy makers to enact further measures of AA. Moreover, it is not clear if measures of AA are being diligently implemented in Ethiopia. If that is so political solutions to limitations in judicial enforcement of AA may be useful. Especially measures of AA identified in policy instruments such as the GTP require further policy actions, which can be brought about through political participation and lobbying.

10. Empirical Evidence

For AA, empirical evidence is relevant for two related purposes: one is to justify AA. As indicated already, AA is based on a factual situation of underrepresentation caused mostly by historical injustice and discrimination, which require empirical evidence. As CERD indicated, "[a]ppraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions."[145] These data may or may not justify measures of AA. For Ethiopia, the writer does not have information on the role of empirical evidence in the introduction of AA including in the Constitution.

The second is the importance of empirical evidence to assess the progress of AA. Here the dual goals of the assessment may be served. The first is to end AA where empirical evidence suggests that equality has already been achieved. As is emphasized elsewhere, AA measures are temporary measures that should be terminated as soon as its objectives of substantive equality are

[143] Here the state's international responsibility may be invoked to enforce obligatory non-self-executing international norms of AA. Moreover, the government's failure to act as the Constitution required it through measures such as extensive application of AA in agriculture and private sector may raise the issue of constitutional interpretation. Both situations raise complex legal issues beyond the scope of the article.

[144] Kellough, cited above at note 21, p. 22

[145] CERD, General Recommendation No. 32, cited above at note 8, paras16-7

achieved. As CERD outlined, "[t]he requirement to limit the period for which the measures are taken implies the need, as in the design and initiation of the measures, for a continuing system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal."[146] The second is to assess the impacts of specific policies, whether positive or negative, to be able to make informed decisions to change the forms or fields of AA. In Ethiopia there seems to exist reluctance to record or publish the progress achieved through measures of AA. For example both in the civil service and educational statistics, the number of employees or students, who have benefited from measures of AA, are not reported.

The cost of carrying out empirical assessment may be huge and cost-benefit analysis is necessary. However, statistical analysis of existing data in employment, agriculture and other sectors may provide indicators of the overall prevalence of underrepresentation, to which policy makers may respond in the form of AA. Statistical data required in states reports to UN treaty bodies, especially relating to disaggregated data based on sex, minorities, or other factors may be useful to achieve the first goal of assessing the situation of underrepresentation although the progress achieved by either AA or other measures of equality has to be corroborated by other sources.

Taking educational statistics in Ethiopia, a point may be made. In the 2010/11 educational statistics, undergraduate enrolment of girls is only 27% when postgraduate enrolment is only 13.8%.[147] This statistics tells many stories. The first is despite some progress, women in higher education are still highly underrepresented; hence corrective measures are necessary to ensure equality of results in accessing higher education by women. The second story is that the existing measures of AA have not brought about any meaningful change. This probably indicates the importance of taking other forms of affirmative or equality measures. Such measures may target high school education or other places that have caused the huge disparity of girls' attendance in higher education.

11. Private Organizations: The Forgotten Players?

In discussions relating to AA in Ethiopia, the question of normative framework applicable to the private sphere poses difficulty. The issue seems neglected especially considering the increasing involvement of the private sector in the country. Should measures of AA cover the private sector? What fields and

[146] Id, para35
[147] FDRE Ministry of Education, Education Statistics Annual Abstract 2010-11, pp.59-60

forms of AA are suitable to the private sector (loosely referring to private business, political organizations and other institutions)? The opportunities in the private sector are enormous, for example getting employment in the widening private sector. The importance of applying preferential treatment in the private sector has also been highlighted in the literature. In his final report, the Special Rapporteur on AA, for example, has identified the private sector such as educational institutions (together with the public sector) as actors that could carry out measures of AA.[148]

In the Ethiopian system of AA as well, private sector is implicated in the application of measures of AA. In the FDRE Constitution, for example, the equality referred to as the purpose of AA to women is equality both in public and "private institutions," leaving way for the application of AA to the private sector.[149] AA provided for persons with disability also applies to private organizations.[150] This may be the only exception in ordinary national laws though its implementation and monitoring has yet to be detailed and scrutinized.

There are generally two possibilities to integrate the private sector into the sphere of AA: through mandatory laws and voluntary commitments. Regarding mandatory rules, the possibility is shown through AA measures to persons with disabilities, though the awareness and implementation of those rules remain unclear. Regarding voluntary commitments, CEDAW foresees the possibility of negotiated and voluntary measures of AA by the private sector.[151] In Ethiopia one can imagine voluntary commitments through measures negotiated between the government and the private sector in government projects. It is also possible to hope the private sector taking its own initiatives of AA. Still doubts remain as to the effectiveness of such negotiated or unilateral commitments. Their effectiveness may be ensured through incentives by tax cuts, government grants, or other measures in which the interaction between the government and private sectors is inevitable. The incentive in the financial assistance by the government to political parties for increased participation of women provides a typical illustration.

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[148] Bossuyt, cited above at note 4, para7

[149] FDRE Constitution, Article 35(3)

[150] Right to Employment of Persons with Disability Proclamation No. 568/2008, Article 2(3) defines "Employer" as "any federal or regional government office or an undertaking governed by the Labor Proclamation".

[151] CEDAW, General Recommendation No. 25, cited above at note 17, para32

12. Conclusions and Recommendations

Affirmative action is part of the human rights law of Ethiopia. It is rooted both in international and national laws. Despite the country's human rights obligations that require extensive forms and fields of AA to enhance equality, however, the review has indicated that fields and forms of AA are very limited. The fields of AA are concentrated in the civil service and higher education, without much policy or legal programs to embrace target groups in the rural community and private sector. The measures of AA are also "weak" forms, which have not taken due account of measures of affirmative mobilization and fairness that would benefit target groups with little social resistance. Although there is little evidence to conclusively state on the effectiveness of AA, statistics in the civil service and higher education indicate that equality aimed by AA has not been achieved. For example, in higher education, the participation of women is only 26% while in the civil service it is less than 35%.

These partial figures indicate that the country has not yet overcome its history of discrimination and marginalization to foresee the end of AA. On the face of such underrepresentation, the importance of AA to accelerate equality becomes more important. Hence, the implementation of existing AA laws and policies has to be intensified. Owing to the inadequacy of existing laws and programs, new forms and fields of AA to enhance the equality of all should be introduced. For example, measures of AA to be implemented in rural areas, business opportunities, and private undertakings should be explored. Together with reforms in mandatory measures of AA, new fields and forms of AA may be designed to encourage governmental and private entities to have voluntary commitments in AA to enhance the representation of certain target groups.

At this moment, a comprehensive strategy for reform and serious implementation of AA seems necessary. This has to be principally the government's undertaking to lead. But complete reliance on the government's initiatives may be too optimistic. One clear option would be for target groups such as women to agitate the government, their representatives, local administrators and policy makers to take equality concerns seriously and to implement measures of AA. For example, target groups may use their votes to dictate how equality and measures of AA on the face of underrepresentation matter.

In introducing new fields and forms of AA, emphasis may be placed on the merit-based application of AA, which counters prejudices and simplifies the implementation of AA. This requires introduction of measures of affirmative fairness and affirmative mobilization. Article 41 of the FDRE Constitution may

also serve as the starting point in identification of new fields and beneficiaries of AA. A number of economic, social, and cultural rights are identified in the article to be areas where the state has to allocate resources to enhance the situation of certain categories of people that require special measures of protection.

Ordinary laws of AA with limited exceptions are shy of embracing private organizations. This may largely be the result of policies of non-interference by government towards private organizations. While providing compulsory legislations may trigger some resistance on grounds of efficiency, merit, *laisez faire* and equality, incentives may be provided to private entities that embrace AA. Moreover, "weak" forms of AA, which entail little objection even by private entities, may be introduced by law and reinforced by government incentives and public scrutiny. Incentives in government projects, tax breaks, and so on should also be possible.

By law, as is indicated, political parties have small incentives to increase the number of women candidates in elections. Aside from that, there are not national goals and timetables set by the government to achieve the number of desirable seats in crucial elected and/or appointed public offices such as ministerial positions in which the representation of women is only a fraction. This should be one critical area where new forms of AA have to aim.

The importance of empirical evidence on the implementation of AA is explained. In efforts of reform as well as enhancing implementation, effectiveness of measures, attitudes of beneficiaries (and other groups), and other aspects of AA have to be empirically tested. Empirical evidence is especially necessary owing to the unsatisfactory statistics (regarding AA) in vastly acknowledged fields of AA, namely the civil service and higher education. Unfortunately, the exact contribution of AA in the progress to equality in these sectors has not been reported. Hence empirical researches on AA are called for if there is a real commitment for meaningful evaluation of AA. Those researches should aim at exploring the awareness on AA, impacts of existing measures, attitudes towards the various potential forms of AA, and so on.

The existing measures of AA have their own institutions to monitor implementation. However, why those institutions have not carried out regular assessments and monitoring with the objective of reevaluating the direction of AA is not clear. Ministry of Labour and Social Affairs, MWCYA, and the Electoral Board are the institutions entrusted with monitoring the outcomes of some of the AA outlined in this article. Their assessment and monitoring as

part of empirical investigation of AA are likely to determine the direction of their respective measures of AA; hence these institutions should be required to regularly monitor the implementation of AA. Apart from that, with suggested reforms in measures of AA, establishment of special offices may be contemplated.

Finally it should be remembered that AA is a means to ensure equality. It starts where committed enforcement of the principle of strict equality ends. If there is no substantial enforcement of equality, measures of AA are nothing but superfluous.