

NOTES CORNER

NOTES ON THE PRINCIPLE “BEST INTEREST OF THE CHILD”:**MEANING, HISTORY AND ITS PLACE UNDER ETHIOPIAN LAW**

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“Give what is best for the child” (V.I. Lenin)**Introduction**

The principle of “*best interest of the child*” is a key concept in the world’s child rights protection movement and it mainly applies in the realm of family disputes such as custody, guardianship, maintenance, adoption of the child¹ and other issues. The overall theme of the principle is that due focus and priority should be given to the political, economic and social interests of the child whenever policies, laws and decisions are made which directly or indirectly affect children.

This principle was first expressly incorporated in the 1924 Geneva Declaration on the Rights of the Child and the 1959 United Nations (UN) Declaration on the Rights of the Child respectively.² It is also one of the cornerstones of the 1989 UN Convention of the Rights of the Child (UNCRC)³ and the 1990 African Charter on the Rights and Welfare of the Child (ACRWC).⁴ The principle of “*the best interest of the child*” has also been

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¹ Stephen Parker (1994), “The Best Interests of the Child: Principles and Problems; The Best Interest of the Child; Reconciling Culture and Human Rights”, *International Journal of Law, Policy and the Family*, Vol. 8, Issue 1, p. 27.

² The preamble of the Geneva Declaration of the Rights of the Child adopted on 26 September 1924 (League of Nations) and the preamble of the Declaration of the Rights of the Child adopted by the UN General Assembly Res. 1386 (XIV) of 10th of December, 1959.

³ Art. 3 of the UN Convention on the Rights of the child (UNCRC) adopted by Resolution 44/25 of the GA of the UN on 20 November, 1989 and entered into force 2nd of September 1990.

⁴ Art. 4 of the African Charter on the Rights and Welfare of the Child (ACRWC) adopted by the Assembly of Heads of State and Government in 1990 and entered into force on November 29, 1999.

recognized in the Ethiopian legal and constitutional system from as early as the 1960's. The standard of the "*best interest of the child*" was incorporated into the Civil Code⁵ and this tradition has continued with the principle having been mentioned in the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution).⁶

Despite its embodiment in international, African and domestic laws, the issue of the best interest of the child and the determination of its test remain problematic. The first two sections of this note deal with the genesis and meanings of the concept "the best interest of the child." These sections address the problems in definition and pursue the rights-based approach regarding the meaning of *the best interest of the child* mainly based on the 1924 Geneva Declaration of the Rights of the Child and the 1959 UN Declaration of the Rights of the Child. The third section briefly discusses the concept of the best interest of the child in light of international and regional human rights instruments from the 1948 Universal Declaration of Human Rights (UDHR) to the 1990 African Charter on the Rights and welfare of the Child (ACRWC). And finally, the fourth section of this note highlights the embodiment of the concept in the Ethiopian legal regime.

1. Historical genesis of the idea of "*The Best Interest of the Child*"

1.1. Evolution of the doctrine of "the best interest of the child"

The doctrine of the best interest of the child is a widely recognized principle in child right protection. This legal principle largely applies in relation to family affairs; in particular, in disputes concerning custody, guardianship, maintenance, adoption, etc of the child.⁷ Originally, the doctrine of the best interest of the child had limited application. It was little more than a way of ensuring that the interests of any children involved would be taken into account in divorce and

⁵ Art. 681 (1) of the Civil Code of the Empire of Ethiopia, Negarit Gazeta, Procl. 165 of 1960, 19th Year No. 2, Addis Ababa 5th May, 1960.

⁶ Art. 36(2) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) ratified on 8th of December 1994 and entered in to force as of August 21st 1995.

⁷ See for instance, Arts. 681, 231 & 234, 821 and 805 of the Civil Code of Ethiopia of 1960 and Arts 113(2), 245 & 249, 210(b), 192 (2) and 194(2) of the Revised Family Code of 2000. Relevant provisions of the Civil Code are cited to indicate that the recognition of the principle of *the best interest of the child* predates the current revised family codes that are applicable in Ethiopia.

custody cases.⁸ However, as it will be discussed later, this principle is, nowadays, extended to apply not only in its original sense, but also "in relation to all actions concerning children" to quote the language of the 1989 UN Child Rights Convention.

Despite its very limited jurisprudential origins, the principle of the best interest of the child is, in one form or another, embodied in many national and legal systems and has important analogues in diversified cultural, religious and other traditions.⁹ However, this apparent communality is accompanied by very diverse interpretations that may be given to the principle under different settings.

In early times, fathers were given custody of their children in case of divorce. For instance, in feudal Europe, the father used to have a paramount right to have custody of his children as children were considered to be part of his patrimony.¹⁰ In countries like Holland, the father was given this paternal preference as he was thought to be capable of properly raising children.¹¹ Hence, during these periods, the father had a right to have custody of his children unless the wife proves that he is unfit.¹² The unfitness, however, was to be proved under stringent conditions. The mother, in most jurisdictions, had to show that the father was insane or for any other reason was incapable of taking care of the children.¹³

In 1839, the British parliament modified this paternal preference by the 'tender years doctrine'.¹⁴ This doctrine holds that children under seven years of age should not be separated from their mothers. This was based on the premise that mothers are very important for younger children due to the special natural

⁸ Philip Alston (1994), "The best interest principle: towards a reconciliation of culture and Human Rights, reconciling culture and Human Rights," *International Journal of Law, Policy and the Family*, Vol. 8, Issue 1, p. 4.

⁹ *Ibid.*, p. 5.

¹⁰ Melina, M.B. (1985), "Louisiana Family Law: The Visitation of the Non-custodian Parent", *Tulane Law Review*, Vol. 59, p. 489.

¹¹ Kidist Alemu (1997) *Post-divorce Decisions of Child Custody in Ethiopia in Light of the "Best Interest of the Child"*, LLB thesis, AAU, Faculty of Law, (Unpublished), p. 6.

¹² *Id.*, See also "Custody of a Minor-Best Interest of the Child Rule", *Tulane Law Review*, Vol. 32, No. 3, 1958, p. 59.

¹³ *Id.*

¹⁴ Lenore J. Weitzman (1987), *The Divorce Revolution : The Unexpected Social and Economic Consequences for Women* (The Free Press: Macmillan Publishing Group), p. 219.

bond existing between them and due to the fact that young children are often looked after by their mothers.¹⁵

In the 1900s, another standard was developed through case laws in the common law countries, especially in the U.S.A. This standard favors the mother as the primary care provider and it was based on the significant place mothers have in the child's mind due to their intimate interaction and the special natural bond which exists between them.¹⁶ This standard differs from the initial paternal predominance in feudal Europe because it prefers mothers by giving due consideration to what is best for the child rather than paternal preference. In fact, the application of the best interest standard is 'gender neutral', and it has currently won recognition in both the common law as well as in the civil law systems, amongst which the U.K., U.S.A. and France may be cited.¹⁷

1.2. The best interest of the child in the 1924 Geneva Declaration of the Rights of the Child

The first organized effort in the process of recognizing the rights of the child came in 1924 with the adoption of the Geneva Declaration of the Rights of the Child by the League of Nations. In the context of the Declaration, the rights of children were primarily seen as measures to be taken against slavery, child labor, child trafficking and prostitution of children.

This Declaration significantly reflected the concerns related to the rights of children that were grossly violated during WWI and its aftermath. The declaration emphasized children's material needs and proclaimed that children must have the requisite means for their formal development. This included food for the hungry, nursing for the sick, due attention for the handicapped and shelter and support-both physical and emotional- for the orphans.¹⁸

The Geneva Declaration of the Rights of the Child was based on the principle that "mankind owes to the child the best it has to give". In fact, this principle was embodied not in the main body of the declaration, but in its preamble. It reads as follows:

By the present declaration of the rights of the child, men and women of all nations, recognizing that mankind owe to the child the best that it has to give, declare and accept as their duty ...

The phrase "mankind owes to the child the best it has to give" clearly underlines our duties towards children, and it entitles them for the best that mankind can

¹⁵ *Id.* See also, Kidist Alemu, *supra* note 11, p. 6.

¹⁶ Lenore J. Weitzman, *supra* note 14, p. 221.

¹⁷ *Id.*

¹⁸ Articles 1, 2 and 3 of the Geneva Declaration of the Rights of the Child of 1924.

give. This implies that the interest of the child should be given primary consideration in actions involving children.

1.3. The best interest of the child in the 1959 UN Declaration of the Rights of the Child

As pointed out earlier, the process of the recognition and enunciation of human rights of children was first initiated in an organized manner by the League of Nations with the adoption of the Geneva Declaration of the Rights of the Child in 1924. This step was carried further by the United Nations 1959 Declaration of the Rights of the Child and the 1989 Convention of the Rights of the Child.

The 1959 Declaration of the Rights of the Child affirmed the principle that "mankind owe to the child the best it has to give" which was the principle recognized in the 1924 Geneva Declaration of the Rights of the Child. It particularly emphasized on the need for special safeguards and care of the child. The third paragraph of the preamble of the declaration states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." The Declaration expressly recognizes the principle of the best interest of the child. Article 2 of the declaration provides that:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, *the best interest of the child* shall be the paramount considerations."

The principle of the best interest of the child is also embodied under Article 7 of the Declaration which states that "best interests of the child shall be the guiding principle of those responsible for his education and guidance ..."

The text of Article 2 of the 1959 Declaration has, in particular, two important notable features. The *first* is that the principle, far from being restricted to child custody arrangements, is of very a wide-ranging application as it was intended to enable the child "to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity." The second is that the child's best interests were not to be one among several factors to be considered, but rather were to be '*the paramount consideration*'. As will be discussed later, this was relatively limited by the 1989 Convention on the Rights of the Child.

2. Meaning of "The Best Interest of the Child"

2.1. Problem of definition

As discussed earlier, the principle of the best interests of the child is recognized not only in different domestic laws of countries but also in many international human right instruments. Despite such universal recognition of the principle,

defining the concept is still a problem. “Just as values and social norms are not the same everywhere, so are the understanding of this notion.”¹⁹ In this regard, James R. Himes observed that:

The challenge of interpreting ‘the best interests’ principle is complicated by many powerful forces at work in the world: poor and conflict-torn societies of Africa to the bewildering legal and ethical concern about the technological manipulation of human genes and the human reproductive system.²⁰

Moreover, the concept is “inherently subjective and its interpretation would inevitably be left to the judgment of the person, institution or organization applying it.”²¹ Robert Mnookin also shares this view when he says “society in general lacks ‘any clear-cut consensus’ as to the values which must be used to determine what is best for the child”²²

In fact, the most common issue of the principle of the best interests of the child revolves around the difficulty of identifying the criteria that should be used to evaluate possible alternative options to act in the child’s best interests. In Mnookin’s view;

The choice of criteria is inherently value laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children’s policies, but they are especially acute in this context because children themselves can’t speak for their own interests.²³

Philip Alston, on his part, raises the following instance to show the difficulty of not having a definite meaning of the principle of the best interest of the child.

... [i]n some highly industrialized countries, the child’s best interests are obviously best served by policies that emphasize autonomy and individuality to the greatest possible extent. In more traditional societies, the links to family and the local community might be considered to be of paramount importance and the principle that “the best interest of the child’ shall prevail” will, therefore, be interpreted as requiring the sublimation of the individual child’s preferences to the interests of the family or even the extended family.²⁴

To conclude, despite the recognition of the principle of the best interest of the child in national and international instruments, there is no binding content attached to it. As a result, determining the exact content of this standard and hence what is best for the child has to be assessed on a case by case basis

¹⁹ Philip Alston, *supra* note 8, p. 10.

²⁰ *Id.*, p. 12.

²¹ *Id.*

²² Robert Mnookin (1985), *In the Interest of the Child: Advocacy, Law Reform and Public Policy* (New York: W.H. Freeman & Co.), p. 17.

²³ Philip Alston, *supra* note 8, p. 9

²⁴ *Ibid*, p. 11.

depending on the particular realities of a given state. As David Chambers notes, "... deciding what is best for a child poses a question no less ultimate than the purpose and values of life itself" and he poses the question: "... where is the judge to look for the set of values that should inform the choice of what is best ... ?"²⁵

2.2. "The best interest of the child": a right based approach

To alleviate this definitional problem we stated above, some scholars suggest that the 'best interest' standard should be construed in light of the other rights of the child.²⁶ It can also be seen in light of the general social welfare, and the moral, religious and cultural inclinations of parents that may tend to compete with the child's best interest in some situations. There is thus the need to check the compliance of a particular set of values with the rights of the child before using it in the determination of a case at hand.

This position is further strengthened by the argument that these rights in general are part of the 'best interest' concept as they are intended to be used in its realization and to be applied with 'the best interest of the child' constantly in mind.²⁷ This line of interpreting 'the best interest' standard in light of the rights of the child leads to the conclusion that the standard exceeds the traditional concepts of child upbringing, which are found in any society.²⁸ In short, this means that the traditional conceptions may be employed only so long as they are in conformity with the other rights of the child.

The exact content of these rights is to be determined having regard to the socio-economic and other relevant factors involved.²⁹ The reference to these factors is called for because 'a judge is not dealing with what is ideal for the child but with what best can be done in the circumstances.'³⁰ This determination of the best setting for a child may involve choice as to which one entails a lesser evil depending on the relevant factors considered.³¹ Therefore, the reference to the other rights of the child will be our benchmark in searching for the actual content of the principle 'best interest of the child' in a rights-based approach.

²⁵ Robert Mnookin, *supra* note 22, p. 17.

²⁶ Michael Freeman and Philip Veerman (ed.), (1992), *The Ideology of Children's Rights*, (Dordrecht: Martinus Nijhoff Publishers), p. 24,

²⁷ *Ibid*, p. 129.

²⁸ Kidist Alemu, *supra* note 11, p. 12.

²⁹ *Ibid*, p. 13.

³⁰ P.M. Bromely and N.V. Lowe (1987), *Bromely's Family Law*, 7th ed.. (London: Butterworths), p. 317

³¹ Kidist Alemu, *supra* note 11, p. 13

3. Some International and Regional Human Right instruments on the principle of “*The Best Interest of the Child*”

3.1- The 1948 Universal Declaration of Human Rights (UDHR)

The United Nations Declaration of Human Rights was drafted and adopted by the UN General Assembly not out of the intention of creating a legal obligation on states, but to set a standard of achievement.³² Secondly, this instrument does not cover particular categories of persons, i.e. children, women, and the like. It rather addresses human rights in general, to which everyone is entitled. Yet, we can interpret some generic provisions in the context of child rights. According to Article 25(1) of the UDHR, every one (including the child) is recognized to have the right to a standard of living adequate for the health and well being of him/herself ... including food, clothing, housing and medical care and other necessary social services. Under the 2nd sub-article of the same provision, children are specifically addressed by the UDHR when it says “motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

This entitles every person the socio-economic rights that are important for his/her life and wellbeing. And in particular, children are entitled to get special care from the law and the society. For example, Art. 26 of the UDHR embodies the human right to education. According to this provision, everyone has the right to education and for the purpose of realizing this right, education shall be free and especially elementary education is made compulsory. Since education is the instrument for the full development of the human personality, parents have the right to choose the kind of education that shall be given to their children as per Sub-art 3 of the same provision. This parental right is based on the presumption that there is no one who is in a better position than parents to determine what is best for the child.

3.2. The 1966 Covenants

The two international covenants, which hold a significant status in the world human right movement, are the International Covenant on Civil and Political Rights (ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the same year. Articles 23(4) and 24 of the ICCPR specifically deal with the rights of the child in the civil and political life of the society. Article 23(4) states that in situations of dissolution of the marriage, the state parties to the Covenant are responsible to take measures which are appropriate for the protection of the child. In other words, the state

³² However, most of the elements of the Declaration have obtained a binding effect as principles of customary international law.

parties are legally obliged to design a legal as well as an institutional framework in their domestic legal and justice system to ensure what is best for the child in the settlement of issues such as custody under situations of divorce. Similarly, Article 24 clearly states that the overall obligation of the family, the society and the state towards the protection and implementation of the rights of the child in general and the best interest of the child in particular.

Under Article 10 the ICESCR of 1966, the family is recognized as the natural and fundamental unit of the society and is accorded the widest possible protection and assistance not only for its being the foundation of a society, but also for its responsibility for the care and education of children. Under the 2nd sub-article of the same provision, pregnant mothers and those who have given birth are protected through entitlements for paid leave or leave with adequate social security benefits. The same principle is adopted under the 3rd sub-article, which compels state parties to adopt special measures of protection and assistance with a view to enhancing the protection and realization of the socio-economic and socio-cultural rights of children. In the realm of education, Article 13 (3) of the ICESCR clearly provides the parental right to choose the appropriate school for their children, which seems to reaffirm a right that was already recognized under Article 26 of the UDHR.

3.3. The 1989 Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child was adopted by the UN general assembly on November 26/1989. The first draft of the convention was in the form of a proposal submitted by Poland in 1978. Poland's proposal sought to adapt the provisions of the formally non-binding 1959 Declaration of the Rights of the Child with a view to making them suitable for inclusion in a binding treaty.³³ Accordingly, the first draft of the Convention contained the principle of the best interest of the child embodied under Article 2 of the 1959 Declaration of the Rights of the Child in its full text as discussed earlier.

However, due to the opposition of some delegations, an alternative draft was submitted in 1980 to the working group of the Commission on Human Rights, which was responsible for the drafting of the Convention. Even then, there were debates on whether the "best interest" principle should be "a primary" or "the paramount" consideration or whether it might be better described in some other way. Some delegates in the working group expressed their concern that the use of the word "paramount" in the revised Polish draft was too broad, while a number of the delegates expressed their view that the draft should offer better protection to the child.

³³ H. J. Steiner and Philip Alston (2000), *International Human Rights in Context: Law, Politics and Morals*, 2nd ed., (Oxford University Press), p. 512.

Ultimately, the proposal that ‘*the best interests of the child should be a primary consideration*’ was adopted. The main justification given for the adoption of this weaker formulation was that there could be instances, in which the competing interests of, *inter alia*, “justice and society at large should be of at least equal, if not greater, importance than the interests of the child.”³⁴ Hence, the objective implicit in opting for such formulation seems to be intended to ensure that there is sufficient flexibility, at least in certain extreme cases, to enable the interests of those other than the child to prevail. Nevertheless, as Philip Alston observed, such formulation would “impose a burden of proof on those seeking to achieve a non-child centered result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist.”³⁵

Moreover, the UN Committee on the Rights of the Child (established by virtue of Article 43 of the Convention) in its general comment clearly states that Article 3(1) of the Convention refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The provision stipulates that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.” The principle thus requires active measures by all organs of the state, i.e. the executive, the legislature and the judiciary.

Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions. An example in this regard can be a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.³⁶ In light of this provision of the Convention, the best interests of the child should be measured against the compatibility or otherwise of any administrative, legislative or judicial measure not only in taking the interests of the child into account, but also to give it a primary consideration.

In addition to Article 3 of the Convention, which is the guiding principle of the ‘best interest of the child’ rule, we also have other provisions (such as Articles 18, 20, 21 and 37) in the Convention which reinforce the principle. Article 18 of the Convention states the overall responsibility of the state and the

³⁴ *Id.*

³⁵ *Id.*

³⁶ Committee on the Rights of the child, General comment no. 5/2003 (34th session on the general measures of implementation of the convention on the rights of the child) 19 September/2003.

family (or guardian) of the child. This specific provision imposes an international legal obligation on the state parties to make utmost effort to ensure the recognition of the principle that both parents (the husband and the wife) have common responsibility for the upbringing and development of the child. States have the obligation to establish institutional mechanisms, design policies and enact laws that render facilities and services such as child-care services for children of working parents. This can indeed create a conducive situation in the performance of obligations of working-parents to give what is best for the child.

Article 20 of the Convention deals with the situation of a child who is temporarily or permanently deprived of his/her family environment or who cannot be allowed to remain in that environment in his/her own interest. In such situations, state parties are legally obliged to look for an alternative care such as personal or institutional adoption, foster placement and the like so that the child can be protected from the adverse effects of that particular hostile environment. This requires sound policies and the enactment of laws that can provide special protection and assistance to a child under such circumstances.

Article 21 of the Convention seems to be the continuation of Article 20 and it regulates the procedural requirements in one of the alternative cares stated under Article 20 (3), i.e., adoption. The provision requires that the state should give priority to the protection of the best interest of the child and that it should, by every means possible, be able to check the protection of the child's interest before it grants permission to any one who wants to adopt the child.

Article 37 addresses the situation whereby the child comes into conflict with the law, or what is traditionally referred to as, juvenile delinquency, as defined in the UN Standard Minimum Rules for the Administration of Juvenile Justice, (or in short the Beijing Rules). Under these circumstances, the state parties should adopt what is best to protect the child, who comes into conflict with the law. Utmost care is thus required in the process of correcting and rehabilitating him/her by way of separating that child from adult prisoners and by way of prescribing a legal procedure in line with constitutional as well as international human right laws.

3.4. The African Charter on the Rights and Welfare of the Child

The basic reasons that necessitated a separate charter on the rights and welfare of the African child include the need for a "more elaborate" legal regime that can provide "better protection to the African child" and the need for "an African touch to the overall concept of child rights."³⁷ Some authors believe that the

³⁷ Tilahun Teshome (1999), *The African Charter on the Rights and Welfare of the Child*, unpublished, p. 8.

Charter adopts a similar, but slightly higher standard than what is found elsewhere, in requiring that ‘in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration’. They, arguably, say that the UNCRC only requires the best interests to be simply ‘a consideration’.³⁸ However, as other eminent scholars in the field argue and as can be seen easily from the UNCRC and the African Charter, the latter is silent on certain issues such as the obligation of states stipulated under Article 3(3) of the Convention on the Rights of the Child which provides:

State parties shall ensure that the institutions, services and facilities responsible for the care and protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The African Charter on the Rights and Welfare of the Child of 1999, in addition to the above mentioned points, also deviates from the UNCRC in many respects, such as the age of conscription into the army. Article 22(2) of the Charter prohibits any act of recruitment of a child to an armed conflict, while Articles 38(2) and 38(3) of the UNCRC allow the participation of children aged 15 to take part in armed hostilities. Article 23(4) of the African Charter is also more advanced in the protection of internally displaced children, while the CRC has no provision which deals with this issue.

4. “The Best Interest of the Child” under Ethiopian Laws

Before the enactment of Ethiopia’s 1960 Civil Code, there were two general patterns³⁹ of child custody in various parts of the country. The first was that the father was considered to have a natural right to the custody of his children after divorce. Secondly, children may be entrusted to their mothers depending on their ages. Children under the age of three were entrusted to their mothers. On the other hand, children above the age of seven were presumed to have attained the age of discernment and could be allowed to be with their mothers if this option becomes their choice.

The 1960 Civil Code embodies the principle of the best interest of the child as its guiding principle in determining cases of custody, guardianship, adoption and maintenance of children. As will be discussed later, this principle is also affirmed in the Revised Family Code and the family codes of regional states.

³⁸ Rachel Murray (2004), *Human Rights in Africa: from the OAU to the African Union*, (Cambridge University Press), p. 167.

³⁹ See for example Gebrehiwot Aregay (1966), *Guardianship and Custody of Children Before and After the Modern Codes* (Unpublished), p. 11.

4.1- The Constitutional Regime of Child Rights in Ethiopia

There was no mention of child rights in the 1931 Constitution, and the whole concept of human rights was given a very minimal recognition. There was no clear provision in the Constitution which provided institutional guarantees for the realization of the few rights that were recognized.⁴⁰ Moreover, the 1955 Revised Constitution did not address the issue of child rights in general and the best interest of the child in particular. However, there was a provision which recognized the need to accord special protection to the family as the source of the maintenance and development of the Empire and as the primary base for education and social harmony.

The 1974 Draft Constitution incorporated some provisions on the rights of the child such as non-discrimination of children born in or out of wedlock with respect of rights and duties,⁴¹ prohibition of child labor,⁴² and parental obligation to get their children at least a primary education.⁴³ Although the Draft Constitution seemed relatively modern compared to its predecessors, it still lacked a specific provision concerning the detailed rights of a child in every aspect of life. Yet, Article 120 of the Draft Constitution had entrusted the Imperial Supreme Court with the power to interpret the constitution. This would have indeed given regular courts the power to interpret and elaborate the provisions (on some aspects of child rights) and develop the trend of protecting the interests of the child. The PDRE (People's Democratic Republic of Ethiopia) Constitution of 1987 only provided for the non-discrimination principle of children born in or out of wedlock⁴⁴ and compulsory primary education to children.⁴⁵ No other mention was made concerning the rights of children.

With respect to the charter of the Transitional Government of Ethiopia (TGE) of 1991, it gave the UDHR of 1948 a general effect of application in Ethiopia in its fullest sense. However, it did not mention or further elaborate the rights and freedoms of individuals (including the child) except freedom of expression, freedom of association and the right of nations, nationalities and peoples to self-determination.

Unlike the preceding, the current FDRE Constitution expressly devotes an article for the rights of children.⁴⁶ This constitutional provision not only

⁴⁰ See for example, Chapter 3, Articles 18-29 and Chapter 6, Arts. 50-54 of the 1931 Constitution).

⁴¹ Art. 30(3) of the 1974 Draft Constitution.

⁴² *Ibid*, Art. 49(1).

⁴³ *Ibid*, Art. 56(2).

⁴⁴ Article 37(2) of the Peoples Democratic Republic of Ethiopia Constitution, 1987.

⁴⁵ *Ibid*, 40(2).

⁴⁶ Art. 36, Federal Democratic Republic of Ethiopia Constitution, 1995.

recognizes and protects the various aspects of child rights, but it also adopts the doctrine of the best interest of the child from the 1989 Convention on the Rights of the Child and from the African Charter on the Rights and Welfare of the Child.⁴⁷

4.2. The Civil Code and revised family laws

a) The Ethiopian Civil Code of 1960

The Ethiopian Civil Code incorporates a spectrum of stipulations that may make up the idea of “*the best interest of the child*”.⁴⁸ Article 2 of the Civil Code considers a merely conceived child as born when his/her *interest* so demands. Accordingly, a conceived child will be considered as born where, *inter alia*, the interest of a conceived child is at stake.⁴⁹ Although they have now been repealed and substituted by revised family codes, the provisions of the Civil Code that deal with the custody of children in post-divorce decisions of the court stipulate that the child shall stay with his/her mother until the age of five unless there is serious reason for deciding otherwise. Moreover, Article 805 of the Code clearly states that adoption may take place only if there is good reason, which takes the child’s benefits into account.

In the realm of successions, Article 842 of the Civil Code renders children of the deceased the first intestate successors and there are provisions that annul the will of a testator if a descendant is born after the making of the will (and where the descendant accepts the succession).⁵⁰ These laws of succession promote the best interest of the child. Moreover, the Civil Code does not allow a testator to disinherit a child or other descendant without stating (in his will) “the reason that justifies the disinheritance”.⁵¹ Even though the reason stated is assumed to be correct, the court shall ascertain whether the reason stated by the testator “justifies the disinheritance”.⁵² Ethiopia’s Civil Code further stipulates that the succession shall remain in common between the heirs where the manner of making the partition depends on the condition of the birth of a child who is merely conceived.⁵³ The Code also protects the best interest of the child in the realm of contracts. Contracts concluded with minors are voidable and they can

⁴⁷ *Ibid*, Article 36(2).

⁴⁸ Tilahun Teshome (1997), “The Child and the Law in Ethiopia: the Case of the UN Convention on the Rights of the Child,” *Journal of Ethiopian Law*, Vol. 18, August 1997, p. 43.

⁴⁹ *Id.*

⁵⁰ *Ibid*, Art. 904 (1) and (2). Please Read the *corrigenda* of the Civil Code with regard to Sub-article 2 of Art. 904.

⁵¹ *Ibid*, Art. 938.

⁵² *Ibid*, Art. 938(2) & (3).

⁵³ *Ibid*, Art. 1063(2).

be invalidated if the minor or his/her submit the application for invalidation within the prescribed limit of time.⁵⁴

b) The Revised Family Code of 2000

The 2000 Revised Family Code has replaced the provisions of the Civil Code concerning family matters and other related issues. Unlike the Civil Code, which entrusts the child to the custody of his/her mother until the age of five, Article 113 of the Revised Family Code entitles the court to decide on the custody of children. The court shall decide the custody of the child by taking into consideration the interest of the child. However, the court may reverse or revise its decision as it thinks fit due to the change of circumstances on the custody situation of the child.⁵⁵

The Revised Family Code (RFC) of 2000 seems to require relatively stringent procedures for the courts in assessing the necessity of adoption before approving the adoption contract. Under the Civil Code, it was enough if the consent and opinion of the adopted child and the adopter are obtained; but the RFC requires not only the opinion of the adopted child and the adopter, but also stipulates that the court shall take into consideration the capability of the adopter to raise and take care of the child.

If the adopter is a foreigner, the court shall investigate the absence of access to raise the child in Ethiopia and the availability of information about the adopter so that the court can be convinced that that the adopter will handle the adopted child as his/her own child and will not abuse him/her. Even if these requirements are met, the court will not allow adoption by a foreigner unless it gets a positive recommendation from the authority in charge of following up the wellbeing of children which shows that the adoption is for the benefit of the child.⁵⁶ These stringent procedures are meant to ensure what is best for the child.

c) Other Regional constitutions and family laws

The Constitutions of Tigray⁵⁷, Amhara,⁵⁸ Oromia and SNNP regional states have adopted the principle of the best interest of the child. This principle is also enshrined in the family codes of the national regional states. Under Article 127 of the new Revised Family Code of the Oromia National Regional State, the interest of the child is clearly protected in post-divorce custody proceedings.

⁵⁴ *Ibid*, Art. 1808(1).

⁵⁵ Art. 113 (3) of the Revised Family Code, 2000.

⁵⁶ *Ibid*, Articles 193 and 194.

⁵⁷ Art. 37(2) of the Constitution of the Regional State of Tigray.

⁵⁸ Article 36 (2) of the Constitution of the Amhara National Regional State.

The only difference with that of the 2000 Revised Family Code is that Oromia's Family Code, same as the 1960 Civil Code, stipulates that children under the age of five should be under the custody of their mother⁵⁹ unless there is a reason compelling the court to decide otherwise. Under Article 211 of Oromia's Family Code, the interest of the child is protected in adoption contracts through similar procedural requirements like that of the 2000 Revised Federal Family Code.

Article 124 (3) of the Family Code of the Amhara National Regional State, similarly, follows the same procedures (pursued in Oromia's Family Code) in post-divorce custody of children. With regard to adoption, the Family Code of the Amhara Regional State follows the footsteps of the federal as well as Oromia's Family Codes by providing for the same requirements.⁶⁰ The Family Code of the SNNP National Regional State has avoided the age limitation of the child in determining his/her post-divorce custody situation.⁶¹ In this regard, it departs from the above mentioned family codes of the two national regional states and it strictly follows the 2000 Revised Family Code. However, Art. 209 of the SNNP Regional State Family Code embodies similar stringent provisions in adoption contracts. To sum up, most constitutions and family codes of the regional states, in spite of some departures from the 2000 Revised Family Code, seem to follow the latter in determining what is best for the child.

4.3. The law and the practice

There are basic problems in implementing the FDRE Constitution and international conventions in deciding what is best for the child. Ato Gedion Sisay, former judge at the first instance of the A.A. Municipal court, notes that judges both at the federal as well as at the municipal level, especially in the first instance, can be reluctant to reason out their decision both in the post-divorce custody of children or in approving the adoption contract by citing and analyzing provisions of the Constitution (and/or other international human right instruments) that are relevant to the rights of children.⁶² The reason for this, he said, is the uncertainty as to what constitutes constitutional interpretation. This raises the issue whether citing or analyzing a provision from the Constitution or from the international instruments, amounts to constitutional interpretation which falls outside their jurisdiction.

However, Ato Gedion explained that it is for the courts to apply the laws including the Constitution and international instruments as per Article 6(1)(a) of

⁵⁹ Art. 127(3), Revised Family Code of the Oromia National Regional State.

⁶⁰ See Art. 205 of the Family Code of the Amhara Regional State.

⁶¹ See Art. 128 of the Family Code of SNNPR.

⁶² Interview with Ato Gedion Sisay, 15 December 2009.

the Federal Courts Proclamation No. 25/1996. What is not allowed for the courts to do, in fact, is adjudicating constitutional cases, which is the power of the House of Federation; but citing provisions from the Constitution and making it the basis for a well reasoned decision falls within the ambit of the functions of courts. After all, the courts have the constitutional duty to respect as well as enforce the human rights provisions of the Constitution as per art. 13(1) of the FDRE Constitution and other Constitutions of Regional States.

Others strongly argue that constitutional adjudication is the function of judicial organs while the interpretation falls within the jurisdiction of the House of the Federation as per Article 62(1) of the FDRE Constitution. Here, a demarcation is made between constitutional adjudication that involves a certain dispute and at least two parties (to be settled by judicial decision) and constitutional interpretation that may not necessarily involve a dispute or opposing parties, and which can also called "abstract review."⁶³ Be that as it may, Art. 36 (2) of the Constitution indicates the primary concern of courts in the protection of child rights, and this provision should be taken as a guiding principle in their decisions.

However, this principle is not put into practice in various courts. A case in point is the decision rendered by Bonga District court, Kaffa Zonal High court and the Southern Nations, Nationalities and Peoples Regional State Supreme Court respectively. The case was brought to the attention of these courts as a result of a dispute between the father of a child and the child's aunt who took full responsibility of the child's welfare and proper upbringing. The child was brought up by his aunt immediately after the death of his mother. Later on, his father, who was not at all involved in supporting the child, appeared and claimed the legal custody of his son. The aunt refused to submit to this claim by arguing that the father's actual motive is the inheritance left by the child's deceased mother.

Bonga District court to which the case was first brought gave the custodial right to the father by reasoning out that the aunt cannot claim the right of guardianship to a child who has a father. The aunt lodged an appeal to the Kaffa Zonal High Court. However, the ruling of the lower court was affirmed by the appellate high court based on Article 235(1) of the SNNP Regional State's Family Code.⁶⁴ The Court held that if one of the parents of the child is dead, the

⁶³ Assefa Fiseha (2000), "Constitutional Interpretation: The Respective Role of Courts and the House of the Federation (HOF)", *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution*, Faculty of Law, ECSC, May 2000, p. 11.

⁶⁴ Proclamation No. 75/1996 (2005), Southern Nations, Nationalities and Peoples Regional State's Family Code.

remaining parent will take the custody of the child, as a result of which the father is entitled to take the custody of the child even though the court had the opinion that the intention of the father in requesting the custody is not genuine. The aunt filed a petition to the Cassation Division of the SNNP Regional State's Supreme Court by stating that both of the lower courts made a basic error of law in granting the custody right to the father. However, the Cassation Division of the Regional State's Supreme Court rejected the petition by stating that the lower courts have not committed any error in interpreting the law.

None of the three benches invoked or considered the principle of *best interest of the child*. Ultimately, a petition was submitted to the Cassation Division of the Federal Supreme Court which reversed the decisions of the District Court, Zonal High Court and the Cassation Division of the Regional Supreme Court. The Cassation Division of the Federal Supreme Court underlined that in all situations concerning children, priority must be given to what is best for them. It decided that any legal provision (including those of custody rights of parents) should be tested against this principle which is embodied, not only in the 1989 Universal Convention on the Rights of the Child, but also under Article 36(2) of the FDRE Constitution.⁶⁵

This decision shows that the Ethiopian judiciary can directly apply international human right instruments. Moreover, interpretation of the Cassation Division of the Federal Supreme Court is binding on lower courts pursuant to Article 2(1) of Proclamation No. 454/2005.⁶⁶ Following the footsteps of the Federal Supreme Court Cassation Division's decision (on the principle of *the best interest of the child*), the Addis Ababa City First Instance Court has rendered a similar decision by interpreting Article 36(2) of the FDRE Constitution and the Article 3(1) of the 1989 UN Convention of the Rights of the Child.⁶⁷

Concluding remarks

The preceding sections have briefly addressed the principle of the best interest of the child from the perspectives of international instruments and in light of Ethiopia's federal and regional legal regime. The problems that need to be addressed in relation with international instruments relate to the lack of clarity regarding the elements that constitute the notion of best interest of the child.

⁶⁵ *Tsedale Demisse vs. Kifle Demisse* (Federal Supreme Court Cassation Division) Cassation File No. 23632, Tikimit 26/2000 (6th November 2007 G.C. See also *Genet Mamo G. et al., vs. Tezazu Abate D.* (Federal Supreme Court Appellate Division) Appellate File No. 20461, Hidar 26/1998 E.C. (December 6/2006 G.C).

⁶⁶ Federal Courts Proclamation Re-amendment Proclamation No. 454/2005.

⁶⁷ *Tilahun H/Mariam and Frehiwot Tsegaye vs. Matewos Asaye* (AA First Instance Court File No. 2608/02, Ginbot 28/2002 (6th June/2010).

Despite such need for clarity in the articulation of its elements, the principle is indeed, in varying degrees, embedded in various international human right instruments such as the 1948 Universal Declaration of human Rights, the 1966 International Covenant on Civil and Political rights, the 1966 International Covenant on Economic, Social and Cultural Rights and mainly the 1989 Convention on the rights of the Child.

The Ethiopian legal regime has gone a long way in the path towards the express embodiment of the principle. However, judicial decisions are expected to pursue the recent trends in the interpretation of Article 36(2) of the FDRE Constitution and the Article 3(1) of the 1989 UN Convention of the Rights of the Child in the course of adjudicating cases that involve the principle of *the best interest of the child*. Even more so, courts are expected not to shy away from the analysis and application of constitutional provisions and human rights instruments in the course of judicial reasoning on legal issues that arise in the process of adjudication. _____■
