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In Collaboration with Save the Children Norway- Ethiopia

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Preface

The Center for Human Rights (CHR) of Addis Ababa University is mandated to carry out teaching, research and community services in connection with its declared objective of the promotion of human rights and good governance. It is the firm belief of the CHR that knowledge and understanding of human rights and fundamental freedoms is of utmost importance for their observance. Inspired by this conviction, the CHR has been making efforts to promote teaching and research on human rights.

The need for the dissemination of knowledge on the law and practice of the rights of children to the general public is of importance as children are entitled to special care and protection by reason of their tender age. In this regard, the CHR recognizes that the limited jurisprudence of the rights of the child in Ethiopia has not been sufficiently investigated. A comprehensive treatment of the legal and policy framework of the rights of the child in Ethiopia is lacking, in particular, for educational and advocacy purposes.

This *Handbook* aims at narrowing the gap in research and advocacy on the rights of the child in Ethiopia. The *Handbook* examines the legal and policy framework in Ethiopia for the promotion and protection of the rights of children. To this end, *Handbook* explores the human rights of the child as enshrined in international, regional and national laws and instruments. Moreover, the *Handbook* utilizes standards from instruments such as international declarations and programs of action, including General Comments from the UN Committee on the Rights of the Child, the African Committee of Experts on the Rights of the Child and other authoritative interpretations of the UN Conventions on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. A unique feature of this *Handbook* is its focus on case law and jurisprudence by courts of law in Ethiopia demonstrating the most recent practice pertaining to the rights of the child in Ethiopia.

Introduction

The Convention on the Rights of the Child was adopted by the General Assembly of the United Nations on November 20, 1989. The treaty came into force on 2 September 1990. The African Charter on the Rights and Welfare of the Child (hereinafter African Children's Charter) was adopted by the Organization of the African Unity on June 27, 1981 and entered into force on 21 October 1986. The African Children's Charter is complementary to the Convention on the Rights of the Child. The adoption of the African Children's Charter was motivated by the need to accommodate the specific realities and circumstances of the African child.

Ethiopia ratified the Convention on the Rights of the Child (CRC) on December 9, 1991¹ by virtue of Proclamation 10/1992. The adoption of the two instruments marks a paradigm shift since it identifies children as bearers of not only care and protection rights but also civil and political rights as well. Ethiopia also ratified the African Charter on the Rights and Welfare of the Child (ACRWC) on October 2, 2002 by virtue of Proclamation 283/2002. These two instruments are comprehensive treaties which recognize the civil, political, economic, social and cultural rights of children. The two child rights treaties are among the treaties ratified by the country by way of notices of ratification i.e. Proclamations 10/1992 and Proclamation 283/2002. Some have contended the issuance of these notices of ratification as a sufficient basis for the justiciability of the treaties in Ethiopian courts despite the fact that the full texts of the treaties are not published in the official law gazette i.e. the *Federal Negarit Gazeta*.

This *Handbook* is organized into eight Chapters. The Organization of the *Handbook* follows the cluster of rights as organized by the Committee on the Rights of the Child in its *Guidelines* for initial and Periodic Reports by States Parties. The first chapter elaborates the concept of childhood and the different protective ages provided in related instruments. The second chapter focuses on the general measures required for the implementation of the rights of the child and elucidates the measures taken by Ethiopia to this effect. The third chapter of the *Handbook* elaborates the four cardinal and general principles of the rights of the child. Chapter four examines the civil and political rights of children. The fifth chapter looks into the right of the child to a family environment and the right to alternative care of children deprived of family

¹ Ministry of Labor and Social Affairs, Ethiopia's National Plan of Action for Children (2003-2010 and beyond), 2004, Addis Ababa, p. i

environment. Chapter six dwells on the basic and welfare rights of children. The seventh chapter is devoted to the discussion of the rights of children to education, leisure and cultural activities. The final chapter of the *Handbook* explains special protection measures in respect to children in situations of emergency, exploitation, children in conflict with the law and children belonging to minorities or an indigenous group.

CHAPTER ONE

DEFINITION OF CHILDHOOD UNDER ETHIOPIAN LAW

Introduction

This chapter considers the elaboration of the concept of childhood as stipulated in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The chapter examines the impact of legal definitions of childhood on social and customary conceptions of childhood. The chapter also dwells upon the concept of childhood as reflected in laws in Ethiopia. Furthermore, chapter one also looks into the various protective ages set forth in the law for different purposes and intents. In this regard, the chapter attempts to demonstrate the adequacy or otherwise of protective minimum ages provided in federal and regional state laws in Ethiopia and outlines the recommendations of the Committee on the Rights of the Child as regards the age limits dealt with.

1.1. Commencement of Childhood

The Convention on the Rights of the Child (hereinafter the “CRC” or “the Convention”) defines “child” as every human being below the age of eighteen years.² The Convention does not provide the minimum age of childhood. It does not stipulate either birth or conception as the starting point of childhood. The silence of the Convention on this point is intentional. The Convention avoids taking position on the controversial issue of abortion with a view to encourage universal acceptance of the instrument.³ The setting of the starting point for childhood is left to the determination of States Parties to the Convention.⁴ Moreover, the Convention does not conflict with domestic legislation which provides better protection more conducive to the realization of the rights of children.⁵ The Revised Family Code does not provide for the minimum age of childhood.

² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 1

³ Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn Geneva 2007) 1

⁴ Hodgkin and Newell (n 3) 2

⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 41

The majority of the rights enshrined in the African Children's Charter as well as the CRC are to be exercised following the birth of the child.⁶ The phrase "*early childhood*" has been defined by the Committee on the Rights of the Child as young children at birth and through infancy, and those during pre-school years and those during transition to school.⁷ Simply put, the children in early childhood are those ranging from birth till the age of 8.⁸ Young children are entitled to all the rights enshrined in the CRC.⁹ Young children are accorded with the right to special protection measures and progressive exercise of their rights.¹⁰ The rights affirmed in the Convention are to be applied holistically in early childhood in the light of the principle of the universality, indivisibility and interdependence of all human rights.¹¹

1.2. End of Childhood

For the purposes of the Convention, childhood comes to an end at the 18th birthday unless; the age of majority is attained earlier pursuant to the domestic laws of States Parties to the Convention.¹² The Convention recognizes that majority may be attained at earlier age under the laws applicable to the child. This flexible approach adopted by the Convention demonstrates that it accommodates the concept of attainment of majority at an earlier age either pursuant to federal laws or state laws of a given Member State. The upper limit of the age of childhood set forth by the Convention is an age of childhood and not that of majority. This approach is adopted owing to the fact that in many legal systems a child can acquire full legal capacity as regards various matters at different ages.

On the other hand, the African Charter on the Rights and Welfare of the Child provides a different definition of the term child. The Charter defines a "child" as every human being under the age of 18 years.¹³ This makes the definitions of the concept of childhood under the African Children's Charter not subject to limitations.¹⁴ The omission of the phrase "*unless majority is*

⁶ Hodgkin and Newell (n 3) 2

⁷ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/C/GC/7/Rev.1 para. 3)

⁸ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/C/GC/7/Rev.1 para. 3)

⁹ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/C/GC/7/Rev.1 para. 3)

¹⁰ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/C/GC/7/Rev.1 para. 3)

¹¹ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/C/GC/7/Rev.1 para. 3)

¹² Hodgkin and Newell (n 3) 2

¹³ African Charter on the Rights and Welfare of the Child, Article 2

¹⁴ Michael Gose, The African Charter on the Rights and Welfare of the Child (Community Law Center, Western Cape, 2002) 27

attained earlier” in the African Children’s Charter makes the instrument more comprehensive and inclusive.¹⁵ On the contrary, the Convention is more prescriptive and not inflexible as regards the end of childhood.¹⁶

The Committee on the Rights of the Child has emphasized that adolescents up to the age of 18 years old are holders of all the rights affirmed in the Convention.¹⁷ Adolescents are accorded with the right to special protection measures and progressive exercise of their rights.¹⁸

This implies the obligation that customary and social constructions of childhood must be compatible with the Convention and African Children’s Charter. In addition, the Human Rights Committee has asserted that protective ages must not be set “unreasonably low”. Moreover, the Human Rights Committee has underscored that a Member State cannot avoid obligations to children under international law despite the fact that they may have attained the age of majority under domestic law.¹⁹

1.3 The Concept of Childhood under Ethiopian Laws

The term “child” is not specifically defined under Ethiopian law. Instead, Ethiopian laws make use of such terms as “minors”, “infant”, “young workers” or “young persons”. Chapter Twelve of the Revised Family Code deals with minors. The Revised Family Code defines a “minor” as a person of either sex who has not attained the full age of eighteen years old.²⁰ Based on the Revised Family Code and Family Codes adopted by other Regional States in Ethiopia, it is possible to assert that the general age of majority in the country is 18 years.

In spite of the fact that the Convention on the Rights of the Child sets 18 as the upper limit of childhood, it allows minimum ages to be set for different purposes. The different minimum ages set forth by a Member State need to strike a delicate balance between the evolving capacities of the child indicated in Article 5 of the Convention with that of the obligation of the State to

¹⁵ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 27

¹⁶ Hodgkin and Newell (n 3) 3

¹⁷ Committee on the Rights of the Child, General Comment No. 4, 2003, CRC/GC/2003/4, para.1)

¹⁸ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/C/GC/7/Rev.1 para. 3)

¹⁹ Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, The Hague, 1999) 57

²⁰ Revised Family Code, Article 215

provide special protection for children. Consequently, Ethiopian legislation has minimum ages defined under various laws pertaining to the protection of children.

Article 15 of the FDRE Constitution assures of the right to life of every person. Article 1 of the Ethiopian Civil Code stipulates that one becomes a holder of rights and duties from the moment of birth onwards. However, Article 2 of the Civil Code also provides exceptional circumstances whereby personality may commence from the moment of conception. The Civil Code assures the unborn child of the right to property if his or her interest so requires and if he or she is born alive and viable if the father dies intestate.²¹ Moreover, the Criminal Code deals with crimes against the life of unborn or abortion. The intentional termination of a pregnancy at whatever stage or however effected is made punishable under the Criminal Code.²² Despite the fact that the Criminal Code provides various grounds on the basis of which abortion is permitted, the practice is considered, in principle, as an offence.²³

1.4. Definition of Specific Minimum Ages under Ethiopian Legislation

Legal and Medical Counseling without parental consent

The Convention does not support the stipulation of a minimum legal age below which children are unable to seek and obtain independent legal advice.²⁴ One has to make distinction between the right to seek and obtain independent medical and legal counseling with that of the right to make decisions which is contingent upon the evolving capacity of the child.²⁵

The right of the child to seek and obtain independent legal counseling is vital for the respect of other rights guaranteed under the Convention, the African Children's Charter as well as Ethiopian legislation. In particular, the right of the child to seek and obtain independent legal counseling is of paramount importance in cases where the interests of the child are distinct or adverse from that of the parent(s), like in the following situations:-

- in case of violence against children, especially, sexual abuse within the family or institutions working and coming into contact with children,

²¹ Civil Code, Article 2 cum Article 3

²² Criminal Code, Article 545(1)

²³ Tsehai Wada, Abortion Laws in Ethiopia, Mizan Law Review, Volume 2 No.1

²⁴ Hodgkin and Newell (n 3) 6

²⁵ Hodgkin and Newell (n 3) 6

- in the event of dispute over children's rights to a name or nationality,
- in cases involving separation from parents, family reunification, illicit transfer and abduction,
- in the case of adoption, exploitation in employment and other forms of exploitation.²⁶

Likewise, the right of the child to seek and receive medical counseling without parental consent is equally important in cases where the interest of the child is adverse or conflicting to that of the parent.²⁷ This is in particular true in case where violence is meted out to the child by the parent or other members of the family. Moreover, medical counseling without parental consent is necessary in case of disagreement and misunderstanding between the child and the parent concerning the propriety of access to health care services and treatment decisions, family planning education and services.²⁸ Thus, this must be read in conjunction with Article 24(2) (e) of the CRC which stipulates that Member States must make sure that children as well as parents are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.”

Adolescent children are also entitled to the right to access to sexual and reproductive information, pertaining to family planning and contraceptives, the risks inherent in early pregnancy, the prevention of HIV/AIDS, and the prevention and treatment of sexually transmitted infections (STIs).²⁹

Medical Treatment or Surgery without Parental Consent

Article 20(3) of the Civil Code alludes to the power of the guardian of a minor to submit him or her to an examination or treatment beneficial to the health of the minor. Similarly, Article 257(1) of the Revised Family Code provides that the guardian shall watch over the health of the minor. Article 257(2) of the Code also states that the guardian shall take the necessary measures for the recovery of the minor in case of the latter's sickness.

²⁶ Hodgkin and Newell (n 3) 6

²⁷ Hodgkin and Newell (n 3) 6

²⁸ Hodgkin and Newell (n 3) 6

²⁹ Committee on the Rights of the Child, General Comment No.4, 2003, CRC/GC/2003/4, paras. 28 and 33

End of Compulsory Education

Article 28(1) of the Convention laid down the obligation of Member States to provide free and compulsory education. On the other hand, Article 32 of the Convention obliges Member States to prevent the involvement of children in work and employment which interferes with their education. Therefore, States Members are obliged to coordinate the age at which compulsory education ends with the age for access to full time employment. It is therefore important to have synchronization between the age when compulsory education ends with that of the age for access to full time employment.

Article 89(2) of the Labour Proclamation (Proclamation 377/2003) stipulates that it is prohibited to employ persons less than 14 years of age. One of the reasons for this stipulation is the need to prevent children from work which interferes with their education.

Admission to Employment

Member States to the Convention are required to protect children from “any work that is likely to be hazardous or interfere with the child’s education by virtue of Article 32. Article 32 also requires Member States to proclaim for a minimum age or minimum ages for admission to employment and to provide appropriate regulation of the hours and conditions of employment. ILO Convention No. 138 establishes three age limits: 18 for hazardous work, 15 for full-time employment in non-hazardous work, and 13 for light work that does not interfere with education. ILO Convention No. 138 requires Member States to adopt all necessary measures including the provision of appropriate penalties to enforce the minimum age requirements.

As mentioned earlier, Article 89(2) of the Labour Proclamation (Proclamation 377/2003) stipulates that it is prohibited to employ persons less than 14 years of age. By virtue of Article 48(2) of the same Proclamation, the prohibition on admission to employment of children below the age of 14 applies to contracts of apprenticeship. Though children between the age ranges of 14 to 18 are not totally banned from employment, the Labour Code provides various restrictions on their condition of employment and work.

Sexual Consent

The laws of various countries stipulate a minimum age below which children are said to be incapable of giving valid consent to sexual activity involving others. Accordingly, the definition of sexual exploitation and abuse includes not only conduct involving violence or other forms of coercion, but also all sexual activity with a child below a certain age whether or it is consensual. Therefore, sexual activity with a child below a certain fixed age of consent renders the perpetrator directly responsible for the crime of rape.

The entitlement to conclude marriage implies the ability to consent for sex. This shows that there has to be synchronization between marriageable age and age of consent for sexual activity. It has been stated that Ethiopian laws do not clearly stipulate a minimum age below which children are said to be incapable of giving valid consent to sexual activity involving others. However, Article 626(1) of the Criminal Code provides that performance of sexual intercourse with a child who is between the age ranges of thirteen and eighteen constitutes the offence of sexual outrage irrespective of consent on the part of the victim. Therefore, the age of sexual consent in Ethiopia is 18 both for boys and girls.

Marriage

Article 16 of the Universal Declaration of Human Rights assures the rights of men and women “*of full age*” to marry and found a family. Article 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires Member States to take all appropriate measures to eliminate discrimination against women in all matters pertaining to marriage and family relations. In particular, Article 16(2) of CEDAW provides that “the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

The 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages requires Member States to eliminate completely child marriages and the betrothal of young girls before the age of puberty. Article 2 of the same Convention requires States “to take legislative action to specify a minimum age for marriage. The provision goes on to state that no marriage shall be legally entered into by any person under the minimum age, except where a

competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses.

Article 35(2) of the FDRE Constitution underscores the equality of spouses. Article 7 of the Revised Family Code raised the marriageable age of a girl to 18 years. Non-observance of this requirement has the effect of invalidating the marriage. However, Article 7(2) of the Revised Family Code reads as follows:

“Notwithstanding the provisions of sub-article 1 of this Article, the Minister of Justice may, on the application of the future spouses, or the parents or guardian of one of them for serious cause, grant dispensation of not more than two years”

Article 648 provides that “whoever concludes marriage with a minor apart from circumstances permitted by relevant Family Code is punishable with

- a. Rigorous imprisonment not exceeding three years, where the age of the victim is thirteen years or above; or
- b. Rigorous imprisonment not exceeding seven years, where the age of the victim is below thirteen years.

Voluntary Enlistment and Conscription into the Armed Forces and Participation in Hostilities

Article 38 of the CRC imposes the obligation on Member States to refrain from recruiting into their armed forces anyone who has not attained the age of 15. The provision also requires Member States to give priority to those who are oldest in recruiting children between the ages of 15 and 18. Moreover, Member States are also called upon to take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities. Article 22 of the African Charter on the Rights and Welfare of the Child requires States to refrain from recruiting children. This implies that children who have not attained the age of 18 cannot be recruited into the armed forces since Article 2 of the African Children’s Charter clearly defines the “child” as person who has not attained the age of 18.

In addition, the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict requires Member States to take all feasible measures to ensure that persons who have not attained the age of 18 do not take direct part in hostilities. The Protocol calls upon Member

States to take measures to prevent the recruitment of and use in hostilities of children who have not attained the age of 18. This shows that 18 years is the age limit currently viewed as appropriate age for the recruitment of children into the armed forces.

Article 4 of Defence Forces Proclamation (Proclamation No. 27/1996) provides that the Ministry of Defence of the country may recruit persons and fit and willing for military services in accordance with criteria periodically issued. However, the proclamation does not stipulate any minimum age for enlistment, recruitment in to armed forces and for direct participation in hostilities. National recruitment guidelines specify recruits must be at least 18.

Criminal Responsibility

Member States to the CRC are required to establish a minimum age limit below which children shall be presumed not to have the capacity to contravene criminal laws by virtue of Article 40(3)(a). Member States are also called upon to ensure that this age limit is not too low and to raise the age incrementally.³⁰

Article 52 of the Criminal Code provides that infants who have not attained the age of nine years shall not be deemed to be criminally responsible. It goes on to state that the provisions of the Criminal Code shall not apply to this categorization of children referred to as infants by the Code. In particular, the Committee on the Rights of the Child urged Ethiopia to raise the minimum age of criminal responsibility at least to 12 and to ensure that children aged 15 to 18 years are accorded the protection of child justice provisions and are not treated as adults.³¹

Deprivation of Liberty and Imprisonment

Article 37(b) of the CRC requires Member States to ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The Convention requires that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used as a measure of last resort and for the shortest appropriate period of time.

The Criminal Code provides different categorizations of children for a variety of reasons. The Criminal Code provides that the penalties and measures to be imposed by the courts shall be only

³⁰ Committee on the Rights of the Child, General Comment No.10, CRC/C/GC/10, paras. 30

³¹ Committee on the Rights of the Child, Concluding Observations, ETHIOPIA crc/c/15/Add. 1434, para. 29

those specified under Articles 157-168 of the Code where a crime is committed by a young person between the ages of nine and fifteen.³² The provision goes on to state that young person's shall not be subject to the ordinary penalties applicable to adults nor shall they be kept in custody with adult criminals.

Capital Punishment and Life Imprisonment

Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of capital punishment and life imprisonment without the possibility of release for offences committed before the attainment of the age of 18.

Second paragraph of Article 176 of the Criminal Code provides that “in no case may death sentence be passed upon a criminal who had not attained his eighteenth year of age at the time of the commission of the crime.

Giving Testimony, in court, in civil and criminal cases

Situations calling for children to give testimony may arise in both civil and criminal cases. Article 12(2) of the CRC affirms the rights of the child to be heard in judicial and administrative proceedings affecting the child. Civil judicial and administrative proceedings affecting the child include, for example, custody, the upbringing of the child, separation from parents, modification of family relations such as adoption and guardianship and the like.³³ On the other hand, criminal cases may include cases whereby children may be required to give evidence. This could be both in cases where children are victims of offences or also cases where children are prosecuted for infringement of criminal laws. Children may also serve as witnesses in cases involving other parties. The consideration of the Convention does not support the setting of a fixed age for this purpose in the national legislations of a Member State.

The issue of general competency to give testimony is governed by Evidence Law. In Ethiopia, there is no codified and comprehensive “Evidence Law”. Instead, there are different versions of Draft Evidence Rules. The consideration of the fragmentary and scattered evidence rules found in Ethiopian legislation demonstrates that there is no hard and fast rule which precludes children

³² Criminal Code, Article 53

³³ Hodgkin and Newell (n 3) 11

from giving testimony under existing laws. The 1967 Draft Evidence Rules in Ethiopia sets forth two-pronged test to determine the general competency. Firstly, witnesses must be able to observe, recollect and narrate. Secondly, witness must be able to understand the obligation to tell the truth. In some instances, child witnesses may also be allowed to testify without taking an oath if he or she is sufficiently intelligent to understand the obligation to tell the truth.

Lodging complaints and seeking redress without parental consent before a court or other authority

Article 12 of the CRC sets forth the principle of the right of the child to be heard. This principle implies the right of the child to have access to complaints procedure. This access is especially pivotal in cases of complaints concerning violence or exploitation, including sexual exploitation in the family context.³⁴ The contention that children below a certain fixed age cannot have access to complaints procedure is not supported by the Convention.

Article 312(1) of the Revised Family Code stipulates that the guardian, tutor, or any other interested person may apply to the court for the emancipation of a child who has attained the age of 14. Article 313 of the Code provides that an emancipated minor shall be deemed under the law to have attained majority i.e. freed from legal restraints thereby in a position to lodge complaints and seeking redress without parental consent before a court or other authority.

Article 291(1) of the Revised Family Code stipulates that the tutor shall consult the minor in all important acts concerning him, unless the latter is less than fourteen years old. This shows that children at the age of 14 years old and above must be consulted when important decisions concerning them are made within the family.

Participating in Administrative and Judicial Proceedings affecting the Child

Article 12(2) of the CRC affirms the rights of the child to be heard in judicial and administrative proceedings affecting the child. As regards legal or administrative proceedings, Article 191(3) of the Revised Family Code provides that the court may approve the adoption upon hearing the opinion of the child in case where the one of the parents is not willing to give his or her consent to the adoption provided that the child is ten years of age or above.

³⁴ Hodgkin and Newell (n 3) 11

Modification, of family relations, adoption, and guardianship

Article 8 of the CRC provides the obligation to respect for the right of the child to preserve his or her identity. The right to identity includes nationality, name and family relations. The fixing of minimum age for the exercise of giving consent to change of identity, including change of name is not supported by the Convention. On the contrary, the reduction of the minimum age limit fixed in domestic legislation at which the child's consent for adoption is required is supported by the Convention.³⁵

As stated above, Article 191(3) of the Revised Family Code provides that the court may approve the adoption upon hearing the opinion of the child in case where one of the parents is not willing to give his or her consent to the adoption provided that the child is ten years of age or above.

Having access to Information concerning the Biological Family

Article 7 of the CRC assures of the right of the child to know his or her parents. Member States are required to take measures to realize this right as far as possible. The exercise of this right of knowledge of biological parents is of particular importance especially to adopted children and abandoned children. The realization of the right of knowledge of biological parentage is dependent upon the presence of adequate documentation and registration of children. Some states impose limitations on access to information concerning origin and parentage and fix minimum age limit for its availability.³⁶ This stipulations run counter to the provision of Article 7 of the CRC.

Legal capacity to Inherit and conduct property transactions

Under Ethiopian legislation the ability to conduct property transactions is dependent upon the attainment of age of majority, emancipation either as a result of judicial decisions or that of marriage before the attainment of 18 for exceptional reasons. Article 216 of Revised Family Code provides that the minor shall be represented by his tutor in matters concerning his or her pecuniary interests and the administration of his property. Article 216(3) of the Revised Family Code goes on to provide that the minor shall not perform juridical acts except in cases provided

³⁵ Hodgkin and Newell (n 3) 11

³⁶ Hodgkin and Newell (n 3) 11

by the law. Consequently, juridical acts performed by the child in excess of his or her powers are subject to invalidation upon the request of the minor or his or her representative by virtue of Article 299 of the Revised Family Code.

Article 205 of the Revised Family Code stipulates that a minor cannot make a will before the attainment of the age of 16 years. The placement of minors under incapacity to perform juridical acts is meant to protect them from unscrupulous individuals who may take advantage of their youth. Article 299 of the Code provides that juridical acts performed by the minor in his or her power shall be of no effect.

To Create or to Join Association

Article 15 of the CRC protects the right of the child to freedom of association. Art.13 (1) of the Cooperative Society's Proclamation No 147/1998 states that any individual may become a member of cooperative societies when he or she has attained the age of 14 years.

Choosing a religion or attending religious school teachings

Article 14 of the CRC protects the right of the child to freedom of thought, conscience and religion. Article 18 of the International Covenant on Civil and Political Rights (ICCPR) stipulates the right of everyone to choice of religion. Thus, the child stands to benefit from this entitlement in the ICCPR as well. Article 14(2) of the CRC also requires Member States to respect the rights and duties of parent to provide direction to the child in the exercise of his or her right in a manner consistent with his or her evolving capacities.

Consumption of Alcohol and other controlled substances

Article 33 of the CRC provides that Member States are required to take all appropriate measures, including legislative, administrative, social and educational measures to protect children from the illicit use of narcotic drugs and psychotropic substances. In several countries, the sale of alcohol and tobacco products and other controlled substances to children below a certain fixed age is a crime.

Minimum Protective Legal Ages Defined by Ethiopian Legislation			
		Boys	Girls
1.	End of Compulsory Education	Not defined	Not defined
2.	Marriage	18	18
3.	Sexual Consent	18	18
4.	Voluntary Enlistment in the Armed Forces	Fit and willing	Fit and willing
5.	Conscription into the armed Forces	Fit and willing	Fit and willing
6.	Participation in Hostilities	Fit and willing	Fit and willing
7.	Admission to Employment	14	14
8.	Criminal Responsibility	9	9
9.	Deprivation of Liberty and Imprisonment	15	15
10.	Capital Punishment	18	18
11.	Giving Testimony in Court, in Civil and Criminal Proceedings	Not defined	Not defined
12.	Lodging Complaints and Seeking redress before a Court or other relevant authority without parental consent	18	18
13.	Legal and medical Counseling without parental consent	Not defined	Not defined
14.	Medical Treatment or Surgery without Parental Consent	Not defined	Not defined
15.	Participating in Administrative and Judicial Proceedings affecting the Child		
16.	Giving consent to Change Identity, including change of name, modification, of family relations, adoption, and guardianship,	Not defined	Not defined
17.	Having access to Information concerning the Biological Family	Not defined	Not defined
18.	Legal capacity to Inherit and conduct property transactions	18	18
19.	To Create or to join Association	14	14
20.	Choosing a religion or attending religious school teachings	Not defined	Not defined
21.	Consumption of Alcohol and other controlled substances	Not defined	Not defined

CHAPTER TWO

GENERAL MEASURES OF IMPLEMENTATION OF RIGHTS OF CHILDREN IN ETHIOPIA

Introduction

Article 4 of the Convention on the Rights of the Child provides obligations of Member States to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights enshrined in the Convention. Similarly, Article 1 of the African Charter on the Rights and Welfare of the Child spells out the obligations of the Member States to recognize the rights and freedoms enunciated in the Charter and to undertake the necessary steps to adopt legislative and other measures necessary for giving legal effect to the provisions of the Charter. Both the Convention and the Charter do not specify particular solutions instead they chart out general measures. Once a State has voluntarily acceded to and ratified a treaty, the State is obliged to adopt the same in good faith.³⁷

As a Member State to both treaties, Ethiopia has been taking various measures to ensure the realization and observance of the rights of children as enshrined under the Convention and African Children's Charter and other treaties as well. These measures range from constitutional recognition of the rights of children to that of various steps to be taken with a view to give the provisions of the two treaties legal effect in Ethiopia.

2.1. Recognition of Child Rights in the FDRE Constitution

The Constitution of the Federal Democratic Republic of Ethiopia affirms the rights of all persons including men, women and children alike. One of the pillars of the Constitution is the right to equality and non-discrimination.³⁸ It provides that race, nation, nationality, or other social origin, color, sex, language, religion, political, or other opinion, property, birth or other status as prohibited grounds of discrimination. Consequently, children have the same rights save certain age-related exceptions including in the sphere of the right to stand for election. The Ethiopian Constitution recognizes the vulnerable position of children and guarantees their right to

³⁷ Charter of the United Nations, Article 1; See also Vienna Convention on the Law of Treaties, Articles 26 and 27

³⁸ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, 1st Year, No.1, Article 25

protection. The Constitution also stipulates that human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.³⁹

The FDRE Constitution stipulates important provision on the rights of children. The Constitution devotes special section specifying rights pertaining to children solely. In particular, Article 36 of the Constitution incorporates rights of children in the supreme law of the land as follows:

1. Every child has the right:
 - (a.) To life
 - (b.) To a name and nationality
 - (c.) To know and be cared for by his or her parents or legal guardians;
 - (d.) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;
 - (e.) To be free of corporal punishment or cruel or inhuman treatment in schools and other institutions responsible for the care of children.
2. In all actions concerning children undertaken by private and public institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child.
3. Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who became wards or who are placed in public or private orphanages, shall be kept separately from adults.
4. Children born out of wedlock shall have the same rights as children born of wedlock.
5. The state shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education.

Therefore, the FDRE Constitution recognizes the rights of children to life, to name and nationality, and to know and be cared for by his or her parents. It provides the right of children to live a life protected from violence, neglect, exploitation and abuse. In particular, the provision affirms the right of children to life and bans exploitative practices against children and their engagement in work which could be prejudicial to their health and well-being. Article 36(1)(e) also prohibits the infliction of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children. Article 36(2) enunciates the principle of the best interest of the child as the primary consideration in matters affecting children. Article 36(3) calls up on the accommodation of children in conflict with the law separate from adults. Article 36(5) also accords special protection for orphans.

³⁹ FDRE Constitution, Article 10(1)

2.2. Status and Domestication of the CRC and ACRWC in Ethiopian Courts

The Constitution of the Federal Democratic Republic of Ethiopia proclaims that the Constitution is the supreme law of the land.⁴⁰ Article 9(4) of the FDRE Constitution renders all international instruments ratified by Ethiopia an integral part of the law of the land. Therefore, any law, customary practice or a decision of an organ of state or a public official in contravention of the Constitution is declared to be of no effect.⁴¹ Furthermore, Article 13(2) of the Constitution provides that the fundamental rights and freedoms specified in the third chapter of the Constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments ratified by Ethiopia.⁴²

However, the effort geared towards giving legal effects to human rights conventions on children and women appears to be inadequate. A systematic attempt aimed at full domestication of the international instruments to which Ethiopia is a party to, leaves much to be desired. In its recent Concluding Observations, the Committee on the Rights of the Child noted that Ethiopia has not yet promulgated the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child in its official law gazette, the *Negarit Gazeta*.⁴³

The failure to publish these international instruments in the official law Gazette has been the cause or a stumbling block for their enforcement before the law. The application of the provisions of the Convention and the African Charter on the Rights and Welfare of the Child has indeed been few and far in between in particular in lower tiers of the judiciary.

Regardless of this, there are certain bright spots. Recently, courts of law are rendering judgments based on relevant provisions of the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child. In particular, the Cassation Bench of the Federal Supreme Court has rendered various decisions relying on these international instruments.

⁴⁰ FDRE Constitution, Article 9(1)

⁴¹ FDRE Constitution, Article 9(1)

⁴² FDRE Constitution, Article 13(2)

⁴³ Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/, para. 9, available at < <http://www.unhcr.org/refworld/docid/45c30bd60.html> [accessed 10 May 2012]

The fact that these judgments are rendered by the Cassation Bench makes them all the more important. This is due to the fact that by virtue of Proclamation 454/2005 interpretation of the law by the Federal Supreme Court rendered by the Cassation division with not less than five judges carries the force of law. Courts of law at the federal and regional level are increasingly following the lead of such landmark decisions. This has increased the number of court decisions based on the Convention on the Rights of the Child. The aforementioned provisions in the FDRE Constitution and recent judicial developments demonstrate that the Convention on the Rights of the Child and African Children's Charter prevail over ordinary legislation in Ethiopia

The Committee on the Rights of the Child also called upon the government to translate the Convention into the different vernaculars spoken in the country.⁴⁴ The Constitution of the Federal Democratic Republic of Ethiopia provides that the fundamental rights and freedoms enunciated in the Constitution are to be interpreted in conformity with the International Bill of Human Rights.⁴⁵ Failure to promulgate the international conventions affirming the rights of children in the official law gazette militates against the effective domestication of the international agreements in to the domestic legal order and thereby the implementation of the rights of children.

2.3. Related International Human Rights Instruments

The Committee on the Rights of the Child provides that the implementation of other international human rights instruments is of particular importance for the realization of the rights of the child as well. At the time of writing of this *Handbook*, Ethiopia is a State Party to seven of the nine core international human rights instruments. It ratified the instruments in the following years:

- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)_1976
- International Covenant on Civil and Political Rights (ICCPR)_1993
- International Covenant on Economic, Social and Cultural Rights (ICESCR)_1993
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) _ 1993

⁴⁴ Ibid.

⁴⁵ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, 1st Year, No.1, Article 13(2)

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) _ 1994
- Convention on the Rights of the Child (CRC) _1991
- Convention on the Rights of Persons with Disabilities-2010

However, there are a number of other international treaties to which Ethiopia is not yet a State Party at the time of the writing of this *Handbook*. These include:

- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
- First Optional Protocol to the International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
- Optional Protocol to the Convention against Torture, Inhuman or Degrading Treatment or Punishment
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
- International Convention on the Protection of the Rights of All Migrant Workers and members of their Families
- Optional Protocol to the Convention on the Rights of Persons with Disabilities
- International Convention for the Protection of All Persons from Enforced Disappearance

2.4. The Need for Comprehensive Legal Reform

Since the adoption of the Constitution of the Federal Democratic Republic of Ethiopia, the government has taken significant steps aimed at legal reform. Several pieces of legislation affecting children have been promulgated. In 2005, the Criminal Code was adopted by the House of Peoples Representatives to establish an effective legal framework for the protection of children. Some of the major legal reform initiatives which play a crucial role for the safeguarding of the rights of children include the entry in to force of the Revised Family Code in 2000, the Labour Proclamation in 2003 and the Criminal Code in 2005.

These legislative measures have drawn inspiration from the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Revised Family Code dwells upon various issues which pertain to children including marriage, adoption, affiliation and maintenance and other issues. The Code addressed some of the gaps and inconsistencies which were inherent in the 1960 Civil Code. Though the Revised Family Code does not define the term child *per se*, the related concept of minor is defined as a person of either sex who has not attained the full age of eighteen years.⁴⁶

The other legal development with major implications for children is the Criminal Code. The Criminal Code which entered into force in 2005 also introduced various changes and addressed several gaps of the previous Penal Code with a view to ensure compatibility with the provisions of international and regional instruments ratified by the country. Accordingly, the Criminal Code proscribed several harmful traditional practices inimical and prejudicial to the rights and welfare of children. To this effect, the Criminal Code has devoted a separate chapter on Harmful Traditional Practices (HTPs) in its Book Five. Some of the traditional harmful practices which have been prohibited under this Chapter include offences against the life, body, and health of a pregnant woman or a child by practicing harmful traditional practices domestic violence against a spouse or partner in an irregular union, female circumcision, infibulations of the female genitalia, bodily injury by practicing other forms of harmful traditional practices, transmission of diseases through the practice of harmful traditional practices, participation in harmful traditional practices and incitement against observance of rules on harmful traditional practices.⁴⁷

The year 2003 also saw the promulgation of the Labour Proclamation (Proclamation 377/2003). This proclamation prohibits the employment of children below the age of 14 years of age.⁴⁸ The proclamation also prohibited the employment of young workers (i.e. persons who have attained the age of 14 but are not over the age of 18 years) to work which is prejudicial to the life or health of the children.⁴⁹ The proclamation has also indicated some of the list of types of employment which are considered hazardous.⁵⁰

⁴⁶ The Revised Family Code of 2000, *Federal Negarit Gazeta* Extraordinary Issue No1/2000, Article 215

⁴⁷ The Criminal Code of 2005, Proclamation 414/2004, Articles 561-570

⁴⁸ Labour Proclamation No. 377/2003, *Federal Negarit Gazeta* 10th Year No. 12, Article 89(2)

⁴⁹ *Ibid*, Article 89(3)

⁵⁰ *Ibid*, Article 89(4)

However, still there are gaps and inconsistencies. The Committee on the Rights of the Child expressed its deep concern over the lack of a systematic legislative review and adoption of a comprehensive Children's Code.⁵¹ Thus, the Committee made a recommendation to the government to undertake a comprehensive legislative reform and adopt Children' Code.⁵²

2.5. Children's Rights under Ethiopian National Policies

Ethiopian government has adopted several major policies which aim at ensuring that children are given opportunities, services and facilities to develop in a healthy manner pointing out the measures and strategies for the realization of the rights of children. These include the draft Comprehensive National Child Policy, National Policy on Ethiopian Women, the draft Social Protection Policy, National Youth Policy, the National Policy on HIV/AIDS and the National Population Policy.

Ethiopia has developed a draft Comprehensive National Child Policy with due consideration of the principles and provisions of the CRC and ACRWC to guide the work of various actors dealing with children and also promote the rights of children.⁵³ The policy emphasizes on three central strategies, 1) development and growth, 2) prevention and protection, and 3) rehabilitation, care and support. The draft Comprehensive National Child Policy is finalized to be presented to the parliament. The National Policy on Ethiopian Women adopted in 1993 aims at achieving *de facto* equality between men and women. It also sets out objectives for the realization of the rights of women to participation, property and access to social services, and to be free from prejudiced stereotypes and harmful traditional practices.

The government of Ethiopia has formulated several policies with focus on children. The draft Social Protection Policy, under active consideration, dwells upon the welfare and developmental needs of children and women. It touches upon varying child welfare issues including begging,

⁵¹ Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/, para. 8, available at < <http://www.unhcr.org/refworld/docid/45c30bd60.html> [accessed 10 August 2010]

⁵² Ibid, para. 9

⁵³ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011), p.8

prostitution and juvenile delinquency. The policy aims at addressing the welfare issues of vulnerable groups including children.

Ethiopia also adopted a National Youth Policy in 2004. The policy defines youth as those with the age ranges of 15 and 29. The policy aims to address children related issues ranging from education to protection. The policy identifies the youth among the segments of society hardest hit by poverty and unemployment and other challenges.

The National Population Policy also discusses the adverse impact of, among others, war related displacement and natural disasters on children including orphanhood. The Cultural Policy of Ethiopia also dwells upon the need to eradicate harmful traditional practices in the country. The Education and Training Policy announced by government also aims at ensuring access to education to all school age children.

The National Criminal Justice Policy promulgated in 2011 has included various changes to address a number of gaps observed in the criminal justice systems and ensure compatibility with the provisions of the CRC and ACRWC. The policy devoted a separate section for care and special handling of victims of crimes and children in conflict with the law. For instance, section 6 of the policy focuses on the circumstances of vulnerable children, the rights of victims to participate in criminal investigation and procedures for charging and trial, legal protection and handling of children in conflict with the law, alternative remedial measures and establishment of special units for children. Most of these provisions provide protection to children who are victims of FGM, early marriage, child labor, neglect and abuse.⁵⁴

2.6. National Strategies for the Realization of the Rights of Children

Ethiopia's National Plan of Action for Children (2003-2010 and beyond) replacing the previous Programme of Action (1996-2000) has been approved. The Plan ensures action for survival, development, protection and participation of children by all concerned organs at different levels of government. The National Plan of Action was devised with the objective of coordinating activities aimed at the implementation of the Convention on the Rights of the Child and "A

⁵⁴ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

World Fit for Children” resolution adopted by the General Assembly of the UN in May 2002.⁵⁵ The National Plan of Action focuses on four themes: promoting healthy lives, providing quality education, protecting against abuse, exploitation and violence and combating HIV/AIDS. However, the National Plan is not clearly time-bound and suffers from insufficient budgetary allocations.⁵⁶

The National Action Plan for Gender Equality (2006-2010) alluded to the Ethiopian Constitution, the Millennium Development Goals and other instruments on general equality. The plan called upon all development programs at federal as well as regional level to mainstream gender concerns. The plan also included violence against women and girls as one of its seven focus areas.

The now expired National Action Plan on Sexual Abuse and Exploitation of Children in Ethiopia (2006-2010) had been endorsed. The overall goal of the national action plan included the reduction and minimization of sexual abuse and exploitation of children.⁵⁷ The National Action Plan had been rooted on the four areas of intervention including prevention of sexual abuse and exploitation of children, protection of victims, rehabilitation and reintegration of child victims and coordination and monitoring of interventions.⁵⁸

2.7. Coordination of Implementation of Children’s Rights

It is evident that the effective implementation of children’s rights requires coordination among central government departments, among different provinces and regions, between federal and other levels of government, and between government and civil society.⁵⁹ It is obvious that it is not possible to vest one single governmental organ with the responsibility of ensuring respect for the rights of children. As a result, there is a need for a permanent body for the purpose of coordinating efforts for the effective implementation of children’s rights across government. To

⁵⁵ Ministry of Labour and Social Affairs, Ethiopia’s National Plan of Action for Children (2003-2010 and Beyond, Addis Ababa (2004) 44

⁵⁶ UNICEF Ethiopia, Child Protection Systems Mapping: The Case of Ethiopia (2010) 43

⁵⁷ Ministry of Labour and Social Affairs, National Action Plan on Sexual Abuse and Exploitation of Children, (2006-2010) Addis Ababa ,p.57

⁵⁸ Ibid. pp. 57-72

⁵⁹ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003), General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available at: <http://www.unhcr.org/refworld/docid/4538834f11.html> [accessed 13 September 2010, para. 37

that effect, the Ministry of Women, Children and Youth Affairs has been established in view of this objective. The Ministry has been established with the mandate to:

- Create awareness and movement on the question of women, children and youth;
- Collect, compile and disseminate to all stakeholders information on the objective realities faced by women, children and youth;
- Ensure that opportunities are created for women and the youth to actively participate in political, economic and social affairs of the country;
- Encourage and support women and the youth to be organized, based on their free will and needs, with a view to defending their rights and solving their problems;
- Design strategies to follow up and evaluate the preparation of policies, legislations, development programs and projects by federal government organs to ensure that they give due considerations to women and youth issues;
- Undertake studies to identify discriminatory practices affecting women, facilitate the creation of conditions for the elimination of such practices, and follow up their implementation;
- Devise means for the proper application of women's right to affirmative actions guaranteed at the national level and follow the implementation of the same;
- Ensure that due attention is given to select women for decision-making positions in various government organs;
- Coordinate all stakeholders to protect the rights and well-being of children;
- Follow up the implementation of treaties relating to women and children and submit reports to the concerned bodies.⁶⁰

However, the Directorate of Child Rights Promotion and Protection in the Ministry lacks sufficient resources and the ability to establish coordination at the regional, zone and *Woreda* level.⁶¹ Accordingly, the Committee urged the government to provide adequate human and financial resources, enabling it to coordinate and monitor implementation at the federal, regional, zone and *Woreda* levels.⁶² As the Ministry is the principal coordination mechanism, its

⁶⁰ Definition of Powers and Duties of Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 691/2010, Article 32

⁶¹ UNICEF, *Child Protection Systems Mapping: The Case of Ethiopia*, (2010) 28 also Cf. CRC/C/ETH/CO/3, para. 10

⁶² UNICEF Ethiopia, *Child Protection Systems Mapping: The Case of Ethiopia* (2010) 28 also Cf. CRC/C/ETH/CO/3, para. 11

limitations is apt to have adverse effects upon the overall implementation of children and women rights.⁶³ In spite of the plethora of coordinating bodies including gender-based violence, vulnerable children, abuse and exploitation, juvenile just and child rights, coordination and cooperation is limited.⁶⁴ The lack of coordination and cooperation among the different organs for the realization of the rights of children is, among others, attributed to lack of knowledge, high staff turnover, lack of communication and overlapping mandate.⁶⁵

In addition, the coordination of the implementation of the rights of children and women at federal, regional, zonal and *woreda* levels is problematic. At the federal level, the coordination of activities for the realization of the rights of children is vested in the Ministry of Women, Children and Youth Affairs. However, in many regional states the mandate to coordinate such activities is vested with the Labour and Social Affairs Offices or other offices. This absence of interface between the federal and regional counterparts has also led to complication in terms of allocation of budget.⁶⁶

2.8. Independent Monitoring of Implementation of Children's Rights

Independent human rights institutions play a crucial role for the monitoring, promotion and protection of the rights of children. Both the Ethiopian Human Rights Commission and the Ethiopian Institution of Ombudsman are vested with the responsibility to promote and protect the rights of children. These quasi-judicial national human rights organs are vested with promotional, protective, monitoring and advisory mandate as regards the implementation of the rights of children.⁶⁷ They are also mandated to undertake studies and research on ways and means of effective implementation of the rights of children. To this effect, both the Ethiopian Human Rights Commission and the Ethiopian Institution of Ombudsman have Commissioners heading Children and Women Affairs specifically responsible for children.

⁶³ UNICEF, *Child Protection Systems Mapping: The Case of Ethiopia*, (2010) 28

⁶⁴ Ibid. p.27

⁶⁵ Ibid. p.27-28

⁶⁶ UNICEF, *Child Protection Systems Mapping: The Case of Ethiopia*, (2010) 31

⁶⁷ Ethiopian Human Rights Commission Establishment Proclamation No 210/2000, *Federal Negarit Gazeta*, 6th Year No. 40, Proclamation to Provide for the Establishment of the Institution of the Ombudsman No. 211/2000, *Federal Negarit Gazeta*, 6th Year, No. 41

However, the Committee on the Rights of the Child expressed its concern over the lack of information concerning the activities of these institutions.⁶⁸ Furthermore, the Committee on the Rights of the Child also recommended that these institutions be provided with adequate human and financial resources.⁶⁹ The Committee also suggested for Ethiopia to ensure the efficient operation of both institutions in compliance with the established Paris Principles for Independent National Human Rights Institutions adopted by the General Assembly in 1993.⁷⁰

2.9. Monitoring and Data Collection

The independent monitoring of progress in terms of the implementation of the rights of children is vital. The absence of data collection makes the assessment of the extent to which the rights of children have been realized impossible. As a result of this, the Committee on the Rights of the Child noted its concern on the lack of data on issues including domestic adoption, street children, and children involved in armed conflicts, children without parental care, children involved in the justice system, sexually abused and trafficked children.⁷¹ The lack of disaggregated data makes it difficult to identify disparity. Currently, there is no annual publication of comprehensive report on the state of children in Ethiopia.⁷²

Consequently, the Committee on the Rights of the Child has recommended the improvement of birth registration, to strengthen its system of collecting disaggregated data in particular in the areas indicated above.⁷³ The availability of data in particular disaggregated data is of paramount importance for the purpose of designing policies for the implementation of the Convention on the Rights of the Child.⁷⁴

The Social Affairs Standing Committee of the House of Peoples Representatives is given the mandate, among others to:

⁶⁸ Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/, para. 14, available at < <http://www.unhcr.org/refworld/docid/45c30bd60.html> [accessed 10 August 2010]

⁶⁹ Ibid. para 15

⁷⁰ Ibid.

⁷¹ Ibid., para. 18

⁷² UNICEF, *Child Protection Systems Mapping: The Case of Ethiopia*, (2010) 30

⁷³ Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/, para. 19, available at < <http://www.unhcr.org/refworld/docid/45c30bd60.html> [accessed 10 August 2010]

⁷⁴ Ibid.

- Supervise the effective implementation of the countries general social development policies and strategies.
- Oversee the expansion of health services and prevention of health hazards
- Control the spread of HIV/AIDS.
- Ensure social security to street children, children with disabilities to realize the safety of children.
- Study about other social related issues and evaluate the problems identified in the process of execution.
- Receive complaints sent to it including that of children's complaints. Thus, the mandate of this Standing Committee in particular yields the basis for independent monitoring and oversight over ministries and executive organs to follow up the extent to which they are living up to the responsibility vested upon them.

2.10 Partnership with Civil Society

As a state party to the Conventions, Ethiopia is required to work in tandem with human rights NGOs, child and youth led organizations, women associations and coalitions, parent and family groups, faith groups, academic institutions, and also professional associations.

The Committee on the Rights of the Child expressed its concern over the restrictions imposed upon civil society since the 2005 elections.⁷⁵ This has led the Committee to recommend for Ethiopia to respect the role played by civil society for the implementation of the Convention on the Rights of the Child. Furthermore, the Committee also called upon Ethiopia to encourage the active, positive and systematic involvement of civil society, including NGOs, in the promotion of children's rights.⁷⁶

In 2001, the House of Peoples Representatives adopted the Proclamation for the Registration and Regulation of Charities and Societies (Proclamation 621/2009). Accordingly, it came with a three-pronged classification of charities and societies as Ethiopian charities, Ethiopian resident charities and international and foreign charities. The law proclaims that only Ethiopian charities

⁷⁵ Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/, para. 22, available at < <http://www.unhcr.org/refworld/docid/45c30bd60.html> [accessed 10 August 2010]

⁷⁶ *Ibid.*, para. 23

are entitled to engage on advocacy on human rights including the rights of children. However, the law requires Ethiopian charities to obtain 90 percent of their funding from local sources. Since at present, Ethiopian charities are not in a position to muster the strength to secure 90 percent of funding for their activities, this has adversely impacted their activities for the promotion of the rights of children.

2.11 Budgetary Allocation for Children

The identification of the proportion of the national and other budget assigned to the social sector, and within that, to children is significant for the determination of the measures taken by a state to fulfill the social, economic and cultural rights of children and women. The Committee on the Rights of the Child welcomed incremental allocation of budget for children. However, the Committee expressed its concern over the inadequacy of the budget allocated for the implementation of the National Plan of Action for Children (2003-2010).⁷⁷ Consequently, the Committee recommended further incremental allocation of budgetary resources for children both at national and local levels.⁷⁸ In particular, the Committee called upon Ethiopia to increase its budgetary allocation as regards vulnerable children including children belonging to ethnic minorities, children with disabilities, children affected by and infected with HIV/AIDS and children living in poverty and in remote areas.⁷⁹

2.12. Dissemination, Awareness Raising and Training

The dissemination of the rights of children is crucial for their overall implementation. The Committee has commended the effort on the part of Ethiopia to disseminate the provisions of the Convention through publications in several vernaculars of the country.⁸⁰ However, the Committee has also highlighted the need to undertake further dissemination and awareness raising activities in particular among relevant professional categories, parents and among children themselves, in particular in rural areas.⁸¹

⁷⁷ Ibid. para. 16

⁷⁸ Ibid, para. 17

⁷⁹ Ibid.

⁸⁰ Ibid. para. 20

⁸¹ Ibid.

The lack of knowledge about the rights of children has been identified as a main challenge.⁸² This lack of knowledge is believed to have adverse impact upon programs implemented.⁸³ Similarly, existing information flow among the different institutions charged with the protection of the rights of the child leaves much to be desired.⁸⁴ The Committee further recommended the enhancement of training on the provisions of the Conventions for such professional categories as law enforcement officials, teachers, health personnel, social workers and personnel of childcare institutions.⁸⁵ In addition, the Committee recommended that human rights education be included at all levels of the curriculum.⁸⁶

⁸² UNICEF Ethiopia, Child Protection Systems Mapping: The Case of Ethiopia (2010) 26

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/, para. 21, available at < <http://www.unhcr.org/refworld/docid/45c30bd60.html> [accessed 10 August 2010]

⁸⁶ Ibid.

CHAPTER THREE

GENERAL PRINCIPLES

Introduction

The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are anchored on the four general principles which are principles of fundamental importance for the implementation of the whole Convention. Therefore, principles of non-discrimination (Article 2), the best interests of the child (Article 3(1)), the right to life and maximum survival and development (Article 6) and respect for the views of the child (Article 12). These four principles have been identified as principles of general application and of cardinal importance for the interpretation of the provisions in these instruments by the Committee on the Rights of the Child.

3.1. *The Principle of Non-Discrimination*

The Convention on the Rights of the Child requires States Parties to respect and ensure the rights enshrined in the Convention to each child without discrimination of any kind, irrespective of the child's or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.⁸⁷ In addition, States Parties are obliged to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.⁸⁸ The protection against discrimination is also affirmed under Article 3 of the African Charter on the Rights and Welfare of the Child. Specifically, Article 26 of African Children's Charter provides protection against apartheid and discrimination on other various grounds.

The principle of non-discrimination is one of the cardinal principles of the Convention which is identified as one of fundamental pillars of the Convention.⁸⁹ The term "discrimination" is not defined in the CRC. However, the Human Rights Committee⁹⁰ has provided the definition of the

⁸⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 2(1)

⁸⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 2(2)

⁸⁹ Hodgkin and Newell (n 3) 17

⁹⁰ The Human Rights Committee is a treaty monitoring body established based on Article 28 of the International Covenant on Civil and Political Rights.

term in its General Comment. The term “discrimination” is defined as “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁹¹

The phrase in Article 2(1) “shall respect and ensure the rights set forth in the Covenant” shows that the obligation imposed on States Parties is an active one.⁹² Therefore, a range of measures are required to be taken for the implementation of the principle including review, strategic planning, legislation, monitoring, awareness raising, education and information campaigns, and evaluation of measures undertaken to reduce disparities.⁹³ The principle of non-discrimination implies that State Parties are required to identify individual children and groups of children the recognition and realization of whose rights may call for special measures.⁹⁴ The implementation of the principle implies collection of disaggregated data, legal reform, appropriate administration, equitable resource allocation as well as educational measures to bring about attitudinal changes.

The principle of non-discrimination enshrined under the CRC needs to be read in conjunction with other instruments affirming the same protection.⁹⁵ The obligation to respect implies the negative duty to refrain from any actions detrimental to the rights of children, whereas the obligation to “ensure” implies affirmative obligations to enable individual children to enjoy and exercise the rights enshrined in the Convention.⁹⁶

In a similar vein, the FDRE Constitution provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The provision goes on to state that, the law shall guarantee to all persons equal and effective protection without

⁹¹ General Comment No 18, Human Rights Committee

⁹² Hodgkin and Newell (n 3) 21

⁹³ Hodgkin and Newell (n 3) 21

⁹⁴ Committee on the Rights of the Child, General Comment No.5, 2003, (CRC/GC/2003/5,para.12)

⁹⁵ Article 2 of the International Covenant on Civil and Political Rights requires State Parties to respect and ensure to all individuals in their territories and subject to their jurisdiction the rights recognized in the Covenant. Article 24(1) of the same Covenant stipulates that children are entitled to special measures of protection required by their status as minors. On the other hand, Article 26 of the Covenant affirms the stand alone or autonomous entitlement of equality before the law or equal protection of the law which applies to rights and freedoms outside the purview of the Covenant.

⁹⁶ Hodgkin and Newell (n 3) 21

discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.⁹⁷ Moreover, the Revised Constitutions of Regional States prohibit any form of discrimination on the basis of race, nation, nationality or other social origin and colour and other prohibited grounds.

3.1.1. Affirmative Action

The principle of non-discrimination does not affect affirmative action i.e. the legitimate differentiation in treatment of individual children.⁹⁸ Affirmative action is beneficial to reduce and eradicate the immediate, root and underlying causes perpetuating discrimination.⁹⁹ In particular, affirmative action proves to be necessary to ameliorate the conditions of children in especially difficult circumstances.¹⁰⁰ Not all forms of differentiation constitute discrimination in particular if they are based on reasonable and objective grounds and aim to achieve legitimate purposes.¹⁰¹ Likewise, legitimate differentiation between children based on the concept of evolving capacities indicated in Article 5 of the Convention is not barred by the principle of non-discrimination.

The Committee on the Rights of the Child stressed that implementation of the general principles of non-discrimination and the best interests of the child as the primary consideration not contingent upon budgetary constraints.¹⁰² Thus, the Committee has recommended the need for affirmative action or positive discrimination on behalf of disadvantaged and vulnerable children.¹⁰³ In other words, resource allocations need to be made favouring children in vulnerable situations including children with disabilities, children affected or living with HIV/AIDS, street children and children in especially difficult circumstances.¹⁰⁴

⁹⁷ FDRE Constitution, Article 25

⁹⁸ Hodgkin and Newell (n 3) 17

⁹⁹ Sharon Detrick (n 19) 71

¹⁰⁰ According to UNICEF, the term “children in especially difficult circumstances” alluded to in the preamble of the convention include refugees, children with disabilities, children affected by organized violence, unaccompanied children in disasters and street and working children.

¹⁰¹ Hodgkin and Newell (n 3) 20

¹⁰² Sharon Detrick (n 19) 71

¹⁰³ Hodgkin and Newell (n 3) 23

¹⁰⁴ Hodgkin and Newell (n 3) 23

In the same vein, Article 36(5) of the FDRE Constitution provides that “the State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education.” Moreover, Article 35(3) of the Constitution provides that 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 compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions. Thus, this provision is applicable to girl children.

3.1.2. Scope of the Obligations arising from the Principle of Non-Discrimination

The phrase “to each child within their jurisdiction” in Article 2(1) of the Convention shows that the principle of non-discrimination is not only applicable to children who are citizens of the State Party. Instead, the provision is applicable to visitors, refugees, children of migrant workers and those in the State illegally.¹⁰⁵

3.1.3. Prohibited Grounds of Discrimination

The prohibited grounds of discrimination listed in Article 2(1) include race, color, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status. Most of these prohibited grounds of discrimination are also reflected in Article 25 of the FDRE Constitution which deals with the right to equality. However, the insertion of the phrase “*other status*” in both Article 2(1) of the CRC and Article 25 of the FDRE Constitution shows that the list is not exhaustive and illustrative. Article 36(4) of the FDRE Constitution provides that “children born out of wedlock shall have the same rights as children born of wedlock”. Thus, this constitutional stipulation recognized the equality of children regardless of birth and their right to protection against discrimination. Therefore, parents and others cannot discriminate between boys and girls in the provision of food, education, and healthcare.

Article 2(2) of the Convention also provides for the right of protection of children from discrimination or punishment on the basis of status, activities, expressed opinions or beliefs of

¹⁰⁵ Sharon Detrick (n 19) 73

child's parents, guardians or family members. This provision has wider ramifications.¹⁰⁶ This provision calls for action against all forms of discrimination and is not confined to the matters considered by the CRC.¹⁰⁷

The Revised Family Code did away with the discriminatory marriageable ages for boys and girls and prescribed the age of eighteen as the marriageable age for both boys and girls.¹⁰⁸ Apart from the Revised Family Code which is applicable in Addis Ababa and Dire Dawa, various national regional governments have also promulgated their own family codes in keeping with the Constitution. The Committee on the Elimination of All Forms of Discrimination expressed its concern over the fact that the Family Code is not yet applicable by all regions and called upon Ethiopia to ensure all regional governments implement the Family Code.¹⁰⁹

3.2. The Principle of the Best Interests of the Child

Article 3 of the CRC provides one of the four fundamental principles of the CRC. The provision states that the best interests of the child shall be a primary consideration in all actions concerning children. The principle of the best interests of the child requires public and private bodies, social welfare institutions, courts of law, administrative authorities or legislative bodies to ascertain the impact on children of their actions with a view to confirm that the best interests of children are taken as the primary consideration in making decisions affecting them. Thus, these bodies and institutions are required to apply the principle of the best interests of children systematically.¹¹⁰ The scope of the principle is very wide.¹¹¹ It encompasses all actions concerning children as a group.¹¹² Article 3(1) of the Convention requires public and private bodies to ascertain the impact on children of their actions, in order to ensure that the best interests of the child are a primary consideration.¹¹³ The provision stipulates that ensuring the best interests of the child must be the primary consideration in all actions and decisions affecting children. It calls for the consideration of the best interests of the child into national plans and policies for children into

¹⁰⁶ Hodgkin and Newell (n 3) 30

¹⁰⁷ Hodgkin and Newell (n 3) 30

¹⁰⁸ The Revised Family Code of 2000, *Federal Negarit Gazeta* Extraordinary Issue No1/2000, Article 7

¹⁰⁹ UN Committee on the Elimination of All Forms of Discrimination against Women, Concluding Comments of the Committee on the Elimination of All Forms of Discrimination against Women: Ethiopia, UN Doc. A/59/38, para. 241

¹¹⁰ *Ibid.*

¹¹¹ Hodgkin and Newell (n 3) 36

¹¹² Hodgkin and Newell (n 3) 36

¹¹³ Hodgkin and Newell (n 3) 35

the activities of legislative, executive and judicial branches of the government both at national and local levels.¹¹⁴ The principle requires consideration of, for example, how a proposed or existing law or policy or administrative action or court decision, affect children. The principle of the best interests of the child applies to children both individually and as a group.

Considerations of best interests must embrace both short and long-term considerations for the child.¹¹⁵ Interpretation of best interest of the child must be compatible with the overall objective and purpose of the Convention. The interpretation of the best interests of the child must not be highly influenced by considerations of cultural relativism.¹¹⁶ The interpretations of the best interests of the child must not put the rights guaranteed under the CRC in jeopardy.¹¹⁷ For example, the interpretation of the best interests of the child cannot be used to justify practices such as corporal punishment.¹¹⁸ The views of parents, professionals as to the best interests of a child may vary at times. The consideration of the rights of the child under the Convention makes the interpretation of the concept less subjective.¹¹⁹ The principle of best interests of the child requires decision be based on the needs and circumstances of the individual child and it is a dynamic concept that must take into account the views and evolving capacities of the child.

The phrase “shall be a primary consideration” in Article 3(1) shows that the best interests of the child will not always be the single, overriding consideration.¹²⁰ However, the rights and interests of children must be actively considered.¹²¹ Therefore, actions and decisions affecting children must amply demonstrate that the interests and rights of children have been actively explored and taken into account as a primary consideration.¹²²

Article 3(3) of the Convention on the Rights of Children provides that States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the area of safety, health, in the number and suitability of their staff, as well as competent authorities. Thus, this

¹¹⁴ Sharon Detrick (n 19) 85

¹¹⁵ Hodgkin and Newell (n 3) 37

¹¹⁶ Sharon Detrick (n 19) 86

¹¹⁷ Hodgkin and Newell (n 3) 37

¹¹⁸ Committee on the Rights of the Child, General Comment No.8, 2006, CRC/C/GC/8, *para.* 26)

¹¹⁹ Hodgkin and Newell (n 3) 233

¹²⁰ Sharon Detrick (n 19) 87

¹²¹ Hodgkin and Newell (n 3) 38

¹²² Sharon Detrick (n 19) 90

provision requires States Parties to establish standards for institutions, services and facilities for the care and protection of children. The state must also ensure that these standards are complied with through competent supervision and monitoring. The adoption of these standards is a clear manifestation of commitment of a government to the protection rights of children. The application of the best interests of the child principle must not diminish or restrict other rights of children as enshrined in the CRC or the African Charter on the Rights and Welfare of the Child, and other treaties or the FDRE Constitution.

The principle of the best interests of the child as a primary consideration is reflected in Ethiopian legislations at varying levels. Article 36(2) of the FDRE Constitution provides that “in all actions concerning children undertaken by private and public institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child.” The Constitution or other secondary domestic legislation in Ethiopia does not provide definition of the term best interest.

However, the laws of certain countries attempt to shed light on the meaning of the term “best interests”. For example, in Philippines, the term best interests of the child is defined as “the totality of circumstances and conditions which are most congenial to the survival, protection and feelings of security of the child and most encouraging to the child’s physical, psychological and emotional development.”¹²³ In Nicaragua, the phrase “best interests” is defined as “all that favours the child’s physical, moral, cultural and social development, in keeping with the evolution of the child’s capacities.”¹²⁴

The reading of the English version of Article 36(2) of the FDRE Constitution makes it clear that the emphasis placed on the concept of best interests of the Child as is stronger than that of Article 3(1) of the Convention. This is due to the fact that the Constitution states that best interests shall be *the* primary consideration, whereas Article 3(1) of the CRC states that it shall be “a primary consideration”. The wording of Article 36(2) of the Constitution gives better protection in this regard. Accordingly, the best interests of the child are a prevailing consideration and not merely a primary consideration under Ethiopian laws. In other words, the

¹²³ The Juvenile Justice and Welfare Act of 2006 of the Philippines, RA 9344, Section 2(b) and 4(b)

¹²⁴ The Children Code of Nicaragua, Article 10

formulation of the principle in the FDRE Constitution conveys the message that the rights of children prevail in case of conflict. In addition, the exercise of the rights of adults may not jeopardize the exercise of the rights of children at any time by virtue of the principle of best interests.

This approach makes the FDRE Constitution akin with that of the African Charter on the Rights and Welfare of the Child. Article 4(1) of the Charter also stipulates that the best interests of the child shall be “*the primary consideration*” as opposed to “a primary consideration” under the Convention.¹²⁵

Article 82 of the Revised Family Code provides that the court needs to take in to consideration the interests of children when giving orders relating to the maintenance of the spouses, custody and maintenance of children and the management of the property of the spouses. Article 113(2) of the Revised Family Code also provides that the court shall take into account the income, age, health and living condition of the spouses as well as the age and interests of the children as to which spouse shall have custody of the children when giving decision on the dissolution of marriage. Thus, courts of law must consider the interests of children in relation to decisions concerning custody following pronouncement of divorce. Likewise, Article 194(2) of the Revised Family Code also requires courts of law to verify whether or not adoption is in the best interests of children before approving adoption agreements. Article 188(2) of the Revised Family Code also requires the court to take into consideration the effects of other children of the adopter on the well-being and best interests of the adopted child.

3.2.1. Case Law by Courts of Law in Ethiopia Applying the Best Interests Principle

In recent years, courts of law in Ethiopia are increasingly applying the principle of the best interests of the child in adjudication of cases. Some of these decisions are rendered by the Cassation Division of the Federal Supreme Court. The decisions of the Cassation Division of the Federal Supreme Court carry a force of law by virtue of Proclamation 454/2005. The following

¹²⁵ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 26

cases are typical of such notable decisions highlighting the incipient jurisprudence of the Courts. It is therefore necessary to discuss the cases owing to their precedent effect.

In *W/t Tsedale Demissie vs Ato Kifle Demisse*, A *Woreda* Court in Bonga Area of Kafa Zone of Southern, Nations, Nationalities and Peoples Regional State (SNNPRS) declared Ato Kifle Demisse, the guardian and tutor of his son Binyam Kifle according to Article 235(1) of the Family Code of the Regional State. The paternal aunt of the minor, W/t Tsedale Demissie, submitted an opposition pursuant to Article 358 of the Civil Procedure contending that the father should not be declared as the guardian and tutor for the child as the former has failed to care and protect the child and did not provide him assistance. She went on to state that the father is merely motivated by the financial gain and property he would derive by his status as tutor and guardian of the child and not in the best interests of the child. She prayed that she is entitled to be guardian and tutor of the child as she is the one who has been nursing and caring for the child for 12 years. However, the Court rejected her plea arguing that tutorship and guardianship cannot be awarded for an aunt while the father is alive. The Court relied upon the Family Code of the Regional State in rendering this decision.¹²⁶ The Court reasoned that the Family Code of the Regional State, particularly, Article 235(1) of the Code, does not allow the aunt to be granted custody of the child while the father of the child is still alive.

She took appeal from the decision of the *Woreda* Court arguing that the father should not be granted the guardianship after failing to ensure the upbringing of the child for about 12 years. She further claimed that the father did not provide for the education, life, survival and development of the child in the past. She submitted that the father applied to be considered as the tutor and the guardian following the death of the mother. She alleged that the father cannot be a responsible guardian and tutor for the child given his past antecedents and unworthiness. Nevertheless, the High Court of Kafa Zone also rejected her appeal on the very same grounds invoked by the *Woreda* Court.¹²⁷ Similarly, the Cassation Bench of the Supreme Court of Southern Nations, Nationalities and Peoples Regional State quashed the application of the aunt alleging the existence of a fundamental error of law committed by the two courts at the lower tiers.

¹²⁶ Family Code of Southern Nations, Nationalities and Peoples Regional State, Proclamation No.75/1996

¹²⁷ High Court of Kafa Zone, File No. 01001

The matter was then submitted to the Cassation Bench of the Federal Supreme Court in March 2006 by the petitioner, W/t Tsedale Demissie. The Cassation Bench summoned the respondent, Ato Kifle Demisse, who, however, did not appear thereby waiving his right to rebut the arguments of the petitioner. In this decision the court invoked Article 36(2) of the FDRE Constitution which provides that the best interests of the child shall be the primary consideration in deciding all matters concerning the child. The Court went on to state that Article 3 of the Convention on the Rights of the Child which has been ratified by the country and therefore is part and parcel of the law of the land by virtue of Article 9 of the FDRE Constitution requires that the best interests of the child to be the primary consideration in deciding all matters concerning children. The Cassation Bench noted that regardless of the fact that Ethiopian Laws give primacy to parents of children for the purpose of guardianship and tutorship; this would be the case only in the event that parents serve in the best interests and well-being of children. The Cassation Bench observed that the literal adherence to the letter of the law demonstrated by the lower courts in this case does not comply with the consideration of the best interests of the child as the primary consideration. The Cassation Bench also stated that the order for removal of the child from the homestead where he lived in serenity (i.e. the dwelling house of the petitioner) for long without consulting the child also constitutes a gross irregularity. The Cassation Bench quashed the decision of the lower courts since it runs counter to the doctrine of the best interests of the child enshrined in the FDRE Constitution and the Convention on the Rights of the Child and awarded guardianship and tutorship of the child to the petitioner.

Another decision of guardianship rendered based on the best interests of the child principle is file number 03389. The consideration of this case is illustrative how the court disposed elaborating the principle of the best interests of the child.¹²⁸ The judgment was made by the Cassation bench of the Federal Supreme Court on November 5, 2007.

The First Instance Court of Addis Ababa City Government initially appointed the present appellant i.e. the aunt of the two children to be their guardian and tutor. However, the court reversed its decision on May 8, 2006 based on Article 360 of the Civil Procedure Code when the

¹²⁸ Federal Supreme Court, Cassation Bench, File No. 03389

grandparent of the children showed up contending that he has priority for custody rights over the aunt.

The appellant took decision from this judgment contending that the court did not take into account the best interests of the child as the primary consideration. She appealed for the appellate court to quash the decision of the lower court which is solely based on strict adherence to the order outlined in the Revised Family Code since the latter's decision harms the children. The parties presented their cases before the appellate court.

The appellate court stated that it is possible for the court to vary the order of guardianship among the legally entitled eligible persons as outlined under Article 226(4) of the Revised Family Code based on the best interests of the child in the event of dispute in this case. The court makes variation to the order of guardianship provided in the law based on the fact that their parents are not alive and the income and living situations of the contending parties. Despite the fact that the respondent has a right of priority over the appellant to be the guardian of the children based on Article 225(a) of the Revised Family Code, the respondent is not entitled to be the guardian for the children for a variety of reasons. To begin with, the respondent is elderly. Secondly, the respondent lives in Fiche town away from Addis Ababa, where the children are based. Thirdly, the respondent is currently also raising two other children. On the contrary, the appellant is taking proper care of the children and supervising their education. The appellant has her personal income and income derived from rental of her house. The court has confirmed that the children opt to live with the appellant.

The court noted that it is convinced that it is in the best interests of the children to be under the guardianship of the appellant than that of the respondent. Therefore, the court reversed the judgment of the lower court and has decided the children to be under the guardianship of the appellant based on Article 226(4) of the Revised Family Code.

3.3. The Right to Life and Maximum Survival and Development

The other principle designated as a general principle is the right to life and maximum survival and development. The principle implies that protection from violence, neglect and abuse is

crucial for the maximum survival and development of the child. The implementation of this principle requires States Parties to the Convention to take measures to ensure the optimal development of the child.¹²⁹ This cardinal principle is also mirrored under Article 5 of the African Charter on the Rights and Welfare of the Child, under the heading “Survival and Development.”

The inherent right to life is affirmed in various international and regional human rights instruments. The protection of the right to life requires not only negative duties but also positive duties.¹³⁰ Negative duties or duties of omission implied by the right to life include prohibiting and preventing death penalty, extra legal, arbitrary or summary executions or situations of enforced disappearance.¹³¹ Affirmative obligations of States Parties include measures aimed at reducing infant and child mortality, increase life expectancy, and eliminating malnutrition and epidemics.¹³²

Article 6 is closely intertwined with Article 24 of the Convention. Article 24 deals with the rights of children to health and health services. Article 24 also requires States Parties to take measures to reduce infant and child mortality. Other implications of Article 6 also include measures to improve perinatal health for mothers and children and create conditions that promote well-being of children.¹³³

3.3.1. Abortion

The Preamble of the CRC 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. As discussed earlier, Article 1 of the Convention intentionally avoids any mention on the minimum age of childhood. It is silent as to whether or not conception or birth marks the beginning of childhood.¹³⁴ Determination on the conflicting rights and interests involved in issues such as abortion and family planning is left to the discretion of signatories to the

¹²⁹ I Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002)

¹³⁰ Hodgkin and Newell (n 3) 84

¹³¹ Sharon Detrick (n 19) 125

¹³² Hodgkin and Newell (n 3) 84

¹³³ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/C/GC/7/Rev. 1, para. 10)

¹³⁴ Hodgkin and Newell (n 3) 85

Convention.¹³⁵ Nevertheless, countries where abortion rates are high and which employ the practice as a method of family planning and gender preference are frowned upon.¹³⁶

However, the Criminal Code deals with crimes against the life of unborn or abortion. The intentional termination of a pregnancy at whatever stage or however effected is made punishable under the Criminal Code.¹³⁷ The practice of abortion is considered, in principle, as an offence.¹³⁸ This is indicative of the fact that the national legislation confers legal protection to the unborn. The Criminal Code provides various grounds on the basis of which abortion is permitted. These include saving the life of the woman, to preserve physical health, to preserve mental health, in case of pregnancy as a result of rape or incest and in the event of foetal impairment.¹³⁹ The Criminal Code does not allow abortion at request or for economic or social reasons.¹⁴⁰ However, the Criminal Code considers “extreme poverty” as a mitigating factor in assessing sentencing.¹⁴¹

3.3.2. Infanticide

Article 544 of the Criminal Code dwells upon the crime of infanticide. Article 544(1) provides that “mother who intentionally kills her infant while she is in labour or while still suffering from the direct effect thereof, is punishable, according to the circumstances of the case, with simple imprisonment.

Article 544(2) goes on to state that “a mother who kills her child, either intentionally or by negligence, in circumstances other than those specified under-article (1) of this Article shall be tried according to the relevant provisions of this Code regarding homicide.” Another person, being a principal, an instigator or an accomplice in the crime of infanticide is excluded from the benefits of extenuation, and is punishable the general provisions relating to homicide, according to the circumstances and the degree of his guilt.

¹³⁵ Hodgkin and Newell (n 3) 85

¹³⁶ Sharon Detrick (n 19) 126

¹³⁷ Criminal Code, Article 545(1)

¹³⁸ Tsehai Wada, Abortion Laws in Ethiopia, Mizan Law Review, Volume 2 No.1

¹³⁹ Criminal Code, Article 551(1)

¹⁴⁰ Criminal Code, Article 551(1)

¹⁴¹ Tsehai Wada, Abortion Laws in Ethiopia, Mizan Law Review, Volume 2 No.1

3.3.3. Capital Punishment

Article 6 of the International Covenant on Civil and Political Rights prohibits capital punishment for crimes committed by persons below eighteen years of age. The same provision prohibits the imposition of capital punishment on pregnant women. Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of death penalty for crimes committed by persons below the age of 18. Article 5(3) of the African Charter also contains a similar prohibition. Second paragraph of Article 176 of the Criminal Code provides that “in no case may death sentence be passed upon a criminal who had not attained his eighteenth year of age at the time of the commission of the crime.”

3.4. *The Principle of Respect for the Views of the Child*

Article 12(1) of the CRC stipulates that any child capable of forming a view has the right to express views freely in all matters affecting him or her. States parties are called upon to promote children to form a free view and to create the conditions conducive for children to exercise their right to be heard.¹⁴² The provision implies obligation on States Parties to make a presumption that a child is capable of forming his or her own autonomous opinion. On the contrary, States Parties are not in a position to make the presumption that a child is incapable of forming views and opinions.¹⁴³ Consequently, the child is not required to prove that he or she is capable of forming opinions.¹⁴⁴

In addition failure, on the part of the child to communicate verbally cannot be invoked as a bar to militate against the exercise of the right of the child.¹⁴⁵ As a result, the exercise of the right implies the recognition of, respect for, non-verbal forms of communication including play, body language, facial expression, drawing, painting, etc.¹⁴⁶

In particular, children with disabilities need to be provided the support and assistance they need to make their views heard.¹⁴⁷ Moreover, children belonging to ethnic, religious and linguistic

¹⁴² General Comment No. 12, CRC

¹⁴³ General Comment No. 12, CRC

¹⁴⁴ General Comment No. 12, CRC

¹⁴⁵ General Comment No. 12, CRC

¹⁴⁶ General Comment No. 12, CRC

¹⁴⁷ General Comment No. 12, CRC

minorities and indigenous groups need to be encouraged to express their views.¹⁴⁸ The State Parties are also required to ensure the safety and security of children who express their views on matters affecting them.¹⁴⁹ Moreover, caution must be exercised in that the hearing and interviewing of children must not affect them adversely and the necessary safeguards must be put in place to that effect.¹⁵⁰

The provision goes on to provide that the views of the child be given due weight based on their age and maturity. The provision does not impose any age limits for the exercise of the principle of respect for the views of the child.¹⁵¹ Thus, States Parties are barred from setting age limits as a precondition for the exercise of the right to be heard.

Article 12(2) entitles children to give their views in any judicial and administrative proceedings affecting him or her. This implies that the child can participate in a variety of settings court hearings as well as formal decision making concerning the child as in the case of education, health, planning, the environment, etc.¹⁵² This principle implies that the child is not merely a passive object of charity, but an active participant in the promotion, protection and monitoring of his or her rights.¹⁵³ The principle implies that the views of children should be considered in decision making, policymaking, preparation of laws and other matters.¹⁵⁴

Practices and attitudes, political and economic barriers which perpetuate the image of children as passive objects of charity are contrary to the principle of respect for the views of the child.¹⁵⁵ Consequently, the right of the child to be heard is also referred to as the child's right to participation.

The formulation of the right, in particular, the phrase "*shall ensure*" demonstrates the fact that the specific and concrete obligations arising from the right are mandatory upon States Parties. The exercise of the right of the child to be heard is a choice to the child and not an obligation.¹⁵⁶

¹⁴⁸ General Comment No. 12, CRC

¹⁴⁹ General Comment No. 12, CRC

¹⁵⁰ General Comment No. 12, CRC

¹⁵¹ General Comment No. 12, CRC

¹⁵² Hodgkin and Newell (n 3) 149

¹⁵³ Sharon Detrick (n 19) 213

¹⁵⁴ General Comment No. 12, CRC

¹⁵⁵ General Comment No. 12, CRC

¹⁵⁶ General Comment No. 12, CRC

Thus, the child is not obliged to exercise this right. To this effect, States Parties are required to provide the child the information and advice required to make informed decision in the light of his or her best interests.¹⁵⁷ The need to provide children with appropriate information is also a right enshrined under Article 17 of the Convention.

States Parties are required to take the necessary measures to give effect to the right of the child to be heard. These include the direct recognition of the right, adoption of laws or the revision of existing ones. The stipulation that the child is entitled to express their view “freely” implies that no pressure, undue influence or manipulation be applied on the child.¹⁵⁸

Children are entitled to express their views “in all matters affecting them.” The term “all matters” encompasses a broad range of issues which may affect children. The provision has opted to employ language which is not limitative.¹⁵⁹ Thus, the right is applicable in regard to family matters, school life as well as community. These may include adoption, expulsion of the child under consideration, decision concerning location of playgrounds and or prevention of traffic accidents.¹⁶⁰

The implementation of the principle of the right of the child to be heard may be direct or indirect. Though affording direct opportunity for the child to be heard may be preferable, it is not the only method. In cases procedural laws may not allow direct implementation, this may take place through representatives. The representatives may include, among others, parents, lawyers or social workers.¹⁶¹

One of the mechanisms for the implementation of the right of the child to be heard is national independent human rights monitoring bodies such as the Human Rights Commissions and Institutions of Ombudsman. Accordingly, the Ethiopian Institution of the Ombudsman has facilitated the establishment of model children parliaments in all the regional states as well as in Addis Ababa and Dire Dawa.¹⁶² These model children parliaments have inspired regional states to establish their own children parliaments and student councils in schools. The model children

¹⁵⁷ General Comment No. 12, CRC

¹⁵⁸ General Comment No. 12, CRC

¹⁵⁹ Hodgkin and Newell (n 3) 155

¹⁶⁰ Hodgkin and Newell (n 3) 155

¹⁶¹ Hodgkin and Newell (n 3) 157

¹⁶² UNICEF, *Child Protection Systems Mapping: The Case of Ethiopia*, (2010) 30

parliaments have proved to be instrumental in the prevention of maladministration and violations of the rights of children. They have also served as a platform for the participation of children on matters concerning them.

This provision implies that proceedings involving matters affecting children need to be conducted in an atmosphere of understanding and must afford children sufficient opportunity to express their views and participate.

Article 14 of the Ethiopian Civil Code affirms the right of every person to think freely and to express his ideas. Article 291 of the Revised Family Code also provides that the tutor shall consult the minor in all important acts concerning him, unless the latter is lesser than 14 years old. Article 249(2) of the Revised Family Code asserts that the court shall consult the minor before making decision as to appoint or remove a person as guardian or tutor of the minor. However, it appears that negative traditional values concerning the participation of children remain to be obstacles to the implementation of this right.

Article 310 of the Revised Family Code provides that the incapacity of a minor comes to an end where he or she attains age of majority or he is or she is emancipated. The minor attains the age of majority when he or she celebrates his or her 18th birthday. Moreover, the child may be entitled to legal capacity if he or she is emancipated. Emancipation of the child takes place for two reasons. Firstly, the child may be emancipated by the sole fact of marriage as provided under Article 311. This happens in the exceptional circumstances of the case where a child is allowed to marry pursuant to Article 7(2) of the Revised Family Code. Secondly, the Court may allow the child to be emancipated if he or she has attained the age of 14 years. However, the court may decide to emancipate the child only where after considering his or her conditions, the reasons applied for, and where it finds that the emancipation is in the minor's best interests. Caution must be exercised that these requirements of capacity do not compromise the ability of children to file complaints due to want of capacity. Children should be given the right, in as far as possible, the opportunity to initiate judicial proceedings and make complaints before administrative bodies to protect their constitutional rights.

Consideration of the incipient jurisprudence of the Cassation Division of the Federal Supreme Court concerning the principle of respect for the views of the child is instructive at this juncture.

The Cassation bench of the federal supreme court was seized of the case involving the principle of respect for the views of the child in case number cassation file no. 35710.¹⁶³ The judgment of the Cassation Division was rendered on December 25, 2008.

The case is presented before the Cassation Bench of the Federal Supreme Court based on the petition alleging that the judgment of the Cassation Division of Addis Ababa City Government Court constitutes fundamental error of law.

The respondent submitted an application before the First Instance Court of Addis Ababa City Government seeking the confirmation of the will made by the late Zenebe Nigussie on January 2, 2004. The application dated 23 May 2005 provides that the testament relates to the property of the deceased and the guardianship and tutorship of Natnael Zenebe. Accordingly, the court confirmed the said testament in its judgment rendered on July 14, 2005. The petitioner submitted a pleading based on Article 358 of the Civil Procedure Code to the same court later opposing its judgment confirming the testament on various grounds. Firstly, she stated that the testament was made on common matrimonial property. Secondly, she stated that it is not possible to deprive the guardianship and tutorship of the child from the mother of the child. The testament embodies vague and dubious language. Thus, she stated that the confirmation of the testament by the court is illegal and it should be cancelled. The court also endorsed the opposition of the respondent and cancelled its decision of the confirmation of the testament based on the very same grounds invoked by the respondent.

The appellate Court of Addis Ababa City also confirmed the decision of the lower court after having examined the parties. However, the Cassation Division of Addis Ababa City Courts quashed the decisions of both lower courts on a variety of grounds and affirmed the validity of the testament. The petition was then submitted to the Cassation Bench of the Federal Supreme Court.

The petition presented to the Cassation Bench of the Federal Supreme Court dated January 21, 2008 alleges that the decision of the Cassation Division of Addis Ababa City Government constitutes a fundamental error of law. The Cassation Bench of the Federal Supreme Court decided the matter warrants further investigation and summoned the respondent. The parties

¹⁶³ Cassation Bench, Federal Supreme Court (Cassation File no. 35710)

submitted their written submissions. The court also undertook oral examination of the parties. The Court also entertained the views of child Natnael Zenebe and recorded his thoughts on the matter.

The Cassation Bench examined the matter against the backdrop of the case as stated above pursuant to the views of the child and the relevant laws. The Cassation Bench asserted that the bone of contention that calls for its determination is whether or not the judgment that the testament the deceased Ato Zenebe Nigussie made on January 2, 2004 is valid.

It is possible to understand from the proceedings of the case that the deceased Ato Zenebe Nigussie had been married to the petitioner and lived in matrimony for some time until the dissolution of the marriage through decision of divorce on December 31, 2002. Upon the pronouncement of the judgment of divorce, the former spouses were asked to produce their mutual agreement concerning the effects of the divorce including custody and partition of common property. If the parties fail to reach mutual agreement on these issues, the court instructed one of them to apply to that effect before the court and closed the file. Afterwards, the Federal First Instance Court has given a judgment requiring Ato Zenebe Nigussie to effect a payment of 10,171.78 Birr to the petitioner in file No. 07941 after litigation concerning the partition of the matrimonial property. The deceased made the testament on January 2, 2004. The deceased passed away on May 8, 2005. The petitioner was approved as the guardian and tutor of child Natnael Zenebe by the judgment of the court rendered on July 14, 2005 based on her submissions dated May 23, 2003. However, this judgment was cancelled by the court on the basis of the opposition filed on October 14, 2005. It is also possible to understand that the petitioner did not obtain the amount money decided in her favour by the court as her moiety.

The Cassation Bench of the Federal Supreme Court also observed that the Cassation Division of Addis Ababa City Government held that the testament of the deceased which devolved the inheritance on the respondent and the child as valid regardless of the fact that it was informed of the fact that the testament relates to the guardianship and tutorship of child Natnael Zenebe. The Cassation Bench of the Federal Supreme Court observed that the judgment lacks clarity.

Therefore, the court noted that it becomes imperative to examine the effects of the testament on the property of the deceased and the guardianship and tutorship of the child in the light of the

law. Cassation Division determined that the first issue that needs to be investigated in the case is whether or not the testamentary appointment by the deceased of the respondent to be the guardian and tutor of child Natnael Zenebe is appropriate.

In its judgment, the Cassation Division of the Federal Supreme Court makes the following reasoning. It noted that children are part of the community entitled to special care and protection. This is due to the vulnerability of children as a result of their tender age. With a view to realize the special protection and care children are entitled to, several international and continental treaties are being ratified and implemented. The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of Children feature prominently among these treaties and agreements. Ethiopia ratified the Convention on the Rights of the Child (CRC) on December 9, 1991 by virtue of Proclamation 10/1992. Ethiopia also ratified the African Charter on the Rights and Welfare of the Child (ACRWC) on October 2, 2002. In addition, there are domestic laws meant for the protection of the rights of children including the FDRE Constitution and regional State Constitutions. These international and continental treaties in relation to the rights of the child embody fundamental principles. One of the fundamental principles is that of taking the best interests of the child as the primary consideration in deciding matters relating to the child. This principle is enshrined in Article 3(1) of the Convention on the Rights of the Child and Article 4(1) of the African Charter on the Rights and Welfare of the Child. Article 9(4) of the FDRE Constitution has made treaties ratified by Ethiopia an integral part of the law of the land. Moreover, Article 13(2) of the Constitution has clearly laid down the stipulation that the domestic laws of the country should be construed in the light of international human rights treaties ratified by the country. Moreover, the Constitution has specifically devoted Article 36 to provide the rights of children. Article 36(2) affirms that the primary consideration shall be the best interests of the child in all actions concerning children undertaken by private and public institutions, courts of law, administrative authorities or legislative bodies. Laws and policies promulgated to entrench this doctrine are also believed to advance the objective of the best interests of the child.

Respect for the views of the child is another principle which is given utmost importance in international and continental treaties on child rights apart from the principle of the best interests of the child. The principle of respect for the views of the child is found enshrined in Articles 12

and Article 4(2) of the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child. The scope of this principle encompasses all matters affecting the lives of children. The principle entitles children to participate in decisions affecting their lives, and exerting influence on decisions affecting their interests. Pertinent provisions make it clear that the right of children to be heard extends to matters such as their health, education, environmental matters as well. The provisions also show the children should be heard before judgments concerning adoption and custody following the divorce between their parents and that due weight needs to be given to their views apart from being listened to. It is indisputable that the weight to be given to the views of children is contingent upon their age and maturity.

The main features and details that must be considered in deciding matters affecting children have been reviewed from the perspective of international treaties. Shifting its attention to the case at hand, the Cassation Bench of the Federal Supreme Court noted that the Revised Family Code has stipulated organs of protection from Articles 219-238. According to the provisions, parents have primacy right over others in regard to guardianship and tutorship of the minor. The provisions also entitle the parent to appoint testamentary guardian or tutor to the child. The rules provide that such appointment can be subject to annulment or variation by a court of law. In the absence of parents or guardian or tutor appointed by their testament, the rules provide hierarchy of relatives of the minor to be appointed by a court for the tutorship of guardianship. However, the administration of the hierarchy must be determined based upon the principle of the best interest of the child as the primary consideration. Article 113(2) and other provisions of the Revised Family Code indicated above vest courts of law with the power to exercise this discretion in this regard. Article 13(2) of the Constitution has clearly laid down the stipulation that the domestic laws of the country should be construed in the light of international human rights treaties ratified by the country. Moreover, Article 9(1) of the Constitution states that any law, customary practice or a decision of an organ of a state or a public official which contravenes the Constitution shall be of no effect.

Consequently, the consideration of the testament of the deceased on the matter demonstrates that it has not taken the best interests of the child as the primary consideration. The child Natnael Zenebe has made it clear to the court that he has no desire to be with his aunt and wants to stay with his mother with proper care and protection. The child has made it clear that he has not

obtained the attention and care needed from his aunt following the death of his father. The court also took note of the fact that the child is 10 years old and manifests maturity. These considerations have necessitated the need to accord due weight to the views of the child. Accordingly, since there is no legal ground that prohibits the annulment of the testamentary provision of the deceased, the court has found the Decision of the Cassation Bench of Addis Ababa City Government constituting fundamental error of law. The Cassation Division of the Federal Supreme Court has also appointed the petitioner as the guardian and tutor of the child.

CHAPTER FOUR

CIVIL RIGHTS AND FREEDOMS

Introduction

The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child enshrine various civil rights and liberties of children. These include birth registration, name, nationality and right to know and be care for by parents, preservation of identity, child's right to freedom of expression, child's right to freedom of thought, conscience and religion, child's right to freedom of association and peaceful assembly, child's right to privacy, child's access to appropriate information and freedom from torture or other cruel, inhuman, degrading treatment or punishment. Many of these rights have also been reflected in the FDRE Constitution and other secondary legislation as will be seen in this Chapter. In principle, the rights and fundamental freedoms enshrined in the Constitution are equally applicable to children except some age-related restrictions such as the right to vote and stand for election.

4.1 Birth Registration, Name, Nationality and Right to Know and Be Care for by Parents

Article 7 of the CRC assures the right to birth registration, name, nationality and the right to know and be care for by parents. The provision mirrors Article 24(2) of the International Covenant on Civil and Political Rights (ICCPR), which stipulates the right of every child to be registered immediately after birth and to have a name. Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) also enshrines the right of the child to acquire nationality. Article 7 of the CRC is distinctive in that it affirms a novel right of the child to know and be cared for by parents. This right is qualified by the phrase "*as far as possible*." This is due to the fact that it is not always possible to trace parents.¹⁶⁴ It is also because of the fact that it is not in the best interests of the child to be cared for by parents at times.¹⁶⁵

Birth registration refers to the official and permanent recording of the birth of a child by the state. Birth registration amounts to the acknowledgement of the legal existence of the child. Accordingly, it provides legal proof of a child's identity and is directly linked with to a child's

¹⁶⁴ Hodgkin and Newell (n 3) 108

¹⁶⁵ Sharon Detrick (n 19) 143

claim to citizenship and to the rights, benefits and obligations that flow from that citizenship. Therefore, birth registration is a right in itself. Furthermore, birth registration is instrumental for ensuring that children enjoy a range of other entitlements to survival, development and protection. In particular, birth registration is useful, among others, to ensure that children have access to services at the appropriate age, including vaccinations and school enrolment.

The importance of universal registration of children is of both intrinsic and instrumental importance. Birth registration is of intrinsic value in that it amounts to the first official recognition of the individual importance of the child to the State and the law.¹⁶⁶

Apart from its intrinsic importance, birth registration is of utility for a variety of reasons. Firstly, children who are not registered are less valued.¹⁶⁷ Thus, the registration of children is an important first step to prevent their discrimination. Secondly, birth registration is useful for national planning for children.¹⁶⁸ For instance, it is not possible for States Parties to have clear information concerning infant and child mortality rates without birth registration.¹⁶⁹ Thirdly, registration is the *sine qua non* for the protection of other rights of children.¹⁷⁰ In this regard, registration makes it possible to identify children following armed conflict, infanticide, trafficking, abandonment and abduction. Moreover, registration is pivotal for the proof of the protective ages of children as in the case of employment, recruitment in to armed forces, administration of child justice, etc. The benefits of registration outweigh the costs by far related with it.

Article 7 requires that children be registered immediately after birth. The term “immediately” is construed to mean with a period of days and not months.¹⁷¹ Countries are obligated to make universal registration compulsory for both parents and of the relevant administrative authorities.¹⁷² The term “universal” is employed here as to mean that all children born within the

¹⁶⁶ Hodgkin and Newell (n 3) 98

¹⁶⁷ Sharon Detrick (n 19) 144

¹⁶⁸ Hodgkin and Newell (n 3) 98

¹⁶⁹ Hodgkin and Newell (n 3) 98

¹⁷⁰ Sharon Detrick (n 19) 144

¹⁷¹ Hodgkin and Newell (n 3) 98

¹⁷² Sharon Detrick (n 19) 149

state regardless of their nationality.¹⁷³ Birth registration should be free, in particular to families of limited means.¹⁷⁴

States Parties must take measures to ensure accuracy of data and prevent falsification of birth records. The main particulars in birth records should include the child's name at birth, the child's sex, the child's date of birth, the place where the child was born, the names of the parents and their addresses and the nationality of the parents.

Article 7 also assures the right of the child to a name as of the moment of birth. It makes it clear that the right is applicable as of "*from birth*." This implies that there should not be delay in naming children. The right of naming is not an absolute parental right. Thus, parents are not entitled to register names that make children an object of ridicule.¹⁷⁵

The right of the child "to acquire a nationality" is another rights specified under Article 7 of the CRC. Article 36(1) (b) of the FDRE Constitution also enshrines the rights of children to name and nationality. The right to nationality is part and parcel of the right to identity enshrined under Article 8 of the CRC. Birth registration of children is also instrumental for the acquisition of nationality. This right is to be implemented in view of the national laws of the State Parties and their obligation under the relevant international instruments in the field, in particular where the child would otherwise be stateless. The last ambit of the provision refers to *the 1961 Convention on Reduction of Statelessness*. This Convention stipulates that children should acquire the nationality of the State in which they were born if they are not granted nationality by any other state or if such children fail to make applications to obtain this right, and then they should be entitled to the protection of the nationality of one of the parents subject to certain conditions.¹⁷⁶ Nationality may be acquired based on parentage (*jus sanguini*) or from place of birth (*jus soli*.)

Article 33 of the FDRE Constitution assures of rights of nationality. Article 33(1) provides that no Ethiopian national shall be deprived of his or her Ethiopian nationality against his or will. The provision goes on to state that marriage of an Ethiopian national of either sex to a foreign national shall not annul his or her Ethiopian nationality. Ethiopian law of nationality is primarily

¹⁷³ Hodgkin and Newell (n 3) 99

¹⁷⁴ Hodgkin and Newell (n 3) 102

¹⁷⁵ Sharon Detrick (n 19) 150

¹⁷⁶ Hodgkin and Newell (n 3) 103

based on decent. The Ethiopian Nationality Proclamation stipulates that shall be an Ethiopian national by descent where both or either of his parents is Ethiopian.¹⁷⁷ This shows that Ethiopian nationality law basically follows the approach of parentage (*jus sanguini*) rather than the place of birth (*jus soli*.) The proclamation also asserts that an infant who is found abandoned in Ethiopia shall be deemed to have been born to an Ethiopian parent and shall acquire Ethiopian nationality unless he or she is proved to have a foreign nationality.¹⁷⁸ Article 7 of the Proclamation also lays down conditions under which a child adopted by Ethiopian national acquires Ethiopian nationality.

Article 7 also assures the right of the child to know and be cared for by his or her parents as far as possible. Article 36(1) (c) goes on to affirm the right of children to know and be cared for by his or her parents or legal guardians. The term parent is widely defined as to include genetic parents and birth parents i.e. the mother who gave birth and the father who claimed paternity through partnership with the mother at the time of birth.¹⁷⁹ Some also include psychological parents in the definition. Psychological parents are those individuals who cared for the child for significant periods during infancy and childhood.¹⁸⁰

However, the implementation of the right to know and be cared for by parents is qualified by the phrase “*as far as possible*.” There are situations whereby it is not possible to realize this right. To begin with, it may be difficult to identify the parent as in cases of a mother who does not the father of the child or in case of abandoned children.¹⁸¹ Secondly, the mother may not be willing to identify the father as in the case of incestuous relationships.¹⁸²

The right of the child to be cared for by the parent implies a duty of more active involvement on the part of the parent than simply effecting payment for the other parent for purposes of upbringing.¹⁸³ The formulation of this right further suggests that it is the right of the child and not only that of the parent. This right cannot be realized if the parents are dead or have disowned the child. Likewise, it is not also possible in situations of parents are deprived of their parental

¹⁷⁷ Ethiopian Nationality Proclamation (Proclamation 378/2003), Article 3(1)

¹⁷⁸ Ethiopian Nationality Proclamation (Proclamation 378/2003), Article 3(2)

¹⁷⁹ Hodgkin and Newell (n 3) 103

¹⁸⁰ Hodgkin and Newell (n 3) 104

¹⁸¹ Sharon Detrick (n 19) 150

¹⁸² Hodgkin and Newell (n 3) 108

¹⁸³ Hodgkin and Newell (n 3) 108

rights based on judicial process in the best interests of the child as in the case of unworthiness. It is also difficult to implement this right in case of runaway children who voted with their feet.

Birth registration also assists enhancing protection of children by reducing the vulnerability of children to age related abuses such as early marriage, child labour, sexual exploitation and criminal prosecution as an adult. It also promotes inheritance rights of children and prevents property grabbing. It is also a useful means for data collection, trend analysis, policy and programme development and decision-making in that it is believed to be essential element of national planning for children. Consequently, birth registration provides benefits for children through their lives.

In Ethiopia, there is no birth registration system currently. There is no adequate legal framework and institutional structure for birth registration.¹⁸⁴ As a result, birth registration in Ethiopia is among the lowest in the world. Significant numbers of children remain unregistered neither at birth nor at a later stage.¹⁸⁵ This state of affairs have led the Committee on the Rights of the Child to persistently recommend for Ethiopia to strengthen and further develop measures to ensure that all children born within the national territory are registered by adopting an adequate legal framework.¹⁸⁶ The Committee also recommended for Ethiopia to create institutional machinery which are accessible and free so as to implement effective birth registration, e.g. by introducing mobile units, especially in rural and remote areas and in Internally Displaced Persons (IDPs) and refugee camps.¹⁸⁷

A draft bill of Vital Events Registration has been submitted to the House of People's Representative for Ratification. At the time of writing of this *Handbook*, the draft legislation on vital events registration which was previously tabled before the House of People's Representatives has been referred back to the Ministry of Justice (MOJ).¹⁸⁸

¹⁸⁴ Committee on the Rights of the Child (CRC), *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 1 November 2006, CRC/C/ETH/CO/, para. 31, available at < <http://www.unhcr.org/refworld/docid/45c30bd60.html> [accessed 10 August 2010]

¹⁸⁵ Ibid.

¹⁸⁶ Ibid. para. 32

¹⁸⁷ Ibid.

¹⁸⁸ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011) p.24

However, there are still further efforts to put in place a system of registration in the country. Notably, the federal and regional bureaus of Women, Children and Youth in collaboration with UNICEF have implemented a pilot project where registration of children in 10 rural and 8 urban selected Kebeles of Addis Ababa, Dire Dawa, Amhara and Tigray. The pilot registration project was carried out from April 2009 to December 2010 and resulted in a total of 28,541 children being registered. The challenges and lessons generated from the piloting phase are documented and analyzed to inform the design of birth registration law and system in the country.¹⁸⁹

Though the Ethiopian Civil Code sets out a detailed system for civil registration under articles 47 to 153, these provisions have not entered in to force owing to the provision of Article 3361 of the Code which provides that these rules will not become operational until the issuance of an order by the state which has not yet been issued. Similarly, article 656 of the newly adopted Criminal Code that makes failure to declare birth punishable by law cannot be applicable on account of the absence of the mechanism to effect birth registration. The only meaningful legal regime for birth registration is the practice of issuing birth certificates by municipalities which has been given recognition by article 321/2/ of the Revised Family Code as a transitory measure until the government establishes institutional arrangements for civil registration.

The above described absence of enforceable laws and institutional system for birth registration has led to the registration of the fact of birth by health institutions, churches and municipalities. Besides being irregular and lack of consistency of records in the registration of births by health institutions, the fact that less than 6% of births take place in the presence of skilled attendants let alone health institutions with a registration system makes the proportion of children registered insignificant.¹⁹⁰ The registration of birth by churches, in addition to the likelihood of being of limited scope and quality, occurs only if the child survives to the time of baptism and actually gets baptized.

¹⁸⁹ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011) p.24

¹⁹⁰ UNICEF, The Official Summary of the State of World Children, Ethiopia, Statistics: Women, 2006.

4.2. The Right of the Child to Identity

Article 8 of the CRC assures the rights of children to identity and to have their identity preserved, and where necessary re-established. The provision covers three elements of identity including nationality, name and family relations. These rights of children are also echoed in the International Convention on the Protection of All Persons from Enforced Disappearance adopted in 2006. Any legislation, which prevents children from assuming the nationality of their parents, is likely to be incompatible with the CRC. For instance, this is a situation likely to occur in countries, which prohibit dual nationality.

The term “preserve” employed in Article 8 indicates both non-interference in identity and the maintenance of records relating to pedigree, birth registration and particulars relating to early infancy.¹⁹¹ States must introduce measures of record keeping and preservation of records or preservation of identifying marks in case of abandoned, refugee or unaccompanied children. States must also ensure that these records are confidential.¹⁹²

Article 9(4) of the CRC obligates States Parties to inform children and parents of the whereabouts of each other if the State has had responsibility for their separation through, for example, imprisonment, deportation and death.¹⁹³ Article 25 of the International Convention on the Protection of All Persons from Enforced Disappearance prohibits tampering with documents giving the true identity of children. In some instances, the State may be entitled to violate the right of the child to preservation of identity for valid reasons.¹⁹⁴ This valid reason may only be justified in regard to the child’s best interests or to protect others.¹⁹⁵

Article 8(2) stipulates that the right of a child who has been illegally deprived of some or all of the elements of his or her identity to be provided by the State with “appropriate assistance and protection with a view to speedily re-establishing his or her identity. This implies that States

¹⁹¹ Hodgkin and Newell (n 3) 115

¹⁹² Sharon Detrick (n 19) 159

¹⁹³ Hodgkin and Newell (n 3) 116

¹⁹⁴ Hodgkin and Newell (n 3) 116

¹⁹⁵ Sharon Detrick (n 19) 162

must remedy any wrongdoing involving the violation of the right to preservation of identity by dedicating adequate resources.¹⁹⁶

Article 8 has also highlighted the importance of preservation of family relations of the child as an integral part of the right to identity. The phrase “*family relations as recognized by the law*” under Article 8 remains far from clear. This phrase implies the right of the child to know his or her parents or family identity. Moreover, it also implies the rights of the child to know his or her siblings, grandparents and other relatives as these can be equally important to the child’s sense of identity.¹⁹⁷

Accordingly, Ethiopian laws have detailed rules concerning ascertainment of paternity and maternity. The Revised Family Code stipulates that the maternal filiation is ascertained from the sole fact that the woman has given birth to the child.¹⁹⁸ On the other hand, the Code provides that paternal filiation can be ascertained through different ways. To begin with, paternal filiation flows from the maternal filiation when a relationship recognized by the law has existed between the mother and a certain man at the time of the conception or the birth of the child.¹⁹⁹ Secondly, paternal filiation may also result from an acknowledgement of paternity made by the father of the child.²⁰⁰ Thirdly, paternal filiation may also result from a judicial declaration.²⁰¹ These provisions are of utmost importance for the protection of the rights of children to know the identity of their birth parents.

The Revised Family Code stipulates that the adopted child shall retain his or her bonds with the family of origin.²⁰² The Code goes on to provide that this also applies to the spouse and descendants of the adopted child.²⁰³

¹⁹⁶ Hodgkin and Newell (n 3) 116

¹⁹⁷ Hodgkin and Newell (n 3) 114

¹⁹⁸ Revised Family Code, Article 124

¹⁹⁹ Revised Family Code, Article 125(1)

²⁰⁰ Revised Family Code, Article 125(2)

²⁰¹ Revised Family Code, Article 125(3)

²⁰² Revised Family Code, Article 183(1)

²⁰³ Revised Family Code, Article 183(2)

4.3. *Child's Right to Freedom of Expression*

The Convention on the Rights of the Child differs from previous instruments on the same subject in that it does not portray children as objects of care and protection but also holders of individual personality rights. This is the paradigm shift brought about by the CRC. The perception that children are not in a position to exercise civil rights is wrong. These gamut of rights recognized in the CRC demonstrate that children are active subjects of rights and not passive objects of charity. Thus, children should also be entitled to the exercise of civil rights and liberties.

Article 13 of the CRC assures the right of the child to freedom of expression. The freedom embodies the “right to seek, receive and impart” information and ideas of all kinds. Article 13(2) imposes limitation on restrictions that may be imposed on the exercise of the right. This right is intertwined with the participatory rights, freedom of thought, conscience and religion and freedom of association affirmed in Articles 12, 14 and 15 of the CRC respectively. The freedom of expression is also affirmed under Articles 19 of the UDHR and the ICCPR.

In the same vein, Article 29(1) of the FDRE Constitution assures the right of everyone to freedom of thought, opinion and expression. Article 29(2) of the Constitution also establishes the right of everyone to freedom of expression without any interference. The freedom protects the right to seek, receive and impart information and ideas. The right extends to the freedom to seek, receive, and impart information and ideas of all kinds orally, in writing, in print, in the form of art, or through other media of one's choice. Article 4 of Freedom of the Mass Media and Access to Information Proclamation also formulates the same entitlement in an identical manner.²⁰⁴

Restrictions imposed on the right of children to express their views should be guided by the three-part test indicated in Article 13(2) of the CRC, article 19 of the ICCPR and Article 29 of the UDHR. Accordingly, limitations must be provided by law, limitations must be imposed only to further legitimate aims and restrictions should be necessary in a democratic society.

²⁰⁴ Freedom of the Mass Media and Access to Information Proclamation (Proclamation 590/2008), Article 4

4.4. *Child's Right to Freedom of Thought, Conscience and Religion*

Article 14 of the CRC assures the right of children to freedom of thought, conscience and religion. The right to freedom of thought, conscience and religion is also affirmed under Articles 18 of the UDHR and the ICCPR. The ICCPR emphasizes respect for the liberty of parents to ensure the religious and moral education of their children in accordance with their own convictions. On the contrary, Article 14(2) of the CRC mirrors the concept of parental guidance stated in Article 5 of the CRC. The same provision requires, however, that parental guidance in relation to freedom of thought, conscience and religion may be exercised in the light of the “evolving capacities” of the child. In other words, the focus of the CRC is the freedom of religion of the child and not that of the parents. Instead, Article 14(2) deals with the rights and duties of the parents and not that of their liberty.

Article 27(1) of the FDRE Constitution also affirms the right of everyone to freedom of thought, conscience and religion. The same provision goes on to state that the right includes the freedom to adopt a religion or belief of his choice, and the freedom either individually or in community with others, and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Thus, though parents are entitled to provide direction, it is the child who exercises the right. Moreover, the direction may not involve physical or mental violence. Simply put, the provisions do not support the view that children are obligated to assume the religion of their parents until they attain the age of 18. Likewise, in case parents disagree as to the religion the child should assume, the matter needs to be resolved based on the basis of the right of the child and neither parent is in a position to exercise authority to the exclusion of the other.

Article 14(3) outlines the restrictions imposed on the exercise of the child to freedom of thought, conscience and religion. Restrictions imposed on the right of children freedom of thought, conscience and religion should be guided by the three-part test indicated in Article 14(2) of the CRC, article 18 of the ICCPR and Article 29 of the UDHR. Accordingly, limitations must be provided by law, limitations must be imposed only to further legitimate aims and restrictions should be necessary in a democratic society.

The notion of freedom of thought is closely linked with the doctrine of participation rights affirmed in Article 12 of the CRC. The implementation of freedom thought is related with the freedom to seek, receive and impart information and ideas of all kinds, the right to information and the right to education. The right of the child to privacy affirmed under Article 16 of the CRC implies that children cannot be forced to disclose their thoughts. Article 14 does not impose restrictions on freedom of conscience; however, sub-article 2 of the provision allows parental guidance.

Freedom of religion of the child may be subjected to specified restrictions. Article 18(1) of the ICCPR stipulates that freedom of religion may include freedom to have or adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. Article 18 of the ICCPR also affirms that no one shall be subject to coercion, which would impair his freedom to have or adopt a religion or belief of his choice.

Article 27 of the FDRE Constitution affirms the freedom of religion, belief and opinion. Article 27(1) reads “everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to hold or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others, and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” Article 27(4) stipulates that parents and legal guardians have the right to bring up their children ensuring their religious and moral education in conformity with their own convictions. Article 14(1) of the Civil Code also affirms the right of everyone to freedom to think and express his or her ideas.

4.5. Child’s Right to Freedom of Association and Peaceful Assembly

Article 15 assures the rights of the child to freedom of association and to freedom of peaceful assembly. Along with the principle of respect for the views of the child and freedom of expression of the child enshrined in Articles 12 and 13 of the Convention, the right to freedom of association and peaceful assembly projects the child as an active and participating member of

society.²⁰⁵ Article 15 affirms the rights of children to collective participation. Other international instruments have also asserted the right to freedom of association and peaceful assembly for “everyone”.²⁰⁶

Article 30 of the FDRE Constitution affirms that everyone has the right to assemble and demonstrate together with others and peaceably and unarmed, and to petition. Moreover, Article 31 of the FDRE Constitution assures the right of everyone of association for any cause or purpose. The Cooperative Society’s proclamation No 147/1998 Art.13 (1) states that any individual may become a member of cooperative societies when s/he attains the age of 14 years.

The Ethiopian Institution of the Ombudsman has facilitated the establishment of model children parliaments in all the regional states as well as in Addis Ababa and Dire Dawa.²⁰⁷ These model children parliaments have inspired regional states to establish their own children parliaments and student councils in schools. The model children parliaments have proved to be instrumental in the prevention of maladministration and violations of the rights of children. They have also served as a platform for the participation of children on matters concerning them.

Article 15 underscores the rights of children as holders of fundamental civil rights and freedoms including the right to engage in peaceful activities as a group.²⁰⁸ Article 15 (2) of the CRC makes it clear that restrictions on the rights enunciated under the provision may be imposed only in accordance with the law and for the legitimate reasons set forth in the provision. The need for parental direction and guidance in the exercise of the right of children to freedom of association and assembly is reflected in the general provision in Article 5 of the CRC.

4.6. *Child’s Right to Privacy*

Article 17 assures the right of the child to privacy. It provides protection against arbitrary or unlawful interference with his or her privacy, family, home, or correspondence as well as against unlawful attacks on his or her honor and reputation. The right to privacy is also enshrined in other international human rights instruments for “everyone”. The right to privacy is also affirmed

²⁰⁵ Hodgkin and Newell (n 3) 197

²⁰⁶ Freedom of association and peaceful assembly have been affirmed under Article 20 of the UDHR, Articles 21 and 22 of the ICCPR

²⁰⁷ UNICEF, *Child Protection Systems Mapping: The Case of Ethiopia*, (2010) 30

²⁰⁸ Hodgkin and Newell (n 3) 199

in Article 12 of the UDHR and Article 17 of the ICCPR. These provisions provide that no one shall be subject to such interference against with his or her privacy, family, home, or correspondence. The right of the child to privacy is applicable in all settings including within the family, alternative care, and institutions, facilities and services.²⁰⁹ Moreover, the article also affords protection to the children's family and home from arbitrary or unlawful interference.²¹⁰ Article 40(2) (b) (vii) of the CRC also stipulates that a child alleged to be in conflict with the law is entitled to the right to privacy at all stages of the proceedings. The right of the child to privacy must also be observed in connection with family proceedings and when children are victims of violence.

Article 26 of the FDRE Constitution provides that everyone has the right to privacy. The provision goes on to state that the right shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession. Consequently, Articles 10-13 of the Civil Code provide detailed protection of the right to privacy. Articles 32 and 33 of the Criminal Procedure Code provide for safeguards against arbitrary search and seizure. Articles 613-619 of the Criminal Code also stipulate the protection against defamation and calumny.

Promotion of the health and development of children, in particular of adolescents calls for respect for their privacy.²¹¹ It is also incumbent upon health care providers to keep the information provided by children confidential.²¹² Adolescent children are also entitled to the right to give informed consent to medical treatment.²¹³

Article 16 prohibits different forms of interference with the privacy of the child. The prohibition applies not only against state authorities but also others. To this effect, the State is required to enact the required legislation. Interference with the right of the child to privacy may only take place in line with the law and only for legitimate reasons. The fact that interference is authorized by the law may not justify the measure unless it is compatible with the aims and objectives of the

²⁰⁹ Sharon Detrick (n 19) 269

²¹⁰ Hodgkin and Newell (n 3) 203

²¹¹ Committee on the Rights of the Child, General Comment No.4, 2003, CRI/GC/2003/4, para 11

²¹² Committee on the Rights of the Child, General Comment No.4, 2003, CRI/GC/2003/4, para 11

²¹³ Committee on the Rights of the Child, General Comment No.4, 2003, CRI/GC/2003/4, para 11

CRC. Such authorized interference is also required to be reasonable.²¹⁴ Moreover, State authorities must provide appropriate and accessible complain mechanisms for children whose right to privacy has been breached.²¹⁵

The right of children in residential and custodial institutions to privacy may be undermined by physical environment and design, overcrowding, lack of appropriate supervision and so on.²¹⁶ Thus, institutions must comply with certain minimum requirements on space, including private space, design of toilets and bathrooms, etc.²¹⁷ This obligation to adopt rules on these issues is affirmed under Article 3(3) of the CRC.

It is usual to keep files of children concerning health, education, social services, etc. The right to privacy of the child implies that the child should know about the existence of information concerning him, that such information is stored and who is in control, has access to the information stored and also is able to challenge and correct, if need be, by having recourse to the established procedures.²¹⁸

Article 16 of the CRC prohibits unlawful attacks on his or her honour or reputation. Children are entitled to protection from verbal attacks, slanders, attacks in writing or through the media or libel.²¹⁹ The child is entitled to the right to effective remedy in case of violations of his or her right to honour and reputation.

4.7. *Child's Access to Appropriate Information and Role of Media*

Article 17 assures the right of the child to access appropriate information. The focus of Article 17 is on the role of the media in regard to the rights to rights of children. The provision also stipulates the child's access to information and material from various sources, in particular those meant to promote well-being and physical and mental health. The provision underscores the need to strengthen the media to disseminate positive material beneficial to the child in view of

²¹⁴ Human Rights Committee, General Comment on Article 17

²¹⁵ Human Rights Committee, General Comment on Article 17

²¹⁶ Hodgkin and Newell (n 3) 206

²¹⁷ Hodgkin and Newell (n 3) 206

²¹⁸ Hodgkin and Newell (n 3) 209

²¹⁹ Hodgkin and Newell (n 3) 211

the aims of education affirmed in Article 29 of the CRC. Moreover, Article 17 implies that children should have access to the media to exercise their participatory rights.²²⁰

Article 17 is not primarily about protecting children from the harmful influence of the media. In fact, the media can be more helpful than detrimental to the rights and interests of children.²²¹ This can be seen from the phrase “important function performed by the mass media” in Article 17. The provision reflects the view that the media can play a pivotal role in terms of optimizing the maximum development of the child.²²²

Article 17 makes reference to the aims of education as set out under Article 29(1) of the CRC. Hence, it requires that the substance of information and material disseminated by the media needs to be compatible with these objectives, which are directed to:-

- development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- development of respect for the child’s parents, the child’s cultural identity, language and values;
- development of respect for the national values of the country in which the child is living and the country from which he or she may originate; and
- development of respect for civilizations different from his or her own.²²³

Article 17(c) also calls for encouragement of the production and dissemination of children’s books and children’s literature. Article 17(d) calls upon States Parties to encourage the mass media to have particular needs of children who belong to a minority group or who are indigenous. This provision is related with Article 30 of the CRC which stipulates that the child who belongs to a religious or linguistic minority, or who is indigenous, should not be denied the right to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language. Likewise, Article 29 of the CRC also calls for respect for varying national

²²⁰ Sharon Detrick (n 19) 283

²²¹ Hodgkin and Newell (n 3) 218

²²² Sharon Detrick (n 19) 287

²²³ Hodgkin and Newell (n 3) 222

values and cultures and languages. These provisions imply the importance of producing material and programmes and translation in to minority and indigenous languages. Moreover, children with disabilities should be given equal opportunities by making information accessible to them through appropriate arrangements.²²⁴

Article 17(e) of the CRC stipulates that States Parties to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being. The projection of violence is believed to have adverse effects upon the physical and mental health of children.²²⁵ The preambular provision of Proclamation on the Freedom of Mass Media and Access to Information also underscore the importance of preservation of the wellbeing of the youth, honour and reputation of persons, national security, public order and other overriding rights. Article 30(4) of Broadcasting Service Proclamation provides that any program intended for transmission may not violate the dignity and personal liberty of mankind or the rules of good behavior or undermine the belief of others.²²⁶ Especially, Article 31 of the Proclamation is exclusively devoted on “Protecting the Well-being of Children”. The provision reads as follows:-

- 1) radio or television transmission programs that may corrupt the outlook of children or harm their feelings and thinking or encourage them to undesirable behavior shall not be transmitted at hours during which children normally watch or listen to such programs
- 2) Children are presumed not to listen or watch to radio or television transmissions from 11:00 o'clock in the evenings up to 5:00 o'clock in the morning.²²⁷

Article 33(4) of the Proclamation stipulates that broadcasting advertisement by interrupting any program the transmission time of which is not more than 20 minutes or children's program shall be prohibited.²²⁸

Article 34 of the Broadcasting Service Proclamation focuses on prohibited advertisements. Accordingly, the provision prohibits the following advertisements:-

²²⁴ Sharon Detrick (n 19) 288

²²⁵ Hodgkin and Newell (n 3) 224

²²⁶ Broadcasting Service Proclamation (Proclamation 533/2007), Article 30(4)

²²⁷ Broadcasting Service Proclamation (Proclamation 533/2007), Article 31

²²⁸ Broadcasting Service Proclamation (Proclamation 533/2007), Article 33(4)

- Any advertisement that violates gender equality and that disregards the dignity and human rights of women
- Cigarette and cigarette related advertisements
- Advertisements related to narcotic drugs
- Advertisements of liquors with more than 12% alcoholic contents
- Advertisements that encourage users to buy medicine that cannot be administered without medical prescription
- Other advertisements prohibited by law²²⁹

As mentioned earlier, Article 29 of the FDRE Constitution provides the right to seek, receive and impart information and ideas. The right extends to the freedom to seek and receive information and ideas of all kinds orally, in writing, in print, in the form of art, or through other media of one's choice. The same entitlement is also reinforced by Article 12 of the Freedom of the Mass Media and Access to Information Proclamation. The proclamation states that all persons have the right to seek, obtain and communicate any information held by public bodies as provided in the Proclamation.²³⁰

Article 644 on protection of minors from such materials stipulates that:-

“Whoever, for gain or to provoke:

- A) Publicly displays by video, or in a shop window, in a booth or in any other place visible from without, writings, images or objects such as to stimulate unduly, to pervert or to misdirect the sexual instinct, or to arouse or to stimulate unduly brutal or bloodthirsty instincts, or anti-social feelings which are inimical to the family spirit, in minors: or
- B) Knowingly offers, elands, gives or sells such objects images or writings to a minor, is punishable with simple imprisonment from six months to three years, and fine without prejudice to the forfeiture of the incriminating material where appropriate”.

²²⁹ Broadcasting Service Proclamation (Proclamation 533/2007), Article 34

²³⁰ Freedom of the Mass Media and Access to Information Proclamation, Article 12(1)

4.8. Freedom from Torture or Other Cruel, Inhuman, Degrading Treatment or Punishment

Article 37(a) provides the right of the child to freedom from torture or other cruel, inhuman, degrading treatment or punishment. This provision is also related to Article 19(1) of the Convention which provides protection against violence and abuse. Article 16(1) of the African Charter on the Rights and welfare of the Child combines the two provisions.²³¹ Article 18(1) of the FDRE Constitution provides that everyone has the right to protection against cruel, inhuman or degrading treatment or punishment.

Article 36 (1) (e) of the FDRE Constitution provides for the rights of children to be free from corporal punishment or cruel and inhuman treatment in schools and other institutions. Furthermore, in 1998, the MOE issued a circular which listed acceptable disciplinary methods that could be employed by teachers to discipline their students, which does not include corporal punishment.²³²

Article 576(1) of the Criminal Code prohibits the maltreatment of children. It stipulates that “whosoever, having the custody or charge of a minor, ill-treats, neglects, over tasks or beats him for any reason or in any manner is punishable with simple imprisonment not exceeding three months.”

Article 576(2) of the Criminal Code further submits that the punishment shall be, in addition to the deprivation of family rights of the criminal, simple imprisonment for not less than one year where the crime causes grave injury to the health, well-being, education or physical or psychological development of the minor.

²³¹ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 55

²³² Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

CHAPTER FIVE

FAMILY ENVIRONMENT AND ALTERNATIVE CARE

Introduction

Chapter five of the Handbook focuses on various issues. The Chapter commences with explication of the concepts of parental guidance and the child's evolving capacities. In this regard, the Chapter also dwells on responsibilities of the child as enshrined in the African Charter on the Rights and Welfare of the Child. This part also examines parental responsibilities and state obligation to provide assistance. The section on separation from parents looks into, among others, child custody and guardianship and visitation rights of the non-custodial parent and the right of the child to parental knowledge. The Chapter also examines the rights of the child to enter or leave his or her country for family reunification. It also considers the prohibition of illicit transfer and non-return of children abroad. Other important matters considered in the present chapter include the right to maintenance, children deprived of their family environment, adoption, child's right to periodic review of treatment and child's right to protection from all forms of violence.

5.1 *Parental Guidance and the Child's Evolving Capacities*

Article 23 of the International Convention on Civil and Political Rights provides that the family is the natural and fundamental group unit of the society. The provision makes it clear that the family is entitled to protection by society and the State. Article 34(3) of the FDRE Constitution provides that the family is the natural and fundamental unit of the society and is entitled to protection by society and the State.

Article 5 of the CRC describes the delicate balance between the child's capacity to exercise his or her rights and responsibilities of parents to provide guidance and protection. The provision also describes the duty of the state to respect the privacy of the family and to protect the rights of children.²³³ It introduces the two twin concepts of "parental responsibilities" and the "evolving capacities" of the child. There are different conceptions of family. The CRC as well as the African Charter on the Rights and Welfare of the Child adopt a flexible definition of the term

²³³ Sharon Detrick, A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff Publishers, the Hague, 1999) 115

“family”.²³⁴ This is because Article 5 refers to parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child. The term family refers to a variety of arrangements that can provide for children’s care, nurturance and development including the nuclear family, the extended family, and other traditional and modern community based arrangements. International law recognizes the family as the basic unit of the society.²³⁵

Article 20 of the African Charter on the Rights and Welfare of the Child also spells out the duties of parents or other persons responsible for the child. The phrase “other persons responsible for the child” includes both *de facto* careers as well as legal guardians.²³⁶ This shows that the responsibility of care for the child in the African context is not confined to the parents but also lies in the extended family.²³⁷ Article 20(1)(b) and (c) of the Charter also provide the duties of parents and other persons responsible for the child to secure conditions of living necessary for the child’s development and to enforce domestic discipline. In turn, domestic discipline must be administered in accordance with humanity and in a manner consistent with the inherent dignity of the child.²³⁸ This shows that African Children’s Charter also prohibits the subjection of the child to dereliction of other people, pillories and stocks or degrading the child as a mere object.²³⁹

A "healthy" family, as a primary and natural group, would provide the context for full development of the personality of the child. According to this Article both parents have primary responsibilities for the upbringing and development of their children. This responsibility may also relate to guardians and tutors of the child. The basic concern of the parents and other

²³⁴ Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague, 1998) 68

²³⁵ Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague, 1998) 67

²³⁶ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 34

²³⁷ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 34

²³⁸ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 34

²³⁹ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 34

guardians is the best interest of the child. The parents have the responsibility to support the exercise of the rights of the child enshrined in the Convention.

The family must be protected and helped by the State to be able to fulfill its primary social role.

- The State must offer effective protection to the family so the family, in turn, will be able to offer protection to the child;
- So, to be able to assume its responsibility towards the child, the family needs the State to assume its own responsibility towards the family.

Article 27 of the Convention on the Rights of the Child imposes a direct and explicit responsibility on parents to secure a standard of living adequate for the child's development. The reading of the provision shows that parents have primary parental financial responsibility. This implies that parents have primary responsibility for securing the right to adequate standard of living for children. Article 27(2) reads "the parents or others responsible for the child have primary responsibility within their abilities and financial capacities, the conditions of living necessary for the child's development."

The responsibility of the state is secondary as can be seen from the reading of Article 27(3) of the CRC. It provides that States Parties shall take appropriate measures to assist parents and others responsible for the child to implement the right to adequate standard of living. Accordingly, the state is obligated to provide materials and financial assistance within its means, after failure of parents to provide it. This is true in particular with regard to nutrition, clothing, and housing. Article 20(2) of African Children's Charter also stipulates similar obligations. In regard to federal family law, Article 255 of the Revised Family Code also stipulates that the guardian may seek assistance from pertinent governmental institutions in order to carry out the powers vested in him under the Code.

Failure to respect the evolving capacities of the child is a violation of the principle of the best interests of the child. Article 312 of the Revised Family Code provides for a possibility of the child being freed from legal restraints. This procedure is known as emancipation. Emancipation takes place either as a result of marriage of a child as envisaged under the exceptional circumstances indicated in Article 7 of the Revised Family Code or judicial decision to that

effect. The recognition by the law of the emancipation of the child from legal restraints before the attainment of the general age of majority shows the flexibility of the law. This flexibility of the law is important as it enables children to acquired rights to make decisions for themselves on certain matters once they have acquired sufficient understanding.²⁴⁰

In line with this, case law of courts of law demonstrates that orders of emancipation are given on several occasions for a variety of reasons. The following cases illustrate the circumstances which lead to applications for emancipation and the judgments rendered by courts and their considerations in reaching the decisions.

In file number No. 117/98, the Federal First Instance court gave the following judgment concerning emancipation on July 19, 2006. The petitioner submitted an application in regard to a 16-year-old boy and a 13 years old girl. She stated that the mother of the children is deceased and the identity of their father is unknown. However, she submitted that the stepfather of the children has secured a court judgment appointing him as their guardian and tutor having misled the court. This has enabled him to take over the house and other property, which is succession of their mother due to her from the grandparents of the children. The petition further states that the stepfather is using it for his personal benefit and not for the children. Moreover, the stepfather has thrown the children out of their homestead. Therefore, since there is no one who will be the tutor and guardian of the children, the petitioner has asked the court to give order of emancipation of the 16 year old and be conferred with legal capacity.

The court has summoned the children and heard their views on the matter. Article 312 of the Revised Family Code has provided the exceptional situation whereby children may be emancipated and be conferred upon legal capacity. Accordingly, the application of the petitioner has a legal basis since it is based on the aforementioned Article. A minor who has attained the age of 14 may be emancipated upon the application of guardian or other interested party. The matter concerns the lasting interests of the child. The stepfather obtained tutorship and guardianship powers by misleading and misrepresenting as though the children were his own children. The stepfather was motivated by the malicious desire to takeover property that does

²⁴⁰ Hodgkin and Newell (n 3) 5

not belong to him in the name of the children. It is also established that the stepfather has failed to discharge his responsibility and exposed the children to abuse and suffering.

Therefore, the court reversed the decision granting guardianship and tutorship status to the stepfather of the children based on the misrepresentation that the children are his. On the other hand, since the testimony of witnesses has confirmed that one of the children has attained 16 years of age and the court is convinced that it is in the best interests of the child to be emancipated from his minority, the court has decided that he is hereby emancipated i.e. freed from legal restraint.

Likewise, the court made a similar finding in file number file No. 104/99 in its judgment rendered on October 17, 2006. In this case, the petitioner submitted a petition stating that, her mother W/o Saba Tsegaye passed away on August 7, 1995. The deceased was also survived by Ashenafi Chala, 11 years old sibling of the petitioner. On the other hand, the petitioner stated that their father Chala Negewo also passed away on April 20, 2001. The petitioner submitted that she is now over 15 years. However, she stated that there is no close relative who may supervise the upbringing of herself and her brother. Therefore, she applied for the court to give judgment of emancipation freeing her from legal restraint on her behalf.

The court listened to the testimony of witnesses. The court has found that the application of the petitioner for emancipation is adequate and necessary. Thus, the court has decided that Frehiwot Chala to be emancipated (freed from legal restraint) based on Article 312 of the Revised Family Code. Furthermore, the court also appointed the petitioner to be the guardian and tutor of her 11 years old brother based on Article 225(b) of the Revised Family Code as she is now considered as having attained majority by reason of the judgment of emancipation and that there is no another suitable person to that effect.

5.1.1. Responsibilities of the Child

African Children's Charter differs from the Convention on the Rights of the Child in that it is also duty-oriented. Article 31 of the Charter outlines the duties and responsibilities of the child at length. The provision states that every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. These responsibilities and duties include:

- The responsibility to work for the cohesion of the family;
- The responsibility to respect his or her parents, superiors and elders at all times and to assist them in case of need;
- The responsibility to serve his national community by placing his physical and intellectual abilities at its service;
- The responsibility to preserve and strengthen social and national solidarity;
- The responsibility to preserve and strengthen African cultural values in his relations with other members of the society;
- The responsibility to contribute to the moral well-being of society;
- The responsibility to preserve and strengthen the independence and the integrity of his country; and
- The responsibility to contribute to the best of his or her abilities, at all times and at all levels, to the promotion and achievement of African Unity

The idea of duties is not particularly unique to the African Children Charter. It is also to be found in Article 1 and Article 29 of the Universal Declaration of Human Rights. However, care must be taken in the interpretation of these responsibilities and duties in African Children's Charter. The list of duties indicated must not put the rights of children affirmed in the Charter and the Convention in jeopardy. In particular, the duty of obedience of children to respect their parents, superiors and elders must not be interpreted to require such obedience even in cases where parents abuse children.²⁴¹ Similarly, the duty of children to work for the cohesion of the family

²⁴¹ Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 40

does not imply the right of parents to exploit their children.²⁴² Simply put, the understanding of the duties of children should be guided by the whole Charter in its entirety.

5.2. Parental Responsibilities and State Assistance

Article 18(1) of the CRC provides that “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. It goes on to state that parents, guardians have the primary responsibility for the upbringing and development of the child and their basic concern will be the best interests of the child. The provision also stipulates that “States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities.

Parents bear the primary responsibility to provide a suitable upbringing for children. Parental responsibility refers to the duties, obligations and rights that parents have regarding the upkeep of children. Accordingly, different provisions of the CRC and the African Children Charter provide for parental responsibilities. Similarly, Article 18(2) of the African Charter on the Rights and Welfare of the Child stipulates the equal and common responsibilities of spouses regarding their children. At this point, it is important to stress the fact that, according to the African Charter on the Rights and Welfare of the Child, the duties of parents are not only shared, but also equal. This approach is also reinforced by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

In line with this principle, Ethiopian laws recognize the joint responsibility of parents in caring for and exercising guardianship rights over their children. The recognition of joint legal guardianship in the Revised Family Code implies that parental authority should be exercised jointly, whether the parents of the child are married, separated or divorced. This requires that parents should reach at amicable settlement concerning the exercise of parental authority. Therefore, this gives rise to a presumption that joint parental responsibility survives the marriage i.e. joint parental responsibility continues even if the marriage is dissolved by divorce.

²⁴² Michael Gose, *The African Charter on the Rights and Welfare of the Child* (Community Law Center, Western Cape, 2002) 40

To begin with, preambular articles of the Convention on the Rights of the Child affirm the fundamental importance of the family for development of the child. The Preamble states that “the Family, as the fundamental group of society and for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”. The child should grow up in a family environment, in an atmosphere of happiness, love and understanding for his or her full and harmonious development of his or her personality. The Preamble goes on to state that the child should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

These preambular articles of the CRC imply two broad categories of rights. Firstly, the child is entitled to the right to a family as an essential right. Secondly, the family has the right to be supported and protected by the State.

Article 18 stresses the need for State support for parents and the family in the discharge of their responsibilities.²⁴³ This provision must be read in tandem with Articles 5, Article 3(2) and Article 27 of the Convention. The cumulative reading of these provisions conveys the message that parents have the primary responsibility for securing the best interests of the child their basic concern.²⁴⁴ The provision further obligates the State to provide support for the parents and family.

In the same vein, Article 34(3) of the FDRE Constitution provides that the family is the natural and fundamental unit of the society and is entitled to protection by society and the State. Article 34(1) of the FDRE Constitution asserts the principle of the equality of men and women with regard to marriage. It goes on to state that men and women have equal rights while entering into, during marriage and at the time of divorce. These provisions demonstrate that the paternal authority over children (*patria potestad*) which was reflected in older domestic legislation in Ethiopia has given way for the notion of parental rights and responsibilities. The provision also reflects the view that the family is the preferred environment or the ideal setting for raising

²⁴³ Sharon Detrick (n 19) 309

²⁴⁴ Hodgkin and Newell (n 3) 231

children and for satisfying their needs. Consequently, the FDRE Constitution has entrenched the right of families to support and assistance.

As stated earlier, the concept of “family” should be understood broadly. Article 18 affirms the primacy of parents. This provision concerns itself with parental responsibilities rather than parental rights. The impairment of the child’s physical, psychological or intellectual development due to actions of parents implies non-compliance with this provision.

Article 18(1) asserts that the basic concern of parents is the best interests of the child. This stipulation dispenses with parental “ownership” of children practiced in certain cultures.²⁴⁵ It therefore dispels any notion of exercise of parental rights over children for the benefit of the parents alone.²⁴⁶ Parental responsibility refers to the legal responsibility of parents to act in the best interests of their children.²⁴⁷ In view of the aforementioned responsibilities, it is incumbent upon the state to advise and educate parents about their responsibilities.²⁴⁸ Parent education is believed to be an effective instrument for addressing grave social problems including social dislocation.²⁴⁹

It is not only the mother or the father who bears responsibility for the upbringing and development of children. Article 18 stresses that both parents have common responsibilities for the day-to-day care of children.²⁵⁰ Similarly, Article 23(4) of the International Covenant on Civil and Political Rights provides that States Parties “shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during and on its dissolution.”

Article 50(1) of the Revised Family Code provides that the spouses shall have equal rights in the management of the family. Article 50(2) goes on to state that the spouses shall co-operate to protect the security and interest of the family to bring up and to ensure the good behavior and education of their children in order to make them responsible citizens. Article 219 of the Revised Family Code stipulates that the father and mother are jointly guardians and tutors of their minor

²⁴⁵ Hodgkin and Newell (n 3) 232

²⁴⁶ Sharon Detrick (n 19) 453

²⁴⁷ Hodgkin and Newell (n 3) 232

²⁴⁸ Sharon Detrick (n 19) 457

²⁴⁹ Hodgkin and Newell (n 3) 235

²⁵⁰ Hodgkin and Newell (n 3) 235

children. Article 220 (1) of the Code provides that in case of death, disability, unworthiness or removal of one of the parents, the one who remains shall alone exercise such functions. Article 220(2) asserts that the mother shall exercise such functions where the father of the child is unknown. On the other hand, Article 225 of the Revised Family Code also envisages situations whereby other relatives may become guardian and tutor of the child.

Article 41 of the Federal Civil Servants Proclamation (Proclamation No. 515/2007) also provides that maternity leave for a pregnant civil servant. Accordingly, she is entitled to a paid leave for medical examination and paid leave before delivery upon appropriate recommendations. Article 46 of the Proclamation also accords medical benefits for working parents in government medical institutions. Moreover, part eight of the Proclamation to Provide for Public Servants Pension envisages benefits for surviving widows as well as children.²⁵¹ The same is true in the case of part eight of Private Organizations Employees Pension Proclamation.²⁵²

Thus, obligation owed to children by their parents under Ethiopian law include:-

- Duty to Maintain contact
- Duty of care of the person of the child
- Fixing the place of residence of the child
- Watching over the health of the minor
- Taking necessary measures in case of sickness of the child
- Directing the upbringing of the child
- Taking the necessary disciplinary measures for the purpose of ensuring his upbringing.
- Directing and supervising the social contacts of the child
- Ensuring that the child receives general and professional education commensurate to his age

²⁵¹ A Proclamation TO Provide for Public Servants' Pension (Proclamation 714/2011), Articles 40-45

²⁵² Private Organization Employees Pension Proclamation (Proclamation 715/2011), Articles 39-44

Paragraph 2 of Article 18 requires States Parties to provide appropriate assistance to parents and families. The provision of state assistance becomes important in the event where the parents are unable to undertake their child-rearing responsibilities.²⁵³ The State is expected to adopt a preventive approach by identifying families at risk of breaking down and provide financial benefits, housing. Day care, home visits, psychological and professional support.²⁵⁴

Various cases considered by courts of law in Ethiopia buttress the concept of joint responsibilities of the parents in the upbringing of their children. The cases relate to the administration of proprietary interests of children by their parents and also other matters. The cases below are meant to illustrate the emerging jurisprudence of courts of law in Ethiopia favoring the best interests of the child.

In File No, 46490, the court made the following decision on March 30, 2010.²⁵⁵ The petitioners instituted a lawsuit against the respondent in High Court of Hawassa seeking the invalidation of the contract of sale that the respondent concluded with another individual. The High Court of Hawassa city accepted the relief sought and decided in their favor ordering the invalidation of the contract of sale. However, the Supreme Court of Southern Nations, Nationalities and Peoples Regional State (SNNPRS) quashed the decision of the High Court. The decision of the Supreme Court was also approved by the Cassation Bench of the Supreme Court of the Regional State. The petition is presented to the Cassation Bench of the Federal Supreme Court alleging the existence of a fundamental error of law in the decisions of the lower courts.

The lawsuit the petitioners first instituted in the High Court of Hawassa city stated that the respondent concluded marriage agreement with Ato Firew Lemma. The respondent built a dwelling house while she was in matrimony with Ato Firew and also gave birth to two children. The respondent sold the house, which is the common property of the spouses to the second defendant in the lower court, upon the death of Ato Firew Lemma, having transferred title in her name. The petitioners demanded the invalidation of the contract of sale as it affects the interests of the children of the two spouses. The respondent argued that the contract of sale should not be invalidated as it is concluded in accordance with the law. The High Court of Hawassa city

²⁵³ Hodgkin and Newell (n 3) 237

²⁵⁴ Sharon Detrick (n 19) 115

²⁵⁵ Federal Supreme Court, Cassation Bench, File No. 46490

decided the invalidation of the contract since the respondent sold the common property including the rightful share of the children which they obtained by virtue of succession from their deceased father. The High Court noted that this adversely affects the rights and interests of the children. The court also ordered the cancellation of the title deed issued in the name of the respondent and ordered the maintenance of the title deed in the name of the deceased so that the house remains the common property of the respondent and the children.

The respondent took appeal from the decision of the High Court to the Supreme Court of Southern Nations, Nationalities and Peoples Regional State (SNNPRS), which reversed the decision of the High Court after having examined the case. The decision of the Supreme Court was also approved by the Cassation Bench of the Supreme Court of the Regional State.

The Cassation Bench of the Federal Supreme Court decided that the petition needs to be examined in the light of the rights of children and the powers of guardianship and tutorship. Thus, the parties were required to make their written submissions concerning the dispute.

The four petitioners seek the invalidation of the contract of sale of the house the respondent concluded since it constitutes common matrimonial property. They contend that the house is the property of the respondent as well as the children. The petitioners argued that the sale of the house adversely affects the rights and interests of the children. They went on to state that the respondent is not entitled to dispose the rightful share of the children along with her's. The guardianship and tutorship of children who have not attained the age of majority is legally vested with the mother and father of the children. In the event of the death of one of the parents, the surviving parent assumes the responsibilities of guardianship and tutorship alone. Accordingly, the respondent is the legal guardian as well as tutor of the children. Due to this fact, she is legally entitled to fixing the place of residence of the child, to care of the person of the child, to watching over the health of the minors, to take the necessary measures in case of sickness of the children, to direct the upbringing of the children, to take the necessary disciplinary measures for the purpose of ensuring his upbringing, to direct and supervise the social contacts of the children, to ensure that the children receive general and professional education commensurate to their age. The respondent is legally entitled to determine appropriate measures in relation to the property of the children if it is necessary for the proper upbringing of the children. Thus, the sole fact of the sale of the moiety of the house belonging to the children does not necessarily mean that it

violates the rights of children if such measure is warranted under the circumstances of the case. Article 292 of the Revised Family Code of the Southern Nations, Nationalities and Peoples Regional State (SNNPRS) makes it clear that the tutor is entitled to sell movable corporeal property, shares and securities to bearer. However, the Code is silent as to whether or not it is possible to alienate immovable properties as well. Article 321 of the Revised Family Code of the Southern Nations, Nationalities and Peoples Regional State (SNNPRS) makes it clear that the relevant provision of Agency Law relating to acts performed in excess of power in case where it is claimed that the tutor is not entitled to alienate the immovable property of the minors. The relevant provisions of the law on agency in the Civil Code show that the principal is entitled to confirm or to reject the acts of the agent performed in excess of his or her power. However, Article 2207(1) of the Civil Code makes it clear that the principal is obliged to approve acts the agent performed in excess of his or her power if it is proved that those were committed by the agent in good faith. Likewise, the respondent contended that the sale of the house is in the best interests of the children for their proper upbringing and their education. She submitted that the sale of the house is necessary as to be able to discharge the responsibility incidental to guardianship of the children. The petitioners argued that the respondent would mix the proceeds of the sale of the house with that of her common property with her newly married husband. However, the petitioners did not adduce any tangible evidence to establish that the respondent has brought about damage to the proper upbringing of the children. They did not also establish that the respondent has squandered the rightful property of the children. Evidently, the respondent is not in a position to squander the property of the children as she pleases only because she happens to be their tutor. Thus, the petitioners are required to prove not only the sale of the house by the respondent but also the fact that this has adversely affected the interests of the children. The sale of the property of the respondent and that of the children including that of immovable property is not itself a sufficient ground for seeking invalidation of the contract so far as this is meant for the proper upbringing of the children. Therefore, the decision of the lower court ordering the invalidation of the contract of sale of the house belonging to the respondent and the children without inquiring whether the sale is justified for the proper upbringing of the children constitutes a fundamental error of law. Consequently, the Cassation Bench of the Federal Supreme Court reversed the decision of the Supreme Court of Southern Nations, Nationalities and Peoples Regional State (SNNPRS).

In another case, the Cassation Bench of Federal Supreme Court made the following judgment on April 9, 2011 in File No. 54129.²⁵⁶ The case relates to the effects of a sale of property belonging to a minor by his or her tutors to a third party on the minor. The lawsuit arose when the petitioner demanded the approval of a contract of sale of immovable property concluded with the parents of the respondent. Accordingly, the court approved the contract of sale.

Following this, the respondent submitted opposition protesting against the decision of the court approving the contract of sale to the same court based on Article 358 of the Civil Procedure Code. The respondent invoked different grounds for his opposition. To begin with, the respondent contended that he has title deed over the immovable property which is the subject matter of the sale, which is registered in his name. Secondly, he stated that at the time the contract of sale was concluded he was minor under the guardianship and tutorship of his parents. Thirdly, he contended that his parents are not entitled to effect the sale of the immovable property under the law. Finally, he argued that the decision of the court approving the contract of sale involving the buyer and his parents in his absence runs counter to his interests based on Article 360 of the Civil procedure Code.

The First Instance Court of the Regional State which approved the contract of sale of the immovable property has also revoked its decision of approval of the contract in a different file stating that its confirmation of the contract in the case does not produce any legal effects.

The laws of the Regional State do not authorize the guardians to transfer or alienate the immovable property of the minor. The Supreme Court of the Oromia National Regional State stated that the decisions of the *Woreda* and the High Court of the Regional State cancelling their prior decisions authorizing the confirmation of the contract of sale does not constitute a fundamental error of law.

The submissions of the parties before the Cassation Bench of the Federal Supreme Court are not that different from their previous submissions in the lower courts. The Cassation Bench looked into the matter against the foregoing backdrop of the case.

²⁵⁶ Federal Supreme Court, Cassation Bench, File No. 54129

It is indisputable that the house which is the object of the contract of sale is registered in the title deed of the respondent. The petitioner argues that the sellers should be compelled to perform the contract of sale though the property is registered in the name of the respondent. The petitioner contended that at the time the contract of sale was concluded that respondent was merely a minor not in a position to make fortunes of this type. The petitioner went on to state that the respondent did not claim to have obtained the immovable by way of inheritance. The petitioner concludes that the property actually belonged to the parents of the respondent. However, the arguments of the petitioner is based on facts and not on legal basis since the substantive law relating to registration of property has given answer to the question “Who is the owner of the property?”

The contention of the petitioner that he was in possession of the property for 14 years after conclusion of the sale and that the opposition of the respondent is groundless is not also tenable. This is because of the fact that the decisions of the lower courts do not establish this fact.

The laws of the Regional State do not authorize the guardians to transfer, alienate, or sell the immovable property of the minor. The Laws of the Regional State are silent on the remedies available to the third party to whom the property has been transferred. The laws provide protection to the minor but not to the third party affected. The sellers did not have any authority to sell the property. Therefore, the cancellation of the decision of lower courts revoking the earlier judgment authorizing the confirmation of the contract of sale of the immovable does not constitute a fundamental error of law.

In File No 54827, the Cassation Bench of the Federal Supreme Court also made the following judgment on April 29, 2011.²⁵⁷ The basis of the petition for the Cassation Bench of the Federal Supreme Court is the litigation revolving around the contract of sale of a house. The plaintiff in the lower court upon the commencement of the lawsuit, the respondent at the cassation hearing, instituted a lawsuit against the petitioners demanding the handing over the house which they sold to him according to the contract of sale. He also demanded that they should facilitate the registration of the property in his name. The petitioners argued that they should not be required to handover the house since there is no contract concluded with them. The High Court of West Shoa Zone examined the case and rejected the claim of the respondent. The court also ordered

²⁵⁷ Federal Supreme Court, Cassation Bench, File No. 54827

the restoration of the parties to their previous situations. The respondent took appeal from the judgment to the Supreme Court of Oromia National Regional State. The Supreme Court reversed the decision of the High Court and decided that the petitioners to perform according to the contract. The Cassation Bench of Oromia National Regional State also decided that the judgment of the Supreme Court does not constitute a fundamental error of law. The petition was presented to the Cassation Bench of the Federal Supreme Court against this backdrop.

The Cassation Bench of the Federal Supreme Court looked in to the matter by examining the written submissions of the parties summoning the respondent. This is because the Bench deemed it proper to examine the issue whether or not the decisions of the lower courts constitutes a fundamental error of law.

The judgment of the court which tried the case initially shows that the contract of sale was concluded on May 15, 2001. However, the respondent instituted lawsuit on May 25, 2007. As indicated in the lawsuit, Elsi (Elsabet), Fasil and Dereje did not attain the age of majority at the time. Consequently, they were represented by their tutor Romework Tesfaye. The respondent is alleging that he concluded the contract of sale of house with these children as well. He also mentioned that he bought the house for a consideration of 200, 000 Birr and effected a payment of 47, 285 Birr. He also mentioned that he did not take over the house. The lower court did not accept the lawsuit based on the argument that the contract is not legally enforceable. However, the appellate court came to the conclusion that there is no reason why the contract cannot be enforced so far as its conclusion is admitted.

The Cassation Bench of the Federal Supreme Court affirmed that the issue to be framed in this case is not whether or not the contract is concluded or admitted. Instead, the issue to be framed in the case so as to reach at the appropriate decision is predicated upon the legal effects that the contract produces. The petitioners may be compelled to perform according to the contract only if it is shown that they are obliged by the legal effects it produces. The petitioners have argued that the contract should not be valid before the law. The reply the respondent submitted in response to the cassation petition confirms that Elsi (Elsabet), Fasil and Dereje were aged 12, 14 and 10 years old respectively at the time of the contract was alleged to have been concluded. Therefore, this implies that the contract of sale of the house was concluded on their behalf by their tutor. Article 1226 of the Civil Code stipulates that the sale of the house may be effected only where it

is concluded on the consent of all the co-owners. This is the reason why the respondent instituted a legal action saying that the petitioners have sold their house to him jointly. However, it becomes pertinent to examine the provisions of the law concerning the protection of minors as at the time of the conclusion of the contract of sale of the house some of the co-owners were minors.

The lawsuit arose in Oromia National Regional State. The lawsuit was also initially entertained by courts in the same region. Oromia National Regional State has promulgated its own Revised Family Code (Proclamation 83/1995). Chapter 12 of the Revised Family Code of the Regional State has laid down the provisions regarding the protection of minors. Part three of this chapter deals with the powers of the guardian and the tutor of minors. Article 294 of the Revised Family Code of the regional State is of particular relevance to the case at hand. According to this provision, the tutor is entitled to sell movable corporeal property, shares and securities to bearer. However, the Code is silent as to whether or not it is possible to alienate immovable properties as well. The Code has opted to specify the property the minor the tutor is authorized to dispose. Arguing *a contrario*, the tutor is not entitled to sell the immovable property of the minor directly. This is also reflected under Article 277 of the Federal Revised Family Code.

The law has stipulated provisions in the family code with a view to ensure the protection of minors. Article 299 of the Revised Family Code of Oromia National Regional State and Article 316 of the Revised Federal Family Code provide that contracts concluded by minors are subject to invalidation let alone contracts concluded by their tutors. This shows that the contract which is at the heart of the lawsuits in this case is not legally enforceable and voidable. The conclusions of the Supreme Court and Cassation Division of Oromia National Regional State on the matter therefore are not in keeping with appropriate construction of the law. Therefore, the Cassation Bench of the Federal Supreme Court has come to the decision that the judgment complained against by the petitioners constitutes a fundamental error of law. The judgments of the Supreme Court and Cassation Division of Oromia National Regional State on the issue have been subject to reversal.

5.3. Separation from Parents

Article 9 of the CRC requires State Parties to ensure that a child shall not be separated from his or her parents against their will. Separation of children from their parents may be justified only in cases where it is in their best interests. Even in these cases, Article 9(1) stipulates that the separation must be sanctioned by competent authorities subject to judicial review. A typical situation may warrant involving the separation of children from parents when the latter abuse or neglect their children. Another circumstance is the situation where parents are living separately and a decision must be made as to the child's place of residence. Article 9(2) provides that opportunity must be given for all interested parties to be given opportunity to participate in proceedings involving separation of children from parents. The cumulative reading of Article 9(1) and Article 9(2) of the CRC hammers home two essential principles.²⁵⁸ Firstly, children should not be separated from parents unless it is necessary for their best interests. Secondly, all procedures involving separation of children from their parents must be fair.²⁵⁹

Article 9(3) requires States Parties to maintain personal and relations and direct contact with both parents on a regular basis unless this is contrary to the best interest of the child. Article 9(4) of the CRC requires States Parties to inform parents and child of the whereabouts of either if the State has caused their separation, for instance, through deportation or imprisonment.

The International Covenant on Civil and Political Rights stipulates “the family is natural and fundamental unit of society and is entitled to protection by society and the State.” This same principle is also mirrored in Article 34(3) of the FDRE Constitution. Article 10 of the International Covenant on Economic, Social and Cultural Rights also provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

Article 9(1) prohibits the separation of children from their parents against their will. The proviso “*against their will*” refers to either to the parent's will or to the parents' and child's will together. In other words, it does not refer to the child's will solely.²⁶⁰ Even though States Parties cannot be held accountable for separation caused as a result of divorce of parents, they are

²⁵⁸ Hodgkin and Newell (n 3) 121

²⁵⁹ Sharon Detrick (n 19) 169

²⁶⁰ Hodgkin and Newell (n 3) 122

obliged to endeavor to undertake research and awareness-raising activities concerning the adverse effects of divorce on the children.²⁶¹

Article 9 makes special mention of two illustrations of when it may be necessary to separate children from one or both parents. These are when parents have abused or neglected the child and, second, when parents live apart. There was also a suggestion to include “where there is a disagreement between parent(s) and child as to where the child’s place of residence”. However, this suggestion was not accommodated in the provision, since the Convention does not attempt to give exhaustive list of circumstances warranting the separation of children from parents.²⁶² Nevertheless, situations whereby parents agree between themselves where the child should live or how parental access needs to be organized without the consent of the child remain deeply vexing.²⁶³

Homelessness or poverty of parents should not serve as a ground for separation of children from parents.²⁶⁴ Parents’ failure to send their children should not also serve as a ground of removal of children into State care. Instead, the State should strive to alleviate the problems while the children are still with their parents.²⁶⁵ Article 9(1) of the Convention on the Rights of Persons with Disabilities provides that “in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.” The Convention on the Rights of Persons with Disabilities also calls upon States Parties to undertake early detection and provide support for parents to prevent “concealment, abandonment, neglect and segregation of children with disabilities.”

One of the major causes of separation of children is that of abandonment. Article 659(1) of the Ethiopian Criminal Code criminalizes the offence of “failure to bring up.” It provides that “a parent or other person exercising the authority of guardian or tutor, who, for gain or in dereliction of his duty:

- a) Grossly neglects the children under his charge and abandons them without due care and attention or to moral or physical danger; or

²⁶¹ Hodgkin and Newell (n 3) 122

²⁶² Hodgkin and Newell (n 3) 122

²⁶³ Sharon Detrick (n 19) 170

²⁶⁴ Hodgkin and Newell (n 3) 123

²⁶⁵ Sharon Detrick (n 19) 171

- b) Entrusts a child for a long time to a person, an organization or an institution with whom or where he knows, or could have foreseen, that it will be reduced to physical or moral destitution, or will be physically or psychologically endangered,

is punishable with simple imprisonment or fine. The provision also states that the court may in addition deprive the criminal of his family rights in grave cases.

Article 574 concerns itself with the crime of exposure or abandonment of another. Article 574 (1) reads “whoever, having the custody or charge, on no matter what grounds, of a person incapable of protecting himself, whether on account of his health, his age, his situation or any other circumstance, intentionally:

- (a) Exposes him, thereby putting him in imminent danger of life or health; or
- (b) Abandons him when in like situation,

is punishable, according to the circumstances of the case, with rigorous imprisonment not exceeding five years, or with simple imprisonment for not less than six months, without prejudice to the deprivation of the criminal’s family rights where necessary.”

Article 574 (2) goes on to state that where the crime is committed against an infant, the punishment shall be rigorous imprisonment not exceeding seven years.

Chapter IV of the Criminal Code of Ethiopia embodies various provisions relating to exposure and abandonment. The chapter is entitled “Crimes Endangering Life of Another. Article 571 of the Code concerns itself with exposure of the life of another. It provides that whoever intentionally puts another in imminent danger of death is punishable with rigorous imprisonment not exceeding three years, or with simple imprisonment for not less than three months. The provision defines exposure as the practice of putting the child in imminent danger of life or health.

Article 574(1) (a) makes exposure a separate crime. Article 574 of the Criminal Code makes it a crime to endanger the health or life of a child through the recklessness or indifference of an adult. Article 574(1(a) dwells upon a form of child abandonment practiced in many cultures and referred to as “Exposure.”

Article 30 of the African Charter on the Rights and Welfare of the Child concerns itself with children of imprisoned mothers. It requires Member States to provide special treatment to expectant mothers and to mothers of infants and young children accused of or found guilty of contravening the criminal law. The imprisonment of parents, especially of mothers of infant children, is disruptive for children. This is due to the fact that children are also punished along with their parents.²⁶⁶ In addition, the situation also entails unnecessary costs on the State for the care of infant children.²⁶⁷ The problem is also likely to lead to a more serious social problem for the State. Two options are suggested as solutions to address this problem. Firstly, it may be necessary to accommodate young infants with their mothers. Secondly, it may be worthwhile to consider a more constructive and non-custodial penalties on the convicted parents.²⁶⁸ The contention that courts of law should consider the best interests of children while sentencing parents remains controversial.²⁶⁹

Article 28 of Federal Prisons Commission Establishment Proclamation (Proclamation 365/2003) provides that a dependent infant not beyond eighteen months and that needs close maternal care may stay with his mother who is in custody where his interest so requires.

Article 12 of the Council of Ministers Regulation on the Treatment of Federal Prisoners takes this one further step and provides as follows:

Article 12: Pregnant and Female Prisoners with Children:

- 1) Where a female prisoner comes with an infant not more than 18 months old and where his interest so requires, the infant shall stay in the prison with his mother.
- 2/ The infant shall, during his stay in the prison, be provided with the necessary food, vaccination, medical as well as other necessary items.
- 3) If the stay of the child in the prison is likely to have an adverse physical or psychological impact in him, he shall be handed over to a close relative; provided, however, that the Administration shall facilitate the possibilities of finding another guardian in the absence of a close relative.

²⁶⁶ Hodgkin and Newell (n 3) 124

²⁶⁷ Hodgkin and Newell (n 3) 124

²⁶⁸ Hodgkin and Newell (n 3) 124

²⁶⁹ Hodgkin and Newell (n 3) 124

- 4) A pregnant or a female prisoner with a child shall be provided with additional food upon the recommendation of a medical officer.

Article 9 of the CRC sets forth various guarantees to be observed when children are separated from parents. Accordingly, any decision involving separation of children from parents must be undertaken by competent authorities, subject to judicial review, in accordance with applicable law and procedures and give all interested parties the opportunity to participate and make their views known.

Child Custody and Guardianship

Under Ethiopian law, guardians and tutors of children can be classified into three. These are guardians and tutors designated by law, testamentary guardians or tutors and tutors and guardians appointed by courts of law.

In regard to tutors and guardians designated by the law, the Revised Family Code provides that both parents are jointly guardians and tutors of their children.²⁷⁰ The Code goes on to state that in the event of default on the part of one of the parents; the other parent exercises all the functions of a guardian and a tutor.²⁷¹ The issue of which parent has custody rights arises in the event of separation or divorce between the parents.

Testamentary guardians or tutors are those which are appointed by a will or testament. In this regard, the Revised Family Code provides that the surviving parent of a minor may specify by his or her last will, who shall be guardian or tutor of the child after his or her death.²⁷² The practice of designation of a guardian or tutor by the surviving parent is of paramount importance as it would prevent unscrupulous individuals from masquerading as the tutor and guardian of the child though the ensuring the best interests of the children is not their basic concern. Since the surviving parents are presumed to know who will be able to provide the best shelter, health, education and upbringing of the child, it would prevent unnecessary altercation likely to ensue following the death of the parent if the latter has already designate the tutor and guardian by a testament. This practice is also hailed as a panacea for the prevention of property grabbing by so-called tutors and guardians who do not cater for the best interests of the child.

²⁷⁰ Revised Family Code, Article 219

²⁷¹ Revised Family Code, Article 220(1)

²⁷² Revised Family Code, Article 222

Lastly, tutors or guardians may be appointed by a court of law based on a judicial determination. Decisions concerning parental divorce call for the regulation of the custody of the children born out of wedlock. In this regard, the Revised Family Code provides the right of the parties to settle this and other issues amicably.²⁷³ If the parties cannot reach at an agreement concerning the custody of their children, the court which pronounced the judgment of divorce is entitled to give an order concerning custody.²⁷⁴

The Revised Family Code provides that issues pertaining to custody, maintenance and visitation rights of the non-custodial parents are ironed out with the dissolution of the marriage.

The consideration of cases and judgments rendered by courts of law in Ethiopia demonstrate the trend concerning the determination of custody. The subsequent discussion has focused on these cases with this spirit.

The first case to be considered in relation to this pertains to File No.57963. The decision of the court was rendered on November 2, 2006. In this case, the court has instructed African Child Policy Forum to undertake inquiry about the circumstances of the case and propose recommendations concerning the upbringing of the two children following the pronouncement of divorce. African Child Policy Forum, on its part, inquired into the matter and proposed a written report recommending custody of the children to be given to their mother.

In addition, the court also entertained the views of the children and the parties in camera hearing. The children explained that they are undergoing their studies properly and do not have any complaints concerning food as well as clothing. However, the children stated that their father prevented them from visiting their mother under the pretext of doing their studies. They further submitted they would love to pay visit to their mother if they get their father's permission.

On the other hand, the petitioner stated that the respondent has two other children and a babysitter looks them after. The respondent has a habit of changing the babysitters every now and then and she is not allowed to see them. She went on to state that the children are better off with her since she is living along with her parents in their private dwelling. The respondent

²⁷³ Revised Family Code, Article 221(1)

²⁷⁴ Revised Family Code, Article 221(2)

denied that he ever prevented the children from seeing their mother and insisted that the children are well off with them.

The Family Council confirmed that the matter has been considered and the members of the council have seen the situation of the children in person. Members of the Family Council have confirmed that the children are in good hands and have been treated well. The Family Council submitted that it has decided by majority vote that it would be better for the children to live along with their father, as it would be entirely different if they were going to grow with their mother.

Child Protection Center of the Africa Child Policy Forum explained that it has inquired in to the circumstances of the children by getting to their residence in person and has concluded that the children should not be living with the respondent and they are well off with the applicant.

The court has asked the attendance of the children and has observed that the situation of the children is not as depicted. The court has realized that the children are well treated. The children were asked by the court to clarify as to whom they wish to be with. The children stated invariably that they prefer to be with their father. The Court also noted that the petitioner has accepted this. Accordingly, the court decided the respondent to be the guardian and the tutor of the children in accordance with Article 221(1) of the Revised Family Code.

In regard to visitation rights, the court allowed the petitioner to take the children once every two weeks. The petitioner was to take the children on Friday at 5 PM and return them at 10 A.M. on Sundays. However, the court gave the following decree since the petitioner complained before the court that the respondent has failed to allow her to see her children following the pronouncement of the previous judgment.

In its decree, the court noted that the mother submitted a petition stating that the father has failed to comply with the order of the court concerning visitation rights. The court summoned the parties and the children and heard them in *camera*. The court realized that the respondent is using different methods to instill fear in the children thereby preventing them from approaching their mother. Therefore, the court was seized of the matter whether or not the respondent should be divested of his guardianship and tutorship?

The Constitution of the Federal Democratic Republic of Ethiopia has endorsed the rights and freedoms of children as enunciated in the Convention on the Rights of Children. The Convention has also been made an integral part of the domestic law of the land by virtue of the Constitution. The Convention affirms the rights of children to the joint care and protection of both their parents for their full development and not to be separated from their parents without their consent. Article 36(c) of the Constitution of the Federal Democratic Republic of Ethiopia proclaims the right of children to be cared for by their parents. Nevertheless, the court has taken note of the fact that the respondent has acted contrary to these rights of the children affirmed in the laws and has inflicted adverse impact on the children. The court awarded the guardianship and tutorship of the children to the respondent in the belief that this would be in the best interests of the children. However, since the items of evidence presented to the court at present indicate that the situation has now changed and, accordingly, the court has reversed its decisions regarding the guardianship and the tutorship of the father based on 113(3) of the Revised Family Code. The court has decided the mother of the children to be their guardian and tutor as per Article 221(2) of the Revised Family Code. The father hereby required to effect a payment of 700 (Seven Hundred Birr) by way of maintenance of the children based on Article 198 (1) of the Revised Family Code.

The other case relating to issues of custody determination is File No. 47760. The judgment of the court was rendered on November 29, 2007. In this case, the petitioner submitted an application stating that the respondent has left abroad after having left the children aged 14 and 7 with her brother. The petitioner requested the court to give him custody of the children since he is capable of raising them. The agent and brother of the respondent replied that the children may be placed under the custody of the petitioner if they are willing.

The court summoned the children and heard their views. The children confirmed that they do not want to be placed under the custody of their father. The court has realized that the petitioner has been engaged in over tasking the children in the trade of weaving. However, the court has confirmed that the brother of the respondent has enrolled the children in school and is ensuring their development properly.

The court has confirmed that the uncle of the children is well-placed to ensure the upbringing of the children than that of the petitioner as the latter has failed to demonstrate his income and ability to fulfill the developmental and psychological needs of the children. Therefore, the court has determined that the petitioner effect a monthly payment of 200 Birr and the children to be under the custody of their uncle, Ato Bekinew Adera, as per Article 113(1) of the Revised Family Code.

Likewise, in File No. 27346, the Court concerned itself with the issue of revision of guardianship and tutorship in case of temporary setback. The judgment was rendered on November 15, 2005. The marriage between the parties was dissolved as a result of the judgment of divorce pronounced by the court. Both parties demanded custody of their children, aged 4 and 7 years old. The petitioner requested custody as he has better income and his mother is a health professional. On the contrary, the respondent requested custody of the children since she has already been raising the children for a year and the petitioner has prevented the children from maintaining contact with her. She stated that the respondent has behavioral problems and is not in a position to raise the children.

After hearing the parties, the court also listened to the opinions of the children. Article 113(2) of the Revised Family Code determines that the custody of children must be determined based on the best interests of the children as a primary consideration. The court noted that both parties have the capacity to raise the children from this perspective. However, the court went on to state that the respondent has smoking addiction and has prevented the children from visiting their mother repeatedly disregarding their rights and the order given by the court. On the contrary, the respondent has returned the children based on the order of the court. The conduct of the respondent entails negative and adverse influence on children compromising their full development. Therefore, the court has decided that it is better for the children to grow under the custody of the respondent than that of the applicant. The conditions and timetable for the visitation rights of the applicant and the amount of alimony he should pay are included in the order.

Four months after the aforementioned decision was given, the applicant submitted a petition demanding the revision of the custody order based on the allegation that the respondent has

given birth to a third child and is no longer in a position to take care of the two children. The respondent opposed the motion and application of the petitioner. The court noted that custody orders might be changed only if the circumstances which were the basis of the orders changed as per Article 113(3) of the Revised Family Code. In the matter at hand, the circumstances, which were the basis of the custody order, did not change. The only change that has taken place is the fact that respondent gave birth to another child. The fact that the respondent gave birth to another child may cause transient and temporary pressure but does not constitute a change in circumstances that necessitates revision of the custody order. Therefore, the court rejects the application for revision of custody order submitted on this ground.

Visitation Rights of the Non-Custodial Parent and the Right of the Child to Parental Knowledge

Article 9(3) requires States Parties to respect of the rights of children to maintain personal relations and direct contact. Children find it difficult to reunite with their parents if contact is not maintained.²⁷⁵ Thus, States Parties need to take this fact in to account when planning placements by ensuring their accessibility.²⁷⁶ As discussed earlier, Article 7 of the Convention provides that children have the right to know and be cared for by their parents. Similarly, Article 19(2) of the African Charter on the Rights and Welfare of the Child stipulates that “every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis”.

These rights make it necessary to provide visitation rights to the non-custodial parent unless this is deemed to be not in the best interests of the child. Accordingly, the Revised Family Code also provides that courts of law can make orders for child support, custody as well as visitation rights of the parties. Visitation rights of the non-custodial parent are instrumental to realize the rights of the child to parental knowledge and to maintain contact to the non-custodial parent. This in turn fundamentally contributes to the full and healthy development of the child.

²⁷⁵ Hodgkin and Newell (n 3) 123

²⁷⁶ Hodgkin and Newell (n 3) 123

Courts of law routinely deal with the issue of visitation Rights of the Non-Custodial Parent and the Right of the Child to Parental Knowledge in law determination. For example, in file number 230004, the court made the following decision on May 2, 2006.

Following the dissolution of the marriage between the parties by decision of divorce, the court decided custody of the children of the parties to the petitioner. The court also gave order concerning visitation rights of the respondent to take the children at 9 A.M. on Saturdays and to return them on 4 P.M. on Sundays. However, the applicant sought the reduction of the duration of visitation rights since it interferes with the study of the children and since the children are not actually accompanied with the respondent during these times.

The court consulted on the matter with the parties as well as the children. According to Article 113(1) of the Revised Family Code, the parent who is not entitled to custody is still entitled to visitation rights. The visitation right of the absent parent is justified by the rights of the children to maintain contact with their parents and to be cared for by them. The court has realized that the children are not happy when the respondent is not accompanying them during times of visitation and it has shortened the time available for their studies. Regardless of the fact that the respondent has stated that he is in a position to hire a tutor and follow their studies, the court did not accept this since it is the applicant who has the right to follow up the educational performance as it is the applicant who is granted custody. Therefore, it is for the children and the applicant to consider the timetable for the studies.

Consequently, the court has made changes with the timetable for the visitation rights of the respondent owing to the aforementioned reasons, in particular to ensure that the children have adequate time for their studies and that the respondent accompanies them during occasions of visits. Thus, the court has ordered the respondent to collect the children at 11P.M on Saturdays and to return them at noon on Sundays based on Article 113(3) of the Revised Family Code.

5.4. Entering or Leaving Countries for Family Reunification

Article 10 of the CRC assures the right of the child to family reunification. It concerns itself with the rights of the child incidental to entering or leaving countries for family reunification. However, the formulation of Article 10 is believed to be weak due to its failure to expressly

specify the right to family reunification. This reluctance is imputed to concerns revolving around immigration control.²⁷⁷

Article 10(1) provides that applications by the child concerning family reunification should be dealt with in a positive, humane and expeditious manner. The word “positive” was taken up in lieu of the proposed two terms, namely, “objective” and “favourable”.²⁷⁸ The term “positive” was deemed to be acceptable since it did not assume that the State must agree to the application. The ensuing term “*humane*” further reinforces the preceding term “*positive*.”²⁷⁹ It also requires the procedure for making decisions concerning applications of family reunification to be *humane*.²⁸⁰ Immigration processes are required to respect the dignity of applicants.²⁸¹ The term “expeditious” implies that all judicial and administrative processes concerning children to be disposed as quickly as possible.²⁸² Delay and procrastination are detrimental for the healthy development of children.

Moreover, States Parties are required to ensure that the submission of such a request will not entail any adverse consequences for the members of the family of the child. In other words, applications for family reunifications should not give rise to reprisals in the form of persecution, discrimination or any breach of human rights.²⁸³ Submission of applications of this kind should not put the applicant in jeopardy.²⁸⁴

The provision also implies duty of states to allow parents and children to visit each other if they live in different countries. In other words, the Article assures of the right of the child, save in exceptional circumstances, to maintain contact, on a regular basis, personal relations and direct contacts with both parents where the parents reside in different States.²⁸⁵ The Hague Convention on the Civil Aspects of International Child Abduction, which also allows parents to enforce court orders for access i.e. contact or visitation rights, also calls for respect for this entitlement.

²⁷⁷ Sharon Detrick (n 19) 183

²⁷⁸ Hodgkin and Newell (n 3) 136

²⁷⁹ Hodgkin and Newell (n 3) 138

²⁸⁰ Sharon Detrick (n 19) 184

²⁸¹ Hodgkin and Newell (n 3) 138

²⁸² Hodgkin and Newell (n 3) 138

²⁸³ Sharon Detrick (n 19) 185

²⁸⁴ Hodgkin and Newell (n 3) 139

²⁸⁵ Sharon Detrick (n 19) 185

The right of child and parents to leave any country (including their own) may only be subject only to legal restrictions “which are necessary to protect national security, public order, public health or morals or the rights and freedoms of others. Moreover, such restrictions must be consistent with the rights enshrined in the CRC. However, on the contrary, no restrictions may be imposed upon the right of the child and parent to enter their own country.

Article 32(1) of the FDRE Constitution assures of the right to freedom of movement. It stipulates that any Ethiopian or foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes to. Article 32(2) also enshrines the right of any Ethiopian national to return to his country. The Immigration Proclamation (Proclamation 354/2003) has been issued with a view to operationalize this entitlement. This proclamation regulates both applications for entry in to Ethiopia and departure from Ethiopia. Article 3 of the Proclamation lays down the requirements that must be fulfilled to enter Ethiopia. Article 3(3) deals with the requirements that must be met so that a foreigner who is a minor and who wants to enter Ethiopia may do so. Article 6 of the Proclamation sets forth the requirements that must be fulfilled to depart from Ethiopia.

5.5. *Illicit Transfer and Non-Return of Children Abroad*

Article 11 of the CRC dwells on the prohibition of illicit transfer and non-return of children abroad. Article 11(1) of the CRC obliges States Parties to combat illicit transfer and non-return of children abroad. In other words, it requires States Parties to prevent children from being wrongfully taken or from being retained outside their jurisdiction. It also requires States Parties to secure that these children are recovered and to undertake that abducted children brought into their jurisdiction are returned.²⁸⁶ The basic focus of the provision is parental abductions and retentions.²⁸⁷ Article 11 regulates situations whereby children are abducted by parents or other relatives and not permitted to return home.²⁸⁸ Such parental abduction are primarily motivated

²⁸⁶ Hodgkin and Newell (n 3) 143

²⁸⁷ Sharon Detrick (n 19) 186

²⁸⁸ Hodgkin and Newell (n 3) 143

by the desire to prevent the child from having access to the parent with whom the child used to live or with whom the child had direct and regular contacts and personal relations.²⁸⁹

The sale, trafficking and abduction of children are covered under Article 35 of the CRC and the Optional Protocol to the Convention on the Sale of children, Child Prostitution and Child pornography. The similarity between the two provisions is evident since “illicit transfer and non-return of children abroad” falls within the ambit of “abduction” regardless of “consent” on the part of the child.²⁹⁰ The main difference between these provisions lies in the fact that the scope of application of Article 11 relates to taking of children for personal instead of financial gain. On the other hand, “sale” or “trafficking” alluded to in Article 35 demonstrates commercial or sexual motive.²⁹¹ Moreover, the scope of application of Article 11 is confined to the case of children taken out of their country, while Article 35 is not.²⁹²

Article 11(2) calls upon States Parties to conclude bilateral or multilateral treaties and agreements or accede to existing ones to prevent “illicit transfer and non-return of children abroad”. In this regard, the Hague Convention on the Civil Aspects of International Child Abduction is of utmost relevance. It is believed that the signing and ratification of this Convention is the most effective way for the prevention of “illicit transfer and non-return of children abroad”.²⁹³ The objective of this Convention is the protection of children under the age of 16 who have been wrongfully removed or retained abroad. The Convention facilitates courts of law to render decisions requiring the return of children to their countries or place of habitual residence. However, courts are not obliged to make such orders if there is evidence suggesting that their return would cause grave risk of harm to the child or he or she has been in the new environment and has settled there. Foreign courts are barred from investigating the merits of the dispute. It is up to the courts of the country of origin or of habitual residence to make decisions regarding the future of the child.

Similarly, the Hague Convention on jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and measures for the Protection of Children is

²⁸⁹ Sharon Detrick (n 19) 203

²⁹⁰ Hodgkin and Newell (n 3) 143

²⁹¹ Hodgkin and Newell (n 3) 143

²⁹² Sharon Detrick (n 19) 207

²⁹³ Hodgkin and Newell (n 3) 144

of importance as well. The purpose of this Convention is to settle issues concerning who has parental responsibility and custody rights of children who have moved between countries. It is also instrumental in resolving which country has jurisdiction to act on behalf of the children, for instance, country of habitual residence or country of nationality.

In addition to the signing of the aforementioned conventions, the implementation of Article 11 of the CRC requires other measures including the creation institutional machinery to check borders and to obtain appropriate court orders, the provision of legal aid and financial assistance to parents to pay for the costs of the return of the children, the training of diplomatic and consular officials on the principles of the Hague Conventions and the provision of information to government agencies and state databases to identify the whereabouts of abducted or wrongfully retained children.²⁹⁴

5.6. *The Right to Maintenance*

Article 27(4) relates to financial maintenance of children by parents and others legally responsible for them. It stipulates that States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the country and abroad. The provision also calls upon States Parties to accede to international agreements which promote the recovery of maintenance from individuals who live in a State different from that of the child.

States Parties must also ensure that maintenance is used in the child's best interest. Fathers should not be allowed to use maintenance as a financial leverage to secure unwanted access to the child or to assert a greater right in determining the future of the child. Similarly, mothers should not be allowed to use maintenance to retain custody with a view to secure financial support or accommodation for themselves. States should also adopt appropriate maintenance recovery procedures. This would discourage irresponsible attitudes towards family planning and fatherhood in general. States should also disseminate knowledge concerning the maintenance procedures.

²⁹⁴ Hodgkin and Newell (n 3) 145

5.7. Children Deprived of their Family Environment

The CRC makes the presumption that children are better off within their families.²⁹⁵ However, if children are deprived of their family environment for whatever reason they are entitled to special protection and assistance. Article 20(1) of the CRC provides that “a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state.” The inability of children to live with their parents and families can be attributed to several structural, underlying and immediate causes including death of parents, abandonment or displacement, removal from custody due to unworthiness of guardians.²⁹⁶

The provision stresses that such children are entitled to “special protection and assistance”. This conveys the message that if parents cannot meet the needs of their children, then children have a moral claim upon society.²⁹⁷ In other words, Article 20 imposes on Member States the obligation to ensure that children deprived of family environment are receive appropriate care.

Article 20(2) of the Convention on the Rights of the Child provides for the right of children to an alternative care in case where they are deprived of family environment. This right is also affirmed in the 2010 UN Guidelines for Alternative Care of Children. Article 20(3) of the CRC outlines the different forms of alternative childcare. In particular, the provision sets forth four types of forms of alternative care, namely, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children. The same provision underlines the need to ensure continuum of care while considering the different options of alternative care for children.

The provision of alternative childcare must be guided by the subsidiarity principle. The subsidiarity principle is enshrined in various instruments including in Articles 4 and 17 of UN Declaration on Social and Legal Principles, relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Article 21(b) of the United Nations Convention on the Rights of the Child, Article 4(b) of The Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption.

²⁹⁵ Sharon Detrick (n 19) 330

²⁹⁶ Hodgkin and Newell (n 3) 277

²⁹⁷ Sharon Detrick (n 19) 331

The subsidiarity principle requires giving due emphasis on the benefits of a permanent solution for the child: first domestically, and then internationally. The subsidiarity principle submits that It is in the best interest of children to be raised by the family or kin. If immediate family or kin is unable, or unavailable, domestic placement with a foster or adoptive family is the next best option. If neither of these alternatives is viable, then placement in an appropriate family in another country through inter-country adoption or placement with in an institution temporarily.

This suggests a hierarchy of options. Firstly, family relatives, including older children as in the case of child-headed households should be considered. Secondly, substitute family through fostering and adoption. Finally, consideration may be given to appropriate institutional care as a last resort.

The hierarchy of options outlined above is informed by the general agreement that the family environment is the family environment. The Convention on the Rights of the Child as well as the African Charter on the Rights and Welfare of the Child both provide that the family environment affords the best environment for the harmonious and full development of the personality of the child. This position is also warranted by many cultures which cherish the solidarity within the family or in the community. Children are entitled to live safe and secure life. Children are also entitled to be raised by caring and responsible parents. Children can develop to their full potential in terms of educational achievements, economic security, healthy attachments and lack of anti-social habits only in this situation. The place of childhood to take place is inside-inside society, inside family, inside a private dwelling. The place children occupy is important because it could be a place where children are nurtured and secured or it can also be a place where children are abused, neglected, corrupted or exposed to deviant habits. A proper place for children is home, not the streets, the brothel or institution. Other forms of childhood are harmful, tantamount to abandonment.

Poverty cannot be considered as a “best interests” reason to deprive children of their family environment.²⁹⁸ Likewise, Article 23(4) of the Convention on the Rights of Persons with

²⁹⁸ Hodgkin and Newell (n 3) 278

Disabilities provides that the disability of either of the parent or of the child is not a sufficient ground to place the latter in institutional care or deprive them of their family environment.²⁹⁹

The principle of subsidiarity needs to be implemented along with the principle of individualization which posits that each child is unique and all placements should be considered in regard to their individual needs.³⁰⁰

In recent times, Ethiopia has taken various measures to ensure that its laws and policies concerning alternative care are in line with the Convention on the Rights of the Child. The Ministry of Women, Children and Youth Affairs has adopted a variety of guidelines concerning the provision of alternative childcare. Mainly, these include the 2009 Revised Alternative Child Care Guidelines to establish a regulatory instrument on the quality of the child care system and the 2010 Standard Service Delivery Guidelines for OVC Care and Support Programs.

The 2009 Revised Alternative Child Care is issued with a view to facilitate the provision of quality and effective care and support to orphan and vulnerable children. The Guidelines acknowledges different forms of alternative child care including community-based alternative care, reunification and reintegration program, foster placement, adoption and institutional care.

Foster placement refers to homes which provide substitute parenting for children who have lost their biological parents, are in orphanages, vulnerable due to the impact of HIV/AIDS and other socio political and economic problems. A foster family is a family which has applied to and is selected by a foster family care organization to provide a temporary physical care and emotional support and protection for an unaccompanied child placed through a foster family care program for an unspecified time.³⁰¹ Foster placement is said to be beneficial for the physical, emotional, guidance and supervision and positive role modeling of children.

Institutional care is a form of alternative care which needs to be considered as a last resort. This is due to documented and verified studies which demonstrate its adverse effects on children. These include loss of brain functionality which can become permanent, causes toxic stress for infants and very young children which can damage brain architecture, lower IQ than their counterpart peers in

²⁹⁹ Sharon Detrick (n 19) 332

³⁰⁰ Hodgkin and Newell (n 3) 280

³⁰¹ Alternative Childcare Guidelines

foster care and tendency to become homeless after leaving institutional care. Moreover, institutional care is more expensive than community based care.

5.8. Adoption

Article 21 of the CRC assures of the rights of children who are adopted. The provision underlines the paramountancy of the best interests of children in all adoption arrangements. It also sets out the minimum requirements which must be fulfilled in adoption procedures. Adoption can be domestic or inter-country. According to Article 21, inter-country adoption may be considered only if the child cannot be suitably placed in his or her own country.

Ethiopia is one of the countries which recognize adoption as a form of alternative child care in view of the sense of security and permanency that it affords for the child. The Revised Family Code stipulates that adoptive filiation, may be created by an agreement between a person and a child.³⁰² This is congruent with Article 34(3) of the FDRE Constitution which recognizes the family as the “fundamental unit of society”. Adoption is not recognized under Islamic Law, which instead has the institution of *kafalah*. *Kafalah* differs from adoption in that the child does not assume family name and inheritance rights. Thus, *kafalah* is a permanent form of foster care.

Article 21 of the CRC enshrines the principle of paramountancy. Accordingly, it emphasizes that the best interests of the child shall be of *paramount* consideration in adoption proceedings. This is therefore different from “a primary” consideration found in Article 3 of the CRC. The requirement of paramount consideration implies that no other interests, whether economic, political, state security or those of adopters may supersede that of the child. Other interests may not be given primacy over that of the child’s interests and cannot even be accorded equal footing. The Revised Family Code requires that the court shall decisively verify that the adoption is to the best interest of the child.³⁰³ To this effect, the court is also required to entertain the opinion of the child about adoption.³⁰⁴ This shows that the Revised Family Code does not specifically stipulate the paramountancy principle, instead the best interests of the child as a requirement for approval of adoption agreements.

³⁰² Revised Family Code, Article 180

³⁰³ Revised Family Code, Article 194(2)

³⁰⁴ Revised Family Code, Article 194(3)(a)

Article 21 of the CRC makes it clear that adoption must be authorized only by competent authorities in accordance with applicable law. The provision further requires that determination must be on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary. Competent authorities include judicial and competent authorities.³⁰⁵ These authorities must ensure that adoption agreements are in the best interests of the child and proper consents have been obtained. They must also ensure that all relevant information is considered.³⁰⁶ The decision of a judge concerning adoption must be based upon all relevant information.³⁰⁷

It has been stated that parents bear the primary responsibility for the upbringing of children. It is therefore incumbent upon parents to exercise this responsibility with the child's best interest as their basic concern. Adoption needs to be considered only if parents are unable or unwilling to perform this task as determined by a judicial process. Competent authorities are therefore required to ensure that children are not wrongly removed from their parents.³⁰⁸ The Revised Family Code stipulates that the opinion of the guardian or tutor of the child must be taken into consideration before approving adoption.³⁰⁹

Article 21 makes it clear that inter-country adoption may be considered as an alternative means of child's care under certain conditions. Inter-country adoption must not be over utilized and susceptible to fraud. According to the CRC, inter-country adoption may only be considered as an option if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. This form of adoption must be considered only as a last resort. This requirement is in line with the continuum of care, the right of the child to know and be cared for by parents as well as the child's right to preserve his or her ethnic, religious, cultural and linguistic identity.

³⁰⁵ Hodgkin and Newell (n 3) 295

³⁰⁶ Sharon Detrick (n 19) 341

³⁰⁷ Hodgkin and Newell (n 3) 295

³⁰⁸ Hodgkin and Newell (n 3) 296

³⁰⁹ Revised Family Code, Article 194(3)(b)

The Convention also states that inter-country adoption should not result in improper financial gain. Inter-country adoption must not involve questionable best interest decision making. Inter-country adoption must be free from criminality, corruption and exploitation. This obligation must be considered in line with Article 35 of the CRC which requires States Parties to take measures to prevent the sale of children for any purpose.

Likewise, the Hague Convention on Protection of Children and Cooperation in respect of Inter-country adoption affirms the subsidiarity principle. The subsidiarity principle holds that inter-country adoption should only take place “after possibilities for placement of the child within the state of origin have been given due consideration. The principle reflects the view that domestic adoptions are more desirable and preferable than inter-country adoptions. However, Ethiopia has not ratified The Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption at this point. The Convention calls for the need to ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption. A child shall not be placed with the applicant before the contract of adoption is finalized with the court’s approval.³¹⁰

Courts of law in Ethiopia adjudicate on matters of adoption on various occasions. The consideration of some of the cases is instructive to identify the jurisprudential trend. The first case to be considered here relates to rejection of adoption agreement. The case was entertained in relation to file number 80100. This decision was given on April 12, 2007.

In file number, 80100, in an application dated December 21, 2006, the two petitioners requested the court to approve the adoption agreement they concluded on December 6, 2006. The application was presented along with items of evidence demonstrating the health and income status of the would-be adoptive parent and clearance confirming absence of any criminal record in relation to the adoptive parent.

The 2nd applicant explained to the court that he signed the adoption agreement since the 1st applicant is the would-be adoptive parent is the grandfather of the child and has requested him to raise the child. The 1st applicant also stated that he has another child and he earns a monthly

³¹⁰ Alternative Childcare Guidelines

income of 1198.50 Birr. It was possible to establish that the would-be adoptive parent earns his livelihood from the 400 US Dollars his child dispatches to him.

The Court is required to ensure that the adoption agreement is in the best interests of the child as per Article 194(2) of the Revised Family Code before approving the adoption agreement based on the evidence presented to it. The 2nd applicant has confirmed that he committed to the adoption agreement not because he is unable to raise the child himself; instead it is because the 1st applicant happens to be the grandfather of the child and asked to raise the child. It is also possible to establish that the party who aspires to be the adoptive parent of the child is not himself leading his livelihood from the income he derives instead he is dependent upon the support of another. Therefore, as the 2nd applicant has the means and ability to raise the child and since the approval of the adoption agreement is not in the best interests of the child, the court has rejected the adoption agreement concluded between the parties on December 6, 2006.

Similarly, File No. 98033, the issue of rejection of a petition against the decision of the Court Revoking of Court-Approved Adoption Agreement was entertained. The decision was made on November 22, 2007. The petitioner submitted a pleading dated on October 8, 2007 stating that the respondent has concluded an adoption agreement on August 14, 1998. Upon the conclusion of the adoption agreement, the petitioner took the child of the respondent with him. He further stated that the adoption agreement has also been approved by a court of law. Regardless of this, the petitioner complained that after the adoption of the agreement, the respondent has not provided with any support and assistance. He therefore, applied for the court to revoke the approved adoption agreement.

The court has framed the issue whether or not court-approved adoption agreement is subject to revocation.

Article 194(2) of the Revised Family Code affirms that the principal reason behind the conclusion of adoption agreements is the best interests of the child to be adopted. Therefore, the interests of the adoptive parent cannot be given more or even equal weight as compared to the best interests of the child.

As per Article 195(2) of the Revised Family Code, adoption agreement will be revoked only if the adoptive parent has treated the adopted child adversely thereby jeopardizing his or her future

full development. Therefore, since the application of the adoptive parent for the revocation of the adoption agreement is not based upon the best interests of the child rather her own interests, the court has rejected her application.

Similar issues were also discussed in Cassation File No. 44101. The decision in this case was rendered on March 3, 2010. The case concerns the procedure concerning the revocation of adoption agreement. Berhan Hiwot Children and Family Support Organization instituted a lawsuit against the present respondents in the Federal First Instance Court. The present respondents sought to adopt child Tulu. However, the respondents changed their minds concerning the adoption of the child while the present applicant took the child from Berhan Hiwot Children and Family Support Organization and was facilitating the adoption by ensuring compliance with formalities thereof. The respondents also dispatched a written confirmation stating that they do not want to adopt the child. However, the court approved the adoption due to the fact that their written submission indicating withdrawal of their request did not reach the court. The applicant informed the respondents that the court has already approved the adoption agreement. However, the respondents maintained their position not to proceed with the adoption of child Tulu. Consequently, the child was forced to stay in the temporary home of the petitioner. Thus, the petitioner submitted an application for the court to revoke the judgment approving the adoption agreement based on the Revised Family Code invoking that the acts of the respondents puts the life and future development of the child in grave jeopardy. However, the Federal First Instance Court rejected the application stating that there is no evidence supporting the claim that the act of the respondents puts the life and development of the child in jeopardy. Though the petitioner took appeal from the judgment of the court, the Federal High Court also confirmed the judgment of the lower court. The petition was then submitted to the Cassation Bench of the Federal Supreme Court so as to obtain the reversal of these decisions.

The counsel of the petitioner has outlined the reasons as to why there is a fundamental error of judgment in the decisions of the lower courts. The counsel has explained in his submissions that the decision of the Federal High Court not to revoke the adoption agreement is inaccurate in view of the fact that the representative of the respondents appeared in person and told the court that the respondents do not have any opposition towards the request to revoke the adoption

agreement approved by the court. The Cassation Bench of the Federal Supreme Court decided to entertain the case *ex parte* since the respondents did not appear in person despite the fact that they were summoned through notices publicized in newspaper.

Article 195(1) of the Revised Family Code clearly established the principle that adoption agreement will not be subject to revocation once approved by a court of law. Article 195(2) of the same Code has specified the grounds for revocation of adoption agreements. The commentary of the relevant provision shows that it is no longer necessary to maintain the adoption agreement intact if there is proof indicating that the adoptive parents are treating the child in a manner contrary to his child and human right entitlements and his or her best interests.

The stipulation of this protection in the law is important to ensure the observance of the best interests of the adopted child. The reading of the law makes it clear revocation of adoption agreements may be pursued in case where there is proof showing that the life, treatment and future of the adopted child have been jeopardized. The court is expected to duly consider the ramifications of the revocation of the adoption agreement on the child.

The legal protection of adoption arrangements is meant to ensure the best interests of the child. Various international and regional treaties have been ratified and are being implemented. In particular, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the child deserve special mention. Ethiopia ratified the Convention on the Rights of the Child (CRC) on December 9, 1991³¹¹ by virtue of Proclamation 10/1992. Ethiopia also ratified the African Charter on the Rights and Welfare of the Child (ACRWC) on October 2, 2002. In addition to these, the Revised Family Code and other regional family laws in operation. These laws reflect the principles enshrined in international and regional treaties. One of the principal treaties mentioned in these laws is taking into account the best interests of the child as the primary consideration in deciding matters concerning children.

³¹¹ Ministry of Labor and Social Affairs, Ethiopia's National Plan of Action for Children (2003-2010 and beyond), 2004, Addis Ababa, p. i

Article 9(4) of the FDRE Constitution has made treaties ratified by Ethiopia an integral part of the law of the land. Moreover, it has clearly laid down the stipulation that the domestic laws of the country should be construed in the light of international human rights treaties ratified by the country. Moreover, the Constitution has specifically devoted Article 36 to provide the rights of children. Article 36(2) affirms that the primary consideration shall be the best interests of the child in all actions concerning children undertaken by private and public institutions, courts of law, administrative authorities or legislative bodies. Laws and policies promulgated to entrench this doctrine are also believed to advance the objective of the best interests of the child.

The fact that adoption is one of the issues considered to relate to the rights and welfare of children is indisputable. Moreover, Article 36(5) of the FDRE Constitution affirms that the state shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education. All these indicate that matters related to adoption must be viewed from the perspective of constitutional principle, the Convention on the Rights of the Child, the Revised Family Code and other relevant laws. This court has also issued several binding decisions based on the principle of the best interest of the child as the primary consideration including in file numbers 23632, 35710 and many others.

The petitioner in the case at hand has explained the respondents have declined to take the child despite the fact that the adoption agreement has been approved. Thus, the child is obliged to stay in the temporary institution of the petitioner which is not equipped to provide all the materials necessary for the children. It has not also been possible to hand over the child for adoption to other parents. The petitioner argued that the act of the respondents has put the life and development of the child in jeopardy. The lower courts could not accept the request for the revocation of the adoption agreement since the grounds mentioned in Article 195(2) of the Revised Family Code have not been established.

It is possible to understand from the reading of Articles 195 and Article 196 of the Revised Family Code that the adoption agreement should not be maintained if there is proof that the adoptive parent has treated the child in a manner contrary to the rights of children. It is possible for an interested party to demand the revocation of the adoption agreement in such a case. Article 195 of the Revised Family Code provides that the court may revoke the adoption in case where

the adopter, instead of looking after the adopted child as his own child, handles him as a slave, or in conditions resembling slavery, or makes him engage in immoral acts for his gain, or handles him *in any other manner that is detrimental to his future*. The lower courts could not have refused to revoke the adoption in view of the fact that the representative of the respondent explained that we are not opposed to the revocation since we have already expressed the same even before the approval of the adoption by the Federal First Instance Court. It is therefore difficult to conclude that this is not going to pose problems for the child in the future. Thus, since the judgments of the lower courts harms the development of the child it suffers from a fundamental error of law. Consequently, the Cassation Bench has quashed the judgments of the lower courts.

In a different case, a similar issue arose in cassation File No. 52691. The decision was rendered on April 30, 2010. The case relates a request regarding the revocation of adoption agreement. The petitioners sought the revocation of the adoption agreement because the child whose adoption agreement was approved by the Federal First Instance Court was diagnosed for suffering from mental development retardation. Consequently, the adopters have been unwilling to take the child. However, the Court noted that adoption agreement once approved cannot be revoked in principle as stated under Article 195(1) of the Revised Family Code. Moreover, the Court noted that adoption may be revoked only Article 195(2) of the Revised Family Code exceptional grounds for the revocation of adoption agreement. Article 195(2) of the Revised Family Code provides that the court may revoke the adoption in case where the adopter, instead of looking after the adopted child as his own child, handles him as a slave, or in conditions resembling slavery, or makes him engage in immoral acts for his gain, or handles him in any other manner that is detrimental to his or her future. The Federal First Instance Court rejected the request for the revocation of the adoption agreement since the grounds invoked do not fall within the ambit of Article 195(2). The Federal High Court also dismissed the appeal of the petitioners over the matter confirming the judgment of the lower court.

The petition is presented to the Cassation Bench of the Federal Supreme Court against the backdrop of the case as discussed above. In their petition, the petitioners explained that they came to know the fact that the child suffers from mental development retardation after the approval of the adoption by the court. They maintained that they would not have agreed to the adoption if

they had knowledge of the fact that the child suffers from mental development retardation. They went to state that if they are forced to take the child despite his condition, he would be subject to significant harm since they do not have the means to be able to cover the costs needed for is upkeep of his health. Thus, they sought the revocation of the adoption since the decisions of the lower courts are incompatible with Article 195(2) of the Revised Family Code. The Cassation Bench of the Federal Supreme Court decided to consider the matter in the light of Article 36 of the FDRE constitution which lays down the principle of the best interests of the child as the primary consideration in decoding matters affecting children.

Article 195(1) of the Revised Family Code stipulates that, in principle, adoption agreement cannot be revoked. Article 195(2) of the Revised Family Code outlines the exceptional situations which warrant the revocation of adoption agreements. Article 195(2) of the Revised Family Code provides that the court may revoke the adoption in case where the adopter, instead of looking after the adopted child as his own child, handles him as a slave, or in conditions resembling slavery, or makes him engage in immoral acts for his gain, or handles him in any other manner that is detrimental to his or her future. The phrase “in any other manner that is detrimental to his or her future” calls for interpretation. The court has already rendered interpretation of this phraseology in Cassation File No. 44101.

Accordingly, this stipulation connotes that there is no point in maintaining the adoption agreement if there is situations that the adoptive parent has treated the child in a manner contrary to the rights of children and his or her best interests. This is also indicated in the commentary of the Revised Family Code. The stipulation of this protection in the law for the institution of adoption is important to ensure the observance of the best interests of the adopted child. Article 36(2) affirms that the primary consideration shall be the best interests of the child in all actions concerning children undertaken by private and public institutions, courts of law, administrative authorities or legislative bodies. Article 36(5) of the FDRE Constitution also affirms that the state shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education. All the aforementioned considerations indicate that issues relating to adoption must be dealt with carefully and that care caution must be exercised in the interpretation of the relevant provisions. Therefore, it is possible to seek revocation of the adoption not only in case where harm is harm

done to the life and treatment of the child at present, but also if there is a likelihood of the same harm happening to the child in the future.

In the case at hand, the petitioners sought revocation of the adoption due to the fact that the child adopted was diagnosed for mental development retardation after the approval of the adoption by the court. The petitioners made it clear that they intended to adopt a healthy child and they do not have the financial means to be able to cover the cost required to meet the health demands of the present child. It has not been confirmed that the adopters have sufficient means to meet the costs for the treatment of the child and have undertaken to adopt the child with full knowledge of the implications. On the contrary, the adopters are expressing their fear that significant harm would materialize to the child's future if they are compelled to take the child. The law permits and provides legal protection to adoption with a view to ensure the best interests of the child as stated above. If the continuation of the adoption is proved to entail harm to the child in the future the adoption should be subject to revocation. The law does not allow the revocation of the adoption not only in case where it is proved that harm would materialize to the child in the future. In view of the fact that the adopters have expressed their inability to take the child and raise him and their assertion that harm would materialize to the child if they are compelled to take him, maintaining the adoption amounts to jeopardizing the life of the child. Thus, the decisions of the lower courts that the adoption agreement will not be subject to revocation do not take into account the aforementioned provisions of the law and constitutes a fundamental error of law.

5.9. Child's Right to Periodic Review of Treatment

Article 25 of the CRC stipulates the right of children to periodic review of treatment. It underlines the need for periodic review of treatment and situation of children placed by the authorities for their care, protection or treatment of their health. The placements envisaged in this provision include placement in foster families or institutions, adoption, children's homes, refugee camps, homes for children with disabilities, sick or mentally ill children, children in residential schools, children deprived of their liberty, children in rehabilitative care and other placements.³¹²

In recent times, there is growing understanding of the potential harm to children of adults working in positions of trust. As a result, attention has been shifted to how agencies and

³¹² Hodgkin and Newell (n 3) 379

organizations working with and for children ensure that the children they come in to contact are kept safe from harm.³¹³ This has led to the adoption, by many agencies and organizations working with and for children, of policies and procedures meant to ensure the protection of children from harm.³¹⁴ At the same, there are also a range of organizations which have not yet built protection measures in to their work. In addition, those who have done so are facing challenges of ensuring that their agencies and organizations are child safe.

However, Article 25 does not extend to placements arranged privately by parents. Thus, private arrangements in a family environment whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) are not included within the scope of Article 25. Article 25 is closely related to Article 3(3) of the CRC, which requires states parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities.

The importance of Article 25 on periodic review of treatment lies in the fact that it constitutes a safeguard against abuse by the State, one of the most serious forms of child abuse. Regulations meant for periodic review of treatment are also useful for developing standards for professionals working and coming into contact with children.

The general requirement of establishing standards and ensuring their observance by those concerned enunciated in this provision of the Convention is echoed in several other provisions which deal with particular services. For example, Article 18(2) and (3) calls for the establishment of standards and their observance for the care of children. Article 20 imposes the same requirement in the case of alternative care for children deprived of family environment. The requirement is also enshrined under Article 23 of the Convention in relation to care and protection for children with disabilities. Moreover, the requirement is also reflected in connection with rehabilitative and institutional care for children in contact with the law in Article 39 and 40 respectively.

The standards on institutions, services and facilities are required to comply with all the provisions of the Convention on the Rights of the Child. More importantly, these standards on

³¹³ Sharon Detrick (n 19) 436

³¹⁴ Sharon Detrick (n 19) 437

institutions, services and facilities must be anchored on the four pillar principles of non-discrimination, the best interests of the child, the right to survival and development of the child and respect for the views of the child. In view of the fundamental importance of these four guiding principles of the Convention in the formulation of standards on institutions, services and facilities and competent supervision, a brief exposition of the principles is in order. The Committee notes that early childhood professionals need to be provided with thorough preparation, ongoing training and adequate remuneration.³¹⁵

Likewise, in its General Comment No.7, the Committee on the Rights of the Child made the following observations concerning institutions, services and facilities as follows:

“States Parties must ensure that the institutions, services and facilities, responsible for early childhood conform to quality standards, particularly in the areas of health and safety, and staff possess the appropriate psychological qualities and are suitable, sufficiently numerous and well trained. Provision of services appropriate to the circumstances, age and individuality of young children requires that all staff be trained to work with this age group. Work with young children should be socially valued and properly paid, in order to attract a highly qualified workforce, in order to attract a highly qualified workforce, men as well as women. It is essential that they have sound, up-to-date theoretical and practical understanding about children’s rights and development ...; that they adopt appropriate child-centered care practices, curricula and pedagogies, and that they have access to specialist professional resources and support, including a supervisory and monitoring system for public and private programmes, institutions and services.”³¹⁶

The Convention on the Rights of the Child requires non-State “for-profit” and for “non-profit” service providers to observe and respect the principles and provisions of the Convention.³¹⁷ The Committee further reminds the States Parties that they have an obligation to monitor and regulate the quality of service provision to ensure that children’s rights are protected and their best interests served.³¹⁸ The Committee on the Rights of the Child has also called for reform, including legal reform of the institutional system by the establishment of standards for condition in institutions, and their regular inspection, in particular by reinforcing the roles and powers of independent inspection mechanisms and ensuring their right to inspect foster homes and public

³¹⁵ Sharon Detrick (n 19) 438

³¹⁶ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/GC/7/Rev. 1, para. 23

³¹⁷ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/GC/7/Rev. 1, para. 23.

³¹⁸ Committee on the Rights of the Child, General Comment No.7, 2005, CRC/GC/7/Rev. 1, para. 23.

institutions without advance notice.³¹⁹ The implementation of Article 25 requires the existence of effective complaint mechanism.³²⁰

5.10. Child's Right to Protection from all Forms of Violence

Article 19 of the CRC concerns itself with the right of children to protection from all forms of violence. It prohibits physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. The scope of Article 19 is broader in that it requires protection from all forms of physical or mental violence while in the care of parents or others.³²¹ The provision is also construed to include the prohibition of corporal punishment and other cruel or degrading punishment or treatment of children.³²² It emphasizes the right of children to full respect for their dignity and physical and personal integrity.³²³ The provision is closely linked with the right to life, maximum survival and development.³²⁴

Article 19(1) requires states to take a myriad of measures to ensure the protection of children from all forms of violence including legislative, administrative, social and educational measures. Article 19 (2) goes on to state that such protective measures should include effective procedures for the establishment of social programmes to provide adequate support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment.

Legislation, which apologizes or authorizes for corporal punishment is not compatible with the CRC and ACRWC. "Mental violence" includes humiliation, harassment, verbal abuse, the effects of isolation and other practices that cause or may result in psychological harm.³²⁵ A number of other provisions in the CRC also address violence and exploitation against children.

Article 17 of the CRC provides for protection of children from harmful information. Article 24(3) of the CRC provides for protection of children from harmful traditional practices

³¹⁹ Hodgkin and Newell (n 3) 42

³²⁰ Hodgkin and Newell (n 3)

³²¹ Hodgkin and Newell (n 3) 249

³²² General Comment No. 8

³²³ Hodgkin and Newell (n 3) 249

³²⁴ Sharon Detrick (n 19) 318

³²⁵ Hodgkin and Newell (n 3)

prejudicial to their health. Article 28(3) of the CRC requires school discipline to be consistent with the child's human dignity. Article 34 of the CRC provides for protection of children from sexual exploitation and sexual abuse including organized abuse and involvement of children in prostitution and pornography. Article 35 of the CRC addresses protection of children from sale, trafficking and abduction. Article 36 prohibits other forms of exploitation. Article 37 underlines protection of children from torture and other cruel, inhuman or degrading treatment or punishment. Article 38 stresses the need to protect children from the adverse effects of armed conflict on children.

Article 19 of the CRC also prohibits treatment causing "injury or abuse, neglect or negligent treatment". Neglect may be intentional or unintentional as in the case of inability on the part of the family, community or the State to provide for the child. The term "negligent treatment" in the provision is closely linked with accidents to children.³²⁶ This notion is also dealt with under Article 24(2)(e) of the CRC. Regardless of the fact that the primary responsibility rests with parents, it is also incumbent upon the state to take action to prevent accidents.

The prohibition of maltreatment or exploitation including sexual abuse in Article 19(1) shows the comprehensive nature of the Article.³²⁷ The term "maltreatment or exploitation" embodies any other adverse treatment not necessarily involving physical or mental violence or defined as abuse.³²⁸

Article 19 prohibits violence against children while they are in the care of parent(s), legal guardian(s), or any other person who has the care of the child. The scope of application of Article 19 extends to that of the family home and within other family-like situations including foster care, day care, schools as well as institutional care. The risk of violence is heightened in particular in regard to certain categories of children including children with disabilities, children infected or affected by HIV/AIDS, unaccompanied or separated children, etc.

Articles 19, 28(2) and Article 37 of the CRC affirm the right of children to protection from corporal punishment and other cruel or degrading forms of punishment. Physical violence has been defined by the Committee on the Rights of the Child in its General Comment No 8 as "any

³²⁶ Hodgkin and Newell (n 3)

³²⁷ Sharon Detrick (n 19) 319

³²⁸ Hodgkin and Newell (n 3)

punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light” whereas mental violence is said to include humiliation, harassment, verbal abuse, the effects of isolation and other practices that cause or may result in psychological harm.³²⁹ Illustrations of physical punishment include hitting (smacking, slapping, spanking) children, with the hand or with an implement such as a whip, stick, belt, shoe, wooden spoon, etc.³³⁰ Physical punishment may also involve kicking, shaking or throwing children, scratching, pinching, burning, scalding or forced ingestion. Corporal punishment is deemed to be degrading. In addition, non-physical forms of punishment including belittling treatment, humiliating, denigrating, scapegoating, threatening, scaring and ridiculing may also amount to degrading treatment.³³¹

States are also required to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children.³³² Article 36(1) (e) of the FDRE Constitution also affirms the right of children to be free from corporal punishment or cruel and inhumane treatment.³³³ This provision prohibits corporal punishment in schools and other institutions for the care of children. The phrase other institutions for the care of children includes all forms of alternative care and the justice system.³³⁴

The issue of violence against children and child abuse is particularly dealt with under the Criminal Code. Evidently, the protection of children from abuse and violence is one of the main objectives of the Criminal Code. The Code contains various provisions pertaining to the protection of children from violence. The Criminal Code (2005) prohibits homicide, domestic violence, violence against children including abduction (article 587-590); harmful traditional practices (articles 561 – 563 and 567 – 570); female genital mutilation (articles 565 and 566), early marriage (article 649), and bigamy (article 650); rape and sexual outrages (articles 620 – 628); trafficking in women and children (articles 597 and 635); forced prostitution (article 634);

³²⁹ UN Committee on the Rights of the Child (CRC), CRC General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia), 2 March 2007, CRC/C/GC/8, available at: <http://www.unhcr.org/refworld/docid/460bc772.html> [accessed 13 September 2010]

³³⁰ Committee on the Rights of the Child, General Comment No.8

³³¹ Committee on the Rights of the Child, General Comment No.8

³³² Committee on the Rights of the Child, General Comment No.8,

³³³ Committee on the Rights of the Child, General Comment No.8

³³⁴ Committee on the Rights of the Child, General Comment No.8

physical violence within marriage or in an irregular union (article 564); child pornography (article 640 (2)(c)) and the like.

Article 576 of the Criminal Code contains provisions concerning the right to protection against child maltreatment. Article 576(1) outlines various points which fall within the ambit of child maltreatment. These include ill-treatment, neglect and over tasking. The provision states that such acts will be punishable with simple imprisonment not exceeding three months. Article 576(2) goes on to state that the punishment shall be simple imprisonment for not less than one year in case where the crime causes grave injury to the health, well-being, education or physical or psychological development of the child. The same provision also envisages the deprivation of family rights of the offender as an additional sanction.

Article 576(3) of the Criminal Code stipulates that the taking of disciplinary measures by parents or other persons having similar responsibilities for the purpose of proper upbringing does not fall within the ambit of child maltreatment.³³⁵ This sub-article also makes cross reference to Article 68 of the Criminal Code, which is found in the section dealing with lawful and justifiable acts and excuses. Acts reasonably done in exercising the right of correction are among acts which are declared to be required or authorized by the law within the meaning of Article 68(b) of the Criminal Code. Article 2039(c) of the Civil Code provides that no offence shall be deemed to have been committed where the act consists in reasonable corporal punishment inflicted by the defendant on his child, ward, pupil, or servant.

The reading of these provisions in the Criminal and Civil Code indicates that corporal punishment is not entirely prohibited under Ethiopian laws. Consequently, the Committee on the Rights of the Child has called upon Ethiopia to revise its legislation on this point. The permission of “reasonable chastisement” by the Criminal and Civil Codes is contrary to the FDRE Constitution. These provisions are also contrary to the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child which do not allow any degree of corporal punishment, no matter light.

The National Criminal Justice Policy issued in 2011 has included various changes to address a number of gaps observed in the criminal justice systems and ensure compatibility with the

³³⁵ Committee on the Rights of the Child, General Comment No.8

provisions of the CRC and ACRWC. The policy devoted a separate section for care and special handling of victims of crimes and children in conflict with the law. For example, section 6 of the policy focuses on the circumstances of vulnerable children, the rights of victims to participate in criminal investigation and procedures for charging and trial, legal protection and handling of children in conflict with the law, alternative remedial measures and establishment of special units for children. Most of these provisions provide protection to children who are victims of FGM, early marriage, child labor, neglect and abuse.³³⁶

Following the adoption of the National Criminal Justice Policy, the Criminal Procedure Code (CPC) was revised and presented to the Federal Parliament for deliberation and enactment. The revised CPC incorporated significant measures to ensure children's access to protective and child friendly justice system. These include measures such as application of diversionary methods and setting up child friendly structures at various levels in the judicial process in line with international principles and standards.³³⁷

Ministry of Education (MOE's) Educational leadership, Organization, Community Participation and Finance Guideline states that discipline in an educational establishment should be maintained on the basis of respect for the dignity of the students. Draft guidelines for investigating and prosecuting crimes committed against children and for providing psychological counseling were developed by the Ministry of Justice (MOJ).³³⁸

The National Coordinating Body for Multi-Sectoral and Integrated Response to Violence against Women and Children was launched in 2008 and focuses on the management of child abuse. Child Protection Units (CPUs) have been established in all ten sub-city police stations in Addis Ababa by the Addis Ababa Police Commission under a pilot project. The Centre for the Investigation and Prosecution of violence against women and children has been established within the compound of the Lideta Division Federal First Instance Court in Addis Ababa. The Federal First Instance Court (FFIC) has also established a victim-friendly bench that entertains cases involving victims of violence against women (VAW) using a closed-circuit TV to protect child victims from facing the perpetrator and public while testifying in court. The Federal First

³³⁶ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

³³⁷ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

³³⁸ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

Instance Court (FFIC) has also established a family court to adjudicate, among other cases, family disputes affecting the best interests of children, and custody, and adoption proceedings.³³⁹

A Manual on Investigative Interview is formulated by the Child Justice Project Office of the Federal Supreme Court. A Child Justice Guideline for dealing with witness and surviving children in the Justice System is developed by the Child Justice Project Office of the Federal Supreme Court.³⁴⁰

Apart from the legal and institutional framework for the prevention of violence against children, the consideration of case law is instructive to shed light as to the jurisprudence of courts in this regard. The following discussion focuses on some illustrious cases demonstrating the jurisprudence.

The first case to be considered here is the judgment of the court on 31 January 2007 in its File No. 75575.³⁴¹ The case relates to the commission of acts of sodomy on the 9 year old boy by the defendant. In this case, the prosecutor submitted a charge dated September 15, 2006 against the defendant. The defendant is charged with the contravention of Article 631(1) (b) of the Criminal Code. The defendant is charged with committing acts of homosexual on a 9 year old boy on August 23, 2006. The defendant was served with the charge which was read to him before the court. The defendant pleaded not guilty contending that he did not do the acts indicated in the charge. The court summoned and heard the testimony of three prosecution witnesses. Moreover, documentary evidence was adduced from the Family Planning Department and the Medical Faculty of Addis Ababa University.

The court gave a ruling requiring the defendant to defend himself as the prosecution has made out a *prima facie* case against him. The court heard the testimony of two defence witnesses.

The court examined the charge along with the evidence presented as follows. The medical evidence adduced by the Family Planning Department states that there no physical injury is

³³⁹ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

³⁴⁰ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

³⁴¹ File No 75575 በፌዴራል ጠቅላይ ፍርድ ቤት የሕፃናትና ወጣቶች ፍትህ ፕሮጀክት ጽ/ቤት፣ ሕፃናትን የተመለከቱ የተመረጡ የፍርድ ቤት ወሳኔዎች (የካቲት 2002 E.C.)

sustained by the boy. However, the court reckons that there may not be any visible physical injury in such cases. On the other hand, the medical evidence presented from Medical Faculty of Addis Ababa University states that the boy was brought to the hospital and was diagnosed. The diagnosis revealed that there is infection nearby the anus of the boy. The medical evidence further confirmed that the infection has been treated and has healed. The court took note of the fact that homosexual acts may lead to infection without any trace of physical injury. Thus, the court stated that this supports the contention of the prosecutor. The court did not find the testimony of the defence witnesses convincing. Therefore, the court found the defendant guilty as charged.

The defendant was asked if he has any grounds for mitigation of sentencing. The court noted that the count the defendant is charged with carries a penalty of rigorous imprisonment varying from 15 years to 25 years. The defendant is found guilty of performing homosexual acts to a 9 year old boy.

The court has sentenced the defendant for 16 rigorous imprisonment based on Article 88 of the Criminal Code. Furthermore, the court has also given orders suspending the civic rights of the defendant including his right to vote and be elected.

Another relevant case is the commission of Sexual outrages committed against infants. This case was entertained in File No. 85118.³⁴² The final judgment was rendered on March 21, 2007. The prosecutor submitted a charge dated March 20, 2007 against the defendant who is accused of rape in violation of Article 627/1// and (5) of the Criminal Code. The charge reads that the defendant performed sexual intercourse on a 9 year old girl. The charge states that the defendant took the girl from her bed, embraced her, put her on his thigh and penetrated her. The prosecutor also presented evidence including witnesses, the statement the defendant gave under Article 35 of the Criminal Procedure Code before the court and medical evidence. The defendant pleaded not guilty. However, the court confirmed that the testimony of the prosecution witnesses and documentary evidence presented prove the commission of the act by the defendant beyond

³⁴² File Number 85118 (as reported in በፌዴራል ጠቅላይ ፍርድ ቤት የሕፃናትና ወጣቶች ፍትህ ፕሮጀክት ጽ/ቤት፣ ሕፃናትን የተመለከቱ የተመረጡ የፍርድ ቤት ውሳኔዎች (የካቲት 2002 E.C.)

reasonable doubt. The defendant stated that he has no defense rebuttal evidence. The court found the defendant guilty of the crime based on the various items of evidence presented to it.

The court noted that the provision of the Criminal code the defendant is accused of violating pertaining to rape on a minor who has not attained the age of thirteen i.e. Article 627(1) entails a penalty of rigorous imprisonment from fifteen years to twenty five years. The court went on to state that the punishment shall be rigorous imprisonment for life if the sexual outrage has caused grave bodily or mental injury to or death of the victim According to Article 627(5) of the Criminal Code. The court made it clear the medical evidence presented demonstrates that the harm done to the child is grave bodily injury. The court recounted that the criminal acted with treachery, perfidy, a base motive and a deliberate intent to injure as provided under Article 84(1) (a) of the Criminal Code. The court is convinced that the defendant should receive penalty commensurate to his cruel and inhuman act. Moreover, the court observed that there are not migrating grounds put forward by the defendant. The court decided life imprisonment on the defendant based on Article 88 of the Criminal Code as to penalize the offender for his deeds and to deter others from doing the same. Moreover, the court also deprived the civic rights of the defendant to be a witness, to vote and stand for election based on Article 124 of the Criminal Code.

Another involving the issue of Rape and Homosexual Acts is (File No. 80596). The judgment was rendered on January 1, 2007. The prosecutor submitted a charge dated December 29, 2006 against the defendant on three counts. In the first count, the defendant is charged with acts of sexual outrage in violation of Article 627(1) of the Criminal Code.³⁴³ The crime took place on November 14, 2006 at a place called Amist Kilo Kindergarten. The defendant, who had been serving as a guard of a kindergarten, allowed the three year old girl into the premises of the school at 7:40 A.M. He then took off her clothes and performed acts of sexual outrage deflowering the girl. In the second count, the defendant is accused of committing homosexual acts in violation of Article 631(1) (b) against a five year old. Thirdly, the defendant is accused of

³⁴³ File No. 80596, በፌዴራል ጠቅላይ ፍርድ ቤት የሕፃናትና ወጣቶች ፍትህ ፕሮጀክት ጽ/ቤት፣ ሕፃናትን የተመለከቱ የተመረጡ የፍርድ ቤት ወሳኔዎች (የካቲት 2002 E.C.)

committing acts corresponding to the sexual act or any other indecent act upon a three year old girl in violation of Article 627(3) of the Criminal Code.

The defendant pleaded not guilty. The prosecutor presented six witnesses and medical evidence. The court heard the testimony of the witnesses and also examined the medical evidence presented to it. Both private complaints also gave testimony corresponding to the charges leveled against the accused and identified him in the court room. The third prosecutor gave testimony that testified that the children were taken to the school earlier before others came and left for job. The court found the defence evidence of the defendant contradictory and unconvincing. The court found the defendant guilty as charged. The court noted that the crimes committed by the defendant are concurrent within the meaning of Article 60 (a) of the Criminal Code. The court stated that this is a ground of aggravation based on Article 85 of the Criminal Code. Thus, the court noted that the sentencing is to be guided by Article 184(1)(a) of the Criminal Code. The court also took note of the fact that the crime is committed by the defendant against children entrusted to his custody and care and dependant on him within the meaning of Article 627(4)(a) of the Criminal Code. The court asserted that there are aggravating grounds against the defendant in both the general as well as the special part of the Criminal Code. The court further noted that there is no ground that may mitigate the sentencing on the part of the defendant. The court sentenced the defendant to 25 years rigorous imprisonment. Moreover, the court also suspended the civic rights of the defendant to be a witness, to vote and stand for election for five years.

CHAPTER SIX

BASIC HEALTH AND WELFARE

Introduction

This chapter deals with the basic health and welfare entitlements of children under the Convention on the Rights of the Child and the African Charter on the Rights of the Child. In particular, the Chapter gives special emphasis to the rights of children with disabilities. In this connection, the Unit examines the rights of children in the Convention on the Rights of Persons with Disabilities (CRPD). Thus, the Chapter looks into the relationship between Article 23 of the CRC and Article 7 of the CRPD. In addition, the Chapter explores the rights of children to health and health services, the right to underlying determinants of health, protection against harmful traditional practices, the right of the child to benefit from social security, the right of the child to an adequate standard of living. Moreover, the Chapter also examines the manner how these entitlements are reflected in Ethiopian legislations, policy documents and strategies.

6.1. *Rights of Children with Disabilities*

Needless to say, all the rights of children enshrined under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child apply to children with disabilities. The four general principles and all the rights enshrined in the CRC are indivisible and interrelated. Furthermore, Article 2 of the Convention on the Rights of the Child requires States to ensure and respect all the rights set forth in the Convention to children with disabilities in their jurisdiction. The same article also prohibits discrimination on the basis of disability.

Article 23 of the Convention on the Rights of the Child requires State Parties to ensure and respect all the rights set forth in the Convention on the Rights of the Child to children with disabilities within their jurisdiction. Article 23 further emphasizes on the need to provide the child with conditions for living that promote self-reliance and facilitate active participation in the community. Paragraphs 2 and 3 of Article 23 of the Convention stress that children with disabilities are entitled to special care in such a way so as to ensure effective access to various services in a manner conducive to the child's achieving the fullest possible social integration and individual development. Article 13 of the African Charter on the Rights and Welfare of the child also stresses the same protection to children with disabilities.

In December 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities. This Convention enshrines civil, political, social, economic and cultural rights. The Convention calls up on States Parties to abolish legislation, customs and practices that discriminate against children with disabilities. The adoption of the Convention marks a paradigm shift from viewing persons with disabilities as objects of charity to considering them as individuals with human rights. The Convention takes note of the fact that there are linguistic, social and cultural barriers which prevent the full and effective participation of persons with disabilities in society on an equal basis with others. The Convention calls up on States Parties to remove such barriers.

Though all provisions embodied in the new Convention on the Rights of Persons with Disabilities apply to children, the Convention dedicates one provision (i.e. Article 7) to enshrine the rights of children with disabilities. Ethiopia also ratified the UN Convention on the Rights of Persons with Disability in 2010. Unlike Article 23 of the Convention on the Rights of the Child which is primarily focused on addressing the special needs of children with disabilities, Article 7 of the Convention on the Rights of Persons with Disabilities advocates for the realization of their rights. In particular Article 7 of the Convention requires States Parties³⁴⁴:

- ▶▶ to ensure the enjoyment of all human rights and fundamental freedoms by children with disabilities on an equal basis with other children;
- ▶▶ to ensure the best interests of children with disabilities is a primary consideration in deciding matters affecting them;
- ▶▶ and to provide disability and age appropriate assistance to ensure that children with disabilities are able to realize the right to their express views on all matters of concern to them and have them taken seriously in accordance with age and maturity.
- ▶▶ introduce age appropriate measures to ensure that children with disabilities have access to justice.
- ▶▶ Take measures to provide age sensitive assistance to prevent exploitation, violence and abuse; age, gender and disability sensitive protection and

³⁴⁴ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61106 (CRPD) Article 7

rehabilitation services; and child focused legislation to ensure that exploitation, violence and abuse is identified and investigated.

- ▶▶ Take measures to ensure that children with disabilities are registered immediately after birth.
- ▶▶ Ensure that children with disabilities are entitled to retain their fertility, thereby forbidding sterilization.
- ▶▶ Ensure that children with disabilities have equal rights with respect to family life and States Parties have an obligation to provide services and support to families to prevent abandonment, concealment and segregation.
- ▶▶ Ensure that children with disabilities are not separated from parents unless this is in their best interests and never on the basis of disability.
- ▶▶ Ensure that education at all levels must be inclusive and children with disabilities have an equal entitlement to general education.

Ensure that children with disabilities must be provided with equal access to participation in play, recreation, and leisure and sporting activities, including in schools.

As per the Central Statistics Agency of Ethiopia, there were 864 218 (1.17%) persons with disabilities of which 464,202 were male and 400,016 were female out of a total population of 73,750 932 in 2007. Children accounted for 232,585 (126,195 male and 106,390 female).³⁴⁵

Article 25 of the FDRE Constitution provides that all persons are equal before the law and entitled without discrimination to the equal protection of the law. The Constitution falls short of explicitly protecting children with disabilities against discrimination, though the phrase '*other status*' includes disability. Furthermore, Article 41 of the Constitution provides that the State shall, within available means, allocate resources to provide rehabilitation and assistance to persons with physical and mental disabilities.

The Ministry of Labour and Social Affairs adopted a national program of action for rehabilitation of persons with disabilities in 2006/7 with the objective of promoting the full participation and equal opportunity for persons with disabilities in all spheres of life.³⁴⁶ The national program of action focuses on prevention of disability, medical, educational and vocational rehabilitation, and increased accessibility and awareness.³⁴⁷ The Ministry of Education launched "inclusive

³⁴⁵ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

³⁴⁶ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

³⁴⁷ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

educational arrangements" in terms of location, social functions at all levels to meet the needs of children with disabilities.³⁴⁸ The Proclamation to Provide for the Right to Employment of Persons with Disabilities affirms the right to participate in any suitable job without discrimination.³⁴⁹ The Building and Construction Code on Barrier-Free Accessibility was adopted in order to promote the development of barrier-free buildings and integrate persons with disabilities into community life.³⁵⁰

6.2. *Child's Right to Health and Health Services*

Article 24 of the Convention on the Rights of the Child is closely linked with Article 6 of the CRC which stipulates the right of the child to life, survival and maximum development. The term "health" is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.³⁵¹ Article 24(1) assures the right of children to highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.³⁵² States Parties to the CRC are obligated to ensure that no child is deprived of his or her right of access to such health care services.

As compared to counterpart provisions in other international human rights instruments, Article 24 of the CRC is distinctive in that it asserts the right of access to health care services and providing a non-exclusive list of appropriate measures imposed on States Parties.³⁵³ The right to the highest attainable standard of health is not the same as the right to health care. Instead, the right to health encompasses a myriad of socio-economic factors necessary to lead a healthy life, and includes the underlying determinants of health such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions and a

³⁴⁸ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011)

³⁴⁹ Proclamation to Provide for the Right to Employment of Persons with Disabilities (Proclamation 568/2008)

³⁵⁰ Ethiopian Building Proclamation (Proclamation 624/2009)

³⁵¹ Hodgkin and Newell (n 3) 344

³⁵² The right to the highest attainable standard of health is also asserted under Articles 25 and 12 of the (Universal Declaration of Human Rights (UDHR) and the (International Covenant on Economic, Social and Cultural Rights (ICESCR) respectively.

³⁵³ Sharon Detrick (n 19) 396

healthy environment.³⁵⁴ Other underlying determinants of health include an adequate supply of safe food, nutrition and housing and sexual and reproductive health.³⁵⁵

The right to health does not also mean the right to be healthy. The right to health comprises both freedoms and entitlements. The right comprises freedoms such as the right to control one's health and body, including sexual and reproductive freedom, the right to be free from interference including freedom from torture, non-consensual medical treatment and experimentation.³⁵⁶ On the other hand, the entitlements embody the right to a system of health protection providing equality of opportunity for all to enjoy the highest attainable standard of health.³⁵⁷ An important ramification of the right to health is the participation of the population in all health-related decision-making at the community, national and international levels.³⁵⁸

Article 24(4) underscores the importance of international cooperation for the full realization of the right to health and health care services.

Article 24 of the CRC requires states to implement their obligations under the provision to the maximum extent of their available resources within the framework of international cooperation. This shows that health rights are of progressive implementation as it is the case with most, if not all, economic, social and cultural rights. This is also reaffirmed as the article obliges states to strive to ensure that no child is deprived of his or her right of access to health care services. The proviso on health rights also promotes and encourages international cooperation with a view to achieve the full realization of the right. The concept of progressive realization serves as a flexibility device.³⁵⁹ However, the phrase “progressive realization” must be given meaningful content. The Convention requires States Parties to move expeditiously and effectively towards the attainment of the highest standard of health and to take concrete and targeted measures to that

³⁵⁴ Committee on Economic, Social and Cultural Rights, general Comment No.14,2000, “The right to the highest attainable standard of health HRI/GEN/1/Rev. 8, para. 4, p.87

³⁵⁵ Committee on Economic, Social and Cultural Rights, general Comment No.14,2000, “The right to the highest attainable standard of health HRI/GEN/1/Rev. 8, para. 4, p.87

³⁵⁶ Committee on Economic, Social and Cultural Rights, general Comment No.14,2000, “The right to the highest attainable standard of health HRI/GEN/1/Rev. 8, para. 4, p.87

³⁵⁷ Committee on Economic, Social and Cultural Rights, general Comment No.14,2000, “The right to the highest attainable standard of health HRI/GEN/1/Rev. 8, para. 4, p.87

³⁵⁸ Committee on Economic, Social and Cultural Rights, general Comment No.14,2000, “The right to the highest attainable standard of health HRI/GEN/1/Rev. 8, para. 4, p.87 and 88

³⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment No.3, 1990, HRI/GEN/1/Rev. 8, paras. 9 to 11

effect. In other words, the phrase “progressive realization” cannot be invoked as an excuse to justify unwillingness or under-acting to bring about the fulfillment of the right.³⁶⁰

Consequently, it is believed that the right to health entails a minimum core obligation of ensuring the minimum essential levels of the right.³⁶¹ The presence of a significant number of people deprived of essential primary health care in a state triggers the *prima facie* presumption of failure to discharge obligations under the provision.³⁶² States Parties are also obliged to monitor and assess the extent of the realization or otherwise of the right to health and to devise strategies and programmes for its promotion.³⁶³

The cumulative effect of Articles 2 and Article 24 of the CRC conveys the message that there must not be discrimination in the implementation of health rights. Consequently, State Parties are required to make sure that children living in poverty, girls, children with disabilities and children living in rural areas are exercising their health rights to the same extent as other children.³⁶⁴

Article 24(2) sets forth the various measures that States Parties are required to take for the implementation of the right to health. These include ensuring the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care. The right to the highest attainable standard of health is linked with the rights to adequate standard of living, education and protection from all forms of physical and mental violence. The list of measures State Parties are required to take and which as outlined in Article 24(2) are not exhaustive but illustrative. However, certain measures that States Parties must take have merited special mention in Article 24(2) due to their particular importance. Thus States are in particular required to take measures to: -

- Diminish infant and child mortality;

³⁶⁰ Committee on Economic, Social and Cultural Rights, General Comment No.3, 1990, HRI/GEN/1/Rev. 8, paras. 9 to 11

³⁶¹ Committee on Economic, Social and Cultural Rights, General Comment No.3, 1990, HRI/GEN/1/Rev. 8, paras. 9 to 11

³⁶² Hodgkin and Newell (n 3) 351

³⁶³ Sharon Detrick (n 19) 397

³⁶⁴ Hodgkin and Newell (n 3) 353

- Ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- Combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;
- Ensure appropriate parental and postnatal health care for mothers;
- Ensure that all segments of society, in particular, parents and children, are informed have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; and
- Develop preventive health care, guidance for parents, and family planning education and services.

Ethiopia has undertaken various activities in terms of provision of the required infrastructure and services for health care of children and has also adopted various laws, policies and strategies for the implementation of the right to health of children. These include the Health Sector Development Program (HSDP), the National Nutrition Strategy, and the National Child Survival and Reproductive Health strategies.³⁶⁵

The National Health Policy is an overarching policy document that gives emphasis to the fulfillment of the needs of the less privileged rural population. The policy outlines democratization and decentralization of the health system, development of the preventive and promotional components of the health service, ensuring access to healthcare for the whole population, promoting inter-sectoral collaboration, involvement of NGOs, UN agencies and the private sector and promoting and enhancing national self-reliance in health development by mobilizing and efficiently utilizing available resources.³⁶⁶

³⁶⁵ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011),.84

³⁶⁶ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011), p.84

6.3. Access to Underlying Determinants of Health

The right of the child to health and health care cannot be materialized in the absence of the fulfillment of the underlying determinants of health. Underling determinants of health are entitlements of the child which are preconditions for the achievement of the highest attainable standard of health. These underlying determinants of health include potable water and sanitation.

The Right to Water

Potable water is one of the vital underlying determinants of health. The right to water has not been expressly laid out in the International Bill of Human Rights or other major international human rights instruments. However, it has been construed as being part and parcel of other rights enshrined under the International Covenant on Economic, Social and Cultural Rights.

The right to water has been more explicitly and holistically recognized through adoption of the General Comment No.15 (GC15) of the Committee on Economic, Social and Cultural Rights. on the Right to Water was adopted by the UN Committee on Economic, Social and Cultural Rights at its twenty-ninth session in November 2002 (UN Doc. E/C.12/2002/11). The Comment provides guidelines for State Parties on the interpretation of the right to water under two articles of the International Covenant on Economic, Social and Cultural Rights - Article 11 (the right to an adequate standard of living) and Article 12 (the right to health). While GC15 is an official and legal interpretation of article 11(1) & Article 12 of ICESCR, it is not legally binding as international conventions and treaties.

The General Comment affirms that ‘the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’. It notes that the right to water has been recognized in a wide range of international documents and reaffirms the fundamental importance of the right stating that: ‘the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights’.

The Right to Sanitation

GC15 states that “State parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women

and children”. The human right to sanitation requires that States ensure to each person access to safe, accessible, acceptable and affordable sanitation facilities in or near to their homes and public institutions (including educational institutions, hospitals and places of work).

The State is required to move as expeditiously as possible towards the full realization of the right to water and sanitation, using its available resources. It has obligations that are of immediate effect, such as the obligation of non-discrimination and the obligation to establish concrete and targeted programs to achieve the full extent of the right to water and sanitation.

Article 90 of the FDRE Constitution provides that policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security to the extent the country’s resources permit. Article 44 of the constitution also states that “all Persons have the right to clean and healthy environment”

The Government of Ethiopia has established appropriate institutional structures as well as issued and implemented various policies and strategies to ensure implementation of the constitutional provision and improve access to water supply and sanitation.,

Development of the Water Resource Management Policy (WRMP), formulation of the national water sector strategy, the issuance of water resources management proclamation and regulation, the preparation of Water Sector Development Program (WSDP) and Universal Access Plan, the issuance of Environmental Pollution Control Proclamation (2002) and Public Health Proclamation (2000), decentralization of rural water supply responsibilities to *Woredas* (2004), and development of National Hygiene and Sanitation Strategy (2006) etc are among the policy and legal responses that the government has put in place to create enabling environment for the realization of right to water supply and sanitation.

6.4. *Protection against Harmful Traditional Practices*

Article 24(3) of the CRC requires States Parties to abolish traditional practices prejudicial and detrimental to the health of children. The same protection is also mirrored in Article 21 of the African Charter on the Rights and Welfare of the Child. The provision calls for States Parties to the African Children’s Charter to discourage any custom, cultural or religious practice affecting the welfare, dignity, normal growth and development of the child. Article 16 of the FDRE Constitution stipulates the right to the security of person. Harmful Traditional Practices (HTPs)

are contrary to this right since they cause permanent or temporary injuries on the body of the victims. Article 35(4) of the FDRE Constitution also provides that the state shall enforce the right of women to eliminate the influences of harmful customs. The provision goes on to state that laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited. Article 91(1) of the FDRE Constitution concerns itself with cultural values. The provision affirms that protection is accorded to cultural values on condition that they are not detrimental to basic human rights and to the dignity of the human person.

In view of the obligation to eliminate harmful traditional practices, the Criminal Code has included several provisions to proscribe various forms of HTPs. These provisions in the 2004 Criminal Code mark a break from the previous Penal Code which in effect condoned many forms of HTPs.

Female Genital Mutilation and Infibulation

Article 565 of the Criminal Code criminalizes female genital mutilation (FGM). It provides that “whoever circumcises a woman of any age, is punishable with simple imprisonment for not less than three months, or fine of not less than five hundred Birr.”

Moreover, Article 566 addresses the infibulations of the Female Genitalia. It reads:

- 1) Whoever infibulates the genitalia of a woman is punishable with rigorous imprisonment from three years to five years.
- 2) Where injury to body or health has resulted due to the act proscribed in sub-article (1) above, subject to the provision of the Criminal Code which provides for a more severe penalty, the punishment shall be rigorous imprisonment from five years to ten years.

Article 569 provides that persons who are accomplices to the crime as parents, guardians or in any other capacity are punishable with simple imprisonment not exceeding three months or fine not exceeding Birr 500.00. Parents or other persons who cooperate with one who commits the act may also be liable to a penalty not exceeding three months simple imprisonment or fine not exceeding Birr 500.00.

Abduction

Article 35(2) of the FDRE Constitution stipulates that marriage is an arrangement that needs to be based upon the full and free consent of the future spouses. Article 14(4) of the Revised Family Code provides that marriage concluded through violence is not valid in the eyes of the law.

Article 587 of the Criminal Code addresses marriage by abduction. Under the Criminal Code, abduction is a crime irrespective of the conclusion of marriage following the abduction. Moreover, the abductor is liable to the penalty prescribed for rape in addition to the penalty for the crime of abduction where the abduction is followed by forced sex. As provided under Article 620. Abduction is punishable by imprisonment ranging from seven to ten years. Article 587 reads as follows:

Article 587 Abduction of Women

- 1) Whoever with intent to marry a woman abducts her by violence, or commits such an act after having obtained her consent by intimidation, threat, trickery or deceit, is punishable with rigorous imprisonment from three years to ten years.
- 2) Where the act of abduction is accompanied by rape, the perpetrator shall be liable to the punishment prescribed for rape in this Code.
- 3) The conclusion of a marriage between the abductor and the abducted subsequent to the abduction shall not preclude criminal liability.
- 4) Nothing shall affect the right of the victim to claim compensation under civil law for the moral and material damage she may have sustained as a result of the abduction.

Early Marriage

Article 35(2) of the Constitution stipulates the principle of the equality of spouses. The Revised Family Code has fixed the marriageable age to 18 years. Articles 7 and 31 imply that failure to comply with this marriageable age entails the invalidation of the marriage. This matter has also been considered in connection with the first Chapter on minimum protective ages.

The 2004 Criminal Code criminalizes early marriage. It reads as follows

Article 648 Early Marriages

Whoever concludes marriage with a minor apart from circumstances permitted by relevant Family Code is punishable with

- c. Rigorous imprisonment not exceeding three years, where the age of the victim is thirteen years or above; or
- d. Rigorous imprisonment not exceeding seven years, where the age of the victim is below thirteen years.

Harmful Traditional Practices in connection with Child Delivery

The 2004 Criminal Code contains various provisions addressing harmful traditional practices related with child delivery.

Article 561 concerns itself with endangering the lives of pregnant women and children through harmful traditional practice. Article 561(1) reads:-

- (1) “Whoever causes the death of a pregnant or a delivering woman or that of a newly born child as a result of the application of a harmful traditional practice such as:-
 - a. Massaging the abdomen of a pregnant woman, or shaking a woman in a prolonged labor; or
 - b. Soiling the umbilical cord of a newly-born child with dung or other similar substances, keeping a newly-born child out of sun or feeding it butter, excising the uvula of a child or taking out milk teeth or preventing the child from being vaccinated; or
 - c. Through the exercise of other traditional practices known by the medical profession to be harmful, is punishable with fine or simple imprisonment from three months to one year.
- (2) Where the death was caused by negligence, the relevant provision of this Code (Article 543) shall apply.

6.5. Child’s Right to Benefit from Social Security

Article 26 assures of the child’s right to benefit from social security. Article 26(1) provides that this right includes social insurance. States Parties are required to take the necessary measures to

achieve the full realization of the right. It includes financial support for children to be provided by the State. The right to social security and social insurance is also affirmed under Article 9 of the International Covenant on Economic, Social and Cultural Rights. The basic elements of social security include medical care and benefit for families.³⁶⁷

It has been said that parents bear the primary responsibility for upbringing of the child. However, when parents are unable to provide for children due to failure to secure gainful employment or due to circumstances beyond their control such as illness or old age, the State is obliged to ensure that the child is provided with financial support.

This financial support may be provided to the child himself directly or through a responsible adult.³⁶⁸ States are required to provide such financial support to the maximum extent of their available resources and within the framework of international cooperation as indicated in Article 4 of the CRC.

Article 41(4) of the FDRE Constitution obligates States Parties to allocate ever increasing resources to provide to the public health, education and other social services. Article 36(5) of the Constitution provides that the State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education. However, this provision can be controversial as a result of its undue emphasis on institutionalization of children. Institutionalization of children is not a panacea to the problem of children deprived of family environment as discussed in the relevant section of the Handbook. Instead, the trend should be towards deinstitutionalization.

Ethiopia has one of the largest numbers of orphans in the world, over five and a half million according to recent estimates.³⁶⁹ The country has been making efforts to address the problems of children in need of social security. These include the effort aimed at developing an adequate policy and regulatory environment. To this effect, Ethiopia is currently drafting its own Social Protection Policy. The policy framework aims to address and respond to social problems with

³⁶⁷ ILO Social Security (Minimum Standards) (No. 102)

³⁶⁸ Hodgkin and Newell (n 3) 385

³⁶⁹ 2007 national report on HIV/AIDS by the Ethiopian Ministry of Health. A little under 17% of these children have been orphaned due to AIDS.

particular focus on vulnerable groups including children. The Social Welfare Services envisaged under the Policy include child welfare services, psychosocial support, alternative care, and grants for the elderly, disability and other social issues.³⁷⁰

6.6. *Child's Right to an Adequate Standard of Living*

Article 27(1) of the CRC affirms the right of the child to a standard of living adequate to his or her physical, mental, spiritual, moral and social development. The right to an adequate standard of living enshrined in Article 27 of the CRC echoes the same right as enshrined in Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights.

Article 27 is closely linked with Article 6 of the CRC which lays down the right to life and maximum survival and development. These provisions imply the need to fulfill the basic necessities of the child including nutrition, clothing and housing. Apart from these, it also points to the need for the fulfillment of clean drinking water, health education, good hygiene and sanitation and breastfeeding. Also implicit in the right to an adequate standard of living are measures aimed at prevention of environmental pollution, child accidents and harmful traditional practices.³⁷¹

Article 27(2) stipulates that parents have the primary duty to secure the full development of the child. This provision mirrors the same principle enshrined in Articles 3(2), Article 5 and Article 18 of the CRC. The parental responsibility to secure the full development of the child is qualified by the phrase “within their abilities and financial capacities.” The provision has also specifically outlined the different aspects of development. Parental responsibility implies the duty of parents to meet the material, emotional, developmental as well as intellectual needs of their children.³⁷²

However, the Convention is quick to add the responsibility of the State to assist parents when they do not have the skills or resources.³⁷³ Article 27(3) provides that States must provide material and other forms of assistance for parents in their endeavor to secure this right. The support provided by the State may extend to food, clothing and housing. The right of the child to

³⁷⁰ Draft Social Protection Policy of the Government of Ethiopia

³⁷¹ Hodgkin and Newell (n 3) 394

³⁷² Hodgkin and Newell (n 3) 453

³⁷³ Hodgkin and Newell (n 3) 395

an adequate standard of living is not merely confined to food, clothing and housing. Article 27 links the right of the child to development with the primary responsibility of parents for securing this development supported by the State.³⁷⁴

At this point, the consideration of case law on the part of courts of law in Ethiopia, in particular, that of the Cassation Division of the Federal Supreme Court is instructive. To this effect, Cassation File No. 45819 which was decided on February 19, 2010 is considered here. The case relates to a petition alleging the existence of a fundamental error of law in the order of the Federal First Instance Court. The provisional order which is the subject of this petition is the order of the Federal First Instance Court which gave injunction against the sale, transfer or exchange of the private car of the petitioner so that the car would serve as a security for the payment of maintenance for children until the latter reach the age of majority. The petition is submitted to the Cassation Bench since the provisional order of the court was also confirmed by the Federal high Court.

The legal counsel of the petitioner submitted a cassation petition dated May 19, 2009 alleging the existence of fundamental error of law in the decisions of the lower courts. The Cassation Bench decided to look into the matter further and the respondent also submitted his reply dated January 6, 2010 to the cassation petition. The counsel of the petitioner also adduced his counter-reply dated January 25, 2010. The Cassation Bench undertook oral examination of the parties. The Bench examined the matter in the light of pertinent provisions of the law.

The petitioner is opposed to the injunction order of the lower court against his private car barring him from selling, transferring or exchanging until the children attain the age of 18 years old. He contended that this would prevent the petitioner from selling his car for the purpose of settling other debts from the proceeds of the sale. The Cassation Bench asked the petitioner if he is in a position to deposit the total amount of money needed for the maintenance of the children in cash. However, the petitioner explained that he is only capable of depositing money to the tune of 3 or 4 months maintenance for the children and not able to deposit the total amount of money needed to ensure the maintenance of the children until they reach the age of majority. The Cassation Bench noted that the amount of monthly maintenance determined by the court is 450 birr. It went

³⁷⁴ Hodgkin and Newell (n 3) 394

on to state that it is not possible to say that this amount would remain adequate to cover costs of the maintenance in the future as circumstances might change. Therefore, the issuance of the provisional order given in relation to the car as a security to guarantee future payments of maintenance is necessary in conformity with the rules of the Revised Family Code relating to maintenance and the constitutional rights of the child. It is not therefore possible to state that the order of the court suffers from a fundamental error of judgment. Thus, the Cassation Bench also confirmed the decision of the lower courts.

CHAPTER SEVEN

EDUCATION, LEISURE AND CULTURAL ACTIVITIES

Introduction

This Chapter focuses on the child's right to education. The Chapter also explores the aims of education as enshrined in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Chapter proceeds with the consideration of the child's right to leisure, play and culture.

7.1. *Child's Right to Education*

Article 28 of the CRC affirms the right of the child to education. The Convention demonstrates that the right to education is a core minimum right and an engine for economic growth. The provision mirrors Article 26 of the Universal Declaration of Human Rights and Article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights. Achievement of universal primary education is also one of the eight Millennium Development Goals.

"Education" refers to the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge."³⁷⁵ Likewise, the definition of the term "education" in the Convention is not confined to instruction delivered within schools.³⁷⁶

It stipulates that the right to education should be achieved "on the basis of equality." The provision "on the basis of equal opportunity" points to the need for measures to prevent discrimination in access to education. The proviso "on the basis of equal opportunity" is the specific manifestation of the general principle of non-discrimination reflected in Article 2 of the CRC. The underlying cause of absence equality of opportunity in terms of access to education is the lack of resources.³⁷⁷ Lack of resources in turn is imputed to low government budget or poverty of families forcing children outside the purview of the education services.³⁷⁸ Girls,

³⁷⁵ The Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms, adopted by the General Conference of UNESCO at its 18th session (November 1974) Article 1(a)

³⁷⁶ Hodgkin and Newell (n 3) 394

³⁷⁷ Sharon Detrick (n 19) 471

³⁷⁸ Hodgkin and Newell (n 3) 413

children with disabilities, children belonging to ethnic, religious and linguistic minorities and indigenous groups are more vulnerable to discrimination in access to education.³⁷⁹

Like the case of most economic, social and cultural rights, the right to education is to be implemented “progressively” as indicated in Article 28 of the CRC. The flexibility device of “progressive implementation” is inserted with acknowledgement of the fact that States may lack the resources to ensure that education is accessible to all children.³⁸⁰ In particular, States may find it difficult to ensure that secondary and higher education is available to all.³⁸¹ The provision obliges States to develop and adopt plans for the progressive provision of education “to the maximum extent of available resources.”³⁸² Regardless of this, the provision decidedly stipulates that primary education must be free and compulsory as a minimum core obligation. However, the duty to provide access to secondary education is recognized, in general programmatic terms, but no reference is made to pre-primary education.

Articles 28(1) (a) to (e) specify detailed obligations imposed upon States Parties in relation to the right to education. Article 28(1) (a) stipulates that “free” education at the primary level is a core minimum that States Parties must be obligated to fulfill for all children. The Committee on Economic, Social Cultural Rights also reinforced this obligation as follows:

“The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category.”³⁸³

Articles 28(1) (b) requires States Parties to encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free

³⁷⁹ Sharon Detrick (n 19) 475

³⁸⁰ Hodgkin and Newell (n 3) 412

³⁸¹ Hodgkin and Newell (n 3) 412

³⁸² Sharon Detrick (n 19) 476

³⁸³ Committee on Economic, Social and Cultural Rights, General Comment No.11, 1999, HRI/GEN/1/Rev. 8, para. 7, p.62

education and offering financial assistance in case of need. Thus, this provision does not impose free compulsory secondary obligation as this is beyond the capacity of many countries.³⁸⁴ Despite this, secondary education should also be available and accessible. The term “accessibility” has three elements. These are non-discrimination, physical and economic accessibility.³⁸⁵ Physical accessibility suggests that education must be available within a safe physical reach at some convenient geographical location or through modern technology including distance education.³⁸⁶ Economic accessibility implies that education has to be affordable to all.³⁸⁷

Article 28(1) (c) provides for higher education to be made available “on the basis of capacity.” Regardless of the fact that higher education is mostly pursued after the lapse of “childhood”, the CRC has opted to consider this as an integral part of children’s rights. Article 28(1) (d) stipulates that States Parties make educational and vocational information and guidance available and accessible to children. On the other hand, Articles 28(1) (e) obliges States Parties to take measures to ensure regular attendance at schools and the reduction of drop-out rates. This provision is vital as it requires the proactive engagement of States than simply requiring them to channel resources.³⁸⁸

Article 28 requires States Parties to ensure that schools are attractive and that school discipline respects the rights of the child. This should be considered in conjunction with provisions in the Convention which prohibit corporal punishment, however light. Thus, disciplinary measures used in schools must be consistent with the child’s human dignity. Likewise, Article 36(1)(e) of the FDRE Constitution stipulates that every child has the right to be free from corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children. This provision clearly implies the constitutional prohibition in the school system of corporal punishment and other forms of degrading and humiliating treatment.

Moreover, Article 28 calls for the promotion of international cooperation in education, particularly taking account of the needs of developing countries.

³⁸⁴ Hodgkin and Newell (n 3) 422

³⁸⁵ Hodgkin and Newell (n 3) 423

³⁸⁶ Sharon Detrick (n 19) 480

³⁸⁷ Hodgkin and Newell (n 3) 423

³⁸⁸ Sharon Detrick (n 19) 482

The Ethiopian Constitution includes the rights of all children to education. In order to realize its educational objectives, the Government introduced a new Education and Training Policy and an Education Sector Strategy in 1994. Moreover, in 1997 the government developed a twenty-year Education Sector Plan, which is divided into a series of five-year Education Sector Development Programs (ESDP).

Pre-primary education level normally includes children of ages 4-6 enrolled in the pre-primary education. The government is currently exerting effort to developing curriculums, training teachers, and providing supervisory support and more recently, developing an integrated policy framework and Early Childhood Care and Education (ECCE) monitoring tools.³⁸⁹ Alternative Basic Education (ABE) is also provided for children for, in particular, pastoralist and semi-pastoralist areas of the country.³⁹⁰

7.2. The Aims of Education

Article 29 of the CRC outlines the fundamental purposes of education. Article 26 of the Universal Declaration on Human Rights (UDHR) asserts that education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms. It goes on to state that education shall promote understanding, tolerance and friendship among all nations, racial or religious groups. Educations should also be designed with a view to pursue the objectives of the United Nations. Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also mirrors the same purposes outlined in the UDHR.

However, Article 29(1) of the CRC is distinctive from the aforementioned counterpart provisions in the UDHR and ICESCR. To begin with, Article 29(1) is more detailed on the aims of education. Moreover, the CRC does not make any specific reference to parent's rights to choose their children's school and to ensure children's education is in conformity with the parent's religious and moral orientation which were reflected in earlier instruments including the ICCPR

³⁸⁹ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011) p.46

³⁹⁰ Ethiopia's 4th and 5th Periodic Reports to the United Nations Committee on the Rights of the Child (2006-2011) p.46

and ICESCR.³⁹¹ Regardless of their recognition in Article 28 of the CRC, parental rights operate only within the framework of the child's own interests and freedoms.³⁹²

The principal objectives of education as discussed in Article 29 (1)(a)-(e) read as follows:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for human the natural environment.

Article 29(2) provides for the rights of individuals and groups to arrange their own forms of education on condition that these are compatible with the aims of education, respect other rights of the children, the Convention and meet any national minimum standards.

Similarly, the Education and Training Policy of Ethiopia provides that the objectives of education include:

- Bringing up citizens who respect human rights, stand for the well being of peoples as well as for equality, justice and peace endowed with democratic culture and discipline;
- Providing education that promotes democratic culture, tolerance and peaceful resolutions of differences and that raises the sense of discharging societal responsibility;
- To recognize the rights of nation/nationalities to learn in their language, while at the same time providing one language for national and another one for international communication.

³⁹¹ Hodgkin and Newell (n 3) 438

³⁹² Sharon Detrick (n 19) 504

7.3. *Child's Right to Leisure, Play and Culture*

Article 31 of the CRC assures the right of the child the right to leisure, play and culture. It covers the rights of the child to rest, to engage in recreational activities and to participate in cultural and artistic life. Though the words “rest”, “leisure”, “play” and “recreational activities” appear to convey the same message, varying meanings have been ascribed to them. “Rest” refers to the basic necessities of physical or mental relaxation and sleep.³⁹³ Rest is very important for the development of the child as is nutrition, housing, health care and education.³⁹⁴ Lack of rest interferes with the ability of children to learn and makes them susceptible to illness.³⁹⁵ This implies that children should have enough time to sleep and relax. This is in particular crucial for working children.

“Leisure” implies having the time and freedom to do as one pleases.³⁹⁶ “Play” means children’s activities which are not controlled by adults and which do not necessarily conform to any rules.³⁹⁷ Thus, play is unstructured and free from adult direction.³⁹⁸ “Recreational activities” embodies the whole range of activities carried out by choice for the purpose of pleasure.³⁹⁹ Recreational activities include sports, performing and creative arts, etc. Play and recreational activities have one thing in common i.e. they are not compulsory.⁴⁰⁰ These activities contribute a great deal to children’s physical and psychological health.⁴⁰¹ Play and recreational activities afford the child the opportunity to develop life skills such as negotiation, sharing and self-control, etc.⁴⁰² To this effect, children need to be provided with safe, accessible space.⁴⁰³

The right to play has sometimes been dubbed as the “forgotten right” due to the little attention to it by adults and the tendency to consider it as mere luxury.⁴⁰⁴ However, rest, leisure, play and

³⁹³ Hodgkin and Newell (n 3) 469

³⁹⁴ Sharon Detrick (n 19) 546

³⁹⁵ Hodgkin and Newell (n 3) 470

³⁹⁶ Hodgkin and Newell (n 3) 469

³⁹⁷ Sharon Detrick (n 19) 546

³⁹⁸ Hodgkin and Newell (n 3) 471

³⁹⁹ Hodgkin and Newell (n 3) 469

⁴⁰⁰ Sharon Detrick (n 19) 546

⁴⁰¹ Hodgkin and Newell (n 3) 471

⁴⁰² Hodgkin and Newell (n 3) 471

⁴⁰³ Sharon Detrick (n 19) 546

⁴⁰⁴ Hodgkin and Newell (n 3) 469

recreational activities are essential parts of development of children.⁴⁰⁵ Lack of play deprives children of important social and personal skills.⁴⁰⁶ Article 31 also underscores the right of children to have access to their cultural and artistic events and partake in them.⁴⁰⁷ This implies that children should be given opportunity to participate in the cultural and artistic pursuits of adults. The provision implies that children are given the opportunity to actively engage in producing cultural activities. Furthermore, children should not be prevented from performances without good cause, for instance, because of potential harm to them.⁴⁰⁸

⁴⁰⁵ Hodgkin and Newell (n 3) 469

⁴⁰⁶ Sharon Detrick (n 19) 546

⁴⁰⁷ Hodgkin and Newell (n 3) 469

⁴⁰⁸ Hodgkin and Newell (n 3) 473

CHAPTER EIGHT

SPECIAL PROTECTION MEASURES

Introduction

Chapter Eight dwells on special measures of protection that need to be implemented in relation to specific category of children. These are further divided into four as children in situations of emergency. Secondly, the Chapter focuses on children in conflict with the law. Thirdly, the Chapter looks into international and national standards relating to children in situations of exploitation. Finally, the Chapter focuses on international standards relating to children belonging to ethnic, religious and linguistic minorities and indigenous groups.

8.1 *Children in Situations of Emergency*

8.1.1 Refugee Children

Article 22 of the CRC stipulates the rights of refugee and asylum-seeking children to appropriate protection and humanitarian assistance. This includes tracing of family members. Refugee and asylum-seeking children are entitled to the rights enshrined in the Convention on the Rights of the Child. In particular, refugee and asylum-seeking children are entitled to the right to nationality and family relations, protection from separation from parents, right to family reunification, entitlement not to be deprived of family environment, protection from trafficking and deprivation of liberty.

The 1951 Convention Relating to the Status of Refugees defines a refugee as a person who fled his country of origin or habitual residence owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of his country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” The Convention definition applied to persons who became refugees before 1 January 1951, in other words who were refugees because of World War II and events after that. It soon became apparent, however, that new refugee movements were occurring, which were totally unrelated to the post war period in Europe. The 1967 Protocol formally excluded such restrictions, giving a universal dimension to the Conventions provisions.

The OAU refugee definition has two parts. The first repeats the definition of the 1951 Convention. The second part goes further. It covers any persons compelled to leave his or her country “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality”. The 2004 Ethiopian Refugee Proclamation incorporated refugee definition from both the 1951 Convention and the 1969 African refugee convention verbatim. Article 4 of the Proclamation adopted a combined definitions of refugees given by the above two instruments. The 1951 convention refugee definition has been considered to be too restrictive. The 1969 OAU definition on the contrary has been hailed to be inclusive. The fact that the Ethiopian Refugee Proclamation combines the two definitions suggests an enormous interest on the part of Ethiopia to be more accommodative and more open to the plights of refugees.

The Ethiopian Refugee Proclamation also asserts that there must not be procedural irregularities in Refugee Status Determination (RSD).⁴⁰⁹ Such irregularities include the lack of oral hearings, decision solely based on paper applications by an administrative or police officer who interviewed the refugee, the lack of translation and interpretation services, the lack of written notifications of decisions, the lack of access to legal aid and advice, delays in receiving decisions, lack of judicial review of rejected asylum applications, lack of appropriate body to consider the appeal and the imposition of prohibitive costs.

Interviews and hearings conducted with children, accompanied or unaccompanied, needs to be carried out in a child friendly environment.⁴¹⁰ Children should be given access to appeal and they should be given adequate representation, translation and interpretation services.⁴¹¹

Internally Displaced children are not specifically protected under the CRC, since they do not fall within the definition of the term “refugee”. However, the plight of internally displaced children is the same with that of refugee children.⁴¹² The first element of the 1951 Convention relating to the Status of Refugees is that the claimant must be outside of his or her country of origin. Many if not most of the persons forced to flee their homes in search of safety remain within the

⁴⁰⁹ Refugee Proclamation (Proclamation 409/2004)

⁴¹⁰ Committee on the Rights of Children, General Comment No.6, 2005, (CRC/GC/2005/6, para. 73

⁴¹¹ Committee on the Rights of Children, General Comment No.6, 2005, (CRC/GC/2005/6, para. 73

⁴¹² Hodgkin and Newell (n 3) 311

boundaries of their state. Thus, internal refugees are excluded from the definition of refugees with the meaning of the Convention and the Protocol. These are called Internally Displaced Persons (IDPs). The UN guiding Principles on Internal Displacement adopted by the then Commission on Human Rights in 1998 defines IDPs as:

Persons or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters and who have not crossed an internationally recognized state border.

Due to their situation, refugee and internally displaced children are highly vulnerable to sexual abuse and military recruitment.⁴¹³ Thus, States Parties have legal and moral obligations to protect these children. In particular, it is incumbent upon States Parties to protect refugee and internally displaced children from separation from families and care givers, sexual exploitation as well as military recruitment.⁴¹⁴

Article 23 of the 1951 Convention Relating to the Status of Refugees also obligates States Parties to accord to refugees lawfully staying in their territory national treatment i.e. the same treatment with respect to public relief and assistance as is accorded to their nationals. Article 22 of the same Convention accords the same treatment to refugee children and asylum-seeker children. Thus, the treatment required is to be afforded to children even if they are not granted refugee status in so far as they remain within the jurisdiction of the State Party.

Refugee and internally displaced children should be provided with appropriate education, health and welfare services.⁴¹⁵ Article 37(b) of the CRC provides that the detention of refugee children should be used as a measure of last resort and for the shortest appropriate period of time. The Convention also requires States Parties to provide appropriate cooperation with the United Nations and specialized agencies, particularly, The United Nations High Commissioner for Refugees (UNHCR), in their efforts to address the plight of refugee and internally displaced children.

⁴¹³ Sharon Detrick (n 19) 361

⁴¹⁴ Hodgkin and Newell (n 3)313

⁴¹⁵ Hodgkin and Newell (n 3)313

Article 22 of the CRC also imposes the obligation on States Parties to trace parents or other members of the family of any refugee child in order to obtain information necessary for reunification. This is aimed at preserving and restoring the child's family unity. Reunification of the child may take place within the country of origin of the child, in the country where the child is seeking asylum or through resettlement in a third country.⁴¹⁶

The CRC states that in cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason. Moreover, the State Party is required to facilitate durable solutions for refugee and internally displaced children.

8.1.2 Protection of Children affected by Armed Conflict

Article 38 of the CRC dwells on protection of children affected by armed conflict. Article 38(1) requires States Parties to respect and ensure the rules of international humanitarian law (IHL) applicable in times of armed conflicts relevant to the child. These are in particular embodied in the 1949 four Geneva Conventions and the 1977 two Additional Protocols. The strict observance of the principles of necessity, humanity, distinction, proportionality and precaution afford children much needed protection in cases of armed conflicts of both international and non-international character. Article 38 implies that States should make efforts to secure the rights of children within their jurisdiction in times of armed conflict and that the principles enshrined in the CRC are not subject to measures of derogation.

Article 38(2) also requires states to ensure that children who have not attained the age of 15 do not take direct part in hostilities. Article 38(3) calls for States Parties not to recruit children who have not yet attained the age of 15 into the armed forces and give priority to the oldest when recruiting children between the age ranges of 15 to 18. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict entered into force in 2002. Pursuant to this Protocol, States are required to take all feasible measures to ensure that under 18-year-olds do not take a direct part in hostilities and to ensure that they are not compulsorily recruited. The Optional Protocol also raises the age of recruitment of children into armed forces to 16 from the age of 15 in Article 38 of the CRC. Article 8 of the Rome Statue of

⁴¹⁶ Sharon Detrick (n 19) 366

the International Criminal Court makes the conscription and enlisting of children below the age of 15 a war crime.

Moreover, Article 38(4) requires States Parties to take all feasible measures to ensure the protection and care of children affected by an armed conflict. Article 4 of Defence Forces Proclamation (Proclamation No. 27/1996) provides that the Ministry of Defence of the country may recruit persons and fit and willing for military services in accordance with criteria periodically issued. However, the proclamation does not stipulate any minimum age for enlistment, recruitment in to armed forces and for direct participation in hostilities. National recruitment guidelines specify recruits must be at least 18.

8.1.3. Rehabilitation of Child Victims

Article 39 of the CRC dwells upon rehabilitation of child victims. It requires States Parties to take measures to assist child victims. The provision mentions various categories of child victims including child victims of any form of violence, neglect, exploitation or abuse, torture or any other form of cruel, inhuman and degrading treatment or punishment as well as victims of armed conflicts.

Article 39 stipulates that recovery and reintegration of child victims should take place in an environment enhancing the health, self-respect and dignity of children. Rehabilitation and recovery of child victims must be available based on the principle of non-discrimination. Rehabilitation must also be geared towards ensuring the best interests of the child. Furthermore, the services should promote the right of the child to life, maximum survival and development. The participatory rights of child victims need to be given due attention in the course of planning and implementation of rehabilitation and recovery. Article 39 is closely linked with various provisions of the CRC including health rights as enshrined in Article 24 of the Convention.⁴¹⁷ Rehabilitation and recovery of child victims has also been buttressed in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which was adopted in 2000.

⁴¹⁷ Sharon Detrick (n 19) 666

Child victims are entitled to protective services. Protective services aim to prevent, respond to, and resolve the abuse, neglect, exploitation and violence experienced by children in all settings. They include, for example, medical, psychosocial and legal support to victims of violence and abuse; fostering and adoption of orphans; outreach work with street children and children with disabilities to help them access livelihood, education and other support, awareness-raising and livelihood support to prevent unsafe child migration and trafficking; reuniting separated children with their families; reintegrating child soldiers and other children associated with fighting forces into their communities; establishing community care committees and other local services to help identify vulnerable children and help them to access support; income and other support to parents to enable them to provide and care for their children in a safe family environment.

Child victims should also be given reintegration assistance, free basic education or vocation training. Efforts must be made to ensure that child victims must not be further victimized by stereotyping them as vagrants, prostitutes, migrants or runaways.⁴¹⁸

8.2. *Children in Conflict with the Law*

8.2.1 Administration of Child Justice

Article 40 of the CRC focuses on administration of child justice. It enunciates the rights of children alleged, accused or recognized as breached the Criminal Code. It covers different stages of the administration of justice including investigation, arrest, charge, pre-trial period, trial, sentencing and post trial stage.

The stipulation in Article 40 mirrors Article 14(4) of the International Covenant on Civil and Political Rights, which provides that in case of juvenile persons, the procedure shall be such as will take account of the age and desirability of promoting the rehabilitation of children in conflict with the law. The implementation of Article 40 must be informed by soft law principles including:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty;

⁴¹⁸ Hodgkin and Newell (n 3) 591

- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);
- Guidelines for Action on Children in the Criminal Justice System; and
- Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.

It is to be recalled that Article 36(2) of the FDRE Constitution requires that the best interests of the child is considered as the primary consideration in all actions affecting children. Needless to say, the principle of the best interest of the child is also applicable in the administration of justice for children who come into contact with the law. It follows that the police, courts of law, corrective institutions must make observance of the best interests of the child their basic concern.

8.2.1.1. Categorizations of children in Conflict with the Law under the Ethiopian Criminal Code

The Criminal Code provides different categorizations of children for a variety of reasons. Article 40 (3) (a) also requires States Parties to raise the minimum age of criminal responsibility to acceptable level. Article 52 of the Criminal Code provides that infants who have not attained the age of nine years shall not be deemed to be criminally responsible. It goes on to State that the provisions of the Criminal Code shall not apply to this categorization of children referred to as infants by the Code. The Code goes on to provide that appropriate steps may be taken by the family, school or guardianship authority in the event where a crime is committed by an infant.⁴¹⁹ States Parties have been urged to raise the age of criminal responsibility to a minimum of 12 years.⁴²⁰ Age limits falling below this are said to be unacceptable internationally.⁴²¹ Consequently, the Committee on the Rights of the Child urged Ethiopia to raise the minimum age of criminal responsibility.

The Criminal Code provides that children with the range of 9 up to 15 years are not immune from criminal responsibility. Article 53(1) of the Criminal Code provides that the penalties and measures to be imposed by the courts shall be only those specified under Articles 157-168 of the Code where a crime is committed by young person between the ages of nine and fifteen.⁴²² The provision goes on to state that young persons shall not be subject to the ordinary penalties

⁴¹⁹ Criminal Code, Article 52

⁴²⁰ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

⁴²¹ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

⁴²² Criminal Code, Article 53

applicable to adults nor shall they be kept in custody with adult criminals. Article 53(2) of the Code makes it clear that the measures and penalties envisaged under Article 158-168 will not be applicable unless the child is first found guilty of the offence.

Similarly, Article 36(1)(e) of the FDRE Constitution has provided the right of the child to be protected from corporal punishment in institutions. Article 36(3) of the FDRE Constitution stipulates that juvenile offenders admitted to corrective or rehabilitative institutions and juveniles who become wards of the state or who are placed in public or private orphanages shall be kept separately from adults.

On the other hand, Article 56(1) of the Criminal Code stipulates that “if at the time of the commission of the crime, the criminal was over fifteen but under eighteen years of age, he shall be tried under the ordinary provisions of the Code.” Article 56(2) goes on to provide that the court may take into account the circumstances of the case including the age of the criminal, his incorrigible or dangerous disposition and the likelihood of his reform in assessing sentence. The provision entitles the court to apply either the general provisions regarding ordinary mitigation of penalties or apply one of the special measures specified for young persons. This provision implies that, save some exceptions, children between the age ranges of 15 up to 18, are treated as adults under the Criminal Code. This position taken by the Criminal Code has prompted the Committee on the Rights of the Child to call upon Ethiopia to ensure that children aged 15 to 18 years are accorded the protection of child justice provisions and are not treated as adults.⁴²³

8.2.1.2. Minimum Judicial Guarantees for Children in Conflict with the Law

Article 40(2) of the Convention sets out the minimum judicial guarantees of the right to a fair trial that must be observed in cases of children alleged to be in conflict with the law. Before all things, children who come in to contact with the law are entitled to the same protection accorded to adults. Moreover, children who come in to contact with the law are entitled to differential treatment on account of their needs for special safeguards. Article 40(2) (a) stipulates that no child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time

⁴²³ Committee on the Rights of the Child, Concluding Observations, ETHIOPIA crc/c/15/Add. 1434, para. 29

they were committed. Consequently, the inclusion of “status” offences such as vagrancy, truancy, running away and the like are frowned upon.⁴²⁴

Article 40(2) (b) goes on to outline minimum guarantees accruing to every child alleged as or accused of having infringed the penal law. The list commences with the minimum guarantee of the presumption of innocence. Article 20(3) of the FDRE Constitution provides that “during proceedings accused persons have the right to be presumed innocent. The protection outlined in Article 40 is further complemented by guarantees under Article 37 of the CRC. As discussed earlier, Article 37 prohibits the imposition of death penalty and life imprisonment without possibility of release. Article 37 also requires that resort to measures involving the deprivation of liberty should be measures of last resort and should be used for the shortest appropriate period of time.

Article 40(2) (b) (ii) asserts the right of the child to be informed promptly and directly of the charges against him or her. Article 19(1) of the FDRE Constitution provides the right to be promptly informed of reasons for arrest and detention and of any charges against oneself. The same provision also affirms the right of the child to have legal or other appropriate assistance in the preparation and presentation of his or her defence. Article 40(2) (b) (iii) provides the right of the child to be tried without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law. Article 20(1) of the FDRE Constitution provides the right to be tried by an independent and impartial tribunal as follows:

“Accused persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged. The court may hear cases in closed sessions only with a view to protecting the right to privacy of the parties concerned, public morals and national security.”

The provision also affirms the right of the child to be tried in the presence of legal or other appropriate assistance unless this is deemed to be in his or her best interests. Article 21(2) of the FDRE Constitution provides as follows:

⁴²⁴ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

“All persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councilors, medical doctors and their legal counsel.”

The right of the child not to be compelled to give testimony or confess guilt is enshrined under Article 40(2) (b) (iv). Article 19(5) of the FDRE Constitution entitles the person arrested not be compelled to make confessions or admissions which could be used in evidence against them.

The right of the child to equality of arms, in particular, to the right to confront or cross-examine adverse witnesses is laid down in the same proviso. Article 20(4) of the FDRE Constitution provides as follows:

“Accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defence, and to obtain the attendance of and examination of witnesses on their behalf before the court.”

The right to appeal is also stated in Article 40(2) (b) (v) of the CRC. Article 20(6) of the FDRE Constitution provides that persons accused have the right of appeal to the competent court against an order or a judgment of the court which first heard the case.

The entitlement of the child to have the free assistance of an interpreter is stipulated in Article 40(2) (b) (vi) of the CRC. Article 20(7) of the FDRE Constitution provides that persons accused have the right to request for the assistance of an interpreter at state expense where the court proceedings are conducted in a language they do not understand.

The right of the child to respect for privacy is also reflected in Article 40(2) (b) (vii). Article 26 of the FDRE Constitution provides that everyone has the right to privacy. The provision goes on to state that the right shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession.

Strategies and policies concerning the incidence of children coming into contact with the law should be predicated on prevention.⁴²⁵ United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) also calls for priority must be measures of prevention.⁴²⁶ This in turn calls for appropriate socialization and integration of children.

Article 40(3)(b) highlights interventions not involving judicial proceedings.⁴²⁷ It provides for diversion i.e. measures for dealing with children who may have contravened the Criminal Code without resorting to judicial proceedings. This is indicative of the fact that the Convention promotes diversion and restorative justice.⁴²⁸ Diversion is in particular advisable in case of children coming into contact with the law for the first time.⁴²⁹

8.2.1.3. Assessment of Penalties and Measures

Article 54 of the Criminal Code concerns itself with expert evidence and enquiry that the court must consider in assessing sentencing in the case of young criminals. Article 54(1) of the Code states that the court may require information about the conduct, education, position and circumstances of the young person found guilty for the purpose of assessing sentence. The court may also examine the parents, the representatives of the school, guardianship authorities of the child and concerned institutions. These individuals and institutions may be asked by the court to produce any files, particulars, medical and social reports in their possession concerning the young person and his or her family.

Article 54(2) of the Criminal Code also stipulates that the court may order the convicted young person to be kept under observation in a medical or education center, a home or any other suitable institution. Moreover, the court may also require the production of expert evidence regarding the physical and mental condition of young person. The court may examine expert evidence as regards what treatment and measures of an educational, corrective or protective kind would be most suitable in the circumstances of the case.

⁴²⁵ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

⁴²⁶ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

⁴²⁷ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

⁴²⁸ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

⁴²⁹ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

Article 55 of the Criminal Code also provides that the court shall take into account the age, character, degree of mental and moral development of the convicted young person and the educational value of the penalties or measures in assessing sentencing or measures. The same provision entitles the court to vary its orders in light of Article 164 of the Criminal Code. Article 164 of the Code supports variation of orders concerning penalties or measures when this proves to be beneficial to the convicted young person.

Measures

The Convention encourages States Parties to provide a variety of alternative dispositions to institutional care. Article 40(4) of the CRC stipulates that a variety of dispositions, such as care, guidance and supervision orders, counseling, probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate care both to their circumstances and the offence.

The Criminal Code provides a variety of measures and penalties to be applied to young persons in view of the special purposes elaborated under its Article 55. The court needs to have secured all the necessary inquiries and evidence to inform its determination of measures and penalties. The guiding philosophy of measures and penalties is that of rehabilitative and not punitive.

It is possible to categorize these measures into two broad categories. These are institutional and non-institutional measures. Institutional measures are those administered in a closed environment, whereas non-institutional measures are those measures taking place in a free environment. The non-institutional measures include admission to a curative institution (Article 158), supervised education (Article 159), reprimand or censure (Article 160), school or home arrest (Article 161) and admission to a corrective institution (Article 162).

Penalties

On the other hand, Article 166 of the Criminal Code provides that the court may impose penalties only if the measures outlined under Article 158-162 have been applied but failed. The penalties envisaged under the Criminal Code on convicted young persons are much lenient as compared to counterpart penalties for the same offences when committed by those children with the age group of 15 up to 18 and adults. These penalties include fine (Article 167) and imprisonment (Article 168). The penalty of fine may be imposed if the convicted young person is capable of paying and realizing the purpose of its imposition. Imprisonment of convicted young person can be authorized by the court if he or she has committed a serious crime which is normally punishable with a term of rigorous imprisonment of 10 years or more or with death penalty.

8.2.1.4. Procedure in Cases involving Children in Conflict with the Law

Article 40 calls for a distinctive child-oriented restorative justice system concerning children in conflict with the law based on international standards.⁴³⁰ It stipulates that the fundamental objectives of this distinctive system of justice should be positive and not punitive.⁴³¹ Moreover, administration of child justice must be carried out in accordance with the four leading cardinal principles of the CRC.⁴³² This in turn requires the establishment of specialized, trained units within the police, the judiciary, court system and prosecutor's office, and specialized representatives to provide legal and other assistance to the child.⁴³³

Accordingly, Article 171 of the Criminal Procedure Code provides that children in conflict with the law shall be tried pursuant to the special procedure established under the Third Chapter of the Code. Article 3 of the Criminal Procedure Code defines "a young person" as a person between the ages of nine and fifteen years. By virtue of Article 172(3) of the Criminal Procedure Code, prosecution of a young person must first be authorized by the court to which the child is summoned. The court may authorize the public prosecutor to frame charges against the young person only if the accusation relates to an offence punishable with rigorous imprisonment

⁴³⁰ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

⁴³¹ Hodgkin and Newell (n 3) 602

⁴³² Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, **para. 3**

⁴³³ Committee on the Rights of the Child, General Comment No.10, 2007, CRC/C/GC/10, para. 3

exceeding ten years or with death. It is this feature that makes the prosecution of young persons far removed from the prosecution of children between the age ranges of 15-18 or adults.

The Code also stipulates a special approach regarding the institution of proceedings in cases of children in conflict with the law. As per Article 172 of the Civil Procedure Code a child in conflict with the law shall be taken immediately to the nearest *Woreda* court. Those entitled to take the child to court are only the police, the public prosecutor, the parents or guardians or the complainant. The act of taking of the child to court must take place immediately meaning, at the earliest possible moment. Such a requirement of urgency is presumably to avoid the custody of the child at the hands of the police or other persons.

Once a child in conflict with the law is brought before the court, the court asks the person who brought the young person to state the particulars of the alleged offence and witnesses (if any). Under normal circumstances, a formal complaint is not necessary in case of child in conflict. However, the court may ask such a person to make a formal complaint.

The principal special procedure in child justice administration cases is that it is the court which issues the police instructions concerning the manner of investigation. Simply put, the police are not free to determine the conduct of investigation. In other words, the police are not in a position to apply Articles 22 and following of the Criminal Procedure Code which govern the process of police investigation in ordinary criminal cases.

Another important peculiar aspect of the procedure involving child justice administration is that no framing of charge is necessary. Framing of charge is not permitted except in cases where the accusation relates to an offence punishable with rigorous imprisonment exceeding 10 years or with death and even in such cases the public prosecutor must be instructed by the court to frame a charge as mentioned earlier. The provisions regulating charge do not apply to young persons unless a court order is made as per Article 179 of the Criminal Procedure Code. Moreover, Article 40(2) of the Criminal Procedure Code states that the public prosecutor shall not institute proceedings against a young person unless instructed so to do by the court as per Article 172 of the same code.

The child suspect of being in conflict with the law may not be handed over to the police. Instead, Article 172(4) of the Criminal Procedure Code stipulates that he or she shall be handed over to

the care of his parents or guardian or relative or in their default to a reliable person who is going to be responsible for ensuring the attendance of the juvenile at trial. At the time when the young person is brought before the court if no parent, guardian or other person in place of parents is present, the first step the court has to take is to inquire the existence or accessibility of such person and if the answer is in the affirmative then it shall summon such person to appear without delay.

Trial of Children in Contact with the Law

Children in conflict with the law are entitled to *camera hearing* as provided under Article 176 of the Criminal Procedure Code. The provision requires that all the proceeding shall be held in chambers and the persons who are allowed to attend the proceedings are limited to witnesses, experts, parents or guardians or representatives of welfare organization. Article 176 prohibits the public prosecutor to be present in hearings involving children in conflict with the law unless it is hearing taking place in the high court. Moreover, the law requires that hearings involving children in conflict with the law must be conducted in an informal manner as this is provided Article 76(2) of the Criminal Procedure Code. This is aimed at ensuring, among others, that the child feels at ease in the court room and not intimidated. In the event the child pleads not guilty, examination of witnesses shall be conducted by the court as stipulated in Article 176 (6) of the Criminal Procedure Code.

8.2.2. Torture, Degrading Treatment and Deprivation of Liberty

Article 37 of the CRC prohibits the infliction of acts of torture, other cruel, inhuman or degrading treatment or punishment, capital punishment, life imprisonment without possibility of release and unlawful or arbitrary deprivation of liberty.⁴³⁴ The provision mirrors comparable entitlements in Article 5 of the Universal Declaration of Human Rights (UDHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) as well as the International Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT).

⁴³⁴ Sharon Detrick (n 19) 619

In addition, Article 37 stipulates basic considerations that must be taken into account in the treatment of children deprived of liberty. Thus, it obligates States Parties to ensure that children deprived of liberty be treated with humanity and respect for the inherent dignity of the human person, taking into account the needs of persons of his or her age. The provision stipulates that children should be separated from adults unless it is believed to be in their best interests and to maintain contact with his or her family through correspondence and visits subject to exceptional circumstances. Children deprived of liberty are also entitled to prompt access to legal and other appropriate assistance and the right to challenge the legality of the measure of deprivation of liberty before a court or other competent, independent and impartial authority. Moreover, children have the right to a prompt decision on such action.⁴³⁵

The scope of application of Article 37 is not confined to children in conflict with the law. The conditions of treatment are also applicable in cases of children deprived of liberty due to other concerns including welfare, mental health and also in connection with asylum-seeker and refugee children.⁴³⁶ Article 37 should be considered in relation to Article 39 which assures the right of victims of torture, and other forms of cruel, inhuman, degrading treatment or punishment recovery, rehabilitation and reintegration.

The prohibition in Article 37 of torture, and other cruel, inhuman, degrading treatment or punishment is taken up by Article 19 of the CRC, which stipulates that States Parties are obliged to take legislative, administrative, judicial, social and educational and other measures to prevent violence against children. The prohibition of all forms of physical and mental violence against children in Article 19 leaves no room for any level of legalized violence against children.⁴³⁷ By necessary implication, corporal punishment constitutes violence against children.⁴³⁸ Therefore, the distinction maintained by certain countries including Ethiopia between acceptable and unacceptable forms of corporal punishment is not legally mandated by the Convention.⁴³⁹

Article 37(a) prohibits the imposition of capital punishment on children. This provision is intertwined with the principle of life and maximum survival and development enshrined under

⁴³⁵ Hodgkin and Newell (n 3) 548

⁴³⁶ Sharon Detrick (n 19) 620

⁴³⁷ Committee on the Rights of the Child, General Comment No.8, 2006, CRC/C/GC/8, paras. 2, 16 and 18

⁴³⁸ Committee on the Rights of the Child, General Comment No.8, 2006, CRC/C/GC/8, paras. 2, 16 and 18

⁴³⁹ Committee on the Rights of the Child, General Comment No.8, 2006, CRC/C/GC/8, paras. 2, 16 and 18

Article 6 of the CRC. The prohibition of the imposition of death penalty on persons who have not attained the age of 18 mirrors the same protection enunciated under Article 6(5) of the ICCPR. For a stronger reason, Article 37 also denounces extrajudicial executions of children.

Similarly, Article 37(a) also prohibits the imposition of life imprisonment without the possibility of release for offences committed by persons below the age of 18. This prohibition must also be viewed from the point of view of Article 37(b) which stipulates that detention of children should be seen as a *measure of last resort and for the shortest appropriate time*. This proviso requires that measures involving deprivation of liberty must be legally mandated and must not be arbitrary.

In the same vein, Article 17 of the FDRE Constitution provides that

1. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law;
2. No person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him.

Therefore, Article 17 of the FDRE Constitution, in line with the provisions in the ICCPR and African Charter on Human and People's Rights, provides for the Principle of Legality. The Principle of Legality means that deprivation of the liberty of individuals must be carried out pursuant to the law and must not be arbitrary. The principle of legality is said to be contravened in the event where a person is arrested or detained on grounds which are not clearly established in the law.

The Human Rights Committee explained that the meaning of the term arbitrary in Article 9(1) of the Covenant should not be construed to mean “against the law” as such. Instead, the Human Rights Committee stated that the term “arbitrary” includes elements of inappropriateness, injustice, unreasonableness, capriciousness, disproportionality, lack of predictability and due process of law. Therefore, the prohibition of arbitrary arrest under Article 17 of the FDRE Constitution shows that remand in custody must not only be lawful but also reasonable and necessary. Moreover, the prohibition of arbitrariness also implies that deprivation of liberty must not be discriminatory.

Article 37 (c) provides that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. It goes on to state that, in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so. Article 5 of the Council Of Ministers Regulation on the Treatment of Federal Prisoners provides that juvenile prisoners under the age of 18 shall have separate accommodations to the extent that circumstances allow.

Article 37 (c) assures the right of the child deprived of liberty to maintain contact with his or her family through correspondence and visits subject to certain exceptions. Article 21(2) of the FDRE Constitution provides that all persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councilors, medical doctors and their legal counsel. This right is also provided under Article 13 of the Council of Ministers Regulation on the Treatment of Federal Prisoners which stipulates that prisoners shall have the right to communicate with their spouses, close relatives and friends, medical officers, legal councilors and religious fathers.

Article 37(d) provides for the right of every child deprived of his or her liberty to prompt access to legal and other appropriate assistance. This proviso also asserts the right of the child to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. Article 21(2) of the FDRE Constitution provides that "all persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councilors, medical doctors and their legal counsel."

Children deprived of liberty are also entitled to accessible complaints procedure by virtue of Article 12 of the CRC. Accordingly, Article 28 of the Council of Ministers Regulation on the Treatment of Federal Prisoners provides that "every prisoner shall have the right to lodge a complaint orally or in writing."

8.3. *Children in Situations of Exploitation*

8.3.1. Child Labour

Article 32(1) of the CRC affirms the right of the child to be protected from economic exploitation and from any work that is likely to be hazardous, or to interfere with his or her education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. Therefore, child labor might be defined as work by a child, which is exploitative, hazardous, otherwise inappropriate for his or her age, detrimental to his or her schooling, or detrimental to his or her social, physical, mental, spiritual or moral development. The protection against child labour is also reflected under Article 15 of the African Charter on the Rights and Welfare of the Child.

The African Charter on the Rights and Welfare of the Child (ACRWC) also affirms the rights of children to be free from all forms of economic exploitation. Article 15(4) of the Charter provides that “every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or interferes with the child's physical, mental, spiritual, moral, or social development.”

Article 32(1) requires States Parties to take legislative, administrative, social and educational measures to ensure implementation of this protection. Article 32(2) also requires States Parties to have regard “to the relevant provisions of other international instruments”. Especially, States Parties are requested to ratify the 1973 Minimum Age Convention (No. 138) as supplemented by recommendation (No. 146) and the 1999 Worst Forms of Child Labour Convention (No.182). Accordingly, Ethiopia has ratified the Minimum Age Convention (No. 138) in 1999 and the Worst Forms of Child Labour Convention (No.182) in 2003. Ethiopia has also ratified the Dakar Optional Protocol on Minimum Age of Admission to Employment in 1999.

The ILO Minimum Age Convention (No. 138)

The Minimum Age Convention No 138 adopted in 1973 is a comprehensive legal document aimed at the total abolition of child labor applicable to all sectors of economic activity whether or not children are employed for wages. The Convention elucidates a consolidation of principles which have been established through earlier subject specific instruments. The Convention applies to work performed by children both for another person and self-employment and requires States

Parties to pursue a national policy designed to ensure the effective eradication of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons. In addition, States Parties to the Convention are obliged to specify the minimum age for employment within their jurisdiction. It is supplemented by Recommendation No. 146 which provides the broad framework and essential policy and enforcement measures for the prevention of child labour.

The ILO Worst Forms of Child Labour Convention (No.182)

ILO Worst Forms of Child Labour Convention (Convention No 182) is another basic Convention adopted on 17 June 1999. The Convention is supplemented by Recommendation (No.190). Article 1 of the 1999 Convention requires States Parties to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour. The Convention and Recommendation apply to all children under the age of eighteen years and to all forms of work.

Article 3 of the Convention defines “*the worst forms of child labour*” as work likely to harm the health, safety or morals of children”. States Parties are given the discretion to flesh out which types of work fit this description by virtue of Article 3(d) of the 1999 Convention.

The worst forms of child labour” includes:-

- All forms of slavery and practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced and compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- The use, procuring or offering of a child for prostitution, for the production and trafficking of drugs; and
- Work, which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The guidelines set forth in paragraph three and four of Recommendation No 190 stipulate the following as constituting hazardous work:-

- Work which exposes children to physical, psychological or sexual abuses;
- Work underground, under water or at dangerous heights;

- Work with dangerous machinery, equipment and tools, or which involves the manual transport of heavy loads;
- Work in an unhealthy environment which may expose children to hazardous substances, agents, or to extreme temperatures, noise levels, or vibrations; and
- Work under particularly difficult conditions such as for long hours, during the night or work where the child is unreasonably confined to the premises of the employer.

Member States to the ILO Worst Forms of Child Labour Convention as supplemented by recommendation (no.190) are required to take the following measures to combat worst forms of child labour:

- design and implement programmes of action to eliminate the “worst forms of child labour”
- design appropriate mechanisms for monitoring implementation;
- take time-bound measures for prevention; and
- provide support for removal of children from the “worst forms of child labour” and for their rehabilitation and access to free basic education or vocational training

Ethiopian Legal Provisions Relating to Child Labour

Article 36 (1)(d) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) stipulates that every child has the right “not to be subject to exploitative practices, neither to be required nor to be permitted to perform work which may be hazardous or harmful to his education, health or well-being”. Article 41 of the FDRE Constitution also requires the state machinery to allocate resources to provide for rehabilitation and assistance to children who are left without parents or guardians within available means.

As a Member State to the CRC and the aforementioned instruments, Ethiopia is obliged to provide for a minimum age or ages for admission to employment, appropriate regulation of the hours and conditions of employment and appropriate penalties or other sanctions to ensure effective enforcement.⁴⁴⁰ To this effect, Ethiopia has adopted various action plans and strategies to address the incidence of child labour. These include Education and Training Policy, National

⁴⁴⁰ Sharon Detrick (n 19) 558

Plan of Action for Children, the National Action Plan on Sexual Abuse and Exploitation of Children, and the Draft National Action Plan on the Elimination of the Worst Forms of Child Labour in Ethiopia.

The Revised Family Code specifies obligations owed to children by their parents. These include duty to maintain contact, duty of care of the person of the child, fixing the place of residence of the child, watching over the health of the minor, taking necessary measures in case of sickness of the child, direct the upbringing of the child, takes the necessary disciplinary measures for the purpose of ensuring his upbringing, direct and supervise the social contacts of the child and ensuring that the child receives general and professional education commensurate to his age.

In particular, Article 215 of the Revised Family Code stipulates a duty on guardians to ensure the safety and welfare of the child's physical and intellectual development. Article 195 of the Revised Family Code provides that adoption agreement approved by a court of law would be subject to revocation if the adoptive parent enslaves the child, engages the child in immoral acts for gain, or handles the child in any other manner detrimental to his or her future. The observance of these obligations by parents is of utmost importance for the prevention of child labour.

On the other hand, the Ethiopian Civil Code provides for the sanctions and remedies for exploitation and abuse of a child. By virtue of Article 2052 of the Civil Code failure to educate or supervise any person under one's care entails extra-contractual liability. The remedies envisaged under the Civil Code take the form of compensation.

Article 576(1) of the Criminal Code prohibits the maltreatment of children. It stipulates that "whosoever, having the custody or charge of a minor, ill-treats, neglects, over tasks or beats him for any reason or in any manner is punishable with simple imprisonment not exceeding three months."

Article 576(2) of the Criminal Code further submits that the punishment shall be, in addition to the deprivation of family rights of the criminal, simple imprisonment for not less than one year where the crime causes grave injury to the health, well-being, education or physical or psychological development of the minor.

Article 659 of the Criminal Code provides that a parent or other person exercising the authority of guardian or tutor, who for gain or in dereliction of his duty (a) grossly neglects the children under his charge and abandons them without due care and attention or to a moral or physical danger, or (b) entrusts a child for a long time to a person, an organization or an institution with whom or where he knows, or could have foreseen that it will be reduced to physical or mental destitution, or will be physically or psychologically endangered is punishable with simple imprisonment or fine.

In regard to prostitution, Article 635 of the Criminal Code states that a person who traffics in children with the intention of gratifying the passions of others whether by seducing them, or by procuring them or otherwise inducing them to their interest is punishable. Similarly, the Code of Petty Offences prohibits immoral soliciting and debauchery.

The Criminal Code also sanctions trafficking and sale of children as grave offences. Accordingly, Article 596(1) of the Criminal Code stipulates that “whoever forcibly enslaves another, sells, alienates, pledges, or buys him, or trades or traffics in or exploits him in any manner; or keeps or maintains another in accommodation of slavery, even in a disguised form, is punishable with rigorous imprisonment from five years to twenty years, and fine not exceeding fifty thousand Birr.

Article 596(2) of the Code goes on to state that “whoever, in order to deliver him at his place of destination, carries off or transports a person found in situations stated above whether by land, by sea or by air or conducts or aids such traffic is liable to the same punishment.” The punishment shall be rigorous imprisonment from ten years to twenty years where the crime is committed against children, women, feeble-minded or sick persons by virtue of Article 596(3).

Article 597 provides that whoever by violence, threat, deceit, fraud, kidnapping or by the giving of money or other advantage to the person having control over a woman or a child, recruits, receives, hides, transports, exports or imports a woman or a minor for the purpose of forced labour is punishable with rigorous imprisonment from five years to twenty years and fine not exceeding Birr fifty thousand.

Article 640 of the Criminal Code pertains to the issue of child pornography. It reads whoever makes, imports or exports, transports, receives, possesses, displays in public, offers for sale or

hires, distributes in writings, images, posters or other objects which are obscene or grossly indecent, or in any other way traffics or trades in them; or advertises, indicates or makes known, by any means, how or from whom such objects may be procured or circulated either directly or indirectly is punishable with simple imprisonment of not less than six months and fine, without prejudice to the forfeiture and destruction of the incriminating materials.

Article 644 of the Criminal Code states that whoever for gain or to provoke publicly displays video, or in a shop window, in a booth or in any other place visible form without writings, images, or objects such as to stimulate unduly, to prevent or to misdirect the sexual instinct, or to arouse or to stimulate unduly brutal or bloodthirsty instinct, or anti-social feelings or feelings which are inimical to the family spirit or knowingly offers, lends, gives or sells such object, images or writings to the minor, is punishable with simple imprisonment from six months to three years and fine, without prejudice to the forfeiture of the incriminating material where appropriate.

Minimum Age for Admission to Employment under the Labour Code

The Labour Proclamation No.377/2003 also contains various provisions pivotal for the purpose of addressing child labour. It is the most important piece of legislation for addressing child labour. Article 89 of the Proclamation provides that a “young worker” is a person who is between the ages of 14 and 18. It also prescribes that no one may employ persons under 14. Thus, the law prohibits the employment of young persons in work which by their nature and/or the conditions under which they are carried out endanger the lives or health of young workers performing them.

Worst Forms of Child Labour under the Labour Code and Relevant Guidelines

The Ministry of Labour and Social Affairs (MOLSA), the Government organ entrusted with the responsibility of implementing the Proclamation is empowered to prescribe the list of activities prohibited to young workers. These, among others, include:

1. Work in the transport of passengers and goods by road, railway, air and internal water way, docksides and warehouses involving heavy weight lifting, pulling or pushing or any other related type of labour;
2. Work connected with electric power generation plants, transformers or transmission lines;

3. Underground work such as mining, quarries and similar works; and
4. Works in sewers and digging tunnels.

The Ministry also adopted a directive containing prohibited activities in addition to those listed in the Proclamation. Accordingly, the engagement of child workers in the following activities is prohibited.

- Engaging in construction activities that require standing on scaffoldings.
- Work in sewers and tunneling activities.
- Work in street cleaning and sewerage of toilets.
- Work in alcoholic beverages and cigarette production.
- Work in hotels, motels and night clubs.
- Works in too cold areas or in areas of high temperature or in areas of dangerous radiation.
- Work in buildings, grindings, cuttings and shaping of metallic objects.
- Work in felling of logs.
- Work in mixing chemicals, which are dangerous to health by their nature.
- Other works which entail moral as well as physical hazards.

Furthermore, the Directive issued by MOLSA has determined various weights of goods that may be moved from place to place in the following manner.

- If the transport is to be wholly accomplished manually and the young worker is engaged in such activity continuously, the weight of the good to be unloaded, loaded, pushed, pulled, etc. must not exceed 7 kgs. If, on the other hand, work is to be done only occasionally, the weight of the good may only be as high as 11 kgs.
- If the above mentioned manual work involves ascending and descending, for continuous work the weight must be 5 kgs. For non-continuous work, the weight May go to 9 kgs.
- If the work is to be done using 1 wheeled cart and the ground is not leveled, the weight of the material to be transported must not exceed 16 kgs. But if the ground is leveled, the weight may go to 20kgs.

- If the transport of the goods is to be performed using a two-wheeled cart and if the ground is not leveled, the weight of the goods must not exceed 30 kgs. On the other hand, if the ground is leveled the weight must not exceed 45 kgs.
- If the transport of goods by young workers involves a three-wheeled cart and the ground is not leveled, the weight of the goods to be transported must not exceed 55 kgs. If, on the other hand, the ground is leveled, the weight of the goods may be 60 kgs.

Regulation of Hours and Conditions of Employment under the Labour Code

The Labour Proclamation stipulates that normal hours for young workers shall not exceed seven hours a day, which is one hour shorter than the normal working hours determined for adult workers. As far as night and overtime work is concerned, children are protected from being engaged in night works between 10:00 p.m. and 6:00 a.m, overtime work, work on weekly rest days or public holidays

Contract of apprenticeship for young workers is also governed by the Labour Proclamation. According to its Article 48, only young persons who have attained the age of 14 qualify to conclude a contract of apprenticeship. As such, a contract of apprenticeship takes place “when an employer agrees to give a person complete and systematic training in a given occupation”. Such a contract is further expected to show the nature and duration of the training in the apprenticeship, the remuneration to be paid and the conditions of the work. Of course, the law does not tell the time in which the training takes place nor the types of activity to be carried out during such training. But we can infer these and other related gaps are covered by the general provisions of child labour referred to above.

Article 48(3) of the Labour Proclamation provides that a contract of apprenticeship and its modifications shall only be valid when they are made in writing and attested to by the Ministry. In addition, Article 170 of the Proclamation has empowered MOLSA to issue directives where necessary in consultation with other concerned organs, regarding the types of occupation and works in which apprenticeship is needed to be given and the duration thereof.

The Labour Proclamation applies to employment relationships within the private sector. On the other hand, Article 14(a) of the Federal Civil Servants Proclamation No.515/2007 provides that persons under 18 are not eligible to be civil servants.

8.3.2. Children and Drug Abuse

Article 33 of the CRC concerns itself with children and drug abuse. The provision focuses on the protection of children from drug abuse. It requires Member States to take all appropriate measures to protect children from illicit use of narcotic or psychotropic substances. These include opiates, coca leaves, cannabis products like marijuana, amphetamine-type stimulants or any other psychotropic/psychoactive drug capable of producing a state of dependence or the abuse of which could lead to social and public health problems warranting international control.⁴⁴¹

Article 33 requires states to take legislative, administrative, social and educational measures against drugs. As discussed earlier, involvement in drugs is one of the activities characterized among the “worst forms of child labour” by the ILO.

Article 525 of the Criminal Code prohibits the production, making, trafficking in or using poisonous or narcotic and psychotropic substances. The provision imposes a penalty of rigorous imprisonment for not less than five years, and fine not exceeding one hundred thousand Birr. However, the penalty is aggravated to rigorous imprisonment for not less than ten years, and fine not exceeding two hundred thousand Birr if, among others, the crime is committed in places where children or young students engage in educational, sporting or other social activities. Similarly, the penalty is also aggravated if the offender employed children or a person with mental illness as a means for the commission of the crime. Child endangerment by the provision of dangerous substances is also punishable under Article 531 of the Criminal Code. Article 185 of the Criminal Code also authorizes the admission of a child in conflict with the law to a curative institution if he or she is found to be addicted to dangerous substances. In the same vein, the Drug Administration and Control Proclamation (Proclamation No. 176/1999) also prohibits and inculcates the aforementioned acts involving illicit drugs.

8.3.3. Sexual Exploitation of Children

Article 34 of the CRC concerns itself with the protection of children from all forms of sexual exploitation and sexual abuse. Article 4 of the Universal Declaration on Human Rights (UDHR) prohibits slavery and all forms of servitude. The prohibition of forced and compulsory labour is

⁴⁴¹ Hodgkin and Newell (n 3) 503

also echoed in Article 8 of the International Covenant on Civil and Political Rights (ICCPR). The protection of children from forced labour or prostitution has long been highlighted.⁴⁴² The protection of children against sexual exploitation is also affirmed under Article 27 of the African Charter on the Rights and Welfare of the Child.

The term “*sexual encounters*” encompasses intercourse, genital contact, fondling or an encounter with exhibitionist.⁴⁴³ Sexual abuse refers to the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent or that violates the social taboos of family roles.⁴⁴⁴ Though all forms of sexual exploitation are abusive, sexual exploitations is performed for financial gain.⁴⁴⁵ In other words, sexual exploitation implies a commercial connotation.⁴⁴⁶

Article 34 of the CRC requires states parties to undertake measures to protect the child from all forms of sexual exploitation and abuse. In particular, Member States are required to take all appropriate national, bilateral and multilateral measures to prevent:

- The inducement or coercion of a child to engage in any unlawful sexual activity;
- The exploitative use of children in prostitution or other unlawful sexual practices; and
- The exploitative use of children in photographic performances and materials.

In other words, States Parties are required to prevent three interrelated forms of exploitation, namely sexual abuse, prostitution and use in pornography. These forms of exploitative use of children are also linked with the sale of and trafficking in children.⁴⁴⁷ Article 19 of the CRC also provides for protection against sexual exploitation and sexual abuse of children while in the home or in the care of other persons having responsibility for the child while in the home or in the care of other persons having responsibility for the child. Article 19 of the CRC is more related with “physical and mental abuse” but also makes mention of “sexual abuse”. Article 34 complements this protection provided under Article 19 of the CRC.

⁴⁴² Hodgkin and Newell (n 3) 514

⁴⁴³ M Freeman, *The moral status of Children: Essays on the Rights of the Child* (1997) 261

⁴⁴⁴ M Freeman, *The moral status of Children: Essays on the Rights of the Child* (1997) 262

⁴⁴⁵ Geraldine Van Bueren, “Child Sexual Abuse and Exploitation: a Suggested Human Rights Approach” 2 *International Journal of Children’s Rights* (1994) 14

⁴⁴⁶ Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Oublisher, the Hague, 1998) 275

⁴⁴⁷ Hodgkin and Newell (n 3) 513

The General Assembly of the United Nations also adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in May 2000. This Optional Protocol entered into force on 18 July 2002. The protocol is adopted with a view to adopt a holistic approach in addressing contributing factors including irresponsible adult sexual behavior, harmful traditional practices and trafficking in children to facilitate the elimination of the sale of children, child prostitution and child photography.

Article 2 of the Protocol provides the definition of the terms “child prostitution” and “child pornography”. Accordingly, child prostitution is defined, as “the use of a child in sexual activities for remuneration or any other form of consideration”. On the other hand, child pornography is defined as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”.

States Parties to the Protocol are required with the responsibility to prohibit the sale of children, as well as the practice of child prostitution and child pornography through implementing and disseminating laws, taking administrative measures, developing social policies and programs to prevent the offence. Moreover, Member States are also required to provide appropriate support services to child victims throughout the legal process and ensure child victims have access to procedures to seek compensation for damages. Member States must also facilitate assistance for the social reintegration of child victims by virtue of Articles 8 and 9 of the Optional Protocol.

One of the measures that Ethiopia needs to take to prevent the sexual abuse and exploitation of children is that of accession to and ratifying Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and international instruments pertaining to trafficking.

Article 18(2) of the Constitution provides that “no one shall be held in slavery or servitude. Trafficking in human beings for whatever purposes is prohibited.” Accordingly, no one shall be held in slavery or servitude and holding a child in slavery like practices or servitude as well as trafficking is a prohibited act. Article 36(1)(d) of the Constitution bars the subjection of children to exploitative practices. It reads:

Every child has the right...not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well being.

Ethiopia has included various provisions in its legislations against sexual offences. These provisions can be found in the Criminal Code. These include rape, sexual outrage, homosexual and other indecent acts and others. Apart from the fact that the commission of the acts constitutes crimes, attempt to commit these offence is also punishable. The following is a brief description of these acts and the penalties they bear. Other related offences not touched upon in the following sections are discussed in the relevant provisions.

8.3.3.1. Age of Sexual Consent and Sexual Outrage

The topic of age of sexual consent has been touched up on in Unit One in connection with the definition of minimum protective ages in Ethiopian legislation. It has been stated that Ethiopian laws do not clearly stipulate a minimum age below which children are said to be incapable of giving valid consent to sexual activity involving others. However, Article 626(1) of the Criminal Code provides that performance of sexual performance with a child who is between the age ranges of thirteen and eighteen constitutes the offence of sexual outrage irrespective of consent on the part of the victim. Therefore, the age of sexual consent in Ethiopia is 18 both for boys and girls. Moreover, the presumption that children below the age of 18 cannot consent for sexual activity is absolute.

The issue of the age of sexual consent was at the heart of the matter in Cassation File No. 46412 before the Cassation Bench of the Federal Supreme Court. The consideration of this case is instructive as it demonstrates the current jurisprudence of the court on this matter. The decision was rendered on November 9, 2010.

The case relates to crimes of sexual outrage committed against children who have attained the age of 13 but are below 18. The case started at High court of Harari National Regional State upon the charge submitted by the prosecutor. The defendant (Bona Ahmed) was charged with the crime of rape in violation of Article 620 of the Criminal Code. The charge recounts that the defendant compelled (Zemu Ahmed) , a 15 year old girl, to submit to sexual intercourse by the use of violence and grave intimidation after having rendered her unconscious or incapable of

resistance on November 17, 2007 at 10PM in the evening at a place called *Nede Gobe*. The charge states that the defendant closed the door behind the girl prevented her from shouting and calling for help holding her mouth and nose. The defendant pleaded not guilty. However, the court acquitted the defendant based on the argument that the prosecution witnesses and evidence confirms that the defendant performed sexual intercourse with the private complainant consensually and not forcibly.

The prosecutor took appeal from the judgment to the Supreme Court of Harari National Regional State. The Supreme Court looked into the case having summoned the parties and confirmed that the defendant has performed sexual intercourse on the private complainant. However, it framed the issue whether or not the crime alleged falls within the ambit of Article 620 of the Criminal Code. The Supreme Court noted that the age of the defendant was 16 at the time of the commission of the alleged crime, whereas the age of the victim is 15 years old. The Court went on to state that the Criminal Code is silent as to what should be done in such circumstances. The Court further observed that Article 2(3) of the Criminal Code states that the court may not create crimes by analogy. In the end, the Supreme Court of Harari National Regional State confirmed, in principle, the decision of the High Court of the Region.

The present cassation petition is presented based on the foregoing background. The prosecutor submitted a cassation petition of three pages dated May 6, 2009. The petition of the prosecutor alleges the commission of a fundamental error of law by the courts of Harari National Regional State in this regard. In particular, the petition submits that the decisions of the lower courts are contrary to Articles 2(3), 56, 211 and 626 of the Criminal Code and Article 113(2) of the Criminal Procedure Code. The prosecutor has also asserted that relief has been sought at the tiers of court demanding the courts to find the defendant in violation of Article 626 (1) of the Criminal Code. Since the Cassation Division is of the belief that the petition submitted by the prosecutor needs to be considered, the parties have been summoned and have given their written submissions to the court.

Having briefly outlined the background of the case, the Cassation Bench of the Federal Supreme Court examined the case framing the issue whether or not the acquittal of the present respondent is appropriate.

It is possible to understand from the proceedings of the courts of Harari National Regional State in the case that both courts have established the fact that the respondent has performed sexual intercourse with the private complainant aged 15 years old. The counsel for the respondent contended before the Cassation bench that there is no evidence confirming that the respondent has performed acts of sexual intercourse with the girl. However, this contention of the legal counsel is not tenable owing to the fact that the Cassation Bench does not have the jurisdiction to reexamine the position of the courts of the Regional State concerning their measure and assessment of standard of proof and conclusions thereof based on Article 80(3)(a) of the FDRE Constitution and Article 10 of Federal Courts Establishment Proclamation (Proclamation No. 25/1996).

It has been established that the respondent was 16 years old when he performed sexual intercourse with the private complainant. The respondent was acquitted by the courts of the Regional State on the contention that Article 626(1) of the Criminal Code is silent in cases where the ages of the private complainant and that of the perpetrator is within the range of 13 up to 18. Article 626(1) of the Criminal Code stipulates that “whoever performs sexual intercourse with a minor of the opposite sex, who is between the ages of thirteen, and eighteen years, or causes her to perform such an act with him is punishable with rigorous imprisonment from three years to fifteen years.” The Court observed that the term “whosoever” in this provision indicates that the matter should be viewed in the light of Articles concerning criminal responsibility as provided under Articles 48 up to 56 of the Criminal Code. In particular, the court noted the reading of Article 56 demonstrates that young persons between the age ranges of 13 up to 18 are not exonerated from criminal liability. Thus, there is no reason to suggest that the respondent is exonerated from criminal liability considering his age at the time of the commission of the crime. The main focus of Article 626(1) of the Criminal Code is that inducing or compelling a minor between the age ranges of 13 up to 18 or causing the minor to perform such an act entails criminal responsibility. The fact that the age of the perpetrator who committed sexual intercourse with a girl between the ages of thirteen, and eighteen years, happened to be in the same range

does not exonerate him from criminal responsibility. Article 211(1) of the Criminal Code states that prosecution and enforcement of penalty is a public proceeding and is instituted by the public prosecutor in all cases unless the law provides otherwise. Consequently, the commission of acts alluded to in Article 626(1) may not necessarily bring about criminal responsibility upon the private complainant. The intention of the lawmaker is not to conclude that boys and girls between the ages of thirteen, and eighteen years and who perform sexual intercourse are immune from criminal responsibility. On the contrary, the intention of the lawmaker is that of preventing children within these age ranges from being exposed to harm. The court further noted that the invocation of Article 2(3) of the Criminal Code by the courts of the Regional state is misplaced. The Cassation Bench went on to conclude that if the fact that the respondent has performed sexual intercourse is established with a 15 year old girl, ruling should have been given requiring the respondent to defend based on Article 113(2) of the Criminal Procedure Code in the light of Article 56 and Article 626(1) of the Criminal Code. Therefore, the decisions of the lower courts affirming that the respondent does not bear criminal responsibility is contrary to Article 56, Article 211(1) and Article 626(1) of the Criminal Code and the purpose of the Criminal Code. Therefore, the court ruled that there is a fundamental error of law in the judgments of the lower courts and repealed the judgments remanded the case to the lowest tier of court.

8.3.3.2. Rape of a Girl between Thirteen and Eighteen Years of Age

The Ethiopian Criminal Code establishes penal sanctions on those found guilty of rape, including rape of a young woman between thirteen and eighteen years of age. Article 620(1) of the Criminal Code defines rape as compelling a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation or after having rendered her unconscious or incapable of resistance. Article 620(2)(a) provides that the punishment shall be rigorous imprisonment from five years to twenty years where the offence is committed on a young woman between thirteen and eighteen years of age. However, the punishment may be aggravated to rigorous imprisonment from five to twenty five years as stipulated under Article 628. Article 628 of the Code stipulates that the punishment shall be rigorous imprisonment ranging from five years to twenty five years, where the relevant provision does not prescribe a more severe penalty, where

- the victim becomes pregnant; or
- the criminal transmits to the victim a venereal disease with which he knows himself to be infected; or
- the victim is driven to suicide by distress, anxiety, shame or despair.

Moreover, Article 620(3) of the Criminal Code provides that the punishment shall be life imprisonment where the rape has caused grave physical or mental injury or death. Article 620(4) authorizes the application of other provisions of the Code concurrently where the rape has caused grave bodily or mental injury or death, or where it has involved illegal restraint or abduction of the victim.

Consequently, Article 555 of the Criminal Code is of particular relevance since it addresses grave bodily or mental injury. It provides for punishment with rigorous imprisonment not exceeding fifteen years, or with simple imprisonment for not less than one year where a person intentionally:

- wounds a person so as to endanger his life or to permanently jeopardizes his physical or mental health; or,
- maims his body or one of his essential limbs or organs, or disables them, or gravely and conspicuously disfigures him; or,
- in any other way inflicts upon another an injury or disease of a serious nature.

Accordingly, if a person is found guilty of rape on a girl child between thirteen and eighteen years of age and causing her grave injury because of the rape, the punishment for each crime will first be determined separately. Afterwards, to determine the total punishment, the court will add the number of years of rigorous imprisonment up to a total punishment of rigorous imprisonment for life under Articles 184(1) (b) and 108(1) of the Code.

8.3.3.3. Sexual Outrage against Children

Article 626(1) defines sexual outrage on minors as performing sexual intercourse with a child of the opposite sex or causing a child of the opposite sex to perform sexual intercourse. It includes all incidents of sexual intercourse with a child that does not fall under the provision dealing with rape on a girl child between the ages of thirteen and eighteen. Accordingly, the definition of

sexual outrage includes not only conduct involving violence or other forms of coercion, but also all sexual activity with a child whether or not it is consensual. Therefore, sexual activity with a child below the age of 18 renders the perpetrator directly responsible for the crime of sexual outrage. Moreover, sexual outrage applies to all children. Thus, sexual intercourse with a boy child is addressed under the provisions of the Criminal Code on sexual outrage.

Article 626(4) provides that the punishment to be imposed upon such criminal shall be more severe when the crime is committed by another person where the victim is the pupil, apprentice, domestic servant or ward of the criminal, or a child entrusted to his custody or care, or in any other way directly dependent upon or subordinate to him.

The crime of sexual outrage bears a penalty of rigorous imprisonment for life if the assault has resulted in grave bodily or mental injury to or death of the victim as per Article 626(3) of the Criminal Code. Moreover, the aggravating circumstances outlined under article 628 will be applicable in cases falling under the first two sub-articles of Article 626. Concurrence of sexual outrage on minors and incest through Article 660(2) will be applicable where a family member or close relative perpetrates the outrage. However, a child victim who has consented to the act of sexual outrage is immune from punishment except for the application of measures for his proper upbringing and protection as alluded to in Article 661(1).

Apart from rape and sexual outrage, the Criminal Code addresses other indecent acts committed against children. Article 627 of the Code criminalizes other indecent acts on minors of the opposite sex. The provision prohibits performing acts corresponding to the sexual act or any other indecent act upon a minor of the opposite sex, or induces him to perform such an act, or deliberately perform such an act in his presence. The phrase “any other indecent act” is a general term covering all acts of sexual nature that do not fall under rape and sexual outrage on minors when conducted on a child by another person, where a child is in any way induced to perform such acts, and another person or persons performing the acts in the presence of a child. These acts bear the penalty of simple imprisonment for not less than three months, or rigorous imprisonment not exceeding five years, where the victim is between the ages of thirteen and eighteen years; or, simple imprisonment for not less six months, or rigorous imprisonment not exceeding seven years, where the victim is below thirteen years of age.

8.3.3.4. Homosexual and other Indecent Acts on Minors

Homosexuality is defined as act of performing sexual intercourse with a person of the same sex. It carries a punishment of simple imprisonment. However, the punishment may be aggravated under Article 631(1) of the Criminal Code if it is committed against children. Article 631(1) of the Code provides that performance of a homosexual act or any other indecent act on a minor is punishable:

- with rigorous imprisonment from three years to fifteen years, where the victim is between the ages of thirteen and eighteen years; or
- with rigorous imprisonment from fifteen years to twenty five years, where the victim is below thirteen years of age.

Article 631(4) of the Code carries even severe penalties where there is a relationship of dependence between the offender and the child victim, the court is directed to impose more severe punishment. Article 631(5) provides that the punishment will be rigorous imprisonment for life if the child victim suffered grave bodily or mental injury as a result of the offence or if the offence led to his death or suicide. Moreover, the punishment for indecent behavior between relatives under Article 655 will be applicable through article 660 addressing concurrence of offences when the offence is committed by a family member or relative of the child.

Article 629 punishes both participants in the commission of a homosexual or other indecent act between persons of the same sex. Article 661 stipulates immunity from prosecution for child victims of such offences. Article 632 criminalizes the participation of a juridical person in sexual outrages committed on minors. It stipulates that an institution established for the purpose of upbringing, educating, training or in any other way taking care of children where the operation or administration of the institution has created a favorable condition for the commission of such offences is punishable.

8.3.3.5. Child Prostitution

Article 634 of the Criminal Code criminalizes habitual exploitation for pecuniary gain including keeping a brothel and land lording over a house of prostitution. The provision reads that “whoever, for gain, makes a profession of or lives by procuring or on the prostitution or immorality of another, or maintains, as a landlord or keeper, a brothel, is punishable with simple

imprisonment”. Article 636(b) aggravates the punishment to rigorous imprisonment not exceeding five years, and fine not exceeding ten thousand Birr if the victim is a trafficking victim.

8.3.3.6. Child Pornography

Article 639 criminalizes public indecency and outrages against morals. It prohibits the deliberate sexual act or any other obscene act or gesture grossly offensive to decency and morals. It lays down the punishment of simple imprisonment of three months to one year. The punishment increases from simple imprisonment of six months to five years where it is knowingly performed in front of a child. Similarly, Article 640 provides a punishment of simple imprisonment for not less than one year, and fine not exceeding ten thousand Birr where the offender knowingly exhibits, hands over or delivers such objects to a minor. Article 640(2) (b) criminalizes the display of a simulation of sexual intercourse by minors or exhibits their genitals.

In addition to the criminal liability, sexual offence against children also entails civil liability under the Civil Code. Article 100 of the Criminal Code envisages this where the perpetrator has been condemned or found guilty in criminal proceedings. Article 2035/1/ of the Civil Code provides that a person commits a fault where he infringes any specific and explicit provision of a law, ordinance or administrative regulation’. Article 2028 states that “whosoever, by his fault, causes damage to another, shall make it good”.

8.3.4. Prevention of Abduction, Sale and Trafficking

Article 35 of the Convention provides protection aimed at the Prevention of abduction, sale and trafficking. This is also reflected under Article 29 of the African Charter on the Rights and Welfare of the Child. In particular, the concept of “trafficking in children” can also be found in Article 24(d) of African Children’s Charter. Article 29(b) of the Charter also prohibits the use of children for begging.

Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) defines trafficking as :

the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of

payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices, similar to slavery, servitude or the removal of organs.

Trafficking in persons can occur both internationally and domestically. There are many provisions in the Criminal Code specifically addressing trafficking in children. The Code criminalizes trafficking in children. Article 636 of the Criminal Code states that whoever trafficks in persons for gain, or to gratify the passions of another including traffic in minors, whether by seducing them, by enticing them or by procuring them or otherwise inducing them to engage in prostitution, even with their consent. Moreover, Article 597 of the Criminal Code stipulates that whoever by violence, threat, deceit, fraud, kidnapping or by the giving of money or other advantages to the person having control over a woman or a child, recruits, receives, hides, transports, exports or imports a woman or a minor.

The reading of Article 636 of the Criminal Code shows that the consent of the victim cannot be invoked as a defense.

Article 637 of the Criminal Code concerns itself with organization of traffic in women and minors. It provides that:

Whoever makes arrangements or provisions of any kind for the procurement of or traffic in women or minors is punishable with simple imprisonment, or according to the circumstances of the case, especially where a professional procurer is involved or where the arrangements are fully made and intended to apply to many victims, with rigorous imprisonment not exceeding three years, and a fine which shall not less than five hundred Birr in grave cases.

Article 585 of the Code criminalizes abduction of a woman. It defines illegal restraint as arresting, confining or detaining or in any other way restraining the freedom of an individual in violation of law or lawful order. Though this offence is punishable with simple imprisonment not exceeding three years, the punishment is aggravated to rigorous imprisonment not exceeding five years under article 590(2)(b) when performed with intent to take unfair advantage of the victim,

or to allow another to take advantage of him, or to use him for debauchery or prostitution as stipulated under Article 590(1)(a). Abduction of a minor is defined under article 589(1) of the code as follows:

Whoever abducts another by violence, or commits such an act after having obtained his consent by intimidation or violence, trickery or deceit, is punishable with rigorous imprisonment from five years to fifteen years.

8.3.5. Children Belonging to a Minority or an Indigenous Group

Article 30 of the CRC concerns itself with children of minorities or of indigenous people. It stipulates that children belonging to ethnic, religious, linguistic minorities and indigenous groups not to be denied the right to enjoy their culture, profess and practice their religion or use their language together with other members of their group.

The inclusion of Article 30 is justified by the sheer size of grave and concerning discrimination against minority or indigenous populations. Article 30 mirrors Article 27 of the International Covenant on Civil and Political Rights. Article of the ICCPR provides that “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

The 2006 Declaration on the Rights of Indigenous Peoples stipulates the rights of indigenous people to autonomous life within the dominant culture without prejudicing their equal right to participate in the political, social and economic life of the country. Article 31(1) of the Declaration further provides that:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 39(2) of the FDRE Constitution provides that every Nation, Nationality and People in Ethiopia including minority nationality has the constitutional right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.

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