



**THE BAN ON INTER-COUNTRY ADOPTION AND
ITS APPLICABILITY TO FOREIGNERS OF
ETHIOPIAN ORIGIN**

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Declaration

I, the undersigned, declare that the thesis comprises my work. In compliance with widely accepted practices, I have duly acknowledged and referenced all materials used in this work. I understand that non-adherence to the principles of academic honesty and integrity, misrepresentation/fabrication of any idea/data/fact/source will constitute sufficient ground for disciplinary action by the University. I also declare that it has never been presented in this or any other university and that all resources and materials used in the thesis have been duly acknowledged.

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Acknowledgment

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Acronyms

ACRWC- African Charter on the Rights and Welfare of the Child

CRC- Convention on the Right of Child

FDRE- Federal Democratic Republic of Ethiopia

FEO- Foreigners of Ethiopian Origin

FDRE- Federal Democratic Republic of Ethiopia

HPR- House of Peoples Representatives

HoF- House of Federation

MoWCY- Ministry of Women Children and Youth

OVC- Orphans and Vulnerable Children

UN- United Nations

RFC- Revised Family Code

USA- United States of America

Abstract

The RFC Amendment Proclamation No.1070/2018, which resulted in the Ban of inter-country adoption is silent regarding the applicability of the ban to FEO. On the other hand, FEO are accorded special rights and privileges under other laws. The study, therefore, tried to identify the scope of application of the ban of inter-country adoption on foreigners, and examine whether FEO have special rights concerning inter-country adoption under the Ethiopian adoption laws. Further, the study tried to assess the objective of the ban and if the total restriction helps to achieve those objectives by analyzing the advantages and disadvantages of the ban if it applies to FEO.

The study, therefore, concluded that the ban should not apply to FEO because they are relieved from some restrictions placed on other foreigners. They are also entitled to some rights and privileges including accommodating social and administrative services. Therefore; adoption is among the social services the FEO can enjoy in their country of origin. Additionally, the objective of the policy in discouraging inter-country adoption can not be achieved by restricting these FEO. Because adoption by FEO does not expose children to experience an identity crisis and other problems that will affect them psychologically and socially. Moreover, the status of domestic alternative care services in Ethiopia is not sufficient to support all the OVC in Ethiopia. Therefore, this is an additional reason for the government to provide FEO exceptional right to intercountry adoption.

Therefore, the study recommends the RFC Amendment Proclamation to be amended in a way that recognizes FEO special privileges and exempt them from the ban. And enact uniform adoption law that can be applied at regional and Federal levels.

Chapter One

Introduction

1.1. Background of the Study

There are millions of children without families, homes, and basic care in our world.¹ The problem is not unique to any specific country, rather it exists in countries where poverty, war, or natural disaster that have left children orphaned, and abandoned exists.² In principle, a child should grow up in a family environment in an atmosphere of happiness, love, and understanding.³ Many families try to fulfill their responsibilities for the wellbeing of their children. Others, however, fail at their responsibilities and obligations due to inadequate knowledge, conflict, or addiction leading many children into psychological and social hardships.⁴ In some countries, poverty also puts the lives of many children at social and psychological risk.⁵

In today's world, millions of children grow up impoverished, vulnerable, abandoned, neglected, uneducated, and discriminated against their rights and wellbeing.⁶ The UN Convention on the Rights of the Child (CRC) recognizes the existence of children who live in difficult conditions in all countries of the world.⁷ Similarly, the African Charter on the Rights and Welfare of the Child (ACRWC) recognizes this fact and adds that children who are separated from their parents should get special protection and should be provided with alternative family care.⁸ Alternative family care includes among others, foster placement, institutional care, and adoption.⁹

¹Margaret Liu, International Adoption (8th edn, TEMP INT'L & COMP LJ 1994) 187, As Quoted by Sara R wallace, 'International Adoption: The Most Logical Solution to the Disparity Between The Numbers Of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others,' [2003] 20(3) Arizona Journal of International and Comparative Law, 689, 689.

²Sara R wallace, 'International Adoption: The Most Logical Solution To The Disparity Between The Numbers Of Orphaned And Abandoned Children In Some Countries And Families And Individuals Wishing To Adopt In Others,' [2003] 20(3) Arizona Journal of International and Comparative Law, 689, 690.

³African Charter on the Rights and Welfare of the Child, (entered into force Nov. 29, 1999. OAU Doc. CAB/LEG/24.9/49(ACRWC) Preamble.

⁴Federal Democratic Republic of Ethiopia National Children's Policy, (2017), Addis Ababa, p.7 [herein after National Children's Policy]

⁵Ibid.

⁶Tesfaye Almu Osman, 'The Operation of Adoption Agencies in the Context of the Best Interest of Orphan and Vulnerable Children to Alternative Care in Ethiopia' (Degree of Master Thesis, Addis Ababa University 2012) 8 (Unpublished).

⁷Convention on the Rights of the Child, (Adopted 20 November 1989, entry into force 2 September 1990, [herein after CRC) Preamble.

⁸ACRWC (n 3) Article 25.

⁹ Ibid.

Millions of families and individuals in different countries want to adopt a child¹⁰ and adoption has been used as one way of providing solutions for children without parental care.¹¹ Adoption benefits not only children but also childless people who desire to create a family.¹² Both the CRC and the ACRWC provides domestic and inter-country adoption as a measure of protection for children deprived of their family environment.¹³ Ethiopia is a signatory to both the CRC and ACRWC.¹⁴ Additionally, the Federal Democratic Republic of Ethiopia (FDRE) Constitution requires the government, to provide special protection to orphan children and to advance their welfare and education. It also demands the establishment of institutions that ensure and promote adoption services.¹⁵

These legal documents, however, promote inter-country adoption to be implemented as the last alternative means of childcare, only if the child cannot be placed under other forms of alternative child care programs in the child's country of origin.¹⁶ However, in Africa, domestic adoption is a less developed alternative means of care for children deprived of their family environment.¹⁷ As a result, inter-country adoption is highly practiced. Recently Africa captured prospective adoptive parent's attention and is becoming a new destination for inter-country adoption.¹⁸

In Ethiopia, before the amendment of the FDRE Revised Family Code (RFC), inter-country adoption has been considered among the alternative care options for OVC. However, the Ethiopian government has recently banned inter-country adoption with the claim that, it failed to compensate for the parental love and care that, the children are deprived in their homes.¹⁹ There is also a concern about children experiencing an identity crisis and related problems that

¹⁰Wallace (n 2) 690.

¹¹Sandi Petersen, 'The 'Rise And Fall' Of Inter-country Adoption: How are Current Practises and Structures Tipping the Balance?' (Master thesis, Flinders University of South Australia, October 2013) 44.

¹² ACPF; Africa; the new frontier for inter country adoption (2012) Addis Ababa the African child policy forum, vii.

¹³ ACRWC (n 3), Article 24 ; CRC (n 7), Article 20

¹⁴Anteneh Geremew Gemedo, 'Domestic Implications of Concluding Observations of the Committee on the Right of the Child: the Case of Ethiopia' (2016) 5 Haremaya Law Review, 38.

¹⁵The Federal Democratic Republic of Ethiopia constitution, 1995, Article 36, Proc. No. 1, Neg. Gaz. 1 year, no.1 [herein after The FDRE constitution]

¹⁶CRC (n 7) Article 20.

¹⁷Benyam Dawit Mezmur, 'Inter-country Adoption in an African Context: a Legal Perspective,' (Degree Doctor of Law Thesis, University Of The Western Cape, 2009), 324.

¹⁸ ACPF (n 12) 6.

¹⁹National Children's Policy (n 4) 7 ; Revised Family Code (Amendment) Proclamation, 2018, Article 2, Proc.No.1070/2018, Neg.Gaz. 24th year, No 26, [Hereafter, the RFC Amendment Proclamation]

will affect them psychologically and socially.²⁰ Instead of protecting children through inter-country adoption, the National Children Policy prefers expansion of domestic adoption, foster care, and community-based programs as child care measures.²¹ And this led to amending the RFC.

The Proclamation No.1070/2018, which amended the RFC and which banned inter-country adoption, repealed Article 193 of the RFC which used to allow adoption by foreigners.²² The ban does not make any distinction between foreigners and doesn't address foreigners of Ethiopian origin (FEO). On the other hand, FEO are granted preferential treatment on separate laws. The Proclamation "providing foreign nationals of Ethiopian origin with certain rights to be exercised in their country of origin," Proclamation no 270/ 2002, allows FEO to have and enjoy certain rights and to be treated similarly to Ethiopian nationals, exceptions to those provided restrictions.²³ It also states that restrictions imposed on foreign nationals, regarding the utilization of economic, social, and administrative services shall not apply to FEO.²⁴ However, the Proclamation which banned inter-country adoption, apart from totally restricting 'foreigners' from adopting, it doesn't address the applicability of the ban on FEOs.

This study deals with the position of foreigners of Ethiopian origin under the Ethiopian adoption law and the applicability of the ban to these foreigners. It will also address if preferential treatment in the case of adoption to FEO is important in light of ensuring the best interest of the child.

1.2. Statement of the Problem

The RFC (Amendment) Proclamation bans inter-country adoption and the ban applies to all foreigners. It doesn't provide distinctive standards of treatment between FEO and other

²⁰National Children's Policy,(n 4)7.

²¹Ibid 19.

²²Revised Family Code (Amendment) Proclamation, 2018, Article 2, Proc. No.1070/2018, Neg.Gaz. 24th year, No 26, [Hereafter, the RFC Amendment Proclamation]

²³Providing Foreign Nationals of Ethiopian Origin With Certain Rights to be Exercised in Their Country of Origin proclamation, 2002, Article 5&6, Proc. No, 270/ 2002, Neg. Gaz. 8th year, No 17, [herein after FEO proclamation]

²⁴ Ibid Article 5(6)

foreigners.²⁵ On the other hand, under the Proclamation No, 270/2002, FEO are accorded preferential treatment on certain rights from other foreigners.²⁶ This proclamation allows FEO to have and enjoy certain rights and stipulates different standards of treatment from other foreigners. Further, restrictions imposed on other foreigners, concerning the utilization of economic, social, and administrative services, will not be applicable to FEO.²⁷

Even though Proclamation 270/2002 relieves FEO from the restrictions imposed on foreign nationals, regarding the utilization of economic, social, and administrative services, the RFC (Amendment) Proclamation, however, doesn't make any distinction between foreigners and FEO. The proclamation generally proclaims that foreigners are not allowed to adopt.²⁸

The failure of the RFC (Amendment) Proclamation 1070/2011 to address the issue of FEO raises several challenges in an adoption process. The applicability of the ban on these FEO has been controversial ever since the ban. It also led to an absence of clarity and created gaps in the application of the law. Further, issues related to the best interest of the child and the rights of FEO to exercise their already provided rights in their country of origin remains unanswered.

In March 2020, the Cassation Bench of the Federal Supreme Court gave binding legal interpretation about the applicability of the ban on FEO.²⁹ The decision provides that the ban should not apply to FEO.³⁰ This decision was given considering the best interest of the child and the rights that FEO are provided under the Ethiopian law.³¹ Further, the Cassation Division took into account the objective of the ban and how it could be met. However, the court's decision doesn't address all the issues that may result from the ban, as its legal effect extends only to courts.³²

Therefore, further assessment needs to be made, on whether the ban should apply to FEO or not and whether it complies with the objective of the ban, which is, protecting children from an identity crisis and other problems that will affect them psychologically and socially. It should

²⁵The RFC Amendment Proclamation, (n 22) Article 2.

²⁶FEO Proclamation (n 23) Article 5.

²⁷Ibid, preamble.

²⁸The RFC Amendment Proclamation (n 22).

²⁹Ato Wondewosen Tadesse and Others (File No 189201, Federal Supreme Court Cassation Division, march 11, 2020) (Unpublished).

³⁰Ibid.

³¹Ibid.

³²Federal Courts Proclamation Re-amendment Proclamation, 2005, Article 2, Proc. No.454, Neg. Gaz. Year 14 no.42.

also be studied if the restriction on FEOREcognizes the best interest of the child, taking into account the alternative mechanism that Ethiopia is capable of providing.

1.3.Literature Review

This study reviews academic and non-academic literature on the topics of adoption, inter-country adoption, alternative care, the best interest of the child.

Inter-country adoption is a widely discussed concept by different scholars and researchers around the world. There are arguments between the proponents and opponents of inter-country adoption. For the proponents, inter-country adoption can be seen as an act of humanity that provides love, care, better opportunities, and a healthy and fulfilling life to children.³³ It is also perceived as an act that transfers a child from extreme poverty and its vulnerabilities to the wealth, comfort, and opportunities of the developed world.³⁴ On the other hand, the opponents argue that inter-country adoption is not an act that serves the best interest of the child and it doesn't maintain the identity, racial, ethnic, and cultural heritage of the child, as a result, it may lead to an identity crisis.³⁵

Benyam Dawit Mezmur on his thesis submitted in fulfillment of the requirements for the degree Doctor of law titled "*Inter-country Adoption in an African Context: A Legal Perspective*" discussed, how inter-country adoption in Africa can be used to promote the best interest of the child. According to him, inter-country adoption can only promote the best interest of the child if only taken the due precaution, i.e. effectively using it as a last resort, promoting the use of other domestic alternative care options, undertaking a comprehensive legislative reform that regulates inter-country adoption, considering the four cardinal principles in every decision, and having a bilateral agreement with the adopting country, etc.³⁶ For him, if inter-country adoption is not effectively controlled and applied may serve against the best interest of the child.

Recently, the Ethiopian adoption law was amended to ban the practice of inter-country. The ban being a recent occurrence, it's not likely to get literature on it. Melat Assefa in her LLM thesis

³³Scott Christian, 'Inter-country Adoption', (2010) Vol. 1:52 The University for Peace Law Review, 54.<www.lawreview.upeace.org/pdf/vol1issue1article4.pdf>, accessed on 18 March 2020.

³⁴Ibid.

³⁵Elizabeth Bartholet: 'International Adoption,' chapter in: Lori Askeland (ed.): Children and Youth in Adoption, Orphanages, and Foster Care, (2006) 120&121.

³⁶Mezmur (n 17) 480-502.

work,³⁷ following the ban, deeply assessed the implications of the law banning inter-country adoption on the right to alternative care of orphans and vulnerable children in Ethiopia. She concludes in her study that considering the current Ethiopian situation and Capacity to provide, domestic alternative options, banning inter-country adoption in the Ethiopian context goes against the best interest of the OVC.

However, the applicability of the ban to FEO, the effect of the total ban on the best interest of the child, and the applicability of the ban concerning the scope of the RFC and the Amendment Proclamation are issues that are not addressed under the aboveworks of literature.

1.4. Research Objectives

1.4.1. General Objective

The general objective of the study is to assess the applicability of the ban of the inter-country adoption to FEO considering they have already been granted preferential treatment from other foreigners under other laws.

1.4.2. Specific Objectives

The specific objectives of this study are:

- To identify the scope of application of the ban of inter-country adoption on foreigners.
- To examine whether FEO have special rights concerning inter-country adoption under the Ethiopian adoption laws.
- To identify whether the total restriction helps to achieve the objective of the ban.
- To analyse the advantages and disadvantages of the ban if it applies to FEO.
- To identify the reasons why the government did not make a preferential treatment to FEO during the ban.
- To scrutinize measures that should be taken by the government to solve the practical challenge faced by FEO as well as to respect the best interest of the child.

³⁷MelatAssefa, The Ban on Inter-country Adoption in Ethiopia: Implications on the Right to Alternative Care, (Degree of Master Thesis, Addis Ababa University, June 2018).

<http://etd.aau.edu.et/bitstream/handle/123456789/12685/Melat%20Assefa.pdf?sequence=1&isAllowed=y>

Accessed on 10March 2020.

1.5. Research questions

This study looks into the problem through the following basic questions.

- What are the scopes of application of the ban of inter-country adoption on foreigners?
- What rights does the Ethiopian law grants to FEO regarding adoption?
- Can total restriction help to achieve the objective of the ban?
- What is the advantage and disadvantage of the ban if it is applicable on FEO?
- What reasons could there be for the government not to make a preferential treatment to FEO during the ban?
- What measures should be taken by the government to solve the practical challenge faced by FEO as well as to respect the best interest of the child?

1.6. Research Methodology

The nature of the study encompasses both doctrinal and non-doctrinal type of legal research. This study is a qualitative type of research since it is concerned with identifying how the law treats FEO regarding inter-country adoption. Information was gathered through interviewing key informants, case study, case analysis, and observation of the researcher. Purposive sampling is used to select the informants and discussants of the study. In this regard, information available and facts obtained were explored based on which the conclusion of the finding has been generated.

1.7. Sources of Data

Both primary data and secondary data are used in the process of data collection. As a primary data, international legislations, conventions, national laws, policies, Constitution, Proclamations, guidelines, Directives of government's organization like MoWCY, and court cases, are used. Also, data is collected through unstructured interview with key informants from representatives of governmental institutions who works on issues related to adoption and child right protection.

Books, journal articles, magazines, commentaries on statutes, dictionaries, and publications issued by international organizations concerning inter-country adoption are included as secondary sources.

1.8.Sampling Method

Among the non-probability sampling techniques, the researcher used purposive or judgmental sampling. Purposive or judgmental sampling is a strategy in which particular settings persons or events are selected deliberately to provide important information that cannot be obtained from other choices.³⁸ The researcher identified people with relevant information who are believed to have various experiences in about adoption and inter-country adoption, by working in a governmental office on child protection programs. Also judges especially, working with cases related to the application of the law of adoption.

1.9.Scope of the Study

The ban on inter-country adoption is a recent occurrence and it is a broad concept that can be addressed in a different direction. However, this study doesn't address the overall concept this study focuses only on the applicability of the ban to FEO.

Regarding the area, this study is limited to the areas of Addis Ababa where the RFC along with the new amendment proclamation that resulted in the ban on inter-country adoption is applicable. Also, the governmental institutions that are mandated to regulate the issue of inter-country adoption and the cases of FEO are found in Addis Ababa.

1.10 Limitation of the Study

Due to the COVID 19 pandemic, which resulted in the State of Emergency Government organs as well as courts, which were selected as an input for this study, were partially closed and physical contacts and movement was also restricted. As a result, court cases were not easily accessible, and collecting data from interviewing key informants was limited. Therefore, the study has faced some limitations in its depth and coverage to fully address its objectives.

1.11. Organization of the Study

The study is organized in five chapters. Chapter one is the introduction part of the paper, which indicates the background of the studies, statement of the problem, research methodology, and methods of data collections. Chapter two introduces the subject and discusses the concept of adoption and inter-country adoption, including a brief review of the development of the concept

³⁸Maxwell, J. A. 'Qualitative Research Design: An Interactive Approach', (1996) London, Applied Social Research Methods Series,

and the theoretical framework. Further, discusses the international and legal framework on inter-country adoption. Chapter three addresses the conceptual, legal, and institutional framework of inter-country adoption under the Ethiopian law including the proclamation that resulted in the ban of inter-country adoption. Chapter four assesses the ban of inter-country adoption and its applicability to FEO by discussing the status of FEO under the Ethiopian law. Further, assess the scope of the ban. Chapter five presents a brief conclusion and recommendations of the study.

Chapter Two

The Conceptual and Legal Frameworks of Inter-country Adoption

2.1. Concept of Adoption and Inter-country Adoption

2.1.1. Definition

Adoption refers to an act of one who takes another's child into his own family, treating him as his own, and giving him all the rights and duties of his child.³⁹ Adoption may be of different types depending on its nature. Domestic adoptions, inter-country adoption, relative (kinship) adoption, open adoption, and closed adoption. Inter-country adoption is the practice in which children in a position of need, and the absence of their biological parents, are sent from their country of origin to an adopting family living in another country usually in the developed world.⁴⁰ This act of transferring children from one nation to another, for parenting purposes can also be called '*stranger adoption*'.⁴¹

Domestic adoption is an adoption that involves adoptive parents and a child of the same nationality and the same country of residence.⁴² Relative adoption is a situation in which a step-parent adopts the child of his or her spouse, or a member of a child's extended biological family adopts the child whose parents have died or become unable or unwilling to parent.⁴³ Such adoptions are mostly less controversial because children stay within the biological family network.⁴⁴ On the other hand, inter-country adoption remains to be argumentative on serving the best interest of the child, because, it involves issues related to race, ethnic and cultural heritage, and nationality.⁴⁵ Adoption can also be classified as open and closed based on the level of communication between the biological parents and adoptive parents.⁴⁶ Open when the birth

³⁹The Law Dictionary, (Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.) <<https://thelawdictionary.org/adoption/>> Accessed 19 March. 2020

⁴⁰Christian (n 33), 52.

⁴¹Ibid.

⁴²Mezmur (n 17), 6.

⁴³Elizabeth Bartholet, "International Adoption: Thoughts on the Human Rights Issues" (2007). Harvard Law School Faculty Scholarship Series, 21, 152, 152

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶Christine Adamec ; Laurie C. Miller, M.D, "*The Encyclopaedia of Adoption*" (Third Edition), 199.

parentsexchange specific identifying information with the adopting parents and closed when information is not shared between the adoptive parents and the birth parents.⁴⁷

2.1.2. Purpose of Adoption

Vulnerable children are children whose survival and development is jeopardized by certain circumstances are therefore in need of alternative care services.⁴⁸ These children are vulnerable to discrimination, inadequate care, abuse, and lack of basic development needs.⁴⁹ Therefore, such children should be entitled to special protection so that they will grow up getting the necessary family love, care, protection, and their basic needs fulfilled.⁵⁰ It is the government's responsibility to ensure the welling of these vulnerable children by providing alternative child care services.⁵¹

Alternative child care program includes, among others, adoption, foster placement, and institutional care.⁵² Adoption, apart from serving as an alternative care option, also enables an unaccompanied child to benefit from permanent family care.

2.1.3. Significance of Inter-country Adoption

Having discussed the types of adoption, inter-country adoption also plays a role in protecting and supporting vulnerable children.⁵³ It is viewed as a humanitarian response to underprivileged children in developing nations who do not have the means to ensure the recognition of their basic rights in their birth environment.⁵⁴ As much as it is beneficial for vulnerable children, it is also helpful for adoptive parents⁵⁵ to fulfill their need to have children. The practice of inter-country adoption is also significant when countries themselves cannot care for their orphaned and abandoned children.⁵⁶ It relieves burden and responsibility to countries.

⁴⁷ Ibid.

⁴⁸ FDRE Ministry of Women Children and Youth, Directive on Foster Family and Domestic Adoption Service, (2019), Addis Ababa, p.3 [herein after, Directive on Foster Family and Domestic Adoption Service]

⁴⁹ Ibid.

⁵⁰ CRC (n 7) Article 20.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid, Article 21(b).

⁵⁴ Christian (n 33) 54.

⁵⁵ Wallace (n 2) 690.

⁵⁶ Margaret Liu (n 1).

In industrialized countries such as the United States and other Western nations, it is becoming increasingly more difficult to adopt.⁵⁷ The number of families and individuals in these countries who are looking to adopt, due to infertility or other reasons, are greater than the number of babies given up for adoption.⁵⁸ In this case, inter-country adoption is a solution to the disparity in the number of orphaned and abandoned children in some countries and the number of families and individuals wishing to adopt children in others.⁵⁹ Not a perfect solution rather a very partial solution.⁶⁰

However, as much as it's considered as a solution some concerns have been raised towards inter-country adoption. It has flaws and it is also argumentative regarding the issues of, the best interests of the child, cross-cultural concerns, child trafficking, and East-West relations.⁶¹ These are common concerns around the world, especially by the sending countries including Ethiopia. Ethiopia was one of the top sending countries until recently concerns like the best interest of the child, physical and Psychological welling of the child, and identity crisis resulted from inter-country adoption led to the banning of inter-country adoption.⁶²

2.1.4. Debates on Inter-country Adoption

As much as there are advocates of inter-country adoptions, there are also people who argue against it. These conflicting views created confusion. When one group views inter-country adoption as a beautiful act of compassion, others considered it a form of child trafficking and slavery.⁶³ Both, advocate for and against inter-country adoption use the "best interests of the child" as the basis for their positions.⁶⁴

⁵⁷Bartholet Elizabeth, *International Adoption: Propriety, Prospects and Pragmatics*, (1996) 13 J. AM. ACAD. Matrim. Law.181, 181.

⁵⁸Ibid.

⁵⁹Bridget M. Hubing, 'International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?' (2001), 15 Notre Dame J.L. Ethics & Pub. Pol'y, 659-660

⁶⁰Bartholet, (n 43) 158.

⁶¹Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, (1999), 8 PAC. RIM L. & POL'Y J. 189.

⁶²National Children's Policy (n 4), p.19.

⁶³David M. Smolin, *Inter-country Adoption as Child Trafficking* (2004) 39 Val. U. L. Rev. 281 (2004) 281, 283.

⁶⁴Mezmur (n 17)3.

For the proponents, inter-country adoption is a humanitarian act serving the most fundamental human rights of the most helpless humans, by providing children with love and care,⁶⁵ which they couldn't get from their parents. And also an act that serves the best interest of the child.

The opponents, on the other hand, argues that it is more or less one form of child trafficking, as it involves the transfer of children from poor nations to rich nations to meet the demand of those in rich nations for children.⁶⁶ In other words, it is there to serve the interest of the citizens of rich countries by allowing them to have access to vulnerable children using their wealth and power.⁶⁷ Furthermore, it is believed that placing children in the hands of adoptive parents, from foreign countries, who are most likely different, can lead to the loss of identity associated with the child's community of origin. Because sometimes, it may be characterized as an act that involves cutting ties with a child's original family and complete integration in the new family.⁶⁸ This can further expose to potential ethnic, racial, and other forms of discrimination.⁶⁹ They also argue that adoption should respect the dignity and rights of the people involved in the process. That is to mean that the birth parents, the adoptive family, and the child.⁷⁰ An adoption that is built upon a severe deprivation of the rights of the birth family inherently harms the child as well, because of the child's profound and permanent connection to their birth family.⁷¹ Therefore, for them, this kind of adoption doesn't serve the best interest of the child.

However, to those who choose to evaluate inter-country adoption case by case, it is appropriate not to conclude that inter-country adoption is neither an inherent good nor an inherent evil. Rather it is a conditional good depending on how it is practiced.⁷² Inter-country adoption can be beneficial or harmful depending on how the government handles it.⁷³ This is why the Hague

⁶⁵ Christian (n 33) 54.

⁶⁶ M. Smolin (n 63) 283

⁶⁷ Ibid.

⁶⁸ Cantwell, Nigel *The Best Interests of the Child in Inter-country Adoption*, (2014). Innocenti Insight, Florence-UNICEF Office of Research, 5

⁶⁹ David M. Smolin, 'Inter-country Adoption and Poverty', (2007) *A Human Rights Analysis*, Capital University Law Review, Vol. 36.

⁷⁰ M. Smolin (n 63) 285.

⁷¹ Ibid, 283.

⁷² Ibid.

⁷³ Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption, (adopted, May 29, 1993, entered into force, 1 May 1995) [herein after the 1993 Hague convention] Article 8.

Convention requires contracting States totake all appropriate measures to prevent improper financial or othergainsin connection with an adoption.⁷⁴

2.1.5. History of Inter-country Adoption

The practice of international adoption began after World War II.⁷⁵ It began primarily as a generous response of theNorth American people to the problem caused by World War II, in Europe, which resulted in thousands of orphaned children.⁷⁶ Members of the U.S. military who were in Europe brought awareness about the children who were orphaned and abandoned as a result of the War.⁷⁷ Accordingly, inter-country adoption developed as a means of saving these children as well as other children affected by famine and other natural disasters.⁷⁸ Therefore,European states were the main source of children to America until the late 1970s.⁷⁹ At the same time, asthe availability ofUnited States-born children for adoption was decreasing, inter-country adoption increased.⁸⁰ Similarly, the Korean War was another major event that increased inter-country adoption and led the international community, particularly the Americas, to adopt from South Korea.⁸¹

Afterward, international adoption has grown significantly over the last few decades, each year many thousands of children cross national borders for adoption.⁸² Even though war and cross border conflicts are the reason for the creation of inter-country adoption, in the second half the twentieth century, it becamea social trend between the Western.⁸³They started considering it as humanitarian and charitable activities.⁸⁴ In the process oflegalizing international adoption, the

⁷⁴Ibid.

⁷⁵ M. Hubing (n 59) 661.

⁷⁶Peter Selman, Inter-country adoption in Europe after the Hague Convention,(1998) in R.Sykes& P. Alcock (eds.), *DevelopmentsinEuropeanSocialPolicy:ConvergenceandDiversity*,Bristol: Policy Press

⁷⁷ M. Hubing (n 59) 661.

⁷⁸Margaret Liu (n 1) 191.

⁷⁹Selman (n 76).

⁸⁰Lisa M. Yemm, International Adoption and the “Best Interests” of the Child: Reality and Reactionismin Romania and Guatemala,(2010) 9 Wash. U. GlobalStud. L. Rev. 555, 556.

⁸¹Christian (n. 33) 53.

⁸²Bartholet (n 43) 153.

⁸³M. Yemm (n 80) 557.

⁸⁴ Ibid.

1993 Hague Convention on Inter-country Adoption was developed between sending and receiving countries.⁸⁵

Recently, the mainsource of children for inter-country adoption in the past, like, Guatemala, China Romania and Ukraine, Russia, Vietnam, and South Korea, have suspended, shut down, or limited inter-country adoption for so many reasons.⁸⁶ As a result, Africa is increasingly becoming ‘the new frontier’ for inter-country adoption.⁸⁷ African children are attracting attention from prospective adoptive parents in other parts of the world.⁸⁸

2.1.6. TotalandPartial Restrictions on Inter-country Adoption

Each sending-country has domestic frameworks and legislation that impact the inter-country adoption process. These countries may suspend, partially restrict or allow with strict preconditions. Sending countries that were once prominent have recently suspended, shut down, or limited inter-country adoption. To mention some, Ethiopia, Guatemala, China, Romania, and Ukraine, Ghana, Russia, and Vietnam⁸⁹ are on the list. The restriction or the ban could be either total or partial. Some countries banned or restricted adoption with some exceptional circumstances that tolerate adoption.

Some countries banned international adoption without any exceptions. For instance, on December 21, 2012, Russia adopted a law called “*DimaYakovlev*”, which banned the adoption of Russian children by foreign citizens.⁹⁰ This ban is made mainly to protect the children from uncontrolled and unsupervised adoptions in the U.S.A that resulted in various incidents of deaths and neglect of Russian orphans by American parents.⁹¹ Likewise, The Federal Democratic Republic of Ethiopia’s (FDRE’s) House of People’s Representatives (HPR) has recently reformed the federal adoption law suspending inter-country adoption.⁹² This ban is a total restriction on adoption by foreigners without an exception. In other words, if the prospective adopter is non-Ethiopian citizens they are not allowed to adopt no matter the case is.

⁸⁵Bartholet(n 43) 154.

⁸⁶ACPF (n 12) 6

⁸⁷Ibid.

⁸⁸Ibid.

⁸⁹ Ibid.

⁹⁰DimaYakovlev Law in facts<<https://sputniknews.com/russia/201412211016090563/>> accessed on March,29/2020

⁹¹Ibid.

⁹²The RFC Amendment Proclamation (n 22) Article 2.

Among the countries which banned partially, Romania adopted a law that ultimately eliminated the possibility of inter-country adoption of Romanian children and which partially allows inter-country adoption when the adopter or one of the spouses in the adopting family who have the domicile abroad is the grandparent of the child.⁹³ In other words, in Romania inter-country adoption is not allowed unless it's by the grandparents of the child. Similarly in Ghana, inter-country adoption is suspended, unless it is a special or emergency case. The emergency cases involve special needs or medical conditions, and relative adoptions.⁹⁴ Such cases would be processed by the headquarters of the Department of Social Welfare.⁹⁵

On the other hand, inter-country adoption can be regulated and restricted by providing a strict precondition to be fulfilled. For instance, China has promulgated extensive regulations requiring that foreign adopters be married, i.e. Marriage is defined as between one man and one woman, which does not permit lesbian, gay, bi-sexual, transgendered, or intersex (LGBTI) individuals or same-sex couples to adopt.⁹⁶ Married couples must adopt jointly, they must have been married at least two years. It does not consider individuals who have been divorced two or more times to be eligible to adopt. The single prospective adoptive parent must not have more than two children in her household under the age of 18 and the youngest child must be at least six years old.⁹⁷ The minimum age for prospective adopters to adopt from is 30 and they have to be physically and mentally fit.⁹⁸ Prospective parents are disqualified if they are single, obese, older than 50, or fail to meet a range of other newly stringent criteria.⁹⁹ The government believed these requirements would make adoption requirements more reasonable and protective of the rights and interests of the children.¹⁰⁰

⁹³Carrie A. Rankin, 'Change In Inter-country Adoption Law results in a Human Rights violation', (2006) *Syracuse Journal of International Law and Commerce*, Vol. 34, 271.

⁹⁴Ghana Web, Government Bans Adoption,, <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Government-bans-adoptions-283210>> accessed on 29 March 2020

⁹⁵Ibid.

⁹⁶Travel .state. Gov, who Can Adopt From China, <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/China.html>> accessed on 29 March 2020

⁹⁷Ibid.

⁹⁸ Ibid.

⁹⁹Bartholet (n 43) 154.

¹⁰⁰Rachel A. Bouman, *China's Attempt to Promote Domestic Adoptions: How Does China's One-Child Policy Affect Recent Revisions in China's Adoption Law and Measure Up to the Hague Convention*,(2000) 13 *Transnat'l Law*. 91 116 <<https://scholarlycommons.pacific.edu/globe/vol13/iss1/7/>> accessed on 13 September 2020

Generally, from the above country's experience, we can infer that it's a country's (sending and receiving) domestic law that determines who can adopt and who can be adopted. Further, a ban, a partial restriction, or an open adoption policy is practiced to serve the best interest of the child.¹⁰¹

2.1.7. Principles that Affects Inter-country Adoption

2.1.7.1. Subsidiarity Principle

Subsidiarity “A *fundamental concept that a problem is best solved in the organization of the system itself*”.¹⁰² In the context of inter-country adoption, the equivalent to the local level in decision-making is the biological family.¹⁰³ The biological family is on the first level and has a priority to raise their children.¹⁰⁴ However, the issue with subsidiarity in the inter-country adoption context centers on who should raise a child if the biological family cannot raise the child.¹⁰⁵ The subsidiarity principle is recognized under the Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption (the 1993 Hague Convention).¹⁰⁶ It is a widely debated principle.¹⁰⁷

There are two views of the subsidiarity principle.¹⁰⁸ Some scholars like Elizabeth Bartholet advocates for the one view; which promotes “no preference” for an in-country placement, including domestic adoption, over inter-country adoption.¹⁰⁹ She believes that the subsidiarity principle is generally understood to mean, in the context of international adoption, a preference for keeping children in their country of origin over placing them abroad. Many argue that this principle means children should be placed in international adoption only as a last resort, after exploring all in-country options. She argues that These ideas are a corruption of the original understanding of subsidiarity, according to human rights scholar, subsidiarity was designed to

¹⁰¹ Nigel (n 68) 5-6.

¹⁰² The Law Dictionary, Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed <<https://thelawdictionary.org/principle-of-subsidiarity/>> accessed on 25 September 2020

¹⁰³ Chad Turner, 'The History of the Subsidiarity Principle in the Hague Convention on Inter-country Adoption,' (Chi.-Kent J. Int'l & Comp. L. Vol. XVI,) 96

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ The 1993 Hague Convention, (n 73) Article, 4(b).

¹⁰⁷ Turner (n 103) 95.

¹⁰⁸ Ibid.

¹⁰⁹ Elizabeth Bartholet & David Smolin, the Debate in Inter-country Adoption: Policies, Practices, And Outcomes, (2012) (Judith L. Gibbons & Karen Smith Rotabi Eds.), 236.

serve individual human rights, not state sovereignty, and the core idea was that children be brought up in a family ideally their family of origin, but if not then a substitute family that can provide the same sense of intimate community.¹¹⁰

On the other hand, David Smolin, in the inter-country adoption context takes the second and opposing, “pro-country” view. Smolin maintains that when family preservation and reunification efforts are unsuccessful, domestic adoption certainly exceeds inter-country adoption. Likewise, domestic placements that are short of a legal, permanent family, such as foster care or institutional care, may come before inter-country adoption.¹¹¹ For him, such placements may be particularly appropriate when taking into account the language, culture, nationality, and age of the child.¹¹²

The idea of the second argument seems to be incorporated under international legislation. However, the understanding of the principle is still incomplete.¹¹³ Article 4(b) of the Hague Convention articulates that adoption within the scope of the Convention shall take place only if, the competent authorities of the State of origin determined after possibilities for placement of the child within the State of origin have been given due consideration. In other words, the principle of subsidiarity, in general, requires that inter-country adoption should be a measure of last resort.

To the Hague Convention, last resort doesn't seem to include all forms of domestic alternatives. It looks like that the Convention, purposefully exclude any reference to foster care as an alternative to be considered before inter-country adoption.¹¹⁴ We find a similar idea or principle of subsidiarity under Article 24(b) of the ACRWC and Article 21(b) of the CRC. However, unlike the Hague convention, under the CRC and ACRWC, inter-country adoption may be considered 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.¹¹⁵ The “suitable manner” is most likely to include an institutional placement or even any other means.

¹¹⁰The Debate," Chapter in Inter-country Adoption: Policies, Practices, And Outcomes. Available at <https://www.researchgate.net/publication/236159292_The_Debate_Chapter_In_Intercountry_Adoption_Policies_Practices_And_Outcomes> accessed on 07 April, 2020.

¹¹¹Elizabeth Bartholet & David Smolin (n 109) 241.

¹¹²Ibid.

¹¹³Chad Turner (n 103) 99.

¹¹⁴Ibid 99.

¹¹⁵CRC (n 7) Article 21 ; ACRWC (n 3) Article 24.

2.1.7.2. The Best Interest of the Child

This principle is incorporated in the CRC, the ACRWC, and the 1993 Hague Convention.¹¹⁶ Article 4(1) of ACRWC, provides that: *“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”*¹¹⁷ The principle is one of the four cardinal principles under the CRC and ACRWC. The principles are interrelated. Therefore, if any measure taken is against one principle, there is a high probability that it might affect the other. The best interests of the child principle should respect the other three cardinal principles.¹¹⁸

Both the CRC and the Hague Convention place the best interests of the child as the highest possible priority.¹¹⁹ But the later focused on adoptive children's best interests, while CRC took it as a principle to every aspect.¹²⁰ As it is stipulated under the provisions of CRC and ACRWC, it is provided that the best interests of the child should be the paramount consideration in applying inter-country adoption.¹²¹ “The paramount consideration” as in, no other interests, whether economic, political, state security, or those of the adopters, should get prior or equal status.¹²²

There are no clear criteria or standards on what constitutes the best interests of the child in the adoption process. Rather, the application of the principle is determined case by case.¹²³ As a result, the process may become less uniform and difficult to implement. Plus the perception of what constitutes the best interest of the child changes from time to time.¹²⁴ Similarly regarding inter-country adoption, the best interest of the child justifies whether inter-country adoption benefits the child or not. However, there is no clear rule and regulation on how to determine what amounts to the best interest of the child and who may or may not be placed on inter-country adoption.¹²⁵

¹¹⁶Benyam Dawit (n 17), 113.

¹¹⁷ACRWC(n 3) Article 4.

¹¹⁸Mezmur (n 17) 119.

¹¹⁹ M. Yemm, (n 80) 561

¹²⁰Ibid.

¹²¹CRC (n 7) Article 21 ; ACRWC (n 3) Article 24.

¹²²Mezmur (n 17)124.

¹²³Ibid 127.

¹²⁴Nigel (n 68) 14.

¹²⁵Ibid 24.

Countries depend on this principle to determine their policy towards inter-country adoption. As a result, the country's policy may be prohibitive, restrictive, or open depending on what which recognizes the best interest of the child.¹²⁶

2.2. Legal Framework of Inter-country Adoption

2.2.1. International Legal Framework

2.2.1.1. The Convention on the Rights of the Child (CRC)

The United Nations Convention on the Rights of the Child (CRC or UNCRC) is a human rights treaty that aims to ensure special safeguards and care, including appropriate legal protection, of a child, before as well as after birth.¹²⁷ The CRC is the first legally binding international instrument to address the civil, political, economic, social, and cultural rights of every child, regardless of their race, religion, or abilities.¹²⁸ It is the most widely ratified human rights treaty in the world. It came into force on 2 September 1990, after it was ratified by the required number of nations.¹²⁹ Currently, 196 countries are party to it, including every member of the UN except the USA. The USA is the only United Nations member state that is not a party to it.¹³⁰

The Convention on the Rights of the Child, clearly states that every child has the right to grow up in a family environment, to know and be cared for by her or his family, whenever possible. When a child's family is unavailable, unable, or unwilling to care for the child, then appropriate and stable family-based solutions should be sought to enable the child to grow up in a loving, caring, and supportive environment.¹³¹ As article 20 of the convention stipulates it, "*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*

¹²⁶Ibid 52-53.

¹²⁷CRC (n 7) Preamble.

¹²⁸Save the Children, UN Convention on the Rights of the Child.

<<https://www.savethechildren.org.uk/what-we-do/childrens-rights/united-nations-convention-of-the-rights-of-the-child>> accessed on 25 September 2020.

¹²⁹CRC (n 7) preamble.

¹³⁰Sarah Mehta, There's Only One Country That Hasn't Ratified the Convention on Children's Rights:

US <<https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>> accessed on 24 August 2020.

¹³¹ UNICEF, Inter-country Adoption <<https://www.unicef.org/media/intercountry-adoption>> accessed on 31st March, 2020.

protection and assistance...” And it is the government of the member state’s responsibility to ensure alternative care for such a child in accordance to their national law.¹³²

As per the convention, Inter-country adoption is among the alternative care options for children who cannot be cared for in a family setting.¹³³ However, it provides it as the least and last option, by stating that, it should be applied only 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.¹³⁴ The convention also tries to ensure, that adoptions are authorized only by competent authorities, guided by informed consent of all concerned, so that inter-country adoption enjoys the same safeguards and standards as national adoptions, and that inter-country adoption does not result in improper financial gain for those involved in it.¹³⁵ Not only inter-country adoption should be used as a measure of last resort, but also when in compliance with the child’s best interests.¹³⁶ In the process of providing care, the CRC places a high priority on continuity in a child’s upbringing and to the child’s ethnic, religious, cultural, and linguistic background.¹³⁷ This may be one reason to consider inter-country adoption as a last resort measure under the CRC.

The handbook on the implementation of the CRC seems to understand the meaning of article 20 of the CRC that when care by the child’s parents is unavailable or inappropriate, care by relatives of the child’s parents, or by another substitute, i.e. foster or an adoptive family or, if necessary, by an appropriate institution should be considered.¹³⁸ And when putting a hierarchy of options: first, family relatives, including older children, second, substitute family through fostering or adoption; and third, and an appropriate institution.¹³⁹ This approach is also reflected in concluding observations by the Committee, which has consistently encouraged States to use institutions only as a last resort.¹⁴⁰ Therefore, this may be interpreted inter-country adoption may be preferred to institutional care.

¹³²CRC (n 7) Article 20.

¹³³CRC (n7) Article 21(b).

¹³⁴Ibid.

¹³⁵UNICEF (n 132).

¹³⁶CRC(n 7) Article 3(1).

¹³⁷ Ibid.

¹³⁸Hodgkin, R & Newell, P. The Implementation Handbook for the Convention on the Rights of the Child (2007) 3 ed. New York: UNICEF 278.

¹³⁹Ibid.

¹⁴⁰ Ibid.

2.2.1.2. The Hague Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption (the 1993 Hague Convention)

Since the 1960s, there has been an increase in the number of inter-country adoptions.¹⁴¹ In some cases, however, adoptions have not been carried out in ways that served the best interest of the children.¹⁴² Because of this; the international community started working to ensure adoptions are carried out in a transparent, non-exploitative, legal manner to the benefit of the children, and families concerned.¹⁴³ On Hague Conference on Private International Law in 1988, to address the issues raised on inter-country adoption, they tried to establish legally binding standards.¹⁴⁴

As a result, the first international policy which comprehensively addresses international adoption, the Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption Hague Convention of 1993 was developed.¹⁴⁵ The convention is an international agreement to safeguard inter-country adoptions, Concluded on May 29, 1993, in The Hague, the Netherlands. The Convention establishes international standards for the practice of inter-country adoptions.¹⁴⁶ The convention recognizes international adoption as preferable for children as compared to any in-country placement other than adoption.¹⁴⁷ On the other hand, the CRC prefers in-country foster care and other suitable institutional care over inter-country adoption.¹⁴⁸

Even though it is a legally binding standard in connection with inter-country adoption,¹⁴⁹ non-convention countries are not required to abide by the requirements for approval. Most likely then,

¹⁴¹ Andrew C. Brown, 'International Adoption Law: A Comparative Analysis' (2008-2009) VOL. 43, NO.3, 1337, 1338.

¹⁴² UNICEF, Inter-country Adoption, <https://www.unicef.org/media/media_41918.html> accessed on 18 March 2020

¹⁴³ Ibid.

¹⁴⁴ C. Brown (n 141) 1338.

¹⁴⁵ Bailey Jo Daugherty, 'Expectations of the Consequences of New International Adoption Policy in the U.S. (2009)' the Journal of Sociology & Social Welfare: Vol. 36: Iss. 2, Article 10, 171 <<https://scholarworks.wmich.edu/jssw/vol36/iss2/10>> accessed on 31 March 2020

¹⁴⁶ Travel.State.Gov, Inter-country Adoption, <<https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-process/understanding-the-hague-convention.html>> accessed on 31 March 2020

¹⁴⁷ Bartholet (n 43), 154.

¹⁴⁸ Ibid.

¹⁴⁹ C. Brown (n141) 1338.

this loophole could be used by less reputable individuals or agencies to engage in the purchasing of children for adoption.¹⁵⁰

2.2.2. Regional Legal Framework

2.2.2.1. The African Charter on the Rights and Welfare of the Child (ACRWC)

Africa is the only region with a region-specific child's right instrument, named the African Charter on the Rights and Welfare of the Child (ACRWC). It was claimed that the CRC was initiated and drafted by the Western nations.¹⁵¹ Few African countries, i.e. Algeria, Morocco, Senegal, and Egypt participated in the drafting process of the CRC.¹⁵² The reason for having an Africa Children's Charter was to have a child right law which reflects the specifics of the African context.¹⁵³ This Charter recognized different child rights including enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.¹⁵⁴ And Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty.¹⁵⁵

Article 25(1) of this Charter provides that, any child, who is permanently or temporarily deprived of his family environment, shall be entitled to special protection and assistance. It is a state's responsibility to ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment, is provided with alternative family care.¹⁵⁶ This alternative family care includes, among others, foster placement, or placement in suitable institutions for the care of children.¹⁵⁷ Even though foster and institutional placements are mentioned under this provision; adoption is also considered as alternative family care under Article 24 of the charter.

¹⁵⁰Ibid, 1341.

¹⁵¹OsifunkeEkundayo, Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?.,(2015) International Journal of Humanities and Social Science Vol. 5, No. 7(1); 147.

¹⁵²Ibid.

¹⁵³Ibid.

¹⁵⁴ACRWC (n 3) Article 19

¹⁵⁵ Ibid Article 20

¹⁵⁶Ibid Article 25.

¹⁵⁷Ibid.

The provision of the African charter concerning adoption under Article 24 mostly is similar to CRC Article 21 of the provision of adoption. In both charters, the best interests of the child shall be the paramount consideration in case of adoption. Both in-country and international adoption are recognized. Concerning inter-country adoption, the ACRWC states that the state shall consider inter-country adoption, as the last resort of alternative means of a child's care, 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.¹⁵⁸ Even though all the means of alternative child care services are not provided, under the charter, reading Article 24, one can conclude that any means that allow the child to have a care in the country of origin is preferable than inter-country adoption. It's up to the member state, to determine who should be domestically adopted and who should be internationally adopted, by establishing competent authorities to determine these matters and to ensure adoption is carried out in conformity with applicable laws and procedures.¹⁵⁹

Article 25(3) of ACRWC also provides that a member state when considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and the child's ethnic, religious, or linguistic background.¹⁶⁰ In other words, there might be a possibility where inter-country adoption may not be considered as a last resort if it doesn't disturb the child's upbringing and doesn't cause identity crises. Considering a child's ethnic, religious, or linguistic background in determining the best interest of the child is crucial.

¹⁵⁸ Ibid Article 24(b).

¹⁵⁹ Ibid Article 24(a).

¹⁶⁰ Ibid Article 25(3).

Chapter Three

Inter-country Adoption under the Ethiopian Law

3.1. Development of Inter-country Adoption in Ethiopia

Adoption in Ethiopia is a long-lasting traditional practice and has an equivalent name in different languages, like, 'gudifecha' in Afan Oromo and 'yetutlij' or 'yemarlij' in Amharic.¹⁶¹ Adoption was practiced for different reasons, i.e. to get someone to look after them when they get older if they don't have biological children, for charity or good deeds by religious people, for creating kinship between families.¹⁶²

In the early 1970s, Ethiopia began placing children for inter-country adoption when thousands of children were orphaned or abandoned as a result of drought, famine, and severe and prolonged civil wars.¹⁶³ In the early 2010s, Ethiopia was the most popular destination for families looking to adopt a child.¹⁶⁴ Before the ban, Ethiopia was second on the list next to China as the most popular country for adoptions by Americans.¹⁶⁵

However, the dark side of inter-country adoption started to be disclosed in 2013 after an American family was convicted for starving and leaving their Ethiopian origin adopted child in the cold.¹⁶⁶ Thirteen yearsold Hanna Williams, who was adopted from Ethiopia, died because of hypothermia resulted from the cold.¹⁶⁷ After this case, inter-country adoption from Ethiopia dropped by two folds to 983 in 2014 than the preceding year.¹⁶⁸ As a result, in January 2018, the Ethiopian parliament banned foreign adoptions, claiming concerns about the safety of

¹⁶¹ መሐረረዳኢ፣ የተሻሻለውን የብተሠብሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ ቅጽ 2፣ 1999 ዓ.ም.፤ [Mehari Redae, Some Points In Understanding The Revised Family Code, Vol.2, 1999 Ec, Amharic Version], At P.84 – 85.

¹⁶² Ibid.

¹⁶³ Howell, Signe, *the Kenning of Foreigners: Transnational Adoption in a Global Perspective*. (2006) New York: Bergahn Books, 203.

¹⁶⁴ 'Inter-country Adoption Ban, Unadoptable to the Best Interest Principle', Addis Fortune (Addis Ababa 21 Jan, 2018) <<https://Addisfortune.Net/Columns/Inter-country-Adoption-Ban-Unadoptable-To-Best-Interest-Principle/>> accessed on 10 April 2020.

¹⁶⁵ Npr.org, In Ethiopia a New Ban on Foreign Adoption is about the National Pride: <<https://www.npr.org/sections/parallels/2018/04/02/595150800/in-ethiopia-a-new-ban-on-foreign-adoptions-is-about-national-pride>> accessed on march 24/2020

¹⁶⁶ Melat Assefa (n 37) 42.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

Ethiopian children.¹⁶⁹ The ban was in part triggered by high-profile cases of abuse like the one discussed above. Also, children who had parents and did not need support were being adopted, instead of those who needed help.¹⁷⁰ The most important reason for the ban, however, is the government's concern about the identity crisis Ethiopian children were facing.¹⁷¹ The announcement of the ban was met with supporting as well as opposing views from the public; some praise it as the right decision to protect children from human rights abuses,¹⁷² while others think it's an early decision that didn't consider the reality in Ethiopia.¹⁷³

3.2. Legal and Policy Frameworks

3.2.1. Policy Framework

Until recently, Ethiopia did not have a comprehensive policy dealing with child rights. Therefore, numerous aspects of children's rights used to be found scattered in different policy documents covering closely associated issues,¹⁷⁴ i.e. National Social Protection Policy addressed international standards relating to the welfare of children. The Cultural Policy of Ethiopia also addresses harmful traditional practices affecting children¹⁷⁵. Similarly, the National Youth Policy and the National Education Policy have included issues of direct relevance to children's rights.¹⁷⁶

However, in April 2017 the Government of Ethiopia has found it necessary to formulate a comprehensive National Children's Policy to bear its commitment to respect, protect, and fulfill children's rights and increase family and community involvement in healthy growth and personality development of children.¹⁷⁷ The Policy has three fundamental pillars: the first one is, Children's development and growth the second one is; Prevention and protection of children

¹⁶⁹RFC Amendment Proclamation (n 22) Article 2(1)

¹⁷⁰Serkalem Tafesse, 'Why adoption by foreigners is banned in this country' <<https://theculturetrip.com/africa/ethiopia/articles/why-adoption-from-foreigners-is-banned-in-this-country/>> accessed on 20 March 2020

¹⁷¹National children's policy (n 4) p. 7.

¹⁷²Interview with Ato Dereje Tegybelu, Legal Affairs Directorate Director at MoWCY, (MoWCY, Addis Ababa, on 15 September 2020)

¹⁷³'Inter-country Adoption Ban, Unadoptable to the Best Interest Principle', Addis Fortune (Addis Ababa 21 Jan, 2018) <<https://addisfortune.net/columns/intercountry-adoption-ban-unadoptable-to-best-interest-principle/>> accessed on 10 April 2020

¹⁷⁴Wolde Tadiq T. Kassa, 'Baseline Study for a Comprehensive Child Law in Ethiopia', (2013) Centre for Human Rights Studies College of Law and Governance Studies Addis Ababa University, 26

¹⁷⁵Ibid.

¹⁷⁶Ibid.

¹⁷⁷National Children's Policy (n 4) p.1

from social, economic, and political hardships and third, providing rehabilitation, care, and support for children in difficult circumstances.¹⁷⁸ Under the Third pillar, the policy addresses the issue of adoption and inter-country adoption.¹⁷⁹ The policy also aims at facilitating alternative family services, depending on the circumstances of the community, for orphans and other children who cannot live with their parents for different reasons.

According to the policy, Inter-country adoption was one alternative child care option, which was not able to fully compensate for the love and care that the children lost in their natural homes.¹⁸⁰ Further, it is a disadvantage to children experiencing identity crises and other problems that will affect them psychologically and socially.¹⁸¹

Therefore, the policy advised supporting OVC only through domestic alternative care options instead of pursuing the option of inter-country adoption.¹⁸² The policy discourages the practice of inter-country adoption.

3.2.2. Inter-country Adoption under the National Legal Framework

International human rights instruments ratified by Ethiopia are an integral part of the law of the land.¹⁸³ Ethiopia ratified the CRC and ACRWC. Therefore, both are considered as part and parcel of the law of the land,¹⁸⁴ or part of the family law of Ethiopia in our context. Ethiopia submits a periodic report to the Committee of the above convention and charter respectively, about the measures adopted which give effect to the rights recognized on the convention and charter and the progress made on the enjoyment of those rights.¹⁸⁵ Accordingly, the committee gives recommendations to the reports.¹⁸⁶ The CRC committee after reviewing the 2015 report regarding inter-country adoption recommended Ethiopia to encourage family and community-based domestic solutions instead of inter-country adoptions.¹⁸⁷

¹⁷⁸Ibid P.2

¹⁷⁹Ibid P.19

¹⁸⁰Ibid.

¹⁸¹Ibid.

¹⁸²Ibid.

¹⁸³FDRE Constitution(n 15), Article 9(4).

¹⁸⁴Ibid.

¹⁸⁵ CRC (n 7)Article 44(1) ; ACRWC (n 3)Article 43.

¹⁸⁶Ibid.

¹⁸⁷UN Committee on the Rights of the Child (CRC), Concluding Observation on the Combined Fourth and Fifth Periodic Report of Ethiopia, 3 June, 2015, Recommendation No. 23(d).

Each country has domestic legal frameworks and legislation which impact inter-country adoption processes. These laws are influenced by the country's values, practical realities, and challenges on adoption. Ethiopia to harmonize the laws with the international child right instruments, including the CRC and the ACRWC, adopted different domestic laws on adoption. Ethiopia under the FDRE constitution considered adoption as one means of provision of special protection for orphans.¹⁸⁸

3.2.2.1. The Revised Family Code

The RFC is the first domestic legal document to proclaim about inter-country adoption.¹⁸⁹The civil code did not recognize inter-country adoption therefore;the RFCis promulgated to fill gaps on child rights and protection. Under this code, the procedure, the manner,and the effects of adoption are provided.¹⁹⁰Unlike the civil code, itallowed foreigners to adopt.¹⁹¹ The RFC does not have strong eligibility requirements for adoption. For instance, any person whether foreign or Ethiopian national can adopt an Ethiopian child as long as he/she is a person whose age is not less than twenty-five years.¹⁹² If the adopter is married, the consent of the other spouse is mandatory.¹⁹³ The code also provides that an adoption whether local or international should be applied considering the best interest of the child. It is the court's responsibility to make sure the adoption maximizes the best interest of the child.¹⁹⁴ Furthermore, article 194 of RFC provides that the opinion of the child, as well as that of the guardian, must be heard by the courts before approving the adoption. This has been serving as one means for identifying the best interest of the child.

Concerning the hierarchy of inter-country adoption and other alternative cares, the code seems to have a similar position with the CRC and ACRWC. Article 194(3) (d), of the code, requires the court, before approving the agreement of adoption, where the adopter is a foreigner, to consider and make sure the absence of access to raise the child in Ethiopia. In other words, inter-country adoption should be the last resort after exhausting available domestic means of alternative care.

¹⁸⁸ FDRE Constitution(n 15) Article 36(5).

¹⁸⁹Revised Family Code Proclamation, 2000, Article 193 Proc. No. 213, Nega. Gaze. 6th Year, Extra ordinary Issue no.1 [herein after RFC Proclamation]

¹⁹⁰Ibid Article 180-190.

¹⁹¹Ibid Article 193.

¹⁹²Ibid Article 184.

¹⁹³Ibid Article 186.

¹⁹⁴Ibid Art 194(2).

However, inter-country adoption is one alternative child care option, which could not fully compensate for the love and care the children have missed in their natural homes.¹⁹⁵ And it led to an identity crisis and other problems that will affect them psychologically and socially.¹⁹⁶ As a result, the RFC was amended and the provisions of the RFC which deals with inter-country adoption was deleted.¹⁹⁷

3.2.2.2. The RFC Amendment Proclamation

As discussed in the previous sub-topic, the FDRE National Children's Policy intended to expand domestic alternative care options, by restricting inter-country adoption.¹⁹⁸ Afterward, the RFC needed to comply with the policy, and the law was amended in 2018. The RFC (Amendment) Proclamation No.1070/2018 deleted the provisions that deals with inter-country adoption on the RFC or impliedly banned inter-country adoption.¹⁹⁹ As a result, it transferred the status of inter-country adoption from last resort as means of alternative care option, to no means at all.

The provisions concerning inter-country adoption that existed under the RFC Proclamation No. 213/2000 are either repealed or deleted under the Amendment Proclamation.²⁰⁰ The RFC Amendment Proclamation is short and general and it doesn't provide exception and further explanation regarding why foreign adoption is banned. It doesn't also clarify who foreigners are and to whom the ban applies. It just omits the word "foreigners" from the law.²⁰¹ It has three Articles; the first article deals with the nomenclature of the proclamation; the second article provides the repealed or deleted provisions from the RFC. And article three provides the effective date of the proclamation. According to Article 2 of the RFC Amendment Proclamation, Article 193 of the RFC which deals with adoption by Foreigners is repealed.²⁰² Additionally, two sub-articles from Article 194 of the RFC, which deal with a foreign adoption, are deleted.²⁰³

Regarding the scope of this Amendment Proclamation, The RFC preamble provided that the RFC is only applicable to administrations that are directly accountable to the Federal

¹⁹⁵ National Children's Policy (n 4) p.7

¹⁹⁶ Ibid.

¹⁹⁷ RFC Amendment proclamation (n 22) Article 2

¹⁹⁸ National Children's Policy, (n.4), p.7.

¹⁹⁹ RFC Amendment Proclamation (n 22), Article 2.

²⁰⁰ Ibid Article 2.

²⁰¹ Ibid.

²⁰² Ibid Article2(1).

²⁰³ Ibid Article 2.

Government;²⁰⁴ and the City administrations accountable to the Federal Government are Addis Ababa and Dire Dawa.²⁰⁵ The RFC Amendment Proclamation is part of the RFC enacted to amend certain provisions. As a result, it will also be applied only in Addis Ababa and Dire Dawa city administrations. This shows that only the two city administrations banned the practice of inter-country adoption, while the regional state's laws remain unamended.

3.2.2.3. Family Laws of the Regional States

The FDRE constitution introduced federalism to share power between the Federal and the states in a way that could accommodate diversity and legal pluralism as one manifestation of this power-sharing.²⁰⁶ Enacting laws like Labor, Commercial, and Criminal Code is the power of the HPR.²⁰⁷ The HPR may also enact civil laws if the HoF deems it necessary.²⁰⁸ However, if a law is neither clearly given to the Federal nor decided by the HoF to be promulgated by the HPR, the power is given to member states.²⁰⁹ As a result, enacting family law is inherently given to regional states.²¹⁰ Seven amongst the nine regional states recognized under the constitution,²¹¹ except Afar and Ethiopian Somali Regional state, have promulgated their Family Laws.²¹²

These Regional Family Laws recognize inter-country adoption in a similar way to the RFC. For instance, the Revised Tigray Region Family Law Proclamation, under article 224 recognizes inter-country adoption and it is the power of the social court to approve the agreement of inter-country adoption after fulfilling the necessary conditions.²¹³ Article 204 of the Amhara Regional Family Code Approval Proclamation stipulates that the regional court may approve international adoption after hearing the opinion of regional or federal authority empowered to give an opinion,

²⁰⁴ RFC Proclamation (n 189), preamble.

²⁰⁵ The FDRE Constitution (n 15), Article 49(3) ; The Dire Dawa Administration Charter, 2004, preamble, Proc. No. 416, Nega Gaz. 10th year no. 60

²⁰⁶ Gebeye, Berihun Adugna, 'Women's Rights and Legal Pluralism: A Case Study of the Ethiopian Somali Regional State' (2013) Women in Society, <<https://ssrn.com/abstract=2683685>> accessed 18 March 2020

²⁰⁷ FDRE Constitution (n 15), Article 55

²⁰⁸ Ibid.

²⁰⁹ Ibid Article 52.

²¹⁰ Ibid Article 52.

²¹¹ Ibid Article 47(1).

²¹² Mulugeta Getu Sisay, 'Departure of Ethiopian Family Laws: The Need to Redefine the Place of Societal Norms in Family Matters', (2015) Haramaya Law Review Vol. 4:1, 89.

²¹³ The Revised Tigray Region Family Law Proclamation, 2007, Art. 224, Proc. No. 116, Nega. Gaz. 15th Year, no. 1

that the adoption is beneficial to the child.²¹⁴ Similarly, the Southern Nation Nationalities and People's Regional Family Law Proclamation recognizes the practice of inter-country adoption.²¹⁵

The Regional States not only can enact their family laws they have also the right to execute these laws.²¹⁶ That means Regional Courts have a mandate to approve an agreement of inter-country adoption.²¹⁷ Even after the Amendment of the RFC which resulted in the ban on the practice of inter-country adoption, none of these regional state's family laws are amended to restrict inter-country adoption.

3.2.2.4. Directive on Foster Family and Domestic Adoption Service

The Ethiopian government after the ban decided to strengthen the domestic alternative care services and needed to adopt a legally binding document.²¹⁸ As a result, in July 2019 the MoWCY has issued a directive on foster family and domestic adoption service, to avoid domestic adoption implementation problems and to establish uniform, standard, transparent and accountable procedures.²¹⁹

The main importance of this directive is to establish uniform, standard, transparent, and accountable procedures in the process of service provision by foster care and domestic adoption.²²⁰ This directive further aims at giving proper execution procedures by providing detailed eligibility requirements for the child to be adopted or placed in a foster family. Similarly, eligibility requirements are provided for the potential family. Further, the directive provides responsibilities and service delivery procedures to be followed by governmental and non-governmental institutions in the process of executing the service.

However, the directive only recognized two of the domestic alternative child care services. Other services, i.e. institutional or orphanage care and different community based care services are not included. Additionally, alternative child care services are scattered. Therefore, the ministry has a

²¹⁴The Amhara Regional Family Code Approval Proclamation, 2003, Art.204, Proc. No 79, Zikr- Hig,8th year, no.3

²¹⁵Southern Nation Nationalities and People's Regional Family Law Proclamation, 2002, Art.208, Proc. No. 75,

²¹⁶FDRE Constitution (n 15), Article 52(1(2)).

²¹⁷The Amhara National Regional Family Code Approval Proclamation, (n 203), Article 205 ;The Revised Tigray Region Family Law Proclamation,(n 202), Article 225.

²¹⁸Ibid.

²¹⁹Directive on Foster Family and Domestic Adoption Service (n 48) Preamble.

²²⁰Ibid P.5.

plan to compile this directive with the one on a process and create a comprehensive domestic alternative child care service directive.²²¹

3.2.2.5. The Alternative Child Care Guidelines

In 2009 the Ministry of Women affairs revised and updated the 2001 alternative child care guideline, which deals with in-country and inter-country issues.²²² The Revised Guideline among others provides the minimum conditions for services where Government, non-governmental, religious, and other institutions that give alternative childcare should adhere to.²²³ It outlines measures and good practices to support, care, and protect children without parental care in an institution or outside of institutions within the economic, social, and political context of the country.²²⁴ It also aims to improve the quality of care and service provided by governmental and non-governmental organizations involved in childcare and advances the welfare of the orphans and other vulnerable children. The guidelines consist of five types of alternative child care services including, community based childcare, reunification, and reintegration program, foster care, in-country, and Inter-country adoption, and institutional care service.

The Guideline, discusses in-country and inter-country adoption issues in section three subsection four of the guideline. It frames measures and procedures to be followed in the process enforcing adoption, by providing minimum precondition to be fulfilled. It also requires strict adherence to the law of the land and guidelines and even strict enforcement of the law on the part of the authorities in charge.²²⁵

However, the Guideline was issued eleven years ago, so it doesn't reflect the current situation and it fails to deeply address the community-based child care service, fails to include other alternative child care programs that recently came into service, i.e. family-like care, financial sponsorship, family preservation. Additionally, the guideline doesn't have legal effect. Therefore

²²¹Interview with AtoDerejeTegybelu (n 172)

²²²FDRE, Ministry Of Women's Affairs The Alternative Childcare Guidelines, Addis Ababa - May, 2009, p.1[herein after The Alternative Childcare Guideline].

²²³Ibid.

²²⁴Ibid.

²²⁵Ibid p.38-47.

to fill all these gaps, the MoWCY is working on updating and changing the guideline into a directive.²²⁶

²²⁶Interview with AtoDerejeTegybelu (n 172).

Chapter Four

Applicability of the Ban to Foreigners of Ethiopian Origin

4.1. Foreigners of Ethiopian origin (FEO)

FEO are foreign national, other than a person who forfeited Ethiopian nationality and acquired Eritrean nationality, who had been Ethiopian national before acquiring a foreign nationality; or at least one of his parents or grandparents, or great grandparent was an Ethiopian national.²²⁷ The proclamation which allows FEO to exercise certain rights in Ethiopia seems to favor FEO over other foreigners. This positive discrimination allowed them to strengthen their tie with their country of origin, by contributing to the development of their country of origin²²⁸ and by giving them the right to utilize economic, social, and administration services.

If a person fulfills the above criteria to FEO, an identification card of FEO will be issued and provided to them so that it will help with the enforcement of the rights, privileges, and responsibilities provided.²²⁹ A spouse of FEO with a foreign nationality shall also be entitled to apply for an Identification card if their spouse holds an Identification card.²³⁰ After they possess the identification card, they shall be entitled to all the rights and privileges granted, as if they are FEO.²³¹ Further, in an exceptional case when the Authority finds it appropriate, the rights and privileges accorded to FEO may be granted to foreign nationals.²³²

4.2. FEO as an Exception to the Ban on Inter-country Adoption

Foreigners of Ethiopian origin (FEO) are foreign nationals, who had been Ethiopian national before acquiring foreign nationality, or at least, one of his/her parents or grandparents or great grandparents was an Ethiopian national.²³³ These people are not Ethiopian citizens, they are foreigners.²³⁴ Yet, they are provided with special treatment under the Ethiopian law, which is lesser than Ethiopian national but better position than foreigners.

²²⁷ FEO Proclamation (n 23) Article 2

²²⁸ Ibid.

²²⁹ Ibid Article 7

²³⁰ Ibid Article 8(3)

²³¹ Ibid Article 8(4)

²³² Ibid Article 8(8)

²³³ Ibid Article 2

²³⁴ Ibid.

The proclamation that provides FEO with certain rights to be exercised in their country of origin, proclamation No. 270/2002 is a response for the significant number of FEO who wishes to strengthen their tie with their country of origin.²³⁵ Additionally, it is believed that foreign nationals could contribute to the development and the prosperity of the peoples and country of their origin if the legal restrictions on the enjoyment of certain rights and privileges are lifted.²³⁶ As a result, the proclamation, by identifying FEO who have acquired foreign nationality, and by lifting the restriction imposed on these foreigners, entitled them to various rights and privileges. It also created a legal framework that allows FEO to fulfill their contribution to the development and prosperity of their country of origin.²³⁷ As provided under article 5, of the proclamation,

The holder of the Identification Card of foreign national of Ethiopian origin shall enjoy the following rights and privileges:

- 1) He shall not be required to have an entry visa or residence permit to live in Ethiopia,*
- 2) Without prejudice to Article 6(2) of this Proclamation, he shall have the right to be employed in Ethiopia without a work permit;*
- 3) He shall not be subjected to the exclusion that applies to foreign nationals regarding coverage of pension scheme under the relevant pension law;*
- 4) Without prejudice to Article, 40(3) of the Constitution, the provisions of Articles 390-393 of the Civil Code shall not apply to persons of Ethiopian, origin holding the Identification Card;*

Investment law;

- 5) He shall have the right to be considered as a domestic investor to invest in Ethiopia under the investment law;*
- 6) restrictions imposed on foreign nationals regarding the utilization of Economic, Social, and Administrative Services shall not be applicable to foreign nationals of Ethiopian origin holding the Identification Card.*

²³⁵Ibid preamble

²³⁶Ibid preamble

²³⁷Ibid Article 3

However, the proclamation provided an exception to the above-stated rights by preventing or denying FEO right to vote or be elected to any office at any level of Government, and the right to be employed regularly in the National Defense, Security, Foreign Affairs, and other similar political establishments.²³⁸ We can infer from the above provisions that FEO are allowed to utilize economic, social, and administration services other than the above exceptions. So if we say that foreign nationals could contribute to the development and the prosperity of the peoples and country of their origin, participating in providing alternative care for OVC can be considered as one.

Further, the right to adopt and create a family can be considered among the social service rights which FEO are granted. In principle, In order to get this entitlement, one's parents, grandparents, or great grandparents must be Ethiopian nationals and the entitlement doesn't exceed beyond the fourth generation. Therefore, their attachment to Ethiopia's identity and cultural background is most likely to be closer.²³⁹ However, these entitlements may be granted to foreign nationals in exceptional circumstances, i.e. to a foreigner spouse of FEO and foreigners residing in Ethiopia.²⁴⁰ In other words, these foreigners are entitled to social and administrative rights including the right to adopt.

Additionally, the provisions of the RFC Amendment Proclamation are general in a way that doesn't define foreigners. Therefore we have to refer other laws to understand who foreigners are. The Ethiopian Nationality Proclamation No. 378/2003 defines a foreigner as a person who is not an Ethiopian national.²⁴¹ That means FEO are still foreigners with an Ethiopian origin that are granted special rights and privileged and who are also relieved from some restrictions on other foreigners.²⁴² Therefore, the application of the ban on FEO should be interpreted in the same manner.

²³⁸ Ibid Article 6.

²³⁹ Ibid.

²⁴⁰ Ibid Article 8.

²⁴¹ The Ethiopian Nationality Proclamation, 2003, Art.2(1), Proc.No. 378,Nega.Gaze. 10th Year, no 13.

²⁴² FEO Proclamation (n 23) preamble.

4.3. Matching the Policy Objective behind the Ban and Privileges of FEO

According to the National children's Policy, inter-country adoption failed to fully compensate for the love and care the children have missed in their natural homes and exposed them to the identity crisis and other problems.²⁴³ Therefore the policy discouraged the practice of inter-country adoption and focused on domestic alternatives.

Further, among the reasons that necessitated the ban of inter-country adoptions are:- identity crisis which resulted from lack of connections with biological parents and country of origin; the children being exposed to human trafficking and other abuses; inter-country adoption failing to serve its purpose because it was being used by normal children who have other options, instead of OVC; it is a reason for parents to abandon their children for economic gains and inter-country adoption becoming a means of income for brokers and agencies.²⁴⁴

Even though the national children's policy claims that inter-country adoption is not sufficient to fully provide love and care for the children,²⁴⁵ this cannot be applied to adoption by FEO which is mostly done by family members, relatives, or people with similar identity background.²⁴⁶ Additionally, adoption by FEO is an adoption between people who has a similar cultural and identity background, so, it doesn't expose children to an identity crisis and complies with the objective of the ban.

Kinship care is one recognized means among the community based care service and it is providing support and care by placing the children in the extended family systems.²⁴⁷ Therefore, adoption by FEO is as good as kinship care, as most of it is made between extended families. Further, most of the adoption process by FEO doesn't involve agencies and brokers, so it cannot have an economic gain as a motive behind.²⁴⁸

The overall objective of the policy concerning OVC who are separated from their family temporarily or permanently is to provide different care and support services through domestic

²⁴³ National Children's Policy (n 4) p.7

²⁴⁴ Interview with Ato Kibri Hailu Abay, Children's Rights Advocacy and Wellbeing Directorate Director at MoWCY (MoWCY, Addis Ababa, May 7 2020).

²⁴⁵ National Children's Policy (n 4) P.7

²⁴⁶ Interview with Ato Berhanu Tasew, Judge in Adoption Bench, Bole Branch Federal First Instance Court, (Federal First Instance Court, Addis Ababa, 26 April 2020)

²⁴⁷ The Alternative Childcare Guidelines, (n 218) p.19.

²⁴⁸ Interview with Ato Dereje Tegybelu, (n 172).

alternative care options.²⁴⁹ The policy preferred domestic adoption to protect children from experiencing an identity crisis and other problems that will affect them psychologically and socially if they are cared for through inter-country adoption.²⁵⁰ However, children adopted by FEO are less likely to face these problems as it mostly involves family.

4.3.1. Positive Discrimination to FEO

During the public hearing organized on the discussion of the Draft RFC Amendment proclamation, providing an exception to the ban in the case of FEO and children with special needs was the main issue raised for discussion.²⁵¹ As to the government's defense, the main reason behind the Draft Amendment Proclamation not providing an exception is to maintain diplomatic relations with foreign countries by not creating discrimination between foreign citizens.²⁵²

The proclamation No. 270/2002 entitled FEO various rights and privileges excluding other foreigners from these rights.²⁵³ This positive discrimination was already made way before the amendment proclamation. It is true that the rights and privileges provided under the Proclamation No. 270/2002, unlike inter-country adoption, are to be exercised domestically, but it doesn't mean this right could not extend abroad. Plus the discrimination is already made when the ban excluded foreigners.

However, the issue was not deeply assessed during the discussion in the public hearing and the HPR and participants of the public hearing did not consider the rights and privileges provided on the Proclamation No.270/2002 while discussing the matter.²⁵⁴ Further, making a distinction between foreigners is being practiced by other countries like Romania which partially allows inter-country adoption when the adopter is the grandparent of the child.²⁵⁵ And Ghana, which made an exception to a special case that, involves medical conditions, and relative adoptions.²⁵⁶

²⁴⁹National children's Policy (n4) p, 7

²⁵⁰Ibid.

²⁵¹Interview with AtoDerejeTegybelu (n 172).

²⁵² Ibid.

²⁵³FEO Proclamation (n23) Article 5.

²⁵⁴Interview with AtoDerejeTegybelu (n 172).

²⁵⁵Carrie A. Rankin, (n 93) 271.

²⁵⁶Ghana Web, Government Bans

Adoption., <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Government-bans-adoptions-283210>
accessed on 29 March 2020.

4.4. Judicial Precedent on the Inapplicability of the Ban on FEO

The applicability of the ban to FEO has been controversial ever since the ban in 2018.²⁵⁷ Even in the processes of court approval, some judges believe that the ban should not apply to FEO and continued to approve adoption agreements that involve FEO.²⁵⁸ Others argue, the ban includes FEO for they are still foreigners therefore, they are not allowed to adopt.²⁵⁹

In the case of Mr. WondwosenTadele and others, the biological parents and the adoptive parent, who is FEO and at the same time the auntie of the adopted child made an agreement of adoption.²⁶⁰ As a result, an application for approval of the agreement was presented before the Federal first instance court. However, it did not get an acceptance for similar reasons of the above argument.²⁶¹

Consequently, the case was taken to the Federal Supreme Court Cassation Division claiming that it contains a fundamental error of law. The cassation court then gave binding legal interpretation about the ban. The decision provides that the ban should not apply to FEO.²⁶² The court mainly cited three reasons for this decision. First, FEO are provided special treatment to participate and to be benefited from economic, social, and administrative activities in Ethiopia. The Amendment Proclamation of RFC which proclaimed the ban is a general law. On the other hand, the proclamation that provides FEO preferential treatment is a special law that provided an exception to foreigners. Therefore, it's not appropriate to treat them as foreigners depending on general law.²⁶³ Second, FEO are foreigners who are familiar with Ethiopian cultural values and principles and they share common culture and identity with the child to be adopted. This helps a child to grow up maintaining the cultural background and identity so that identity crises will not be an issue.²⁶⁴ Third, the adoptive parent is an auntie to the child, so, the adoption doesn't defer from moving to another country with a family member. Plus, the adoption agreement considers the best interest of the child. Therefore, it is not proper to deprive the child of this

²⁵⁷ Interview with Ato Kibri Hailu Abay (n 244).

²⁵⁸ Interview with Ato Berhanu Tasew (n 246).

²⁵⁹ Ibid.

²⁶⁰ Ato Wondewosen Tadesse and others (n 29).

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

opportunity.²⁶⁵ Because of the above reasons, the court allowed the adoptive parent to adopt the child regardless of her being a foreigner. This decision paved a way for FEO to be treated as an exception to the general rule of the ban.

A decision rendered by the Federal Supreme Court Cassation Division is a binding decision that serves as precedent at all levels of regional and federal courts.²⁶⁶ That means it is most likely to be considered as a law. Even though the cassation decision is binding and serves as a precedent to the courts at all levels,²⁶⁷ it doesn't provide a solution for all the questions and inconveniences that might arise regarding the ban and its applicability to FEO.

The first problem that could not be solved by the cassation decision is regarding the mandate of the Government Authorities. When the adopter is a foreigner the court, before approving the adoption, requires the opinion of MoWCY whether the adoption is beneficial to the child or not.²⁶⁸ After the ban, however, MoWCY claims that the mandate to give an opinion on inter-country adoption came from Article 193 of the RFC. Accordingly, the authority's mandate to give opinion ended after Article 193 of the RFC is repealed.²⁶⁹ In different cases, especially in cases of adoption by FEO, the court gave an order to MoWCY for an opinion about the personal, social and economic position of the adopter but, the authority responds that their mandate is waved by the amendment proclamation, therefore; they refused to give an opinion.²⁷⁰ The binding effect of the Cassation decision is on the courts not on other governmental Institutions.²⁷¹ Therefore, it cannot force the executive organs in the government.

This issue has been debatable between the Authority and the Court.²⁷² Nevertheless, the court has made tireless efforts on getting an opinion from the ministry.²⁷³ The ministry, however, has been giving a similar response claiming that what the court requested is something beyond the ministry's mandate. As a result, the court kept approving inter-country adoption without getting opinions on whether the agreement is beneficial to the child. The court relies only on what is

²⁶⁵ Ibid.

²⁶⁶ Federal Courts Proclamation Re-amendment Proclamation (n 32), Article 2.

²⁶⁷ Ibid.

²⁶⁸ RFC Proclamation, (n 189) Article, 193.

²⁶⁹ Interview with Ato Dereje Tegybelu (n 172).

²⁷⁰ Interview with Ato Berhanu Tasew (n 246).

²⁷¹ Federal Courts Proclamation Re-amendment Proclamation (n 32) Article 2.

²⁷² Interview with Ato Berhanu Tasew (n 246).

²⁷³ Ibid.

presented in the courtroom.²⁷⁴ However, this may affect the best interest of the child if there is no authority to collect and analyze relevant information about the personal, social, and economic position of the adopter.

The other issue is when one of the adopting parents is a foreigner and the other is FEO. In such cases, the cassation decision cannot serve as a precedent and it may lead to an argument.²⁷⁵ Similar issues will be raised if they are both foreigners living in Addis Ababa or one of the adopting parents is an Ethiopian national and the other is not.

For instance, in the case of Kibebetsehay orphanage and others, the couples who wanted to adopt a child from Kibebetsehay were an Ethiopian and a Spanish national living in Addis Ababa.²⁷⁶ However, this adoption agreement was considered as inter-country adoption because a foreigner was involved. MoWCY was not willing to give an opinion for the reasons provided above. Even though, the court approved the adoption agreement as it is in line with the best interest of the child,²⁷⁷ most likely the adoptive parents are to face problems in other governmental offices, as they are required to have supportive letters to finish the remaining process.²⁷⁸

4.5. Scope of the Ban and its Applicability to FEO

As discussed in chapter three, regional states have the mandate to enact as well as execute family laws.²⁷⁹ Accordingly, most of the regional states have enacted their own regional family laws, which are applicable in their respective territories. Inter-country adoption is recognized under these regional laws and regional courts have a mandate to approve an agreement of inter-country adoption.²⁸⁰

²⁷⁴Ibid.

²⁷⁵Ibid.

²⁷⁶Kibebetsehay Orphanage and Others, (Federal First Instance Court, Bole Branch 3rd Civil Bench, Case No 80382, 26 June 2018) unpublished.

²⁷⁷Ibid.

²⁷⁸The Alternative Childcare Guidelines (n 218), p.46.

²⁷⁹FDRE Constitution (n 15), Article 52.

²⁸⁰The Amhara National Regional Family Code Approval Proclamation, (n 206), Article 205 ;The Revised Tigray Region Family Law Proclamation, (n 205), Article 225.

Inter-country adoption is banned since 2018.²⁸¹ However, As the RFC Amendment Proclamation is the extension of the RFC; the ban only applies to Dire Dawa and Addis Ababa.²⁸² That means Regional states can still practice and approve inter-country adoption.

However, in practice, the MoWCY and other Federal agencies that are in concern with processing inter-country adoption; do not accept the approval and decision of regional courts rather require it to be recognized by the federal court.²⁸³ Two possibilities are there in such cases, one is that the Regional states can still practice inter-country adoption and the other is FEO who wants to adopt from these regional states has no limitation on regional laws. In both cases, however, administrative agencies don't accept the court approval from this regional state's court.²⁸⁴

In the case of Mrs. Letenchel G/michael and others,²⁸⁵ the adoptive parents, who are Ethiopian origin foreigners and the legal guardian, concluded an adoption agreement. This agreement was concluded in Tigray according to the Tigray Region Family Law, after the ban of inter-country adoption under the RFC. They took the case to a Social Court in Axum for approval. The agreement was approved by the court accordingly.²⁸⁶ However, while they were perusing for supporting letters in Federal agencies, they were told that the agreement needs the approval of federal courts because it involves inter-country adoption.²⁸⁷ The case was taken to the Federal First Instance Court for recognition of the decision of Axum court and the regional court decision was approved accordingly.

Concerning matters on the family law, the legal effect of the decision of the Regional court should be as valid as that of the Federal court. Because matters in the regional family law including inter-country adoption should be a state court matter.²⁸⁸ Even if we assume that inter-country adoption is a matter that involves an international agreement that needs the involvement

²⁸¹RFC Amendment Proclamation (n 22).

²⁸²RFC Proclamation (n 189), preamble.

²⁸³Interview with Ato Berhanu Tasew (n 246).

²⁸⁴Ibid.

²⁸⁵Wo/ro Letenchel G/michael and Others (Bole branch 3rd Civil Bench, case No 81314, Federal First instance court, 06 July 2018) unpublished.

²⁸⁶Ibid.

²⁸⁷Interview with Ato Berhanu Tasew (n 246).

²⁸⁸FDRE Constitution (n 15) Article 80.

of the federal government,²⁸⁹ it should have been discussed in separate law promulgated by the federal government. But, as long as it is in the regional law it will be the mandate of the regional state's court.

Regardless of the gaps, however, the Regional state's family Laws are in favor of FEO adopting a child within their territory. And legally speaking we cannot say Ethiopia as a country banned the practice of inter-county adoption.

4.6. Additional Reasons that Necessitates to Provide Exception to the Ban

4.6.1. The Status of Domestic Alternatives Care Services

In the Ethiopian case, Orphans and Vulnerable Children (OVC) are children whose survival and development are jeopardized by certain circumstances and are therefore in need of alternative childcare services.²⁹⁰ These OVC has been supported through international and national alternative care services. However, inter-country adoption has not been effective in providing care and support to the OVC, so supporting OVC only through domestic alternative care options instead of pursuing the option of inter-country adoption has become the advisable way suggested by the policy.²⁹¹

The domestic alternative care service includes foster care placement, institutional care, community based care, and domestic adoption.²⁹² Also, the government arranged a program where, celebrities, government officials, and interested people can adopt OVC financially. This type of adoption is only economic adoption.²⁹³

The community based care service is a preferable program to help OVC in Ethiopia. The objective of this Childcare Service is to mobilize the community, its resources, and indigenous knowledge with the ultimate goal of sharing a burden of the government and addressing the needs and rights of OVC.²⁹⁴ It is also believed to be a better alternative because it is by far cost-

²⁸⁹Ibid Article 51(8).

²⁹⁰The Alternative Childcare Guidelines (n 218), p.11.

²⁹¹National Children's Policy (n 4) P.7

²⁹²Interview with Ato Kibri Hailu (n 244).

²⁹³Ibid.

²⁹⁴The Alternative Childcare Guidelines (n 218), p.14.

effective and its greater advantage of reaching a large number of target children in a given community.²⁹⁵

In the long run, the goal of the government is to deinstitutionalize OVC and provide care and protection through other options, i.e. domestic adoption, community based care, foster care.²⁹⁶ In other words, institutional care is the last resort among domestic care options. Therefore the government, through the responsible institution MoWCY, is working on strengthening these alternatives and there is an initiative of creating awareness and promoting these domestic alternatives to achieve the deinstitutionalizing goal.²⁹⁷ However institutional child care services are currently serving a large number of OVC comparing to others.

According to the 2020 MoWCY administrative report currently, there are 150,092 abandoned children on the street.²⁹⁸ The administrative report also shows that the alternative child care services available all over Ethiopia are, 137 child care institutions (orphanage) raising 8,955 children, 346 group homes caring for 6,920 children, 22 shelters helping 2,510 children 21 boarding school providing service for 3,641 children.²⁹⁹ Totally, 22,026 OVC are getting care and protection through different means available.

As we can infer from the above data, there are still a great number of abandoned children without any care and protection. Plus among those who are getting the service most of them are in group homes, institution, and shelters,³⁰⁰

In the case of domestic adoption, the community's awareness about it has been unsatisfactory. Inter-country adoption hindering it, the community's wrong understanding, and lack of due attention from the government are among the reasons behind.³⁰¹ Recently the ministry is working on different awareness-raising programs so that the community develops the culture and plays a

²⁹⁵ Ibid.

²⁹⁶ Interview with Ato Kibri Hailu (n 244)

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Interview with Ato Berhanu Tasew (n 246)

significant role in supporting children by domestic adoption.³⁰² According to MoWCY, 6,276 VOC were benefited through domestic adoption between the year 2015/16 and 2018/19.³⁰³

In this case, considering adoption by FEO as an additional option will help the children to get care and protection in a safe family, by a person from the same background, knowing their norm, values, and culture, having access to better education, health service, and above all a permanent family environment. Plus in a country where there are weak social services, large numbers of street children, providing an exception to inter-country adoption may help.

4.6.2. Effects of the Ban

In the Ethiopian context, Extended families are recognized to take part in the process of raising a child in the absence of biological parents. The law automatically delegates relatives to exercise the functions of guardian or tutor in the absence of parents.³⁰⁴ In the case of inter-country adoption by FEO, most of it is practiced among relatives and extended family members.³⁰⁵ Restricting FEO from adopting will indirectly affect the children's right to be reunited with their family members abroad. Further, this will deprive their chance of getting better protection, love, care, permanent family environment, health, and educational service and stay in a stranger domestic alternative service instead.³⁰⁶ In such cases, the main concern should be the best interest of the child, instead of the nationality of the adoptive parent.

The CRC requires state parties to make sure that the child concerned by inter-country adoption enjoys the protection and standard equivalent to those existing in the case of national adoption.³⁰⁷ In other words, inter-country adoption should be allowed after making sure the children are going to get at least equal or better protection to what they were going to get domestically. As we have discussed above adoption by FEO is mostly free from causing identity crisis and other physical and psychological problems. Therefore, the assumption is, it gives better protection than foster family care and institutional care and maybe similar domestic adoption if the adoption is made by relatives.

³⁰²Interview with AtoKibriHailu (n 244)

³⁰³Ibid.

³⁰⁴RFC Proclamation (n 189), Article 225

³⁰⁵Interview with AtoBhailuTwabe, Former Judge in Adoption Bench , Bole Branch Federal First Instance Court, (Federal First Instance Court, Addis Ababa, 20 April 2020)

³⁰⁶Ibid.

³⁰⁷CRC (n 7), Article 21

There is an assertion that inter-country adoption, be it by FEO or foreigners, serves not children in need, rather, it was being used by children who have access, as a means to go abroad.³⁰⁸ The RFC is silent about the eligibility requirements of the adopted child.³⁰⁹ However the alternative child care guideline provides eligibility requirements and among these requisites, being certified by a recognized body that his/her parents are not able to take care of him/her because of medical or economic reasons leads to adoption.³¹⁰ It is the mandate of MoWCY to confirm that the child and the applicant of adoption meet the criteria of eligibility for inter-country adoption.³¹¹ Accordingly, it is the government's responsibility to follow up on the provided controlling mechanisms.

Also considering the number of OVC in Ethiopia and the status of the domestic alternatives discussed earlier, one cannot say OVC are fully being cared for and protected by domestic alternative care. Therefore, denying them inter-country adoption, they may end up in lesser care and protection compared to what access they could have got. In the case of Kibebet Sahy orphanage and others, Bersabeh is an abandoned child who grows up in an in Kibebet Sahy orphanage. An Ethiopian and FEO couple wanted to adopt her and took their case to the federal first instance court for approval.³¹² In this case, the options for Bersabeh are, to get adopted by this family, or to stay in the orphanage until she gets domestic parents who can adopt her, this if she gets lucky. The court approved the adoption by FEO not only considering the rights of FEO but also the best interest of the child.³¹³

The ban also affects potential adoptive parents. FEO who are already provided preferential treatments in other laws are being denied to exercise their already existing rights concerning adoption. This also limits their right to participate in activities that contribute to the country of origin's economic development; their right to help their families in their country of origin and

³⁰⁸ Interview with Ato Kibri Hailu (n 244)

³⁰⁹ RFC Proclamation (n 189) Article 180-196

³¹⁰ The Alternative Childcare Guidelines (n 218) p.41

³¹¹ Ibid p.40

³¹² Kibebet Sahy orphanage and others, (case No 78141, Federal First instance court, Bole Branch 3rd Civil Bench, 24 April 2018) Unpublished

³¹³ Ibid.

the right to be parents. Further, it may affect Ethiopian citizens who are married to FEO or a foreigner.³¹⁴

The negative effect on the child and potential adoptive parents indirectly affect the economic development and the wellbeing of the country at large. Allowing FEO to adopt, on the other hand, plays a great role in sharing the burden of the government to care and protect OVC.

³¹⁴Bezunesh Wale and Others, (case No 77516, Federal First Instance Court, Bole Branch 3rd Civil Bench, 4 July 2018.) Unpublished

Chapter five: Conclusion and Recommendations

Conclusion

The RFC amendment Proclamation is silent regarding the applicability of the ban to FEO. The proclamation is general and fails to grant FEO special treatments. Under other laws, however, FEO are entitled to special rights and privileges. These privileges are lesser than those provided to the Ethiopian nationals and better than the foreigners. The proclamation 270/2002 positively discriminates FEO and relieves them from some restrictions on other foreigners. The privileges include accommodating social and administrative services. Therefore, adoption is among the social services the FEO can enjoy in their country of origin.

Therefore this study concludes that the application of the ban towards FEO should be interpreted in a manner that considers the rights and privileges of FEO under other laws. As a result, the ban on inter-country adoptions should not be applicable to FEO.

Additionally, the main objective of the policy behind discouraging inter-country adoption is to protect children from experiencing an identity crisis and other problems that will affect them psychologically and socially, which may result from inter-country adoption. However, inter-country adoption by FEO is not a threat to such problems; because adoption by FEO mostly involves extended family members, relatives, or at least a person from the same cultural background. Therefore, if FEO are provided as an exception to the ban, it would not be against the objective of the policy.

The RFC Amendment Proclamation applies to Addis Ababa and Dire Dawa city administrations. At the same time, regional states are governed by their own family law. Inter-country adoption is recognized under these regional laws and regional courts have a mandate to approve an agreement of inter-country adoption. That means the applicability of the ban does not exceed to regional states. Therefore, FEO can still adopt a child from these Regional states.

Further, this study tried to show how domestic adoption and other domestic alternative care services are not sufficient enough to support all the OVC in Ethiopia. On the other hand, how adoption by FEO can be a means to better care and protection. And creates an opportunity to live

in a family environment, with a better living standard than what they get in an orphanage, foster family, or even domestic adoption in some cases, without facing an identity crisis and physical and psychological abuse. Additionally, adoption by FEO shares the burden of the Ethiopian government in protecting and promoting the OVC.

Recommendations

After assessing the applicability of the ban to FEO this study proposes the following recommendations to resolve the legal and practical challenges in the process.

1. The RFC Amendment Proclamation banned inter-country adoption without providing exceptions and without recognizing the rights of FEO granted under other laws. Therefore it needs to be amended in a way that provides FEO are exceptions to the ban. Additionally, a clear mandate of government Authorities should be provided.
2. The RFC Amendment Proclamation applies to Addis Ababa and Dire Dawacityadministrations that means the applicability of the ban does not extend to regional states. Therefore, the RFC Amendment Proclamation should be amended in a manner that can provide the scope of the ban.
3. Inter-country adoption is not only a family matter but it also involves the issue of child rights and it is a matter that involves foreign relation. Therefore, the HoF should decide and deem it necessary for the HPR to enact an adoption law, separate from the family law, that can legally bind regional states and that can create uniformity between the Federal and the regional adoption laws.

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