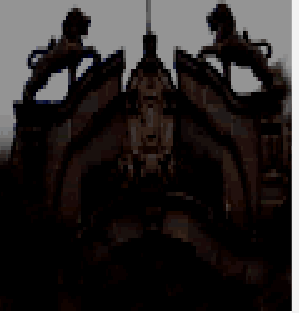


Addis Ababa  
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**ADDIS ABABA UNIVERSITY SCHOOL OF GRADUATE STUDIES**

**COLLEGE OF LAW AND GOOD GOVERNANCE**

**CHILDREN'S RIGHT TO BE HEARD DURING JUDICIAL PROCEEDINGS: WITH  
PARTICULAR REFERENCE TO THE WESTERN HARARGHE ZONE OF OROMIA,  
ETHIOPIA**

**BY: YOSEF PETEROS YOSEF**

**ADVISOR: ABERA DEGEFA (Assistant Professor)**

**March, 2014**

**CHILDREN'S RIGHT TO BE HEARD DURING JUDICIAL PROCEEDINGS: WITH  
PARTICULAR REFERENCE TO THE WESTERN HARARGHE ZONE OF OROMIA,  
ETHIOPIA**

**IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE  
OF MASTER OF HUMAN RIGHTS LAW**

**BY: YOSEF PETEROS YOSEF**

**March, 2014**

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## **Declaration**

I declare that ‘Children’s Right to be Heard During Judicial Proceedings: With Particular References to Western Hararghe Zone of Oromia, Ethiopia’ is, to the best of my knowledge and belief, original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this or any other university.

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Date \_\_\_\_\_

This thesis has been submitted for defense under my guidance as advisor in the College of Law and Good Governance of Addis Ababa University

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## **I. List of Acronyms**

- ACRWC- African Charter on the Rights and Welfare of the Child
- AU- Africa Union
- ACPF- African Child Policy Forum
- CRC- Convention on the Right of the Child
- FDRE - Federal Democratic Republic of Ethiopia
- UN - United Nation
- UNICEF - United Nation Children’s Fund
- RFC- Revised Family Code
- ONRS- Oromia National Regional State
- ONRSFC- Oromia National Regional State Family Code
- ICL- Independent Children’s Lawyers
- E.C- Ethiopian Calendar
- NRSC- National Regional States Council

## **II. Glossary of Local Terms**

**Kebele:** small administrative units within Woreda

**Woreda :** District administration

**Committee:** UNCRC Committee on children right to be heard

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## **Abstract**

The idea that children should be heard and their views respected during parental divorce has become an important principle of family law in recent years. Researches on children's right to be heard in judicial proceedings in Ethiopia is non-existent and only available on others types of children's rights, for instances; child violence, juvenile justice, e.tc. Hence, there are rampant and serious problems both in law and in practices on allowing children to have voice in family law proceedings

The main objectives of this study were to over view the legal gaps of the existing laws and lack of mechanisms used to hear children's voices in the practices of the family law proceedings of the Doba Woreda and high courts of the western Hararghe zone. It draws on the narratives of eight children, four parents and two judges interviewed in relation to their views and questioners made for six judges on children's experiences to have voice in the family law proceedings of these courts, specifically within the context of supervised contact. Hence, the judicial interview to the children is the only mechanism to hear children's voice in the family law proceedings of these courts, though the outcome of these proceedings will affect many important aspects of a child's life.

In order to reach at the stated objectives, qualitative data collection method pertaining to different research questions of the study got suitable. Unstructured interviews using interviews guide meant to avoid any red herring on the main objective of the research; observation of the natural setting and, key informant interviews were use.

The study argues that children's right to be heard in Ethiopia, demands amendments of legislation, direct and full incorporation of the CRC in to the domestic laws, publication of the whole texts of the CRC into the official Negarit Gazetta and dissemination of the translated versions of the CRC and General Comment No.12 to all stakeholders. Thus, this study also concludes as Ethiopia has obligation to fulfill all the mechanisms used to hear children's voices in family law proceedings, giving training for professionals and allocate budget for courts of all levels in order to realize this right. Therefore, by over viewing the existing laws and the practices of the family law proceedings of the Doba woreda and high courts of the western Hararghe zone of Oromia, this study forwards the concluding observations and recommendations.

## CHAPTER ONE

### 1.1. Background of the Study

The United Nations Convention on the Rights of the Child (UNCRC), which was adopted by the UN General Assembly in 1989, is an international agreement, which protects the human rights of children under the age of 18. It is the first global instrument to recognize the child possessing rights and the state to respect and ensure them. It defines universal principles for the status of children, providing them with fundamental human rights and freedoms.

It included article 12, a provision that introduced a right of all children capable of forming their views to be heard and to be taken seriously. This article was a new concept in international law, and posed a challenge to most countries throughout the world, where a culture of listening to children was not widespread or even acceptable. Hence, article 12 of the Convention is a crucial and visionary provision of the Convention on the Rights of the Child, because of hearing children's voices, helped to see childhood through a new lens and gain a renewed understanding of citizenship and democracy.

Thus, when heard, children can develop positive self-esteem, easily manage stressful experiences, and less prone to depression, hopelessness and suicide.<sup>1</sup> Hence, hearing children in judicial proceedings, particularly in family law proceedings is not something that should be done merely because it is the current fashion;<sup>2</sup> but it is a symbol of the modern welfare state's commitment to the value of freedom, democracy and the like.<sup>3</sup>

In modern society, at both domestic and international level, although, there is a strong move towards canvassing the views of all stakeholders, but because of there is great variation in the way in which countries ensure children's voices in parental separation and divorce are not being sufficiently heard.<sup>4</sup> Thus, some countries incorporated this right in their domestic laws, in codes of practices and policies, and placing obligations on local authorities, judges, and schools to entertain the views of children.<sup>5</sup>

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<sup>1</sup> See as cited by Anna L. Schmidt, and M.G.Flekkøy, *Children's participation and monitoring children's rights*, in E. Verhellen (ed. (14. July 2003). *Monitoring Children's Rights*, The Hague, Martinus Nijhoff Publishers, 1996, pp.58-62.

<sup>2</sup> Paul S., Steve G., and Glenn M., '*Child Participation*', 2004, p.5

<sup>3</sup> Allison J., *Giving Voices to Children's Voices: Practices and Problems, Pitfalls and Potentials*, University of California press, 2007, Vol.109, p.2

<sup>4</sup> Rose M., *Children Participation in Research*. REPOA Brief, 2006, p.1.

<sup>5</sup> The United Nations Convention on the Rights of the Child, GA Resolution 44/25, UN GA Resolution Supp.No.49, UN Doc A/44/736, Article 12

Ethiopia is one of the oldest members of the UN with its admission in 1945, and it has ratified the Convention on the Rights of the Child (CRC) in 1991 without any reservations.<sup>6</sup> In addition, Ethiopia is a signatory of African Charter on the Rights of Child and Welfare (ACRWC). Signing the Convention is the first step, but without legislation, political willingness, money, and support from Civil Society children's rights to be heard which is stated under the CRC, remain empty promises. Hence, the government of Ethiopia has international obligation, regarding the full and direct incorporation of the CRC in domestic laws and fulfillments of the mechanisms needed to realize children's rights to be heard judicial proceedings.<sup>7</sup>

## 1.2. Statements of the Problem

*“If the judge is okay to hear our voices, we have something new that may serve him as evidence regarding our family, education, health, food and clothes before giving an order of divorce.”*<sup>8</sup>

Children have a right to express their views and have them taken seriously in accordance with their age and maturity – has proved one of the most challenging right to implement.<sup>9</sup> Thus, there are opinions about the importance of being listened to and having children's views taken into account when decisions about their living arrangements are made.<sup>10</sup> Hence, though Ethiopia is the signatory of the CRC, but still children are the marginalized groups of the society<sup>11</sup> and are not enjoying their rights to be heard in all matters affecting their interests in judicial proceedings. Moreover, Children lost their right to be heard in the family law proceedings of the Doba woreda and high courts of Western Hararghe Zone of Oromia National Regional State (ONRS).

Moreover, they are exposed for harassments in the family law proceedings of these courts due to some factors attributed to lack of facilities (mechanisms) used to hear children's voice, trained human powers, institutional set ups, non-implementation of domestic laws and international instruments ratified by the country. Thus, children's right to be heard is not realized in these courts. Therefore, this study focuses on the examination of the domestic laws and the practices of the Doba woreda and high courts of

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<sup>6</sup> Ethiopia, 3<sup>rd</sup> Report (2003): To Committee on the Rights of the Child; 43<sup>rd</sup> Session, p.2.

<sup>7</sup> Daniel Hailu ., 'A Situational Analysis on Investing on boys and girls. Past and Future. Toward an Integrated Social Protection Strategy in Ethiopia's Forthcoming PRSP- The Growth and Transformation Plan,' 2010/11-2015/16, p.8.

<sup>8</sup> Extracted from the interview made for Hussen Ahmed, a 17 years old boy living in Doba woreda of western Hararghe.

<sup>9</sup> Gerison L., 'Every Child's Rights to be heard.' A Resource guide on the UN Committee on the Rights of the Child. General Comment No.12, Save the Children, 2011, p.7 (vi).

<sup>10</sup> M Gollop, N Taylor and A Smith, 'Children's Perspectives of their Parents' Separation' in A Smith, N Taylor and M Gollop (eds), *Children's Voices: Research, Policy and Practice* (2000), p.153.

<sup>11</sup> Daniel Hailu cited at Supra note 7, 2006, p.1-5.

Western Hararghe Zone of Oromia National Regional State (ONRS) regarding the realization of children's right to be heard in their family law proceedings.

### **1.3. The Research Questions**

This study focuses on the following research questions:

1. Who is a child?
2. What are the human rights of children to express their views and to be heard under UNCRC?
3. Do children's Right to be heard in the custody assessment, maintenances and parental time plans is incorporated under the FDRE Constitution, FDRE Revised Family Code and the Oromia National Regional State Family Code (ONRSFC)?
4. Does children are enjoying their right to be heard in the family law proceedings of the Doba woreda and high courts of Western Hararghe Zone of Oromia National Regional State?
5. Do these courts have all needed mechanisms (methods) and trained professionals used to realize children's right to be heard in the family law proceedings?
6. What are the prospects (legal and administrative measures), shall expected to realize children's right to be heard in family law proceeding of the courts of researched areas.

### **1.4. Objectives of the Study**

This research is conducted to achieve the following general and specific objectives.

#### **1.4.1. General Objectives**

The general objective of this research is to examine the existing laws governing children's right to be heard, particularly, the CRC, ACRWC, FDRE Constitution, FDRE Revised Family Code of 2000 and Family Code of Oromia National Regional State in light of article 12 of the CRC. In addition, it is to examine the international obligation of Ethiopia toward the implementation of the CRC and its incorporation in the domestic laws of the country.

#### **1.4.2. Specific Objectives**

The specific objectives of the research include assessing the debates on children's voices, international conventions, Regional and national laws on the rights of children to express their views freely and to be heard in all matters affecting them in custody assessments, maintenance and parenting time plans. This could be achieved by exploring the views of the proponents and opponents of this right based on international, regional and Ethiopian legislative contexts.

Particularly, this study is to examine the practices of the family law proceedings of the Doba woreda and high courts of Western Hararghe Zone of ONRS in realization of children's rights to be heard. It includes:

- Exploring the practices of these courts in using the CRC, General Comment No.12 along with domestic laws in realizing children's right to be heard in the family law proceedings;
- Assessing and observing the practices of these courts and examines how judges are hearing children's voice in their family law proceedings and
- Exploring the availability of the court set ups, mechanisms (facilities) and trained professionals used in realization of children's right to be heard in custody assessments, maintenances and parenting time plans.

### **1.5. Research Design**

This research paper employs descriptive and analytical research methods, which are entirely based on qualitative research method. The qualitative research method provides the facility to examine subjects in depth, by providing a unique tool for studying what lies behind or underpins a certain phenomena. Hence, the major source to this research include, the study of academic literature, international conventions, domestic laws of Ethiopia and the practices of the family law proceedings of the Doba woreda and high courts of Western Hararghe Zone of the ONRS. In addition, the document analysis is composed of scrutinizing the contents of books, magazines, newspaper and the electronics media.

Moreover, this work is highly focused on examining the practices of the family law proceedings of the researched areas, by preparing the questioners to six judges working on the family law proceedings of the researched areas, interviews to eight children of divorced parents and four parents. The questioners may carry out for the social workers and Independent Children's Lawyer (ICL) and any other professionals and expertise working on the family law proceedings of the researched areas if any.

All the contact made to children in the due course of the interviews was carried out in the ethical manners. It is to save children from harassment and intimidation by interviewing them in a friendship spirit after I proved their voluntariness; and telling them the nature and purpose of the interviews and the benefits of their rights to be heard in the family law proceedings. All the contacts with children have done by going to the place where they are playing or herding goats, sheep or cattle to save them from transportation costs and other psychological crisis for coming the place where they do not know before.

In addition, children those come to the courts, have heard in the presence of coordinator of the legal aid offices of Haramaya University,<sup>12</sup> since they were familiar with him in the due course of their families' conflicts for searches of free legal aids.

## **1.6. Scope of the Study**

Geographically, the scope of this study is delimited to the examination of mechanisms and practices of family law proceedings (e.g. in custody assessment, maintenances and parental time plans) of the Doba woreda and high courts of western Hararghe zone of ONRS. West Hararge is one of the Zones in the Ethiopian 'Region of Oromia.'<sup>13</sup> It takes its name from the former province of Hararghe, and bordered on the south by the Shebelle River which separates it from Bale, on the southwest by Arsi, on the northwest by the Afar Region, on the north by the Somali Region and on the east by East Hararghe. Woredas in West Hararghe include Chiro, Bedessa, Gelemso, Mieso, Tullo, Mesela, Gammachis, Anchar and Dobba. Based on the 2007 Census conducted by the CSA, with an area of 15,065.86 square kilometers, this Zone has a total population of 1,871,706, among which children are numbered 575219.<sup>14</sup> Doba Woreda is named after its major town Doba and one of the Woreda's (administration wards), in the Oromia National Regional State of Ethiopia. Part of the West Haarghe Zone, Dobba is bordered on the South by Chiro, on the West by Mieso, on the north by Somali region, on the east by Eastern Hararghe Zone, and on the southern by Tullo woreda. The 2007 national census reported a total population for this Woreda is 133,939, of whom 68512 were men and 65,427,<sup>15</sup> among which children are 63726,<sup>16</sup> in number.

## **1.7. Limitations of the Study**

This study is only limited to children's rights to be heard in custody assessments, maintenances and parenting time plans in the practices of the Doba woreda and high courts of Western Hararghe of ONRS.

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<sup>12</sup> Haramaya University opened the Legal Aid Office at Doba woreda court to give free legal aid services for the poor and incapable people since, Oct 2013.

<sup>13</sup> Oromia National Regional State (ONRS) is one of the Regional States in the Federal Democratic Republic of Ethiopia. Geographically, the Region extends from 3°24'20"- 10°23'26"N latitudes and 34°07'37"-42°58'51"E longitudes. It shares borderlines with all the Regional States in the Federal Democratic Republic of Ethiopia, except Tigray. It also shares international borderlines with the Republic of the Sudan (with 66 km borderline) in the west and Kenya Republic (with 521km) in the south.

<sup>14</sup> From the reported plan made by the western Hararghe zonal women and children's office to Oromia Regional National State for 2006 budgetary year; by attachment letter No. 2/62/dd-du-124A, on 23/12/2005, p.10-15.

<sup>15</sup> From the Population and Housing census of Ethiopia: Result for Oromia Region , Vol.1, (accessed on 13 Dec.2012).

<sup>16</sup> Letter written by Doba Woreda women and children's affairs office to west Hararghe Zonal women and children's affairs office by attachment paper No. *Dhi/Dub/ fi D/AD/906/35, date 16/04/2006b, p. 4.*

Hence, the study does not examine issues about children's rights to be heard in criminal and administrative proceedings. In addition, the issues of children's right to be heard in Alternative Dispute Resolution (ADR) and adoption cases are not the concern this study.

In addition, with regarding to legal regimes, this study is only limited to the overview of the provisions of the CRC, ACRWC and FDRE Constitution, FDRE Revised Family Code and the Oromia National Regional State Family Code, which are dealing with children's right to be heard in matters affecting their interests in custody assessments, maintenances and parental time plans. Therefore, throughout this study, I may use the word children '*participation*' interchangeably in place of the phrase 'children's Rights to be heard' although this term itself does not appear in the text of article 12, but agreed by the UN Committee on the Rights of the Child, on general comment No 12.<sup>17</sup>

## **1.8. Related Literature**

There are now substantial bodies of researches especially; from across the westerns jurisdictions that portrays a consistent message: children do not like being kept in the dark about family proceedings which impact on their lives. These researches elaborate that many children go further and want the opportunities to talk to the judge who is going to make the decision that will have long-term repercussions for their future.

In Australian family law disputes, there were the early findings on the area of children's voice by Patrick P. and Judy C. (2008); and Consultation on the voice of the child at the fifth world congress on family law and children's rights, (2009). In addition, Judicial Meetings with Children in Australian Family Law Proceedings: 'Hearing Children's Voices' by Michelle M. Fernando, (2011); and Children's participation in family justice processes, (2009); are the prominent works on the children's voices in family law disputes.

All these studies indicate that there is much to be gained by giving children the chance to have a greater voice in family proceedings. However, in my view, the questions of how, when and where merited further debated since there is lack of mechanisms (methods) used to hear child's voice and trained professionals in family law proceedings of the developing countries. Hence, all of the above mentioned works have mentioned that there is no single "best answer" or "single best method" to how to engage children in family proceedings, rather by employing different systems:<sup>18</sup> *inter alia*; nature of the cases;

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<sup>17</sup> CRC as cited at Supra note 5, under its introduction part, 2009, Para. 3, p.5.

<sup>18</sup> Nicholas B., The child's role in family litigation: '*A voice but not choice*,' at Diverse voices conference, (2010), p. 28-30.

matters at issue; child's age, capacity and desire; resources of family and community and professional preferences and competencies.

On the other hand, there are some studies made on children's rights in Ethiopia. For instance, *"Implementation of the Convention on the Rights of the Child, with particular reference, to Civil and Political Rights"* done by Zenebe Fikre (2008); *"The Child and the Law in Ethiopia,"* done by Tilahun Teshome, published on Journal of (Ethiopian Law, Vol.XVIII, 1997). In addition, *"State responsibility for the protection of rights of children deprived of their family environment: the Ethiopian perspective"* done by Solomon Tekle (2009) are the prominent works on the area of children rights. However, all these works are examined only children's rights in general, children protection, and the like. Thus, there are no official studies conducted on children's rights to be heard in family law proceedings of Ethiopia, particularly on Oromia National Regional State.

In general, all these above mentioned studies grew out of observations that the family law system, which purported to be focused on reaching decisions that are in the best interests of the child, often excluded the children themselves. Therefore, my study is an original work, which may fill the gaps of the early studies by assessing the practices of courts and mechanisms that are essential to realize children's rights to be heard in family law proceedings of Western Hararghe Zone of ONRS, Ethiopia.

### **1.9. Significance of this Study**

This study has benefits for children to know their rights how to participate in family law proceedings, *inter alia*, custody assessment, maintenances and parental time plans. Therefore, this study has the following significances:

- Creates awareness to the legislatures, Executives, and Judiciary regarding children's have right to be heard in family law proceedings.
- Vividly to inform researchers in order to conduct further researches on children's voices in family law, criminal as well as administrative proceedings.
- Cites ways in which the voices of children can be heard in the context of legal proceedings and this can create some awareness to legislature, executive and judiciary to allocate fair budget in order to create mechanisms in which this right can be realize and world –fit for children.
- Create awareness for the judges working on the family law proceedings of the Doba woreda and high courts of western Hararghe on how and where to hear children's voices in their family law proceedings; and

- Using this research, different NGO's will gaze their eye to this area to solve the problems and
- Creates awareness for the judges working on the family law proceedings of the Doba woreda and high courts of Western Hararghe Zone on how and where to hear children's voice in custody assessments, order of maintenances and parental time plans .

## **1.10. Organization of the Research**

This research is partitioned in to five main chapters:

***The First Chapter:*** Deals with the introduction parts of the study, which includes background of the study, statement of the problem, research questions, objectives of the study, the research design and methods, scope the study, limitation of the study, related literature, significance of the study and organization of the study.

***The Second Chapter:*** Deals with conceptual and theoretical frameworks regarding children's rights to be heard in family law proceedings. Hence, it examine the definition of the child, the notion of children rights, children's right to be heard, children involvement in family law proceedings, the debates on involving children in family law proceedings, mechanisms to hear children's voices and barriers of children's participation in family law proceedings.

***The Third Chapter:*** Deals with the Overview of the existing legal frameworks governing children's right to be heard in judicial proceedings, particularly in family law proceedings. Hence, an attempt will be made to explore the background of the UNCRC, Children Right to be heard under the CRC and ACRWC, the general-consensus on the implementation of the CRC, the Status of CRC in the Domestic Laws of Ethiopia and the National Child Policy of Ethiopia. It also deals with the overview of the Effect of article 12 in Ethiopian Domestic Laws, the Decision of Cassation Division of the FDRE Supreme Court, the Committee's Recommendations on the Periodic Reports of Ethiopia (1993-2011), and the Laws of Oromia National Regional State (ONRS).

***The Fourth Chapter:*** Mainly focused on the analysis, interpretation of the gathered data, and the survey on the availability of the mechanisms used to hear Children's voice in the practices of the family law proceedings of the Dobbba Woreda and high courts of western Hararghe zone of Oromia.

***Chapter Five:*** Presented the summary of major findings, conclusions drawn and possible recommendations based on the findings of the study. At the end, there are attached lists of reference materials and interview guide to competent concerned organs and key informants.

## CHAPTER TWO

### 2. Conceptual and Theoretical Frameworks

Under this chapter, I want to explore the notions of children rights and debates on child's right to be heard, mechanisms used by judges to hear children's voice in divorce, custody assessment, order of maintenances and parenting time plans and the barriers to realize this right.

#### 2.1. Who is a child?

The term 'child' is difficult to define; the biological, legal and cultural consideration or variation in the definition of the word 'child' contributes to the difficulty. To avoid this difficulty the following definition adopted from convention on the right of the child. Article 1 of the United Nations Convention on the Rights of the Child ('UNCRC'), states, 'for the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'<sup>19</sup> Article 2 of the African Charter on the Rights and Welfare of the Child (ACRWC) also states the definition of the child in the same language with the CRC. Likewise, the CRC, the ACRWC, has clearly specify the upper age limit for childhood to 18 years, however, both of them did not set the lower age limit at which childhood could begin.

In addition, article 215 of the FDRE Revised Family Code, defines a child or "a minor" as "a person of either sex who has not attained the full age of 18 years."<sup>20</sup> Hence, a child who is below the age of 18 years, can enjoy the proper care of his/her person, shall be placed under the authority of a guardian; concerning his/her property shall be represented by his/her tutor.<sup>21</sup>Hence, as it is stated under article 2(1) of the CRC, States parties have an obligation to respect the rights of persons below 18 years of age. However, they are allowed to absolve themselves from their obligation under the CRC as regards persons bellow the age of 18 years who have already attained majority under applicable law by means of emancipation. These are off course, not the general rules; but are an exception to the rule. Article 310 of the FDRE Revised Family Code (RFC) also recognizes that majority may be obtained at earlier age by a means of emancipation. For instance, under FDRE Revised Family Code, marriage shall take place only by free and full consent of the spouses attained the full age of 18 years of age. <sup>22</sup>

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<sup>19</sup> CRC as cited at Supra note 5, Article 1

<sup>20</sup> The Revised Family Code of Ethiopia, proclamation No. 213/ 2000, Article 215

<sup>21</sup> Ibid, Article 216

<sup>22</sup> Ibid, Article 687

However, the Ministry of Justice or the head of Regional State Justice Berue may on the application of the future spouses, or the parents or the guardian of one of them, for serious cause, grant dispensation of not more than two years.<sup>23</sup> The phrase ‘for serious cause’<sup>24</sup> is not defined and the Ministry of Justice or head of the Regional State Justice Bereus would examine it on the case by case. Therefore, the focus of this study is to examine the rights to be heard of children below 18 years of age in custody assessments, order of maintenances and parenting time plans.

## **2.2. The Emergence of the Notion of Children’s Rights**

Historically, many children worldwide have experienced human rights violations and adults have viewed them in various ways, from ‘little adults,’ to the property of their parents and sometimes as a confused mixture of both. According to Philippe Aries, in his renowned treatise “Centuries of Childhood,”<sup>25</sup> the concept of childhood emerged relatively recently in the past 400 to 600 years.<sup>26</sup> It was only in the latter part of the 20<sup>th</sup> century and specifically the 1970s and early 1980s that the concept of children rights emerged.<sup>27</sup> During the middle ages, children were expected to participate in adult tasks, including apprenticeships and during the Renaissance, this view evolved to where children were viewed as weak and in need of their parents’ protection.<sup>28</sup>

Furthermore, the birth of the UNCRC has signaled the beginning of a new stage and for the first time, an international treaty recognized that the child had the right to participate in all matters affecting him or her as stated under article 12 of the CRC. In addition, the CRC for instance, is intertwined the definition of children's human rights, with what human rights are considered relevant to children and their circumstances, children's claims, identification of duty bearers<sup>29</sup> and ultimately, what constitutes human rights violations in children's lives. It has also asserted that direction and guidance provided by parents

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<sup>23</sup> The Revised Family Code , Supra note 22, Article 7(2)

<sup>24</sup> The following situation may be taken as a serious cause: i). if the woman becomes pregnant before attaining 18 years of age; or ii). If the future husband of the woman is to go to war front taking into consideration the legal, social, and psychological impact of delivering a child out of wedlock. See, also Mehari Redae , issues that would help to understand the Revised Family Code of Ethiopia, Volume I, 995E,C, p.22-23.

<sup>25</sup> New York: Alfred A. Knopf, 1962.

<sup>26</sup> M. Freeman, the *Rights and Wrongs of Children* (Dover, N.H.: F. Pinter, 1983) p. 8.

<sup>27</sup> M. Freeman, “Whither Children: Protection Participation, Autonomy?” (1994), p. 20.

<sup>28</sup> Christine D. Davies, *Access to Justice for Children: The Voice of the Child in Access and Custody Disputes*, (2004), p.17.

<sup>29</sup>Children and other individuals are rights holders. Duty-bearers have obligations under the UNCRC and other international human rights instruments. As the primary duty bearer, the State may delegate some of its responsibilities to others (such as public services providers). The international community, parents and others providing services to children are 'secondary' duty-bearers, with specific responsibilities towards children. Others with responsibilities for children may have moral duties rather than legal duties.

or others with responsibility for the child must take into account the capacities of the child to exercise rights on his or her own behalf as stated under article 5 of the CRC.

However, now days, there are a prevalence of the knowledge that all children, including most vulnerable and marginalized have moral and legal entitlements to the full realization of their human rights, including those rights articulated within international human rights law.<sup>30</sup> Thus, international human rights law provides the legal source for children's human rights, from children's perspectives. However, its existence can appear far removed from children's daily lives, raising questions about how children's human rights can be made relevant to children in meaningful and effective ways. On the other hand, the slowly changing policy environments and knowledge base regarding children's well-being are showing progresses time to time.

### **2.3. Children's Rights to be Heard**

*"The voices of children themselves must be prominent in the exploration of what is going on in their lives- we must approach children as knowing subjects."<sup>31</sup>*

In 20th century, various attempts were made at international level to protect children's interests and give protection for their right to be heard in international and regional treaties.<sup>32</sup> Moreover, at the dawn of the 21<sup>st</sup> century, the 'voice of the child' emerges as a live issue that demands our utmost attention and recognized as a full human being who possesses the ability to participate fully in society.<sup>33</sup> Thus, following the UNCRC 1989, listening to the voices of children has become a powerful and pervasive mantra for activists and policy makers worldwide.<sup>34</sup> However, arguably, these rights become the most significant and the most controversial than that of other types of children's rights.

Article 12 of CRC and article 4(2) of ACRWC are the unique provisions in children human rights treaties, since they have addressed the legal and social status of children. These articles imposes an obligation on adults, in their capacity as parents, politicians, professionals and courts to ensure that children are enabled and encouraged to contribute their views on all relevant matters, and to provide age-appropriate information with which to form their views.

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<sup>30</sup> Making Human Rights Relevant to Children; Paper Prepared for: International Summer Course on the Rights of the Child. Moncton, NB (August 2012), p.3.

<sup>31</sup> Children Rights News Letter, 'Children's Rights International,' 2005, p.27.

<sup>32</sup> Inter alia Article 19 of the Universal Declaration of Human Rights, Article 19 of the Convention on Political and Civil Rights, Article 9 of the African Charter on Human and People's Rights, Article 10 of the European Convention on Human Rights and Article 13 of the American Convention on Human Rights.

<sup>33</sup> Freeman, *Children's Rights: A Comparative Perspective* (Dartmouth Aldershot: University College London, 1996), p.3.

<sup>34</sup> Allison J., 'as cited at Supra note 3, Vol.109, issue 2, p. 261-272.

The right to be heard extends to all actions and decisions that affect children's lives - in the family, in school, in health care, in local communities, and at the national political level. Thus, the decision-makers have obligation to give due weight to the opinion(s) of the child and recognizing that the child can and should have a direct influence (in accordance with their age and maturity) on her/his future. The decision-makers may also give a due weight for the views of young child that may be mature beyond his or her years.<sup>35</sup>

## **2.4. Children's Voice in Family Law Proceedings**

As I have mentioned under the topic 2.3, the idea that children should be heard and their views respected in family law proceedings has become an important principle of family law in recent years. No longer considered objects of concern, children are now understood as entitled to 'have a say' in the decision-making that determines post separation residence and contact arrangements.<sup>36</sup> One Commentator has also stated that, "Children typically suffer pain, confusion, and insecurity when their parents separate. They are especially hurt by the outbursts of anger, bitterness, lack of respect, inability to communicate, and overt hostility that can repeatedly flare up between battling parents."<sup>37</sup>

Archibald D. Hart has also stated, 'divorce is a threat to the child's very existence as he or she knows it, a shaking of everything stable and sure. It is an emotional earthquake of the highest magnitude.'<sup>38</sup>

The UN Committee on the Rights of the Child also considers the participation of children in family law proceedings is beneficial for the children themselves, the families, the community, the school, the state and democracy.<sup>39</sup> In addition, research shows; children have a unique body of knowledge about their lives, needs and concerns, together with ideas and views, which derive from their direct experience.<sup>40</sup> Therefore, hearing the voices of children in family law proceedings can provide a growing body of evidence, and has widespread positive impact in realization of the due processes of law and helps children to:<sup>41</sup>

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<sup>35</sup> G. Van Bueren, "The Right of the Child to Freedom of Expression" in *The International Law on the Rights of the Child* (The Netherlands: Martinus Nijhoff Publishers, 1995) 131,p. 136.

<sup>36</sup> Robyn M. Fitzgerald, *Children having a say: a study on children's participation in family law decision making*; Southern Cross University, ePublications@SCU 2009, p.5.

<sup>37</sup> Janet R. Johnston, Karen Breunig, Carla Garrity, and Mitchell Baris, *Through the Eyes of Children: Healing Stories for Children of Divorce*, New York: The Free Press, 1997, p. xiii.

<sup>38</sup> Archibald D. Hart., *Children and Divorce: What to Expect-How to Help*, Dallas Word Publishing, 1982-1989. p. 57.

<sup>39</sup> General Comment No.12, on the Rights the Child 15<sup>th</sup> Session, Geneva, 25 May-12 June 2009, Para.93, p.22.

<sup>40</sup> Gersion L., as cited at Supra note 9, p.5.

<sup>41</sup> General Comment No.12, Supra note, 39, Para. 94, p.22.

- develop self-esteem, cognitive abilities, social skills and respect for others, as well as improving their understanding of decision-making processes in their day-to-day life;
- get more effective and appropriate services and policies that address their needs;
- consider the effects of their decisions and deciding which alternatives are best;
- learn debates, negotiate and communicate with groups and act as facilitators and leaders and
- develop relationships with other children like adults; becoming aware of their rights in society and feeling satisfied about their participation and bringing about changes that are good for children.

## **2.5. The Debates on Children’s Involving in the Family Proceedings**

Debates about the roles of children in family proceedings are not new, but it is old enough as the emergence of the notions of the rights of children itself. However, recently after many state parties incorporate the CRC into their domestic laws and after this rights got international recognition almost among all nations of the world, the debates on the voices of the child has escalated in jurisdiction across the world. These debates are based on the questions like: Should the children be given seats to the boxing match, or invited into the ring? Rather, they represented by the lawyers? or should they be excluded from the venue? In the past, the most common response to questions around the world has been that the courts should seek to protect the children from the conflict as far as possible. However, in this era of modernization, the practices differ between jurisdictions; it is generally very unusual for children to be called to give evidence in custody assessment and parenting proceedings.

Parents must realize how much children suffer when they are embroiled in parental battles and take steps to manage their anger responsibly, shield children from parental conflicts, and work cooperatively in child’s best interest.<sup>42</sup> Thus, one commentator stated that “Children caught in the flames of a high-conflict divorce have been referred to as ‘children of Armageddon’- victims of the final war on earth. They are true casualties. Parents trapped in mutual anger often become heedless of anything else.”<sup>43</sup> Hence, if children lost their voices in family law proceedings, we may lose generation; because of they may fall in depression, anxiety and hating themselves associated with conflicts of their families.<sup>44</sup>

However, others argued in contrast, as such right burdened children with tasks of an adult. These groups of scholars have held the views that children lack capacity to be heard in family law proceedings and

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<sup>42</sup> Edward T., *Helping Children Cope with Divorce*, San Francisco: Jossey-Bass, 1992, p. 79.

<sup>43</sup> Judith S. Wallerstein, and Sandra Blakeslee, *What About the Kids?* New York: Hyperion, 2003, p. 213-214.

<sup>44</sup> Mary E. Hannibal, *Good Parenting Through Your Divorce,* New York: Marlow and Company, 2002, p. 24.

their participation will have adverse effects for their well-being.<sup>45</sup> Therefore, I want to classify their views as follow.

### 2.5.1. The Proponents' Views

Proponents of children's rights to be heard in family law proceedings, cites a number of rights-based as well as interest-based reasons for doing so, and backed their arguments by numbers of reasons.

- They argued that the CRC has explicitly incorporates legal rights that children should be express their views and be heard in judicial proceedings.<sup>46</sup> Hence, they have argued that hearing children's voice in family law proceedings does not mean that children wish to make the decision or take side with one parent; but they have a right to know what is happening, because of they can understand the difference between providing input into the decision making process and the making final decision.<sup>47</sup>
- They argued that children want to be kept informed, want access to information about the separation and/or divorce process, and want their needs and interests heard during times of parental divorce; however, they should not be forced if they are unwilling to speak.<sup>48</sup>
- They argued that children's participation is inextricably linked with social inclusion from a broader policy perspective. <sup>49</sup>That means unless children's views are incorporated into the policy development and the family law proceedings, decision-makers do not have the benefit of reliable evidences on how to solve the problems, suggestions, and/or thoughts about what should happen in children's life.
- They argued denials of children's right to be heard is only heightens the pain, confusion and other negative effects felt because of the family separation.<sup>50</sup>That means keeping children aside while family are divorcing, ensuing transitions can make children feel disempowered and isolated, and may inhibit children's resilience in coping with family difficulties.<sup>51</sup> Therefore, children's participation custody assessments and parenting time plans can facilitate children being clear about

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<sup>45</sup> Gersion L., as cited at Supra note 9.

<sup>46</sup> CRC as cited at Supra note 5, Article 12.

<sup>47</sup> The reader is also encouraged to review Richard Chisholm's paper, Children's participation in family court litigation, presented at the International Society of Family Law, World Conference, Brisbane, Australia, July 9-13, 2000 regarding the debate for and against children's participation in family law. It can be accessed online at: <http://www.familylawwebguide.com.au/library/spca/docs/Childrens%20participation%20in%20family%20court.pdf>

<sup>48</sup> Lisa Carlos Rogers (1987); "*Child Custody: The Judicial Interviews of the Chill*", 1985-1986-Part II; Vol.47/No.3, p.585.

<sup>49</sup> Involving Children, '*A guide to children engaging children in decision-making; by ministry of social development of New Zealand*,' 2003, p.7.

<sup>50</sup> N Taylor, 'What Do We Know about Involving Children and Young People in Family Law Decision Making? A Research Update' (2006) 20 *Australian Journal of Family Law* 154, p. 164.

<sup>51</sup> Gollop et al, '*Children's Involvement in Custody and Access Arrangements after Parental Separation*,' p. 398.

their own wants and needs, which can translate into enhancing their advocacy skills regarding communication and negotiation with their family.<sup>52</sup>

- They backed their views with the concept of the evolving capacity of the child,<sup>53</sup> as pursuant to article 5 of the CRC. They stated that the CRC has established, sometimes the concept of evolving capacity is ‘forgotten’ concept and it is expected from the adults to give guidance and protection to the children. Hence, children’s voices in the process of parental litigation can reduce both the intensity and duration of conflict as well as enhancing conciliation between parents to communicate more effectively on behalf of their children.

Therefore, failure to keep children informed and consult with them may lead to increased distress and feelings of rejection on the children. For instance, Taylor argued ‘Children lacking information about the separation are also more likely to suffer from such symptoms as anxiety, depression and conduct disorder, to exhibit distress and to blame themselves for their parents’ separation. They cope better if they have appropriate information and involvement and are helped to understand the changes and to participate actively in them. Ideally, children’s participation should start early as it has many benefits for the development of personal identity, moral reasoning, competency, and increases children’s satisfaction with the outcome of any decision reached.’<sup>54</sup>

### **2.5.2. The Opponents’ Views**

As to the opponent’s views, parental conflict may results on the child long-term emotional and behavioral wounds, feelings of disillusionment, fear, insecurity, or vulnerability, and temper tantrums, school problems, or self destructive behaviors.”<sup>55</sup> Hence, they argued that involving children in family law proceedings are likely to cause in them: tension, anxiety, and regression, feelings of confusion and embarrassment; feelings of responsibility and self-blame, withdrawal or clinging behavior at transitions.

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<sup>52</sup> Canadian’s Research Report on the Voice of the Child in Separation/ Divorce Mediation and other Alternative Dispute Resolution Processes: *A Literature Review* (2009), p.1.

<sup>53</sup> Landsdown, G., ‘The evolving capacity of the child, Innocent Centre,’ Firenze, 2004, p.42

<sup>54</sup> Taylor, ‘What Do We Know about Involving Children and Young People in Family Law Decision Making?’ p. 165

<sup>55</sup> Philip M. Stahl, *Parenting After Divorce: A Guide to Resolving Conflicts and Meeting Your Children’s Needs*, Atascadero, California: Impact Publishers, Inc., 2000, p.25.

Dr Brown sums up the arguments of the recent years opponents',<sup>56</sup> which dictate that children should not be included in family law disputes. Thus, as to these views, involving children in custody assessments and parenting time plans can:

- places responsibility on the child for making decisions that their parents are unable to make;
- erodes parental rights and undermines their authority; which may in turns can cause further negative intrusion in to children's lives and family relationships;
- if a child has been asked to express his/her views; s/he may be disappointed if it is discovered that his/her views were not listened to because they may believe that their views will be determinative of the outcome.;
- creates further stress for the child who may have divided loyalties and places the child at risk of retribution from a disappointed parent. In addition, in such battle one parent or the other may use the child's wishes as a 'trump card'<sup>57</sup> to obtain an agreement or alternatively, claim that the process traumatizes the child;
- further exposes the child to the parental conflict, because of one parent or the other may take sides during a disputed custody and access matter, which in turn can create anxiety and loyalty conflicts for children and
- mediators may not have appropriate training and skills in child development and family dynamics, nor adequate knowledge of the impact of divorce on children to allow them to interpret the child's actions, statements and preferences in context.

Therefore, the opponents argued that such child inclusion in family law proceedings might lead to a tug of war as their parents compete for the child's preferences. In such cases, children may not express their true feelings if they fear their parents' retaliation or anger about their views and therefore should not be placed in that position. In addition, the opponents argued that the biggest problem often is not choosing the right side but having to choose at all.<sup>58</sup>

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<sup>56</sup> Carole Brown, 'Involving Children in Decision Making Without Making them the Decision Makers': Paper presented at a Seminar for Directors of Court Counseling and Casework Supervisors,' Victor Harbour, SA, Feb 1996, p.5.

<sup>57</sup> A trump is a playing card, which is elevated above its normal rank in trick-taking games. <http://en.wikipedia.org/wiki/Trump#cite-note-1>, Accessed on 20 Feb.2014, 5:00 PM. Thus, in the context of this study the one parent can get the voices of the child by bribing the child as if he/she will do something good or buy something.

<sup>58</sup> Robert E. Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation*. New York: The Guilford Press, 1994. P. 32

### 2.5.3. Summary on the Views of Proponents and Opponents

In fact, there are no easy answers as to whether children's participation in post separation decision-making should be included or excluded. A new rhetoric of the importance of children's participation in family law proceedings is different in jurisdictions of different parts of the world. There is lack of common consensus in the clinical and social science literature about the children's rights to be heard in family proceedings. Hence, to solve these tensions, the following summaries of views may serve as a yardstick to balance the pros and cons of hearing children's voice in family law proceedings.

- i. **From a theoretical point of view:** It depends on the theoretical and conceptual lens of the mediator. The mediator would have to have the conceptual viewpoint that children have the rights to be heard and get a due weight for their voices. In addition, it is expected that the mediator know how children's rights to be heard is the sets of children's human rights. Therefore, once children are aware that their parents are separating or have done so; they may want to talk with someone in trying to come to terms with what it all means for them.<sup>59</sup>
- ii. **From a practice point of view:** One commentator says, "... divorce may be the most significant event in the life of a child who experiences it; and it's the knife that slashes not only his family but his world into pieces."<sup>60</sup> That means, undoubtedly, anger between adults . . . is stressful and emotionally arousing for children of all ages, and it increases their aggressiveness and such marital discord may inflict pain and left unforgettable memo in children life. Hence, as stated above, professionals and judges stated that children could be a victims of the discord of marriage unless they express their hear heart grievances and being heard in an ethical manners.
- iii. **From a research point of views:** Many studies suggest that the direct or indirect involvement of children in family law proceedings makes them 'feel respected, valued and involved.'<sup>61</sup> They have shown that children should to have the voice in family law proceedings since they are able to form views from the youngest age, even when she or he may be unable to express them verbally.<sup>62</sup>

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<sup>59</sup> Lansdown, G, Taking Part: Children's Participation in Decision-Making (Institute of Public Policy Research, London, 1995); Chisholm, R, 'Children's Participation in Family Court Litigation' (1999) 13 Australian Journal of Family Law 197-218; Warshak, R A, 'Payoffs and Pitfalls of Listening to Children' (2003) 52 Family Relations, p. 373-384.

<sup>60</sup> Susan B. Boyan and Ann M. Termini, 'Cooperative Parenting and Divorce: Shielding Your Child from Conflict: A Parent Guide to Effective Co-Parenting,' Atlanta: Active Parenting Publishers, 1999, p. 2.

<sup>61</sup> Baroness H. of Richmond, 'Children's Participation in Family Law Decision-Making: Lessons from Abroad' (2006) 20 Australian Journal of Family Law 119, p.124.

<sup>62</sup> Lansdown G., as cited at Supra note 53, p.35.

It teaches children useful skills for taking responsibility, empowers them to be effective citizens, strengthens their feelings of personal identity and may facilitate children's growth towards mature and responsible adulthood.<sup>63</sup> Hence, Atwool mentioned in his research that 'there is nothing more damaging than the pervasive sense of powerlessness that result from having no voice'.<sup>64</sup>

- iv. **From a policy point of view:** Over the last decade, the UN members have reached on broad agreement that human rights are universal, indivisible, interdependent and interrelated. The members, which signed the UNCRC, shall have international obligation to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.<sup>65</sup> Thus, the more children granted the rights to be heard, the more likely that the programs and policies that are developed to assist them and be able to respond effectively to their needs and the needs of their families and communities can realized. Therefore, though it depends on resources, training, policies, and legislations-governing children's inclusion before, during, and after parental separation and/or divorce; it is a duty to the states parties to the convention to arrange their policies in realization of such rights.<sup>66</sup>
- v. **From the legal point of view:** As I have mentioned above both article 12 of the CRC and article 4(2) of the ACRWC state that children have the legal rights to express their views and to be heard and get a due weight for their views in judicial proceedings. It means that the decisions being made by adults (i.e. judges, lawyers, mental health professionals, and their parents) should involve their views. Therefore, there are legal basis at international and regional treaties signed on children's rights by almost all countries of the world.
- vi. **From the Views of the UN Committee on the Rights of the Child:** The Committee is the body of independent experts that monitors implementation of the CRC by its State parties, according to article 44 of the CRC.

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<sup>63</sup> Smith et al, 'Rethinking Children's Involvement in Decision-Making after Parental Separation', above n 207

<sup>64</sup> N Atwool, 'Children's Participation in Decision-Making' (Paper presented at Children's Issues Centre 6th Child and Family Policy Conference, Dunedin, 31 July 2005), p.11.

<sup>65</sup> CRC, Article 4(2)

<sup>66</sup> Ibid, Article 2

The Committee also emphasizes the importance of ensuring that the provisions of the Convention are given effect at national level through legal measures of implementation.<sup>67</sup> On its General Comment No.12, the Committee mentioned the importance of the voice of children during divorce and urges states to avoid tokenistic approaches. In 2009, the Committee posits that it is not up to a child to prove his or her capacity, but that the child's capacity should be presumed. Thus, since article 12 of the CRC imposes no age limit on the right of the child to express her or his views, the Committee discouraged State parties from introducing age limits either in law or in practices. Because, fixing the lower age limit would restrict the child's right to be heard in all matters affecting her or him.<sup>68</sup>

The Committee strongly recommends, 'even when confronting difficulties in assessing age and maturity, State parties should consider children as a group to be heard, and exert all efforts to listen to or seek the views of those children speaking collectively.'<sup>69</sup> As summarized above, children's voices can easily heard in family proceedings if all the needed mechanisms and expertise are fulfilled for the courts. Therefore, it is not the 'mercy of an adult' and charity to hear the children in family law disputes, but it is the human right to children.<sup>70</sup>

## **2.6. Mechanisms (Methods) Used to Hear Children's Voice**

The CRC, states that children shall provided the opportunity to be heard in judicial proceedings directly, or through a representative or appropriate body.<sup>71</sup> However, methods of children's involvement in family law proceedings are highly varied, within and between jurisdictions and the court consider numerous factors to hear children's voice in family law proceedings.<sup>72</sup>

The Committee emphasizes that State parties are under strict obligation to undertake appropriate measures to fully implement this right for children by ensuring the mechanisms in used to hear children's voices in judicial proceedings.<sup>73</sup> Therefore, this right can ascertain in a variety of ways, including by:

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<sup>67</sup> See General Comment No. 5, 'General measures of implementation for the Convention on the Rights of the Child,' CRC/GC/2003/5, (2003), Para.19, p.6.

<sup>68</sup> General Comment No. 12, as cited at Supra note 39, Para.20-21, p.9

<sup>69</sup> Ibid, Para.10, p.7

<sup>70</sup> Ibid, Para.20-21, p.9

<sup>71</sup> See CRC Article 12(2).

<sup>72</sup> Rachel B., Nicholas B., and Francine C, *Children Experiences with Family Justice Professionals in Ontario and Ohio*, *International Journal of Law, Policy and the Family* 25(3),(2011), p. 398-422.

<sup>73</sup> General Comment No. 12, as cited at Supra note 39, Para.19, p.8.

- 2.6.1. Testimony by children
- 2.6.2. Judicial interview
- 2.6.3. Independent Children’s Lawyer (ICL)
- 2.6.4. Psychologists
- 2.6.5. Social workers
- 2.6.6. Evidence from other adults
- 2.6.7. Submissions by children
- 2.6.8. Child-friendly court rooms and court preparation

### **2.6.1. Testimony by the child**

Child’s testimony in court has positive effects and may allow the child to take an active role towards mastering the trauma and towards seeing justice done. Moreover, it may be appropriate for older children to present their views directly to the court in the form of affidavits, and appear as witnesses in the proceedings. Openly they can correct without any restriction the dissatisfaction with having their views ‘filtered’ through a family report, or being subject to the ‘best interests’ advocacy of an Independent Lawyers for Children (ICL).<sup>74</sup>

To get such child’s testimony as evidence, the permission from the court is mandatory. For instance, research shows that in Australia, children’s participation in family law proceedings, as a witness needs the permission from the court of law.<sup>75</sup> The need for such court permission is obviously designed for the protection of children and for their removal as far as possible from forensic partisanship in spousal conflict. Because, the Committee also recommended that the judges should have to assess children’s voices in family law proceedings case-by-case examination.<sup>76</sup>

### **2.6.2. Judicial Interviews**

It may occur at all stages of proceedings, including at motions, at pre-trial conferences and at the trial in judge’s chambers and allows children to express their views and be heard in a free and a relaxed manner. It would be much easier to the judges, to piece together the puzzle of what is in the child’s best interests. It can also give a judge a broader picture of the child to determine the views and preferences of the child. Thus, judges can make interviews directly to the children or can prepare the questions and

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<sup>74</sup> Michelle M.Fernando, *Judicial meetings with children in Australian Family law proceedings: Hearing children’s voice*, 2011, p.101.

<sup>75</sup> As cited by *Cooper and Cooper* (1980) FLC 90-870, 75,509 (Watson SJ)

<sup>76</sup> General Comment No.12, as cited at *Supra* note 39, Para.29, p.11.

give it to the Independent Children's Lawyers (ICL) or the social workers to know the heart feeling of children indirectly.<sup>77</sup>

However, in some jurisdictions the practice of a judge privately interviewing a child as a means of ascertaining a child's wishes is a subject of controversy and raises some controversial issues.<sup>78</sup> Researches also stated that the practice of judicial interviews should only be resorted to when other means of obtaining the child's views are unavailable.<sup>79</sup> This is because of judges may have insufficient skills and lack appropriate training; to ask the child in a child-sensitive manner and interpreting their answers, lack psychological knowledge and judges themselves might be too intimidating to children.<sup>80</sup>

### **2.6.3. Independent Lawyer for the Child (ICL)**

Lawyers have traditionally played three different roles with respect to representing children. First, there is the traditional advocate role where the lawyer puts forward the child's wishes based on the child's instructions. Second, a child's lawyer can act as a guardian *ad litem* (best interest advocate) by presenting to the court his/her opinion of what the final decision should be based on the child's best interests. Third, the child's lawyer can act as *amicus curiae* (friend of the court).<sup>81</sup>

However, the Independent Children's Lawyer (ICL), is not a child's legal representative and not obliged to act on any instructions given by a child; but is a 'best interests' representative.<sup>82</sup> Their role has two distinct features to assist the court to make decisions in the best interests of children, and to provide a voice for children in proceedings affecting them.<sup>83</sup> This means, the ICL is an advocate who should have speaks to ensuring the child's best interest,<sup>84</sup> and has a duty to wards all matters relevant to the

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<sup>77</sup> Dan L. Goldberg, 'Judicial interviews of children in custody and access cases: Time to pause and reflect,' 2010, p.2.

<sup>78</sup> Rachel B., and Nicholas B., *Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio*.htm; *Oxford Journals Law Int. Jnl. of Law, Policy and the Family* Volume 24,, Issue 3 , 2011, p. 300-337.

<sup>79</sup> Abella, L'Heureux-Dubé, Rothman, p. 329.

<sup>80</sup> Joanne J. Paetsch, Lorne D. Bertrand, Leslie D. MacRae and Nicholas Bala, 'Consultation on the voice of the child at the 5<sup>th</sup> world congress on family law and children's rights,' 2009, p. 5.

<sup>81</sup> Rachel B., and Nicholas B., *Supra* note, 72, 2011, p. 300-337.

<sup>82</sup> Bennett and Bennett, *Family Law Courts, Guidelines for Independent Children's Lawyers*, (2007), p 92-191

<sup>83</sup> Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (2004) [2.3]. The cost of an ICL is borne by the Legal Aid Commission, or by the parties, depending on the parties' financial circumstances (see s117 (3), (4)).

<sup>84</sup> The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review: *accessed on Child in Family Law cases/child voice new/new 1/3.0 what does children's participation means? (Part 1), A Literature Review.htm, 3 August. 2013, 11:30 PM.*

child's wishes and instructions are before the court.<sup>85</sup> Hence, the ICL do only put forward the children's views,<sup>86</sup> and to present all the differing opinions to the courtrooms.<sup>87</sup>

One Independent Children's Lawyer says, 'the first thing I do when I first meet a child is try to make them laugh. I am very conscious of how it must feel to be a child in a proceeding like this, having to talk to so many people about such serious issues. Kids have a right to be kids and I stress this to every child I meet. I believe it is very important to remove the burden from them.'<sup>88</sup>Therefore, the ICL is a lawyer represents the best interests of the child by bringing the information to the court. Therefore, they prepare the reports by:<sup>89</sup>

- seeing a family report- family report is prepared by a social worker, psychologist or psychiatrist to help the court understand the family situations and child's views and best interests;
- asking for reports from teachers, guidance officers or other professionals who have regular contact with the child; or
- speaking with the child and his/her family.

#### **2.6.4. Psychologists**

These are usually mental health, counseling, and a psychologist who specializes in child and family issues. They prepare their reports to the court after they discuss with the child and each parent and observations of the child's interactions with each parent.<sup>90</sup> Thus, their reports are adduced into evidence and they can be cross-examined and questioned as to the bases for their views.<sup>91</sup>They provide an important service to children and the courts by providing competent, objective, impartial information in assessing the best interests of the child; by demonstrating a clear sense of direction and purpose in conducting a child custody evaluation; by performing their roles ethically; and by clarifying to all involved the nature and scope of the evaluation.

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<sup>85</sup> Victoria Protecting Victoria's Children , Child Protection Practice Manual: *Separate legal representation for children*, 2013, p. 1-4.

<sup>86</sup> The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes, *Supra note 84*.

<sup>87</sup> Family Law Council, as cited at *Supra note 83*.

<sup>88</sup> Nicholas B., Representation for Children - Voice of the Child in Court Proceedings: *Topics in Family Law A Collection of Articles.htm*, accessed on 4 3August 2013, 11:34 PM.

<sup>89</sup> Queens Land, *How will an independent Children's lawyer helps my child? An independent children's lawyer's role explained*, (2013). Available on [www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au), accessed on 8/2.2014, at 4:35 PM

<sup>90</sup> Observation is a technique used more often with younger children (P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008), p. 127.

<sup>91</sup> Ahmad A., *Hall and Hall* (1979), p.90-633

Therefore, the value of the report to the court and the ultimate decision is heavily reliant on the skill, accuracy and credibility is to ensure the best interests of the child.<sup>92</sup>

### **2.6.5. Social Workers**

They are expertise to discuss and make collateral interviews with children, parents, schoolteachers and other officials and provide reports about the child to the court if the parents cannot settle their disputes in peaceful manner. Hence, integrating the social work assessments with legal deliberation provides a safe, effective way for children's voices to be heard and to influence decisions to reflect their best interests in family law proceedings. Thus, one commentator stated that, 'the filtering of children's voices has the benefit not only of shielding them from the centre of the conflict but also allowing their voices to be articulated by a social science trained professional who can be sensitive to the parent-child dynamics in terms of how those views are presented.'<sup>93</sup> However, there is evidence that children are not happy in some jurisdictions with the techniques employed by report of social workers, because of lack of confidentiality and for the privacy of the children's views.<sup>94</sup>

### **2.6.6. Evidence from others adults**

Historically, the evidence of hearsay is inadmissible and inherently unreliable,<sup>95</sup> because of there is an absence of an opportunity to cross-examine the maker of the statement in order to test perception, memory, narration and sincerity.<sup>96</sup> However, in family law matters, evidence from others (the hearsay) about representations made by a child may be admissible. This is because of the members of the legal professions having supported the liberalization of the hearsay rule for children are the desire to spare children the experience of testifying in court.<sup>97</sup>

Hence, evidence about the child acquired from others adults, is the most common method by which a court hears evidence from others of what the child has said to them. This may include evidence from each of the child's parents and where applicable, from grandparents, family friends, therapists and others who spend time with the child. Hence, though the self-serving affidavits from parents that include the

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<sup>92</sup> The American Psychological Association., 'Guidelines for Child Custody Evaluations in Divorce Proceedings.' , Washington, DC, July 1994 Vol. 49, No. 7, p.B1.

<sup>93</sup> Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, *New Zealand Law Journal* vol. 267& 268, 2000, p. 89, p. 61

<sup>94</sup> *Ibid*, p. 164 and p. 149 respectively.

<sup>95</sup> J. Sopinka and S. N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974), p.39-40.

<sup>96</sup> D.A.R. Thompson, "Children Should Be Heard But Not Seen: Children's Evidence in Protection Proceedings" (National Family Law Programme) (Calgary, July 1990), at H2-9.

<sup>97</sup> A. P. Nasmith, "*The Inchoate Voice*" (1991-92), 8 *Can. Fam. L.Q.* 43 at 39.

views of children ‘are common, but of little value,’<sup>98</sup> a child may tell a parent what they think the parent wants to hear.<sup>99</sup>

### **2.6.7. Child-Friendly Court Rooms and Court Preparation**

A Child-friendly / child-responsive courtrooms are a systems of the family law proceedings of the court that have booster seats, better audibility and amplification systems. Thus the Committee emphasizes that it is ‘an environment in which children feel respected, confident, the sense of being heard, and get due weight to their views, and secure when freely expressing her or his opinions.’<sup>100</sup> Hence, in such child-friendly courtrooms a child may feel friendship with judges to express his/her view freely in all matters affecting his/her interests.

In contrast, if the building and the whole atmosphere of the family courts proceedings were seemingly designed to exclude them children may disappointed, harassed and exposed for secondary internal re victimization by the judges presiding over the case. In addition, the Committee has stated ‘that a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.’<sup>101</sup>

#### **2.6.7.1. Use of Screens in the Courtroom**

The erection of a screen, which prevents the child from seeing the parties to the proceeding, has the effect of reducing the anxiety of the child and of fostering an atmosphere in which the child can give accurate and comprehensive testimony.<sup>102</sup> Several jurisdictions, including England, Wales, and some U.S. States, have passed legislation that permits screens to be erected for children involved in the legal

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<sup>98</sup> J Redman, ‘The Voice of the Children in Family Disputes’ (1997) 12(1) *Australian Family Lawyer* 29, p.30

<sup>99</sup> Chief Justice A Nicholson (as he then was), ‘Children and Children’s Rights in the Context of Family Law’ (Paper presented to the LawAsia Conference, Brisbane, 21 June 2003) 6; R Warshak, ‘Payoffs and Pitfalls of Listening to Children’ (2003) 52 *Family Relations*, p. 373- 374.

<sup>100</sup> F Raitt, ‘Judicial Discretion and Methods of Ascertaining the Views of a Child’ (2004) 16 *Child and Family Law Quarterly*, p. 151, and 161.

<sup>101</sup> General Comment No. 12, as cited at Supra note 39, Para .32, p. 12

<sup>102</sup> London Child Witness Project (London, Ontario, Nov. 1990), p.22; and Spencer and Flin, p. 83.

process, particularly in family law proceedings.<sup>103</sup> Therefore, a one-way screen allows the parties and lawyers to observe the child while he or she is tendering evidence.

### **2.6.7.2. Closed-Circuit Television**

Live Television Link (LTL) enables the child to be examined and cross-examined from outside the court in the congenial atmosphere of a witness room. The television cameras and screens are needed in the courtrooms to enable the judges, the parties, and members of the public, to see and hear the child testimony. Many common law jurisdictions like Australia, England, and over 33 U.S States have used closed-circuit television;<sup>104</sup> to save the children from harassment in their family law proceedings.

Furthermore, the availability of closed-circuit television:<sup>105</sup> protects the child from the anxiety-inducing courtroom full of strangers and shields the child from physical confrontation with the parties to the proceedings. It renders the child better able to tell his or her story, remember, and answer questions clearly and accurately. This may enables the trier of fact to obtain a more detailed and accurate account from the child.

### **2.6.7.3. The Use of Videotapes**

Courts can hear directly the wishes and interests of young person's by this method. That means, the traditional manner of taking evidence is undergoing a searching reexamination in the light of modern technological developments and that video recording is being seen as a way of using that technology to treat child witnesses more humanely. This method has been heralded as one of the most innovative responses to eliciting the views and observations of children particularly young persons in family law proceedings.<sup>106</sup> Thus, there are two methods of eliciting the child's views by videotape will the use of videotapes; and these are: (a) Videotaped testimony and (b) Videotaped interviews.

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<sup>103</sup> See discussion in Law Reform Commission of Western Australia, *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses*, (Perth, Australia, April 1990), p. 60; Law Reform Commission of Ireland, op.cit., note 238, at 70; Scottish Law Reform Commission, op.cit., note 238, at 19; R. Flin, and R. Bull (eds), *Children's Evidence in Legal Proceedings: An International Perspective* (Cambridge Lectures, England, June 1989)

<sup>104</sup> Spencer and Flin, p. 84-90; and J. C. Robbard and L. J. Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989), 27 *Alta. L. Rev.* 327, p. 351.

<sup>105</sup> Scottish Law Commission, p. 21; and Law Reform Commission of Western Australia, 2007, p 45.

<sup>106</sup> Law Reform Commission of Western Australia, 2007, p. 45.

### **(a) Videotaped Testimony**

It also referred to as videotaped depositions and offered to children in both continental legal systems and common law jurisdictions in case of informal proceedings. The child can be examined and cross-examined before a judge in a small, congenial room rather than a courtroom. In addition, the legal garb is not worn and the judge, counsel, and the child sit together at a table. In such cases, the parties to the litigation are not present in the room; they view the proceedings through a one-way screen or through the medium of closed-circuit television, and they communicate with their lawyers through a microphone and an earpiece.<sup>107</sup> Hence, the videotaped testimonies have advantages:<sup>108</sup> that the child is not required to appear at the trial; can express her views in an informal setting; and the child need not endure the anxiety associated with waiting months for the trial to take place.

### **b) Videotaped Interviews**

It captures the child terminology, facial expressions, and emotional responses of the child.<sup>109</sup> The interviews take place in a relaxed setting, which minimizes the anxiety of the child. In addition, the parents may view the video in advance of trial and consequently, may be more apt to take the needs and wishes of their children into account in their representations to the court.

#### **2.6.7.4. Trained Judges (Child-Sensitive judges)**

The early findings have shown that because of lack of training and experiences, that the members of the judiciaries are reluctant to allow children to give their voices in family law proceedings and may irrevocably harm the children.<sup>110</sup> These studies have recommended for the availability of child-sensitive judges in family law proceedings,<sup>111</sup> which gives children a safe avenue to express their views; upholds their rights to be heard, improves the emotional availability of parents to children; and produces developmentally sensitive agreements. Therefore, such environment may improve child's ability to speak the truth to the judges and save them from not feeling frozen when speaking to a judge.

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<sup>107</sup> Spencer and Flin, p. 42; Scottish Law Commission, p. 18-19; Law Reform Commission of Ireland, p. 72-73; and Law Reform Commission of Tasmania, *Child Witness*, 1989, p.1.

<sup>108</sup> Ibid, Spencer and Flin, p. 18-19; Law Reform Commission of Ireland, p.72-73; and Law Reform Commission of Tasmania, *Child Witness*, 1989, p. 1.

<sup>109</sup> B. McAllister, "Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom," (1986), 18 *St. Mary's L.J.* 279, p. 311.

<sup>110</sup> C. Huddart and J. Ensminger, "Hearing the Voice of Children" (1991-92), *Can. Fam. L.Q.* 95 at 101; J. McLeod, "Factors Governing the Award of Custody" in *Child Custody Law and Practice*, ed. J. McLeod (Ontario: Thomson Canada Ltd., 1992) at 4-36. See also *Wakaluk v. Wakaluk* (1976), 25 R.F.L. 192 (Sask. C.A.).

<sup>111</sup> Consultation on the Voice of the Child at the 5<sup>th</sup> world congress on family law and children's rights; submitted to Justice Canada by Joanne J. Paetsch, Lorne D. Bertrand, Jan Walker, Leslie D. MacRae and Nicholas Bala, 2009, p. 8-10.

## 2.7. Barriers to Hear the Voice of Children

Many times children are largely invisible in law and policy and in decision-making due to the lack of integrated structures, the absence of mechanisms to childproof law, policy, and budgets to the implementation of children's rights, which cut across areas of government responsibility. Hence, the previous study has traced the barriers to realize children's rights to express their views and to be heard in family law proceedings as follows:<sup>112</sup>

- Thinking that children lack the experience to participate; not valuing children's views; and thinking that it's not appropriate to involve children in decision-making;
- Lack of resources, time and financial constraints; and not knowing how to contact children; and concerns about safety and ethics;
- Thinking that children don't want to participate; and language as well as cultural barriers;
- Lack of knowledge how to involve children and how to discuss issues with them; and
- Thinking that the processes are too complex and time-consuming.

In addition, Biniyam Dawit, has also stated on African children that 'resources have often been mentioned as the main barriers but... [in my experience] where the political will exists the economic will follows through. Some of the countries that I know of that are making headway in the conceptualization, but also the implementation, of children's rights... are not necessarily the richest countries... But beyond that, in some regions particularly, it's the issue of attitude which needs to be addressed through awareness raising [and] education. We often say that education is an enabling right partly due to the fact that it helps to realize other civil and political rights [and economic, social and cultural rights]...If we make a concrete effort in making sure that the attitudes of all stakeholders, adults but also children, are right, are informed. I think we would be able to achieve quite headway for the realization of children's rights'<sup>113</sup> Therefore, the necessary shift is needed away from the paternalistic approach, whereby adults know best, to the recognition that children are rights-holders, with a right to have voice in their lives including family law proceedings.

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<sup>112</sup> CRC, as cited at Supra note 5, p.7-8.

<sup>113</sup> <sup>113</sup> See, the CRIN standing for election to the UN Committee on the Rights of the Child, Benyam Dawit Mezmur (Ethiopia), December 2012, question no.3.

## CHAPTER THREE

### 3. Overview of the Existing Legal Frameworks Governing Children’s Right to be Heard

This chapter provides the reader the understanding about the effects of CRC and the ACRWC in domestic laws of Ethiopia, on children’s right to be heard in family law proceedings. Hence, under this chapter, I would like to examine the provisions of the CRC, ACRWC, FDRE Constitution, FDRE Revised Family Code and the Family Code of Oromia National Regional State and the Decision of the FDRE Supreme Court Cassation Division, the Periodic Reports of Ethiopia on children’s right to be heard in family law proceedings.

#### 3.1. Background to the UNCRC

The United Nations General Assembly adopted the Convention on the Rights of the Child (CRC) in 1989 after a ten-year drafting process. It came into force on 2 September 1990 in accordance with its article 49, after ratified by 20 states. Thus, by September 1998, the Convention had been ratified by 191 States, 6 more than the number of members of the United Nations. The only States, which have not ratified the UNCRC, are the United States and Somalia.<sup>114</sup> South Sudan also did not sign the Convention because of it is a new emerging state.

The CRC is the first international document, which influenced the world, both in how societies regard children and in how they react to children as people. It is also a landmark in the history of childhood,<sup>115</sup> and the most widely ratified international treaty. It ‘marked the full transformation, and complete emergence, of the idea of children as rights bearers at the international level’.<sup>116</sup> It has drafted with the vision that children should gain the “special care and assistance” that are unique to childhood.<sup>117</sup> Its foundational principles create “the tension between the public duty to protect children's welfare and the tradition of allocating power over children to the private realm of family life.”<sup>118</sup>

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<sup>114</sup> See the UN Resolution 44/252.

<sup>115</sup> M. Freeman, “Introduction: Children as Persons in *Children’s Rights: A Comparative Perspective*,” (England: Dartmouth Publishing Company Limited, 1996), p. 1.

<sup>116</sup> J Tobin, ‘The Development of Children’s Rights’ in G Monahan and L Young (eds), *Children and the Law in Australia* (2008), p. 26.

<sup>117</sup> CRC, Article. 3.

<sup>118</sup> Barbara B. Woodhouse, *Talking about Children’s Rights in Judicial Custody and Visitation Decision Making*, 2002, p. 105 & 108

Other treaties do not protect the unique needs of children and do not focus exclusively on children;<sup>119</sup> but the CRC gives unique protections to children's rights that currently exist in various other human rights treaties.<sup>120</sup> Thus, under its 10<sup>th</sup> paragraph the CRC states that bearing in mind that, as indicated in the Declaration of the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.<sup>121</sup> Furthermore, the drafters wanted children to "be fully prepared to live an individual life in society by bringing them into the spirit of the ideals proclaimed in the UN Charter, particularly, in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity."<sup>122</sup> Thus, the drafters have framed the background of the Convention, based on protecting children from "arbitrary or unlawful interference with their privacy, family, home or correspondence" and any form of "unlawful attacks" against their "honor or reputation."<sup>123</sup> Therefore, the adults and the state parties,<sup>124</sup> have the duties to protect those rights, support and guide children throughout their childhood, so that they may enjoy the rights to be express their views and to be heard in family law proceedings.

## **3.2. Right to be heard under the CRC and ACRWC**

### **3.2.1. Under the CRC**

Children lack the full autonomy of adults but they are subjects of rights. Thus, the CRC is an international agreement that protects the human rights of the children under the age of 18. Article 12 of the CRC is a unique provision in a human rights treaty; it addresses the legal and social status of children.<sup>125</sup>

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<sup>119</sup> Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 2006, p. 164-66.

<sup>120</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>; on Oct. 30, 2013, International Covenant on Civil and Political Rights, Dec. 19, 1966, 9 U.N.T.S. 171, 6 I.L.M. 368.

<sup>121</sup> CRC as cited at Supra note 5, under its preamble of the CRC, Para.10.

<sup>122</sup> Ibid

<sup>123</sup> Ibid, Article. 16.

<sup>124</sup> Ibid, Article. 18.

<sup>125</sup> General Comment No.12, as cited at Supra note 39, Para.1, P.5.

## **Article 12**

*(1). States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*(2). For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

This article 12 of the CRC is a substantive right, saying that children are entitled to be actors in their own lives and to participate in the decisions that affect them. But, as with adults, democratic participation is not an end in itself. It is the means through which to achieve justice, influence outcomes and expose abuses of power. In other words, it is also a procedural right enabling children to challenge abuses or neglect of their rights and take action to promote and protect those rights. It enables children to contribute to respect for their best interests.<sup>126</sup>

It does not impose an obligation on children to participate, but it provides a right, which is one of the fundamental values of the Convention for them to do so. It is not only a freestanding right, but the Committee on the Rights of the Child has identified article 12 as one of its four general principles.<sup>127</sup> In other words, it must be considered in the implementation of all other rights, and as one of the general measures of implementation of the UNCRC.<sup>128</sup> Hence, there has been progress, since the adoption of the UNCRC in 1989, at local, national, regional and global levels, towards putting this principle into effect. At the UN General Assembly Special Session on Children in 2002, States Parties affirmed their commitment to the realization of article 12.<sup>129</sup>

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<sup>126</sup> Gerison L., Promoting children's participation in democratic decision-making. Paper by UNICEF Innocenti Research Center, 2001, p.2.

<sup>127</sup> These general principles are Article 2, on non-discrimination, Article 3, on best interests and Article 6, on the right to life and maximum survival and development.

<sup>128</sup> General Comment No. 5, as cited at Supra note 67, Para.6, p.2

<sup>129</sup> UN General Assembly, *A World Fit for Children*, A/RES/S-27/2, October 2002, p. 11.

### 3.2.2. Under the ACRWC<sup>130</sup>

The African Charter on the Rights and Welfare of the Child (ACRWC), adopted unanimously in 1990,<sup>131</sup> is the first and the only regional treaty on the rights of the child in existence and is the most important for children's rights within the AU human rights system with its own monitoring organ. According to article 4(2) of ACRWC, a child who is capable of communicating his/her own views, should be the opportunity to be heard either directly or through an impartial representative as a party to the proceedings in all matters that may affect his/her interests in all judicial or administrative proceedings.

This article acknowledges children as individuals having distinct interests from the interests of their parents or family member's. It mandating the hearing of a child "who is capable of forming his or her views" and giving "due weight" to the views in accordance with the age and maturity of the child, and advocate the role of the child as an active participant in the promotion, protection and monitoring of her or his rights. In addition, these provisions introduce a dimension to the status of African children by recognizing that they are subjects of rights those demand that children themselves are entitled to be heard, rather than merely recipients of adult protection. This right applies to all children without discrimination and recognizes them as a full human being who possesses the ability to participate fully in society.<sup>132</sup> Therefore, the decision-makers have also the duty to give a due weight for the views of young child that may be mature beyond his or her years.<sup>133</sup>

### 3.3. The general consensus on the implementation of the CRC

When a State ratifies the Convention on the Rights of the Child, it takes on obligations under international law to implement it. The international human rights treaties do not specify how State parties are to give effect to their obligations regarding the measures of implementation of the CRC at domestic levels, but do require that they take 'all appropriate measures.'<sup>134</sup> Hence, article 4 of the CRC requires States parties to take 'all appropriate legislative, administrative and other measures' for

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<sup>130</sup> African Charter on the Rights and Welfare of the Child (ACRWC), OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999; Article 4(2).

<sup>131</sup> Francis, V., *International Human Rights Law in Africa*, New York, Oxford University Press, 2007, p.261

<sup>132</sup> Freeman, *Children's Rights: A Comparative Perspective* (Dartmouth Aldershot: (University College London, 1996), p.3.

<sup>133</sup> G. Van Bueren, "*The Right of the Child to Freedom of Expression*" in *The International Law on the Rights of the Child* (The Netherlands: Martinus Nijhoff Publishers, 1995), p. 131 &136.

<sup>134</sup> See, for example, Human Rights Committee, General Comment No. 3, Implementation at the national level, HRC/GC/1981/3, 1981, Para. 1.

implementation of the rights contained therein. Thus, it is up to individual States to determine how to implement the CRC in practices,<sup>135</sup> because the political, economical and social development of the State parties to the Convention is not the same, which in turns has an effects on implementation of this rights either in fulfillment of mechanisms or professionals and expertise. Therefore, studies have underlined that there are two types of measures (legal and non-legal measures), in implementation of the CRC at a national level.

**i. Legal measures<sup>136</sup>**

- Direct incorporation – the CRC is fully transformed into domestic law at either legislative or constitutional level. Thus, the Committee urges for the direct and full incorporation of the CRC into the domestic laws of State parties.<sup>137</sup> Because, such direct incorporation provided opportunities for strategic litigation given that the CRC was part of the domestic legal system, since it conveyed the strong message about the status of children and their rights, and the knock-on effects for implementation of children’s rights principles into domestic law and policy.<sup>138</sup>

Hence, some countries directly incorporate the CRC into their domestic law. For instance, ‘the law on the rights of the child and protection of children’ adopted by Rwanda in 2001 is one of the first implemented by an African nation to recognize the right of the child to be heard in broad, general terms.<sup>139</sup>

- Indirect incorporation – other legal mechanisms that are used to give the CRC some effect in the domestic legal order (e.g. Child Act). For instance, Ethiopia did not incorporate the CRC directly and fully into its Constitution, but incorporate it into Revised Family Code and other relevant domestic laws.
- Sectorial Incorporation- this is about the transposing relevant provisions of the CRC into relevant sectoral laws, such as those relating to education or family.

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<sup>135</sup> Williams J., ‘Multi-level governance and CRC implementation’ in Invernizzi, A. and Wiliams, J. (eds.), *The Human Rights of Children: From visions to implementation*, Ashgate, Farnham, 2011, pp. 239–262

<sup>136</sup> See for example, Laura Lundy, Ursula Kirkelly, Bornagh Byrne and Janson Kang(eds), , *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries*, 2009, p 3.

<sup>137</sup> General Comment No. 5, as cited at Supra note 67, p.19.

<sup>138</sup> *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries*, 2009, p.2

<sup>139</sup> *Law reform and implementation of the Convention on the rights of the Child*, prepared by Innocent Research Centre under the guidance of UNICEF, 2009, p. 13

## **ii. Non-legal measures:**<sup>140</sup>

The non-legal measures is to mean the incorporation of the rights described in the CRC, in national strategies and action plans for children; child impact assessment processes to anticipate the impact of proposed laws and the policies or budgetary allocations. In addition, the establishment of children's commissioners or ombudspersons, either as distinct offices or as part of a national and human rights institution is also a non legal measures used to implement the CRC. The Committee has identified a wide range of measures that are needed for effective implementation, including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels.<sup>141</sup> Therefore, to realize children's rights to be heard, the studies have mentioned that, the State parties should adopt the following strategies. These are:<sup>142</sup>

- Review and withdraw restrictive declarations and reservations to article 12
- Establish independent human rights institutions, such as children's ombudsmen or commissioners with a broad children's rights mandate.<sup>143</sup>
- Provide training on article 12 of the CRC, and its application in practice, for all professionals working with, and for, children, including lawyers, judges, police, social workers, community workers, psychologists, caregivers, residential and prison officers, teachers at all levels of the educational system, medical doctors, nurses and other health professionals, civil servants and public officials, asylum officers and traditional leaders
- Ensure appropriate conditions for supporting and encouraging children to express their views, and make sure that these views are given due weight, by regulations and arrangements which are firmly anchored in laws and institutional codes and are regularly evaluated with regard to their effectiveness
- Combat negative attitudes, which impede the full realization of the child's right to be heard, through public campaigns, including opinion leaders and the media, to change widespread customary conceptions of the child.

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<sup>140</sup> The CRC, as cited at Supra note 139, a study of legal implementation in 12 countries, 2009, p.2

<sup>141</sup> In 1999, the Committee on the Rights of the Child held a two-day workshop to commemorate the tenth anniversary of adoption of the Convention on the Rights of the Child by the United Nations General Assembly. The workshop focused on general measures of implementation following which the Committee adopted detailed conclusions and recommendations (see CRC/C/90, Para. 291).

<sup>142</sup> General Comment No. 12, as cited at Supra note 39, Para. 49, p.14.

<sup>143</sup> See the Committee's general comment No. 2 (2002) on the role of independent human rights institutions, Para.4, p.2. Note: As State parties to the Convention Ethiopia has international obligation to adopt and implement the above-mentioned strategies used to realize children's right to be heard through non-legal measures.

### **3.4. The Status of CRC in the Domestic Laws of Ethiopia**

Ethiopia has been a member of the United Nations since 1945. It is a party to six of the seven core human rights treaties among the CRC is the one.<sup>144</sup> The Country has ratified the CRC during the period of Transitional Government of Ethiopia (TGE) under proclamation No. 10/1992, which, according to its article 4 came into force on January 30, 1992 without any reservations.<sup>145</sup> Article 9(b) of the Charter authorized the council of representative of the TGE to ratify international agreements and thus it is based on this provision of the law that the convention was made part of the Ethiopian law.

Article 9(4) of the FDRE Constitution in effect grants associated rights to Ethiopians and the duties to Ethiopian government to take actions to realize those rights. Thus, in keeping with the Ethiopian Constitution and the international instruments Ethiopia has ratified, the incumbent government has under taken three major legal reforms with the aim of revisiting discriminatory laws (e.g. the Revised Family Code, the Labor Proclamation and the Revised Criminal Code taken into force in 2005, 2004, and 2000 respectively<sup>146</sup>). Moreover, such legal reforms have taken to protect the rights of vulnerable groups, however, the status of international instruments ratified by the country remain controversial issue. Therefore, there are hot and persistent debates made by legal scholars and professionals of the country on the status of the CRC in the domestic laws and the issue of publication of the CRC in the official Negarit Gazeta.

#### **3.4.1. Debates on the Status of the CRC in the Domestic Laws of Ethiopia**

In some countries, the CRC may have the same status or standing as the constitution and, in others still, it may occupy the equivalent level as legislation.<sup>147</sup> For instance, in some countries once the CRC is ratified at international level, it automatically forms part of national law and it binds state authorities and may be directly enforceable by national courts. However, the position that the CRC occupies in the hierarchy of the domestic legal systems is variable. In some cases, it may be subordinate to the constitution, but prevail over ordinary legislations.

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<sup>144</sup> Eva B., Ethiopia before the United Nations treaty monitoring bodies. *Ghent University, Belgium, Afrika Focus*, Vol. 20, Nr. 1-2, 2007, p. 52

<sup>145</sup> See, Committee on the Rights of the Child 43<sup>rd</sup> Session, Ethiopia, 3<sup>rd</sup> Report, (2003), p. 1.

<sup>146</sup> The Revised Family Code addresses gaps and inconsistencies inherent in the 1960's Civil Code regarding the rights of children and women. The Criminal Code proscribed several harmful traditional practices inimical and prejudicial to the rights and well fare of the children and women. The Labor Proclamation (Proclamation 377/2003) prohibits employment of children below the age of 14 years of age and to engage young workers in types of employment, which are considered hazardous. Apart from contributing their social and psychological well-being, these legislative reform have say little about children's rights to be heard in judicial proceedings particularly, in family law proceeding.

<sup>147</sup> UNICEF, *Law Reform and Implementation of the CRC*, UNICEF Innocent Research Centre, Florence, 2007, p.12-13

Thus, article 9(4) of the FDRE Constitution states, ‘All international agreements ratified by Ethiopia are an integral part of the law of the land.’ In addition, article 13(2) of the same Constitution states, ‘The fundamental rights and freedoms specified in this Chapter(Chapter Three, part two) shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.’<sup>148</sup>Hence, there are a hot and persistent debates and controversies among scholars of the country, regarding the exact meaning and interpretation of article 9(4) and article 13(2) of the Constitution and the status of the CRC in domestic legislations and its publication in domestic laws. These debates hold two-tiered competing views regarding the position of CRC in Ethiopia’s domestic laws.

One view hold that the supremacy clause of article 9(1) of the constitution rendering any inconsistent ‘law, customary practices, practice or a decision of any organ of the state or all ratified treaties.’ They have argued that the role of human rights instruments envisaged by article 13 (2) of Constitution is nothing more than being a mere interpretive guidance and tools.<sup>149</sup> Hence, this view rules out the departure from the provisions of the constitution even where and when it stands in clear contradiction with the terms of human rights instruments ratified or adopted by the country. Hence, they concludes that whether the constitution provides for a better or lesser protection to individual or groups, its terms prevail over those of human rights instruments to the extent that the latter conflict with the former.

For instance, Ibrami Idiris is among the scholars of the country, those hold this view.<sup>150</sup> Ibrahim argued that the wording of article 9(4) and 13(2) of the FDRE Constitution maintained national law prevails over an international treaty in case the later runs contrary to the interests of Ethiopia.<sup>151</sup>Therefore, as to him, the ratified international treaties that pose a threat to Ethiopia’s interest could be subject to repeal.

The second view holds that, the declaration under article 9(4) of the constitution that dully ratified treaties are ‘integral law of the land’, and the requirement of article 13(2) that the Bills of Rights<sup>152</sup> of the constitution must be interpreted in conformity with ratified treaties. This view concludes the supremacy of the constitution established under article 9(1) of the same is to be differed as far as the human right instruments are concerned.

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<sup>148</sup> Ethiopian Federal Democratic Republic Constitution, *Proclamation No. 1/1995*, Article 13(2)

<sup>149</sup> See, Ibrahim Indris, ‘*The Place of International Human Rights in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution.*’ JEL, Vol.20 (2000), p. 134-135.

<sup>150</sup> Ibrahim I., as cited at Supra note, 150

<sup>151</sup> Ibid

<sup>152</sup> Promulgated by virtue of proclamation No. 1/1995, *A proclamation to pronounce the coming into effect of the Constitution of Federal Democratic Republic of Ethiopia*, Federal Negarit Gazeta, 1<sup>st</sup> year, No.1, 21 August 1995.

For instance, Takele Soboka has argued, “infractions the basic human rights are no longer matters of internal concerns, just as sovereignty is no longer an acceptable defence to deprivation of fundamental rights of nationals and other residents of the country.”<sup>153</sup> Hence, the approach of interpreting constitutional provisions in line with country’s international obligations has the effects making constitutions convenient ‘sites for implementation of international law and has long been in use in other countries.’<sup>154</sup>

In my opinion, the second view is more audible than the first. Because, article 41, of the CRC and article 13(2) of FDRE Constitution can a solution such divergent, hot and persistent debates. Article 41 of the CRC states that if the laws of a particular country protect children better than the articles of the Convention, then those laws should stay; and article 13(2) of the constitution says that the constitution is required to be interpreted in conformity with the concerned international human rights instruments ratified by Ethiopia.

In addition, the CRC Committee has stated that if case of any conflict in legislation may arise, that predominance should always be given to the CRC as pursuant to article 27 of the Vienna Convention on the Law of Treaties of 1969.<sup>155</sup> This treaties, provides that, emphatically maintains a part of international treaty, the supremacy of the provisions of the Convention over the national laws a state parties may not invoke its national laws so as to carry out an international conventions.<sup>156</sup> It means, once enters in a Convention on its free will and ratified it the States have an obligation in good faith (‘*Pacta Sunta Survanda*’) to fulfill it.<sup>157</sup> Therefore, there are no ways to excuse the States if they rely on Constitution or other domestic laws to extricate themselves from their international obligations, except under very exceptional circumstances.<sup>158</sup>

### **3.4.2. Publication of the CRC in Official Negarit Gazeta**

The other Controversial and debatable issue is about the question frequently raised by scholars, whether ‘a ratified international human rights convention internally applicable as part of Ethiopian law without being published in Negarit Gazeta; Ethiopian Law Gazette?’ The FDRE Constitution of 1995 and the

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<sup>153</sup> Takele S. Bulto, ‘The Monist-Dualist Divide and the Supremacy ‘Clause’: *Revisiting the status of human rights treaties in Ethiopia*, 2009, p.158.

<sup>154</sup> Vicki J., ‘*Constitutional Comparisons: Convergence, Resistance and Engagement*’ (2006) 119 Harvard Law Review, p.109,152

<sup>155</sup> The Vienna Convention of the 1969 Vienna Convention on the Law of Treaties, 2003, Para.20, Article 27.

<sup>156</sup> The Vienna Convention as cited at Supra note 156.

<sup>157</sup> Ibid, Article 26.

<sup>158</sup> Ibid, Article 46 and 47.

Federal Negarti Gazeta Establishment Proclamation No. 3/1995, have clear legal answer for this question as follows.

Article 71(2) the FDRE Constitution state, 'He [the president] shall proclaim in Negari Gazeta laws and international agreements approved by the HPR in accordance with the constitution.' In addition, Article 2(3) of the Federal Negarit Establishment Proclamation No. 3/1995, state, 'All federal or regional legislative, executive, and judicial organs as well as any national or juridical person shall take judicial notice of laws published in Federal Negarit Gazeta.' Hence, as the wording of these articles the publication of laws into Negaret Gazeta is an absolute requirement in order to give them judicial notice.<sup>159</sup> However, still Ethiopia did not publish the CRC fully into the official Negarit Gazeta. Because, the ratification proclamation of the CRC, proclamation No. 10/1992 contains only four articles, which only deal with citation, ratification, delegation power and date of enforcement. Hence, this proclamation does not incorporate the full text of the CRC.

On its 37st meeting, the Committee also suggested that Ethiopia should publish the full text of the CRC in Negarit Gazeta in its local language.<sup>160</sup> The Committee believed that such full publication of the CRC would enable individuals to know about children's rights under the convention and that all the administrative and judicial authorities would also aware of the obligations. In my opinion, the legal maxim, which says '*ignorance of law is no excuse*,'<sup>161</sup> strengthens the importance of bringing the whole texts of CRC to the attention of the general-public. Under the principle of good faith, there is a need to bring domestic legislations, administrative rules and practices into conformity, with the CRC, which is highly minded legal formulation to ensure such normative compatibility of domestic laws with international instruments. Because, destroys this, says Aristotle and 'you destroy the intercourse of man.'<sup>162</sup>

Some academic works mentioned that because of many of those treaties adopted were not published; the requirement of publishing treaties adopted by Ethiopia was not always met in practices.<sup>163</sup> Therefore, it is expected from Ethiopia to publish the full text of the CRC in the official Nagrit Gazeta. In addition,

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<sup>159</sup> The FDRE Constitution Article 71(2), and the Establishment of Negarit Gazeta Proclamation No 1/1942 Article 2(3)

<sup>160</sup> See the Concluding Observations by the Committee on the Rights of the Child at meeting (Fourteenth Session), held on January 24, 1997, p.7.

<sup>161</sup> The Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Article 2035(2).

<sup>162</sup> Hugo Grotius, De Jure Belli ac pacis (1925), quoted in Maria Munuela Farrajota, 'Notification and Consultation in law Applicable to International Watercourses' in L Boisson De Chazournes, and Salman A Salman (ed), Water Resources and International Law (2005), p. 281.

<sup>163</sup> Shemelis Metafera, 'Treaty-Making Power in Ethiopia, Senior Thesis, Faculty of law Addis Ababa University,' 1967, p.20 (unpublished).

the National Human Rights Commission has the duty to translate in to vernacular the CRC and disperse it to the competent concerned bodies.<sup>164</sup>

### **3.5. The National Child Policy of Ethiopia**

Ethiopia has developed Comprehensive National Child Policy with due consideration of the principles and provisions of the CRC and ACRWC to guide the work of various actors dealing with children and promote the rights of children. The policy emphasizes on three central strategies, 1) development and growth, 2) prevention and protection, and 3) rehabilitation, care and support. Thus, the strategic objectives of the Policy Framework focus on, establishing coherent governance, program implementation structures for Early Childhood Care and Education (ECCE) and mainstreaming it in all relevant national policies and programs.<sup>165</sup>

The policy promotes the development of accessible, equitable and quality ECCE services for children particularly to those with special needs and marginalized children; protecting young children from abuse and harmful practices; promoting and strengthening partnerships and collaboration among all stakeholders required for mobilization of the necessary resources and ensuring effective delivery of services and programs for young children.

The country also developed the National Plan of Action for children, which was drafted by MOLSA, in collaboration with the concerned organizations, for the period 2003-2010 and beyond. The NPA emphasizes on the principles of putting children first, eradicate poverty, leave no child behind, care for every child, educate every child, protect children from harm and exploitation, protect children from war, listen to children and ensure their participation, and protect the earth for children. The major Components of the NPA are,<sup>166</sup> providing quality education; providing health facilities, clear water, sanitation, food and nutrition; combating HIV/AIDS, and protecting children against abuses, exploitation and violence.

However, in my opinion, the child policy fails to lay the necessary guidelines for taking measures to create the protective environment for children in family law proceeding.<sup>167</sup> In addition, the African Child

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<sup>164</sup> *The Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000*, 'Gaze, Year 6, No.40, Article 6(8).

<sup>165</sup> See the *Combined 4<sup>th</sup> and 5<sup>th</sup> Periodic Reports submitted to the UN Committee on the Rights of the Child by FDRE Government (2006 – 2011)*, p.3.

<sup>166</sup> The Combined 4<sup>th</sup> and 5<sup>th</sup> periodic report, *Ibid*, p.5.

<sup>167</sup> See, Articles 561- 570 of 1994 new Criminal Code of Federal Democratic Republic of Ethiopia. The new criminal code reinforces the constitutionally guaranteed human rights of women and children by protecting them from traditional practices that are known to be harmful to their health and wellbeing. *Inter alia*, Female genital mutilation, early marriage, the abduction of young women and other forms of sexual violence.

Policy Forum (ACPF) set forward as though there is vast progress made by Ethiopia in framing child policy, but still there are numerous challenges, bottlenecks and gaps in policy to realize children rights. These are the absence of a single and comprehensive policy that deals with the issue of children's rights to be heard, general directive regulating the form of assistance to be delivered and the failure to translate the official text of the CRC and the African Charter into the official working languages of the different regional states.<sup>168</sup>

On the day of African children, one commentator has responded for the interview made to him by saying that, 'children lost right to be heard particularly in country like Ethiopia, for a dozen of reasons. These may be due to too few resources (budgetary) are allocated to children, particularly while comparing with, for example, defence and security; and little harmonization of the CRC and ACRWC in too domestic laws, lack enforcement, existence of a huge gap between law and practice, which may be related to capacity.'<sup>169</sup>

Therefore, it is expected from Ethiopia to develop and adopt a comprehensive Children's Act, which incorporates all the provisions of the CRC rather than copying its text.<sup>170</sup> Moreover, each provision of the CRC has to be translated into concrete and specific rules within the context of national legislation.<sup>171</sup> Thus, coming with such Comprehensive Children's Act is useful to allocate required financial and human resources to give training for government institutions and relevant officials to realize children rights.

### **3.6. The Effect of article 12 on Ethiopian Domestic Laws**

As enshrined under article 12 of CRC, Ethiopian children have a right to express their views and be heard in any proceedings affecting them and get a due weight for their voices. Therefore, it requires Ethiopia to put in place facilitative mechanisms that are appropriate to hearing the views of the child. Among these mechanisms, one is the direct and full incorporation of article 12 of the CRC into domestic laws. Therefore, as a part of the obligation to take legislative measures, it is required to harmonize the existing laws in accordance with the CRC. In addition, legislation is needed to provide children with

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<sup>168</sup> Eddy J. Walakira, and Gilbert O. Onyango, *"Laws, Policies and the Reality for Ending Violence against Children in Ethiopia, Kenya and Uganda"*, Addis Ababa. The study made on existing gaps in legislation to end violence against children, study presented on ACPF (2011), P.16

<sup>169</sup> An interview made to Dr. Assefa Bequele by CRIN on the Day of the African Child, 2008, Para. 12

<sup>170</sup> The 43<sup>rd</sup> Session, Concluding Observations on Ethiopia, by the Committee, CRC/C/ETH/CO/3(2003), Para.9. *The Committee recommends that it is required from the Ethiopian government to undertake a comprehensive legal review and adopt a comprehensive children's code, which incorporates the provisions of the CRC*

<sup>171</sup> Eddy J. Walakira, and Gilbert O. Onyango *Supra* note 169, "In the Best Interests of the Child, Harmonization of National Laws with the Convention on the Rights of the Child: Some Observations and Suggestions," ACPF (2007), P 8.

complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.<sup>172</sup>

### 3.6.1. The FDRE Constitution of 1995

*“I do believe that if article 12 of the CRC incorporated directly to the Constitution, it is too easy to realize all the rights enshrined under domestic laws, and national policy.”<sup>173</sup>*

Incorporation of article 12 of the CRC in to the constitution at the national level is ‘a high water mark’<sup>174</sup> in realization of other rights for children. Any treaties ratified or adopted by Ethiopia, form an integral part of the law of the country.<sup>175</sup> Thus, the umbrella and leading article of the Constitution, article 36 provides comprehensive rights of the child such as right to life, identity, non-discrimination, and best interests of the child, right to protection from cruel, inhumane and degrading punishments and other basic rights in light of international standards. Notwithstanding, all these rights, there is no explicit provision which is tailored to the children’s rights regarding their right to be heard in judicial and administrative proceedings. However, under this Constitution, the right to be heard of the ‘Ethiopian children’ remains elusive.<sup>176</sup>

In addition, children have the right to be heard through their best interests’ representative or the Independent Children’s Lawyers (ICL). Thus, article 12 (2) of the CRC states that children have the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body’ and ‘have the right to prompt access to legal and other appropriate assistance, deprived of his or her liberty. Consonant to the article 12 (2) of the CRC; under Section 28(1) (h) the 1996, Constitution of the South Africa states, ‘Every child has the right . . . (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; . . .’<sup>177</sup>

However, under the FDRE Constitution, there is no provision, which gives children the right to be represented by Independent Children’s Lawyer of their best interests, which can support the court by providing the reports of the voice of children in family law cases. The Constitution gives this right only

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<sup>172</sup> General comment No. 5, as cited at Supra 67, Para. 24, p.7.

<sup>173</sup> Interview made for Ato Aliyi Kedir, the Judge working on the family law of the high court of western Hararghe, done at his office on 11/04/2006, 8:00 pm.

<sup>174</sup> Kilkelly, U., Incorporation of article 12 into the constitution at national level, 2011a, p. 147.

<sup>175</sup> The FDRE Constitution, as cited at 149, Article 9(4)

<sup>176</sup> Getachew Assefa Woldemariam., *The predicaments of child victims of crime seeking justice in Ethiopia: a double victimization by the justice process*; Africa focus, Volume 24, Nr. 1, 2011, Para.3, p. 11-12,

<sup>177</sup> See the Constitution of the Republic of South Africa of 1996, Section 28, and “*The Law reform and implementation of the Convention on the rights of the Child, prepared by Innocent Research Centre under the guidance of UNICEF,*” 2007, p. 13.

for everyone in criminal cases under article 20(5). This sub article says, accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.<sup>178</sup>

**i. Article 36(2) of the FDRE Constitution Vs Article 12 of the CRC**

I want to appreciate the language used by article 36(2) of the Constitution to advocate the principle of best interests of children than as it stated under the CRC. This principle serves as catalyst throughout the Convention and State parties' domestic laws to realize children rights, particularly, the rights to be heard in family law proceedings.<sup>179</sup>

Thus, article 36(2) of the Constitution reads,

*(2), in all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.*

Article 3 of the CRC states,

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be 'a primary' consideration.*

As stated above, the FDRE Constitution used an adjective word, '*the*'<sup>180</sup> in front of the phrase '*primary,*' whereas, the CRC used the word '*a*'<sup>181</sup> in front of such phrase. Thus, article 36 (2), of the Constitution does not give a leeway for judges or any organ having contact with the cases of children to put the rights of the child in choice. In addition, article 36(2) reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives. Moreover, under article 36(2) of the Constitution children's best interests have the priority than that of adult's rights.

Therefore, the Convention obliges State parties to assure that those responsible for these actions hear the child as stipulated in article 12. In addition, the Committee mentioned the mandatory steps that shall be adopted by the States parties to realize the best interests of a child. These are:<sup>182</sup>

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<sup>178</sup> The FDRE Constitution, Article 20(5).

<sup>179</sup> General Comment No. 5, '*General Measures of Implementation for the Convention on the Rights of the Child*' (Arts 4, 42 and 44, Para. 6), CRC/GC/2003/5 for an elaboration of the general principles.

<sup>180</sup> The FDRE Constitution, Article 36(2)

<sup>181</sup> The CRC, Article 3.

<sup>182</sup> General Comment No.12, as cited at Supra note 39, Para. 71-74, p. 18.

- consultation with the child when established the best interests of the child;
- have to considered in all action concerning the child and
- hearing the child’s view properly and giving a due weight for his/her view.

**i. Articles 27(1), 29(2) of the FDRE Constitution Vs Article 12 of the CRC**

In the 2<sup>nd</sup>, the 3<sup>rd</sup> and the combined 4<sup>th</sup> and 5<sup>th</sup> periodic reports made in 1998 and 2006 to 2011, the delegation of Ethiopia has invoked that article 27(1) and 29(2) of the FDRE Constitution are provisions that are used to fulfill Ethiopia’s international obligations toward the realization of children’s rights to be heard. The country mentioned, as currently several new initiatives:<sup>183</sup> children parliament, child club, and effective use of media by children are developed in the country to promote children participation and to have their views heard.

Thus, article 27(1) says, “Everyone has the right to freedom of thought, conscience and religion;” and article 29(2) states, “Everyone has the right to hold opinions without interference.”<sup>184</sup> What these two articles are talking about is quite different from what is stated under article 12 of the CRC. However, the Committee emphasizes that there is a difference between freedom of expression (Article 13) and right to express views and to be heard (Article 12) of the CRC.<sup>185</sup> Hence, rights enshrined under these articles 27(1) and 29(2) of the FDRE Constitution are similar with rights stated under article 12 of the CRC, but similar with the right that stated under article 13 of the CRC which deals with freedom of expression.

Furthermore, freedom of expression relates to the right to hold and express opinions; and to seek and receive information through any media. The Committee also stated, ‘freedom of expression asserts the right of the child not to be restricted by the State party in the opinions she or he holds or expresses. As such, the obligation it imposes on States parties is to refrain from interference in the expression of those views, or in access to information, while protecting the right of access to means of communication and public dialogue.’<sup>186</sup>

Article 12 of the CRC, however, relates to the right of expression of views specifically about matters, which affect the child, and the right to be involved in actions and decisions that impact on her or his life. Thus, this article imposes an obligation on States parties to introduce the legal framework and mechanisms necessary to facilitate active involvement of the child in all actions affecting the child and

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<sup>183</sup>The Combined 4<sup>th</sup> and 5<sup>th</sup> periodic reports as cited at Supra note 166, p. 12

<sup>184</sup> The FDRE Constitution, Article 29(1)

<sup>185</sup> General comment No. 12, *Supra note* 39, Para.80 & 81, p. 19.

<sup>186</sup> *Ibid*, Para.80 & 81, p. 19.

in decision-making, and to fulfill the obligation to give due weight to those views once expressed. However, the freedom of expression (article 13) requires no such engagement or response from State parties.<sup>187</sup>

On the other hand, Ethiopian children can enjoy the right enshrined under article 29(2) of the Constitution, by their status as “everyone,” of Ethiopian national, but the CRC have strongly advocated for the moves toward reaffirming children’s rights to express their views and to be heard independently in the domestic laws. Thus, under its preamble, the CRC states that bearing in mind as indicated in the Declaration of the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.<sup>188</sup>

Therefore, more effort is required from Ethiopia in incorporating article 12 of the CRC directly into its domestic laws or publishing the full text of the CRC in the official *Federal Negarit Gazeta*-which is a mandatory requirement in the country’s law-making process.<sup>189</sup> In addition, consideration should be given for the direct implementation of this right in any organs of the government through further legislations and a compilation works of laws on children’s rights to be heard.

### **3.6.2. The FDRE Revised Family Code (RFC)**

Children are the victims in cases of family divorce and unequivocally affected by decisions of the courts. Graham and Fitzgerald have expressed this concern that: ‘by failing to fully implement a child’s right to be heard as expressed in Article 12 of UNCRC, the legislation affords children limited opportunity to express their wishes in all family law proceedings that concern them and continues to position children at the margins of participation.’<sup>190</sup>

In its Situational Analysis made on Ethiopia, the UNICEF states that when a child is assertive and argues for participation on issues that affect him/her, the parental reaction is negative, and an assertive child is considered undisciplined.<sup>191</sup> Hence, though it discriminate children by their ages and have vague provisions regarding how the judges can understand the feelings of children in family law proceedings, the RFC gives the right to be heard in family law proceedings for elder children regarding their custody

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<sup>187</sup> General comment, No. 12, Supra note 186

<sup>188</sup> CRC, as cited at Supra note 5, under its Preamble, Para.10<sup>th</sup> .

<sup>189</sup> The FDRE Constitution, Article 71(2) and Article 3 of the *Federal Negarit Gazeta* Establishment Proclamation 3/1995. Article 14 the law-making procedure for the House of Peoples’ Representatives Proclamation 14/1994.

<sup>190</sup> A. Graham and R. Fitzgerald, “*Taking Account of the ‘To and Fro’ of Children’s Experiences in Family Law*” (Paper presented at the Childhoods Conference, Oslo, June 2005), p.43.

<sup>191</sup> Children’s Rights in Ethiopia: *A Situational analysis by UNICEF* (March 2003), p.27-31, Para.1. For such Situational analysis, the state of Ethiopia says that the Minister of Labor and Social Affairs (MoLSA) promotes participation of children in family, school and Social life in cooperation with Child-Centered NGO’s and concerned government institutions.

matters or the administration of their properties. Therefore, here below, I want to examine the provisions of the RFC dealing with children's right to be heard in custody assessment, maintenance, and parenting time plans if any.<sup>192</sup>

**i. Custody Assessment:**<sup>193</sup>

Custody assessment is a comprehensive clinical exploration of the needs of a child, within the context of his/her family and environment and resulting in recommendations relevant to custody and/or access, regarding how those needs can best be met. The process involves a series of clinical judgments made by the social worker that serve as the basis of actions to be taken throughout the assessment process, and which result in a recommendation, or facilitation of a parenting plan. Although the social worker may make a recommendation, the parties and/or the court make the final decision.<sup>194</sup>

Hence, article 113(1) of the RFC says, 'the court shall, when deciding the dissolution of marriage, also decide as to which spouse shall have custody of the children, care of their education, health, maintenance and the rights of the parents and the children to visit each other.' Article 191(3) of the RFC also states, where one of spouse will not give his/her consent in custody case and if the child is 10 years old or above, the court may decide the custodianship right by hearing the opinion of the non-consenting parent and the child. In addition, article 191(4) of the RFC stipulates, where the child is not capable of consent the court may decide on the custodianship, taking into account the interest of the child.

The above listed provisions of the FDRE Revised Family Code dictate that the judge must decide over the custody and maintenances of the child before the order of divorce has given. However, these provisions discriminate children by ages (see, article 191(3)), and capacity (see, article 194(4)) to give their voices in custody assessment. In addition, these provisions do not mention any mechanism (methods) by which the court can assess the custody of the children in family law proceedings.

**i. Appointment/Removal of Guardians and Administration of Properties**<sup>195</sup>

- Article 249(2) of the RFC, stipulates that 'the views of the child may heard in the case of decisions regarding the appointment or removal of guardians. This provision read as "where it thinks fit it (the court) may hear the minor himself.'

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<sup>192</sup> The Revised Family Code, as cited at Supra note 83, Articles 80(3), 82(6), 113(2), 191((3) (4)), 249(2) and 291(1).

<sup>193</sup> Ibid, Under Chapter 12, Section 2, about organs of protections of minors, p.78

<sup>194</sup> See Guidelines for Social Work Members of the Ontario College of Social Workers and Social Service Workers, 'Practice Guidelines for Custody and Access Assessments,' 2009, p.7.

<sup>195</sup> Revised Family Code, Supra note 193, Articles 249(2) & 291(1)

- Article 291(1) of the RFC, states: ‘the tutor shall consult in all important acts concerning him, unless the latter is less than fourteen years old.’

After the decision of divorce has given by the court, both divorced spouse may compete to get the custodianship right of the child as a guardian. Thus, as to article 249(2) of the RFC states that the court ‘may’ hear the child with whom he/she likes to live. This article enshrines the view that the court may hear the voice of the child where it thinks fit. However, article 12 (1) of CRC and General Comment No.12 of the Committee on the Rights of the Child used the phrase ‘shall’<sup>196</sup>; which shows a mandatory clause to hear from the child in family law proceedings in assessment of his/her custody matter, order their maintenances and parenting plans.<sup>197</sup> Therefore, hearing from the child is not mandatory under the provision of the RFC.

On the other hand, article 291(1) of the RFC says that it mandatory for the tutor to hear from the child on all-important matters concerning the child, but if and only if the child is aged 14 years of age and above. However, the Committee on the rights of the child, emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages State parties from introducing age limits either in law or in practice which would restrict the child’s right to be heard in all matters affecting her or him.<sup>198</sup>

## **ii. Parenting time Plans**

Preserving a healthy and ongoing relationship between children and both their parents after divorce or separation is of utmost importance; because of the loss of contact with a parent is the worst consequence of divorce or parental separation. Hence, written access plans provide children and parents with some assurances of maintaining meaningful contact and can prevent future conflict. The parents could do this arrangement or the court can order them to fill the parenting time plans forms and to fix the contacting arrangement with their children after divorce. Thus, article 113(1) of the RFC, gives children the right to visit and to be visited by their parents after the order of divorce has given. However, this article does not mention how the court can give such order. In addition, this article does not make clear whether the court may hear the voice of the child before giving such order or not.

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<sup>196</sup> General Comment No.12, as cited at Supra note 39, Para.19, p.8.

<sup>197</sup> See the Black Law Dictionary, ‘*Parenting plan time is a time when a parent exercise their duties concerning to his or her child, including the right to educate, and discipline the child and the right to control the child’s earnings and property*’ p.1156.

<sup>198</sup> Supra note 196, Para. 21, p. 9.

In general, though children have extensive rights under the RFC, but still its provisions are discriminate children in age; do not mention the methods to hear the voices of the child; use the binary word ‘*may*’ and give a leeway to the judges not to hear the child’s voice in family law proceedings. Therefore, in my opinion, the children’s right to be heard under the RFC has not embraced all the elements stated under article 12 of the CRC and General Comment No.12. *Inter alia*,<sup>199</sup> “shall assure;” “capable of forming his/her views”; “expressing their views freely”; “in all matters affecting the child”; “due weight in accordance with the age and maturity of the child”; “either directly or through a representative, or appropriate body”; and Steps to implement this right (e.g. preparation, the hearing.)

### **3.7. The Decision of Cassation Division of the FDRE Supreme Court**

In Ethiopia, the supreme federal judicial authority is vested in the Federal Supreme Court and it shall have the highest and final judicial power over Federal matters.<sup>200</sup> Article 80(3a), of the FDRE Constitution states, the Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. In addition, article 2(3) of Federal Courts Re Amendment Proclamation No.454/2005 states, the cassation bench has power on which not less than five judges presides over the cases having a power of cassation over any final court decision containing a basic error of law. Hence, the FDRE Supreme court exercises this power by its cassation over final decisions it has rendered in its appellate jurisdiction, in its first instance jurisdiction and final decisions of regional supreme courts rendered in their first instance jurisdiction or in their appellate jurisdiction. It looks only over the decisions contain fundamental error of law.

The decisions made by the federal supreme courts’ cassation division, become precedent (law) and shall have an erg omens effects at any levels of courts of the country.<sup>201</sup> Hence, as stated under article 2(2) of this proclamation, the Federal Supreme Court shall publish and distribute these decisions.<sup>202</sup> However, the president of the Supreme Court of Ethiopia, has mentioned that there are lack of quality and experiences in the publications of the decisions of the cassation division of federal Supreme Court of Ethiopia, when compare with the cassation divisions of the developed countries.<sup>203</sup>

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<sup>199</sup> General Comment 12, Para.19, 20, 22, 26, 28, 35, 41 & 42; P. 8, 9, 10, 11, 12 and 13, respectively.

<sup>200</sup> The FDRE Constitution, Articles 78(2), 79(1) and 80 (1) and (2).

<sup>201</sup> The FDRE Supreme court , Proclamation No. 454/1997, Article 2(1)

<sup>202</sup> The Federal Courts Proclamation Re amendment Proclamation, Proclamation No. 454/2005. This proclamation has become necessary to remand the Federal Courts Proclamation Number 25/1996.

<sup>203</sup> See, a heading speech made by the president of Ethiopian Supreme Court on volume 10 of decisions of FDRE Supreme Court Cassation Division, December, 2003.

Furthermore, the Federal Supreme Court Cassation division passed a landmark decision on Dec. 16 /2001, in its file No. 35710. The decision was made on disputes over the custody matter of the child called Nathanael Zenebe. The applicant was the mother of the child and the respondent was his aunty. The appeal is over the grievance of the decision rendered by the lower courts of Addis Ababa City court in its first instance jurisdiction and in its cassation power over the custody of her 10 years old minor called Nathanael Zenebe.

The division mentioned that Ethiopia is a signatory to CRC in 1989, and ACRWC in 2<sup>nd</sup> October 2002 and the FDRE Constitution has extensive provisions dealing with children rights as it is stated under international instruments. It also said, ‘as it is known to everyone, since they are the venerable group, children are a group of societies that need special and particular protections. Therefore, that is why many regional and international agreements have signed on Children Rights and Well-being to save them from danger. Hence, in its decisions concerning children, the judicial organs have the duty to take in to consideration the interests and safety of children.’<sup>204</sup>

Whenever examining the cases of children, the judges working on family law proceedings of courts of any levels, shall have a duty to realize the interests and welfares of children as stated under article 36(2) of the FDRE Constitution.<sup>205</sup> Thus, after determining the age and maturity of Nathnael, the judges presiding over the division, allowed him to participate in proceeding and to be heard over the assessment of his custody. The child has expressed to the judges since his aunty did not have care for him during his stay with her; he has preferred to live with his mother. Hence, the division quashed the decisions given by the Addis Ababa City courts and decided in favor of the applicant’s after hearing the voices of the child.<sup>206</sup>

However, the African Child Policy Forum (ACPF), defended the principle of the ‘best interests of the child’ from article 4 of ACRWC and article 3 of the UNCRC as applicable in Ethiopian law-demonstrated that international agreements can be directly invoked into domestic law. The ACPF stated, ‘it remains unclear whether the precedent set by the Cassation division will override the mandatory and

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<sup>204</sup> Decision of FDRE Supreme Court Cassation division, Dec.3/ 2001, file No. 35710, Vol.8, p. 243-246.

<sup>205</sup> See the Decision of FDRE Supreme Court Cassation division, Oct.26/2001, file No. 23632, Vol. 5, pp.182-191. The division pronounced that the decision made thereof by the lower courts, which separate the child from a home and environment where he grew in peace and with care, has not taken the interests and welfare of the child into consideration. *Therefore, it is to be considered and noticed that the provisions clearly indicated in the Federal and Regional Family Laws, empowering parents to have custodianship and administrator status over their children, shall be only applicable so long as the custodian or administering parents work for the interests and benefits of the children.*

<sup>206</sup> General Comment No. 12, as cited at Supra note 39, Para. 20&21, p.9.

absolute requirement to include international human rights obligations in the official gazette (*gazeta*) requirement to obtain judicial notice and to be binding in the country.’<sup>207</sup> The ACF has forwarded such debate because of the lack of publication of full text of the CRC in official Negarit Gazeta by the government of Ethiopia.

### **3.8. The Committee’s Recommendations on the Periodic Reports of Ethiopia (1993-2011)**

The periodic report is the primary mechanism for enforcing and monitoring the implementation of the CRC by the state parties in their respective jurisdiction as pursuant to Article 44 of the Convention. The signatory state to the CRC is required to submit its first report two years after ratification of (or accession to) the Convention and subsequent reports are required every five years thereafter. Its procedure is a valuable process, and ‘provides a forum for a constructive dialogue between a State Party and an independent group of experts to monitor, in a non-adversarial manner, overall compliance with international treaty obligations ....’<sup>208</sup>

Ethiopia has made five periodic reports (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, the combined 4<sup>th</sup> and 5<sup>th</sup>) to the Committee on the Rights of the Child from the years 1993 to 2011. Thus, though progress has made on children rights, there are a number of general remarks given by the Committee on each periodic reports of Ethiopia. These are:<sup>209</sup>

#### **3.8.1. The Initial Periodic Report (1993)**

Under this report, Ethiopia has mentioned that children’s rights to be heard in family law proceeding is enshrined under articles 14 (1) and 304 (1) of the Civil Code of 1960. Thus, article 14 (1) says, ‘every person’ is free to think and to express his ideas. Article 304(1) also states that ‘where a minor is capable of discernment and at least fifteen years old, he shall as far as possible be consulted on all the important acts concerning him.’

The Committee forwarded its concern to the Ethiopian delegation, that the full text of the Convention must be published in official Negarit Gazette and training manuals incorporating the text of the

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<sup>207</sup> Eddy J. Walakira and Gilbert O. Onyango , “*Laws, Policies and the Reality for Ending Violence against Children in Ethiopia, Kenya and Uganda*. Addis Ababa. On existing gaps in legislation to end violence against children, study presented on The African Child Policy Forum, ACPF (2011), Para.3, P. 8. NB: On such the country research teams, Ethiopia: Deliver Partners Institute for Consultancy.

<sup>208</sup> Report of the Secretary General: Comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the Charter of the United Nations Commission on the Status of Women, 40th Session, E/CN.6/1997/4, 21 January 1997, Para. 11

<sup>209</sup> Eva Brems, *Ethiopia before the United Nations treaty monitoring bodies*; Africa Focus, Vol.20, Nr.1-2, 2007, p.49-74

Convention must be published for the professionals groups working with or for children.”<sup>210</sup> The Committee also mentioned that during these periods, there were numerous child-specific human rights violations have been occurred in Ethiopia,<sup>211</sup> and ... that the greater efforts be made to promote the participation of children in family, school and social life, and the effective enjoyment of their fundamental freedoms, including the freedom of opinion, expression and association.<sup>212</sup> Therefore, the Committee concluded that Ethiopia should have to take serious measures to change the persisting negative attitudes towards children’s rights to be heard.<sup>213</sup>

As a defense to this and a response to the Committee’s concern, Ethiopia invoked the legacies of the military regime’, chronic underdevelopment and extreme resource constraints facing the country.<sup>214</sup> As to the response of the delegation, the chronic problems, which hamper the country to implement the Convention, were related to the difficulty of socio-economic situation, the lack of the requisite manpower and institutional framework, infrastructure in many parts of the country, lack of public awareness regarding on the CRC as well as harmful traditional practices.

### **3.8.2. The Second Periodic Report (1998)**

Under this report, Ethiopia mentioned that children are enjoying the freedom of expression under article 27 (2) of the FDRE Constitution, by their status as ‘everyone’ of the society. However, the Committee recommends that children's right to be heard, is insufficiently respected particularly in rural areas of Ethiopia and the country has publish the CRC in the Nagerit Gazettea.<sup>215</sup> In addition, with regard to legislative undertaking, the Committee’s concern is that domestic laws are not yet fully compatible with the provisions and principles of the Convention; since young children and adolescents are not always permitted to express their opinions freely.<sup>216</sup>

Thus, the Committee summarized its recommendation by saying that:

*“The State party (Ethiopia) should have to strengthen its efforts to ensure that children’s right to be heard is respected. In addition, the country has the duty to make every effort to ensure the right of children and adolescents to express opinions, including through peaceful demonstrations, make*

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<sup>210</sup> The 3<sup>rd</sup> Periodic report of Ethiopia: CRC/C/129/ which covers the period 1999-2003/04, Para. 228, p.63.

<sup>211</sup> The Committee on the Rights of the Child, 2001, p. 36-37.

<sup>212</sup> General Comment No.12, Supra note 39, Para.43, p. 18.

<sup>213</sup> First Periodic report of Ethiopia: CRC/C/ 8/Add.27, on 14<sup>th</sup> Session, 9 -10 January 1997, p. 4

<sup>214</sup> Ibid, Para.228, p.54

<sup>215</sup> The 2<sup>nd</sup> Periodic Report of Ethiopia, CRC/C/70/Add.7, 26<sup>th</sup> Session, 2000, Para. 43, p. 18.

<sup>216</sup> Ibid, Para.96, p. 32

*appropriate follow-up, and create Children's Forum. In this regard, the country has to seek assistance from UNICEF.*<sup>217</sup>

Therefore, the government of Ethiopia accepted the recommendations of the Committee regarding further international assistance to realize the children's right to be heard in judicial proceedings. In addition, the country still admit that there is lack of adequate trained manpower, the necessary institutional infrastructures, appropriate implementation mechanisms and extreme shortage of financial and material resources, and slow process of drafting and adopting new legislations.

### **3.8.3. The Third Periodic Report (2003)**<sup>218</sup>

Under this report, Ethiopia mentioned that article 29(1) of the Constitution entitles every citizen to freedom of thought, conscience and religion. In addition, the country mentioned currently, children are using Ethiopian Television (ETV), Ethiopian Radio, Radio Fana and FM Addis 97.1 to transmit their programmes weekly in different languages of the country.<sup>219</sup>

However, for the third times, the Committee urges that Ethiopia have to publish the full text of the Convention in the official Gazette and ensuring its translation in all national languages. Thus, the concern of the Committee is to reaffirm article 12 of the CRC into the domestic laws including the in the Constitution.<sup>220</sup> Therefore, as a summary, the Committee also recommends that greater efforts be made to promote the participation of children in family, school and social life, and the effective enjoyment of their fundamental freedoms, including the freedom of opinion, expression and association.

Therefore, as a defense for the concerns of the Committee, Ethiopia invoked the political and socio-economic problems of a country characterized by grinding poverty,<sup>221</sup> and existence of legislative gaps and a lack of trained human resources with respect to the protection as well as upholding of the rights of

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<sup>217</sup> The 2<sup>nd</sup> Periodic Report, as cited at Supra note 216, Para.96, p. 32.

<sup>218</sup> The state report, list of issues, answers to the list of issues, General Comments, and the Concluding Observations of the Committee as well as the reservations, declarations and understanding of the State party are available at <http://www.ohchr.org/english/bodies/crc/crcs43.htm>

<sup>219</sup> The 3<sup>rd</sup> Periodic report, Para. 90- 93, p.23. See also, *under Page 23, Para. 94*, Ethiopia invoke before the CRC Committee, the *Addis Zemen*, the daily Amharic newspaper, has a special column devoted to imparting information to children and parents on child rights and other related issues. This is aimed at promoting the child's social, spiritual and moral well-being. In addition, *Addis Zena*, a private weekly Amharic newspaper, has a two-page column containing advice, stories, facts, etc., suitable for children. Another private newspaper, *Brilliant*, aims at imparting information in the form of puzzles, short stories, questions, cartoons, etc., created exclusively for children. A major private newspaper, the *Reporter*, usually carries children's issues in both Amharic and English.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid*, Para.234, p. 64.

the child. In addition, the country's report concludes that, a greater proportion of the judges and police forces do not have sufficient awareness about the rights of the child to be heard.<sup>222</sup>

### **3.8.4. The Combined 4<sup>th</sup> and 5<sup>th</sup> Periodic Reports (2006 – 2011)**

Under this combined report, Ethiopia mentioned that the judicial and administrative processes involving cases of children are required to consider the opinion of the child in question. For instance, the Ethiopian Family Law requires a court before which an application of adoption is submitted to consider the opinion of the child in question (Article 804 and article 194). In addition, the country has mentioned that currently there are several new initiatives in realizing freedom of expression for children i.e. children's parliaments, to promote the participation of children and to have their views heard.<sup>223</sup>

For the second times, the country also mentioned that children are provided with opportunity to express their views in radio and TV broadcasts, public associations, Community Care Coalitions (CCC) and Orphan Children Clubs. Events and celebrations such as the Day of the African Child and Universal Child Day were among the opportunities by which a large number of children expressed their views in Ethiopia. Moreover, children are enjoying right to be heard by child forum.

However, the Committee forwards its concern that because of traditional societal attitudes appears to limit children freely expressing their views in the community, the schools, the courts, or within the family, the implementation of children's rights to be heard in judicial proceeding is in infant stage.<sup>224</sup>

Hence, the committee forwarded its advice that the country should have to strive for the realization of children's rights to be heard to its 'maximum available resources of the country,' co-operation from United Nations agencies, international NGOs and bilateral donors all-round the world for financial assistance and support in the spirit of article 4 of the Convention.<sup>225</sup> Therefore, for the 4<sup>th</sup> and 5<sup>th</sup> times, the Committee recommends that it is expected from Ethiopia to publish the full text of CRC it into the official Negarit Gazeta and translates it into the local languages, in order to make it accessible for the stakeholders.

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<sup>222</sup> Supra note 221, Para.228, p.63.

<sup>223</sup> Combined 4th and 5th Periodic Reports, as cited at supra note 166, P 13, above note 1, 2, 3 &5. In this report, Ethiopia, mentioned that currently, there are close to 80 children's parliaments in major cities of the country, each consisting of about 100 child members of parliament. The representatives of these parliaments often attend meetings in the regional parliaments, and regional and city council meetings and express their views and concerns.

<sup>224</sup> Ibid, 2006, p. 29.

<sup>225</sup> The CRC, Article 4. *This Article states that with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*

### **3.9. The Laws of Oromia National Regional State (ONRS)**

Under this section, I want to examine the provisions of the Oromia National Regional State Revised Constitution and Family Code regarding children's rights to be heard in family law proceedings.

#### **3.9.1. The ONRS Revised Constitution**

Article 50(5) of the FDRE Constitution allows to the National Regional States Council (NRSC), the power to legislate on matters falling under their jurisdictions. Consistent with the provisions of FDRE Constitution, the NRSC has power to draft, adopt and amend the state constitution. Hence, the ONRS council adopts the Revised Constitution of 2001, with its amendment proclamation No. 94/2005 and 108/2006. Consonant to article 13(2) of the FDRE Constitution, article 13(2) of the Revised Constitution of the ONRS,<sup>226</sup> also says, 'the fundamental rights and freedoms in this chapter (Chapter three or articles 13-44) shall be interpreted inconformity with the international human rights laws, humanitarian Conventions and principles of other relevant instruments that have been adopted by Ethiopia.' Moreover, the inclusion such novel phrase 'humanitarian Convention' under article 13(2) of the Revised Constitution of the ONRS, makes this article sound full article 13(2) of the FDRE Constitution.

In addition, in a verbatim copy of the FDRE Constitution, the Revised Constitution of ONRS has an umbrella provision regarding the rights of the children. Thus, article 36 of the Revised Constitution of the ONRS states that children have the rights to name, nationality, life, not to be subject to exploitative practices, to be free of corporal punishment or cruel and inhumane treatment in schools and other institutions reasonable for the care of children. In addition, article 36(2) of Revised Constitution of the ONRS says, in all actions concerning children undertaken by government organs or private institutions of social welfare, courts of law, administrative authorities or legislative bodies, 'the primary consideration shall be the best interests of the child.'

Notwithstanding to the above mentioned, there is no direct provision/s/ which gives children right to be heard in any judicial and administrative proceedings. On the other hand, Article 29(2) of the Revised Constitution the ONRS says, everyone has a freedom of expression without any interference and mentioned as children living in the ONRS can enjoy freedom of expression by their status as 'everyone' on equal footing with an adults. This is similar with the freedom of expression enshrined under article

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<sup>226</sup> The Oromia National Regional State Revised Constitution, proclamation No. 94/2005, Articles 13-44

29(2) of FDRE Constitution. However, the right stated under article 29(2) of both FDRE and Revised Constitution of the ONRS is quite different from the right stated under article 12 of the CRC.

Article 29(2) of the Revised Constitution of the ONRS includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice". However, article 12 of the CRC, is the article that holds rights that have tailored only to the interests of children due to their vulnerability. Therefore, rights that are enshrined under article 29(2) of the Revised Constitution of the ONRS are quite different from the rights stated under article 12 of the CRC.

### **3.9.2. Children's Right to be Heard under the ONRS Family Code<sup>227</sup>**

In a similar fashion to the FDRE Revised Family Code (RFC) of 2000, the Oromia National Regional State Family Code (ONRSFC), also states that the minor can become major and have full and free consent if and only if he/she attend 18 years of age.<sup>228</sup> Hence, children below 18 years have no legal capacity under the ONRS Family Codes.

Moreover, the ONRSFC has clear provisions regarding child's right to be heard about his/her future. Thus, I want to examine the provisions dealing with where the child will, live (known as 'Custody'), how parent will arrange to see their children (known as 'visitation') and how the child will be financially supported (known as 'child maintenance.')

#### **i. Assessments of Custody**

Under the article 283(2) ONRSFC 'the primary' consideration is to the best interests of the child in all matters that may affect him/her in the assessments of the custodianship right. Thus, such situation leaves no leeway for the law enforcer or for the judicial personnel to deny giving the priority for the best interests of the child than the need of parent in custody assessment. Article 103(3) of ONRSFC says, the court can endorse the divorce agreement made by the spouse and gives order which it seems thinks fit on how to correct the shortcomings if such agreement may not effectively protect the 'safety' and interests of the child. In addition, article 105(4) of the same code also says immediately after the spouse has filled divorce petition, the court orders what it thinks fit regarding the protection of children.

In addition, article 105(5) of the ONRFC states, the court shall take into consideration about the Custody of the children when one parent leaves the home due to divorce. The court shall have to consider which

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<sup>227</sup> The Oromia National Regional State Family, Proclamation No. 69/1995, Articles 105(5), 266(1-2) & 308

<sup>228</sup> Ibid, Article 26 (1).

party can harm the child in such case. In addition, under article 127(1) of the same code the court shall give order over the petition of divorce concurrently with the custody, education, health, food and clothing of children and with all what needed for children's life. Article 283(2) also states if the spouse fail to settle their dispute through mediation or negotiation and runs for divorce, the court shall gives the priority for the best interests of the child or the well-being of a child. Therefore, the court can use the voice of children in assessment of the custodianship rights of their parents during family breakdown.

Moreover, if the child is not capable to express his/her views in such custody assessment, the court can hear from the relatives. For instance, the court shall hear the ascendants, brothers, or the sisters of the minor on the appointment or removal of the guardian.<sup>229</sup> However, the court may hear the voice of the child if it thinks fit.<sup>230</sup>

In addition, article 308 of the ONRSFC states that if the child's age is 14 year and older, the tutor shall consult him/her regarding administration of his/her property. However, under the ONRSFC, the child below five years of age has no right to be heard in family law proceeding. Because, article 127(3) of the ONRSFC states, the court shall order for the child bellow the age of 5 year to live with his/her mother after the divorce order has given, unless the contrary is proved. However, the court can hear the voice of the child indirectly through social workers, the ICL, psychologists, or relatives if the contrary is proved.<sup>231</sup>

Hence, as mentioned above the court may hear the voice of children regarding their custody assessment, removal or appointment of guardian via these people (e.g. ascendants, brothers or sister), directly from children themselves if it thinks fit, and by classifying them in age. However, the Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice since it restrict the child's right to be heard in all matters affecting his /her interests.

## **ii. Order of Maintenances**

Getting divorced or separating does not end parental responsibility. All parents who are not living in the same household as their children are legally obliged to make child support payments towards their financial expense. Child maintenance is regular, reliable financial support that helps towards the child's

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<sup>229</sup> The ONRS Family Code, Article 266(1).

<sup>230</sup> The ONRS Family Code, Article 266(2).

<sup>231</sup> The ONRS Family Code, Article 127 (3). This article states that '*the court can change the decision given over the interests of the child below 5 years of age by seeing the circumstances regarding the protection and safety of the child.*'

everyday living costs.<sup>232</sup> Because, it can make a real difference to children as it can help pay for things like clothing, food and other essentials.

Thus, the ONRSFC states that before the order of divorce has given, the court has the duty to take into consideration the food, education, health and clothing of the children. Hence, the court shall give such order by considering the age, health, and financial capacity of the divorced parent. In addition, during such order the court has also the duty to take into consideration the age, circumstances, benefits and interests of the child.<sup>233</sup> For instance, article 127(1) of the ONRSFC states, the court has the duty to give an order over the food, health, and clothes of the children.

Research shows that most of the street children are typically children who are abandoned due to quarrel or parental conflict.<sup>234</sup> Thus, I believe that the existence of this provision in the ONRSFC can at least minimize the exposure of children to live on the street to beg for food, clothes or money. Therefore, the courts of the ONRS have the duty to realize this right for the children before the order of divorce has given.

### **iii. Parenting Time Plans/Visitation/**

Studies demonstrate the adverse consequences that can follow when the child (ren) does not have a relationship with both parents.<sup>235</sup> Thus, article 9(3) of the CRC, says, ‘state parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.’ This article is based on the premise that it is usually in a child's best interest to have frequent, meaningful and continuing contact with each parent.

The goal of any parenting time plan should be to ensure that a child (ren) has a relationship with both parents that, as nearly as possible, encourages continued parental responsibility and promotes continued parental access. Parenting time should not be viewed as a portion of the child (ren)’s time allocated to a parent, but rather a portion of a parent’s time reserved for the child (ren).<sup>236</sup> Thus, the court has to examine whether the agreements in the parental plan are in the interests of the child. Hence, to insure

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<sup>232</sup> *Child Maintenance, ‘Legal rights and responsibilities, for parents living apart,’ 2012, p.6.*

<sup>233</sup> The ONRS Family Code, as cited at Supra note 228, Article 127(2).

<sup>234</sup> Anna L. Schmidt, *Neglected and forgotten: the Human Rights of street children. Poverty reduction and development in Ethiopia*, 2003, p.55.

<sup>235</sup> *Michigan Parenting Time Guideline which developed by State Court Administrative Office, Lansing, MI 48909, p.3.*

<sup>236</sup> *Michigan Parenting Time Guideline , as cited at Supra note 236, p.3-4*

more responsible parenting and to promote the healthy adjustment and growth of a child each parent should recognize and address a child's basic needs:<sup>237</sup>

- To know that the parents' decision to live apart is not the child's fault.
- To develop and maintain an independent relationship with each parent and to have the continuing care and guidance from each parent.
- To be free from having to side with either parent and to be free from conflict between the parents.
- To have a relaxed, secure relationship with each parent without being, placed in a position to manipulate one parent against the other, and to enjoy regular and consistent time with each parent.
- To be financially supported by each parent, regardless of how much time each parent spends with the child.
- To be physically safe and adequately supervised when in the care of each parent and to have a stable, consistent and responsible child care arrangement when not supervised by a parent.
- To develop and maintain meaningful relationships with other significant adults (grandparents, stepparents and other relatives) as long as these relationships do not interfere with or replace the child's primary relationship with the parents.

Therefore, like wise article 113(1) of the RFC, children living both researched areas have the right to be heard in parental time plans after the order of divorce has given by the court, as stated under article 127(1) of the ONRSFC.<sup>238</sup>

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<sup>237</sup> *Indiana Rules of Court, Indiana Parenting Time Guidelines, which is developed on March 28, 2008, p.4.*

<sup>238</sup> The ONRS Family Code, Article 127(1)

## **CHAPTER FOUR**

### **4. Findings and Analysis**

Analysis on the Doba Woreda and high courts of Western Hararghe Zone of Oromia National Regional State of Ethiopia has divided thematically according to the six research questions. These are meaning of the child, the legal rights of children to be heard under the CRC and the domestic laws of Ethiopia; children's voice and the mechanisms (methods) used by the Doba woreda and high courts of western Hararghe zone to hear their voice in their family law proceedings. In addition, the researcher analyzed the problems that are encountering these courts in implementation of the CRC and the prospects to realize children's right to be heard in the family law proceedings these courts.

This chapter has three parts. The first part contains the responses made to the questioners by three judges working on the family law proceedings of Doba woreda court and three judges of the high court of Western Hararghe Zone. The questioners include, views of the judges on children's right to be heard; dissemination of the CRC and General Comment No.12 in these courts; issues of capacity of children to express their views; due weight given for the child's views; and the availabilities of methods (mechanisms) used to hear children's voice in the family law proceedings of these courts.

The second part contains the interviews made to the children of divorced parents, parents, presidents of courts, the team leader of civil proceedings, and the judges working on family law proceedings of the courts of researched areas. The interview was also made for the head of the offices of Women and Children's Affairs of Western Hararghe Zone of ONRS. The third part contains my personal [the researcher's] views for what I have observed from the practices of these courts in realization of children's rights to be heard in their family law proceedings.

#### **4.1. Responses to the Questioners made by Six Judges working on the Family Law Proceedings**

Under this sub section, I would like to analyze the responses made to the questioners by three judges of the Doba woreda court and three judges of the high court of Western Hararghe Zone of ONRS. Twenty nine questions are included in these questioners regarding the availabilities of methods (mechanisms) used to hear children's voice, the legal and institutional problems that became barriers to realize children's right to be heard in the practices of the family law proceedings of these courts.

### **4.1.1. Dissemination of CRC and General Comment No.12 for the Competent Concerned Organs**

There are progresses in the areas of children rights at the national level; however, there are problems with regard to children's rights to be heard in the family law proceedings. This is true in practices of the woreda courts and high court of Western Hararghe Zone, regarding children's rights to be heard in the family law proceedings. The CRC and the General Comment No.12 were not translated in the local language and not being disseminated to the concerned organs found in the researched areas.

Article 42 of the CRC states 'State Parties under take to make the principles and provisions of the Conventions widely known, by the appropriate and active means, to adults and children alike.'<sup>239</sup> This will necessitate translating it into the relevant languages, making child-friendly versions available, holding workshops and seminars to discuss its implications and how best to implement it, and incorporating it into the training of all professionals working for and with children. As a result, the Committee recommends that States parties shall widely disseminate General Comment No 12 within government and administrative structures as well as to children and civil society by translating it into the relevant languages, making child-friendly versions.<sup>240</sup> Therefore, the government of Ethiopia along with the ONRS has international obligation to translate the CRC and General Comment No.12 in local language and disseminate them to the competent organs found the researched areas.

As I have interviewed Ato Abdurehman Osman, there are no version of the CRC and General Comment No.12, which are translated into Amharic or Afan Oromo in the courts of Wstern Hararghe Zone.<sup>241</sup> In addition, w/ro Alemishet, responded that 'the translated version of the CRC and General Comment No.12 are not available at Women and Children's Affairs offices found in the zone.'<sup>242</sup> Moreover, the judges working on the family law proceedings of the courts of the researched areas are not using these documents along with the ONRSFC to entertain the cases of children right in their family law proceedings.<sup>243</sup> However, both the CRC and the General Comment No.12 can serve the judges to check the compatibility of the domestic laws to realize children rights as stated at international arena. The

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<sup>239</sup> The CRC, as cited at Supra note 5, Article 42

<sup>240</sup> General Comment No.12, as cited at Supra note 39, Para. 7, p.6.

<sup>241</sup> Informal discussion made with Ato Abdurehman Osman the Judges and team leader of the Civil Proceedings of the high court of western Hararghe, done at his office on 11/04/2006 E.C, at 5:00 AM. Ato Abdurhman Osman is the Judge and the team leader of the Civil Proceedings of the high court of Western Hararghe Zone.

<sup>242</sup> Interview made for W/ro Alemishet Regasa, the Deputy Head of the Women and Children's Affairs Offices of Western Hararghe Zone, done at her offices, on 11/04/2006 E.C, 4:00 PM.

<sup>243</sup> Informal discussion made with Ato Abdurehman Osman , as cited at supra note 242.

government of the ONRS along with the federal government has the duty to disseminate these international documents to the courts of researched areas and the concerned organs found in the zone. Therefore, if so, the judges working on the family law proceedings of these courts can easily check the compatibility of the ONRS laws and the practices of their courts in light of these international documents.

#### **4.1.2. Views of the judges Working on the Family Law Proceedings**

All the six judges responded to the questioners from the Doba woreda and high courts of western Hararghe zone were the holders of law degree from different universities. All of them have divergent views on children's right to be heard in custody assessment, order of maintenances and parental time plans. Two of the three judges responded to the questioners from Doba woreda court agreed that the children have to heard in family law proceedings. They responded that this right is well realizing in the practices of the family law proceedings of their respective court and children are heard in the assessment of custody, order of maintenances and parental time plans.

Moreover, they believed that hearing children's voice could help the court to get clear and reliable evidences about children's best interests.<sup>244</sup> However, one of the three judges of this court has responded that though there are international laws and domestic laws, which allow children to be heard in any matters that may affect their interests, but there are no practices in the family law proceedings of the Doba woreda court to realize this right.<sup>245</sup> He argued that the rooms and the environments of the court are not conducive to hear children's voice as stated under article 12 of the CRC.

In addition, the views of all the six judges responded to the questioners from the high court of Western Hararghe Zone are similar with the views of the three judges from Doba woreda court. Two of the three judges from the high court have responded that children have to enjoy the right to be heard in custody assessment, maintenance and parenting time plans. However, they have agreed that there court has no facilities, mechanisms and trained professionals used to realize this right for children in the family law proceedings. Hence, they are striving a lot to hear the child's view through judicial interviews, to solve

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<sup>244</sup> Responses to the questioners made by two judges working on the family law proceedings of the Doba woreda court, done on 15/04/2006, p.2, question No.2.

<sup>245</sup> Responses to the questioners made by one judge working on the family law proceedings of Doba woreda court, done on 15/04/2006 E.C, p.2, question no. 2.1-2.3.

these problems and to realize the best interests of the child as stated under article 36(2) of the Revised Constitution of ONRS.<sup>246</sup>

However, one of the three judges from the high court has responded that children are not heard in custody assessments, orders of maintenance and parental time plans on their court. He argued, ‘though laws recognize right to be heard of children, but due to lack of mechanisms and trained professionals on our court, they lost this right’. Therefore, he concluded that the judicial interviews made by their court may results injustices since children may advised by one of the parent to take their side which in turn may prejudicial to justice systems.<sup>247</sup>

In general, from both courts four of the six judges have responded that there are practices to realize this right in the family law proceedings of their respective courts through judicial interviews of the child. However, two of the six judges have responded in contrary to the views of the four judges. Moreover, all the six judges responded to the questioners have mentioned that they have no special training on how, when and where to hear from the child particularly in their custody matters and parental time plans after the order of divorce has given.<sup>248</sup> Therefore, all six of them have responded, due to lack of facilities (mechanisms), trained professionals and problems related to child-friendly courtrooms, children are not enjoying this right in the family law proceedings the Doba woreda and high courts of western Hararghe zone.

#### **4.1.3. Views on the Capacity and Ages of the Child to be Heard**

The UN Committee on the rights of the Child emphasizes, State parties should presume that a child has the capacity to form his/ her own views and to be heard. Under article 12 (1) of the CRC the phrase which says ‘the child who is capable of forming his or her own views’ should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible.<sup>249</sup> In addition, it stated, it is not up to the child to prove her/his capacity; rather the courts have to consider setting up a procedure whereby proceedings can be initiated on behalf of a child, where the child lacks the capacity to do so for himself/herself.<sup>250</sup>

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<sup>246</sup> Responses to the questioners made by two judges working on the family law proceedings of the high court of Western Hararghe Zone, done on 11/04/2006, E.C, p.2, question No.2.1-2.3.

<sup>247</sup> Responses to the questioner made by one judge working on the family law proceedings of the high court of Western Hararghe Zone, done on 11/04/2006 E.C, p.2, question no.2.1-2.3.

<sup>248</sup> Ibid, p.2, question no.2.4.

<sup>249</sup> See, the CRC, Article 12 (1) and General Comment No.12 under Para.20, P. 9.

<sup>250</sup> General Comment No.12, as cited at supra note 5, P.9, Para. 20.

However, there is no such procedure in the practices of the Doba woreda court and the judges working on the family law proceedings of this court have divergent views and employ different grounds to assess the capacity of the child to express his/her views and to be heard. Thus, two of the three judges have responded, the age of the child and existence of home violence could be the ground to allow the child to express his views and to be heard in custody assessments, orders of maintenances and parental time plans.<sup>251</sup> However, one among three judges of this court has argued that the willingness and ability of the child to express his/her views could be the ground to hear his/her voice in such proceedings.<sup>252</sup>

In addition, judges responded to the questioners from the high court of Western Hararghe use different grounds to assess the capacity of the child to express his/her views and to be heard in their family law proceedings. This court also has no clear procedure on how to fix the capacity of children to express their views and to be heard as stated by the Committee. Thus, two of the three judges from the high court have responded that age of the child, existence of domestic violence, his/her ability and the nature of the cases could be ground to hear his/her views in the family law proceedings.<sup>253</sup> However, one of the three judges from this court has argued the child's willingness to express his/her views in the family law proceedings could be the ground to determine his/her capacity to be heard in custody assessments, orders of maintenances and parental time plans.<sup>254</sup>

In general, all the six judges responded to the questioners from both courts of Western Hararghe zone have used different grounds to assess the capacity of the child. Thus, to assess the capacity of the child, the grounds used by the judges of Doba woreda court may not seen as a good grounds by the judges of the high court to hear from the child in family law proceedings. In fact, the judges have the discretionary powers to assess whether the child is capable of forming his/her views by depending on case- by-case-basis.

On the other hand, the ONRS Family Code has provisions, which introduce the age limitation to hear from the child in the family law cases. For instance, article 308 of the ONRSFC states a child whose age is 14 years and above could consult the guardian on the administration of his/her properties. That means children below the age of 14 years have no legal right to consult their guardian on how to administer their own properties. In addition, according to article 127(3) of ONRSFC the court shall give an order of

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<sup>251</sup> Responses to the questioners, made by two judges working on the family law proceedings of the Doba woreda court, done on 15/04/2006 E.C, question No.3.12, p.4.

<sup>252</sup> One judge responded from the Doba woreda court, as cited at Supra note 246, , question No. 3.12, p.4.

<sup>253</sup> Two judges responded from the high court as cited at supra note 247, question No.3.12, p.4.

<sup>254</sup> One judge responded from the high court, question No. 3.12, p.4.

the custody of the child below the age of 5 years to his/her mother without hearing his/her voice unless the 'contrary is proved.'<sup>255</sup>

All the six judges from the Doba woreda and high courts of Western Hararghe zone have responded that the issue of hearing the voices of the child below the age of 5 years remain 'holy cow.'<sup>256</sup> That means the law gives the custodianship right to the mother of the child, the judge never strive to hear the voices of the child below the age of 5 years either directly or indirectly to assess his/her custody or to order the parenting time plans. However, one judge has responded that under article 127(3) of the ONRS Family Code, the phrase which says 'unless the contrary is proved', could give the judges the chances to hear the voice of the child below the age of 5 years either through their relatives, sisters, brothers, social workers, Independent Children's Lawyers (ICL) or the psychologists.<sup>257</sup>

In my opinion, to prove the contrary and to give the order of custodianship right of the child below the age of 5 years for persons other than the child's mother, the courts have to fulfill all the needed facilities and the trained professionals. However, both courts of the researched areas have no social workers, psychologists or ICL, which collect the real evidences about the child by making home visits, talking to the neighbors.

Therefore, the provisions of the ONRS Family Code and the practices of the family law proceedings of the Doba woreda and high courts of Western Hararghe zone, creates discriminations among children to enjoy or not to enjoy their right to be heard either directly or indirectly on matters that may affect their interests. However, the article 12 of the CRC imposes no age limit on the rights of the child to express his/her views and to be heard in all matters that may affect his/her interests.

In addition, the Committee discourages the State parties from introducing age limits either in law or in practices, which would restrict the child right to be heard in all matters affecting her or him.<sup>258</sup> In addition, in its recommendations following the day of general discussion on implementing child rights in

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<sup>255</sup> Article 127(3) of the ONRSFC never allows the judge to hear the voice of the child below 5 years of age in family law case. The reason is these children have a close intimacy with their age since they may never leave feeding the breast at this age. However, the judge can change the custodianship of the mother to father or another person if the mother is not capable due to insanity or health or ethics related problems.

<sup>256</sup> *Holly Cow is an exclamation or surprise word used mostly in the United States, Canada, Australia, and England. Hence, in the context of this study, the phrase 'Holly Cow' represents untouchable issues. Accessed on [www.http://en.wikipedia.org/wiki/Holy-cow](http://en.wikipedia.org/wiki/Holy-cow), (expression), on Feb.7/2014, 6:30 PM. Thus, the courts of the researched areas have no methods and mechanisms to hear the voice of children below the age of 5 years even though the contrary issues may exist as stated under article 127(3) of the ONRSFC.*

<sup>257</sup> Interview made to Ato Aliyi k., the judge working on family law proceedings of the high court of western Hararghe of Oromia, at his office 11/04/2006 E.C, 8:00 pm.

<sup>258</sup> General Comment No.12 as cited at supra note 39, Para 21, p.9

early childhood in 2004, the Committee underlined that the concept of the child as a right holder is “... anchored in the child’s life from the earliest stage.”<sup>259</sup> Therefore, a child should not be excluded from a hearing solely on the basis of age and capacity.<sup>260</sup>

#### **4.1.4. Due weight for Children’s Voice**

The judges of the Doba woreda and high courts of western Hararghe are striving in their day-to-day contact with children, to give due weight for children’s voice in family law proceedings. Courts are obliged to give due weight for the voices of children having contact with their family law proceedings in accordance with the age and maturity of the child. Hence, Two of three judges from the Doba woreda court responded as they give a lot due weight to the views of child aged 9-15 years. They give less due weight for children bellow 9 years of age.<sup>261</sup> However, one among the three of them has responded that a lot due weight should be given for the voices of children aged from 9-13 years. He argued that these groups of children needs a great protections than children aged from 13-15.<sup>262</sup>

In addition, two of three Judges from the high court have responded that they give a lot due weight for the voices of children bellow the ages of 9 years. They have argued that the older children can easily express their views than the younger children and the young people needs a lot due attention for their voices.<sup>263</sup> However, one among the three of them has responded as he gives little attention for the voices of children bellow 9 years of age and children above 15 years of age. He argued that children bellow the age of 9 years have no capacity where as children above 15 years of age could presumed as an adult and can speak the truth.<sup>264</sup>

However, the Committee, emphasizes that ‘the due weight should be given for the views of the child in accordance with the age and maturity of the child’<sup>265</sup> Therefore, in my opinion, a lot due weight must given for children below 9 years of age as responded by two judges of the high court of western Hararghe zone. Because, these children are more vulnerable than that of their elders counterparts and they cannot express their heart grievances boldly to the court without the help of social workers, psychologists, psychiatrists and the ICL.

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<sup>259</sup> General Comment No.12 as cited at supra note 39, Para 21, p.9

<sup>260</sup> Gerison L., as cited at supra note 9, p.57.

<sup>261</sup> Two judges responded from the Doba woreda courts, as cited at supra note 245, question No. 3.13, p.5.

<sup>262</sup> One judge responded from the Doba woreda court, question No. 3.13, p.5.

<sup>263</sup> Two judges responded from the high court as cited at supra note 247, question No.3.13, p.5.

<sup>264</sup> One judge responded from the high court, question No. 3.13, p.5.

<sup>265</sup> General Comment No.12, as cited at supra note 39, Para. 28, p.11.

#### **4.1.5. Mechanisms Used by the Judges to Hear Children's Voice**

There are different methods or mechanisms used to hear children's voice in custody assessments, order of maintenances and parental time plans. Among these, testimony/submission by children, judicial interviews, Independent Children's Lawyer (ICL), psychologist, social worker, evidences from other adults, and child-friendly courtrooms and court preparation are the prominent one.<sup>266</sup> However, the judges Abdurehman and Aliyi have stated, 'due to lack of methods used to hear children's voice and trained professionals those assist the court, children's rights to be heard in the family law proceedings of the high court of western Hararghe zone is not realized as stated under the CRC.'<sup>267</sup>

In addition, as I have observed the practices of the family law proceedings of the Doba woreda and high courts of western Hararghe zone there are lack of the mechanisms (methods) used to hear children's voices and trained professionals needed to assist judges in realization of children's right to be heard.<sup>268</sup> Thus, children having contact with these courts feel, as they are the cause for the breakdown of their family. Hence, in my opinion, unless these useful mechanisms (e.g. child-friendly courts, screens, closed circuit TV, tape recorder...) and trained professionals (e.g. social workers, psychologists, psychiatrists and ICL) fulfilled any attempt to hear children's voice by these courts may result them for secondary internal victimization.

##### **4.1.5.1. Testimony and Submission by Children**

It is a process used by children (e.g. the older children), to present their views to the court in the form of affidavits or appear as witnesses in the proceedings and submit their heart grievances through hotlines, e-mail or postal services.<sup>269</sup> Hence, these courts have to encourage children to provide evidences about themselves through free hotlines, postal number and e-mail of the court to submit their views to the family proceedings about the custody assessment, order of maintenances and parental time plans.

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<sup>266</sup> Patrick P. and Judy C., *The Voice of a Child in Family Law Disputes*, October 2008, p.39-60

<sup>267</sup> Panel discussion made with judges of high court Ato Abdurehman Osman and Alyi Kedir working on family law proceedings, on 11/04/2006 E.C, 2:55 am. The panel was made in the office of Ato Abdurehman Osman the judges and team leader of the civil proceedings of high court of western Hararghe without recording their voices into my voice recorder.

<sup>268</sup> *Judicial interviews could be classified into formal and informal.* Formal judicial interview is when the judge meet children directly in the proceedings, whereas informal judicial interview is a process by which the judge can collect evidences from others about the real life of the child.

<sup>269</sup> Michelle M. Fernando, *Judicial Meetings with Children in Australian Family Law Proceedings: Hearing Children's Voices*, 2011, p.101.

However, all the six judges responded to the questioners from the Doba woreda and high courts of western Hararghe zone responded that their courts have no hotlines, postal services or e-mail services used to collect the views of children in the family law proceedings.<sup>270</sup> Thus, children have no knowledge about how they to explain their heart feeling for the court through phone, letter or email. In addition, as I have observed, the family law proceedings of these courts, there are no postal services, free telephone line or e-mail to collect the ideas of children's of divorced parent to assess their custody, order maintenances and parental time plans.

#### **4.1.5.2. Judicial Interviews**

It is the only method used by the judges of the Doba woreda and high courts of western Hararghe zone to hear children's voice in their family law proceedings. Thus, Ato Firew, the president of Doba woreda court and Ato Aliyi, the judge working on family law proceedings of the high court of western Hararghe zone, have responded, 'judicial interview is the only method used to hear children's voice in the family law proceedings of their courts.'<sup>271</sup> However, research shows that unless training, guidelines or best practices could be developed to assist judges in meeting with children, it is difficult to realize children's best interests since judges do not know how to interview children.<sup>272</sup>

In addition, all the three judges responded to the questioners from the Doba woreda court have stated that judicial interview is the only and viable method to hear children's voice in their court. Two of these Judges have argued that judicial interviews to children are the best mechanism used in the day-to-day activities of their court to get the true evidences about children's voice in the family law proceedings.<sup>273</sup> However, one among the three judges of the same court has responded that judicial interviews can cause psychological harm to children."<sup>274</sup>

In addition, two of the three judges responded to the questioners from the high court of western Hararghe zone, have mentioned that the judicial interview is the best mechanisms to hear children's voice. However, one among the three judges has argued that the judicial interview is only to clarify the new facts from the child in family law proceedings. In addition, he argued that since the judges are not

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<sup>270</sup> Responses made to the questioners, by six judges working on the family law proceedings of the Doba woreda and high courts, on 11-22/04/2006 E.C, question No. 3.9, p.4.

<sup>271</sup> Interview made to Ato Aliyi k., the judge working on family law proceedings and an informal interview made to Ato Firew, the president of Doba woreda court of the high court of western Hararghe of Oromia, at their offices on 11/04/2006 E.C, 8:00 PM and 15/04/2006 E.C, 3:30 AM respectively.

<sup>272</sup> Alfred A. Mamo and Danielle Gauvreau, *Judicial Interviews of Children in Custody/Access Disputes*, 2002, p.11

<sup>273</sup> Two judges responded from the Doba woreda court, as cited at supra note 245, question No.3.7 & 3.7, p.3-4.

<sup>274</sup> One judge responded from the Doba woreda court, question No.3.7 & 3.7, p.3-4.

psychologist, they might traumatize and re victimize children having direct contact with them by the procedures of the court.<sup>275</sup> For instance, Ato Aliyi, argued, ‘judicial interview to children is not the best methods to realize children’s right to be heard in family law proceedings. The judges have no special training to save children from secondary internal re victimization.’<sup>276</sup>

Therefore, from my personal observations, questioners to six judges of both courts and interviews for one judge working on the family law proceedings of the high court, and the president of the Doba woreda court, I conclude that,<sup>277</sup>

- the judges of both courts wear the legal grabs and sit on the high seats to interview children;
- the judges of both courts have no special training on how, when and where to hear child’s voice in family law proceedings;
- there is no flexibility as to when be the appropriate time for a judges to see and hear a child;
- there is no child-responsive venue and the courts arrangements are not motivate the child to express their heart grievances in divorce, custody assessment and parenting time plans; and
- there are no practices of hearing the evaluators or experts reports regarding the behavior of children in home, school, or their social life in the community.

#### **4.1.5.3. Independent Children’s Lawyers (ICL)**

The ICL are independent lawyers different from traditional lawyers that analyze relevant reports and documents about children’s voices and bring the reports having the best interests of the child to the court’s attention. They act impartially in dealings with the parties, minimize the trauma to the child associated with the proceedings and resolve disputes where possible.<sup>278</sup>

After agreed with the benefits of the ICL to their courts, all the six judges responded to my questioners from the Doba woreda and high courts of western Hararghe Zone have responded that their courts have no the ICL used to realize children’s right to be heard the family law proceedings.<sup>279</sup> However, one

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<sup>275</sup> One judge responded from the high court as cited at supra note 248, question No.3.7 & 3.7, p.3-4

<sup>276</sup> Interview made to Ato Aliyi k., as cited at supra note 258.

<sup>277</sup> Queens Land, How will an independent Children’s Lawyer help my child? An independent children’s lawyer’s role explained, (2013), Available on [www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au) accessed on 08/2/2014, at 4:35 PM.

<sup>278</sup> Nicola R., Independent Children’s Lawyers: *Relational approaches to children’s representation; Australian Journal of Family Law; Vol.26, 2012, p.217. Thus, the ICL form an independent view on the evidence of what is in the best interests of the child and act in the proceedings on this basis.*

<sup>279</sup> Responses to the questioner made by three judges working on the family law proceedings of the Doba woreda and three judges of the high court of western Hararghe, on 11-22/2006 E.C, question No. 3.5, p.3.

judge from the Doba woreda court and one judge from the high court of western Hararghe zone have expressed their views regarding the absences of the ICL from their family law proceedings.<sup>280</sup>

Thus, one judge among three judges responded to the questioners from the Doba woreda court has mentioned that ‘because of the structure of the Doba woreda court has no box to recruit the ICL in the family law proceedings. Hence, he argued that the absence of the ICL makes the family law proceedings of Doba woreda court too complex to realize of the best interests of the child which is stated under article 36(2) of the FDRE Constitution.’<sup>281</sup>

In addition, one judge among three judges responded to the questioners from the high court has stated that the ICL is not needed to high courts since such courts entertain cases only that come by appeal. Hence, he argued that the judge could hear child’s voice by means of judicial interviews only by examining appeals brought to the family law proceedings by the parents or other competent organs.<sup>282</sup>

In addition, Judge Aliyi Kedir, has responded, ‘the role of the ICL is irreplaceable in the family law proceedings particularly in realization of the best interests of the child in custody assessment, order of maintenances and parental time plans. However, there are no provisions under the FDRE Constitution or ONRSFC, which deals directly about children’s rights to be represented by lawyer of their best interests in the family law proceedings.’<sup>283</sup>

Furthermore, article 20(5) of the FDRE Constitution is only gives children and adults the right to be represented by legal counsel in criminal cases. In addition, article 34(1) of Civil Procedure Code of Ethiopia, says ‘a person under disability may sue or be sued through his legal-representative,’<sup>284</sup> As pursuant to this article children can represented by the traditional lawyers or advocates, and guardians in civil cases to sue or to be sued. Therefore, these both provisions do not give children the right to be represented by the ICL of their best interests. However, the Committee on the Rights of the Child emphasizes, the opportunity for representation made for children must be in a manner consistent with the procedural rules of national law. This clause should not be interpreted as permitting the use of procedural legislation, which restricts or prevents enjoyment of this fundamental right.<sup>285</sup>

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<sup>280</sup> One judge responded from the Doba woreda court, as cited at supra note 246, question No. 3.5, p. 3

<sup>281</sup> One judge responded from the high court, as cited at supra note 248, question No. 3.5, p.3.

<sup>282</sup> One Judge responded from the high court as cited at supra note 248, question No. 3.5, p. 3.

<sup>283</sup> Interview made with Ato Aliyi Kedir., as cited at supra note 248.

<sup>284</sup> The Civil Procedure of Ethiopia, Article 34(1)& (2)

<sup>285</sup> General Comment No.12 as cited at supra note 39, Para. 38, p.12.

In my opinion, the ICL's have irreplaceable roles in the family law proceedings to minimize the complexity of the evidences, to make a true reports and reliable evidences by making home and school visits about the heart grievances of the children to the courts. Therefore, the Doba woreda and high courts have to recruit to realize children's rights to be heard the family law proceedings that have mentioned under the articles 105, 266, 127, 308 of the ONRSFC and article 12 of the CRC and the best interests of the child as stated under article 36(2) of the FDRE Constitution.

#### **4.1.5.4. Social Workers**

Social workers are professionals specializes in child and family matters to assist children by coping with all issues in their everyday lives, relationships with their families and solve personal and family problems.<sup>286</sup> They advice parents, elderly people or family members about housing, transportation, long-term care, and other services; and coordinate and monitor these services. They may perform such activities by going to the proposed custodial homes and observe the child and parents interacting in an informal atmosphere, the Social Workers provide the reports on children's views to the court.<sup>287</sup>

In my observations, I have seen that there are no social workers in family law proceedings of the Doba woreda and high courts of western Hararghe zone. In addition, all the six judges responded to the questioners from both courts have mentioned that social workers are not available on their family law proceedings.<sup>288</sup> Ato Abdurrahman responded that 'even though the interdisciplinary approach: a social worker/mental health professional should be involved in family law proceedings, our court has no such professionals.'<sup>289</sup> In addition, Ato Firew, has mentioned 'the social workers are very useful to assist the judges working on the family proceedings, however, they are not recruited because of lack of boxes in the structures of our court.'<sup>290</sup>

In addition, the Women and Children's Affairs office of the western Hararghe have no legal counselors and social workers to entertain the cases of children and to make reports to the courts in the family law cases. Hence, w/ro Alemishet Regassa, has responded, 'all the woredas and zonal offices of Women and Children's Affairs have no lawyers and social workers entertain family law cases. We have no

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<sup>286</sup> Social Worker Overview: Prepared as part of the Sloan Career Cornerstone Center, Available on [www.careercornerstone.org](http://www.careercornerstone.org), accessed on 08/2/2014, at 4:35 PM

<sup>287</sup> Michelle M. Fernando, as cited at supra note 270, p.84.

<sup>288</sup> Six judges responded from the Doba woreda and high court of western Hararghe zone, as cited at supra note 280, question No. 3.0, p.2.

<sup>289</sup> Informal panel discussion made with Ato Abdurrahman Osman, as cited at supra note 242.

<sup>290</sup> Informal panel discussion made with Ato Firew, the president of Doba woreda court, done at his office, on 15/04/2006 E.C, at 4:00-5:00.

cooperation with other stakeholders or courts in realizing children's right to be heard in family law proceedings.'<sup>291</sup>

#### **4.1.5.5. Evidences from other Adults**

The court can consider children's views before the order of divorce has given by hearing the evidence from others of what the child has said to them. This may include evidence from each of the child's parents and where applicable, grandparents, family friends, therapists and others who spend time with the child.<sup>292</sup> Thus, article 266(1) of the ORSFC allows the court to hear about the behavior and social life of the child from the ascendants, brothers or sisters before giving an order on the custody, maintenances and parenting time plans.

However, article 266(1) of the ONRSFC does not explicitly allow other relatives, neighbors, friends and schoolteachers to give evidences to the court about the child's interests during breakdown. One judge among three judges responded to the questioners from the high court of the western Hararghe zone has responded that regarding children's voice, their court has no practices of hearing other adults other than those listed under this article.<sup>293</sup> Therefore, as I have made interviews to six judges and observe the practices of both courts and as to the wording of article 266(1) of the ONRSFC the persons other than ascendants, brothers or sisters of the child are not allowed by the judges working on the family law proceedings to testify about the child's life or best interests.

#### **4.1.5.6. Child- Friendly Court Rooms and Child-Sensitive Judges**

The high court of western Hararghe has built huge building, which could a model for many courts found in Oriomia National Regional State. The building has very conducive court offices for judges, administrative staffs and benches for both criminal and civil proceedings. Both the civil and criminal proceedings of the high court have their own case team leaders. On the other hand, though some additional rooms are under construction in Doba woreda's court, there are convenient courtrooms to entertain adult's cases. However, these both courts have no rooms in which the judges can hear children's voice in divorce, custody assessment and parental time plans.

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<sup>291</sup> Interview made for W/ro Alemishet Regasa, as cited at supra note 243. She responded that it is very good if they work with the court, prosecutors, police and hospitals to realize the best interests of the child. But in practices of the zonal offices and all the woredas of Western Hararghe there is no such habits to work together. In addition, she mentioned that the structure of their office by itself has a problems; because of there is no way to recruit the Lawyers and Social Workers. Thus, she forwarded her suggestion that since one of the mandate of their office is to realize children's dreams, including the budget, every mechanism should have to fulfill to them.

<sup>292</sup> Michelle M. Fernando., as cited at Supra note 270, p.97

<sup>293</sup> One judge working responded from of the high court as cited at supra note 248, question No. 3.1o, p. 4.

### **i. Child- Friendly Court Rooms**

Children shall be treated according to their age, their special needs, their maturity and level of understanding.<sup>294</sup> Hence, rooms in which the judges and experts used to hear children's views have to fill with soil, pictures, puppets and all what are needed materials. In such environment children may become free from anxiety and secondary internal harassment that may resulted by the employee of the justice organs.

However, all the six judges responded to the questioners from both courts, have responded that their courts have no child-friendly courtrooms and child-sensitive environments.<sup>295</sup> In addition, as I have observed the practices of the Doba woreda and high courts of western Hararghe zone the physical design of the courtrooms, the elevated position of the judge, and the public gallery of these courts are intimidating and may exacerbate the anxiety of a child who wishes to participate in divorce, custody and parenting plans. Thus, the judges of these courts are entertaining the cases of children in normal courtrooms that adjusted for adults. Therefore, these courts have no rooms that are filled by materials used to hear the voices of the child (e.g. audible amplification, Screens, Closed circuit Television, Video recorder and Tape recorder).<sup>296</sup>

### **ii. Child- Sensitive Judges**

One judge among three judges responded to the questioners from the high court and all the three judges of the Doba woreda court of western Hararghe zone have responded that they have no special training on how, when and where to entertain children's right to be heard in family law proceedings. However, two judges responded to the questioners from the high court have responded that they have training on children right in general but not on how, when and where to hear children's voice in custody assessment, order of maintenance and parenting time plans.<sup>297</sup>

In my opinion, separation and divorce is often an extremely stressful transition in the life of a family and the children.<sup>298</sup>

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<sup>294</sup> Child Rights International Network (CRIN), *Child-Friendly Justice and Children's Rights*, (2011); Available on [www.crin.org](http://www.crin.org), accessed on 07/2/2014, p. 1

<sup>295</sup> Six judges responded the Doba woreda and high courts, as cited at supra note 280, question No. 3.2, &3.3, p. 3,

<sup>296</sup> Observations made on both the Doba woreda and high courts of western Hararghe, from 11-22/04/2006 E.C.

<sup>297</sup> Responses to the questioners made by the six judges working on the family law proceedings of the Doba woreda and high courts, 11-22/2006 E.C, question No. 2.4, p.2.

<sup>298</sup> *Practice Guidelines for Custody and Access Assessments*, 2009, p.6.

Judges have to treat children with due regard, dignity, and legitimate privacy without seeking to intimidate or humiliate them.<sup>299</sup> Child-sensitive judges could easily hear their voices directly or indirectly in a very sensitive manner by giving the priority for the best interests of the child. Therefore, as I have observed the practices of these two courts of western Hararghe zone, though they have lack of mechanisms used to hear children's voices and trained professionals, but all the judges working on the family law proceedings of these courts of the researched areas are too child-sensitive.

## **4.2. Interviews made for the Divorced Parents and their Children**

Under this section, I want to analyze the interviews made on children's voice in the custody assessment, order of maintenances and parental time plans for eight children and four parents from the Doba woreda and high courts of western Hararghe zone. Among these, six children and two parents are from the Doba woreda court, whereas, two parents and two children are from the high court of western Hararghe zone. Except one child, all the interviewed seven children were living in countryside to keep cattle, sheep and goats. Thus, I faced many inconveniences and difficulties to find these children during the due courses of the interviews since parents think that their children may reveal the secrets of the family and may speak against their will. Rather, they hide or warned these children not to be interviewed or speak on any matters attached to their custody assessments, order of maintenances and parental time plans. Therefore, I have conducted these interviews after I got permission from the parents to interviews their children by going to the place where these children are keeping goats, sheep and cattle.

### **4.2.1. The High Court**

When their parents have divorced on the Doba woreda court in 17/2/2001 E.C, Shukri Jafer and Na'oli Jafer were 4 and 3 years old children respectively. During that time after giving the order of divorce, the judge of the Doba woreda court gave the custodianship right of these children for their mother. Because, article 127 (3) of the ONRSFC states the court order the custody of child below the age of 5 years to his/her mother unless the contrary is proved. That means children bellow the age of 5 years are not allowed to be heard by the judges. Therefore, due to their age the Doba woreda court did not hear the voices of Shukri and Na'oli on their custody matters, maintenance, and parenting time plans during their family breakdown.

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<sup>299</sup> American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* (Washington D.C.: May 1985), p. 9-10

The courts have the duty to order the parental time plans and informed the parents as they have obligation to visit their children after separation or divorce.<sup>300</sup> Thus, article 127(1) of the ONRSFC children have the right to be visited by their divorced parents. However, the father of Shukri and Na'oli has responded that, 'the Doba woreda court ordered me to pay 200 birr per month for the maintenance of these children but did not respect for me the right to visit them.'<sup>301</sup>

In Dec. 2006 E.C, the mother leaves both Shukri and Na'oli to their father by claiming that 200 birr are no sufficient for their school fee, food, clothes, health and the like.<sup>302</sup> Then the father took these children to the Doba woreda court to get the custodianship right. Thus, on the proceeding held on 4/3/2006, both children have chosen to live with their father because of their mother has another husband.<sup>303</sup> Hence, the judge presiding over the case has decided the custody of Shukri and Na'oli for their father after remitting the order of paying 200 birr for maintenance starting from 4/3/2006 E.C in the absence of their mother.

On 14/4/2006 E.C, the mother appealed to the high court of western Hararghe zone for the calim of the custodianship right and maintenance for these two children. She has stated in hear appeal her children (both Shukri and Na'oli) were intimidated by their father to choose him for their custody and maintenance. Hence, her claim from the high court was to quash the order of the Doba woreda court, which has given in her absence.<sup>304</sup>

Hence, on 22/04/2006 E.C, the two children were called to the high court of western Hararghe zone for judicial interviews regarding their custody matters. Thus, during such interviews, the elder boy (Shukri) responded to live with his father whereas the younger boy (Na'oli) reply to live with his mother and the court decided accordingly.<sup>305</sup> Moreover, regarding such differences on the assessment of their custody and the reason of their choice, both children have responded as follow:<sup>306</sup>

- **Shukri:** I love my father, because, he has promised to send me to Adama City for education. Hence, that is why I chose him for my custody and decided to live with him on the Doba woreda and high courts of western Hararghe.

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<sup>300</sup> Informal interview made for Ato Firew, the president of Doba woreda court, on 15/04/2006 E.C, at 4:00 AM.

<sup>301</sup> The interview made for Ato Jafer Mohamed done at his office, on 14/04/2006 E.C, at 8:00 PM.

<sup>302</sup> The interview made for W/ro Se'ada Mohammed, done at her home on 23/04/2006 E.C, at 3:00 AM.

<sup>303</sup> Decision rendered by Doba woreda Court, on 4/3/2006 E.C, on file No. 02701, P.12.

<sup>304</sup> An appeal filled by W/ro Se'ada Mohamed to the high court of western Hararghe of Oromia, on 14/4/2006 E.C.

<sup>305</sup> Decision made over the Custody of Shukri and Na'oli by the high court of western Hararghe of Oromia, on 22/4/2006 E.C, file No.28846, p.3.

<sup>306</sup> The interview made for 9 years old boy Shukri and 8 years old Na'oli on their custody matters, done at the high court of weteren Hararghe, on 22/4/2006 E.C, 4:30 AM.

- **Na'oli:** I love my mother, because she gives me food, buys clothes, and sends me to school. But I don't know why my father flogs me always and never give food for me. Instead, he said to me 'go and eat whatever you please!' That is why I chose to live with my mother.

From responses of these two children, I have inferred that as both spouse used them as a tool to their own interests. The father promised the elder boy to send him to Adama City for education while the mother gave food and gifts for the younger boy to get his voice. Thus, both spouses used such mechanisms to get the voices of these two children in the assessments of custody and order of maintenance.

The decision-making process must carefully consider the possible impacts (positive and negative) of the decision on children, and must give this impact primary consideration when weighing the children's best interests in custody assessments, order of maintenances and parental time plans.<sup>307</sup> However, the judicial interviews made to these children and decisions made by both courts of western Hararghe zone are not qualified enough and not according to the principle of the best interests of the child. Thus, both judges interviewed these children from the Doba woreda and high courts did not deeply investigate the best interests and these children rather than merely deciding over their custody matters and maintenances.<sup>308</sup> In my opinion, the judges of both courts did not understand the true feelings of these children and the competing interests of their family regarding the custodianship right and order of maintenances. Therefore, such difficulties to understand the competing interests of the parents and children could be faced these courts due to lack of social workers, ICL, psychologists, psychiatrists and child-friendly courtrooms and court preparation to hear children's voices in their family law proceedings.

#### **4.2.2. The Doba Woreda Court**

The divorce cases have taken a lion share among all cases decided by the Doba woreda courts in the 2005 E.C, budgetary year. Thus, the judges working on the family law proceedings of Doba woreda court have decided over 370 files of the family cases.<sup>309</sup> Among these files, one is the file of w/ro Nefisa and her Ato Ahmed. W/ro Nefisa and her late husband were divorced in 03/01/2006 E.C,<sup>310</sup> on the Doba

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<sup>307</sup> Jean Zermatten., the Best Interests of the Child: Literal Analysis, Function and Implementation, 2010, p.7. The "best interests of the child" is a fundamental legal principle of interpretation developed to limit the extent of adult authority over children (parents, professionals, teachers, judges, etc.).

<sup>308</sup> Decision made by the high court of western Hararghe as cited at supra note 306, P.3.

<sup>309</sup> Report on civil cases of quarter 4<sup>th</sup> and 2005 year reported by Doba woreda court from July 1/2004 -20/10/2005, file No. MMAD/2/1356/2005, in 20/7/2005.

<sup>310</sup> Doba woreda court decision on case of W/ro Nefisa and her husband on 03/01/2006 E.C, file No. 11563/2006.

woreda court. Hence, after their separation, the custody of their four children named: Hussen, Halima, Mohamed and Sadiya has left for w/ro Nefisa.

W/ro Nefisa and her husband were divorced because of the conflict born in their peaceful home after the government confiscated their land for public interests. They got 235000 birr for compensation from the administration of the Doba woreda in 2005. Thus, w/ro Nefisa responded, ‘we have got 235000 birr from the Doba woreda administration after our farm land was confiscated by the government for public interests. My late husband has deposited this amount of money in the bank in name of his father. Then after, he has refused to give money for our home expenditures. Therefore, after that we were in a chronic conflicts for long times.’<sup>311</sup>

The interviews made w/ro Nefisa, reminds me what has stated by one commentator of the family law on the results of parental conflict on their children. This Commentator has stated, ‘chronic conflict . . . causes chronic distress and agitation in children as well as a loss of emotional control. . . . In a home marked by conflict and unpredictability, children form insecure attachments to their parents. They do not have a deep and abiding trust in their caretakers.’<sup>312</sup> After, I got the file of w/ro Nefisa and her late husband from the Doba woreda court; immediately, I went their home, which is 5km far from the Doba town for search of these four children. Thus, I have interviewed these children individually about their custody, maintenance and right to visit or to be visited by their parents. Hence, all of them have responded as they feel sad and hopelessness since their parents was divorced. These children blame their parents since they have done nothing to settle their conflict peacefully and amicably.

Moreover, as I have seen them, they are facing a critical economic problems and psychological crisis. Thus, I was highly impressed by what all these four children responded to the interviews made for them about their education, health, food, clothes and parenting time plans. Therefore, I want to jot down what they have responded on their custody matters and parenting time plan as follow.<sup>313</sup>

- **Hussen Ahmed** is 14 years old boy and the elder in his family having four children. Hussen is student of grade seven having ranked 1<sup>st</sup>-3<sup>rd</sup> among students of grade seven approximately numbered 50 to 60. However, the conflict happened in his family irritated him highly since all the burden of the family laid on his shoulder.

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<sup>311</sup> The interview made for W/ro Nefisa Ahmed living in Doba woreda of western Haraghe, on 17/4/2006 E.C, at 5:00 AM.

<sup>312</sup> Elizabeth M. Ellis, *Divorce Wars: Interventions with Families in Conflict*. Baltimore: Port City Press, 2000, p.49.

<sup>313</sup> The interviews made for the children called Hussen Amhed, Halima Ahmed, and Mohamed Ahmed done at their home and Sadiya Ahmed, done at the office of the coordinator of the Legal Aid center of Harmaya University situated in Doba woreda Court’s compound, on 17/04/2006 E.C, & 18/04/2006 E.C respectively.

I was highly impressed by the words of his mouth when he responded for the interviews on the consequences of the divorce happened in his family in 2006. He responded, “After my father divorced from my mother and leaves our home, all things laid on my shoulder. I have no sleep at night since hyenas and other wild animals come to eat our goats and sheep. Hence, I am in troubles after my parent divorced. Unfortunately, our mother is sick and does nothing for me and for my brother and my two sisters. When we asked her for money to buy pen, pencil, exercise books and clothes, she replied for me, ‘Go away! Ask your father.’ This makes me busy after school to prepare a meal for my brother and two sisters. Hence, I lost the time to study.

Regarding my right to be heard in the assessment of custody, maintenance and parental time plans, the court of Doba woreda has called me to the proceeding. The judge did not interview me about my right with whom I prefer to live, maintenances, to visit, and to be visited by my divorced parent. I Love my father and I miss him, but I do not know where he is now. Therefore, I am too happy if my family solves their problems and re integrated again.”<sup>314</sup>

- **Halima Ahmed** is 12 years old girl and the second child for her family having four children. When I interviewed her, she responded as follow: “After my family divorced each other, I feel no comfort in my life. I am student of grade 5, though I am not attending the classes on a regular basis due to workload. In addition, I have no uniform, pens, pencils, exercise books and the like. However, the court order nothing on our custody matters, particularly, about our education, food, clothes, health and our right to visit or to be visited by our father. Moreover, I have caught with fear and did not sleep for several nights, since hyenas come to our home at night to eat our animals. However, my brother Hussen is striving to keep at night from hyenas. I love my father and my mother too. Therefore, I wish my family may reintegrate and our problems will come to an end.”<sup>315</sup>
- **Mohamed Ahmed** is 10 years old boy and student of grade six. He was not willing to speak and not to respond to the interviews for fearing of his mother since she may flog him at night. He told me that as he can respond to my interview with his elder brother Hussen in the absence of his mother.

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<sup>314</sup> The interview made for Hussen Ahmed a 14 years old boy living in Doba woreda of western Hararghe, 14/04/2006 E.C, 9:00 PM.

<sup>315</sup> The interview made for Halima Ahmed a 12 years old girl living in Doba woreda of western Hararghe, 14/04/2006 E.C, 9:30 PM.

Hence, he responded a little word by his gestures and with the help of his elder brother Hussien by saying that, “I am not living in good situation after my family has separated. I need both of them.”<sup>316</sup> As I have observed from his face, there are the feelings of sadness and hopelessness. The reason why he was not willing to respond to the interview is for fear of his mother. However, I could understand as he is in problems and miss his father, from his facial expression, gestures and body movements.

- **Sadiya Ahemed** is 7 years old girl and student of grade two. She has no words to express easily about the consequences of such divorce happen in the life of her parents. Rather she likes to cry when remembered the situations resulted the disintegration to her family.

Sadiya was too familiar with Ato Wudessa, the coordinator of the Free Legal Aid Office of Haramaya University branch found in the compound of the Doba woreda court. She has created such familiarity with him since she comes to his office for several times with her mother for search of a solution to the conflict happened in their family. Therefore, I have interviewed her in the presence of Ato Wudessa and she responded by saying, “I do not know the reason why my father creates such conflict every night and intimidates my mother to kill her. He bit her several times all night. I lost sleep when they quarreled, and feel sad when he bit her. I remember, the judge has called me to the proceeding and only asked me how old I am. However, I was not interviewed on Doba woreda court regarding my interests in custody assessment and parenting time plan.”<sup>317</sup>

One commentator stated that, “exposure to inter adult discord has significant impact on children’s emotional, behavioral, interpersonal, and even physiological functioning. . . . How the parents fight and whether they are able to resolve their differences probably holds the key to understanding the impact of marital discord on children.”<sup>318</sup> Therefore, as I mentioned above, these children are found in psychological crisis and problems regarding their education after their family get divorced. For instances, four of them have responded to the interviews that they are fear hyenas at night, missed their father, busy with workload, have no clothes, faced shortage of some materials needed for their education, *inter alia*, pens, pencils, exercise books and some fees made for school.

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<sup>316</sup> The interview made for Mohamed Ahmed, a 10 years boy living in Doba woreda of western Hararghe, 14/04/2006 E.C, 10:00 PM.

<sup>317</sup> The interview made for Sadiya Ahmed, a 7 years old girl living in Doba woreda of western Hararghe, 17/04/2006 E.C, 4:00 PM.

<sup>318</sup> Mark .E, Cummings and Patrick Davies, *Children and Marital Conflict: The Impact of Family Dispute and Resolution*. New York: The Guilford Press, 1994, p.xii.

These children often want to know what is going on, and greatly upset because of they did not interviewed, and make their own assumptions, as they are not lucky to enjoy the love of their families. They can state observations about matters of fact: as they were left alone at night, their mother did nothing for them, and so on. Their statements could be important in helping the court determine disputed questions of fact.

However, they are competent and capable to speak about the conflict born in their home, the Doba woreda court did not gave them the chance to express their views and to be heard on custody assessment, maintenances and parental time plans. Rather, the judge presiding over the case has given an order of divorce to their family before taking into consideration their best interests regarding their custody, maintenances and their right to visit and be visited by their father. Therefore, reluctances of these court to hear their voices, these little ageless are found under the feelings of sadness and hopelessness about their future life.<sup>319</sup>.

- Another divorce case, which I have seen from the Doba woreda court, was the 1998 E.C, case of w/ro Yeshi and Ato Fikadu. They have a 14 years old girl child called Feven Fikadu. Nowadays, Feven is living with her mother after her family was divorced. I have tried a lot to see this file file from the Doba woreda court, but the officer of documentation class of this court was so reluctant to give the evidence of this case for me. Even he refused to give me the file number of the divorce case of w/ro Yeshi and Ato Fikadu. Therefore, based on the information I have got from the legal officer of the court called Chaltu, I went to the home of w/ro Yeshi (the mother of Feven) to get permission to make interviews with Feven. Hence, I get that she was so competent and willing to respond for the interviews regarding her feelings on the divorce her parents, her custody, maintenances and her rights to visit her father and to be visited by him. Feven was 8 years old girl child when her family breakdown in 1998 E.C. But during this interview, she is 14 years old and student of grade 9. Hence, willingly she responded for the interviews as follows:<sup>320</sup>

*“When my family has divorced in 1998 E.C, I was 8 years old child. The judge of Doba woreda court has called me to the proceeding before the order of divorce has given on the petition of my parents. The judge did not allow me to express my views regarding on my custody, maintenance and my right to visit*

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<sup>319</sup> I saw the feelings of sadness and hopelessness from the facial expression and interviews made to Hussein, Halima, Mohamed and Sadiya, living in Doba woreda, on 17-18/04/2006 E.C.

<sup>320</sup> Interview made to Fven Fikadu, a 14 years of girl child, living Doba woreda with her mother custodianship. I have interviewed her about her feeling when her family was divorced in 1998 when she was 8 year old and the feeling she may now after she became 14 years old, 12/04/2006 E.C, 12:00 PM.

*and be visited by my divorced parent. At that time, though I was 8 years old child, he [the judge] told me that, as I am not capable to give my voice and to be heard. Therefore, by denying me the right to express my heart grievance and to be heard, the judge gave the order of divorce and decided, as I have to live with my mother. My father has also ordered to pay maintenance to my mother for my education, food, clothes, health and the like.”*

Feven responded that, as she feels sad during holly days and the New Year when fathers bought clothes and gifts for their children. She feels also as she is not lucky for lost the chances to be visited and get gifts from her father. In addition, however her father pay the maintenance, but she responded that as she is not happy for lost the love of my father.<sup>321</sup> She believes that since her father has other children from his second wife and he has no love for her. She responded, “Surprisingly even, when I meet him on the road, he does not like to greet me. That is what makes me unlucky child and always resulted me to cry. To tell you the truth, though my mother does everything for me, I am not happy as a child growing with their both parents. For future I would like to make myself a sample for children of divorced families and to advice the parents not to run for divorce but have to negotiate over their conflicts.”<sup>322</sup>

As stated above, Feven has lost the right to express her views and to be heard in the family law proceedings of the Doba woreda courts. The judge presiding over the divorce case of her family did not gave her the right to be heard about her heart grievances directly or indirectly to the court, regarding her custody, maintenance and right to visit and to be visited by her father. Therefore, as I have interviewed her now she feels, as she is not lucky for she lost her chance to visit and to be visited by her father even during holydays and New Year.

- Another case that I have included in this paper was the case of w/ro Momina Usso having the claim of custodianship right over her grandchildren called Nejatu Shemshudin and Fahmi Shemshudin in 15/04/2006 E.C. Nejatu and Fahmi were the children of her son called Shemshudin and are living with her after their parents have divorced in 2005 E.C. During this interview, these children were aged seven and five years respectively. Thus, w/ro Momina has responded, “these children are the children of my son. After divorced from his wife, their father has thrown in to jail since he committed and imprisoned for 10 years. During their divorced, I was living in East Wollega,<sup>323</sup> but my son called me to come to Hararghe. After, I came; I saw that he was divorced from his wife and these two children have left

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<sup>321</sup> During interview: *Feven was not willing for me how much allowance the court was ordered for her, on 12/04/2006 E.C.*

<sup>322</sup> Interview made to Fven Fikadu, as cited at Supra note 321.

<sup>323</sup> Eastern Wollega is a zone that found in western Oromia National Regional State.

without custody. Because, their father is found in jail, whereas their mother got another marriage and refused to take their custodianship obligation. Hence, I need from the Doba woreda court to get the order of the custodianship right over these two children.<sup>324</sup>

On the other hand, Nejatu and Fahmi have responded about their feelings regarding their custody assessment and parental visits. Both of them have tried to express their grievances verbally and by gestures as well as body languages. Surprisingly, the elder child (Nejatu) aged seven years cannot express his feeling verbally for lack of ability to communicate. However, Fahmi, a five years old child has responded well than Nejatu on the situation they are facing after their family has divorced and on their custody matters. I have interviewed Fahmi in the presence of his grandmother and the coordinator of the Legal Aid office of Haramaya University. Hence, Fahmi has responded for the interview by saying that ‘our mother has another husband and she never loves us. During their divorce, the Doba woreda court did not called us to the proceedings to hear our heart grievances over the assessments of our custody, maintenances, and our right to visit and to be visited by our divorced parents. Thus, after our parent’s breakdown, I and my brother Nejatu, are living with our grandmother. But we are in crisis since our grand father never like to see our eyes and did not give us a food.’<sup>325</sup>

Moreover, as I have informally interviewed both Nejatu and Fahmi, they are not attending their education and even they have no chance to get food when their grandfather is in home. Rather their grandmother gives them food by hiding it from their grandfather or she did so when he leaves the home. Therefore, it was expected from the Doba woreda court to give the order of custody, maintenances and parenting time plan to realize the best interests of these children as stated under the article 36(2) of the FDRE Constitution before giving the order of divorce.

On the other hand, when I interviewed a 5 years old child called Fahmi I have acquired a very good experience, which may challenge article 127(3) of the ONRSFC. This article never allows children below 5 years of age to express their views and to be heard in the family law proceedings. Rather, it allows the mother of the child bellows the age of 5 years to get the custodianship over the child unless the contrary is proved. However, Fehmi a five years old child responded to the interviews perfectly

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<sup>324</sup> The interview made for W/ro Momina Uso living in Doba woreda of western Hraghe of Oromia, 12/04/2006 E.C, 6:00 AM. She came to the court to seek justice regarding custodianship of these children by her status of guardianship and to claim from the court the order to get for these children the right to be visited by their parents and to get allowance from both of the divorced spouse.

<sup>325</sup> Interview made to 5 years old boy called Fahmi Shemshedin living with his grandmother in Doba woreda, 12/04/2006 E.C, 6:00 AM.

than that of his elder brother called Nejatu Shemshudin who is aged seven years. Therefore, this shows that children below 5 years of age may be competent and have the ability to express their views and to be heard if the decision-makers may earn ears for them in the family law proceedings.

### **4.3. Reflections on Personal Observations**

I have observed several things during 11-22/04/2006 E.C, from the practices of the family law proceedings of the Doba woreda and high courts of western Hararghe zone. Thus, both courts of the researched areas have no mechanisms and trained legal professionals and other expertise to realize children's right to be heard as stated under article 12 of the CRC.<sup>326</sup> The high court of the researched zone built huge court building which have many courtrooms. All the ordinary courtrooms are so convenient for adult customers. However, the physical design of its family law proceedings courtrooms is not convenient for the judges to realize children rights to be heard child-friendly manners. For instance, all benches are elevated and are not child-sensitive; there are lacks of comfort items (stuffed animal, toy, closed circuit TV, screens, tape recorder and video recorder and screens e.tc) in the rooms. In addition, as I have observed the Doba woreda court, the judges are entertaining children's cases in a normal rooms designed for a regular proceedings of adult customers. The design of the courts could create fear and anxiety on children, which may in turn result them for loss of comfort, security, and confidence. Therefore, the family law proceedings of the Doba woreda court are also the place where children lost their right to be heard on matters that may affect their interests.

The judicial interviews are the only mechanism used to hear children's voices in the family proceedings of these courts. Therefore, the practices of these courts have resulted children for harassment and secondary internal victimization while interviewed by the judges having no skills and training how to communicate with children.<sup>327</sup> In addition, though article 127(1) of the ONRSFC, gives children the right to enjoy visitation, these courts are not ordering this right for them. Therefore, because of all these factors, children having contact with the Doba woreda and high courts of western Hararghe are not enjoying their right to be heard in the family law proceedings.

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<sup>326</sup> Personal Observation made to the Doba woreda and high courts of western Hararghe zone of Oromia National Regional State, from 11-22/04/2006 E.C.

<sup>327</sup> Responses to the questioners made by six judges working on the family law proceedings of the Doba woreda and high courts of western Hararghe, interviews made for two presidents of the courts, team leader of the Civil proceedings of the high court, one judge working on family law proceedings of the high court and the deputy head of the zonal women and Children's Affairs office, done on 11-22/04/2006 E.C

## **CHAPTER FIVE**

### **5. Conclusions and Recommendations**

#### **5.1. Conclusions**

Family law proceedings encompass a broad range of issues, including custody, maintenances and visitation.<sup>328</sup> In a child custody evaluation, the child's interests and well-being are paramount. Parents competing for custody, as well as others, may have legitimate concerns, but the child's best interests must prevail. Therefore, pursuant to article 12 of the CRC and article 4(2) of ACRWC, children have the right to give their input into decisions that will affect their lives and their voices can help the courts to get important and timely evidences about their best interests in custody assessment and parenting time plans. Therefore, the federal and ONRS governments as well as the Doba woreda and high courts of Western Hararghe Zone of Oromia have their own obligations as stated bellow.

##### **5.1.1. The Federal government**

The present Ethiopia is in a better position in relation to giving due respect for the rights of children, when compared with the previous regimes. The country has undertaken an important steps towards ratification of the CRC and a draft Comprehensive National Child Policy with due consideration of the principles and provisions of the CRC and ACRWC to guide the work of various actors dealing with children and promote the rights of children. The government has also developed a policy on the Developmental Social Welfare Policy (DSWP), enacted in 1996 and Ethiopian National Plan of Action for Children for the Period 2003-2010 and beyond issued in June 2004.

All the above-mentioned positive measures could also be taken as one means of showing the government's commitments towards safeguarding the rights of children. However, it does not mean that Ethiopia is fully implementing the rights of children as incorporated in the CRC. Because, hearing the child's views is a process but not something achieved by a single event (or interview) and best achieved by a variety of routes. These include the reported opinions of the social workers, psychologist, child's testimony (via submission of documents), evidences from other adults, an accredited court appointed Independent Children's Lawyer (ICL), and sometimes a conversation with the judge (via judicial interviews).

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<sup>328</sup> *Guidelines for Child Custody Evaluations in Family Law Proceedings*, by American Psychological Association, 0003-066X/10/\$12.00, Vol. 65, No. 9, 863–867 DOI: 10.1037/a0021250, December 2010, p. 863.

Children's right to be heard in the family law proceedings is an entitlement, not merely a matter of good practice.<sup>329</sup> In the national level, there is lack of transplantation of article 12 of the CRC directly into the supreme law of the land (the FDRE Constitution) in the child tailored manners. However, this right is incorporated under the FDRE Revised Family Code, and National Child Policy, but there are problems in the implementation of children's right to be heard in judicial proceedings, particularly in the family law proceedings.

- Failure to publish the full texts of the CRC in to official *Federal Negarit Gazeta*, which is a mandatory requirement in the country's law-making process, and consideration of its implications for domestic legislations.<sup>330</sup> However, publication makes the provisions of the CRC to get judicial notes and easily used by judges in any matters regarding children rights, particularly children's right to be heard in family law proceedings;
- Failure to grant children the right to be represented by the ICL in civil proceedings, particularly, in family law proceedings. There are no provisions under the FDRE Constitution, the FDRE Revised Family Code and the ONRSFC, which authorized children to be represented by the ICL of their best interests. However, some African countries (i.e. South Africa Constitution of 1996),<sup>331</sup> incorporate the provision to children's right to be represented in civil case by the ICL.
- Lack of taking direct legal measure: Any Child can enjoy the benefit of article 29(2) of the FDRE Constitution regarding freedom expression, by this/her statuses as "*everyone*" of the community. In contrast to this, the international community opts for the independent laws, which is tailored to the best interests of the child due to his/her vulnerability and need for special protections and treatments both in laws and in practices.<sup>332</sup> However, children's right to express their views and to be heard in judicial or administrative proceedings on any matters that may affect their interests is not incorporated under article 36 of the constitution.
- The existing domestic laws have discriminatory provisions, which introduce age limitation on children to enjoy their right to be heard in family law proceedings. For instances, articles 291(1), and

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<sup>329</sup> Gerison L., as cited at supra note 9, p.57.

<sup>330</sup> The FDRE Constitution, Article 71(2), Article 3 of the federal Negarit Gazeta establishment proclamation 3/ 1994, and Article 14 the law making procedure for the House of Peoples' Representatives proclamation 14/1994.

<sup>331</sup> The South African Constitution of 1996, Section 28(1) (h) states, "*Every child has the right . . . (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result .*

<sup>332</sup> See the preamble of the CRC and ACRWC, Para. 8, &9, and Para. 6 respectively. The CRC and African Charter on the Rights and Welfare of the Children (ACRWC), gives children the right to enjoy special legal protection since they are the vulnerable group of the society.

191(3) of the FDRE Revised Family Code have introduced age limitation to hear from the child. These provisions limits children's age to 10 years and above to give his/her voice in assessment of custody and 14 years and above in appointment or removal of the guardian and administration of his/her property. However, the Committee discourages the State parties not to introduce the age limitation either in law or in practices to hear the children's voices.<sup>333</sup>

- Though Ethiopia is a signatory to the Convention, hearing the children's voice in the family law proceedings is not obligation under its domestic laws. For instance, article 249 (2) of the RFC, states that the judge 'may' hear the voices of the child on the assessments of custody matters. However, hearing from the child is an obligation under the CRC.<sup>334</sup>
- Failure to implement the policies and strategies framed on children rights, at the zonals, kebeles and grass root levels administrations due to lack of skilled man power.<sup>335</sup>
- Failure to translate the text of CRC and the General Comment No.12, into the local languages and disseminate to the courts, and competent concerned organs found in all respective regional states.
- Failure to give short term and long-term training for judges, lawyers and expertise working on family law proceedings of the zonals and woreda's courts on children's how hear child's voice.<sup>336</sup>

### **5.1.2. The Oromia National Regional State**

Likewise, the Revised Family Code of the federal government, the ONRS Family Code has provisions, which introduced age limitation on children to express their views and to be heard in family law proceedings. In addition, the regional government did not recruit social workers, ICL, psychologists and other expertise trained on children's rights to the zonals and woredas levels of courts. In my opinion, such problems are because of lack strong legal background.

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<sup>333</sup> General Comment No.12, as cited at Supra note 39, under the Sub-tile "*Capable of forming his or her own views*", Para. 20 &21, p. 9.

<sup>334</sup> General Comment No.12, as cited at supra note 39, Para. 19a, p.8.

<sup>335</sup> The Government of the FDRE therefore welcomes the recommendations of the Committee on the Rights of the Child in its concluding observations, as there is a lack of adequate trained manpower, the necessary institutional infrastructure and appropriate implementation strategies and extreme shortage of financial and material resources. See, CRC/C/70/Add.7, Para.97 &98, page .32.

<sup>336</sup> As emphasized by the Ethiopian delegation on the 3<sup>rd</sup> periodic report of 2005 made for the UN Committee on the Rights of the Child, 'there are legislative gaps and a lack of trained human resources with respect to the protection and upholding of the rights of the child. Although there have been attempts to acquaint the law enforcement community with the precepts and provisions of the Convention, a greater proportion of the judges and police forces do not have sufficient awareness about the rights of the child.' See, CRC/C/129/Add.8, page 63 Para.228.

#### **a. Legal Problems**

- Lack of a comprehensive or consolidated child’s code
- Article 36 of ORNRS Revised Constitution did not incorporate the children’s right to be heard and to be represented by the Independent Children’s Lawyers (ICL) in the judicial or administrative proceedings.
- Articles 127(3) and 308 of the ONRSFC introduce age limitation on children to express their views and to be heard, and not to participate in the family law proceedings to 14 years or above and below 5 years respectively. However, the Committee on the rights of the child discourages the States Parties from introducing the age limitation either in law or in practices, which would restrict the child’s right to be heard in all matters affecting her or him. In addition, article 12 of the CRC imposes no age limit on the right of the child to express her or his views and to be heard.<sup>337</sup>
- Article 105(5) of the ONRSFC says the court can hear from the child ‘if such hearing is necessary’ to appoint the tutor or guardian as well as to decide over the custody of the child. As to this article, hearing the child’s voice is not obligatory, rather it seems the charity made to children by the judges. However, article 12(1) of the CRC used the obligatory word ‘shall assure’, which shows that hearing the voice of child in the family law proceedings is not a charity but obligation to the states parties signed the Convention.<sup>338</sup>

#### **5.1.3. Western Hararghe Zone**

The provisions of the ONRSFC obliged the judges not to give the order of divorce before hearing the interests of the child.<sup>339</sup> However, these courts have no guidelines on how, where and when to hear the children’s views and how to order the parenting time plans after divorce. Therefore, children living in both researched areas have lost their right to be heard in divorce, custody, order of maintenances and parenting time plans because of the bellow listed problems.

#### **a. Problems related to the practices of these courts**

- Divorce cases have a lion share among the civil cases that have instituted in the Doba woreda and high courts of western Hararghe Zone. It may because of lack of awareness and factors related to

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<sup>337</sup> General Comment No.12, Para. 21, p.9.

<sup>338</sup> CRC, article 12(1), and CRC/C/GC/12, Para. 19a, p.8

<sup>339</sup> The ONRSFC, Articles 103, 105, 127, 266, 283, and 308.

polygamy.<sup>340</sup> However, the practices of these courts are not child centered and child sensitive. Children have had little opportunity to participate in divorce, custody and parental time plans in the family law proceedings of these courts. There is no other mechanism used to hear children's voice in the family law proceedings, except judicial interview, which is the only method, used.<sup>341</sup>

- Judges of these courts are not calling brothers, sisters, relatives and schoolteachers or neighbors to hear about the best interests of the child in custody assessment and parental time plans. Therefore, it is too hard to say that the best interests of the child is ensured as stated under article 36(2) of the FDRE Constitution by these courts.
- However, article 127(1) of the ONRSFC grants to the children the right to enjoy parental visits, but the judges working on the family law proceedings of the courts of the researched areas are not realizing this right for the children having contact with their proceedings.
- Lack of mechanisms used to allow the admission of documents that may submitted by children to the court via postal services, hotlines or e-mail, to the family law judges regarding their heart feeling on their family breakdown.

**b. Problems related to trained man power**

- Lack of social workers, psychologists, ICL and other expertise, used to realize children's right to be heard in their family law proceedings;
- The judges working on the family proceedings of these courts have no training on how, when and where to heard children's voices in family law proceedings.

**c. Lack of Child-friendly Courtrooms, Mechanisms (Facilities) and Comfort items used to decrease fear and anxiety**

The child's right to be heard imposes the obligation on States parties not only to review or amend their legislations, but also to introduce mechanisms (facilities) and professionals providing children with access to appropriate information, adequate support, feedback on the weight given to their views, and procedures for complaints, remedies or redress. Therefore, there are bottlenecked problems to realize children's right to be heard in the family law proceedings of the courts of the researched areas.

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<sup>340</sup> A cumulative responses of the interview made for Ato Aliyi, the judges of the high court, Ato Befikadu., the president of Chiro woreda court, and the informal discussion made with Ato Firew., the president of Doba woreda court and Ato Abdurrahman O., the team leader of the civil proceedings of the high court of western Hararghe, done all their offices, on 11, 15,&22/04/2006 E.C.

<sup>341</sup> Responses to the questioners made by six judges working on the courts of both researched areas, on 11-22/04/2006, question No. 2.4.& 3.7, p.2 & 3.

- Lack of child-friendly and child-sensitive waiting room/s/in, when called to the family law proceedings to give their views and to be heard in divorce, custody assessment, and parental time plans.
- Lack of the child-friendly courtrooms adjusted by facilities (closed-circuit television, video recorder, tape recorder and audibled amplification) and comfort items (e.g. toys, play soil, stuffed animal and child-related pictures).
- Lack of postal services, hotlines or e-mail, and free telephone line used by children to express their views in all judicial proceedings, particularly to express their views and to be heard in the family law proceedings.

#### **d. Institutional Problems**

- The stake holders working on children and family matters have no cooperation with themselves as well as with the National or International NGO,s found in the zone.
- The zonal and the Doba woreda Women and Children’s Affairs office have no social worker and legal counselor to help the family proceedings of these courts by providing the real evidences about the child to the proceedings of these courts.

## **5.2. Recommendations**

Based on the findings I have made for this study, I would like to propose the following recommendations so as to address the problems found in the practices of the Doba woreda and high courts of western Hararghe zone. Therefore, the following recommendations are worth considering:

### **5.2.1. The Federal Government Should:**

#### **a. Publish the Full text of the CRC into the Official Negarit Gazetta**

Article 71(1) of FDRE Constitution states that the president of the Federal Democratic Republic of Ethiopia shall proclaim laws and international agreements approved by the House of Peoples’ Representatives (HPR) in to the Negarit Gazeta, in accordance with the Constitution. In addition, article 2(3) of the Federal Negarit Establishment Proclamation No. 3/1995 also states that all federal or regional legislative, executive, and judicial organs as well as any national or juridical person shall take judicial notice of laws if and only if published in Federal Negarit Gazeta.<sup>342</sup> However, still Ethiopia did not publish the CRC in the official Negarit Gazeta.

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<sup>342</sup> The FDRE Constitution, Article 71(2), and Article 2(3) of the Federal Negarit Establishment Proclamation No. 3/1995

Thus, the Committee reiterates its recommendation by saying that Ethiopia has to publish the CRC in the official Negarit Gazeta since such publication would facilitate awareness and access among professionals working in the administration of justice.<sup>343</sup> Therefore, it is recommendable that the government Ethiopia has to publish the full texts of the CRC into the official Negarit Gazetta, which is a mandatory requirement to give the judicial notices for such laws.

**b. Directly Incorporate and re-affirmed article 12 of the CRC in the Domestic laws**

It is clear that article 36 of the FDRE Constitution has extensive rights of children. However, this article does not give children the right to express their views and to be heard in judicial and administrative proceedings on matters that may affect their interests. The constitution also has no provision, which authorize children to be represented by the ICL in civil proceedings. In addition, articles of the FDRE Revised Family Code those gives children the right to be heard [e.g. articles 113(1), 191(3), 249(2), 291(1), and 249(2)] are age discriminatory and use the word ‘*may*’ which implies non-obligation to hear from the child. Therefore, it is recommendable that the federal government should reaffirm article 12 of the CRC

**c. Translate the text of CRC and the General Comment No.12 into local language and disseminate them to Concerned Organs situated in the ORNS**

The country has the duty to translate both the CRC<sup>344</sup> and the General comment No.12 into the local language and disseminate to the competent organs and to the courts of all levels. This would help the children to understand easily the entire intention of the convention regarding their rights. In addition, the stakeholders, the judges, the families and others professional having contact children could easily know their obligation to realize children’s rights in family law proceedings.

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<sup>343</sup> See the third periodic report of Ethiopia (CRC/C/129/Add.8) at its 1162nd and 1164th meetings (see CRC/C/SR.1162 and 1164), held on 12 September 2006, and adopted, at its 1199th meeting (CRC/C/SR.1195), held on 29 September 2006, Para. 9.

<sup>344</sup> Ibid at its 1162nd and 1164th meetings (see CRC/C/SR.1162 and 1164), held on 12 September 2006, and adopted, at its 1199th meeting (CRC/C/SR.1195), held on 29 September 2006. The Committee notes with appreciation the efforts made by the State party in disseminating the Convention through its publications in several local languages and public events. Para. 20.

Hence, it is recommendable that the Federal government has obligation to translate the CRC and General Comment No.12 into the local languages and disseminate to all competent concerned organs and the courts of all levels found in the ONRS.<sup>345</sup>

### **5.2.2. The Oromia National Regional State Should:**

#### **a. Develop a comprehensive or consolidated child's code**

A comprehensive or consolidated children's code aimed at protecting children in family law proceedings.<sup>346</sup> However, the courts of researched areas have no children code. The judges are interviewing children having contact with their family law proceedings as to their will and their mercy. Therefore, it is recommendable that the ONRS has to develop a comprehensive child code to harmonize the practices of realization of children's right to be heard in family law proceedings.

#### **b. Amend provisions of Its Family Code which are contrary to the article 12 of the CRC**

For instances, articles 127(3) and 308 of the ONRSFC introduce age limitation in which children can give their voices to the family law proceedings. Article 105(5) of the same code, says as hearing from the child is not mandatory. However, article 12 of the CRC imposes no age limit to hear from the child, however, it states that hearing the voice of the child by the States Parties to the Convention is mandatory. Therefore, it is recommendable that the ONRS has to amend such age these provisions in order to create compliance with the principle of the best interests of the child, which stated under article 36(2) of the Revised Constitution of the ONRS.

#### **c. Allocate Resources**

The ONRS government has to allocate financial resources so as to maximize the potential of the zonals and woredas courts to implement the plan of realizing children rights. Therefore, it is recommendable that the ONRS government has to fulfill materials and budget for the Doba woreda and high courts of western Hararghe zone.

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<sup>345</sup> General Comment No.12, as cited at supra note 39. The Committee recommends that States parties widely disseminate the present general comment within government and administrative structures as well as to children and civil society. This will necessitate translating it into the relevant languages, making child-friendly versions available, holding workshops and seminars to discuss its implications and how best to implement it, and incorporating it into the training of all professionals working for and with children, 25 May-12 June 2009, Para.7, p.6.

<sup>346</sup> ACPF, *Laws, Policies and the Reality for Ending Violence against Children in Ethiopia, Kenya and Uganda*. Addis Ababa: The African Child Policy Forum, 2011, p. 19.

**d. Encourage the Scholars or NGO, s to conduct further studies on children’s Voice in family law proceedings.**

There are no researches conducted on this title in Ethiopia. Thus, as a first work this study may motivates many young researchers to conduct researches on Children’s right to be heard in judicial proceeding in general and in the family law proceedings in particular. Therefore, I believe, if studies may conducted, the policies, laws, practices, cultures and traditions that may affect children’s best interests may be challenged .

**e. Conduct Training**

Training could strength the institutional capacities of courts and confidences of the judges in the realization of children’s right to be heard in family law proceedings. Thus, the UN Committee on the Rights of the Child further recommends the reinforcement of adequate and systematic training of all professional categories working for and with children in particular targeting law enforcement officials.<sup>347</sup> Therefore, it is recommendable that the ONRS government has to conduct short term or long-term trainings for the judges and professionals supporting all levels of courts. In addition, the training is needed for the law enforcers, government and NGO,s working on children and family matters, children and families on how to hear children’s voices in parental conflicts.

**f. Recruit the Trained professionals and expertise**

Trained legal professionals and expertise have irreplaceable role in realizing the best interests of the child by preparing the reports to the court after hearing the views of the child either from the child himself/herself or from other adults. Therefore, it is recommendable that the ONRS has to fulfill the following professionals and expertise for the Doba woreda and high courts of western Hararghe zone.

- Child-sensitive judges who have training on children’s rights;
- Independent Children’s Lawyers (ICL) recruited by the state expenses (the Legal Aid Plan), and work for the best interests of the child;
- Social workers and interpreters who are able to communicate with children, particularly for children living with disability in divorce, custody, access proceedings and parenting time plan.
- Psychologists/Psychiatrists: Who makes home or school visits to interview the child as well as his/ her friends, about the feeling of the child in custody, access to proceedings, education, health,

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<sup>347</sup> General Comment No.12 as cited at supra note 39, Para.21, p. 6.

food, age, behavior and parental time plan, to make reports for the judges working on family law proceedings.

### **5.2.3. The Doba woreda and high courts of western Hararghe Zone Should:**

#### **a. Alter the physical environment of the courtrooms to make it less intimidating for the child**

Alteration of the physical environment in the courtroom to make it more child-friendly can make a child feel more at ease and thus improve the child's ability to participate in the court process. Two notable considerations for courts include creating a child-friendly waiting room and making a judge appear less intimidating. However, both the courts of the researched areas have no child-sensitive family law proceedings. Even these courts have no the waiting rooms for children in separate facilities. Therefore, it is recommendable the Doba woreda and high courts of western Hararghe zone have to establish child-friendly courtrooms.

#### **b. Adjust the courtrooms with comfort items and facilities to decrease Child's fear and Anxiety regarding the court process.**

In family law cases involving children, judges have inherent authority to fashion procedures and modify standard trial practices to accommodate the special needs of child witnesses.<sup>348</sup> In addition, permitting a comfort item such as a stuffed animal, toy, soil, or child-sensitive materials and some facilities used to hear children's voice may provide comfort, security, and confidence for the child by decreasing fear, anxiety or being nervous. Therefore, it is recommendable that the Doba woreda and high courts of western Hararghe have to fulfill the following items to realize children's right to be heard in their family law proceedings.

- Toys, stuffed animals, e.tc;
- Closed-circuit television (TV);
- Video tape recorder;
- Screens and Audible amplifications;
- Child-friend benches, chairs are the prominent and
- E-mail, free postal and phone services by which children can submit their heart grievances as well as their interests to the family law proceedings.

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<sup>348</sup> Janet L. Richards., *Protecting the Child Witness in Abuse Cases* 34 Fam. L. Q. 393, (2000), p. 410-11.

### **c. Create child-sensitive environment in family law proceedings**

In family law cases involving children, judges have inherent authority to fashion procedures and modify standard trial practices to accommodate the special needs of child witnesses.<sup>349</sup> However, the judges of the Doba woreda and high courts of western Hararghe zone are interviewing children in rooms, which were designed for adult customers. Therefore, they should:<sup>350</sup>

- Treat children with respect of their age, their special needs, their competence and level of understanding and telling as confidentiality is ensured regarding their voices;
- Familiarize children with the layout of the court and the court actors;
- Minimize the intimidating factors, for example, judges have to wear less formal clothes, enabling the child to see what is going on, and introducing more informal seating;
- Use language appropriate to the child's age and his/her level of understanding, in order to make him/her feel at ease;
- Avoid not to use the images or information that could be harmful to their welfare;
- Make regular breaks and hearings that do not last too long; and
- Avoid disruption and distractions in between that may be made by anybody while hearing his or her views.

### **d. Create Cooperation with other Stakeholders and international or Local NGO, s charged with children and family matters**

The structures of the organs, which are responsible for the implementation of the child rights and needed to cooperate, should go down to the federal and regional governments' Zonal, and Woredas levels. To realize children rights stated under the Convention, cooperation among the government organs and NGO, s is legal.<sup>351</sup> Hence, the offices of Public Prosecutors, the Police, the Women and Children's Affairs as well as the Hospitals or medical centers, and NGO, s found in the western Hararghe zone should have to cooperate and work hand in hand with these courts to realize children's rights to be heard in the family law proceedings.

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<sup>349</sup> Janet L. Richards.,Supra note 348

<sup>350</sup> General Comment No. 10, '*Children's Rights in Juvenile Justice*', CRC/C/GC/10, Feb 2007, Para.13, p.6

<sup>351</sup> Article 4 of the CRC states that "...With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

In addition, now days because of the BPR (Business Processes Re-engineering), the practices of courts become quite different from the traditional court procedures. Thus, the courts have to create awareness about the procedures of their proceedings through brochures, flyers, media, newsletters, magazine and the like. Therefore, it is recommendable that these courts have to fulfill its courtrooms with all needed facilities and conduct training on; how children can submit the document or letters to the court through e-mail or postal services. In addition, it is expected from these courts to fix how children can use free phone call and announce availability of such services through media and newsletters by creating cooperation with governmental organs and NGO, s found in the zone and charged with the issues of children rights.

**e. Conduct short training for their employees and making visits to the Practices of other courts**

The Doba worda and high courts should: Arrange short-term trainings for the judges, legal officers and court registrars on how, where, and when to hear the voice of the child, how to give an admission for the documents or reports submitted to the court through the ICL, Social workers, psychologists/psychiatrists, other adults, and children.

- Send the judges to Oromia Justice Training and Research Institute for long- term training and
- Make special visits to States or federal courts to catch up the practices in the family law proceedings of these courts regarding children's right to be heard in custody assessment, order of maintenances, and parental time plans.

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2. W/ro Se'ada Mohamed, living in Chiro woreda of the Western Hararghe Zone, done at her home on 23/04/2006
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# Appendixes

## Questioners and Interview Questions Administered to Collect Primary Data

### I. Questionnaire for the Judges, Social Workers, Children’s Lawyers and Psychiatrist/Psychologist Working on Doba Woreda and high courts of western Hararghe

Dear Respondent,

My name is Yosef Peteros and I am Masters Student at Addis Ababa University, School of Law. I am conducting a research on *“Children’s Rights to be Heard During Judicial Proceedings: with Particular Reference to Western Hararghe of Oromia, Ethiopia”*; as part of fulfillment for the Maters programme in Law. The information I would like to collect from you is purely for academic purposes and will therefore not be used for any other purpose. You are therefore, kindly requested to participate in this research by answering all the questions as sincerely and fully as possible. Your confidentiality is assured.

During analysis, some data may be changed so that no respondent will be recognized. After finishing the project, the data will be destroyed. Participation in the project is voluntary and therefore you have the right to decline answering any questions, or terminate the interview without giving an explanation.

**Please answer by ticking (√).**

### Survey on the Voice of the Child in the Family Law Proceedings of Doba woreda and high courts of western Hararghe

#### 1.0. Demographic Information

1.1. In what city/town do you work? \_\_\_\_\_

1.2. What is your gender?  Male  Female

1.3. What is your primary profession?

Judge  Psychiatrist/Psychologist

Independent Lawyer for Children (ILC)  Social Worker

Other (please specify) \_\_\_\_\_

1.4. How many years of experience do you have in this profession? \_\_\_\_\_years

## 2.0. Hearing the Voices of the Child in Family Law Proceedings

The Both *the United Nations Convention on the Rights of the Child (UNCRC)* and *African Charter on the Rights and Welfare of the Child (ACRWC)* establishes the right of the child (everyone below the age of 18 years) to participate in decisions that affect his or her life and to be heard.

2.1. Do you agree that children should have the right to express their views and to be heard in family law proceedings that affect them? If yes, to what extent?

Strongly Agree  Agree  Disagree  Strongly Disagree

2.2. Do you consider that allowing the child to express their views and to be heard in court is a good fair justice in family law proceedings?

Yes  No

Please give reasons for your answer. \_\_\_\_\_

2.3. Should children's participation in family law proceedings that affect them be mandatory in your jurisdiction?  Yes  No

Please give reasons for your answer. \_\_\_\_\_

2.4. Do judges in your jurisdiction have special training on Children's Rights?

Yes  No

Please cite what types of training they have \_\_\_\_\_

3.0. Does your jurisdiction have mechanisms to ensure that the voice of the child is heard?

Yes  No

3.1. What mechanisms, if any, are used in your jurisdiction to enable children to voice their views in family law proceedings? (Please tick -all that apply.)

- Testimony in court by child
- Submission by child (e.g., letter, e-mail, standardized form/kit, videotape)
- Testimony by psychologists/social worker who has interviewed the child
- Testimony by other adults who know the child (e.g., grandparent(s), teachers)  
regarding child's wishes
- Legal representation for child
- Judicial interview with child

Other (please specify) \_\_\_\_\_

3.2. Does your jurisdiction have the mechanisms to aid children in giving views and to be heard in family law proceedings? (e.g., screens, closed-circuit television, videotaped testimony, support person).  Yes  No

3.3. Does your jurisdiction have child-friendly courtrooms for use in family court proceedings?  
 Yes  No

3.4. Do you consider that legal representation for the child is a good mechanism for hearing the voice of the child?  Yes  No

Please give reasons for your answer. \_\_\_\_\_

3.5. Is Independent Lawyer for children available in your family law jurisdiction?

Yes  No

Please give you reason \_\_\_\_\_

3.6. Does your jurisdiction have social workers/ Expert Witness?  Yes  No

Please give your reason \_\_\_\_\_

3.7. Do you consider that a judicial interview is a good mechanism for hearing the voice of the child?

Yes  No

Please give reasons for your answer. \_\_\_\_\_

\_\_\_\_\_

3.8. Do judges in your jurisdiction conduct interviews with children?  Yes  No

How and Where? \_\_\_\_\_

3.9. Does your jurisdiction allow admission of documents authored by children (e.g., letters, e-mails)?

Yes  No

If No, why? \_\_\_\_\_

3.10. Do you consider that testimony by other adults such as grandparents, relatives or teachers (i.e., hearsay statements) is a good mechanism for hearing the voice of the child?

Yes  No

Please give reason for your answer \_\_\_\_\_

3.11. Do you consider that assessment or evaluation reports prepared by mental health professionals/social workers are a good mechanism for hearing the voice of the child?

Yes  No

Please give reason for your answer \_\_\_\_\_

3.12. Which of the following factors do you use when deciding what weight should be given to the child's views? (Please tick (√) all that applies.)

Age of child  Ability of child to communicate  
 Child's reasons for views  Presence of domestic violence

Other (please specify) \_\_\_\_\_

3.13. In general, how much weight should be given to the wishes/preferences of a child at the following ages?

	None	A Little	A Lot
Under 9 years of age	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9-13 years of age	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13-15 years of age	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15 years or older	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

3.14. Whose responsibility should it be to inform children of the court's decisions in matters affecting them?

The Judge  A Social Worker  Their Parents  
 The Parents' Lawyer,  The Child's Lawyer

Other (Please specify) \_\_\_\_\_

3.15. Should the information that children provide regarding their wishes be made available to their parents?  Yes  No

Please give reason for your answer \_\_\_\_\_

3.16. Does your court have parenting plan after divorce?  Yes  No

Please give reason for your answer \_\_\_\_\_

3.17. Does your jurisdiction have any special programs for hearing the voice of the child?

Yes  No

If yes, please describe them. \_\_\_\_\_

3.18. Has your jurisdiction encountered any problems in implementing programs/mechanisms for hearing the voice of the child?  Yes  No

If yes,

3.18.1. Please indicate the nature of the problems.

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3.18.2. What solutions, if any, have been identified for dealing with these problems?

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3.19. Have you made any visit, and got experience from anywhere?  Yes  No

If yes, from where and what you feel about? \_\_\_\_\_

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3.20. If you have any thoughts about how best to hear the voice of the child in family law proceedings, please note them below.

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*Thank you for completing this survey.*

*Please return it to me*

## **Appendix-Interview guide**

### **A) Interview questions for children**

Open-ended questions, for interviewing children, regarding their participation in custody assessment and parenting plans. These are:

Name\_\_\_\_\_Sex\_\_\_\_Age\_\_\_\_Educational level\_\_\_\_

1. What do you remember about your parents' separation and how you felt?
2. Did you give your voice on court or by any means when your parents made about living apart, particularly in assessment of your Custody and Parenting Plan?
3. Is there any parenting plan made for you and how did you find out about the plans that were made for your care?
4. What can you remember about your participation in the process?
5. What did you find helpful in the process, and what was not helpful? And
6. What advice would you give to lawyers/social workers/judges who work with children and young adults to help others in similar circumstances?

### **B) Interview guide for parents**

1. Name\_\_\_\_\_ Age\_\_\_\_\_
2. What are the roots causes of your divorce?
3. Do you agree if children heard when their family runs to divorce?
4. Why you like to be the custodianship to your child?
5. Have you filled parenting plan at the court to visit your child, after your marriage divorced?
6. What advice would you have for parents in order not to run for divorce?

### **B) Interview guideline for key informants**

1. Personal description
2. What is your position/argument regarding children's right to be heard in family law proceedings?
3. What prospects would you have to realize children's right to be heard as stated under article 12 of the CRC on you court?
4. Does your office have cooperation with Organs working on family and children's issues?

## II. Appendix – Pictures



*Me (the Researcher), Na'oli and Shukri Jafer*



*Hussien, Mohamed and Halima from right to left*



*Nejatu Shemshudin and Fahmi Shemshudin*



*Sadiya Mohamed and me the researcher*



*Children with their families*