

**ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW**



**THE PROTECTION OF THE RIGHTS OF CHILDREN OF DIVORCED PARENTS IN
ETHIOPIA**

**BY:
FIREHIWOT GIRMA ALEMU**

**May 2, 2017
Addis Ababa, Ethiopia**

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BY: FIREHIWOT GIRMA ALEMU

ADVISOR

**MIZANIE ABATE TADESSE PHD) ASSISTANT PROFESSOR OF LAW, ASSOCIATE
DEAN FOR GRADUATE PROGRAMS, SCHOOL OF LAW, COLLEGE OF LAW AND
GOVERNANCE STUDIES, ADDIS ABABA UNIVERSITY**

**A THESIS SUBMITTED TO SCHOOL OF GRADUATE STUDIES, COLLEGE OF LAW
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APPROVED BY BOARD OF EXAMINERS

Name	Signature	Date
_____	_____	_____
Advisor		
_____	_____	_____
Examiner		
_____	_____	_____
Examine		

DECLARATION

I, **Firehiwot Girma**, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged and cited.

Name: Firehiwot Girma

Job: Lawyer at Federal First Instance Court

Signature: _____

April 30, 2017

Addis Ababa University

This thesis has been submitted for examination with my approval as University advisor.

Advisor: *Mizanie Abate Tadesse(PhD), Assistant Professor of Law, Associate Dean for Graduate Programs, School of Law, College of Law and Governance Studies, Addis Ababa University*

Signature: _____

Date: May 2, 2017.

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Abstract

The paper analyzes the protection of the rights of children of divorced parents in Ethiopia from the perspective of the general legal regime of children's rights such as the Convention on the Rights of Child, the African Charter on the Rights and Welfare of Children, the Constitution of Federal Democratic Ethiopia, the Revised Family Code and the Criminal Code of the Federal Democratic Republic of Ethiopia. The analysis is substantiated primarily by selected divorce cases decided by the Federal First Instance Court Bole Division relating to the rights of children of divorced parents and by information acquired through interview of one judge at the FFIC Bole Division and two legal experts each at the Children's Legal Protection Center and the Ethiopian Women Lawyers Association. The analysis is also supplemented by Cassation Decisions of the Federal Supreme Court; Reports; and Concluding Observations as well as the General Comments of the Committee on the Convention on the Rights of Child.

The children of divorced parents have various rights including the rights to maintenance, custody and visitation. These rights are special rights unique to such children apart from other civil and political, and socio-economic as well as cultural rights to which they are entitled just like any children. The researcher argues that the modalities for determining custody, maintenance and visitation rights as stipulated under Article 113(2) of the Revised Family Code are too general and not exhaustive. For there is no rules of procedure or guideline providing objective standard, it seems consideration of the factors listed under the provision is left to the judges' subjective appreciation of the circumstances of the case. As a result, decisions of the court relating to the rights and interests of children of divorced parents lacks predictability and uniformity.

Consequently, the researcher recommends the enactment of a binding rules of procedure or a guideline for the implementation of custody, maintenance and visitation rights of children of divorced parents (separately for each or in one) so as to fully implement Article 113(2) of the RFC and thereby ensure uniformity and predictability of the practice at courts. To achieve this end, the Draft Directive for the Determination of Maintenance prepared by the FFIC might be used as a model.

Key words & terms: Child/Children, children of divorced parents, divorce, custody, maintenance and visitation.

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LIST OF ACRONYMS

AAU	Addis Ababa University
ACRWC	African Charter on the Rights and Welfare of Children
Cass.Div.	Cassation Division
CRC	Convention on the Rights of Child
CSOs	Civil society organizations
CLPC	Children’s Legal Protection Center
CSP	Charities and Societies Proclamation
Cv. C.	Civil Code
Cr.C.	Criminal Code
DRC	Declaration of the Rights of Child
E.C.	Ethiopian Calendar
EHRC	Ethiopian Human Rights Commission
EIO	Ethiopian Institute of Ombudsmen
EWLA	Ethiopian Women Lawyers Association
FDRE	Federal Democratic Republic of Ethiopia
FFIC	Federal First Instance Court
FSC	Federal Supreme Court
G.C.	Gregorian Calendar
HPR	House of Peoples Republic
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LON	League of Nations
MOWA	Ministry of Women Affairs
NGOs	Non-Governmental Organizations
NHRI	National Human Rights Institutions
No.	Number
NPAs	Non-Profit Associations
OAU	Organization of African Unity
RFC	Revised Family Code
UDHR	Universal Declarations of Human Rights
UN	United Nations
UNCRC	United Nations Committee on the Rights of Child
UNICEF	United Nations International Children’s Emergency Fund

CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND OF THE STUDY

Children are part of the community who deserve special care and protection due to their vulnerability as a result of their tender age. Especially, children of divorced parents, the target group of this study, require much attention from the law owing to the exigent situation to which they are exposed. With a view to realize the special protection and care children are entitled to, several international and continental treaties are being ratified and implemented.

The Convention on the Rights of Child (herein after referred to as CRC or the Convention)¹ is the most comprehensive instrument in recognizing and in rendering special protection for the child right at international level. From the regional legal instruments the African Charter on the Right and Welfare of the Child (referred to as ACRWC or the Charter)² is a pioneer one. There are two dominant theorists namely, Child Liberationist and Child Protectionist which respectively favors and opposes children as right bearers.³

As a state party⁴ to CRC and ACRWC in particular, and other international human rights instruments in general, Ethiopia has made a promise under the Constitution to respect, protect and enforce the rights and privileges of children enshrined there under.⁵ Most essentially, the Constitution in its Article 36 specifically recognizes the rights of children. Also the Revised Family Code (RFC)⁶ elaborates what the Constitution says regarding children's right in general. Moreover, the most interesting feature of Ethiopian legal system is that it extends protection to

¹UN Convention on the Rights of the Child (CRC) adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2nd of September 1990.

²African Charter on the Rights and Welfare of the Child (ACRWC) adopted by the Assembly of Heads of State and Government in 1990 and entered into force on November 29, 1999.

³Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*, (2002) p.8, available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/family/2002_1/pdf/2002_1.pdf (accessed on 23/11/2016).

⁴Ethiopia ratified CRC on December 9, 1991 by Proclamation 10/1992, and ACRWC on October 2, 2002 by Proclamation 283/2002.

⁵The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, 1st Year, No.1.

⁶The Federal Revised Family Code of 2000, *Federal Negarit Gazeta* Extraordinary Issue No1/2000.

unborn child.⁷ Similarly, in cognizance of a merely conceived child the Criminal Code has made punishable any act of intentional termination of a pregnancy at whatever stage.⁸ Hence, in the Ethiopian context, childhood begins from the period of conception and ends at eighteen years.

The study of protection of the right of child in a large scale requires a big project to exhaust. As a result, the focus of the study under consideration is on the protection of rights of children of divorced parents with a particular emphasis on the practice at the Federal First Instance Court (FFIC) Bole Division-Family Bench and some selected local Non-Governmental Organizations (NGOs) working on child rights protection. The minimal attention given to this area so far in Ethiopia highly inspired the writer to conduct this study.

1.2. STATEMENT OF THE PROBLEM

Children obviously face a problem due to dissolution of marriage on what so ever ground. To protect the rights of children after divorce the participation of state and non-state actors is indispensable. Strong and working legal as well as institutional mechanism should also be there. The FDRE government has taken significant steps aimed at legal reform since the adoption of the Constitution.⁹ The Regional National States or regions have also gone a significant step forward in the protection of child rights. To this effect, some regional states have enacted a separate family code dealing with family matters, including rights and interests of children within their respective jurisdiction. In this regard, the Oromia,¹⁰ Amhara¹¹ and Tigray¹² National Regional States have issued their respective family laws.

⁷The Civil Code, Negarit Gazeta, Proc.165 of 1960, 19th Year No. 2; from the cumulative reading of Article 1 and 2 of this code it is obvious that an unborn child or a conceived child is considered as a person provided that conditions attached thereto are satisfied.

⁸The Criminal Code of FDRE, Proc. No.414/2004, Article 545(2).

⁹Since the adoption of the Constitution in 1995 several pieces of legislation relating to children have been promulgated. Some of the major legal reform initiatives which play a crucial role for the protection of the rights of children include the entry in to force of the Revised Family Code in 2000, the Labor Proclamation in 2003, and the Criminal Code in 2005. Besides, the incorporation of the general principles of the CRC and the ACRWC within the constitution and the RFC is a further achievement.

¹⁰The Oromia National Regional State Family Code, Proclamation No.69/2002 Megeleta Oromia, (Finfinne, 2nd July 1995 E.C.), and its Amendment Proclamation No. 83/2003 Megeleta Oromia, (Finfinne, July 1996 E.C.), available at: www.abbyssinialaw.com (accessed on 25/01/2017).

¹¹The Amhara National Regional State Family Code Approval Proclamation No. 79/2003, Zikire-Hig Gazette 8th Year No.3, (Bahir Dar, 25th day of 2003), available at: www.abbyssinialaw.com (accessed on 25/01/2017).

¹²The Tigray National Regional State Revised Family Code Proclamation No. 116/2007 Tigray Negarit Gazzete 8th Year No. 1, (Mekele, 10th of Feb. 1999 E.C.), available at: www.abbyssinialaw.com (accessed on 25/01/2017).

Nevertheless, these achievements scored by Ethiopia towards children's right protection are not without limitation. At this juncture, the UN Committee for the CRC expressed its deep concern over the country's lack of a systematic and comprehensive Children's Code.¹³ However, this is not yet realized by the country.

Institutionally, courts are the major protective organs for protection of rights of children of divorced parents in Ethiopia. But, and absence of distinct child law in general, and separate legislation as well as rules of procedure or guideline for the protection and implementation of the rights of children of divorced parents in particular would inevitably curtail effective functioning of courts. Lack of such legislations makes the practice or decisions of the court relating to the rights of children of divorced parents inconsistent and unpredictable.

Also, the non-state actors' role of child protection in Ethiopia is not free of restrictions. Under the Charities and Societies Proclamation (CSP) No.621/2009 only Ethiopian charities who are able to obtain 90 percent of their funding from local sources are entitled to engage in any of the charitable activities that are related to human rights advocacy including the protection of the rights of children.¹⁴ Consequently, the numbers of NGOs working on the protection of the rights of children are decreasing from time to time.

The Children's Legal Protection Center (CLPC or the Center)¹⁵ and the Ethiopian Women Lawyers Association (EWLA or the Association),¹⁶ whose practice is briefly dealt within this study, are the major local NGOs currently playing a significant role in providing direct legal and psycho-social service to children. However, lack of resource due to the 'ninety percent (90%) local fund clause' as provided under Article 14 of the CSP obviously hinders the well-functioning of the Center as well as the Association.

¹³UN Committee on the Rights of the Child, Concluding Observations on Ethiopia, (1st November 2006), CRC/C/ETH/CO/3, available at: <http://www.refworld.org/docid/45c30bd60.html> (accessed on 14/12/2016).

¹⁴FDRE Charities and Societies Proclamation No.621 of 2009. Federal Negarit Gazette, Year 15, No.25, Art. 14.

¹⁵Available at: http://www.africanchildforum.org/site/_archived/index.php/inernational-policy-conference/126-the-childrens-legal-protection-center-clpc.html (accessed on 14/12/2016).

¹⁶Available at: <http://www.ewla-et.org> (accessed on 19/03/2017).

1.3. RESEARCH QUESTIONS

This study principally addresses the question: What are the legal and institutional frameworks for the protection of the rights of children of divorced parents in Ethiopia?

And, it endeavors to address the following specific questions:

- What are the rights of children of divorced parents?
- Is there a separate legislation as well as rules of procedure or guideline for the protection and implementation of the rights of children of divorced parents in Ethiopia?
- What is the practice of protection of the rights of children of divorced parents at the FFIC Bole Division Family Bench?
- What are the roles of government as well as non-government actors in the protection of children of divorced parents?
- What are the progresses and challenges of protection of the rights of children of divorced parents in Ethiopia?

1.4. OBJECTIVES OF THE STUDY

The general objective of this study is to identify and examine the legal and institutional frameworks for the protection of the rights of children of divorced parents in Ethiopia.

The Specific objectives of the study are:-

- To identify the rights of children of divorced parents from the perspective of relevant domestic (national), regional and international legal regimes on children's rights;
- To analyze how the courts in Ethiopian protect rights of children of divorced parents, with a particular reference to the practice at the FFIC Bole Division Family Bench;
- To investigate the role of local NGOs particularly, the CLPC's and EWLA's role in protection of children of divorced parents in Ethiopia; and
- To point out strengths or progresses and challenges of the protection of children of divorced parents in Ethiopia; and to provide recommendations thereto.

1.5. METHODOLOGY OF THE STUDY

This research is a qualitative type which focuses on why and how questions. This method of research enables the researcher to explore attitudes and experiences on the subject matter of the

study which was rarely approached so far.¹⁷ As such, it analyzes the protection of the rights of children of divorced parents in Ethiopia from the perspective of the general legal regime of children's rights such as the CRC, the ACRWC, the FDRE Constitution, the RFC and the FDRE Revised Criminal Code.

The analysis is substantiated primarily by some randomly selected divorce cases decided by the FFIC Bole Division relating to the rights of children of divorced parents and by information acquired through interview of one judge at the Court under consideration and two legal experts each at the CLPC and the EWLA. The Cassation Decisions of the FSC, Reports and Concluding Observations as well as the General Comments of the Committee on the CRC also supplement the analysis as the case might be.

In order to explore the practice at the institutions selected for this study, purposive sampling technique is used so as to select the interviewees. According to this mode of sampling, the interviewees are chosen with a specific purpose in mind or due to their significance to the issue under investigation.¹⁸ Also, the researcher has employed unstructured mode of interviewing using 'why' and 'how' questions for it helps to go further to the extent to which emphasis is placed on the interviewee's thoughts.¹⁹

The issue which might be raised here is as to whether or not the selected institutions are representative of the overall reality of the subject of the research. In qualitative studies the aim is not to be representative of the population rather the validity, meaningfulness and insights generated from such studies has more to do with the information richness of the target areas selected, and the analytical qualities of the researcher than with the sample size.²⁰

In short, primary sources like laws, interview records and cases as well as secondary sources like scholarly books, journals and articles will be used by the researcher.

¹⁷Dr. Catherine Dawson, Practical Research Methods: A User-Friendly Guide To Mastering Research Techniques And Projects, (2002, United Kingdom: How to Books Ltd.), p.14.

¹⁸Martyn Denscomb, The Good Research Guide for Small-Scale Social Research Projects, 2nd ed., (2003, Philadelphia: Open University Press), p.15.

¹⁹Id, p. 167.

²⁰Larry W. Krueger & W. Lawrence Neuman, Social Work Research Methods with Research Navigator, (2006, England, Pearson), p.9.

1.6. LITERATURE REVIEW

The study of the protection of the rights of children of divorced parents in Ethiopia did not get much attention it deserves from researchers or scholars. Some of the law as well as behavioral science researches that are conducted so far in the country are too general and often limited to other aspects of the children as shown subsequently.

To begin with studies conducted in Ethiopia, first comes an undergraduate thesis with a title: “Protection of Children’s Rights in case of Divorce under Revised Family Code.”²¹ This thesis provides a detailed discussion of conceptual framework of divorce and the rights of children in divorce under relevant laws. Yet, it is limited to rights of children at the time of divorce. And, it is silent as to the protective organs of children and the practice relating the subject matter.

Second, a research: “The Role of Federal Government Organs in the Protection of the Best Interest of Child in Ethiopia”²² conducted at postgraduate, among others focuses on the principle of best interest of child within international, regional and domestic legal framework. It only deals with the issue of best interest of child in general terms. As such, it failed to address the applicability or relevance of the principle in the protection of the rights of children of divorced parents in Ethiopia.

Third is the study of Save the Children Sweden on Child Protection with an emphasis on child friendly justice.²³ It focuses on child abuse or violence against children in general, and protection of children in conflict with law in particular.

Fourth, though interdisciplinary in nature, there are two research works²⁴ which focus on the legal and institutional frameworks for protection of children in Ethiopia. Their emphasis is on

²¹Gibe Geneti, Protection of Children’s Right in Case of divorce under Revised Family Code, (2006, unpublished).

²²ZenayeTadesse, The Role of Federal Government Organs in the Protection of the Best Interest of Child in Ethiopia, Masters Thesis: Addis Ababa University. (2008, unpublished).

²³Tsegaye Deda Baffa, Introducing Child Protection and Child Friendly Justice in a Society with Complex Socioeconomic Challenges: Experiences and Lessons from Ethiopia, (2011), available at: <https://ethiopia.savethechildren.net/sites/ethiopia.savethechildren.net/files/library/Experiences%20%26lessons%20on%20CP%20and%20child%20friendly%20justices.pdf> (accessed on 15/12/2016).

²⁴These two papers are: Menelik Solomon, The State of Child Rights in Ethiopia: Assessment of the Legal Framework and its Social Work Implication, Masters Thesis: Addis Ababa University (2016); and Birhan Teka, Child Rights Protection in Ethiopia and Kenya: A Comparative Analysis, Masters Thesis: Addis Ababa University (2015), available at: <http://etd.aau.edu.et/bitstream/123456789/8187/1/2.birhan%20teka.pdf> (accessed on 29/03/2016).

children in general. Both do not specifically address the protection of children of divorced parents.

Last, there are also a number of interdisciplinary studies, especially on divorce and its impacts or effects on children from social, economic and psychological perspective.²⁵ They all do not explicitly deal with the protection of the rights and interests of children of divorced parents like the studies mentioned. All in common address the socio-economic and psychological consequences of divorce on children.

There are also some related studies conducted abroad. One is, a background paper prepared in Canada, with a title “The Voice of the Child in Divorce, Custody and Access Proceedings.”²⁶ As can be inferred from its title, it specifically deals with right of children to express views in divorce proceeding, and in post-divorce proceeding relating to custody and access (to non-custodial parent) or children’s visitation right. It does not expressly provide other rights and interests of such children in post-divorce proceedings on matters such as maintenance. The other study focuses on the practice of fifteen (15) European countries with respect to right to health and co-parenting of children of divorced parents.²⁷ It stresses on the social and biomedical consequences of divorce on children.²⁸ It does not touch upon other rights of children of divorced parents other than right to health and co-parenting or joint custody.

Unique to these and other studies and publications, this research paper analyzes the practice of protection of the rights of children of divorced parents in Ethiopia. In particular, it identifies the legal and institutional systems for child rights protection in Ethiopia; examine how these systems are functioning; analyzes how the courts in Ethiopian especially, the FFIC Bole Division Family

²⁵Some of the literatures which touch upon the socio-economic and psychological impacts of divorce on children include:- Aster Shibeshi, Causes of Divorce and Its Effects on Children’s Wellbeing in Yeka Sub-City, Masters Thesis: Addis Ababa University (2015); Serkalem Bekele, Divorce: It’s Cause and Impact on the Lives of Divorced Women and their Children: A Comparative Study between Divorced and Intact Families, Masters Thesis: Addis Ababa University (2006); Selome Argaw, The Economic, Social and Psychological Aspects of Post Divorce Problems of Women in Addis Ababa: The Case of Women That came to EWLA, Masters Thesis: Addis Ababa University (2007); and Bogale Abera, “A Proposal to Decrease the Impact of Divorce on the Family: Prepared for Social Policy Analysis” in Dr Deborah Zinn et al (Editors), Ethiopian Social Policy Reader (Vol.1,2 & 3), Graduate School of Social Work, Addis Ababa University, (2008).

²⁶Supra note 3.

²⁷Vittorio Vezzetti, European Children and the Divorce of their Parents: A Question of Right to Health; available at: http://www.figlipersempre.com/res/site39917/res666721_europeanchildren2.pdf (accessed on 10/12/2016)

²⁸Id, p.1.

Bench protect children of divorced parents; and investigates the role of local NGOs with an emphasis on the CLPC and the EWLA's role in this regard. To this end, this paper is of a paramount importance in identifying and narrowing the gaps in research and practice of protection of rights of children of divorced parents both by courts and other stakeholders.

1.7. SIGNIFICANCE OF THE STUDY

This study has a paramount importance for scholars interested in identifying as well as exploring the rights and interests of children of divorced parents and institutional frameworks for protection of such rights under Ethiopian laws. It also helps to know the application of the general principles of both the ACRWC and the CRC by Ethiopian courts in the protection of the rights of children of divorced parents. Besides, it contributes in creating awareness and in narrowing down the gap in research on the area under consideration. Above all, it serves as a source for further studies on the same area.

1.8. SCOPE AND LIMITATION OF THE STUDY

The scope of this study is limited to the protection of rights of the children of divorced parents with a particular reference to the practice at the FFIC Bole Division Family Bench, and the CLPC of Child Justice Project of the FSC and the EWLA. The latter two local NGOs are selected for they are the only ones currently providing direct psycho-social and legal aid services to children.

The study tries to consult and review relevant national laws and guidelines as well as international legal instruments on child rights in general, and the rights of children of divorced parents in particular. In addition to this, it endeavors to incorporate the reports or findings of major child based government and non-government organizations.

The researcher genuinely strive to achieve this end under the pain of limitations such as inaccessibility of cases at court due to lack of systematically organized data; shortage of relevant and sufficient references on the subject matter; and lack of interest as well as reluctance of sample groups (interviewees) to speak their minds on the issue under consideration.

1.9. ORGANIZATION OF THE STUDY

The paper is organized into five chapters. The first chapter under distinct headings covers a brief background of the study, statement of the problem, research questions, objectives, methodology, and review of related literatures, significance, and scope and limitations of the study.

The second chapter deals with the general overview of protection of the rights of children. It is organized into four main sections. These sections respectively deal with the concept of child rights protection; theories on child rights protection; historical development of protection of children's rights; and childhood (children) and divorce.

The third chapter has two main sections respectively dealing with the legal frameworks and protective organs. As such, the first section has four sub-sections which respectively dwell on the CRC and ACRWC; the FDRE Constitution; the protection of children of divorced parents under RFC; and the significance of the Criminal Code FDRE in the protection of such children. The second section under its four sub-sections respectively deals with Executive Organs of Government; National Human Rights Institutions; Courts; and Non-State Actors NGOs as prominent protective organs of children in general and children of divorced parents in particular. Conclusion of the main findings the chapter comes at the end.

The fourth chapter dwells on the analysis of the protection of the rights of children of divorced parents in Ethiopia with specific reference to the practice at the FFIC Bole Division. The chapter is organized into three main sections which respectively deal with the analysis of the practice pertaining to Custody, Maintenance, and Visitation Rights of children of divorced parents. Conclusion of the main findings of the study under this chapter comes at the end. The last chapter brings to an end the paper with conclusions and recommendations.

CHAPTER TWO

OVERVIEW OF THE RIGHTS OF THE CHILDREN OF DIVORCED PARENTS

Introduction

This chapter deals with: the concept of child right protection; theories/thoughts on the concept or different connotations and understandings attached to the concept; and its historical development respectively under the first three sections. Under the last section, the chapter looks into the concepts of childhood/children and divorce.

2.1. THE CONCEPT OF CHILD'S RIGHT PROTECTION

It is true that children deserve special care for they are vulnerable due to their tender age. However, the idea of child protection is understood in various ways by various bodies. It is used to describe a set of usually government-run services designed to protect children and young people who are underage, and to encourage family stability.²⁹ This definition is not all inclusive when seen in a contemporary context. This is because the task of child protection today concerns both state and non-state actors almost equally.

In a more comprehensive manner, UNICEF defines child protection as preventing and responding to violence, exploitation and abuse against children, including commercial sexual exploitation, trafficking, child labor and harmful traditional practices such as female genital mutilation/cutting and child marriage.³⁰ Similarly, Save the Children defines the concept as measures and structures to prevent and respond to abuse, neglect, exploitation and violence affecting children.³¹

Moreover, as indicated by Oladiji, the concept of child protection as taking measure in order to protect the rights of children can be understood from the perspective of the CRC that draws the

²⁹Wikipedia, Children's Rights, available at: https://en.wikipedia.org/wiki/Children's_rights (accessed on 02/12/2016).

³⁰UNICEF, what is Child Protection? (2006), available at: https://www.unicef.org/protection/files/What_is_Child_Protection.pdf (accessed on 02/12/2016).

³¹Save the Children, Child Protection Initiative. Building Rights-Based National Child Protection Systems: A Concept Paper to Support Save the Children's Work, (2010), p.4; available at: https://www.savethechildren.net/sites/default/files/cp_strategy_final_web_email1.pdf (accessed on 15/12/2006).

human rights to be respected and protected for every child under the age of 18 years.³² From human rights perspective the child protection embodies the right to be protected from economic exploitation and harmful work, from all forms of sexual exploitation and abuse, and from physical or mental violence, as well as ensuring that children will not be separated from their family against their will.³³

The idea of protection of the rights of children of divorced parents can be summarized as providing basic necessities of life, giving custody and maintaining contact or relationship of such children with their non-custodial parent.³⁴ In short, child protection is a wide concept which comprises of ensuring the respect for the fundamental rights of children not only when the parents are together but also beyond that as long as childhood subsists.

2.2. THEORIES ON THE PROTECTION OF RIGHTS OF CHILDREN

There are two major theories developed with respect to the concept of protection of children's rights. They are conventionally regarded as Libertarian or Self-determination school of thought (also called Child Liberationists), and the Nurturance school of thought (also called Child Protectionists). We first discuss these two theories briefly one by one, and put a few words on the influence of these theories upon the overall child protection regime.

2.2.1. CHILD LIBERATIONISTS

The two American scholars, John Holt and Richard Farson,³⁵ are pioneers of this theory. They subscribe to the view that self-determination is the root of children's liberation.³⁶ Under this theory children are viewed as equals of adults.³⁷ One of the proponents of this school of thought, Hillary Rodham, also takes the position that children are the best judge of their own interests.³⁸ In short, this theory of child liberationist invoke as its root that of Hart's 'Choice Theory' which

³²S.O.Oladiji, The Role of International, Regional And Domestic Standards In Monitoring Children's Rights, Masters Thesis: University of South Africa (2012), p.12, available at:http://uir.unisa.ac.za/bitstream/handle/10500/10567/dissertation_oladiji_so.pdf.txt?sequence=3(accessed on 15/12/2006).

³³Supra note 30.

³⁴Children's Right in Divorce, available at: www.mediate.com/divorce/pg1037.cfm (accessed on 10/11/2016).

³⁵Supra note 3, p.8.

³⁶Ibid.

³⁷Stanford Encyclopedia, Children's Right, available at: <https://plato.stanford.edu/entries/rights-children/> (accessed on 02/12/2016).

³⁸Supra note 3, p.8.

states that people are “active managers of their own lives even when to do so will work to their overall detriment.”³⁹

2.2.2. CHILD PROTECTIONISTS

According to the advocates of this thought, the “irrelevance of age” asserted by child liberationists “does not square with our knowledge of biology, psychology, or economics.”⁴⁰ They further believe that children need to be protected from the adult-centric world, including the decisions and responsibilities of that world for in a dominantly adult society, childhood is idealized as a time of innocence, a time free of responsibility and conflict, and a time dominated by play.⁴¹

Despite the contending themes of the two theories on the protection of child right as discussed above they in common served as a building block for the present day legal regime of child protection both at regional and international level. Most importantly, international conventions the CRC⁴² as well as the ACRWC⁴³ seem to incorporate both the child liberationist and child protectionist views of children’s rights. For example, the right to be free from poverty, the right to adequate health care, the right to a proper education, the right to adequate housing and the right to adequate nutrition do not entail giving children autonomy to make decisions for themselves.

These theories have also made a significant contribution in the development of national child protection system. For example, the influence of both theories is obviously noticeable from the provisions of FDRE Constitution⁴⁴ dealing with children’s right in particular, and rights of every person. The understanding of the divergent views of the above two schools of thought on child protection further drives one to inquire an understanding on the history and development of the concept under consideration.

³⁹Northumbria Law Blog, Do children have a right?, Available at: <https://northumbrialawblog.wordpress.com/2012/10/16/do-children-have-rights-a-brief-analysis-of-the-theories-of-rights/> (accessed on 09/12/2016).

⁴⁰Supra note 29.

⁴¹Ibid.

⁴²Supra note 1 see for instance, Articles 26(1), 24, 28, 27(1), 12(2), 37(d), 40(2 (b) iii), 14(1), 13(1), 16(1), and 17.

⁴³Supra note 2 see for instance, Articles 14(1) 11(1) 14(2(c)), 17(2) (c) (iii), 8, and 10 of ACRWC.

⁴⁴Supra note 5 Art. 36 of FDRE Constitution, among others recognize children’s right to: life, name and nationality, know and be cared by his or her parents, be free of corporal punishment or cruel and inhuman treatment, and other rights generally guaranteed for every person under chapter three of the Constitution.

2.3. THE HISTORICAL DEVELOPMENT OF THE PROTECTION OF THE CHILDREN'S RIGHT

It was not until nineteenth century that a nascent child's rights protection movement countered the widely held traditional view that children were mainly quasi-property and economic assets.⁴⁵ Accordingly, France was the first country to give children special protection, enabling the progressive development of "minors' rights" in such a way that since 1841 French laws start to protect children in their workplace and since 1881 adopted the right for the children to be educated.⁴⁶

Moreover, with the establishment of League of Nations (LON) in 1919 the international protection of children's rights has got further momentum. Within a decade of its establishment, LON has ratified the 1924 Declaration of the Rights of Children (DRC), on which the 1959 Declaration of Rights of Children (DRC) clearly built upon. However, since the earlier international agreements had only concentrated on particular problems affecting children such as working conditions and slavery, the effort towards the international norms concerning the global protection of children was less successful.⁴⁷

The birth of United Nations (UN) has resulted considerable success in terms of enacting a comprehensive set of human rights protection system for children.⁴⁸ The growth of children's rights in international and transnational law has been identified as a striking change in the post-war legal landscape.⁴⁹ For example, the so-called International Bill of Human Rights issued under the sponsorship of UN⁵⁰ contains a broad set of human rights, and many of their principles are reflected and validated in children-specific legislation.

Generally, the protection of child rights has gone through various stages of developments, of which the milestones at international level are: the 1924 - Geneva Declaration of the Rights of

⁴⁵Law Library of Congress, Children's Right: International Law, available at: <https://www.loc.gov/law/help/child-rights/international-law.php> (accessed on 02/12/2016).

⁴⁶Humanium-Together for Children's Rights, Children's Rights History, available at: <http://www.humanium.org/en/child-rights/> (accessed on 02/12/2016).

⁴⁷Supra note 24, p.15 see Birhan Teka.

⁴⁸Ibid.

⁴⁹Supra note 45.

⁵⁰The major International Bills of Human Rights are: The 1948 Universal Declaration of Human Rights(UDHR), The 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)

the Child; the 1948 - Universal Declaration of Human Rights; the 1959 - Declaration of the Rights of the Child; the 1979 - International Year of the Child; the 1989 - Convention on the Rights of the Child; the 1990 - World Summit for Children held at the UN; the 2000 - Optional protocols to the CRC, specifically On the Involvement of Children in Armed Conflicts, and On the Sale of Children, Child Prostitution and child Pornography; and in 2002 - A World Fit for Children is agreed to as a consensus document at the United Nations General Assembly Special Session for Children.⁵¹ Regionally, the major achievements towards the protection of child rights are: the adoption of 1990 African Charter on the Rights and Welfare of Childs (ACRWC) and the 1996 European Convention on the Exercise of Children's Rights (ECECR).⁵²

2.4. CHILDHOOD (CHILDREN) AND DIVORCE

2.4.1. CHILDHOOD/CHILDREN

“Children “and “Childhood “throughout the world have mostly been understood in terms of a golden age that is synonymous with innocence, freedom, joy, play and the like.⁵³ The CRC defines “children” as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.⁵⁴ The Convention does not provide the minimum age of childhood.⁵⁵ On the other hand, ACRWC provides a different definition of the term child. The Charter defines a “child” as every human being under the age of 18 years.⁵⁶ This makes the definition of the concept of childhood under the Charter not subject to limitations.⁵⁷

When we come to Ethiopia the term “Child” or “Childhood” is not defined under any law of the country. Instead, Ethiopian laws make use of such terms as “minors”, “infants” and “young workers”. The Revised Family Code defines a “minor” as a person of either sex who has not

⁵¹Supra note 45.

⁵²Ibid.

⁵³Supra note 24, p.22 see Menelik Solomon.

⁵⁴Supra note 1, Art.1.

⁵⁵Girmachew Alemu and Yonas Birmeta, Handbook on the Rights of the Child in Ethiopia. Center for Human Rights studies, College of Law and Governance studies, Addis Ababa University in Collaboration with Save the Children Norway- Ethiopia, (2012) p.9; available at:<http://resourcecentre.savethechildren.se/sites/default/files/documents/6630.pdf> (accessed on 23/11/2016). The setting of the starting point for childhood is left to the determination of States Parties to the Convention.

⁵⁶Supra note 2 Art. 2.

⁵⁷Supra note 55, p.10. Under the charter as opposed to the convention, state parties cannot provide in their laws attainment of majority below eighteen years. But, just similar to the convention, the charter left the task of determination of the commencement of childhood to state parties.

attained the full age of eighteen years old.⁵⁸ This means, childhood ends or majority is attained upon eighteen years of age. However, there are exceptions to this rule under the code.⁵⁹ Accordingly, some laws in Ethiopia defined minimum ages pertaining to the protection of children. For example, from the cumulative reading of Article 1 and 2 of Civil Code,⁶⁰ it is obvious that an unborn child or a conceived child is considered as a person provided that conditions attached thereto are satisfied. Similarly, in cognizance of a merely conceived child the Criminal Code has made punishable any act of intentional termination of a pregnancy at whatever stage.⁶¹

2.4.2. DIVORCE

Literally the term divorce is defined as dissolution of marriage or termination of marital relationship.⁶² In legal terms, it is a juridical act of bringing to an end a contract of marriage upon unilateral request of one the spouses or mutual consent of both depending on the circumstances of the case.⁶³ It is argued that, early marriage by family arrangement and abduction are the major factors that contribute the large share to risks of divorce.⁶⁴ Indeed, these and other factors might be the basic causes of divorce.

But, the law gives attention to immediate/present conducts and acts of spouses regardless of the way marriage is created. Under the RFC divorce is put into action when: the spouses have agreed to divorce by mutual consent and such agreement is accepted by court; and the spouses or one of them made a petition, for divorce, to the court.⁶⁵ Whatever the case might be, the high divorce rate and breakup of marital relationships mean that more and more children are experiencing severe hardships in their life.⁶⁶ This urges a separate regime of family law which among others is

⁵⁸Supra note 6, Art.215.

⁵⁹Id. There are two exceptions to this rule. One is known as emancipation which is provided as per Article 310 (b) of the code whereby a minor or child concludes marriage, in which case incapacity ceases even prior to the attainment of majority or the age of eighteen years. Another exception provided by the code is upon the decision of the court pursuant to Article 312(1) where the minor has attained fourteen years. The court declares the emancipation of the child upon the application of the guardian or tutor or any interested persons.

⁶⁰Supra note 7.

⁶¹Supra note 8.

⁶²Supra note 25, p. viii, see Aster Shibeshi.

⁶³Supra note 6 see for example Art. 75.

⁶⁴Supra note 25, p. 76, see Serkalem Bekele.

⁶⁵Supra note 6 Art. 76.

⁶⁶Supra note 25, p.4, see Aster Shibeshi.

meant for protection of children of divorced parents. Hence, protection of the rights of children of divorced parents is an alarming issue which needs to be taken into account seriously.

Conclusion

Children in general deserve special protection for they are vulnerable due to their tender age. The concept of child protection is broader in a sense that it encompasses the task of safeguarding social, political, economic and cultural interest of children. The idea of child rights embodies the right to be protected from economic exploitation and harmful work, from all forms of sexual exploitation and abuse, and from physical or mental violence, as well as ensuring that children will not be separated from their family against their will. Most importantly, it is pointed out that the idea of protection of rights of children of divorced parents, among others, refers to children's right to develop and maintain an independent relationship with each parent; a right to have ones voice heard in the divorce proceeding; and a right to be financially supported by both parents.

CHAPTER THREE

THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF THE RIGHTS OF CHILDREN OF DIVORCED PARENTS IN ETHIOPIA

Introduction

It is obvious that protection of human rights in general requires the existence of relevant legal and institutional framework. This chapter focuses on discussion of relevant laws as well as organs established there under for the protection of children of divorced parents. As such, the chapter has two main sections respectively dealing with the legal frameworks and protective organs. The first section has four sub-sections which respectively dwell on the CRC and ACRWC; the FDRE Constitution; the protection of children of divorced parents under RFC; and the significance of the Criminal Code FDRE in the protection of such children. The second section under its four sub-sections respectively deals with Executive Organs of Government; National Human Rights Institutions; Courts; and Non-State Actors (NGOs) as prominent protective organs of children in general and children of divorced parents in particular.

3.1. THE LEGAL FRAMEWORK

3.1.1. THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC) AND THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF CHILDREN (ACRWC)

The United Nations adopted an international legal instrument called “Convention of the Rights of Child (CRC)”, the founding text of a new concept: children’s rights.⁶⁷ In addition to adoption of CRC by the United Nations, ACRWC as the first regional instrument with specific focus on protecting the rights of children was adopted and ratified by the African countries under the auspices of Organization of African Unity (OAU).⁶⁸ In a similar trend with any legal instrument in stipulating its addressees, both CRC’s Article 1 and ACRWCs Article 2 provides the foundation for the application of the two child rights instruments. Both instruments follow a holistic approach in defining the rights and freedoms of children. That is to say, children are

⁶⁷Supra note 1.

⁶⁸Supra note 2.

entitled to civil and political rights;⁶⁹ and social, cultural and economic rights⁷⁰ under both instruments. These rights are applicable on all children from every walk of life without distinction based on any ground. In other words, special groups of children such as, children of divorced parents like any other children are entitled to these rights and freedoms. For instance, right to maintenance; right to visitation; right to adequate standard of living; and right to education, *inter alia*, are highly pertinent to such children.

The UN Committee on the Rights of the Child (UNCRC) highlighted four principles that were to help in the interpretation of the convention as a whole and thereby guide its implementation.⁷¹ These principles are: the principle of non-discrimination;⁷² the principle of best interest;⁷³ the right to be heard;⁷⁴ and the right to survival, life and development.⁷⁵ These principles are also adopted by the ACRWC almost in a similar fashion.⁷⁶ The subsequent section deals with the protection of child rights in general, and rights of children of divorced parents in particular under the Constitution of the FDRE.

⁶⁹The major civil and political rights include: right to name, nationality and to know his or her parents (Article 7 of the CRC and Article 6 of the ACRWC); right to preserve his or her identity (Article 8 of the CRC); right to freedom of expression to seek and receive information (Article 13 of the CRC and Article 7 of the ACRWC); right to freedom of thought, conscience and religion (Article 14 of the CRC and Article 9 of the ACRWC); right to freedom of association and peaceful assembly (Article 15 of the CRC and Article 8 of the ACRWC); right to privacy (Article 16 of the CRC and Article 10 of the ACRWC); right to access to appropriate information (Article 17 of the CRC); and freedom from torture or other cruel, inhuman, degrading treatment or punishment (Articles 37(a)&19(1) of the CRC, and Article 16(1) of the ACRWC).

⁷⁰The socio-economic and cultural rights of children include: right to maintain personal relation and direct contact with non-custodial parent or visitation right (Article 9/3 of the CRC and Article 19/2 of the ACRWC); right to maintenance (Article 27/4 of the CRC); right to periodic review of treatment (Article 25 of the CRC and 14/2(b & d) of the ACRWC); right to protection from all forms of violence (Article 19 of the CRC and Article 16 of the ACRWC); right to health and health services (Article 24/1 of the CRC and Article 14/1 of the ACRWC); right to water and sanitation (Article 24 of the CRC and Article 4/2(c & h) of ACRWC); right against harmful traditional practices (Article 24/3 of the CRC and Article 21 of the ACRWC); right to benefit from social security (Article 26 of the CRC); right to adequate standard of living (Article 27 of the CRC and Article 5/2 of the ACRWC); right to education (Article 28 of the CRC and Article 11 of the ACRWC); and right to leisure, play and culture (Article of 31 the CRC and Article 12 of the ACRWC).

⁷¹International Child and Youth Care Network, The Four Principles of Child Rights (20 November 2001) available at: <http://www.cyc-net.org/today2001/today011120.html> (accessed on 2/12/216).

⁷²Supra note 1, Article 2 of CRC; and supra note 1, Article 3 of the ACRWC.

⁷³Id, Article 3(1) of the CRC; and Article 4(1) of ACRWC.

⁷⁴Id, CRC Article 6 sub; and Article 5(1, 2&3) of ACRWC.

⁷⁵Id, Article 12(1) of the CRC; and Article 4(2) of the ACRWC.

⁷⁶Although the expressions or wordings of these principles in the CRC are not exactly identical to the principles enshrined under the ACRWC, it seems both have almost the same aspirations and goals to achieve.

3.1.2. THE CONSTITUTION OF THE FDRE

The Constitution of the FDRE as opposed to its predecessors brought a radical shift in terms of human rights.⁷⁷ It affirms the rights of all persons including men, women and children alike. Race, nation, nationality, or other social origin, color, sex, language, religion, political, or other opinion, property, birth or other status are declared as prohibited grounds of discrimination.⁷⁸ As a result, children have the same rights save certain age-related exceptions including in the sphere of the right to stand for election.

In addition to the transformation in terms of human rights in general, it also declares the vulnerable position of children in particular and granted them rights as well as the subsequent protection thereto.⁷⁹ It stipulates important provision on the rights of children which; inter alia, include the right to life; the right to know and be cared for by his/her parents or legal guardians; and the right to respect for their best interest.⁸⁰

Ethiopia as a state party to both the CRC and the ACRWC has incorporated the general principles of these instruments within the Constitution as well as the RFC. Article 25 of the FDRE Constitution recognized the principle of non-discrimination which states that “all persons are entitled to the right of equality before law.” Therefore, divorced parents cannot discriminate between their children in the provision of basic necessities of life like food, education, healthcare and other services on the basis of any ground. The principle of best interest is clearly enshrined under Article 36(2) and 113(2) of the Constitution and RFC respectively.

The constitution has also incorporated the principle of survival, right to life and development under Article 36(1/a) (children’s right to life) specifically, and Articles 15 (right to life of every person) and 43/1 (people’s right to improved standard of living and sustainable development) generally. As to the principle of respect of the views of child, there is no explicit clause both within the constitution and other laws except Article 291 of the RFC which provides that the tutor shall consult the minor in all important matters concerning him, unless the latter is lesser than 14 years old.

⁷⁷Adem Kassie, “Human Rights under the Ethiopian Constitution: A Descriptive Overview” Mizan Law Review, Vol. 5, No.1, (2011), p.42.

⁷⁸Supra note 5, Article 25.

⁷⁹Supra note 55, p.23.

⁸⁰Supra note 5 Article 36.

Despite the fact that Article 9(4) of the constitution provides that international as well as regional instruments ratified by Ethiopia are an integral part of the legal system of the land (once ratified), the effort geared towards giving legal effects to the CRC and the ACRWC appears to be inadequate.⁸¹ As an integral part and parcel of Ethiopian legal system these two instruments should have been made known to the public on the basis of *Federal Negarit Gazeta* Establishment Proclamation.⁸² The failure to publish these instruments in the official law *Gazette* has been the cause or an obstacle to their enforcement.⁸³

Above all, the most significant development introduced by the Constitution is its promise towards the enactment of laws so as to ensure the protection of rights and interests of children at the time of divorce.⁸⁴ However, so far as the knowledge of the researcher is concerned, there is no distinct legislation primarily meant for protections of child rights during or after divorce except the RFC which is too general. This is one of the loopholes of Ethiopian legal system towards the protection of the rights of the children of divorced parents. One way or another, this is attributed to the absence of single all-encompassing Children's Act-a law that amalgamates everything about child rights and child protection.⁸⁵

Since the adoption of the Constitution, Ethiopia has taken significant steps aimed at legal reform. Several pieces of legislation affecting children have been promulgated. Some of the major legal reform initiatives which play a crucial role for the safeguarding of the rights of children include the entry in to force of the Revised Family Code in 2000, the Labor Proclamation in 2003 and the Criminal Code in 2005. The labor proclamation prohibits the employment of children below the age of 14 years of age.⁸⁶ The place of the RFC in the realm of protection of child rights is dealt with subsequently.

⁸¹Supra note 55, p.25.

⁸²The Federal Negarit Gazette Establishment Proclamation No. 3/1995, Federal Negarit Gazette, Year 1, No.3 Article 2(2).

⁸³Supra note 55, p.25.

⁸⁴Supra note 5, Article 34(1).

⁸⁵Supra note 13. In this regard, the UN Committee on the Rights of the Child expressed its deep concern over the need for adoption of a comprehensive Children's Code by Ethiopia.

⁸⁶Labor Proclamation Number 377/2003, Federal Negarit Gazette, Year 10, No. 12, (26th February 2004 Addis Ababa), Article 89(2).

3.1.3. THE REVISED FAMILY CODE OF THE FDRE

One of the successes of the Ethiopian legal system towards the protection of family is the adoption of a comprehensive code called the Revised Family Code of the FDRE dealing with family matters at Federal level. For the purpose of this study the RFC can be invoked as a most relevant law for the protection of the rights of children of divorced parents. The RFC dwells upon various issues pertaining to children including marriage, adoption, affiliation and maintenance, custody and other issues.

The issue worth mentioning here is what are the protections guaranteed to the children of divorced parents by the RFC? Though the code does not explicitly define such rights under a separate section, from the overall reading of and by inter-playing the provisions of the code relating to divorce with the Constitution and other relevant laws including the CRC and the ACRWC, we draw rights and benefits to which children of divorced parents are entrusted.

Accordingly, Articles 80(3), 82(5&6) and 113(1&2) envisage that such children are entrusted with: right to maintenance, right to custody, right to be heard through their parents or a court, the right to visitation, right to education and right to health care. Also, these provisions of the code imply that certain obligations lie on divorced parents to respect these rights and refrain from acts violating the exercise of the rights.⁸⁷

The above mentioned rights of children of divorced parents are formulated on the basis of the guiding principles of children's rights defined both under the CRC and the ACRWC. These principles would serve as a parameter or standard in course of putting the aforementioned rights into action administrative as well as judicial organs of the government. From among the four principles, the principle of best interest of child serves as the most influential test with respect to the protection of rights of children of divorced parents. The protection guaranteed for children of divorced parents under the Criminal Code is dealt under the section that follows.

⁸⁷Supra note 55, p. 87. According to Girmachew Alemu and Yonas Birmata, obligation owed to children (in general) by their parents under Ethiopian law include: duty to maintain contact; duty of care of the person of the child; fixing the place of residence of the child; watching over the health of the minor; taking necessary measures in case of sickness of the child; directing the upbringing of the child; taking the necessary disciplinary measures for the purpose of ensuring his upbringing; directing and supervising the social contacts of the child; and ensuring that the child receives general and professional education commensurate to his Age. For stronger reason, divorced parents obviously owe these obligations to their children.

3.1.4. THE CRIMINAL CODE OF THE FDRE

The interest of the society at large in the proper upbringing of the future generation necessitates a special protection for children by the law. The Criminal Law is one field of law meant to achieve this end. It is one of the achievements of legislative reforms carried out by Ethiopia in order to ensure the protection of children's rights.

The most relevant penalty clauses prescribed by this code for the protection of children are maltreatment of minors, failure to maintain, failure to bring up and failure to produce a minor as provided under articles 576, 658(a), 659 and 592 respectively. These provisions could also be invoked for the protection of the rights of children of divorced parents. The penalties or sanctions imposed on parents or lawful guardians under these provisions vary from fine, deprivation of the parents' custody right to imprisonment.

However, it is argued that the measures to be taken based on the penalty or sanctions prescribed by the code should not go beyond the privacy limit of the concerned parent or spouse primarily in a sense not to jeopardize the life of the child after divorce.⁸⁸ Hence, through the means of application indicated under article 212 of the Code (for crimes punishable upon complaint) the penal sanctions should apply taking into account the reasonableness of the decision to be made.⁸⁹ This means, since penal sanctions are more severe than civil sanctions all possible means should be exhausted before applying it. Also, it is because restraint of the privacy of custodial parent inevitably affects the interest and security of the child under his/her custody.

3.2. THE INSTITUTIONAL FRAMEWORK OR PROTECTIVE ORGANS

In the absence of protective organs or institutional mechanisms for the enforcement of the rights of children of divorced parents, legal frameworks discussed above remain mere wish. With regard to child protection in general, the CRC Committee has commented state parties to establish permanent self monitoring mechanism or organ in order to follow up the implementation of the CRC.⁹⁰ This section deals with the protection of the rights of children by

⁸⁸Supra note 21, p. 65.

⁸⁹Ibid.

⁹⁰Committee on the Rights of the Child, General Comment No.5, 2003, (CRC/GC/2003/5, para.35-41) available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En?OpenDocument) (accessed on 01/01/2017).

Executive Organ, the Judiciary Organ, the National Human Rights Institutions (NHRIs) and Non-Governmental Organizations NGOs.

3.2.1. THE EXECUTIVE ORGANS OF GOVERNMENT

In Ethiopia, the higher government organ that is entrusted to follow up the implementation of the children's right is the Ministry of Women and Children's Affairs (MWCA or the Ministry).⁹¹ The 'Children and Mothers Department' of this Ministry is deemed to be an equivalent of the kind of government organ required by the CRC Committee as mentioned above.⁹² It is argued that a kind of government organ required as per the CRC Committee recommendation which is specifically concerned to children matters, vested with sufficient level of authority to make the matters of children visible in the government and to centrally guide, coordinate and monitor the efforts and effects of all other concerned agencies and organizations is not available in Ethiopia.⁹³

Other key government bodies established for the implementation of the rights of child include the National Inter- Ministerial Committees (NIMC) on the CRC at regional, zonal, *woreda* and *kebele* levels.⁹⁴ The Ministry of Labor and Social Affairs (MOLSA) has also established a National CRC Committee wherein government ministries, international organizations and NGOs

⁹¹Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 691 of 2010, Federal Negarit Gazette, Year 17, No.1, (27th October 2010, Addis Ababa). According to Article 10, the Ministry is entrusted with the power and duty to initiate policies and laws; prepare plans and budgets, and upon approval implement same; to ensure the enforcement of the federal government laws; and to undertake study and research; collect, compile and disseminate information relating to women and children's affairs.

⁹²Supra note 23, p.132.

⁹³Ibid. According to Ato Tsegaye Deda, the author added that the recommendation of CRC Committee is to consider establishing an organ perhaps a "Children Commission" solely concerned with children matters and directly reporting to the prime minister, cabinet office, or the federal parliament which would ensure that activities of various sectors could, not only be effectively coordinated centrally, but also sanctioned.

⁹⁴Ghetinet Metiku, Child Rights Monitoring and Enforcement Mechanisms under Ethiopian Law, (January 2010, Addis Ababa), p.7 available at: <http://www.slideshare.net/gmgiorgis/child-rights-monitoring-and-enforcement-mechanisms-under-ethiopian-law-january-2010> (accessed on 21/12/2016). The National Inter- Ministerial Committees (NIMC) which was established in 1994 with the overall mandate of monitoring and guiding the implementation of the CRC, is composed of Ministries of Health, Education, Information, Justice, Finance and Economic Development, Culture and Sports as well as the Police Commission and the Prime Minister's Office, and chaired by children, Youth and Family Affairs Department of the Ministry of Labor and Social Affairs (MOLSA).

are members with a mandate to follow-up the implementation of the CRC by member organizations.⁹⁵

3.2.2. THE NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

Every state party to the CRC are required to have an independent and effective human rights institution that are constitutionally entrenched and legislatively mandated with responsibility for promoting and protecting children's rights.⁹⁶ Ethiopia has provided constitutional base for the establishment of these NHRI via article 55(14) & (15) of its Constitution, which empowers the House of Peoples Representative (HPR) to establish the Human Rights Commission and the institution of the Ombudsman determining their power and function.⁹⁷ To this end, the HPR has issued two proclamations establishing and defining mandates and powers of the said Commission (EHRC)⁹⁸ and Institution (EIO).⁹⁹

The EHRC is established, *inter alia*, with a mandate to follow up the implementation of the CRC while investigating matter in respect of child rights and make recommendations to improve the functioning of State organs.¹⁰⁰ The activities of the EHRC also include monitoring visits to orphanages and alternative care providing institutions to check the quality of their services from a human rights perspective, and recommend their immediate improvements or even closure if their standard is below the required level.¹⁰¹

The basic functions of the Institution of the Ombudsman (EIO) is to protect citizens including children of divorced parents against administrative injustices and bureaucratic oppression and to provide an aggrieved persons with accessible avenue for compliant when such injustices and

⁹⁵The FDRE Country Response to the Questionnaire on Violence against Children to the UN Secretary General's Independent Expert on the Study on Violence against Children, (May 2005) p.6. available at: www2.ohchr.org/english/bodies/CRC/docs/study/responses/Ethiopia.pdf (accessed on 20/02/2017)

⁹⁶Committee on the Rights of the Children, General Comment No. 2, 2002, (CRC/C/GC/2002/2, Para. 8), available at: ([http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2002.2.Sp?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2002.2.Sp?OpenDocument)) (accessed on 02/01/2017)

⁹⁷Supra note 5, Article 55(14) & (15).

⁹⁸Ethiopian Human Rights Commission Establishment Proclamation No 210 of 2000, Federal Negarit Gazette, Year 6, No.40, (4th July, Addis Ababa).

⁹⁹Institution of Ombudsman Establishment Proclamation No 211 of 2000, Federal Negarit Gazette, Year 6, No. 41, (4th July, Addis Ababa).

¹⁰⁰Supra note 98, Art. 6 (1&4).

¹⁰¹Combined 4th and 5th Periodic Reports of the Federal Democratic Republic of Ethiopia to the United Nations Committee on the Rights of the Child 2006 – 2011, (April 2012, Addis Ababa), p. 12. Available at: <http://www.africanchildforum.org/clr/Report%20and%20Concluding%20Observation/CRC/report/ethiopia-%20fourthandfifth-uncrc-sr-en.pdf> (accessed on 20/03/2017)

oppressions occur.¹⁰² In this regard, the institution has designed 11 model children parliament in the two city administration and in all regions as a platform where children learn and exercise their democratic and other rights, come together to discuss around their common problems and make their voice heard by the executive organs.¹⁰³ This is one of the significant achievements of the institution in the area of child rights protection.

3.2.3. COURTS

The adoption of both the CRC and the ACWRC by Ethiopia, and incorporation of the principles or standards of such instruments in domestic laws worth noting if not put into action at court of law. As expressly provided by the RFC, courts are the only competent organs to decide on divorce, to decide or approve the conditions as well as effects of divorce.¹⁰⁴ For instance, in case of divorce both by mutual consent and by petition, the court is empowered to ensure that divorce agreement as between spouses shall not affect the interest and wellbeing of children, and give order regarding custody and maintenance of children from the time petition for divorce is brought before it.¹⁰⁵

The law requires the court to ensure the best interest of children of divorced parents when giving decision regarding custody, care of education, health, maintenance and right to of visitation; and in case of divorce by petition while deciding which one of the spouses shall leave a common abode as provided under Articles 82(6) and 113(1&2) of RFC. As an organ of protection of children of divorced parents, courts are also empowered: to decide tutorial or guardianship of children while deciding on divorce where spouses failed to agree; and to appoint or remove guardian or tutor other than parents.¹⁰⁶

In addition to being an organ of protection, courts together with parents also serve as a representative of children of divorced parents as can be understood from Articles 80(2&3), 83 (1,2,5&6) and 113(1) of RFC. This is because, under the section of RFC dealing with divorce there is no clause relating to legal representation of children in the divorce proceeding. Here, it is natural that parents are eligible to act on the behalf of their fellow children. But, it is argued that

¹⁰²Supra note 99, Article 5.

¹⁰³Supra note 101, p.10.

¹⁰⁴Supra note 6, Articles 117, 80 and 113.

¹⁰⁵Id, Articles 80(3) and 83(5).

¹⁰⁶Id, Articles 221(2) and 249 (2).

parents going through the pain of separation are not always in the best position to make a rational decision about their own interests, let alone their children.¹⁰⁷ Also, in a country like Ethiopia where judges are harassed by pressure of time due to shortage of man power it is doubtful to expect from courts effective representation of children in divorce proceeding.¹⁰⁸

The Federal Supreme Court (FSC) Cassation Bench, the highest judicial body in Ethiopia has been making a great deal of contribution towards protection of the rights of children of divorced parents. Since recent years it has granted milestone decisions, among others: concerning custody;¹⁰⁹ removal of guardian and tutor of children;¹¹⁰ maintenance on the basis of principles of best interest of children;¹¹¹ and right to view of children.¹¹² These decisions would serve as a law and as such binding on future similar cases by virtue of Proclamation 454/2005.¹¹³

3.2.4. THE NON-GOVERNMENTAL ORGANIZATIONS (NGOs)

The CRC Committee recommends that state parties to the Convention need to respect autonomy of the NGOs working on promoting, protecting and monitoring children's human rights.¹¹⁴ Ethiopia as signatory state of the CRC is obliged to comply with the recommendations of the CRC Committee. However, Proclamation for the Registration and Regulation of Charities and Societies which is issued in 2009 came up with curtailing clauses that seriously hinder NGOs especially those working on advocacy of human rights including protection of children's rights.¹¹⁵

¹⁰⁷Supra note 21, p.56.

¹⁰⁸Id, p.57.

¹⁰⁹W/t Tsedale Demissie vs. AtoKifle Demisse, FSC Cassation Division File No.23632, Compilation of FSC's Cassation Decisions on Children's Rights, (2007 E.C., Addis Ababa)p.5-7.

¹¹⁰Id, W/ro Tiruhayew Bitew vs. Ato Gashaw Andarge FSC Cass. Div.File No., 85831, pp.221-126.

¹¹¹Id, Ato Kasa Fanta vs.W/ro Iskedar Gichewu, FSC Cass. Div. File No. File No. 45819, pp.54-55; Mr. Adem Hamid vs. Hannah Abdulqadir, FSC Cass. Div. File No. 98552, pp.127-130; and Ato Abdul Hamde vs. W/ro Zemzem Redi, FSC Cass.Div. File No. 101320, pp.136-138.

¹¹²Id, Wro Etsegenet Eshetu vs. Wro Selamawit Nugusie, FSC Cassation Division File No.35710; pp.14-21.

¹¹³Federal Courts Re-amendment Proclamation No.454/2005, Federal Negarit Gazette, Year 11, No, 42, (14th June 2005 Addis Ababa).

¹¹⁴Committee on the Rights of the Child, General Comment No.5, 2003, (CRC/GC/2003/5, para.12) available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En?OpenDocument) (accessed on 01/01/2017).

¹¹⁵Supra note 14, Article 14 (j-n). From among three classifications of charities and societies recognized by the proclamation, only Ethiopian charities are entitled to engage on advocacy on human rights including the rights of children.

Among others, the Proclamation requires Ethiopian charities to obtain 90 percent of their funding from local sources. The Committee on the Rights of the Child expressed its concern over the restrictions imposed upon NGOs and requested Ethiopia to respect the role played by civil society for the implementation of the Convention on the Rights of the Child.¹¹⁶ Despite such recommendation from the CRC Committee and other stakeholders the proclamation is still viable. Consequently, the number of NGOs working on child rights protection is decreasing from time to time. The data from the International Center Not for Profit Law indicates that there were 3181 Civil Society Organizations (CSOs) as of December 2014. In the same year, while 174 new CSOs were registered; 158 were closed out of which 133 were involuntarily collapsed for failing to implement projects due to lack of funds.¹¹⁷

However, the FDRE government has been sticking to the position that the enactment of the Proclamation created an adequate legal framework to administer the sector, defined area of intervention of charities and societies, created conducive situations for NGOs to operate and defined their relations with sector bodies.¹¹⁸ Currently, CSOs in Ethiopia are working in seven core service areas of child protection which includes: shelter and care; economic strengthening; legal protection; health care; psychosocial support; education, food and nutrition; and coordinated care linked to all sectors for appropriate mix of services for program beneficiaries.¹¹⁹

There are some NGOs that are working on the protection of children's rights enduring the existing practical as well as legal inconveniences. Among others, some of these are: The African Child Policy Forum (ACPF), The CLPC, The EWLA, and Prison Fellowship Ethiopia (PFE). At this juncture, a brief discussion of the EWLA and the CLPC is necessary owing to the significant role they play as compared to others in the protection of the children of divorced parents.

To begin with the CLPC, it was formerly established in 2005 G.C. as non-profit organization with the overall objective of promoting and protecting the rights of children in Ethiopia.¹²⁰ It was restructured in 2012 G.C. under the auspices of Child Justice Project of the FSC, and thereby

¹¹⁶Supra note 13 Para. 22. The Committee on the CRC also called upon Ethiopia to encourage the active, positive and systematic involvement of civil society, including NGOs, in the promotion of children's rights.

¹¹⁷ Available at: <http://www.icnl.org/research/monitor/ethiopia.html> (accessed on 02/01/2017)

¹¹⁸Supra note 101, p. 15.

¹¹⁹Ibid.

¹²⁰Supra note 15.

partly funded by the government.¹²¹ Currently it is one of the few non-profit associations in Ethiopia that provide direct legal representation and counselling as well as psycho-social service to children. As a part of its legal aid service program it renders mediation of divorce cases and post divorce disputes which arise as between the divorced spouses with regard to children's custody, maintenance and visitation rights.¹²² The Center has branch office at Federal High Court Lideta Division and at the FFIC Yeka Division in addition to its main office at the FSC.

According to Ato Sena Tilahun, a legal advocate at the centre there are four major challenges restraining the task of protection of child rights in general and the rights of children of divorced parents in particular. First comes, failure to publish the CRC and the ACWRC, that has been creating discrepancy among the lawyers' understanding of the English version of the instruments. Second, the absence of distinct child law on the one hand, and separate legislation dealing with the protection and implementation of rights of children of divorced parents on the other hand. Third, absence of separate and binding legislation or guidelines for the protection and implementation of rights of children of divorced parents in turn is the cause for the lack of uniformity or consistency and predictability of decisions of courts relating to the rights and interests of children of divorced parents. Last, judges working on family bench lack specialization and depth knowledge on family law in general and on the legal regimes for the protection of children in particular.

When we come to EWLA, it is a local women's NGO established not-for -profit in 1995 G.C. with a primary objective to promote the rights of women (and girls) through three interdependent programs which are research and law reform advocacy, public education and legal aid.¹²³ It provides financial support, temporary shelter (by referral to the volunteer foster organization) and psycho-social support (by referral to hospitals) to the needy children of divorced parents mostly until the time post-divorce proceeding relating to their custody and maintenance is settled.¹²⁴ In this regard, W/t Eyerus maintained that the legal advocates of the association are

¹²¹ Available at: <http://www.fsc.gov.et> (accessed on 19/03/2017 G.C.)

¹²² Interview with Ato Sena Tilahun, A Legal Advocate at Children's Legal Protection Center (CLPC) of the Child Justice Project of Federal Supreme Court, on 15 January, 2009 E.C.

¹²³ Supra note 16.

¹²⁴ Ibid.

those having rich experience and specialization on the women and children's rights.¹²⁵ They are also required to regularly update themselves with the cassation decisions of the FSC and the General Comments as well as Concluding Observations of the committee on the CRC relating to women and children's rights.¹²⁶

The association's advocacy and lobbying engagements had been significant in the process of reform of laws that had been discriminatory against children and women which resulted in the revised laws such as: the RFC, the FDRE Revised Criminal Law, Pension law and the Sexual Harassment Guideline.¹²⁷ This and the above roles it has been playing in the area of child rights protection are the most significant achievements of the association. Yet, it is not free of challenges. Most essentially, shortage of financial resource which is mainly attributed to the 'ninety percent local funding clause' of the CSP is combating the association from implementing its programs to the fullest scale envisioned.¹²⁸

Conclusion

Ethiopia being a state party to both the CRC and the ACRWC has made considerable efforts towards protection of child rights. Among others, incorporation of the four guiding principles within the Constitution, the RFC and other laws as discussed above is a great success. But, absence of distinct child law in general, and binding legislation and rules of procedure or guidelines for the protection and implementation of rights of children of divorced parents in particular are the major loopholes of legal framework for the protection of the rights of children of divorced parents in Ethiopia as it stands now. As to the institutional framework, the kind of government organ recommended by the Committee on the CRC which is vested with sufficient level of authority to make the matters of children visible in the government and to centrally guide, coordinate and monitor the efforts and effects of all other concerned agencies and organizations is not available in Ethiopia. Also, the 'ninety percent local funding clause' of the Communities and Societies Proclamation (CSP) is challenging local NGOs/CSOs from implementing their objectives and programs of child protection to the fullest scale possible.

¹²⁵Interview with W/t Eyerus Solomon, A Project Coordinator At Ethiopian Women Lawyers Association (EWLA), On 17 January, 2009 E.C.

¹²⁶Ibid.

¹²⁷Supra note 16.

¹²⁸Supra note 125.

CHAPTER FOUR

ANALYSIS OF THE PROTECTION OF THE RIGHTS OF CHILDREN OF DIVORCED PARENTS IN PRACTICE

Introduction

The children whose parents are divorced owing to none of their fault should not be subjected to misery. They deserve a special protection by the law. The RFC has guaranteed the children of divorced parents with rights that include: the rights to maintenance, custody and visitation. These are special rights unique to such children apart from other civil and political, and socio-economic as well as cultural rights to which they are entitled just like any children. Analysis of the protection of the rights of children of divorced parents in practice with particular emphasis on the rights to maintenance, custody and visitation is the focus of this chapter.

As such, the chapter is organized into three main sections respectively dealing with the analysis of the practice pertaining to the protection of Custody; Maintenance; and Visitation rights of children of divorced parents. Conclusion of the main findings of the study under this chapter comes at the end.

4.1. THE RIGHT TO CUSTODY

In general terms, the word custody pertains to whom the child is to live with, and which parent has the responsibility to make major decisions about the life of the child.¹²⁹ It is natural that there is nothing better for children than living with both of their parents under the same roof. But, divorce, among others, interrupts such natural course of things. It is in such a scenario that children of divorced parents are accorded with the benefit of custody. Yet, the termination of spousal relationship through divorce does not bring to an end to the parenting status of the spouses over children. So, though custody is primarily meant to protect children, it benefits the divorced parents, too.

Under both article 9(1) of the CRC and article 19(1) of the ACRWC children are entitled to a right to live with their parents unless this is deemed incompatible with their best interests. The proviso “*a child shall not be separated from his or her parents...*” under these provisions can be interpreted to mean the right of children to remain under the custody of their parent(s) even after

¹²⁹Aschalew Ashagrie and Martha Belete, Law of Family: A Teaching Material, (Unpublished, 2009) p. 264.

a divorce. Ethiopia as a signatory state of both instruments has recognized the fact that the rights and interests of children in divorce require a special legal protection.¹³⁰

The RFC has well recognized the urgency of the issue of custody of children of divorced parents.¹³¹ In case of divorce by mutual consent of both spouses it is stated that the agreement of the spouses with regard to divorce shall also regulate the consequences of their divorce,¹³² and such agreement need not to be contrary to the wellbeing and interest of children.¹³³

Even though spouses mutually agree to divorce, in most cases they fail to reach upon agreement when it comes to settlement of the effects of divorce including custody of children. Ato Sena, a legal advocate at the Center mentioned that most fathers deliberately contest paternity at the critical moment of divorce merely so as to evade their paternal responsibility with respect to children.¹³⁴ As a result, most of the time, mothers are forced to request the court to order a DNA investigation.

The Centre is the only institution in Ethiopia which sponsors DNA investigation if the court found it necessary to proof paternity. It is claimed that this service is the most cumbersome of all tasks of the centre.¹³⁵ This is because, the investigation is expensive and takes long period of time as it is conducted abroad. As a result, the centre is currently facing shortage of finance and not effectively carrying out other services for the protection of children's rights. This obviously delays determination of custody for it is difficult to do so unless the issue of paternity is resolved first.¹³⁶ The above mentioned legal expert blame courts for simply rushing to order DNA investigation without exhausting other possible way outs to proof paternity.¹³⁷ In this regard, in a certain case between anonymous parties, the FSC Cassation Bench stated that the DNA investigation shall not be claimed as of right. It added that courts need to resort to order such investigation as a last option. That is, it is not reasonable if the court directly rush to order DNA

¹³⁰Supra note 5, Article 34(1).

¹³¹Supra note 6, Article 82(5). In case of divorce by petition of one of the spouses, it is provided that: "From the time the petition for divorce is brought before it, the court shall forthwith give appropriate order regarding the maintenance of the spouses, the custody and maintenance of their children and the management of their property." .

¹³²Id; Article 70(1).

¹³³Id; Article 80(3).

¹³⁴Supra note 122.

¹³⁵Ibid.

¹³⁶Ibid.

¹³⁷Ibid.

investigation without exhausting other procedures of ascertainment of paternity provided by the RFC such as legal presumption, acknowledgment and judicial declaration one after another as per Articles 126, 131 and 143.¹³⁸

Upon the final pronouncement of divorce the issue as to which parent shall take custody as well as guardianship of the child would also be settled by the courts as per Article 113(1) of the RFC. Yet, the practice in this regard shows circumstances where by the determination of custody of children might be adjourned even after the divorce is finally disposed. For instance, in the case of *W/ro Yordanos Worku vs. Ato Immiru Beniam*,¹³⁹ the court found the petitioner eligible to take custody of the one year old infant named Elnatan on condition that she is willing to change her occupation within thirty days from the date of the decision. As a result, the final determination of the custody of the infant is made to wait for a month upon which the petitioner is ordered to notify her position whether to change her current occupation or not.

With regard to the criteria of determination of child custody the RFC provides that the court has to take into consideration the income, age, health, and condition of living of the spouses as well as the age and interests of the children.¹⁴⁰ These conditions need to be cumulatively considered by the court in order to decide as to which spouse shall have custody of the children. Here, the researcher believes that if the spouse claiming custody has good income, but old aged and terminally ill, she/he is presumed not eligible to take custody of the child. This is mainly meant to ensure the best interest as well as the survival and development of the child.

In its milestone judgment, in *W/t Tsedale Demissie vs. Ato Kifle Demisse*,¹⁴¹ the FSC Cassation bench invoked Article 36(2) of the FDRE Constitution and Article 3 of the CRC which provides that the best interests of the child shall be the primary consideration in deciding all matters concerning the child. The Cassation Bench noted that regardless of the fact that Ethiopian Laws give primacy to parents of children for the purpose of guardianship and tutorship this would be the case only in the event that parents serve in the best interests and well-being of children. It observed that the literal adherence to the letter of the law demonstrated by the lower courts in

¹³⁸Supra note 109, Mr. A vs. B, FSC Cassation Bench File no. 90121, 28/01/2007 E.C. pp. 131-135.

¹³⁹*W/ro Yordanos Worku vs. Ato Immiru Beniam*, Federal First Instance Court Civ. File Number 26605, on 19 June, 2007 E.C. (Unpublished).

¹⁴⁰Supra note 6, 113(2).

¹⁴¹Supra note 109.

this case does not comply with the principle of the best interests of the child as the primary consideration. The Cassation Bench also stated that the order of lower courts for removal of the child from the homestead where he lived in serenity (i.e. the dwelling house of the petitioner) for long without consulting the child also constitutes a gross irregularity. It has further maintained that the respondent was merely provoked by the financial gain and property he would obtain by his status as tutor and guardian of the child contrary to the best interests of the child. As such, the Cassation Bench quashed the decision of the lower courts since it runs counter to the doctrine of the best interests of the child provided in the FDRE Constitution and the CRC on the Rights of the Child and awarded guardianship and tutorship of the child to the petitioner as she is the one who has been nursing and caring for the child for 12 years.

The nature of occupation of the spouses is an important factor to be taken in to consideration to determine custody. That is, the convenience as well as the working hour of the occupation of the custodian spouse has an impact on the upbringing of the child. In the aforementioned case the court ordered the petitioner (the mother) to change her occupation within a month so as to take the custody of the infant child.¹⁴² The age of the child is also required to be considered strictly while deciding on custody. For instance, in the File No. 25637¹⁴³ which was decided on October 29, 2007 E.C., the petitioner claimed the custody of the child named Christian (ten months old at the time of the decision) arguing that the child is too infant and highly needs breast feeding that the biological mother can only provide.¹⁴⁴

The court ensures the fact that determination of custody of children is made in a manner compatible with article 113(2) of the RFC mainly on the basis of the opinion of the social worker or expert in addition to the evidences provided by the spouse claiming custody or the petitioner parent.¹⁴⁵ A Family Council may also involve in the assessment of the best interest of child with respect to custody.¹⁴⁶

But, these mechanisms are not enough to exactly discern the needs and interests of the child. The most efficient mode of ensuring the best interest of children, which in most cases is passed over

¹⁴²Supra note 139.

¹⁴³Wro Eleni Yimer vs. Ato Samuel Woldeyes, Federal First Instance Court, Civ. File Number 25637, on 29 October, 2007 E.C. (Unpublished).

¹⁴⁴Ibid.

¹⁴⁵Interview with Ato Berhanu Tasebe, A Judge at FFIC Bole Division, on 10 February, 2009 E.C.

¹⁴⁶Supra note 51, p.101.

by the court, is giving children an opportunity to express their opinion by appearing on trial.¹⁴⁷ In cognizance of this fact the CRC Committee suggested that all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes relating to issues of maintenance, custody and access or visitation.¹⁴⁸

However, under the section of the RFC dealing with divorce there is no explicit mention of the right to views of children of divorced parents in the court proceeding or mediation process relating to their interest, and there is no specific provision dealing with separate representative for children in divorce proceeding. Such gap paved a room especially for lower courts to act arbitrarily on whether to hear the opinion of the child or not.¹⁴⁹

However, it is noteworthy to mention here the cassation decision of the FSC in a file no. 35710¹⁵⁰ granted on 16 December, 2001 E.C. This case is filed based on the petition alleging that the judgment of the Addis Ababa City Government Court Cassation Bench constitutes fundamental error of law. Both parties submitted their written submissions. The court also undertook oral examination of the parties. The Court also entertained the views of child and recorded his thoughts on the matter. As such, the child has made it clear that he has not obtained the attention and care needed from his aunt (the respondent) following the death of his father. From this, the court took note of the fact that the child is 10 years old and manifests maturity. This consideration has necessitated the need to accord due weight to the views of the child. Accordingly, the court has found the Decision of the Cassation Bench of Addis Ababa City Government constituting fundamental error of law and thereby appointed the petitioner (sister of the child) as the guardian and tutor of the child.

In the above mentioned case of *W/ro Yordanos Worku vs. Ato Immiru Beniam*,¹⁵¹ the court has taken into account the nature of occupation of the petitioner so as to determine the custody of the child. The social worker who was ordered by the court to investigate the circumstances of the

¹⁴⁷Supra note 90, par. 74. The Committee on the Rights of the Child (UNCRC) commented that there exists a complementary relationship between the principle of best interest of child and the child's right to be heard in such a way that the later serves as a means to ensure the former.

¹⁴⁸Id, par. 51 and 52. The Committee has further indicated that the implementation of the right of the child to be heard is on the case-by-case basis taking in to account the capacity of the child to manifest his/her will.

¹⁴⁹Supra note 145.

¹⁵⁰Supra note 109, Wro Etsegenet Eshetu vs. Wro Selamawit Nugusie, FSC Cassation Division File No.35710; pp.14-21.

¹⁵¹Supra note 139.

case proposed the mother to be the custodian merely taking into account the age of the child. But, the court found the occupation of the petitioner mother not convenient to the upbringing of the infant child as it significantly limit the time she has to spend with the child. Accordingly, the respondent is ordered to take custody of the child provided that the petitioner is not willing to drop her occupation within one month.

The RFC empowers the court to deprive both spouses from custody of their children if the interest of the child is jeopardized by being under custody of their parents.¹⁵² This is in most cases where either one or both of the parents are died, absent or imprisoned; or are with severe and permanent health problem, or economically destitute.¹⁵³ In such cases, if there is no any other person to shoulder custody of the child, it is a matter of necessity for the court to resort to child-foster organizations.¹⁵⁴

Such organizations currently rendering child foster service in Ethiopia include: the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN); Forum on Street Children (FSC); Shama; Organization for Prevention, Protection, Rehabilitation and Integration of Female Street Children (OPPRIFS); Christian Children's Fund (CCF); Beza Lehiwot; Amrif; Ananyia; Felege Tibib; and others.¹⁵⁵ The CLPC closely works with most of these organizations. As such, most federal courts including the FFIC Bole Division use the CLPC as a bridge to access or contact foster organizations willing to take the custody of children whose divorced parents are not in a position to play the custodial role.¹⁵⁶

Another point noteworthy is that joint custody as an alternative is not legally recognized in Ethiopia. This is inferred from Article 113(1) of the RFC that says: "as to which spouse shall have custody of the children" which obviously indicate 'a sole custody' preference. As an alternative to sole custody, some jurisdictions recognize joint physical custody, in which children

¹⁵²Supra note 6, Articles 247-249.

¹⁵³Supra note 122.

¹⁵⁴Ibid.

¹⁵⁵ANPPCAN, Desk Review and Analysis of Literature on Child Protection Systems in the Eastern Africa Region: Ethiopia, Kenya, South Sudan, Sudan, Rwanda, Tanzania and Uganda, (Nairobi, Kenya, 2011), p.36, available at: <https://resourcecentre.savethechildren.net/.../documents/7032.pdf> (accessed on 20/02/2017)

¹⁵⁶Supra note 122.

spend equal time with both parents.¹⁵⁷ Supporters of joint custody argue that it lessens the feelings of losing a parent that children may experience after a divorce, and that it is fair to both parents provided that they fit both psychologically and physically to discharge their custodial obligation, and agreed to co-operate and share parental responsibility.¹⁵⁸ With respect to the practice in Ethiopia, it is argued that the RFC should be amended in a manner incorporating joint custody as an alternative to a sole custody for it better ensures the best interest of the children and promotes peaceful and friendly post-divorce co-existence of spouses.¹⁵⁹ This writer too takes the same position since joint custody of children possibly creates conducive atmosphere for ex-spouses to remarry.

In short, there are some implementation problems with respect to determination of custody of children of divorced parents. To begin with, there are situations whereby the judgment of the court is made arbitrarily when it chooses the father or the mother to be the custodial of the child. The court, most of the time, does not equally consider all the factors that are listed down under Article 113(2) of the RFC. It sometimes grants judgment only relying on the opinion of social worker as to preference of the child without requiring the child to physically appear on trial and express its views. The court does not dare to prove whether the child's preference (according to the opinion of the social worker/expert) was influenced by parental pressure or not.

4.2. THE RIGHT TO MAINTENANCE

According to Black's Law Dictionary; "Maintenance is sustenance support assistance and the furnishing by one person to another, for his or her support of the means of living, or food, clothing, shelter, etc, particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child or husband and wife, the supplying of the necessity of life."¹⁶⁰ This means, the term connotes someone's legal obligation to provide basic necessities of life to someone else. In other words, it refers to someone's right to claim basic necessities of life from someone else who is legally obliged to do so.

¹⁵⁷The Free Dictionary, available at: <http://www.legaldictionary.thefreedictionary.com/Child+Custody> (accessed on 10/10/2017 G.C.). The Family Code of California establishes the presumption that joint custody is in the child's best interest, thus placing joint custody as a preferred option when courts make custody determination in that state.

¹⁵⁸Ibid.

¹⁵⁹Supra note 21, p.59.

¹⁶⁰Black's Law Dictionary, (6th edition 1993) p. 953.

The RFC provides that an obligation to supply maintenance exists as between ascendants and descendants; persons related by affinity in the direct line; and brothers and sisters by which one owes to the other an obligation to supply the means to feed, lodge, clothe, and to care for health and education.¹⁶¹ From this it is obvious that divorced parents are obliged to provide maintenance to their children. The CRC ensures the right of the child to a standard of living adequate to his/her physical, mental, spiritual, moral and social development.¹⁶² The ACRWC also imposes on parents and other responsible persons the duty to secure conditions of living necessary to the child's development.¹⁶³

Minors or children in general are in need of maintenance because they are dependent on their parents to sustain their lives and at the same time they are not expected or are unable to earn their livelihood by their work¹⁶⁴ except where those of 14 years of age and above are allowed to be employed and earn income by their labor.¹⁶⁵ It is believed that children of divorced parents like any children are entitled to maintenance for they are under age on the one hand, and for they are needy and vulnerable due to divorce of their parents on the other.¹⁶⁶

The RFC under Article 113(2) like in the case of custody provides factors such as, income, age, health, and condition of living of the spouses as well as the age and interests of the children which need to be taken in to account by the court while determining maintenance. The RFC also requires an obligation to supply maintenance to be performed in a decent manner having regard to social conditions and local custom;¹⁶⁷ and the amount of maintenance allowance need to be fixed by taking in to consideration the needs of the person claiming it and the means of the person liable thereto.¹⁶⁸ In a file no.101320,¹⁶⁹ the FSC Cassation Bench has underscored that the extent of maintenance payment should be determined by taking into account the needs of the

¹⁶¹Supra note 6, the cumulative readings of Articles 197 and 198(1) of the RFC.

¹⁶²Supra note 1, Article 27(1). Sub-article 4 further stipulates that States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the country and abroad.

¹⁶³Supra note 2, Article 20(20/1/b).

¹⁶⁴Supra note 129, p.268.

¹⁶⁵Supra note 86, Article 89(1).

¹⁶⁶Supra note 125.

¹⁶⁷Supra note 6, Article 197.

¹⁶⁸Id, Article 202(2); also Supra note 1, see Article 27(2) of the CRC; and supra note 2, Article 20(1/b) of the ACRWC.

¹⁶⁹Supra note 109, Ato Abdul Hamde vs. W/ro Zemzem Redi, FSC Cass.Div. File No. 101320, pp.136-138.

child entitled to it and the level of income of the parent liable to pay it. It has also added that the decision relating to the parent liable to pay maintenance, its amount and mode of payment is subject to revision or change up on the occurrence of substantial change of circumstances as per Article 113(3) of the RFC.

In a file number 38923 which was decided on 17/06/08 E.C.,¹⁷⁰ the petitioner claimed the respondent to pay ten thousand birr (10,000) of maintenance allowance per month for the two children under her custody. But, the respondent replied that he does not afford to pay the amount claimed, and requested the court to decide the maintenance allowance taking in to account his income. The court has critically assessed the needs of children such as school fee, food, cloth and transport cost; the financial capacity of the respondent; and the property the spouses (both the petitioner and respondent) own in common. Concerning the income of the respondent, the court discovered the fact that the latter is employed in a certain supermarket and earning monthly salary; and in another pending file on the partition of property with the petitioner, he has agreed to pay his advocate one hundred sixty five thousand birr (165,000 birr). Consequently, the court affirmed that the respondent is economically betteroff and ordered him to pay two thousand two hundred eighty five birr (2285 birr) maintenance allowance for both children monthly.

The serious problem in practice is that there is no clear and uniform parameter used by courts especially to balance between the financial capacities or income of parents and the interests or needs of children. For instance, in the above case the court failed to consider expenses required for the health care of the children. The court should have taken in to account such expense than considering a cost for the children's tutorial class. This is because; health care is one of the basic necessities of life constituting maintenance as can be understood from Article 197 of the RFC.

Different judges on different benches order two or more spouses/parents having similar income to pay different maintenance finance.¹⁷¹ A certain judge may order the parent to pay extremely high amount of allowance money simply out of prejudice; and another judge may order the parent to pay low sum of maintenance allowance merely out of sympathy.¹⁷² This means,

¹⁷⁰Wro Amel Mohammed vs. Ato Mokonen Hadush, Federal First Instance Court, Civ. File Number 38923, on 17 February, 2008 E.C. (Unpublished).

¹⁷¹Supra note 122.

¹⁷²Ibid.

children whose parents possess similar economic position are treated differently contrary to the general principle of non-discrimination.

Also, it is clear from most decisions rendered by the court under consideration that the modalities for determining maintenance allowance stipulated under Article 113(2) of the RFC are not consider exhaustively, thoroughly and reasonably. To this effect, it is maintained that these above mentioned problems are basically attributed to the absence of legislation or manual which defines in detail the general conditions or modalities stated under Article 113(2) of the RFC.¹⁷³

To fill this gap, the Federal First Instance Court (FFIC) in cooperation with the Child Legal Protection Center (CLPC) has prepared Draft Directive which serves courts as a guideline to decide child maintenance.¹⁷⁴ This draft directive is one significant achievement of the judiciary in Ethiopia towards the protection of the rights of children of divorced parents. It is primarily meant to ensure uniformity and predictability of the practice of determining the maintenance payment of children by courts within the Addis Ababa city administration. It clearly states that the best interest of children is required to be the primary consideration while deciding maintenance; and children with special needs such as disabled children shall be given a special consideration.

However, the point noteworthy here is that there is no mention of enabling clause within the preamble of the draft directive which indicates legal basis which empowers the FFIC to issue the directive. This makes the directive not binding. Even so it is undeniable that the draft directive would serve as a best reference in guiding courts to address discrepancies existing concerning the practice of determining of maintenance payments for children.

In most cases, the court in its decisions indicate that the amount of maintenance allowance is determined or fixed by taking in to account the best interest of the child. But, most of the decisions are vague, as to how the preference or interest of the child is secured, and whether such interest of the child is genuine or not. As mentioned in the foregoing section, one way of ensuring the best interest of children of divorced parents while determining maintenance

¹⁷³Supra note 145.

¹⁷⁴Federal First Instance Court (FFIC), The Draft Directive for Determination of Child Maintenance, (Unpublished). As can be understood from its preamble, the preparation of the draft directive was necessitated by the irregularities and inconsistencies that have been existing relating to the practice of determining maintenance allowance of children.

allowance is by listening to the opinion of children.¹⁷⁵ This means, the court needs to require the child to personally appear and express its views if it thinks that the child is capable enough to speak of its mind as clearly stated by the FSC Cassation Bench in *Wro Etsegenet Eshetu vs. Wro Selamawit Nugusie*, mentioned in the preceding section.¹⁷⁶

The RFC has further laid down requirements for the existence an obligation to supply maintenance in that the person who is demanding it has to be in need of it and he/she has to be not in a state of earning his/her livelihood by his/her work.¹⁷⁷ This same principle holds true in case of maintenance of children of Divorced parents. But, there is a misconception in practice that the obligation ceases as soon as the child attains majority age. Most parents think that an obligation to supply maintenance ends on 18th year birth day of the child.¹⁷⁸ Surprisingly enough this misunderstanding was not addressed by the above mentioned draft directive. Some judges too insisted to misconceive this fact up till now.

To take an example, in the case between *Wro Amel Mohammed vs. Ato Mekonen Hadush*,¹⁷⁹ the court provided the reasoning that respondent's obligation to supply maintenance is determined taking in to account the basic necessities of life required for the child until he/she attains eighteen years of age. This clearly seems the misconception of what is connoted by Article 201 of the RFC. That is, this provision connotes that the obligation of the parents to supply maintenance sustains so long as the child is needy and he/she is not in a state of earning his/her livelihood by his/her work.

There are some instances whereby spouses come to agreement and smoothly settle the consequences their divorce entails on children. There is a case worth mentioning here. This case is between *Wro Tirualem Sintayehu Yihune vs. Ato Belayneh Bekele Aboye*¹⁸⁰ which was decided on 09/05/2008 E.C. In this case, the spouses have agreed on whom shall take the custody of the child, and as to the amount of maintenance allowance the non-custodian spouse need to pay. As such, while the petitioner agreed to take custody of the child, the respondent consented to pay a

¹⁷⁵Supra note 122.

¹⁷⁶Supra note 109, *Wro Etsegenet Eshetu vs. Wro Selamawit Nugusie*, FSC Cassation Division File No.35710; pp.14-21.

¹⁷⁷Supra note 6, Article 201.

¹⁷⁸Supra note 122.

¹⁷⁹Supra note 170.

¹⁸⁰*Wro Tirualem Sintayehu Yihune vs. Ato Belayneh Bekele Aboye*, Federal First Instance Court, Civ. File Number 38930, on 09 January, 2008 E.C. (Unpublished)

maintenance allowance of one thousand birr (1000 birr) monthly. This helped the court to dispose the case expediently both in terms of time and resource. What the court did was simply to pronounce the divorce and confirm the agreement reached at by the spouses on custody and maintenance of the child.

Another practice of the court which seems an established trend is that while custody of children is commonly awarded to mothers, the obligation to supply maintenance is left to fathers. Some try to justify this trend in such a way that since women in Ethiopia are said to be not in an equal economic position with men, it becomes to their disadvantage to require them pay maintenance allowance.¹⁸¹ Yet, requiring mothers to take custody of a child is indeed indirectly requiring them to partake in the maintenance of the child.¹⁸² Whatever is the case, taking an assumption that maintenance is always up to fathers is wrong. This is because; the law presumes ascendants (parents) equally responsible to provide maintenance to their descendants (children).¹⁸³

Indeed, enabling children to benefit maintenance allowance from the parent with better income ensures the best interest of children. In a certain cassation petition sought before the FSC Cassation Bench,¹⁸⁴ the petitioner argued that the monthly maintenance payment of 12,000 birr he was ordered to pay by the Federal High Court constitutes basic error of law as it is highly exaggerated compared to the expense really required to bring up a child in Ethiopia. However, the Cassation Bench rejected the petition on the ground that the stated amount of maintenance is not said to be exaggerated since it is not beyond the expense required to cover the basic needs of the child and so far as the petitioner affords to pay it. The most important point stressed by the court is that children of divorced parents are entitled to benefit from the increase in income of their parents.

It is undeniable that the aforementioned draft directive prepared by the FFIC is an encouraging step forward in ensuring the right to maintenance of children of divorced parents. However, this draft directive, strictly speaking, is not the same as the child maintenance recovery procedures that the CRC under Article 27(4) requires state parties to adopt. According to this provision

¹⁸¹Supra note 21, p. 54.

¹⁸²Id, p. 55.

¹⁸³Supra note 6, Article 198(1).

¹⁸⁴Supra note 109, Mr. Adem Hamid vs. Hannah Abdulqadir, FSC Cass. Div. File No. 98552, pp.127-130.

states are required to issue a binding legislation which governs the implementation of both the recovery and execution procedures of the decision or decree of the court on child maintenance.¹⁸⁵

From this, it is fair to conclude that there is no distinct and binding legislation issued on this area except the RFC which governs family matters in general.¹⁸⁶ Besides, courts have no separate bench meant for the execution of the decree of child maintenance.¹⁸⁷ The claim for the execution of the decree of child maintenance is sought before benches entertaining the execution of decrees on other civil matters.¹⁸⁸ This inevitably takes long period of time leading to delay of justice to children of divorced parents.¹⁸⁹ In such situation, if the period of execution takes for a period not more than three months, children are entitled to arrears of the maintenance allowance they have not been paid as per Article 206 of the RFC.¹⁹⁰

The last but most important point need to be raised is that the court can order injunction against the sale, transfer or exchange of the private property of the parent responsible to supply maintenance.¹⁹¹ The property under injunction would serve as a security for the payment of maintenance for children until the latter become capable of generating an income to live on. In the case of *Ato Kasa Fanta vs Wro Iskedar Gichew*,¹⁹² the FSC Cassation Bench upheld the decision of lower courts barring the petitioner from selling, transferring or exchanging his car until the children attain the age of 18 years old. This holding shows the significant concern given by courts to the protection of the right of children to maintenance.

In short, in order to overcome irregularities relating to the implementation of child maintenance, it is highly imperative for Ethiopia to issue binding legislation specifically dealing with child maintenance recovery procedures, and it is high time to institute a separate trial within the framework of the FFIC which exclusively carryout the execution of the decree of child

¹⁸⁵Supra note 55, p. 148.

¹⁸⁶Supra note 145.

¹⁸⁷Ibid.

¹⁸⁸Ibid.

¹⁸⁹Ibid.

¹⁹⁰Supra note 6, Article 206. But, where the period of execution exceeds three months the arrears cannot be claimed as of right unless the custodian parent proves that such arrears were necessary for the subsistence of the child or the children.

¹⁹¹Supra note 55, p. 148.

¹⁹²Supra note 109, *Ato Kasa Fanta vs. W/ro Iskedar Gichewu*, FSC Cass. Div. File No. File No. 45819, pp. 54-55.

maintenance. This takes us to the discussion of the implementation of the visitation right of children of divorced parents.

4.3. VISITATION RIGHT

Divorce of the parents inevitably leads to separation of children from one or both of their divorced parents. Separation of children from their parent(s) has social, psychological and health impact on the children's future life. In order to combat such social and other effects of the separation, it is indispensable to put in place a system by which children of divorced parents maintain contact or parental relationship with the non-custodial parent. Visitation is one way to achieve this end. That is, children of divorced parents are entitled to have an access to their non-custodial parents. This is what we call 'visitation right'. This right of children is justified in such a way that children are less likely to be reunited with their parents if contact is not maintained.¹⁹³ By this right the non-custodial parent is also entitled to visit his or her children. For the purpose of this study analysis of visitation right is made from the perspective of children of divorced parents.

Under Article 9(3) of the CRC a child who is separated from one or both parents is entitled to a right to maintain personal relations and direct contact with both parents on a regular basis. Similarly, the ACRWC entitles every child who is separated from one or both parents the right to maintain personal relations and direct contact with both parents on a regular basis.¹⁹⁴ Under both instruments visitation right is maintained only insofar as it is not contrary to the child's best interest. Article 113(1) of the RFC requires the court when deciding the dissolution of marriage, among others, to decide on the rights of the parents and the children to visit each other. The visitation right of children of divorced parents toward their non-custodial parent is instrumental to realize the right of the children to parental knowledge,¹⁹⁵ which in turn fundamentally contributes to the full and healthy development of the children.¹⁹⁶

¹⁹³Rachel Hodgkin and Peter Newell, Implementation Handbook for the Convention on the Rights of the Child (3rd ed., UNICEF, Geneva, 2007) p. 123, available at: https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf (accessed on 20/02/2017).

¹⁹⁴Supra note 2, Article 19(2).

¹⁹⁵Supra note 1, Article 7.

¹⁹⁶Supra note 55, p. 105.

In practice factors which need to be taken into account by court when giving decision on custody and maintenance as per Article 113(2) of the RFC are also equally considered by courts while deciding on visitation rights. This means, visitation right like custody and maintenance is not absolute. It is subject to denial and restriction by the court if it is contrary, among others, to age, health, and condition of living of the spouses as well as the age and interests of the children as provided under Article 113(2). Some jurisdictions hold the position of denying or restricting the visitation right if it endangers seriously the child's physical, mental, moral or emotional health.¹⁹⁷

There is an interesting case worth mentioning here concerning how the court ensured the best interest of children of divorced parents pertaining to visitation rights. In the case of *Wro Habib Sayed Muhe vs Ato Musahid Ali*,¹⁹⁸ the petitioner opposed the respondent's right to visit the children. She argued that since the respondent is a smoker as well as a *khat* and alcohol addicted allowing him visitation amounts a severe psychological and health impact on children. However, the court stated that prohibition of visitation is to the disadvantage of the children. That is, it is the position of the court that prohibition of visitation more affects the children than the respondent. As a result, the court ordered the respondent father to act in a decent manner at the moment of visitation of the children. He was ordered not to chew *khat* or smoke or drink alcohol at the time of visitation or for the time he is with the children. At the same time, the court advised the petitioner to lodge a petition at any time provided that the respondent failed to observe the order. In doing so the court is meant to ensure the children's best interest, that is, the health and psychological makeup of children.

But, the problem with this particular case as opposed to most cases is that the court in its decision failed to specifically indicate or fix the time of visitation. Such gap would inevitably cause a conflict between the petitioner and the respondent. It paves a room for the respondent father to require visitation at any time even against the will of the children and the petitioner (the custodian mother). Hence, it is advisable to specifically fix the time of visitation mainly so as to avoid the possible conflict of interest which might arise as between the divorced parents.

¹⁹⁷Supra note 129, p. 270.

¹⁹⁸*Wro Habib Sayed Muhe vs Ato Musahid Ali*, Federal First Instance Court, Civ. File Number 26272, on 15 January, 2009 E.C. (Unpublished)

As to frequency of the visitation, the court in most cases orders it to be once within a week, usually on weekends (either on Saturday or Sunday). A weekend is preferred for the obvious reason that it is inconvenient to both the visitor parent and the children from Monday to Friday. The visitor parent is presumed to be on work on these days, and the children too probably spend at school. For all, it seems the court prefers visitation to be held on weekends just for the sake of convenience both to the children and the visiting parent.

Yet, the issue is, for how long does visitation last? That is, what is the extent of time of visitation? As can be understood from most decisions of the court, the time limit set for visitation is not uniform. Nor the decisions are clear as to the grounds in extending or shortening the time. The time set in most cases is from 3.00 in the morning to 11.00 o'clock in the afternoon. However, in *Wro Eleni Yimer vs Ato Samuel Woldeyes*,¹⁹⁹ the manner in which the court ordered the time for visitation is a little bit different from the trend followed in most cases. That is, the court in its order stated that the respondent and the children are entitled to visit each other on the weekends for not less than five hours. The order is unclear whether the date of visitation is on Saturday or Sunday, or both; and for how long the time of visitation goes beyond five hours is vague. Such open-ended order of the court without doubt creates inconvenience both to the children and the parent entitled to visitation. It might also cause a conflict of interest as between the latter and the custodial parent. That means; its effect is almost the same as that of failure not to specify or fix the time of visitation as discussed above.

In this same case, the court has clearly imposed an obligation on the petitioner (the custodial parent) to create a favorable atmosphere and cooperate with the respondent father on the visitation of children. In other words, the other parent to whom the custody right of a child is given must permit the other non-custodial parent to visit the child.²⁰⁰ Put differently, the right of the parent who is awarded sole legal custody is not absolute, and subject to limitation through visitation right of the non-custodial parent.²⁰¹

The court in its decisions rarely addresses the issue concerning visitation on special occasions such as the child's birth day, holidays and summer vacations other than weekends. The

¹⁹⁹Supra note 143.

²⁰⁰Supra note 129, p. 264.

²⁰¹Ibid.

researcher has managed to access one interesting case²⁰² in which the court has clearly entitled the child, named Adonai, to visitation of his father on holidays and on the celebration of his birthday. The court ordered the child to spend with his father on such occasions before noon, from 2.00 to 6.00 o'clock local time and to spend with his custodial mother in the afternoon. This is quite important for the child to have a healthy memory of such occasions in his future life.

It is obvious that the visitation right would serve as a means to fully enforce the children's right to parental knowledge as explicitly guaranteed under Article 7(1) of the CRC. This means that the children's right to maintain personal relations and direct contact with their divorced parent(s) is one way of sustaining parental relationship as between children and parents. In some jurisdictions the scope of definition of "parent(s)" goes beyond "natural" or "biological" parents thereby entitling any person having an interest in the children's welfare to reasonable visitation.²⁰³ Such persons having an interest in the children's welfare noticeably includes close relatives, such as grandparents, uncles, aunts, brothers, sisters and etc.

However, in our case, from the reading of the proviso "the rights of the parents and the children to visit each other" provided under Article 113(1) of the RFC the ongoing practice it is pretty clear that visitation right with respect to children of divorced parents seems only works for natural or biological non-custodial parent. Such strict application of the right as it stands now is unnatural. The close relatives of the child from the side of his/her non-custodial parent especially, grandparents ought to have been entitled by the RFC to visit the child on regular basis. This is because; doing so would be invaluable in the future identity and psychological makeup of the child. This being the case, in file numbers 44434²⁰⁴ and 30104,²⁰⁵ the court failed to decide on the rights of the parents and the children to visit each other contrary to Article 113(1) of the RFC. Similarly, in *W/t Desta Belay vs. Tadesse Amare*,²⁰⁶ the court did not address the issue of visitation of the children and their respondent father who is currently imprisoned in

²⁰²Wro Sara W/Gerima vs. Ato Kidane H/Mariam Federal First Instance Court, Civ. File Number 30152, on 30 February, 2009 E.C. (Unpublished).

²⁰³*Custody of Minor Children in a Divorce*, available at: <http://www.legalzoom.com.htm> accessed on 02/12/2016)

²⁰⁴Wro Eyerusalem Asgedom vs. Ato Tewolde H/Mariam, Federal First Instance Court, Civ. File Number 44434, on March 12, 2009 E.C. (Unpublished).

²⁰⁵Wro Metadel Gashaw vs. Ato Eman Merga, Federal First Instance Court, Civ. File Number 30104, on 30 May, 2008 (Unpublished).

²⁰⁶W/t Desta Belay vs. Tadesse Amare, Federal First Instance Court, Civ. File Number 36712, on 29 March, 2009 E.C (Unpublished).

Addis Ababa Prison, commonly known as *Qallitti*. This clearly amounts to basic error of law given the mandatory nature of the provision and the purpose attached to it as discussed above.

Another point noteworthy here is that, there is no mention of the place of visitation in the court its decisions of almost all cases consulted by this study. This undoubtedly creates inconvenience both to the children and the parent entitled to visitation. It might also cause a conflict of interest as between the non-custodial parent and the custodial parent just like in the case of failure to fix time of visitation as discussed above.

Furthermore, the visitation arrangement of children of divorced parents like custody and maintenance awards is not permanent. In other words, children of divorced parents are entrusted with the right to get revision or reversal (wholly or partly) of the decision or order of the court pertaining to their custody, maintenance and visitation rights. Revision in some jurisdiction is sought when circumstances affecting the child's best interests change substantially.²⁰⁷ As such, either parent may seek a change (increase or decrease) in child support or maintenance at any time if a substantial change in circumstances has occurred after the order was entered by the court.²⁰⁸

The RFC under Article 113(3) provides that the court may, on application and taking into account the change of circumstances, revise or reverse its decision given under this Article regarding the custody and maintenance of the children. The presumption as to the existence or absence of change of circumstances is left to the discretion of the court. This means, it is clear from the phrase "the court may" that the court under its discretion, may or may not revise or reverse its decisions of custody or maintenance of children of divorced parents. The cumulative fulfillment of two conditions is required under this provision. That is, an application or a petition shall be lodged requiring reversal or revision; and a change of circumstance which necessitates reversal or revision shall be there.

It seems the practice is clear in this regard. For instance, in the above mentioned case of *Wro Habib Sayed Muhe vs Ato Musahid Ali*,²⁰⁹ the court ordered the respondent father not to chew *khat* or smoke or drink alcohol at the time of visitation or for the time he is with the children. At

²⁰⁷North Carolina Bar-Association, Child Custody, Visitation and Child Support, (2005) available at: <https://www.ncbar.org/media/209956/child-custody-visitation-and-child-support.pdf> (accessed on 20/02/2017)

²⁰⁸*Ibid*.

²⁰⁹Supra note 198.

the same time, the court advised the petitioner to lodge an application at any time provided that the respondent failed to observe the order. From this order, it is clear that the petitioner mother or any interested person is entitled to apply to the court for reversal or revision of its decision regarding visitation arrangement if the respondent father failed to observe the above mentioned order of the court.

By and large, the parent whom by his/her willful conduct or act perpetrated change of circumstance that necessitates revision or reversal under this provision is not left without liability. For instance, the parent who maltreated, failed to maintain and bring up the child is criminally liable respectively under Articles 576, 658 and 659 of the FDRE Criminal Code. However, the implementation of these provisions of the Criminal Code is rare. That is, courts in practice do not resort to penalty measures of the code as against the parents' act or conduct of willful neglect of custody, or neglect to maintain children.²¹⁰ The courts pass-over such parents simply by taking measures such as warning, admonishment, or reprimand.²¹¹ In short, this and other irregularities with respect to the implementation of visitation right as in the case of custody and maintenance are directly or indirectly attributed to absence of comprehensive and binding legislation or manual defining standard and procedure which helps in ensuring uniformity and predictability of the practice at courts.

Conclusion

The children of divorced parents have various rights including the rights to maintenance, custody and visitation. These are special rights unique to such children apart from other civil and political, and socio-economic as well as cultural rights to which they are entitled just like any children. The litigation process at the court is relatively expedient except in rare cases like when DNA investigation is sought for proof of paternity. Yet, the urgency of the needs and interest of children of divorced parents warrants the need for accelerated trial on separate bench. This is still continuing to be a challenge to the country. Another main challenge is that the decisions of the court regarding custody, maintenance and visitation rights of children of divorced parents are less uniform and predictable. This is basically attributed to the absence of legislation or manual

²¹⁰Supra note 145.

²¹¹Ibid.

which defines in detail the general conditions or modalities stated under Article 113(2) of the RFC.

Generally, the need for revision or reversal of previous decision of the court relating custody, maintenance and visitation awards under Article 113(3) of the RFC is mainly to guard the wellbeing and life, or the best interest of children of divorced parents against change of circumstances. As such, the right to apply for revision or reversal of the decision of the court on custody, maintenance or visitation rights of children of divorced parents under this provision shall be entrusted to any interested persons.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1. CONCLUSIONS

With a view to realizing the special protection and care children are entitled to, several international and continental treaties are being ratified and implemented. The CRC and the ACRWC to which Ethiopia is a party are pioneer ones. Also, there are domestic laws meant for the protection of the rights of children including the FDRE Constitution, the RFC and the Revised Criminal Code. Children of divorced parents like any other children are entitled to rights and freedoms guaranteed by these legal regimes. But, as a special group, they are also endowed with special rights such as custody, maintenance and visitation. By this study, the analysis of the practice relating to the protection of the rights of children of divorced parents in Ethiopia was conducted.

The scope of the study is limited to the analysis of the protection of rights of the children of divorced parents with a specific reference to the practice at the FFIC Bole Division Family Bench, and the CLPC of Child Justice Project of the FSC and the EWLA. As to the methodology, the researcher has primarily relied on divorce and post-divorce cases decided by the court relating to the rights of children of divorced parents. In addition, interview of one judge at the court and two legal experts each at CLPC and EWLA was conducted to acquire views and experiences on the subject matter of the study. The mode of interview was unstructured, and the informants are selected on the basis of purposive sampling technique.

By way of findings, the following major progresses and challenges or gaps are identified by the study relating to the protection of the rights of children of divorced parents in Ethiopia:

Ethiopia as a state party to both the CRC and the ACRWC has made considerable efforts towards the realization of the child rights. The most important achievement in this regard is corporation of the guiding principles of the instruments within the Constitution, the RFC and other subsidiary laws. However, the failure to publish these instruments in *Negarit Gazetta* has been creating an obstacle in their enforcement. Among others, it has been creating a discrepancy among lawyers' understanding of the English version of the instruments. Also, the obstacle can be expressed in terms of inaccessibility of the instruments to the public at large.

Ethiopia has also taken significant steps aimed at legislative reform since the adoption of the Constitution in 1995. The major legal reform initiatives include the entry in to force of the Revised Family Code in 2000, the Labor Proclamation in 2003 and the Criminal Code in 2005. However, Ethiopia failed to adopt a comprehensive and all-encompassing Children's Code despite the Committee's recommendations at different times.

The modalities for determining custody, maintenance and visitation rights as stipulated under Article 113(2) of the RFC are too general and not exhaustive. For there is no rules of procedure or guideline providing objective standard, it seems consideration of the factors listed under the provision is left to subjective appreciation of the circumstances of the case by judges. This has been seriously hindering courts from rendering uniform and predictable decisions relating to the rights and interests of children of divorced parents. Indeed, though not yet binding, the Draft Directive for Child Maintenance Determination prepared by the FFIC in cooperation with the CLPC is one significant step forward.

The 'Children and Mothers Department' of the Ministry of Women and Children's Affair (MWCA) is believed to be an equivalent of the kind of government organ required by the CRC Committee. However, this department addresses the children's issue only as part of many other duties it is up to, and is not established in accordance to a particular regulation that vests it with authorities sufficient to effectively execute the expected roles. As result, it is almost without a significant achievement in the protection of the rights of children in general and the rights of children of divorced parents in particular.

The 'ninety percent local funding clause' of the Charities and Societies Proclamation is hampering the local NGOs from implementing their objectives and programs of child protection to the fullest scale possible. For instance, it is claimed that EWLA has currently ceased to undertake research and advocacy service due to lack of local source of fund. The Committee on the CRC expressed its concern over the restrictions imposed by this proclamation upon NGOs and requested Ethiopia to respect the role played by civil society for the implementation of the CRC.

The urgency of the needs and interest of children of divorced parents warrants the need for accelerated trial on separate bench. Yet, this is still a challenge to the judiciary structure of the country. As a result, for instance, the claim for the execution of the decree of child maintenance

is sought before benches entertaining the execution of decrees on other civil matters. This inevitably takes long period of time leading to delay of justice to children of divorced parents.

The CLPC is the only institution in Ethiopia which sponsors DNA investigation if the court found it necessary to proof paternity. It is claimed that this service is the most cumbersome of all tasks of the centre. This is because the investigation is expensive and takes long period of time as it is conducted abroad. As a result, the centre is currently facing shortage of finance and not effectively carrying out other services on the protection of children's rights. It is also maintained that the DNA investigation is one of the factors delaying justice to children of divorced parents. In other words, the court has to wait for the result of the investigation in order to finally settle issues of custody, maintenance and visitation rights of children. In this regard, the centre blames courts for simply rushing to order DNA investigation without exhausting other possible way outs to proof paternity.

5.2. RECOMMENDATIONS

The following recommendations are forwarded based on the thesis in general and the aforementioned findings in particular:

1. A comprehensive and all-encompassing Children's Law applicable on children in general and which in particular deals with the rights of children of divorced parents under a separate section should be enacted by the HPR on the basis of the recommendations forwarded by the Committee of the CRC;
2. A binding rules of procedure or a guideline for the implementation of custody, maintenance and visitation rights of children of divorced parents shall be issued (separately for each or in one) by a Council of Ministers so as to fully implement Article 113(2) of the RFC and thereby ensure uniformity and predictability of the practice at the court. To achieve this end, the Draft Directive for the Determination of Maintenance prepared by the FFIC might be used as a model;
3. The protection of the rights of children of divorced parents ought to be given at least as much attention as given to other vulnerable groups of children such as orphans and street children by all stake holders, state or non-state actors. Particularly, the task of protection of the rights of children by government at higher level or within the ambit of executive organ shall be strengthened in terms of both finance and man power;

4. An accelerated trial system on a separate bench which exclusively entertains litigation on matters relating to the interests and rights of children of divorced parents shall be arranged by the FFIC within all of its divisions; and judges working on such bench shall have a specialization on children's law in general and be acquainted with depth knowledge and experience on the rights of children of divorced parents in particular;
5. Judges, legal advocates, experts and other stakeholders working on the protection of the rights of children or children's rights in general shall regularly update themselves with decisions of the Cassation Bench of the FSC rendered relating to rights of children of divorced parents;
6. The courts as well as the prosecution office shall work seriously on the implementation of penalty measures prescribed under the special part of the Criminal Code relating to the act of mistreatment of children as well as willful neglect of divorced spouses to bring-up and maintain children; and
7. Finally, the government shall take a step to import the medical technology of DNA investigation which this day is becoming indispensable for proof of paternity which in turn has a significant impact on the protection of the rights of children of divorced parents by courts. This is because as it stands now, the investigation is carried out abroad which is expensive and takes long period of time which in turn inevitably amounts to delay of justice at courts (to children) in case proof of paternity is sought.

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Wro Yordanos Worku vs. Ato Immiru Beniam, FFIC Civ. File Number 26605

W/t Desta Belay vs. Tadesse Amare, FFIC, Civ. File Number 36712

W/t Tsedale Demissie vs. Ato Kifle Demisse, FSC Cass. Div. File No. 23632

9. Interviews

Interview with Ato Brahanu Tasebe, a Judge at FFIC Bole Division, on 10 February, 2009 E.C.

Interview with Ato Sena Tilahun, a Legal Advocate at Children's Legal Protection Center (CLPC) of the Child Justice Project of the FSC, on 15 January, 2009 E.C.

Interview with W/t Eyerus Solomon, a Project Coordinator at Ethiopian Women Lawyers Association (EWLA), on 17 January, 2009 E.C.

Interview Questions

Preliminary Questions for all interview guides

Name of the interviewee_____

Name of the institution_____

Position in the institution_____

Time of interview_____

Date of interview_____

I. For a Judge(s) of Family Bench at Federal First Instance Court Bole Division

The following questions are meant to gather information from Judges of family bench on the practice relating to the protection of the rights of children of divorced parents at Federal First Instance Court Bole Division.

1. How do you perceive the idea of protection of the rights of children of divorced parents?
Do you think such children deserve special protection? Why?
2. Is there a special legislation and rules of procedure or a guideline issued for the protection as well as implementation of the rights and interests of children of divorced parents in Ethiopia? If no, how do you see the impact of the absence of such legislation in practice?
3. If your response to question number 3 is “Yes”, do you think the existing legal framework is sufficient? If yes, how? If no, why?
4. What are the rights to which children of divorced parents are entitled as the law in Ethiopia stands today?
5. How often do you invoke the general principles of the CRC and the ACRWC in your decisions of cases relating to children of divorced parents?
6. How do you see the impact of failure to promulgate/publish the CRC and the ACRWC in *Negarit Gazeta* upon the protection of the rights of children of divorced parents?
7. How often do you invoke the decisions of the Cassation Division of Federal Supreme Court relating to the rights of children of divorced parents?

8. What are the major roles (powers and responsibilities) of the courts in the protection of the rights of children of divorced parents?
9. How do you explain the major challenges or gaps and the progresses of both the law and practice of protection of the rights of the children of divorced parents?
10. What do you advice to enhance the protection of the rights of children of divorced parents in Ethiopia?

II. For Legal Advocates or Experts at the CLPC (the center) and the EWLA (the association)

The following questions are meant to gather information from legal advocates or legal experts on the practice relating to the protection of the rights of children of divorced parents both at the center and the association.

1. How do you perceive the idea of protection of the rights of children of divorced parents? Do you think such children deserve special protection? Why?
2. Is there a special legislation and rules of procedure or a guideline issued for the protection as well as implementation of the rights and interests of children of divorced parents in Ethiopia? If no, how do you see the impact of the absence of such legislation in practice?
3. If your response to question number 3 is “Yes”, do you think the existing legal framework is sufficient? If yes, how? If no, why?
4. What are the rights to which children of divorced parents are entitled as the law in Ethiopia stands today?
5. How often do you invoke the general principles of the CRC and the ACRWC in your representation or advocacy of children of divorced parents before the court?
6. How do you see the impact of failure to promulgate/publish the CRC and the ACRWC in *Negarit Gazeta* upon the protection of the rights of children of divorced parents?
7. How often do you invoke the decisions of the Cassation Division of Federal Supreme Court relating to the rights of children of divorced parents?

8. What are the major roles you play in the protection of the rights of children of divorced parents?
9. What are the major challenges you face in your task of protection of children of divorced parents?
10. How do you explain the impact of Charities and Societies proclamation no. 621/2009 upon your activities?
11. What is your relationship with other NGOs or CSOs working on the child rights protection?
12. How do you work with courts and other organs of government in this regard?
13. How do you explain the major challenges or gaps and the progresses of both the law and practice of protection of the rights of the children of divorced parents?
14. What do you advice to enhance the protection of the rights of children of divorced parents in Ethiopia?

Annexes

- Cases of the FFIC used by the study.
- Copy of the 'Draft Directive for Determination of Child Maintenance' prepared by the FFIC in cooperation with the CLPC.