Wachemo **UNIVERSITY**

COLLEGE OF LAW

The Interpretation Of The Principle of “Best Interest Of The Child” In Custody Matter : A Case Study in Debre Birhan Woreda court.

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A Thesis Submitted to School of Law of Debre Birhan University in Partial Fulfillment of the Requirements for the Degree of Bachelor of Law (LLB)

Declaration

We, the undersign, have examined the thesis entitled "The Interpretation Of The Principle of "Best Interest Of The Child" In Custody Matter : A Case Study In Debre Birhan Woreda court. Is our original work and has not been used by others for any requirements in other places and sources of materials used in this project have been dully acknowledged

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Certification Statement

Herewith, I certified that Wudneh Enyew and Girja Zenbe have carried out this research work on the topic entitled " the interpretation of the principle of best interest of the child" A case study in debre birhan woreda court under my supervision. this work is original in nature and has not been presented for a degree in any university and it is sufficient for submission for the partial fulfillment for the award of LLB degree.

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ACCRONOMY

- ✓ **FDRE** Federal Democratic Republic of Ethiopia

- ✓ **RFC** Revised Family Code
- ✓ **CRC** Convention on The Right of The Child
- ✓ **ACRWC** African Charter on The Right and Welfare of The Child
- ✓ **EUCJ** European Union Court of Justice
- ✓ **UDHR** Universal Declaration of Human Right
- ✓ **ECHR** European Court of Human Right
- ✓ **UN** United Nation

Contents

Declaration.....
.....iv

Dedication.....
.....v

Acknowledgment.....
.....vi

Acronym.....
.....vii

CHAPTER ONE.....1
INTRODUCTION.....1
1.1. Background of the Study.....1
1.2.Literature Review.....3
1.3. Objective of the Study.....6

1.3.1.The General objective of the Study.....6
1.3.2.The Specific Objective are as Follows:.....6
1.4.Research Question.....6
1.5.Significance of the Study.....7
1.6.Methodology and Data Source.....7
1.7.Scope of the Study.....8
1.8.Limitation of the Study.....8
1.9.Organization of the Study.....9
2.1. Introduction.....9
2.1.Concept and meaning of the best interest of the child.....10
2.1.1.Problem of Definition.....10
2.1.1.“The Best Interest of the Child”: a Right Based Approach”.....11
2.2. The Concept of Childhood Under International and National Laws.....16
2.2.1.Commencement of Childhood.....16
2.2. Historical Development of the Best Interest of the Child.....17
2.2.2.Evolution of the Doctrine of “The Best Interest of the Child”.....17
CHAPTER THREE.....19
The Legal Incorporation of the Principle of the Best Interest of the Child.....19
3.1. The Declaration of Geneva.....19
3.2. The Universal Declaration of Human Rights.....20
3.3. The 1966 Covenants.....21
3.4. The Best Interest of the Child under the Convention on the.....22
Rights of the Child (CRC) Articles 3 and 4.....22
3.5. CRC General Comment on the Best Interest of the Child.....24
3.5.1. Legal analysis of article 3, paragraph 11.....24
“In all actions concerning children”.....24
3.5.2. Elements to be Taken into Account when assessing the Child's Best Interests.....30
3.5.3. Balancing the Elements in the Best-Interests Assessment.....33
3.6 . The Best Interest of the Child Under Regional Legal Instrument.....33
3.6.1.The Best Interest of the Child and the African Charter on.....34
the Rights and Welfare of the Child (ACRW).....34
3.7. The Best Interest of the Child Under Ethiopian Laws.....35

3.7.1.The Constitutional Regime of Child Rights in Ethiopia.....36
3.7.2.The Civil Code of the Empire of Ethiopia 1960 and The Federal Revised.....38
Family Code.....38
3.7.2.1. The Civil Code of the Empire of Ethiopia 1960.....38
3.7.2.2.The Federal Revised Family Code of Ethiopia 2000.....39
3.7.2.3. The Amhara National Regional State Family Law 2003.....40
CHAPTER FOUR.....43
4.1. Cases, Analysis and the Current Practice of Courts on Custody Matter. 43
4.2. CASE ANALAYSIS.....45
4.3. GETTING EXPERTS AND OTHER PROFESSIONALS ENGAGED.....51
CHAPTER FIVE.....53
Conclusion and Recommendation.....53
5.1 Conclusion.....53
5.2. Recommendations.....56
5.3. Reference
.....
.....

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

The long history of child custody and the awarding of it goes to colonial times and the early republic between 1630 and 1830.[1] In colonial and early republic times, children were treated as economic asset based on the amount of labor they were able to do. In this early era, the father as the head of the household had the complete right to the custody and control of his children both during the marriage and in the rare event of divorce.[2] In the1839,the British parliament modified this paternal preference by the "***tender years doctrine***, mother gained favor as the parent better able to handle the emotional and nurturing needs of children.[3]

During the twentieth and twenty-first centuries, women took on more of an equal economic role, resulting in the shift of custody from one parent over the othis to both parents, or joint as long as it's in "the best interest of the child. While the divorce rate soared, the rule governing child custody grew increasingly focused. " the simple fact of being a mother does not by itself , indicate a capacity or willingness to render a quality of care different from that which the father can provide" with the old rule gone, state legislator and judges have turned to social science to develop new guideline to aid the

[1] Mason , Marry Ann , The History of Child in The United State (1994) p.2
[2] Malia ,M,B, Louisiana Family Law ; The Visitation of The Non Custodian Parent (1985), Vol. p.489.
[3] Lenore J. Weitzman , The Divorce Revolution; The Unexpected Socio and economic Consequence for women,(1987) p. 219

judges in making this difficult decision. this standard differ from the initial parental predominance to best interest of the child . in fact the application of best interest of the child standard is " gender neutral" and it has won recognition in both the common law as well as in the civil law system.[4] It can be said that what constitute "the best interest of the child" is a matter of continuing dispute.

Currently, what is envisaged under many law is the principle of " best interest of the child" in determining custody issue. The principle of the best interest of the child incorporated in different international human right instrument. One of such international human right instrument is the united nation convention on the right of the child. which says that " in all action concerning children ,whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interest of child shall be the primary consideration." Accessing the best interest of child means to evaluate and balance all the elements necessary to make a decision in a specific for a specific individual child or group of child. Due to the diversity of factors to consider, usually more than one profession or institution is involved in assessment process, bringing together various perspective and areas of expertise from the country of origin and destination and, in particular, the perspective of child. Art.4 of the convention of the right of children provides obligation of member state to undertake all appropriate legislative ,administrative and other measure for the implementation of the right enshrined in the convention.[5]

Similarly Under art.4(1) of African charter on the right welfare of the child which provide better than CRC for child's takes the best interest of child as a principle that should be employed in deciding any issue

[4] Ibid
[5] Convention on The Right of The Child,1989,Art.3(1), 20 Nov.

that involve the right of child and it gives primary consideration for the best interest of the child.[6]

Ethiopia is a state party to the convention on the right of the child ,the African charter on the right and welfare of the child and international human right treaties .as a member state to both treaties, Ethiopia has been taking various measure to ensure the realization and observation of the right of the child as enshrined under the convention and African charter and other treaties as well. These measure range from constitutional recognition of the rights of children to that of various step to be taken with a view to give the provision of the two treaties legal effect in Ethiopia.[7]There are basic problem in implementing the FDRE Constitution and international convention in deciding what is best for the child, Ato Gedion Sisay, former judges at the federal instance of Addis Abeba municipal court , note that judges at federal as well as at municipal level, especially the first instance, can be reluctant to reason out their decision in post divorce custody of the child by citing and analyzing of the provision of the constitution(and /or international human right instrument) that are relevant to the right of the children. The reason for this, he said, it is uncertainty as to what constitue constitutional interpretation. This raise the issue whether citing or analyzing the provision from the constitution or from the international instruments,

6 African charter on The Right and Welfare of The Child ,1999,Art.4(1), Nov 29.
7 The Constitution of the Federal democratic Republic of Ethiopia,1995, Art.36(2), proc. No 1

8 Kidist Alemu, Post- Divorce Decision of Child Custody in Ethiopia in Light of The " Best Interest of The Child(1997), p,18

amount to constitutional interpretation which falls outside their jurisdiction.[8]

1.2.Literature Review

Many writers try to explain and define what the best interest of the child is and what it constitutes. But most the literature on the child custody is from outside Ethiopia. However, there is some literature on child custody matter from Ethiopia, thus different publication related to the best interest of the child matters relating to custody were examined in order to drive a problem for research. Some of these publication are discussed below.

Andrew Schepared Examined that child custody dispute in Virginia, argue that Parents are essential to raising children. They love them, make major decision for them, provide a roof offer their heads. In "intact" families, parents make decision for their children jointly. There is no issue about where child lives because parents live together with the child in the same place. However, many families do not remain "intact" the parent separate or divorce . When separating or divorcing parents cannot agree on who should make decision for their child ,where the child should lives or how much one parent should see the child . In every state ,the overarching principle that the judge use to evaluate the parents competing claims is the " best interest of the child .". according to him , a custody decision must contain the following criteria in determining the best interest of the child. The age and physical and mental condition of the child , the age and physical condition of the parent, the propensity of each parent to actively support the child's contact and relation with the other parent.[9]

[8]

[9] Andrew Schepared , Best Interest of The Child (http:// child custody project.org/ essay/ best- interest-of –the –child) last visited on NOV.29

Girmma Alemu, examined how the principle of best interest of the child is enshrined under international law, the obligation of the state and its administrative organ. The provision states that the best interest of the child shall be a primary consideration in all action concerning children, the principle of the best interest of the child require public and private bodies ,social welfare institution, courts, administrative bodies to ascertain the impact on the children of their action with the view to confirm that the best interest of the children are taken as the primary consideration in making decision affecting them. Thus, the bodies and institution are required to apply the principle of the best interest of the children systematically. He also added that Interpretation of the best interest of the child must be compatible with the overall objective and purpose of the convention. the interpretation of the child must not be highly influenced by consideration of cultural relativism . further state that the principle best interest of the child require decision be based on the needs and circumstance of the individual child and it is dynamic concept that must taken into account the views and evolving capacity of the child.[10]

Ashagrie, G. Abdi, try to view the best interest of the child principle in line with the Ethiopian civil society law and recommend that there must be mechanism in place to implement the principle of the best interest of the child.[11]

As far as the above literature is concerned, we therefore, wants to explore how far the court of Debre Birhan woreda court has gone as regard the opinion of the child in custody matter. Since most of the writer is outside Ethiopia ,we want to investigate how the court of Debre Birhan woreda court interpreted the principle and what are the criteria that they employed. Many writers try to define what

[10] Girmachew Alemu , Hand Book on The Right of The Child in Ethiopia. P. 42
[11] Ashagrie Abdi, The Ethiopian Civil Society Law in Light of The Principle of The Best Interest of The Child ,p 19

exactly the " best interest of the child mean". But most of them failed to address adequately discuss how to interpret the principle of the best interest of the child by courts and what factor should be take in to account when decision are taken by courts which would or likely affect the child. This principle cannot be adequately discussed unless reference is made to the issue that commonly affect children , such as divorce and custody.

Our paper try to show what the " best interest of the children" principle mean and what are the factor taken in to account by courts when the decision are made by using real life case .to show how the principle are is considered and applied. Many researcher on this topic only focus on the legal framework of the best interest of the child without investigate how Ethiopian courts applied and interpreted the principle of the best interest of the child. Even if they try to show one real cases, one decision of the court cannot lead us to say or conclude that Ethiopian courts interpreted in this way. So our paper fill the gap by using real life case on the specific courts.

1.2. Statement of the Problem

What inspired us to conduct this research arose from the question we asked about ourselves about custody of the child after reviewing the law and some literature related to it. We asked ourselves a number of question .Is the principle of the best interest of the child really implemented by the judiciary? Is it really the child's best interest or someone else's interest? Does the consideration taken by the judiciary in awarding custody regarding the financial situation of parents and custom of the community to which the parties belong , serve the best interest of the child ? .It is difficult to determine the best interest of child because the application of the best interest of

child criterion is always difficult. The problem may arose from the absence of adequate interpretation of the principle or from the reluctant of the judges to analysis the constitution and international instruments. Or from difficulty it is hard to know which factor to take in to account when deciding what is the child's best interest.[12] There are some factors which the judiciary consider in issue of custody . Such as, the custom of the community to which parents belong, the behavior of parents and their financial situation which can limit or deny the best interest of child in custody matter. From the literature we read, it seems that the court do not often call for the opinion of the child and as the result they give more weight to the custodians parents view.

Hence, the study seeks to find out the judicial implementation of the best interest of child criterion in matter relating to Custody by using real life cases.

1.3. Objective of the Study

1.3.1.The General objective of the Study:

To identify how the concept of " best interest of the child" is interpreted by courts in child custody matter.

1.3.2.The Specific Objective are as Follows:

1,To identify legal gaps in implementing the best interest of the child principle by the judiciary in custody matter.

2, To investigate factors taken in to account by courts in deciding child custody matter.

[12] Kidist, supra note 8,p.18

3, To recommend possible solution to the problem arising in implementing the best interest of the child criterion in the matters related to child custody matter.

1.4.Research Question

Main question:

How the principle of the “best interest of the child” is interpreted by courts in relation with custody matters?

Specific question:

1, How experts and other professional involved in the determination the child’s best interest?

2,What are the factor taken in to account in determining the best interest of the child?

3,Whose interest are taken in to account by courts in awarding custody?

1.5.Significance of the Study

- ✓ provide guide line for the judicial body how to the best interest of a child principle should be interpreted
- ✓ it recommend a possible solution to the problem arising in implementing the best interest of child principle in matter relating to custody
- ✓ the research would serve as a literature review in a sense that it would provide useful information for other researchers , who conduct research on this topic or related topics

1.6.Methodology and Data Source

This paper presents the findings of a qualitative small-scale study, documenting and
providing an overview of the interpretations of the concept of “best interests of the
child” in child custody proceedings by child protection workers and attorneys, including child inclusion in the court practice.

Qualitative research method also helps to interpret and better understanding of the multifaceted reality of a given situation. Moreover, the research conducted using qualitative method can come up with findings that are not determined in advance and the objective of exploring people’s experience in a given situation is also better achieved with this method . The reason why we prefer this methodology is because of our research mainly focus in why and how the court of law make decision regarding custody matter . we thoroughly examined many written materials on the issue available at internet web sources, found in different libraries. In general, the methodology employed by this research paper is critical analytical approach

Data

primary data:

- ✓ International instruments
- ✓ African charter on the right and welfare of the child
- ✓ The FDRE constitution
- ✓ Real cases

Secondary data :

- ✓ published and unpublished articles, books, journals research paper

1.7.Scope of the Study

The study focuses on the implementation of the best interest of the child principle. It mainly evaluate the application of the best interest of the child principle in child custody matter in Debre Birhan woreda court which is located in Amhara National Region State specifically Debre birhan woreda court.

1.8.Limitation of the Study

The researchers has faced here under listed limitation and challenges. Shortage of time is the main limitation in the course of conducting this research, for the researchers had conducted this research at the time we are required to attend classes and preparing for exit exam. Time and financial constraints has not allowed us to undertake the significant field to explore details to the courts in Debre Birehan. The other difficulties we had encounters during our researches are lack of accessibility of transports and lack of internet access. However, irrespective of this barriers, we have tried our best to compromise and came up with good research.

1.9.Organization of the Study

This research papers generally consists of five chapter: The first chapter has general overview about the study (proposal),such as background of the study ,statement of the problem, objective ,significance ,methodology, scope of the study, limitation and limitation of the study .The second chapter contain literature review which include the concept of the best interest of a child principle, and its interpretation. the third one is best interest of the child under international law. the fourth chapter deals with Ethiopian

laws and its practice. The fifth chapter contains conclusion and recommendation.

CHAPTER TWO

The Best Interest of the Child : General Overview

2.1. Introduction

The principle of ***" best interest of the child"*** is a key concept in the world's child right protection movement and it mainly applies in the realm of family disputes such as custody, guardianship ,maintenance , adoption of the child [13]and other issue. The overall theme of the principle is that due focus and priority should be given to the political, economical and social interest of the child whenever policies, laws and decision are made which directly or indirectly affect children.

This principle was first expressly incorporated in the 1924 Geneva Declaration on the Right of the child and the 1959 United Nation (UN) Declaration on the Right of the Child respectively.[14] It is also one of the cornerstone of the 1989 UN Convention of the right of child (UNCRC)[15] and the 1990 African Charter on the Right and Welfare of the Child(ACRWC).[16]The principle of ***"the best interest of the child"*** has also been recognized in the Ethiopian legal and constitutional system from as early 1960s.[17]The standard of the "***best interest of the child"*** was incorporated in to the civil code and this

[13] Stephen Parker ,The Best Interest of The Child: principle and problems: The Best Interest of the Child : Reconciling Culture and Human Rights , International Journal of Law, Policy and The Family ,(1994) Vol.8 p.27.

[14] The Preamble of the Geneva Declaration of the Right of Child adopted on 26 September1924 (League of Nation) and the Preamble of the Declaration of the Right of the Child adopted by UN General Assembly Resolution 1386of 10th December 1959.

[15] United Nation Convention on the Right of Child,1989,Art.3

[16] African Charter on the Right and Welfare of the Child ,1990,Art.4

[17] The Civil Code of the Empire of Ethiopia 1960,Art.681,roc.No 2 neg. gaz. year 19th

tradition has continued with the principle having been mentioned in the Constitution of the Federal Democratic Republic of Ethiopia(FDRE Constitution).[18] Even though, its incorporation in international, African and domestic laws, the issue of the best interest of the child and the determination of its test remain problematic. it is evident that the international and domestic legislation and other measure of protection that exist lack effectiveness when it come to the monitoring and implementation of children's rights. Furthermore, the law on the children that currently exist are either completely silent or specifically providing for the principle on the best interest of the child, or where this principle can be inferred, is not adequate.

2.1.Concept and meaning of the best interest of the child.

2.1.1.Problem of Definition

As we try to discussed earlier, the principle of the best interest of the child is recognized not only in different domestic laws of countries but also in many international human right instrument. Despite such universal recognition of the principle, defining the concept is still a problem. " just as value and norms are not the same everywhere, so are understanding of this notion."[19] In this regard James R. Himes observed that:The challenge of interpreting

" the best interest" principle is complicated by many Powerful forces at work in the world: poor and conflicted –torn societies of Africa to the bewildering legal and ethical concern about the technological manipulation of human genes and the human reproductive system".[20]

[18] Supra nota 7

[19] Phil Alston, "The Best Interest Principle :Towards a Reconciliation of Culture and Human Right, Reconciling Culture and Human Right"(1994), Vol.8. p.4

[20] Id, p.12

Moreover, the standard of the best interest of the child is subjective, vague and non directive as the result it require courts to make subjective decision regarding children's the welfare. Because of the standard provides no objective basis for judicial choice, best interest decision depend on the character, value and prejudices of the presiding judge.[21]

Philip Alston, on his part, raise the following instance to show the difficulty of not having a definite meaning of the principle of the best interest of child. In some highly industrialized countries, the child's best interest are obviously best Served by policies that emphasis autonomy and individuality to the greatest possible extent. In more traditional societies, the links to family and the local community might be considered to be paramount importance and the principle that " the best interest of the child" "shall prevail" will, therefore, be interpreted as requiring the sublimation of the individual child's preferences to the interests of the family or even the extended family.[22] To conclude, despite the recognition of the principle of the best interest of the child in national and international instruments, there is no binding content attached to it. As a result, determining the exact content of this standard and hence what is best for the child has to be assessed on a case by case basis depending on the particular realities of a given state.

2.1.1."The Best Interest of the Child": a Right Based Approach"

To alleviate this definitional problem we stated above, some scholars suggest that the 'best interest' standard should be construed in light of the other rights of the child.[23] It can also be seen in light of the

[21] Janel L. Dolgin, Why Has The Best Interest Standard Survived?.the historic and social context (1996) p. 2
[22] Phil Alston supra note 19.p.10
[23] Michel Freeman and Philip Veerman ,(ed.) ,The Ideology of Children's Rights(1992) p. 24

general social welfare, and the moral, religious and cultural inclinations of parents that may tend to compete with the child's best interest in some situations. There is thus the need to check the compliance of a particular set of values with the rights of the child before using it in the determination of a case at hand.

This position is further strengthened by the argument that these rights in general are part of the 'best interest' concept as they are intended to be used in its realization and to be applied with 'the best interest of the child' constantly in mind.[24] This line of interpreting 'the best interest' standard in light of the rights of the child leads to the conclusion that the standard exceeds the traditional concepts of child upbringing, which are found in any society.[25] In short, this means that the traditional conceptions may be employed only so long as they are in conformity with the other rights of the child.

The exact content of these rights is to be determined having regard to the socio-economic and other relevant factors involved.[26] The reference to these factors is called for because 'a judge is not dealing with what is ideal for the child but with what best can be done in the circumstances.'[27] This determination of the best setting for a child may involve choice as to which one entails a lesser evil depending on the relevant factors considered.[28] Therefore, the reference to the other rights of the child will be our benchmark in searching for the actual content of the principle 'best interest of the child' in a rights-based approach. The following sub-section offer a number of

[24] Ibid, p. 129
[25] Kidist Alemu supra note 8
[26] Ibid p.13
[27] P.M Bromely and N.V Lowe , Bromley's Family aw (7th ed., 1987). P. 317
[28] Kidist alemu supra note 25

schematic arguments in support of the proposition that the best interests concept is fundamentally a rights-based concept.

(a)Best Interests' Informs the Meaning of Rights

The best interests obligation as established in Article 3(1) CRC has been identified by the Committee RC as a general principle of the Convention, applicable across all the other substantive rights. Thus it has stated in its jurisprudence that '[a]s regards Article 3 Paragraph 1 of the Convention, the Committee emphasizes that the Convention is indivisible and its articles are interdependent and that the best interests of the child is a general principle of relevance to the implementation of the whole Convention.'[29] In terms of its value-added to the substantive rights in the Convention, at least three functions of the best interests principle can be identified.

First, it may be used as an interpretative device, giving meaning to a substantive

right where the meaning of the right is obscure or obscure in a particular context. The CJEU has begun to use the best interests principle in Article 24 of the Charter of Fundamental Rights as an aid to the interpretation of other Charter rights.[30] and secondary legislation, albeit not yet in the asylum context. The ECHR regularly uses the best interests principle in its interpretation of Article 8 ECHR and in the past year has begun to use the principle to inform the meaning of Article 5 ECHR in cases involving immigration detention of minors.[31]

[29] Committee RC, Concluding Observations to, *inter alia*, Jordan in 2006, U.N. Doc CRC/C/
JOR/CO/3, para. 37.
[30] Smyth Mary , The Common European Asylum System and Rights of Children : an Exploration of Meaning and Compliance(2013) p. 27-29.
[31] Ibid

Second, the best interests concept can act as a means of extending the scope of a right to a situation of *non-liquet*. For example, while the CRC refers in articles 5 and 18(2) to the concept of legal guardianship, and provides in Article 20 that a child temporarily or permanently deprived of his/her family environment 'shall be entitled to special protection and assistance provided by the state', the Convention falls short of establishing the right of a child temporarily or permanently deprived of his/her family environment, such as an unaccompanied minor, to a legal guardian or equivalent representative. However, the best interests concept can be brought to bear to bridge the gap between these two rights.[32]

Third, the best interests concept can act as a mediator in resolving possible conflicts between rights. For example, the immigration detention of accompanied children can pit two core rights against each other: the right of the child not to be deprived of his/her liberty arbitrarily under Article 37(b) CRC and a right not to be separated from his/her parents against their will under Article 9(1) CRC. The best interests of the *particular* child will be key in deciding whether to a) release the child into the care of the state, thus prioritizing the right not to be arbitrarily detained over the right not to be separated; b) keep the family together in detention, thus prioritizing the converse or c) release the entire family.[33]

(b)Rights Inform the Meaning of 'Best Interests'

If 'best interests' inform the meaning of rights, it is also true to say that rights inform the meaning of best interests – something that has been recognized by the CJEU, and the ECHR. Perhaps the clearest illustration of the right of the child to be heard – sometimes called the

[32] Ibid

[33] Ibid

right of the child to participate. One of the traditional criticisms of the best interests concept was that it appeared to superimpose on the child a decision about what was in his/her best interests, contrary to or at least regardless of his/her own view of what was in his/her best interests. The problem is succinctly put by Archard and Skivenes:

The problem arises because the two commitments [best interests and the child's views] seem to pull in different directions: promotion of a child's welfare is essentially paternalistic since it asks us to do what we, but not necessarily the child,
think is best for the child; whereas, listening to the child's own views asks us to consider doing what the child, but not necessarily we, thinks is best for the child.[34]

However, an approach that construes the child's best interests in opposition to the child's views is not consistent with the scheme of the CRC. Article 3(1) on the best interests of the child is one of four general principles of the Convention. But another of the general principles is contained in Article 12, paragraph 1 of which provides: 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'[35]The *travaux préparatoires* reveal that an early version of Article 3 referred to the best interests principle in paragraph 1 and the principle of child participation in paragraph 2.35 However, as paragraph 2 overlapped with a separate article on the right to express opinions, it was decided to devote one single article (eventual Article 12) to the right of the child to be heard, thereby separating the concepts of best interests

[34] David Archard and Marit Skivens, Balancing a Child's Best Interest and a Child's Views , International Journal of Children's Rights(2009) p.2
[35] Smyth Mary supra note 30 p.31

and participation. However, the Committee RC has been consistent in its efforts to reunite the two concepts, culminating in General Comment No. 12 on the right of the child to be heard, in which the Committee notes that:

There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.[36]

To be clear: it is not that the child decides what is in his/her best interests; it is that the child participates in the decision-making process. There is no panacea to the real life difficulties of reconciling divergent accounts of best interests by the decision-maker2444 and the child. However, the participation of the child in the process increases the likelihood of a decision that coincides with the views of the child and ensures that a decision that is contrary to the views of the child is justified on that account, making the decision-making process more robust and the decision-maker more accountable.

It is clear from the preceding arguments that the rights-based approach to best interests has superseded the welfare approach. The rights-based approach underscores the symbiotic relationship between best interests and rights. Of course, it is not possible to say in the abstract what is in the best interests of any given child; indeed,

[36] Committee RC, General Comment No. 12, 'The right of the child to be heard', U.N. Doc. CRC/C/GC/12 (2009), para. 74.

part of the function of the best interests principle is to direct attention to the individual child and his/her unique circumstances.
But the rights of the child function as general signposts of the child's best interests. Thus, Eekelaar comments that 'such rights [as are contained in the CRC] can be viewed as objective determinations by the international community of what children's interests are.' Furthermore, the rights of the child and, indeed, the spirit of the Convention as a whole (which centers on the dignity of the individual) circumscribe what can be said to be in the best interests of the child .Accordingly, it is simply not possible to assert that a given course of action is in the best interests of the child if it violates a relevant right of the child – something that has been reiterated by the Committee right of child on numerous occasions. Applied to the asylum context, the close connection between the best interests of the child and the rights of the child means that any assessment of best interests in the CEAS instruments (or indeed of whether the CEAS is in the best interests of children) is essentially an inquiry into the degree of respect for the rights of the child. [37]

But for the sake of definition purpose, the *best interest of the child* means considering the child before a decision affecting his/her life is made. This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common law principle that has been used to assist primarily courts and other institutions in the decision-making process. It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say in determining the overall welfare of the child. They do through a relatively delicate balancing of interests. These interests themselves are particularly

[37] Smyth Mary supra note 30 p.34

sensitive as they often relate to family status matters in terms of divorce, maintenance, and custody and control.[38]

2.2. The Concept of Childhood Under International and National Laws

2.2.1.Commencement of Childhood

The Convention on the Rights of the Child (hereinafter the "CRC" or "the Convention") defines "child" as every human being below the age of eighteen years.[39]

The Convention does not provide the minimum age of childhood. It does not stipulate either birth or conception as the starting point of childhood. The silence of the Convention on this point is intentional. The Convention avoids taking position on the controversial issue of abortion with a view to encourage universal acceptance of the instrument.[40] The setting of the starting point for childhood is left to the determination of States Parties to the Convention.[41] Moreover, the Convention does not conflict with domestic legislation which provides better protection more conducive to the realization of the rights of children.[42]

On the other hand, the African Charter on the Rights and Welfare of the Child provides a different definition of the term child. The Charter defines a "child" as every human being under the age of 18 years.[43] This makes the definitions of the concept of childhood under the African Children's Charter not subject to limitations.[44] The omission of the phrase "*unless majority Is attained earlier*" in the

[38] Mahlobogwane, F. "south African Courts and The Best Interest of the Child in Custody Dispute .(2005).p.3
[39] Convention on The Right of The Child,1989,Art.1(1), 20 Nov.
[40] Girmachew Alemu (Ph.D), Yonas Birmeta, Handbook on the Right of the Child in Ethiopia. P.9
[41] Ibid
[42] Ibid
[43] African charter on The Right and Welfare of The Child ,1999,Art.2, Nov 29.

African Children's Charter makes the instrument more comprehensive and inclusive.[45] On the contrary, the Convention is more prescriptive and not inflexible as regards the end of childhood.[46]

The term "child" is not specifically defined under Ethiopian law. Instead, Ethiopian laws make use of such terms as "minors", "infant". "young workers" or "young persons". Chapter Twelve of the Revised Family Code deals with minors. The Revised Family Code defines a "minor" as a person of either sex who has not attained the full age of eighteen years old.[47]Based on the Revised Family Code and Family Codes adopted by other Regional States in Ethiopia, it is possible to assert that the general age of majority in the country is 18 years.

2.2. Historical Development of the Best Interest of the Child

2.2.2.Evolution of the Doctrine of "The Best Interest of the Child"

The doctrine of the best interest of the child is a widely recognized principle in child right protection. This legal principle largely applies in relation to family affairs; in particular, in disputes concerning custody, guardianship, maintenance, adoption, etc of the child. Originally, the doctrine of the best interest of the child had limited application. It was little more than a way of ensuring that the interests of any children involved would be taken into account in divorce and custody cases.[48]

However, as it will be discussed later, this principle is, nowadays, extended to apply not only in its original sense, but also "in relation to all actions concerning children" to quote the language of

[44] Michael Gose , The African Charter on The Right and Welfare of The Child (2002) p.27
[45] Ibid
[46] Ibid
[47] The Revised Family code of Ethiopia, Art 215
[48] Philip Aliston supra note 19,p.4

the 1989 UN Child Rights Convention. Despite its very limited jurisprudential origins, the principle of the best interest of the child is, in one form or another, embodied in many national and legal systems and has important analogues in diversified cultural, religious and other traditions.[49]

However, this apparent communality is accompanied by very diverse interpretations that may be given to the principle under different settings. In early times, fathers were given custody of their children in case of divorce. For instance, in feudal Europe, the father used to have a paramount right to have custody of his children as children were considered to be part of his patrimony.[50] In countries like Holland, the father was given this paternal preference as he was thought to be capable of properly raising children.[51] Hence, during these periods, the father had a right to have custody of his children unless the wife proves that he is unfit.[52] The unfitness, however, was to be proved under stringent conditions. The mother, in most jurisdictions, had to show that the
father was insane or for any other reason was incapable of taking care of the children.[53]

In 1839, the British parliament modified this paternal preference by the '*tender years doctrine*'.[54] This doctrine holds that children under seven years of age should not be separated from their mothers. This was based on the premise that mothers are very important for younger children due to the special natural bond existing between

[49] Ibid p.5
[50] Melina, M.B," louisiana Family Law: The Visitation of the Non- Custodian Parent"(1994) vol. 59.p.489
[51] Kidist Alemu supra note 8 .p,6
[52] Ibid
[53] Ibid
[54] Lenore J. Weitzman, The Divorce Revolution: The unexpected Social and Economic Consequence fo Women(1987) p. 219

them and due to the fact that young children are often looked after by their mothers.[55]

In the 1900s, another standard was developed through case laws in the common law countries, especially in the U.S.A. This standard favors the mother as the primary care provider and it was based on the significant place mothers have in the child's mind due to their intimate interaction and the special natural bond which exists between them.[56] This standard differs from the initial paternal predominance in feudal Europe because it prefers mothers by giving due consideration to what is best for the child rather than paternal preference. In fact, the application of the best interest standard is 'gender neutral', and it has currently won recognition in both the common law as well as in the civil law systems, amongst which the U.K., U.S.A. and France may be cited.[57]

CHAPTER THREE

The Legal Incorporation of the Principle of the Best Interest of the Child

3.1. The Declaration of Geneva

The first international declaration, the Declaration of Geneva of 1924, is most limited in its scope. In its Preamble it states that 'mankind owes to the child the best it has to give. Its five terse principles emphasize welfare: the requisite means for normal development; food

[55] Kidist Alemu supra note 8 p. 6
[56] Lenore J. Weitzman supra note 54.p.221
[57] Ibid

and medicine, help for the 'backward', rehabilitation of the delinquent; relief in times of distress; to be put in a position to earn a livelihood and protection against
exploitation; and socialization to serve others.[58] The principles, the fifth above all, reflected the aftermath of an imperialist war.[59] It was an 'aspirational document'.[60]

This Declaration significantly reflected the concerns related to the rights of children that were grossly violated during WWI and its aftermath. The declaration emphasized children's material needs and proclaimed that children must have the requisite means for their formal development. This included food for the hungry, nursing for the sick, due attention for the handicapped and shelter and support- both physical and emotional- for the orphans.[61] The phrase "mankind owes to the child the best it has to give" clearly underlines our duties towards children, and it entitles them for the best that mankind can give. This implies that the interest of the child should be given primary consideration in actions involving children.

3.2. The Universal Declaration of Human Rights

In 1948 the Universal Declaration of Human Rights was adopted.[62]There are
provisions in this tailored to children. this instrument does not cover particular categories of persons, i.e. children, women, and the like. It rather addresses human rights in general, to which everyone is entitled. Yet, we can interpret some generic provisions in the context of child rights. According to Article 25(1) of the UDHR, every one

[58] P.vermeen, The Right of Child and The Changing Image of Childhood(1992.p155-161
[59] E. muller, Great Britain and The Declaration of Geneva V (1925) VI (7) The world's Children(1925).p.116
[60] D. marshall, The Construction of Children as un Object of International Relation (1999)
[61][61] The Geneva Declaration of Right of Child(1924) At.1,2 and 3
[62] M.Mcdougal and H. Lass well, The customary law Status of The UDHR.

(including the child) is recognized to have the right to a standard of living adequate for the health and well being of him/herself … including food, clothing, housing and medical care and other necessary social services.[63]

Under the 2nd sub-article of the same provision, children are specifically addressed by the UDHR when it says "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."[64] This entitles every person the socio-economic rights that are important for his/her life and wellbeing. And in particular, children are entitled to get special care from the law and the society. For example, Art. 26 of the UDHR embodies the human right to education. According to this provision, everyone has the right to education and for the purpose of realizing this right, education shall be free and especially elementary education is made compulsory.[65] Since education is the instrument for the full development of the human personality, parents have the right to choose the kind of education that shall be given to their children as per Sub-art 3 of the same provision. This parental right is based on the presumption that there is no one who is in a better position than parents to determine what is best for the child.

3.3. The 1966 Covenants

The two international covenants, which hold a significant status in the world human right movement, are the International Covenant on Civil and Political Rights (ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the same year. Articles 23(4) and 24 of the ICCPR specifically deal with the rights of the child in the civil and political life of the society. Article 23(4)

[63] UDHR Art.25(1)
[64] Id Art.25(2)
[65] Id Art.26

states that in situations of dissolution of the marriage, the state parties to the Covenant are responsible to take measures which are appropriate for the protection of the child.[66]

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

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

[66] ICCPR, Art23(4)

3.4. The Best Interest of the Child under the Convention on the

Rights of the Child (CRC) Articles 3 and 4

While child rights are set forth in a number of international legal instruments, the ***Convention on the Rights of the Child****1* (CRC) is the most authoritative international legal instrument for the protection of children's human rights, with almost universal acceptance. The CRC has highlighted the fundamental human dignity of all children, the urgency of ensuring their protection, well-being, survival and development, and the concept of children as bearers of human rights.[67] According to Article 3(1) of the CRC, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[68]

The principle thus requires active measures by all organs of the state, i.e. the executive, the legislature and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions. An example in this regard can be a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.[69]

In light of this provision of the Convention, the best interests of the child should be measured against the compatibility or otherwise of any administrative, legislative or

[67] UNHCR, Guideline on Formal Determination of the Best Interest of The Child .p.3
[68] CRC Art.3
[69] Committee on The Right of The Child ,General Comment ,NO 5/2003.

judicial measure not only in taking the interests of the child into account, but also to give it a primary consideration.[70] The best interest of the child can only be achieved if state parties take certain actions towards the realization of children's rights. In this regard,

Article 4 of the Convention provides what state parties should do in order to achieve the rights under the convention. It states that: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their avail resources and, where needed, within the framework of international cooperation.[71]

Article 3, paragraph 1, establishes a framework with three different types of obligations for States parties:

* The obligation to ensure that the child's best interests are *appropriately integrated and consistently applied* in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;
* The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.
* The obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions

[70] Ibid
[71] CRC Art.4(1)

that concern or impact on a child.[72] Commenting on this article, the UN Committee on the Rights of the Child states: "[while it is the State which takes on obligations under the
Convention, its task of implementation of making reality of the human rights of children - needs to engage all sectors of society."[73] The Committee also makes it clear that the CRC contains some children's rights that are already covered by other human rights instruments, because children are persons. It states that "many other articles, including articles 2, 3, 6, and 12 of the Convention, contain elements which constitute civil/political rights, thus reflecting the interdependence and indivisibility of all human rights. Enjoyment of economic, social, and cultural rights is inextricably intertwined with enjoyment of civil and political rights."[74]

The CRC does not offer a precise definition of the best interests of the child. While the term "best interests" broadly describes the well-being of a child, it is not possible to give a conclusive definition of what is in the best interests of the child, as this depends on a variety of individual circumstances, such as the age and the level of maturity of the child, the presence or absence of parents, the child's environment, etc. The term "best interests" should, however, be interpreted and applied in conjunction with the CRC and other international legal norms. It is important to be aware that for certain specific actions, including adoption and separation from parents against their will, the CRC requires that the best interests be the *determining factor*, whereas for other actions it has to be *a* primary consideration, which does not exclude other considerations to be taken into account. the exact wording of the CRC that refers to the term "best interests".[75]

[72] Supra note 69
[73] Ibid
[74] Supra note 71
[75] Supra note 67

3.5. CRC General Comment on the Best Interest of the Child

The committee on the right of the child has published its general comment No 14 on the right of the child to have his/ her best interest taken as a primary consideration (art.3).

The present general comment seeks to ensure the application of and respect for the best interest of the child by the state parties to the convention. It define the requirement for due consideration, especially in judicial and administrative decision as well as in other action concerning the child as an individual, and at all stage of the adoption of laws, policies, strategies, programs and all implementation measure concerning children in general or as a specific group.

3.5.1. Legal analysis of article 3, paragraph 11.

"In all actions concerning children"

A, "in all action

Article 3, paragraph 1 seeks to ensure that the right is guaranteed in all decisions and

actions concerning children. This means that every action relating to a child or children has to take into account their best interests as a primary consideration.[76] The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures. Inaction or failure to take action and omissions are also "actions", for example, when social welfare authorities fail to take action to protect children from neglect or abuse**s".**[77]

[76] Supra note 72
[77] Ibid

(b) "concerning

The legal duty applies to all decisions and actions that directly or indirectly affect children. Thus, the term "concerning" refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure. As stated in the Committee's general comment No. 7 (2005), such actions include those aimed at children (e.g. related to health, care or education), as well as actions which include children and other population groups (e.g. related to the environment, housing or transport) (Para. 13 (b)).

Therefore, "concerning" must be understood in a very broad sense. Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests o the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate. Thus, in relation to measures that are not directly aimed at the child or children, the term "concerning" would need to be clarified in the light of the circumstances of each case in order to be able to appreciate the impact of the action on the child or children.[78]

(C), public or private social welfare institutions"

These terms should not be narrowly construed or limited to social institutions *stricto*

sensu, but should be understood to mean all institutions whose work and decisions impact

[78] Ibid

on children and the realization of their rights. Such institutions include not only those
related to economic, social and cultural rights (e.g. care, health, environment, education,
business, leisure and play, etc.), but also institutions dealing with civil rights and freedoms (e.g. birth registration, protection against violence in all settings, etc.). Private social welfare institutions include private sector organizations – either for-profit or non-profit – which play a role in the provision of services that are critical to children's enjoyment of their rights, and which act on behalf of or alongside Government services as an alternative.[79]

(D) "courts of law"

The Committee underlines that "courts" refer to all judicial proceedings, in all instances whether staffed by professional judges or lay persons – and all relevant procedures concerning children, without restriction. This includes conciliation, mediation and arbitration processes. In criminal cases, the best interests principle applies to children in conflict (i.e. alleged, accused or recognized as having infringed) or in contact (as victims or witnesses)with the law, as well as children affected by the situation of their parents in conflict with the law. The Committee5 underlines that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.[80]

In civil cases, the child may be defending his or her interests directly or through a representative, in the case of paternity, child abuse or neglect, family reunification, accommodation, etc. The child may be affected by the trial, for example in procedures concerning

[79] Ibid
[80] Ibid

adoption or divorce, decisions regarding custody, residence, contact or other
issues which have an important impact on the life and development of the child, as well as child abuse or neglect proceedings. The courts must provide for the best interests of the child to be considered in all such situations and decisions, whether of a procedural or
substantive nature, and must demonstrate that they have effectively done so.[81]

(E)"administrative authorities"

The Committee emphasizes that the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others. Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures.[82]

(F) "legislative bodies"

The extension of States parties' obligation to their "legislative bodies" shows clearly
that article 3, paragraph 1, relates to children in general, not only to children as individuals. The adoption of any law or regulation as well as collective agreements – such as bilateral or multilateral trade or peace treaties which affect children – should be governed by the best interests of the child. The right of the child to have his or her best interests assessed and taken as a primary consideration should be explicitly included in all relevant legislation, not only in laws that specifically concern children. This obligation extends also to the approval of budgets, the preparation and development of which

[81] Ibid
[82] Ibid

require the adoption of a best interests-of-the-child perspective for it to be child-rights sensitive.[83]

(G)"The best interests of the child"

The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the

child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator the best interests of children in general must be assessed and determined in light of the

circumstances of the particular group and/or children in general.

In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols. The child's best interests shall be applied to all matters concerning the child or children, and taken into account to resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties.

Attention must be placed on identifying possible solutions which are in the child's best interests. This implies that States are under the obligation to clarify the best interests of all children, including those in vulnerable situations, when adopting implementation measures. The flexibility of the concept of the child's best interests allows it to

[83] Ibid

be responsive to the situation of individual children and to evolve knowledge about child development.

However, it may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant.[84]

(H)"Shall be a primary consideration"

The best interests of a child shall be a primary consideration in the adoption of all

measures of implementation. The words "shall be" place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.

The expression "primary consideration" means that the child's best interests may not

be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voiceless. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

In respect of adoption (art. 21), the right of best interests is further strengthened; it

is not simply to be "**a primary** consideration However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The

[84] Ibid

best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

Viewing the best interests of the child as "primary" requires a consciousness about
the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.[85]

(I)Best interests assessment and determination

Assessing the child's best interests is a unique activity that should be undertaken in
each individual case, in the light of the specific circumstances of each child or group of
children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children

[85] Ibid

find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc

Determining what is in the best interests of the child should start with an assessment
of the specific circumstances that make the child unique. This implies that some elements
will be used and others will not, and also influences how they will be weighted against each other. For children in general, assessing best interests involves the same elements.

The Committee considers it useful to draw up a non-exhaustive and non-hierarchical
list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests. The non-exhaustive nature of the elements in the list implies that it is possible to go beyond those and consider other factors relevant in the specific circumstances of the individual child or group of children. All the elements of the list must be taken into consideration and balanced in light of each situation. The list should provide concrete guidance, yet flexibility.

Drawing up such a list of elements would provide guidance for the State or decision maker in regulating specific areas affecting children, such as family, adoption and juvenile justice laws, and if necessary, other elements deemed appropriate in accordance with its legal tradition may be added. The Committee would like to point out that, when adding elements to the list, the ultimate purpose of the child's best interests should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child. Consequently, elements that are contrary to

the rights enshrined in the Convention or that would have an effect contrary to the rights under the Convention cannot be considered as valid in assessing what is best for a child or children.[86]

3.5.2. Elements to be Taken into Account when assessing the Child's Best Interests

(a)The Child's Views

Article 12 of the Convention provides for the right of children to express their views

in every decision that affects them. Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.. The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests.

(b) The Child's Identity

Children are not a homogeneous group and therefore diversity must be taken into

account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.

[86] Ibid

Regarding religious and cultural identity, for example, when considering a foster
home or placement for a child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (art. 20, para. 3), and the decision-maker must take into consideration this specific context when assessing and determining the child's best interests.[87]

(c) Care, Protection and Safety of the Child

The terms "protection and care" must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as "to protect the child from harm"), but rather in relation to the comprehensive ideal of ensuring the child's "well-being" and development. Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.

Emotional care is a basic need of children; if parents or other primary caregivers do
not fulfill the child's emotional needs, action must be taken so that the child develops a
secure attachment. Children need to form an attachment to a caregiver at a very early age,
and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.

Assessment of the child's best interests must also include consideration of the child's
safety, that is, the right of the child to protection against all forms of physical or mental
violence, injury or abuse (art. 19), sexual harassment, peer pressure, bullying, degrading

[87] Ibid

treatment, etc.,14 as well as protection against sexual, economic and other exploitation,
drugs, labour, armed conflict, etc.(arts. 32-39). Applying a best-interests approach to decision-making means assessing the safety and integrity of the child at the current time; however, the precautionary principle also requires assessing the possibility of future risk and harm and other consequences of the decision for the child's safety.

(D)The Child's Right to Health

The child's right to health (art. 24) and his or her health condition are central in assessing the child's best interest. However, if there is more than one possible treatment for a health condition or if the outcome of a treatment is uncertain, the advantages of all possible treatments must be weighed against all possible risks and side effects, and the
views of the child must also be given due weight based on his or her age and maturity. In
this respect, children should be provided with adequate and appropriate information in
order to understand the situation and all the relevant aspects in relation to their interests,
and be allowed, when possible, to give their consent in an informed manner.[88]

(E)The Child's Right to Education

It is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of
charge. All decisions on measures and actions concerning a specific child or a group of
children must respect the best interests of the child or children, with regard to education. In order to promote education, or better quality education, for more children, States parties need to have well-trained

[88] Ibid

teachers and other professionals working in different education related settings, as well as a child-friendly environment and appropriate teaching and learning methods, taking into consideration that education is not only an investment in the future, but also an opportunity for joyful activities, respect, participation and fulfillment of ambitions. Responding to this requirement and enhancing children's responsibilities to overcome the limitations of their vulnerability of any kind, will be in their best interests.

3.5.3. Balancing the Elements in the Best-Interests Assessment

It should be emphasized that the basic best-interests assessment is a general

assessment of all relevant elements of the child's best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment.

The elements in the best-interests assessment may be in conflict when considering a

specific case and its circumstances. For example, preservation of the family environment

may conflict with the need to protect the child from the risk of violence or abuse by parents. In such situations, the elements will have to be weighted against each other in order to find the solution that is in the best interests of the child or children.

In weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective
enjoyment of the rights recognized in the Convention and its Optional Protocols, and the
holistic development of the child. In the best-interests assessment, one has to consider that the capacities of the child will evolve.

Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child's present and future situation.[89]

3.6 . The Best Interest of the Child Under Regional Legal Instrument

When determining the best interests of the child, it is important to consider all the rights of the child. In addition to the norms contained in the CRC, there are other legal bases, both at the international and the national level, that may affect the decision on what constitutes the best interests in a particular situation. One has, however, to take into account that the higher standard shall always apply.

[89] Ibid

3.6.1.The Best Interest of the Child and the African Charter on

the Rights and Welfare of the Child (ACRW)

The African Charter on the Rights and Welfare of the Child was adopted by the then Organization of African Unity (now African Union) on July 11, 1990. The Charter entered into force on November 29, 1999. Some argue that a "critical look at the substantive provisions of the Children's Charter in direct comparison with the CRC shows that in a number of respects, it sets a higher level of protection than its UN equivalent."[90] The Charter has also repeated the best interest of the child as a principle to be employed in deciding any issues that involve the rights of the child.

According to Article 4(1), "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."[91] It should also be noted that Article 4(1) extends to all actions by 'any person so that parents are included. This is wider than Article 3(1) of the UNCRC. In other ways also the ACRWC is wider than the UNCRC.[92] The basic reasons that necessitated a separate charter on the rights and welfare of the African child include the need for a "more elaborate" legal regime that can provide "better protection to the African child" and the need for "an African touch to the overall concept of child rights.[93] However, as other eminent scholars in the field argue and as can be seen easily from the UNCRC and the African Charter, the latter is silent on certain issues such as the obligation of states stipulated under Article 3(3) of the Convention on the Rights of the Child which provides:

[90] Priscilla Yachat Ankut, The African Charter on The Right and Welfare of The Child: linking Principle with Practice(2008)
[91] The African Charter on The Right and Welfare of The Child(1990), Art.4(1)
[92] Michael Freeman, A Commentary on The United Nation Convention on The Right of the Child.p.21
[93] Tilahun Teshome, The African Charter on The Right and Welfare of The Child(1999) Unpublished.p.8

State parties shall ensure that the institutions, services and facilities responsible
for the care and protection of children shall conform with the standards
established by competent authorities, particularly in the areas of safety, health,
in the number and suitability of their staff, as well as competent supervision.[94]

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

3.7. The Best Interest of the Child Under Ethiopian Laws

Ethiopia is a federal state comprising nine regional states, and two cities directly accountable to the federal government. Pursuant to article 50(2) of the Constitution, "The Federal Government and the States shall have legislative, executive and judicial powers." The constitution has also clearly divided the power between the three organs of the state at the federal level and between the federal

[94] Ibid

government and the states. Adopted after the overthrow of the communist regime, the Ethiopian Constitution incorporates fundamental human rights. Subsequently, Ethiopia has acceded to and/or ratified many international human rights treaties.

The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) are among the ratified treaties. To make the existing laws compatible with the commitments entered into through these treaties, Ethiopia has revised many of its existing laws dealing with children subsequent to the ratifications. For example, the revised family code, criminal code, and labor code. now include provisions intended to protect and promote child rights.[95]

3.7.1.The Constitutional Regime of Child Rights in Ethiopia

There was no mention of child rights in the 1931 Constitution, and the whole concept of human rights was given a very minimal recognition. There was no clear provision in the Constitution which provided institutional guarantees for the realization of the few rights that were recognized.[96] Moreover, the 1955 Revised Constitution did not address the issue of child rights in general and the best interest of the child in particular. However, there was a provision which recognized the need to accord special protection to the family as the source of the maintenance and development of the Empire and as the primary base for education and social harmony.[97]

The 1974 Draft Constitution incorporated some provisions on the rights of the child such as non-discrimination of children born in or out of wedlock with respect of rights and duties, prohibition of child labor, and parental obligation to get their children at least a

[95] Ashagrie Abdi, The Ethiopian Civil Society Law In Light of The Principle of Child.p.1
[96] Ibid
[97] Ibid

primary education. Although the Draft Constitution seemed relatively modern compared to its predecessors, it still lacked a specific provision concerning the detailed rights of a child in every aspect of life. Yet, Article 120 of the Draft Constitution had entrusted the Imperial Supreme Court with the power to interpret the constitution. This would have indeed given regular courts the power to interpret and elaborate the provisions (on some aspects of child rights) and develop the trend of protecting the interests of the child. The PDRE (People's Democratic Republic of Ethiopia) Constitution of 1987 only provided for the non-discrimination principle of children born in or out of wedlock and compulsory primary education to children. No other mention was made concerning the rights of children. With respect to the charter of the Transitional Government of Ethiopia (TGE) of 1991, it gave the UDHR of 1948 a general effect of application in Ethiopia in its fullest sense. However, it did not mention or further elaborate the rights and freedoms of individuals (including the child) except freedom of expression, freedom of association and the right of nations, nationalities and peoples to self determination. [98]

Unlike the preceding, the current FDRE Constitution expressly devotes an article for the rights of children. This constitutional provision not only recognizes and protects the various aspects of child rights, but it also adopts the doctrine of the best interest of the child from the 1989 Convention on the Rights of the Child and from the African Charter on the Rights and Welfare of the Child. The 'bill of rights' chapter of the FDRE Constitution lists fundamental rights and freedoms that apply to 'all persons', age or other statuses notwithstanding; likewise an array of rights specifically designed to ensure the protection and welfare of children are provided.

[98] Gebrehiwot Aregay, Guardianship and Custody of Children Before and After Modern Code(1966) Unpublished.p.11

A very remarkable clause in the constitutional organization - informing the normative scope of the best interest of the child principle - is also that ‘substantively’ the application of fundamental rights specified in chapter III of the Constitution shall be tuned to higher standards (of child rights) prescribed under the Universal Declaration of Human Rights and international human rights covenants adopted by Ethiopia More importantly, Art.36.2 of the Constitution explicitly provided for the ‘best interest of the child’, dictating that the principle shall be the ‘primary consideration’ in all actions concerning children by public or private welfare institutions, courts of law, administrative authorities and legislative bodies. This constitutional prescription is replicated in several policy and legal frameworks, sometimes plainly and in other cases only indirectly, further providing a guideline for decisions and actions by the judiciary whenever circumstances so warrant. The Constitution serves as overarching socio-political and legal instrument - instructing future directions in child-related policy, legal developments and judicial activism.

3.7.2.The Civil Code of the Empire of Ethiopia 1960 and The Federal Revised

Family Code

3.7.2.1. The Civil Code of the Empire of Ethiopia 1960

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

age of discernment and could be allowed to be with their mothers if this option becomes their choice.[99]

The 1960 Civil Code embodies the principle of the best interest of the child as its guiding principle in determining cases of custody, guardianship, adoption and maintenance of children. As will be discussed later, this principle is also affirmed in the Revised Family Code and the family codes of regional states. The Ethiopian Civil Code incorporates a spectrum of stipulations that may make up the idea of "*the best interest of the child*".[100]Article 2 of the Civil Code considers a merely conceived child as born when his/her *interest* so demands. Accordingly, a conceived child will be considered as born where, *inter alia*, the interest of a conceived child is at stake.[101] Although they have now been repealed and substituted by revised family codes, the provisions of the Civil Code that deal with the custody of children in post-divorce decisions of the court stipulate
that the child shall stay with his/her mother until the age of five unless there is serious reason for deciding otherwise. Moreover, Article 805 of the Code clearly states that adoption may take place only if there is good reason, which takes the child's benefits into account.

In the realm of successions,[102] Article 842 of the Civil Code renders children of the deceased the first intestate successors and there are provisions that annul the will of a testator if a descendant is born after the making of the will (and where the descendant accepts the succession).[103] These laws of succession promote the best interest of the child. Moreover, the Civil Code does not allow a testator to disinherit a child or other descendant without stating (in his will) "the

[99] Ibid
[100] Tilahun Teshome Supra note 89,p.43
[101] Ibid
[102] Id Art.904(1)
[103] Id Art.938

reason that justifies the disherison". Even though the reason stated is assumed to be correct, the court shall ascertain whether the reason stated by the testator "justifies the disherison". Ethiopia's Civil Code further stipulates that the succession shall remain in common between the heirs where the manner of making the partition depends on the condition of the birth of a child who is
merely conceived. The Code also protects the best interest of the child in the
realm of contracts. Contracts concluded with minors are voidable and they can be invalidated if the minor or his/her submit the application for invalidation within the prescribed limit of time."[104]

3.7.2.2.The Federal Revised Family Code of Ethiopia 2000

The 2000 Revised Family Code has replaced the provisions of the Civil Code concerning family matters and other related issues. Unlike the Civil Code, which entrusts the child to the custody of his/her mother until the age of five, Article 113 of the Revised Family Code entitles the court to decide on the custody of children. The court shall decide the custody of the child by taking into consideration the interest of the child. However, the court may reverse or revise its decision as it thinks fit due to the change of circumstances on the custody situation of the child.[105]

However, The revised family code of Ethiopia has its own gaps on the child custody matter, Custody law in Ethiopia it is bases and major guideline under art.113 of the revised family code.[106] The matter of custody shall be considered and decided by the court taking in to account the best interest of the child. This is apparent in the guide line for deciding and custody according to the various international

[104] Id Art.808(1)
[105] The Revised Family code of Ethiopia, Art 113
[106] The Revised Family code of Ethiopia, Art.113

and regional human right instrument, like CRC art.3 , African charter(ACRW**C)** art**.** 4 and the FDRE Constitution art.36(2) the best interest of the child should be a primary concern.

Despite this fact, the federal revised family code gives a little place in this regard. There is only one provision in the revised family code that deals with child custody matter and this provision also is very general one. Even though this article is an improvement from the previous law, leaving custody matters to the court instead of family arbitrators, who could easily get biased by family or friendship ties, it lacks effectiveness in other aspects.

The revised family code of Ethiopia , lays too much burden on the courts, because now it is the duty of the courts to ascertain the income, age, living conditions of the spouses concerned. This wide range of duties takes up the time and man power especially of an office of government that would have hundreds of similar cases pending. Decisions could, therefore, be very much delayed. And since the courts are distanced third parties to such dispute, their lack of deep knowledge makes it easy for any one of such spouses to conceal information like ones monetary or health status or underlying abusive behaviors. Due to such barrier the court may take a wrong position in giving in giving child custody decision .[107]

Under such instances, a group of arbitration could have provided a neutral more detailed and firsthand look of the existent situation and this would have helped but the law makes no such provision. It also open a door for residing judges to interpret this provision based on their perception or in a way without take in to the best interest of the child. In addition, the provision of the revised family code does not contain exhaustive list factor for courts to consider in making determining regarding the best interest of the child is another

[107] Fikadu Asfaw, A Brief Note on the Provision of Ethiopian Legal System Governing Child Custody (2010)

problem of the provision. It let the judge freely to determine what is best for the child and as a result the decision we be biased.

3.7.2.3. The Amhara National Regional State Family Law 2003

In 2003 of June the Amhara national regional state family law is promulgated.[108] In proclamation No 79/2003 Article 124(1) and (2) stated that the best interest of child/children that are very similar with the federal revised family code.

The federal revised family code has extensive consideration of living standards of the parents, health and age. But the 1960 civil code has very essential point that the mother to have custody on the issue of "tender year is circumstance that forces the court to reverse its decision, the court is obliged to entitled the mother to have custody over the child/children who are under the age of five years and must be under her custody until they reach the above mentioned age " Children less than six years of age must be kept by their mother because in this age they need their mother love more than the other age. The revised federal family cod has suspended the 1960 civil code of that is entitled "*Tender years*" presumption. The Amhara regional state law has not neglect the 1960 civil code Art 3 which is very significant provision. It is also very important ***"to protect and keep watch the best interest of the child / children".)***[109]

Like that of the federal family code the Amhara regional state family code is general in its nature. This law it lays too much burden on the courts, because now it is the duty of the courts to ascertain the income, age, living conditions of the spouses concerned. This wide range of duties takes up the time and man power especially of an office of government that would have hundreds of similar cases pending. Decisions could, therefore, be very much delayed. And since

[108] **The 2003 G.C Amhara Regional State Family Law Article 124 1,2,**
[109] **The 1960 G.C. Civil code Article 13**

the courts are distanced third parties to such dispute, their lack of deep knowledge makes it easy for any one of such spouses to conceal information like ones monetary or health status or underlying abusive behaviors.

What make this regional family code special is found under art.124(3) " Unless it is faced with a compelling cause for deciding otherwise in accordance the stipulation laid down under sub-art 1and 2of this article, the court shall order the custody of children below the age of five years be entrusted to their mother up to such age".[110] This article follow ***" the tender year doctrine"*** under which the mother was deemed to be the more suitable custodial for the children. which developed in the mid 19th century. The presumption favoring the mother was justified both by assumed biological superiority of the mother as parent and by social custom . but it is eroded in 1970s and has been abolished latter because it is based on *out dated stereotypes.* [111]

Although the tender doctrine has formally be replaced by the best interest of child principle, the doctrine is still, in practice and has legally incorporated under the Amhara national state family code under art.124(3) unless it is faced with a compiling cause for deciding otherwise in accordance with the stipulation aid down under sub-article 1 and 2,, the court shall order the custody of children below the age of five be entrusted to their mother up to such age. It is the duty of the father to rove the mother to be unfit parent for custody while the mother need not to prove the father is unfit in order to win the custody herself . if the father failed to prove neither the court nor the mother has the duty to prove the contrary as a result the judge are reluctant in serving what is best for the child and simply order the issue of custody to be entrusted to the mother. But, this is against

[110] **The 2003 G.C Amhara Regional State Family Law Article 124 1,2**
[111] Aschalew Ashagre and Martha Bekele, Law of Family Teaching Material (2009) p.96

the FDRE constitution provision which provide under art.25 and 34,“ *all person are equal before the law and entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on the grounds of sex, race……..*[112] More specifically under art.34(1) says “ *Men and Women, without any distinction as race, nation, nationality or religion, who have attained marriageable as defined by law, have the right to marry and found a family. They have equal right while entering in to, during marriage, and the time of divorce.*[113] In addition to this it is also undermine the principle of best interest of the child which is enshrined under the convention on the right of children art.3 Article 3, paragraph 1, of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Under this doctrine the interest of the child will be secondary to the mothers interest. The mother is automatically favored.

The ‘maternal preference’ or ‘tender years’ principle could be seen as violating the equality clause in the Constitution by discriminating between parents on the basis of gender. Judicial awareness of opposition to all forms of chauvinism and sexism, the striving for equality between the sexes, and the current changes (both nationally and internationally) in the traditional roles of parents and spouses led to value systems and societal beliefs underpinning the maternal preference principle being challenged

[112] The Constitution of the Federal democratic Republic of Ethiopia,1995, Art.25
[113] Ibid art.34

CHAPTER FOUR

4.1. Cases, Analysis and the Current Practice of Courts on Custody Matter

The most serious problem emerges in the true world practice on the claim of maintenance and custody matter mostly after separation or divorce. In practical situation the decision may be unfair and injustice. This problem starts from insufficient skill and knowledge of the judges.[114] In this case they cannot properly interpret the law and unable to give the appropriate decision. And also the law has the short coming of to be special indication related to the case. It has also the problem giving a quid line to give the right and the correct decision to each and every case to the courts. In this case judges are fully biased on the ground of giving decisions. There for courts are mostly based on equity influenced decisions rather than codified based decisions. According to the above and other factors, many parents and child have been affected by the unfair decisions. In addition to this, also they suffer by economical, financial, psychological and other social problems. And the possibilities are very narrow to reverse decisions on the appellate counts.[115]

Our objectives were to investigate: to identify legal gaps in implementing the best interest principle by the judiciary in custody matter and the factors taken into account by courts in deciding custody; how courts apply the law relating to custody, its adequacy and compliance with human rights instruments; problems or gaps in implementing the best interests of the child criterion by the judiciary in custody matters; and to recommend possible solutions to the problems arising in implementing the best interests of the child

[114] Abebe Tsehay , The Problems Surrounding Divorce In Federal Revised Family Code (2010) p.31
[115] Ibid

criterion in matters relating to custody. In this regard, our findings are discussed below.

Regarding the legal gaps , the researcher come up with the following finding. Both the federal revised family code and the Amhara national regional state family code has their own flaw. the federal revised family code gives a little place . There is only one provision in the revised family code that deals with child custody matter and this provision also is very general one. Even though this article is an improvement from the previous law, leaving custody matters to the court instead of family arbitrators, who could easily get biased by family or friendship ties, it lacks effectiveness in other aspects.

The revised family code of Ethiopia , lays too much burden on the courts, because now it is the duty of the courts to ascertain the income, age, living conditions of the spouses concerned. This wide range of duties takes up the time and man power especially of an office of government that would have hundreds of similar cases pending. Decisions could, therefore, be very much delayed. And since the courts are distanced third parties to such dispute, their lack of deep knowledge makes it easy for any one of such spouses to conceal information like ones monetary or health status or underlying abusive behaviors. Due to such barrier the court may take a wrong position in giving in giving child custody decision. Like that of the federal revised family code, the Amhara national regional state family code is general in its nature. It lay too much burden on the court, because now it is the duty of the court to ascertain the income , age, living condition of spouses. Moreover, the Amhara national regional state family code under art.124(3) follow outdated doctrine the *tender year doctrine* under which the mother was deemed to be the more suitable custodial for the children. This doctrine in now replaced by the best interest of the child principle, but this doctrine is still in practice and

has legally incorporated under the Amhara national regional family code under art.124(3) under this provision it is the duty of the father to prove the mother to be unfit parent for the custody. While, mother, has no a duty to prove the father unfit in order win the custody of the child for herself. If the father failed to prove, neither the court nor the mother has the duty to prove the contrary. As a result the judge are reluctant in serving what is best for the child and they simply order the issue of custody to be entrusted to the mother.

There is also another legal gaps regarding the age where a child can be regarded as capable expressing an independent opinion. As result judges used there own perception ,skill and experience to determine at what age the child are capable to express their opinion. Due to this legal gaps, the right of the child to express their opinion is adversely affected. This law gaps make the best interest of the child secondary to the custodial parents interest.

4.2. CASE ANALAYSIS

In recent years, courts of law in Ethiopia are increasingly applying the principle of the best interests of the child in adjudication of cases. Some of these decisions are rendered by the Cassation Division of the Federal Supreme Court. The decisions of the Cassation Division of the Federal Supreme Court carry a force of law by virtue of Proclamation 454/2005. The following cases are typical of such notable decisions highlighting the incipient jurisprudence of the Courts. It is therefore necessary to discuss the cases owing to their precedent effect.

W/ro Tsedale Demissie Vs Ato Kifle Demissie
Woreda Court of Bonga
File no. 23632

In *W/t Tsedale Demissie vs Ato Kifle Demisse,* File no.23632, A *Woreda* Court in Bonga Area of Kafa Zone of Southern, Nations, Nationalities and Peoples Regional State (SNNPRS) declared Ato Kifle Demisse, the guardian and tutor of his son Binyam Kifle according to Article 235(1) of the Family Code of the Regional State.

The paternal aunt of the minor, W/t Tsedale Demissie, submitted an opposition pursuant to Article 358 of the Civil Procedure contending that the father should not be declared as the guardian and tutor for the child as the former has failed to care and protect the child and did not provide him assistance. She went on to state that the father is merely motivated by the financial gain and property he would derive by his status as tutor and guardian of the child and not in the best interests of the child. She prayed that she is entitled to be guardian and tutor of the child as she is the one who has been nursing and caring for the child for 12 years.

However, the Court rejected her plea arguing that tutorship and guardianship cannot be awarded for an aunt while the father is alive. The Court relied upon the Family Code of the Regional State particularly, Article 235(1) of the Code, does not allow the aunt to be granted custody of the child while the father of the child is still alive. She took appeal from the decision of the *Woreda* Court arguing that the father should not be granted the guardianship after failing to ensure the upbringing of the child for about 12 years. She further claimed that the father did not provide for the education, life, survival and development of the child in the past. She submitted that the father applied to be considered as the tutor and the guardian following the death of the mother. She alleged that the father cannot be a responsible guardian and tutor for the child given his past antecedents and unworthiness.

Nevertheless, the High Court of Kafa Zone also rejected her appeal on the very same grounds invoked by the *Woreda* Court.

Similarly, the Cassation Bench of the Supreme Court of Southern Nations, Nationalities and Peoples Regional State quashed the application of the aunt alleging the existence of a fundamental error of law committed by the two courts at the lower tiers. The matter was then submitted to the Cassation Bench of the Federal Supreme Court in March
2006 by the petitioner, W/t Tsedale Demissie. The Cassation Bench summoned the respondent, Ato Kifle Demisse, who, however, did not appear thereby waiving his right to rebut the arguments of the petitioner. In this decision the court invoked Article 36(2) of the FDRE Constitution which provides that the best interests of the child shall be the primary consideration in deciding all matters concerning the child. The Court went on to state that Article 3 of the Convention on the Rights of the Child which has been ratified by the country and therefore is part and parcel of the law of the land by virtue of Article 9 of the FDRE Constitution requires that the best interests of the child to be the primary consideration in deciding all matters concerning children. The Cassation Bench
quashed the decision of the lower courts since it runs counter to the doctrine of the best interests of the child enshrined in the FDRE Constitution and the Convention on the Rights of the Child and awarded guardianship and tutorship of the child to the petitioner.[116]

Our research question was to find out whose interests are taken into account by courts in awarding custody and the following is our findings.

It shall be the duty of a court hearing a petition for a decree of separation or divorce to inquire in to arrangements made or proposed as regards maintenance and custody of the infant children,

[116] *Tsedale Demisse vs. Kifle Demisse* (Federal Supreme Court Cassation Division)
Cassation File No. 23632, Tikimit 26/2000 (6th November 2007 G.C (Unpublished)

if any, of the marriage and to satisfy itself that such arrangements are in the best interests of the children.

The judiciary considers the interests of the children secondary to the custodian parent's interests because in some cases, such as those settled out of court, courts did not inquire into the arrangements made or proposed by the parties as regards custody of the infant children. The courts also did not inquire about the suitability of the parents or the custodian parent, as also observed by

W/ro Hana Degafe Vs Ato Abera Fantaye
Debre Birhan Worda Court
Debre Berhan
July 22,2006
File no. 0108894

In W/ro Hana Degafe versus Ato Abera Fantaye, the applicant W/ro Hana under her statement of claim submitted in the case recounts that the plaintiff and the defendant had been lived together starting from July 2003 up to may 2006 E.C as husband and wife without having concluded a valid marriage as per the art 109 of the family code of the Amhara National Regional State for more than three years in Debr Birhan town Kebele 02 and 09.During this time the applicant gave the birth a baby called Emanuel Abera 2 years old baby and during this relation they also produce common property. However the respondent has engaged relationship with another girl an irregular union and forced the applicant to leave the house and put her in trouble. Thus the applicant prayed the court for the partition of the common property with the custody of the child and maintenance. the court after proof the existence of irregular union between the applicant and the respondent the court direct the spouse to settle their dispute through arbitrator of their own choice and the parties agreed to settle their dispute through amicably. the parties agreed to settle the matter out of court and asked the court to adopt

the agreement made between them as a court judgment and to issue a decree of divorce accordingly. On the issue of custody of the only baby, namely Emmanuel Abera the parties agreed that: applicant shall have the custody of the child .[117]

However, the court did not inquire further into the arrangements made by the parties for the child to check if they best served the interests of the child. The court entered judgment as per the agreement of the spouses. The decision of the court in this case illustrates that the court satisfied itself that the arrangements made by the parties were in the best interests of the child. Hence it can be argued that when a child attains the age of five years he or she is considered as capable of forming an independent opinion. The implication here is that the views of the child below five years will not be sought by the court. The interests of the child therefore become secondary to the custodian parent's interests.

W/ro Kelemua Vs Ato Assfaw Wondimagegnehu
Debre Berhan Woreda Court
Debre Birhan
March 28 2004 E.C
File no 0104540

Another case which involve the best interest of the child is a case between w/ro Kelemua Bekele versus Ato Assfaw wondim agegnehu. The matter has brought before the woreda court of debre birhan. By the suit the applicant w/ro kelemua and the respondent has concluded a marriage before an officer of civil status for 21 years. During this time the applicant gave birth of the child to the respondent namely,1st Stedale Assefa 20 years of age, 2nd Tewodros Assfaw 17 years of age,

[117] Hana Degafe Vs Abera Fantaye (civil file no 0108894,Debre Birhan Woreda, July 22 2006) (Unpublished)

3rd Eyerus assfaw 14 years of age, 4th Dagim Assfaw 11 years of age 5th Sosina Assfaw 11 years of age, 6th Yeabsera Assfaw 1 years of age. and they also generate many common property, but due to the change in the behavior of the respondent the applicant and their children's cannot live peacefully. Thus the applicant prayed to court to pass a decree of divorce and the partition of their common property with the custody of their children .

The woreda court after hearing the petition of the applicant and the respondent statement of defense, direct them to settle their dispute through arbitrator of their own choice. However due to the party are unable to settle their dispute through arbitrator. the court after made all effort rendered the divorce of marriage and regarding the custody of their children the court summoned all the children below the age of 18 and asked them where they want to stay with, as a result only Eyerus Assfaw 14 years old daughter prefer to stay with her father the respondent and the rest of other children prefer to be under the custody of their mother.[118]

The court should ascertain that the child's choice was not a result of undue influence from the chosen parent, as there is a strong possibility of the parent with interim custody to counsel the child to his or her choice. This influence may assume different forms; that which tends to convince the child that one of his parents is better than the other, that which manipulates the child's immature desire for less discipline or restraint; or simple attempts by one parent to turn the child against the other parent.

Judge are also required to base custody decision on " the best interest of the child" this means that a judge look at all of the circumstance, including what the mother can offer and what he father can offer what the specific need of the child are. the judge then

[118] Kelemua Bekele Vs Assfaw Wondimagegn (civil file no0104540, Debre Birhan Woreda Court, May 13, 2004) (Unpublished)

decided what living situation will be best for the child. Even though the convention the right of children and the family code of both the federal and the regional state does not specify list of factors to be considered in the "best interest of the child" analysis, some of the common factor are the capacity of the parent to provide for the need of the child including educational, physical and emotional, the need for to protect the children from physical and psychological harm caused or that may be caused, the child's school performance and attendance record , comparative school quality in each parents town and the amount quantity time each parent can spend with the child. When seeking the opinion of the child, two factors need to be considered. The first one is age of the child. The court has to be sure that the child has reached the age group in which he can make a reasonable preference. in the second situation, the court is required to make its own assessment of the preference of the child.

The wish of a child, particularly an older child, may be relevant to the judge's decision ,except in extraordinary circumstance, however***, the child's wish will not be the deciding factor.*** It is extremely important not to pressure , coach, or otherwise seek to influence child's opinion regarding custody. The woreda court basis its decision solely based on the wish of the child without due considering other best interest factors that are the most vital to maintain the best interest of the child. That means the court has failed to whether the applicant can offer educational, physical need of the child, and whether the respondent has a good behavior or not.

One of Our research question was how the principle of best interest of the child is applied and interpreted by courts of law. and the following are our findings. Under Art.3 of the convention on the right of the child, the child have the right to have his/her best interest to be assessed and taken in to account as a primary consideration in all action or decision that concern him/ her both in public or private

sphere. Article 12 of the Convention provides for the right of children to express their views in every decision that affects them. Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.

under art.7 of the African charter on the right and welfare of the child states: every child who is capable of communication his/her own view shall be assured the right to express his/her opinion in all matter and to disseminate his opinion subject to such restriction as prescribe by law.

On the same fashion the FDRE constitution art.36(2) Says " in all action concerning children undertaken by private or public welfare institution, courts of law, administrative body, or legislative body the primary consideration shall be the best interest of the child. even if such express legislation the woreda court fails to take in to account such laws.

W/ro Seble Abate Vs Ato Girmma Yeshitla

Debre Birhn Woreda Court

Debre Birhan

October 11, 1998 E.C

File no 033601

In a case between W/ro Seble Abate Vs Ato Girmma Yeshitla .the applicant, under her statement of claim, the applicant and the respondent has concluded a legally recognized marriage and lived peacefully for a long period of time. but due to the disagreement

occurred between the spouses, the applicant prayed the court for the dissolution of the marriage and the custody and maintenance of their three children's. After investigate and examine the existence of marriage between the spouses direct them to settle their dispute through arbitrator of their own choice. But they failed to reached with agreement. The court believed that a marriage only existed as far as the spouses are willing to live together. As a result the court rendered the dissolution of the marriage as per art.86(c) of the Amhara National Regional State family code. regarding the custody of the children's acquired during their relationship ,the court after ascertaining that the child are lived with the applicant since the petition for divorce was instituted and order the child's to be under the custody of the applicant .[119]

The order of the court here violate the right of the child to have his/her best interest assessed and take in to account as a primary consideration in all action that concern him/her and the right to be asked or express their wish where they want to stay with .a decision that does not taken in to account the child's view or does not give their views due weight according to their age, does not respect and protect the child's interest .the court in deciding in whose custody an infant should be placed ,shall have regard to the welfare of the child as a primary consideration and the court also required to have regarded to the wishes of the child. In a case at hand the court did not bother to seek the view of the children and preference was give to the applicant simply because the children were under the custody of the applicant since the petition for divorce was instituted.

Our another research question was how experts and another professional are engaged in the determination of best interest of the child and here is our finding.

[119] Seble Abate Vs Girmma Yeshitla (civil File no03360, debre Birhan Worda Court ,October 11,1998 E.C) (Unpublished)

4.3. GETTING EXPERTS AND OTHER PROFESSIONALS ENGAGED

Often custody and relating issues are too complicated to be resolved in a quick temporary orders hearing. it is not easy for the courts to determine the best interests of the child. There should be social workers who may investigate the home surroundings of the parties, and so on, like it is done in criminal cases. Depending on the evidence of the parties only is not good because they might pretend in court. This helps the magistrate to determine what is best for the child.' A judge who hears allegations of serious unfitness or hears about a complicated situation may very well conclude that he or she does not have the information needed to make a custody or visitation decision. At this point, a judge may appoint a neutral person to investigate and/or evaluate the situation and present a report on all factors that might affect the child's best interest. The judge will then use this report to help him or her make a custody decision. There are a number of people that a judge might appoint to conduct this investigation or evaluation of custody situation. The judge may appoint one of the following:

- a mental health professional,
- a lawyer, or
- social science worker

Some other courts have special court clinics that are an arm of the Family Service Office, which are staffed by mental health professionals who will conduct custody investigations and/or evaluations. When one or both of the parents have the resources to pay for a third-party investigation and/or evaluation, the party or parties who are able to will be ordered to pay the expert for his or her services. When neither party has the resources to pay, the judge may either order that the Commonwealth cover the evaluator's fee or may ask that the Family Service Office or the court clinic handle the

investigation and/or evaluation since these are both arms of the court and do not charge for their services.

There are several advantages of having the court appoint a “neutral expert” to investigate and/or evaluate custody . One is that it brings important information before the court that the court needs to make the decision that truly takes your child’s needs into account. Another is that often having a neutral expert can prevent a situation where both sides hire their own experts to support their own position; the situation where both parties hire their own experts can become very costly, very contentious, and, from the judge’s perspective, can still leave him or her with many questions about what is truly in the child’s best interest.[120]

Even if the involvement of such neutral expert or professional has paramount importance in determining what is best for the child in a particular case, the practice of the Woreda courts shows that there was no such expert or professional that assist the judge in finding what is best for the child. It is only judge that evaluate or investigate and render a judgment without any further investigation or whether their decision truly take in to account the child’s best interest .due to the lack of this expert the judge will be biased and its decision will not serve the best interest of the child’.

[120] Stephanie E. Golden, Family Law Advocacy For Low and Modern Income Litigant , (2008) p.257

CHAPTER FIVE

Conclusion and Recommendation

5.1 Conclusion

The principle of the best interests of the child is one of the most important provisions of the CRC ; one of the most difficult to explain too.. But it seems impossible to work with the CRC without having any idea of this principle of interpretation or of this rule of procedure, or having just the impression that everybody is acting for the best interests of the child /children.

There is a gaps of law under the federal revised family code and the Amhara national regional state family code, there is only one provision under the federal revised family code that deals with the custody matter of the child. It gives less legal protection for the child's best interest and it also very general one. This make the provision vulnerable to various interpretation by the presiding judges based on their own perception or in a way without take in to account the best interest of the child .In addition the provision of the federal revised family code does not contain exhaustive list of factor for a courts to consider in determining the best interest of the child.

The Amhara national regional state family code also has its own flaw. like that of the federal revised family code, the Amhara national regional state family code gives less legal protection, there only one provision that deals with the child custody matter . Beside it is also general and burdensome in its nature. In addition the provision of the

Amhara national regional state family code does not contain exhaustive list of factor for a courts to consider in determining the best interest of the child. Furthermore, this family code under art.124 follow one of the outdated doctrine which is called *tender year doctrine* under which the mother is deemed to be suitable for the custodial of the child. Even if this doctrine is now replaced by the principle of the best interest of the child it is still practiced and has got a legally recognition under the Amhara natonal regional state family code. The tender age presumption which is provided for under art. 124 of the Amhara regional family code has been applied by judicial officers as an automatic right of mother without even questioning the suitability of the parent to have custody of the child or seeking the views of the child as to where he or she prefers to stay. In this case therefore, mothers got custody of the children below five years of age and fathers got custody of the children above five years of age, especially when the wish of the child was taken into consideration by judicial officers. Hence, judicial officers consider the interests of the child secondary to the custodian parent's interests and in this case they limit the best interests of the child.

There is a problem as regards the age where a child can be regarded as capable of expressing an independent opinion. In this case therefore, judicial officers each have their own perception as regards the right age. This can also adversely affect the right of the child to an opinion as there is no expressed age in the Law of family where a child can be regarded as capable of expressing an independent opinion. As a result the views of the child are not sought by judicial officers and his or her interests are therefore considered secondary to the custodian parent's interests.

The practice of the Debre Berhan Woreda court show that whenever, they entertained a divorce case which involve the custody matter of

the child below five years, they simply entrusted the custody of the child to the mother without even whether the mother is suitable and capable for the custody of the child or not. It is the duty of the father to prove the mother is to be unfit for the custody of the child but if the father is unable to prove, the court will do nothing other than entrusted the mother as the custodian parent for the child. As a result the best interest of the child will be secondary to the parents best interest. There is also a practical problem on judges of the woreda court when they rendered a judgment on the child custody matter. Judges are not making any further investigation by themselves to protect and serve the international and constitutional guaranteed right of the child which is called principle of best interest of the child. When the spouses come up with an agreement on the custody of the child, the court simply approve the agreement without any further inquiry s to the mental, health of the custodian parents, and child's wish, their right to education. There is another practical problem when child express their wish as to where they prefer to stay with. The woreda court basis its decision solely based on the wish of the child without due considering other best interest factors that are the most vital to maintain the best interest of the child. That means the court has failed to whether the applicant can offer educational, physical need of the child, and whether the respondent has a good behavior or not.

The involvement of social welfare officers in custody matters is paramount in the determination of the best interest of the child. Non-involvement of the social welfare officers can sometimes make the work harder for judicial officers when determining the best interests of the child, since the social welfare officer's role is to provide them with the background of the parties, their home environments and their lives with their children. The practice of the woreda court shows

that there was no social worker until 2008 Ethiopian calendar to assist the judge in determining what is best for the child.

5.2. Recommendations

As far as the findings and the conclusion are concerned, we recommend the following for effective implementation of the principle of the best interests of the child by judicial officers.

For the Woreda Court of Debre Berhan

1, Judicial officers should have regard to other factors

Judicial officers should realize that the best interests of the child are not served by only

Whishes of parent and wishes of the child . They need to also consider other factors, such as suitability of the parent to have custody of the child and child's right to education, the right to health and care and protection as well as inquiring into the arrangements made or proposed by the parties for the child when they decide to settle the matter out of the court. They should also realize that they are the upper guardians in issues of custody of which there is one norm they need to apply and that is the predominant best interests of the child. To the court, as upper guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied, namely the predominant interests of the child.

2 Awareness raising on the application of the tender age presumption

There should be awareness raising among judges that the tender age presumption which is provided for under art 124(3) does not give automatic right to either parent to have custody of the child depending on the age of the child. They should therefore be made aware of its application in custody matters and that it is a rebuttable

presumption whereas it may or may not be applied depending on the circumstances of the case. In this case they should be aware that the suitability of the parent to have custody of the child should be questioned and the views of the child should also be sought for the interests of the child to be served. Awareness raising can be done through seminars and workshops by other judicial officers who are conversant with the application of the said provision.

3. Sensitization of judicial officers on the importance of social welfare officers

courts shall call for the advice of a social welfare officer in custody matters. The judiciary should therefore conduct seminars and workshops which would be carried

out by judicial officers themselves. Since most of custody disputes come as part of a divorce case, whereas matrimonial disputes must pass through the social welfare office before reaching the court, judicial officers should call for advice from the social welfare officer whenever it is practicable. They should also learn that social welfare officers can provide them with background information about the parties in a custody dispute

and the circumstances of the children's lives too, on which they can make a decision. As Bromley, explaining their importance, emphasized:

It should be appreciated that a welfare officer is an officer of the court and as such has an independent role being neither child's representative nor a witness for either party when welfare officers are appointed by courts they are expected to investigate the

circumstances of the child or children concerned and the important figures in their lives with a view to providing the court with *factual information* on which to make a decision.

For the Federal House of People Representative

As the finding of the study indicated, there is a legal gaps relating to the legal protection and enforcement of the principle of the best interest of the child. even though, there is provision dealing with the custody matter, it is general in its nature and lay too much burden on the court. Furthermore, there is no exhaustive list of factors that the judiciary should take in to account while they determine the best interest of the child. so we, recommend to the house to amend the provision to give wider protection to the child best interest and in a manner that contain exhaustive lists of factor that the judiciary must take in to account in deciding the best interest of the child. And in a compressive way that avoid the issue of interpretation by judges when they decide the child custody matter.

For the Amhara National Regional State Council

As the finding of the study shows, like that of the federal revised family code, the Amhara national regional state family code gives less protection for the best interest of the child in case of divorce. There is only one provision that deals with child custody matter. What make the Amhara family code special is found under art.124(3) of the Amhara national regional family code which states that “unless it faced with compelling cause for deciding otherwise in accordance the stipulation laid down under sub article 1 and 2 of this article, the court shall order the custody of children below the age of five years be trusted to their mother up to the age”. It is clear that, this provision shows the tender year doctrine which prefer the mother as the custodian parents of child. It impose burden only up on the father to prove the mother is unfit for the custody of their child. This provision make the judges reluctant in serving the best interest of the child

because in most of the cases we seen, the judges entrusted the mother as custodian parent as far as, the child are below five years of age. This principle is now replaced by the principle of the best interest of the child which gives more protection for the child during divorce.

So we recommend that, in order to make the Amhara national regional family code consistence with other international principle, the state council must amend this provision In a manner that consistence with the convention on the right of child.

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Contents

Declaration

Dedication

Acknowledgment

Acronym

CHAPTER ONE.....1

INTRODUCTION.....1

1.1. Background of the Study.....1

1.2.Literature Review.....3

1.3. Objective of the Study.....6

1.3.1.The General objective of the Study.....6

1.3.2.The Specific Objective are as Follows:.....6
1.4.Research Question.....6
1.5.Significance of the Study.....7
1.6.Methodology and Data Source.....7
1.7.Scope of the Study.....8
1.8.Limitation of the Study.....8
1.9.Organization of the Study.....9
2.1. Introduction.....9
2.1.Concept and meaning of the best interest of the child.....10
2.1.1.Problem of Definition.....10
2.1.1.“The Best Interest of the Child”: a Right Based Approach”.....11
2.2. The Concept of Childhood Under International and National Laws.....16
2.2.1.Commencement of Childhood.....16
2.2. Historical Development of the Best Interest of the Child.....17
2.2.2.Evolution of the Doctrine of “The Best Interest of the Child”.....17
CHAPTER THREE.....19
The Legal Incorporation of the Principle of the Best Interest of the Child.....19
3.1. The Declaration of Geneva.....19
3.2. The Universal Declaration of Human Rights.....20
3.3. The 1966 Covenants.....21
3.4. The Best Interest of the Child under the Convention on the.....22
Rights of the Child (CRC) Articles 3 and 4.....22
3.5. CRC General Comment on the Best Interest of the Child.....24
3.5.1. Legal analysis of article 3, paragraph 11.....24
“In all actions concerning children”.....24
3.5.2. Elements to be Taken into Account when assessing the Child's Best Interests.....30
3.5.3. Balancing the Elements in the Best-Interests Assessment.....33
3.6 . The Best Interest of the Child Under Regional Legal Instrument.....33
3.6.1.The Best Interest of the Child and the African Charter on.....34
the Rights and Welfare of the Child (ACRW).....34
3.7. The Best Interest of the Child Under Ethiopian Laws.....35
3.7.1.The Constitutional Regime of Child Rights in Ethiopia.....36

3.7.2.The Civil Code of the Empire of Ethiopia 1960 and The Federal Revised.....38
Family Code.....38
3.7.2.1. The Civil Code of the Empire of Ethiopia 1960.....38
3.7.2.2.The Federal Revised Family Code of Ethiopia 2000.....39
3.7.2.3. The Amhara National Regional State Family Law 2003.....40
CHAPTER FOUR.....43
4.1. Cases, Analysis and the Current Practice of Courts on Custody Matter. 43
4.2. CASE ANALAYSIS.....45
4.3. GETTING EXPERTS AND OTHER PROFESSIONALS ENGAGED.....51
CHAPTER FIVE.....53
Conclusion and Recommendation.....53
5.1 Conclusion.....53
5.2. Recommendations.....56