Wollega University

School of Law

Ascertainment of Paternity Out of Legally Recognized Relation under the FDRE Revised Family Code

Prepared by:

1.MathewosMunune
2.AbinetMelaku
3.HachaluTilahun
4.Abdela Mohammed
5.Hakim Hamza

Advisor: Feyisa Oluma(LLB,LLM)

November, 2016

Nekemt, Ethiopia

Table contents

Contents

Pages

Table contents.....I

AKNOWLEDGMENT.....III

Abstract.....IV

CHAPTER ONE.....1

INTRODUCTION.....1

1.1 Background of the Study.....1

1.2 Statement of the problem.....3

1.3 Research Questions.....3

1.4 Objective of the Study.....3

1.4.1 General objectives.....3

1.4.2 Specific objectives.....4

1.5 Literature Review.....4

1.6 Significance of the Study.....5

1.7 Research Methodology.....5

1.8 Limitation of the Study.....5

1.9. Organization of the Study.....6

Chapter Two.....7

The Paternity Rights of the Child.....7

2.1 Introduction.....7

2.2 The Basis of the Right.....8

2.3 The Definition of the Childhood.....8

2.4The Constitutional Principles on Children's Rights.....9

2.4.1 The Principle of Best Interest of the Child.....9

2.4.2 The principle of Non Discrimination.....10

2.4.3 The Right to identity.....11

2.4.4 The Right to Maintenance.....12

2.5 The Establishment of Paternity under the Federal Revised Family Code.....12

2.5.1 Paternal Filiations.....12

2.5.1.1 Presumption of Paternity....13
2.5.1.2 Acknowledgement of Paternity....14
2.5.1.3 Judicial Declaration of Paternity....14
2.5.1.4 Adoption....16
Conclusion....17
Chapter Three....19
Analysis of the Revised Family Code on the Establishment of the Paternity Bond in Relations Other than Marriage and Irregular Union....19
3.1 Introduction....19
3.2 legally Recognized Relations....19
3.2.1 Marriage....19
3.2.2 Irregular Union....20
3.3 Restrictions with Regards to Judicial declaration of Paternity....21
3.4 The Discrepancy between the Provisions of RFC....23
3.5 The Discrepancy between the Federal RFC and the FDRE Constitution together with the CRC....23
Conclusion....24
Chapter Four....25
Conclusion and Recommendation....25
4.1 Conclusion....25
4.2 Recommendation....26
References:....27

AKNOWLEDGMENT

Above all we thank the Almighty GOD. Without his help our academic success is nothing, but is a dream.

This senior thesis would not have been possible without the guidance and support of several individuals in one way or another contributed and extended their invaluable assistance in the preparation and completion of this thesis. We thank all of them and especially:

We would like to extend our deepest gratitude to our advisor Mr. Feyisa Oluma for his unreserved and invaluable advice, encouragement and provision of relevant materials for us.

And also we wish to express our love and gratitude to our beloved family; for their endless support and advice through duration of our studies and infinite support throughout our life.

Lastly, but not certainly least thank you all our classmates especially our friends for sharing the literature and invaluable in making our life joyful at Campus.

Abstract

According to the Convention on the Rights of The Child, every child has the right to paternity without discrimination of any kind, irrespective of the child's parent's race, color, sex, origin, birth and other status. The FDRE Constitution, which is the supreme law of the land, as well as provides that every child has the right to know and be cared by his/her parents. It also mentions that whether children, born of wedlock or out of wedlock, the same rights shall be granted and no discrimination between children based on that status.

The Federal Revised Family Code under its Article 107 (2) provides that without prejudice to the provisions of the code relating to acknowledgement of paternity or adoption, children born out of marriage and irregular union shall have a juridical bond only with their mother. According to this provision, if child not born in a relationship recognized by the law, it has no father unless acknowledged or adopted by some body, which is a clear discrimination between children born in legally recognized relationship and out of legally recognized relationship. In contradiction with Article 107(2) of Federal Revised Family Code, Article 143 of the same code provides ways through which judicial declaration of paternity can be ascertained.

The purpose of this senior thesis is to examine ways through which paternity can be ascertained in cases where children are born out of marriage and irregular union. It will also analyze whether Article 107(2) and 143 Revised Family Code contradict each other. Furthermore this senior thesis will analyze whether Article 107(2) of Federal Revised Family Code is consistent with Art, 36 of FDRE Constitution and Convention on the Rights of Child, if not whether there is the possibility of fatherlessness.

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The paternity right of child is one of basic rights of child that recognized at international level by the Convention on the Rights of the Child, which adopted by United Nation General Assembly. According to this convention, every child has the right to paternity without discrimination of any kind, irrespective of the child's parent's race, color, sex, origin, birth, language, political, ethnic or social origin property, disability, and other status.[1] This aimed at ensuring the applicability of principle of non-discrimination in so far as children concerned.

The recognition of the right by international community by stipulating the right to paternity in the CRC with a view to safeguarding the full and harmonious development of the child's mental, psychological and physical personality he/she should grow up in family environment in atmosphere of happiness, love and understanding. It was added that the child by reason of his/her both physical and mental immaturity, needs special care and assistance which is the primary responsibility of parents including appropriate legal protection. CRC states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[2]

The FDRE Constitution, which is the supreme law of the land, provides that, every child has the right to know and be cared by his/her parents.[3] It also

[1] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 (CRC) Art 2
[2] Ibid Art 3
[3]Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proclamation No.1, Federal Neg.Gaz. 1st Year, No.1,Art 36(1)c

mentions that children whether born in wedlock or out of wedlock, the same rights shall be granted and no discrimination between children based on that status.[4]

The Federal Revised Family Code recognized three modes of establishment of paternity.[5] The first mode is the presumption of paternity. It is applicable to children born from legally recognized relationships such as marriage and irregular union.[6] The second mode is acknowledgement of paternity. It is a voluntary declaration of paternity. This voluntary declaration of paternity can be used to establish paternal filiation if paternity is not possible to establish using the presumptions of paternity.[7] The last mode is a judicial declaration of paternity. Under this mode of establishment of paternity, a child who does not have a father either through the operation of the presumption of paternity or by acknowledgement can have a father only if the court declares a certain man to be his father. The court makes such declaration where it is satisfied that one of the grounds which justify judicial declaration of paternity is found.[8]The above three modes of ascertainment of paternity are recognized also by Civil Code of 1960.

However, even though the judicial declaration of paternity was recognized as one mode of ascertainment of paternity, its application has been excluded by article 107 (2) of the Federal Revised Family Code and hence, it contradict with article 143 of the same code. Furthermore the Federal Revised Family Code has prescribed a fixed period of duration of pregnancy from 180 days up to 300 days as period of pregnancy for ascertainment of paternity, for children born from legally recognized relations. The prescribed period of pregnancy was applicable for children born from legally recognized relation for ascertainment of paternity. This does not

[4] Ibid Art 36(4)
[5]The Revised Family Code of 2000, Federal NegaritGazeta Extraordinary Issue No1/2000, Article 125
[6]AschalewAshagrie& Martha Belete, Family Law Teaching Material, 2009, p 164
[7]Ibid, p 172
[8]ibid, p 180

mean, it is not applicable for relation not recognized by the law. Judicial declaration of paternity requires as one condition a fulfillment of requirement of period pregnancy. However children may born out of prescribed period of pregnancy (less than 180 days and more than 300 days) and hence, such requirement may affect children born out of legally recognized relation to ascertain his or her father. The conditions stipulated under article 143 of RFC for judicial declaration which may curtail the right of child to have his/her father.

1.2 Statement of the problem

FDRE Constitution which is a supreme law of the land among other ensures the right of every child to have and to know his father.[9] Also the constitution guarantees non-discrimination of children whether born of wedlock or born out of wedlock.[10]

The Federal Revised Family Code which is devoted to family issue provided three modes of the establishment of paternity for enforcing constitutional guarantee of right to paternity. These are presumption of paternity, acknowledgement and judicial declaration. The first mode is applicable for children born of legally recognized relation whereas the last two modes are applicable to children born out of legally recognized relation.

However Art 107(2) of Federal Revised Family Code excludes the application of judicial declaration of paternity on one hand and it discriminate between children born of legally recognized relation and out of legally recognized relation on the other hand. Furthermore article 143 stipulated conditions which may curtail the rights of the child to have his/her father.

[9]Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proclamation No.1, Federal Neg.Gaz. 1st Year, No.1, Art 36(1)c
[10]ibid Art 36(4)

1.3 Research Questions

This senior thesis intended to try to answer the following major research questions;

- Whether article 107 of the Federal Revised Family Code is contradict with article 36 of FDRE Constitution?
- Whether Art 107(2) and Art 143 of Federal Revised Family Code are consistent?
- Whether there are impediments of child to have his/her father in relation not recognized by law and possibility of fatherlessness according to Federal Revised Family Code?

1.4 Objective of the Study

1.4.1 General objectives

The main objective of this thesis is to analyze whether the provision of Federal Revised Family Code is compatible with FDRE Constitution which is supreme law of the land and with Convention on the Rights of the Child which ratified by Ethiopia, with regard to paternity right of children.

1.4.2 Specific objectives

The specific objectives of this thesis;

- To analyze whether Art 107(2) of Federal Revised Family Code is compatible with Art 36 FDRE Constitution and Convention on the Rights of the Child
- To analyze whether there is discrepancy between article 107(2) and Art 143 Federal Revised Family Code
- To analysis whether there are impediments for child to have his/her father and possibility of fatherlessness under the Federal Revised Family Code where born out of legally recognized relation
- To make a recommendation on what need to be made and how solution can be effected

1.5 Literature Review

The FDRE Constitution under Art, 36 provides that every child has the right to name and know and be cared by his her father. It also provides children born out of wedlock shall have the same rights as children born of wedlock.

The Federal Revised Family Code which devoted to family issues provided three modes of establishment of paternity to enforce the constitutional guarantee of the right to paternity. These are presumption of paternity, acknowledgement and judicial declaration. The first mode is applicable for children born of legally recognized relation whereas the last two modes are applicable to children born out of legally recognized relation.

However Art 107(2) of Federal Revised Family Code excludes the application of judicial declaration of paternity on one hand and it discriminate between children born of legally recognized relation and out of legally recognized relation on the other hand. Since it discriminate between children born of legally recognized and out of legally recognized relation, it contradict with the constitution and CRC.

Mehari Redae tried to discuss on the issue of ascertainment paternity under Federal Revised Family Code.[11] In his book he discussed possibility of fatherlessness of child born out of legally recognized relation. However he failed to raise inconsistence between Art 107(2) of Federal Revised Family Code and Art 36 of FDRE Constitution.

Aschalew Ashagrie& Martha Belete, writers of Family Law Teaching Material, discussed three modes of establishment of paternity under Federal Revised Family Code. However they failed to raise the discrimination between children born of relation recognized and out of relation not recognized by law. The writers had not risen whether Art 107(2) excludes application of judicial declaration of paternity or not.

[11]Mehari Redae, Yeteshashalewn Yebeteseb Hig Lemegenzeb Yemiredu AndiAndi Netiboch,2002, p 8

Generally, this thesis unique and sought to fill gaps that mentioned above. The study be conducted to sought solution to the problem that left untouched by the above scholars

1.6 Significance of the Study

The thesis may give some hints to the future researchers for further analysis. It can also help the potential claimants to argue in certain possible ways for their rights. Furthermore it can be used for the concerned body to make necessary measures to rectify the inconsistence so as to comply the Federal Revised Family Code with the FDRE Constitution and with CRC which ratified by Ethiopia.

1.7 Research Methodology

This thesis paper employed the qualitative research method. Both primary and secondary sources of data are employed to conduct this study.

The primary sources which studied include:

- Convention of the Rights on the Child
- FDRE Constitution
- Federal Revised Family Code
- Civil Code of 1965
- Regional family laws

The secondary sources which studied include materials, other research papers and internet sources.

1.8 Limitation of the Study

Lack of adequate published materials is one of the limitations of this study. Due to that reasons the researchers conduct their study only by materials and laws available at their hand. Since the researchers are attending class and preparing themselves for exit exam are also another limitation of the study. Due to it the researchers will conduct this study by reducing the time allocated for preparing their exit exam.

1.9. Organization of the Study

This senior thesis has four chapters .The first chapter is a proposal part. The second chapter deals with the definition, commencement and end of childhood and the ways of the establishment of paternity under RFC. The chapter three deals analysis of the Revised Family Code on the establishment of the paternity bond in relations other than marriage and irregular union. The conclusion and recommendation part are provided under the last chapter.

Chapter Two

The Paternity Rights of the Child

2.1 Introduction

This chapter has two parts. The first part deals with the concepts, commencement and end of childhood. The second part deals with ways of establishment of paternity under Federal Revised Family Code.

Recognition of the right to paternity by the FDRE Constitution and international community by stipulating in the CRC is with a view to safe guarding the full and harmonious development of the child's mental, psychological and physical personality. The child should grow up in the family environment, in an atmosphere of happiness, love and understanding.

The UNCRC is a corner stone with regards to the evolution of the right and hence will serve as a standard interpretation of the right since chapter three of the FDRE Constitution requires the interpretation of any of the fundamental human rights to be in line with international instruments ratified by Ethiopia among[12] which United Nation Convention on the Rights of the Child is one and in fact the most important in so far as the child's rights is concerned.

"Determining paternal filiations is difficult, because it is not easy to exactly know who the biological father of the child is. Hence, the law has provided certain important modes of establishment of paternity. Because, this modes are very much relevant particularly from the view point of the rights of the child, due attention has been given to them."[13]

[12] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proclamation No.1, Federal Neg.Gaz. 1st Year, No.1, Art 13(2)
[13] Aschalew Ashagrie& Martha Belete, Family Law Teaching Material, 2009, p 157

There are three modes of ascertainment of paternity according to the RFC. These are presumption of paternity, acknowledgment and judicial declaration of paternity. These modes of ascertainment of paternity will be discussed under this chapter in detail. Adoption is also one way through which children get artificial paternity which will be discussed in this chapter.

2.2 The Basis of the Right

The stepping stone towards the child right to know his/her parents is the UN Convention on the rights of the child. The convention provides that the child shall have inter alia, the right to know and be cared for by his/her parents as far as possible.[14]

The Constitution of FDRE has embodied such rights as one of the fundamental human rights. The Constitution promotes the rights of the child to know and be cared by his/her parents under its Art 36(1) (c). The constitution has made the rights one of the fundamental human rights embodied under Chapter Three.

2.3 The Definition of the Childhood

Defining the term child or as may be used by a vast majority of states minor is of a practical importance. So the beneficiaries of those rights can easily be known. In this scenario we will briefly see into the commencement and end of childhood.

The FDRE Constitution doesn't tell us who may be considered as a child for indeed, such should be the business of subordinate legislations. The CRC on the other hand defines a child right as… Every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier.[15]

[14] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 (CRC) art 7

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

The convention doesn't specify when childhood begins. All that it talks is about its end. The absence of clear indication as to when childhoods begins in the convention moves us to resort to our domestic legislations. The relevant authority for this particular purpose would be the provisions in the Civil Code dealing with physical person. Accordingly, the human person is the subject of rights from its birth to its death as a matter of legal principles[16]. Notwithstanding the above principle, a child merely conceived should be considered born wherever his interests so demands, provided that he is born alive and viable as a result of which he becomes a subject of rights.[17]

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

2.4The Constitutional Principles on Children's Rights

2.4.1 The Principle of Best Interest of the Child

Article 3 of the CRC provides one of the four fundamental principles of the CRC. The provision states that the Best interest of the child shall be a primary consideration in all actions concerning children. "The principles of best interest of the child requires the public and private bodies, social welfare institutions, courts of law, administrative authorities or legislative bodies to ascertain the impact on children of their actions with a view to

[16]Civil code of the Empire of Ethiopia, proclamation No. 165 of 1960, Art 1
[17] Ibid Art 2
[18]Girmachew Alemu and Yonas Birmet, Handbook on the Rights of the Child in Ethiopia,p.11

confirm that the best interest of the children are taken as the primary consideration in making decisions affecting them.''[19]

Thus, these bodies and institutions are required to apply the principles of the best interest of the children systematically. The scope of the principles is very wide.[20] It encompasses all actions concerning children as a group.[21] Art. 3(1) of the convention requires the public and private bodies to ascertain the impact on children of their actions, in order to ensure that the best interest of the child is a primary consideration.[22] The provision stipulates that ensuring best interest of the child must be the primary consideration in all actions and decisions affecting children. "It calls for the consideration of the best interests of the child into national plans and policies for children into the activities of legislative, executive, and judicial branch of government both at national and local levels''[23]. The principle requires consideration of, for examples, how a proposed or existing law or policy or administrative action or courts, decision, affect children. The principle of best interest of the child applies to children of both individually and as a group.[24]

Considerations of best interests must embrace both short and long term considerations for the child,[25] the interpretation of best interest of the child must not put the rights guaranteed under the CRC in jeopardy.[26] For example, the interpretation of the best interest of the child cannot be used to justify practices such as corporal punishment.[27] The principle of the best interest of the child requires decision to be based on the needs and

[19]Ibid p42
[20] Hodgkin and Newell, Implementation Of Handbook for the Convention on the Rights of the Child (3rdedn, UNICEF,Geneva, 2007)(n) 36
[21] id
[22] Ibid, (n3)35
[23] Sharon Detrick A Commentary on the United Nations Convention on the Rights of the Child(Martinus Nijihoff,Hague,2009 (n19)85
[24] Girmachew Alemu and Yonas Birmet, Handbook on the Rights of the Child in Ethiopia, p 42
[25] Hodgkin and Newell, Implementation Of Handbook for the Convention on the Rights of the Child (3rdedn, UNICEF, Geneva, 2007)(n) 37
[26] ibid
[27] Committee on the Rights of the Child ,GENERAL Comment No.8,2006 para.26

circumstances of the individual child and it is dynamic concepts that must take into account the views and evolving capacities of child.[28]

The principle of best interest of the child as a primary consideration is reflected in Ethiopian legislation at varying levels. The FDRE Constitution provides that "in all actions concerning children undertaken by private or public institution, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child."[29]

2.4.2 The principle of Non Discrimination

The convention on the Rights of the child requires states parties to respect and ensure the rights enshrined in the convention to each child without discrimination of any kind, irrespective of the child's or her parents or legal guardians race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[30] In addition, states parties are obliged to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardian, or family members.[31] The protection against discrimination is also affirmed under Art.3 of the African charter on the rights and welfare of the child.

"The principles of non- discrimination are one of the cardinal principles of the convention which is identified as one of the fundamental pillars of the convention.''[32] The term discrimination is not defined in the CRC. However, the human Rights committee[33] has provided the definition of the term in its

[28] Girmachew Alemu and Yonas Birmet, Handbook on the Rights of the Child in Ethiopia,p.43
[29] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proclamation No.1, Federal Neg.Gaz. Art36(2)
[30] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 (CRC) art 2(1)
[31] Ibid,art 2(2)
[32] Hodgkin and Newell, Implementation Of Handbook for the Convention on the Rights of the Child (3rdedn, UNICEF, Geneva, 2007)(n) 17
[33] The Human Rights Committee is a treaty monitoring body established based on Article 28 of the International
Covenant on Civil and Political Rights.

general comment. The term discrimination is defined as any distinction, exclusion, restriction, or preference which is based on any ground such as race, color, sex, language, religion, political, or other opinion, national, or social origin, property, birth or other states which has purpose or effect of nullifying or impairing the recognition enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[34]

Art.36 (4) of FDRE constitution provides that "children born out of wedlock shall have the same right as children born of wedlock." Thus, this constitution stipulation recognized the equality of children regardless of birth and their right to protection against discrimination. Therefore, children born out of wedlock shall have the same right with children born in wedlock.

2.4.3 The Right to identity

Art. 8 of the CRC assure the rights of children to identity and to have their identity preserved, and where necessary pre -established. The provision covers three elements of identity including nationality, name and family relations. Any legislation, which prevents children from assuming the nationality of their parents, is likely to be incompatible with the CRC.

The RFC have detailed rules concerning ascertainment of paternity and maternity. Art. 36(1) (b) and (c) of the FDRE constitution stipulates that "every child has the right to a name and nationality, to know and be cared for by his or her parents or legal guardian.''

The RFC stipulates that the maternal filiation is ascertained from the sole fact that the woman has given birth to the child.[35] On the other hand; the Code provides that paternal filiations can be ascertained through different ways. To begin with, paternal filiation flows from the maternal filiations when a relationship recognized by the law has existed between the mother

[34] General Comment No18, Human Rights Committe
[35]The Revised Family Code of 2000, Federal Negarit Gazeta Extraordinary Issue No1/2000,Art,124

and a certain man at the time of conception or birth of the child.[36] Secondly, paternal filiations may also result from an acknowledgement of paternity made by the father of the child.[37] Thirdly, paternal filiations may also result from judicial declaration.[38] These provisions are of at most importance for the protection of the right of children to know the identity of their birth parents.

2.4.4 The Right to Maintenance

Parents bear the primary responsibility to provide a suitable upbringing for children. The preamble of CRC states that, “the family as a fundamental group of society and for growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.” The child should grow up in a family environment, in an atmosphere of happiness, love and understanding for his or her full and harmonious development of his or her personality.

Art. 198(1) of the RFC provides the existence of maintenance obligation between ascendants and descendants. As per this article, there is no maintenance claim and obligation between ascendant and descendant unless there is father and child relationship is established.

2.5 The Establishment of Paternity under the Federal Revised Family Code.

There are three different modes of ascertainment of paternity according to the RFC. These are presumption of paternity according to the RFC. These are presumption of paternity, acknowledgment and judicial declaration of paternity. These modes of ascertainment of paternity will be discussed under this part in detail. Adoption is also one way through which children get artificial paternity which will be discussed..

[36] Id, Art, 126&130
[37] Id,Art,131
[38] Id, Art,143

2.5.1 Paternal Filiations

Establishing both maternal and paternal filiations is important, among other things, to protect the rights of the child.[39] Ascertaining mother of the child is less difficult than ascertaining the father of the child.[40] Despite such difficulty, the law should do whatever possible to ascertain both parents since the child, inter alia, has the right to know and be cared for by his/her parents.[41]

Hence, the Ethiopia family laws should implement the principles enshrined under the convention and the constitution. Accordingly, the family laws have provided modes by which paternal filiations is established. Generally, the modes of ascertainment of paternity are divided into three.[42] There are;

a. Presumption of paternity
b. Acknowledgement of paternity
c. Judicial declaration of paternity

Let us discuss each mode as follows:

2.5.1.1 Presumption of Paternity

"This is the first mode of ascertaining paternity which is provided under RFC (Arts.126-130). Logically, paternity ought to result from the begetting of a child by a certain man. But, there is a problem in determining biological paternity.''[43]

Because of this difficulty the need to rely on legal presumption is felt the establishment of paternity. The presumption is attached to a person who may happen to the husband of the mother of the child or the man in an irregular union at the time of conception or birth.[44]

The first element of presumption of paternity is the existence of legally prescribed union. Accordingly, paternal filiations is established if at the

[39]Aschalew Ashagrie& Martha Belete, Family Law Teaching Material, 2009, p 138
[40] ibid
[41] ibid
[42] The Revised Family Code of 2000, Federal NegaritGazeta Extraordinary Issue No1/2000, Art 125
[43]AschalewAshagrie& Martha Belete, Family Law Teaching Material, 2009, p 139
[44] The Revised Family Code of 2000, Federal NegaritGazeta Extraordinary Issue No1/2000, Art 126&130

time of conception or birth of the child the mother had relations provided by law with certain man. Only children born or conceived within such relationship could benefit from the presumption of paternity.[45]According to Art.126 and 130 of the RFC the relationship capable of ascertaining the presumption for the purpose of establishing paternal filiations are marriage and irregular union.

The second element of presumption is birth or conception within the legally provided union. Art.126 of the RFC provides that" a child conceived or born in wedlock has the husband as a father. "By the same token "a child conceived or born during an irregular union has as father the man engaged is such union, according to Art. 130 of the same code[46]

Duration of pregnancy is strictly limited under the Ethiopia family law and can be used as a test for paternity. "A child shall be deemed to have been conceived in wedlock if it is born more than 180 days after the celebration of marriage and less that 300 days, after its dissolution and no proof shall be admitted against the presumption.''[47] A child is presumed to have been conceived in wedlock if it is born on or after 181st date following celebration of marriage or, on or before the 299th date after dissolution of the marriage and can get paternity according to this presumption.[48]

2.5.1.2 Acknowledgement of Paternity

This is the second mode of establishments of paternal filiations. "This voluntary declaration of paternity can be used to establish paternal filiations, if paternity is not possible to establish using the presumption of paternity''.[49] Literally, this refers to children conceived and born out of a legally provided union and excludes children that were conceived or born in wedlock or an irregular union.

[45]AschalewAshagrie& Martha Belete, Family Law Teaching Material, 2009, p 139
[46] The Revised Family Code of 2000, Federal NegaritGazeta Extraordinary Issue No1/2000, Art,130
[47] Ibid Art,128
[48] Aschalew Ashagrie& Martha Belete, Family Law Teaching Material, 2009, p 128
[49]Id

Any child who is merely conceived or born may be acknowledged in so far such acknowledgement does not interfere with already established filiations as child cannot be acknowledged if he has a father by operation of law."[50] Neither can acknowledgment validly establish paternal filiation if the child has already been acknowledged unless such an acknowledgement is invalidated''.[51]

Acknowledgment is to be made personally by the alleged father of the child. This must be done by the father even if the father has not attained the age of majority.[52] However, acknowledgment may be made by an agent when such agent is specially appointed for this purpose by special power of attorney which must be approved by the court according to Art.134 of FRC

2.5.1.3 Judicial Declaration of Paternity

This is third mode of establishing paternity. "Under this mode of establishment of paternity, a child which does not have a father either through the operation of the presumption of paternity or by acknowledgment can have a father only if the court declares a certain man to be his/her father.''[53] The court makes such declaration where it is satisfied that one of the grounds which justify judicial declaration of paternity is found.

Art. 143 of the RFC provide that:

Where, after applying preceding articles the father of the child is not ascertained, a judicial declaration of paternity may be obtained under the following conditions;

a. *In the case where the mother has been the victim of abduction or rape at the time of the conception of the child.*

[50] Id ,P.147
[51] ibid
[52] Id,p.149
[53] Id ,p.153

b. *In the case where at the time of the conception of the child, the mother has been the victim of seduction accompanied by abuse of authority, promise of marriage, or any similar acts of intentional deception.*
c. *In the case where there letter exists or other documents written by the claimed father which unequivocally proofs paternity.*
d. *In the case where the claimed father and mother of the child have lived together on continuous sexual relation, without having a legally recognized union in the period regarded by law as the period of pregnancy.*
e. *In the case where the person claimed to be the father of the child participated in the maintenance, care and education of the child in the capacity of a father*.

Generally, if the above criteria's are fulfilled, the court declares the claimed man as the father of the child. Let discuss the above grounds one by one briefly as follows.

- ✓ In the case of Art 143(a), the court shall pass this declaration, only if the child is born within the legally presumed period of pregnancy. The child should be born within 181st days to 299th days from the rape of the mother.[54]

  Art. 143(b) is meant to alleviate a social problem faced by mothers and children in Ethiopia.

  Some men, using the economic weakness of women, have sex by promising marriage.[55]

  However, when the woman conceives, the man declines to accept that he is father of the child. This creates problem on the mother and the child. The child, in such circumstances, does not get the treatment that he can

[54] ibid
[55] Id ,p.154

get from a father unless such man is judicially declared to be the father of the child.[56]

- ✓ According to the ground under Art. 143(c), where there are letters or other documents which are written by the claimed father which unequivocally proof paternity, the man can be declared to be the father of the child.
- ✓ According to the ground under Art. 143(d), the grounds of judicial declaration of paternity is where the claimed father and mother lived together in continuous sexual relation, without concluding marriage or establishing an irregular union. Two facts must be proofed. The first is that has to proof that there was continuous sexual intercourse between them and secondly, that the child was born within legally presumed time of pregnancy.[57]
- ✓ According to the last ground of making judicial declaration of paternity, if the mother of the child is able to proof that the claimed father of the child has voluntarily and in the capacity of father participated in the maintenance, care and education of the child, judicial declaration of paternity may be made.[58]

2.5.1.4 Adoption

"Adoption is the creation of parent-child relationship by judicial order between two parties who usually are unrelated.''[59]

In the normal course of circumstances, in is natural filiation which creates parent-child relationships. "However, exceptionally an artificial filiation is established by agreement between an adopter and an adoptee for several reasons''.[60] One of such several reasons is that creating parent-child relationship. According to Art 36(c) of FDRE constitution every child has right to know and be cared for by his or her parents or legal guardians. The

[56] ibid
[57] Id,p.155
[58] ibid
[59] Black's Law Dictionary, 8th ed, 2004, p. 52.
[60] Aschalew Ashagrie& Martha Belete, Family Law Teaching Material, 2009, p 178

convention on the Rights of the child (CRC) under Art 7 adds the same. So, if it is impossible to ascertain paternity through presumption of paternity, acknowledgement of through judicial declaration, it is through artificial filiations that children got their parents. This shows that children can get paternity through adoption The Ethiopia Civil Code defines “adoption as a bond of filiations created artificially by a contract of adoption between the adopter and the adopted child’’.[61] The RFC followed the same. An adopted child shall, for all purposes, be deemed to be the child of the adopter.[62]

Because, adoption establishes and artificial filiations, the provision of the civil code dealing with succession both intestate and testate do apply to the adopted child. Adopted children shall be assimilated to the other children in the case of succession.[63]

Adopted parent are duty bound to support and care for the adopted child. Since the adopted child has an equal right as a naturally born child, it is also incorporated in both FDRE constitution and UN convention on the Rights of the Child (CRC) that the child is entitled to acquire care of his/her guardian. The adoptive parents are responsible to maintain the child and give all the necessary material support within their capacity.

Conclusion

The stepping stone towards the child right to know his/her parents is the UN Convention on the Rights of the Child and FDRE Constitution. Defining the term child or as may be used by a vast majority of states minor is of a practical importance. So that who the beneficiaries of those rights can easily be known. The CRC on the other hand defines a child right as, every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier.

[61] Civil code of the Empire of Ethiopia, proclamation No. 165 of 1960, Art ,796(1)
[62] The Revised Family Code of 2000, Federal Negarit Gazeta Extraordinary Issue No1/2000, Art 181
[63] Civil code of the Empire of Ethiopia, proclamation No. 165 of 1960, Art ,836

The convention doesn’t specify when childhood begins. All that it talks is about its end. The absence of clear indication as to when childhoods begins in the convention moves us to resort to our domestic legislations. The relevant authority for this particular purpose would be the provisions in the Civil Code dealing with physical person. Accordingly, the human person is the subject of rights from its birth to its death as a matter of legal principles

Generally, the modes of ascertainment of paternity are divided into three. These are; Presumption of paternity, Acknowledgement paternity and Judicial declaration of paternity.

The first modes have two elements. The first element of presumption of paternity is the existence of legally prescribed unions. The second element of presumption is birth or conception within the legally provided union. The second mode of establishments of paternal filiations is acknowledgement. This voluntary declaration of paternity can be used to establish paternal filiations, if paternity is not possible to establish using the presumption of paternity. This is third mode of establishment of paternity is judicial declaration paternity. Under this mode of establishment of paternity, a child which does not have a father either through the operation of the presumption of paternity or by acknowledgment can have a father only if the court declares a certain man to be his father.

In the normal course of circumstances, in is natural filiation which creates parent-child relationships. However, exceptionally an artificial filiation is established by agreement between an adopter and an adoptee for several reasons. The Ethiopia Civil Code defines adoption as a bond of filiations created artificially by a contract of adoption between the adopter and the adopted child. The RFC followed the same. An adopted child shall, for all purposes, be deemed to be the child of the adopter.

Chapter Three

Analysis of the Revised Family Code on the Establishment of the Paternity Bond in Relations Other than Marriage and Irregular Union

3.1 Introduction

We have seen in the chapter two, that child right to know his/her parents specially the right paternity is constitutionally guaranteed in Ethiopia to the extent of dispensation with qualifying phrase “as far as possible” which was envisaged under Art 7 of the Convention on the Right of the Child (CRC). Despite the existence of such right in the constitution and CRC, there are some provisions under the RFC that curtail the effectiveness of the right. This chapter is devoted to look into those problems in particular with regards to paternal filiation.

3.2 legally Recognized Relations

There are two legally recognized relation by Federal Revised Family Code. Accordingly to Art 107(2) of RFC marriage and irregular union are legally recognized relations. As pursuant to Art,107(1) relations other than marriage and irregular union shall have no juridical effect attached to them. The child that was born of legally recognized relations establish his/her father by application presumption of paternity[64] whereas the child that born out of legally recognized relations establish his/her father by application of acknowledgment and judicial declaration of paternity.[65]

3.2.1 Marriage

Marriage was not only recognized by ordinary legislation but also it has constitution foundation. Neither constitution nor Revised Family Code

[64] The Revised Family Code of 2000, Federal NegaritGazeta Extraordinary Issue No1/2000, Art 126 and 130

[65] Ibid ,Art,131 and 143

defined marriage[66]. Neither the constitution nor a Revised Family Code defined marriage,

“In the English legal system, marriage, as defined by Sir James Wilde in the land mark case of Hyde Vs Hyde, is the voluntary union for life of one man and one woman to the exclusion of all others.”[67] This same definition is also upheld under the Australian Marriage Act of 1961.[68] The definitional part as well as Section 46 of the Australian Marriage act defines marriage as the voluntary union of one man and one woman for life to the exclusion of others.[69] “This definition has been taken from the English definition of marriage. Both definitions contain three common elements.’’[70] First, the marriage has to be concluded between a man and a woman, there is no legal marriage between same sex persons. Secondly, the institution of marriage is to be entered into with the absolute consent of the parties i.e., voluntarily. In addition, the marriage is expected to last for a life time, death being the only cause for dissolution.

The children that are conceived and born with in marriage acquire their father by presumption of paternity. Accordingly, the paternal filiation is established where at time of conception or birth of child the mother had marriage with certain man. Accordingly to Art,126 of RFC the relation capable creating the presumption of paternity for the purpose of establishing paternal filiation is marriage. As far as children born in a wedlock is concerned, there are strong reasons to justify the presumption. Most of the time, it is possible to maintain that a child born in marriage is the child of the husband because of the duties of cohabitation and fidelity.[71]

[66]Mehari Redae, Yeteshashalewn Yebeteseb Hig Lemegenzeb Yemiredu AndiAndi Netiboch, volume 2, 1999 p.5
[67] Definition of marriage in UK,1
[68]Aschalew Ashagrie& Martha Belete, Family Law Teaching Material, 2009, p 20
[69] ibid
[70] ibid
[71] Id, p.139

3.2.2 Irregular Union

In Ethiopia irregular union has been recognized by the 1960 Civil Code of Ethiopian, the union is not the recent phenomena. Currently the Federal Revised Family and the new regional family laws are recognized irregular union. Irregular union was defined by Federal RFC as follows:

"An irregular union is the state fact which is created when a man and woman live together as husband and wife without having concluded a valid marriage."[72]

Among the rationale for recognition of the irregular union one reason the right of the child who born or conceived in the union. Since the constitution guarantees that every child to have his/her father, the recognition of irregular union has paramount importance for child born and conceived in such union because they know their parents and they get their parents assistance and their upbringing.

Children that were born and conceived in the irregular union establish their father by presumption of paternity. Accordingly, Art,136 the paternal filiation is established where at the time conception or birth of child the mother had irregular union with a certain man.

3.3 Restrictions with Regards to Judicial declaration of Paternity

Judicial declaration of paternity is the third and last mode by which a child's paternal filiations can be ascertained. A child the paternity of which cannot be ascertained by the application of legal presumption or who is not acknowledged will have a father only by judicial declaration of paternity.[73] This idea is manifested by the civil code and in all family laws promulgated both at regional and federal level. Judicial declaration of paternity as the name signifies is involuntary mode of establishment of paternity where by a

[72] The Revised Family Code of 2000, Federal Negarit Gazeta Extraordinary Issue No1/2000, Art 98
[73] Id,p.153

court holds a certain person to be the father of a certain child owing to the acts of the alleged father. According to the civil code, judicial declaration of paternity is sought only when a mother of the child has been the victim of rape or abduction.[74] The grounds for judicial declaration have been increased in the RFC and the Amhara and Oromia Family codes with a view to curbing the phenomena of fatherlessness. The trend recently adopted is no doubt of a great help in alleviating the problem of fatherlessness. Despite the great advancements made in this regard, it would not be difficult for one to come across foggy circumstance that need clarity for its open to interpretation. A restriction has been made in order that no other grounds are admitted to bring an action to claim paternity.[75] The banning of any other ground than the above mentioned ones, it was suggested, was to do away with the unnecessary proliferation of cases pertaining to claim for paternity.

a) According to Art 143(a) of the RFC judicial declaration of paternity is possible in case where the mother has been the victim of abduction or rape at the time conception of the child. But what if the mother of the child has been the victim of abduction or rape by more than one person during period of conception? Accordingly what if he can show that the mother of child has sexual relation with another man at time of conception? The spirit of the law does not at least apparently, seems it difficult to determine who would be the father of the child in such particular case.so the child may left without father.

b) It is appropriate to see the requirements of continuous sexual intercourse between the mother of the child and the alleged father so as to bring an action for judicial declaration of paternity. One thing to be noted, however, is that continuous sexual intercourse is require not up until the birth of the child but during the probable period of conception. All what the

[74] Civil code of the Empire of Ethiopia, proclamation No. 165 of 1960, Art ,758
[75]The Revised Family Code of 2000, Federal Negarit Gazeta Extraordinary Issue No1/2000, Art 145

law tells us is that continuous sexual intercourse must exist. Besides, it is not continuous sexual intercourse that results in conception of the child. For that matter, it is a matter of fact, a single sexual intercourse may results in conception of the child. But if the child is conceived by a single sexual intercourse, he/she cannot get a father.

c) As principle the period of pregnancy was applicable to relation recognized by the law. Exceptionally it is applicable for children who claim ascertainment of paternity by the judicial declaration. The duration of pregnancy set forth our RFC is minimum of 180 days and maximum of 300 days. The law allows no proof to the contrary to be admitted according to Art 128 of the RFC. A child may be born less or more than the average period of pregnancy. Scientific data indicates that there is survival of babies born five to six months.[76] However, a child whose paternity is sought to be declared by the court, for instance, if born less than 180 days after the alleged say rape of abduction made against the mother of the child cannot be entitled to have a father irrespective of a scientific proof as to the factually uncontestable begetting of the child by the defendant. The fact that children born preterm is rare does not any way mean that there are no children born so and hence these children should also be protected.

“It is common knowledge that the great majority of duration of pregnancy fall under the period fixed by the Ethiopian law. But what the writer wants to clarify here is that, there are births outside this period fixed by the law. Especially those births after 300 days should not be neglected, as they constitute a relatively larger proportion. What is the fate of children of such births? The answer is clear. They could be made illegitimate. For example, if the marriage is dissolved today and if a child is born just after the 300th day, this child is neither conceived nor born in wedlock. Hence it cannot have the ex-husband of its mother as its father.’’[77]

[76] Ethiopia law Review, vol no, 2002
[77] ibid

3.4 The Discrepancy between the Provisions of RFC

According to Art 107(2) of the RFC, without prejudice to the provisions relating to acknowledgment of paternity or adoption, children born out of marriage and irregular union shall have a juridical bond only with their mother. According to this provision, if a child born out of wedlock or irregular union, such a child, by any means cannot have a father, except by acknowledgement or adoption. However, according to Art 143 of the same code, even if a child is born out of wedlock or required union, such a child can have a father through judicial declaration by fulfilling the criteria's required by the law. This shows the clear contradiction between Art 107 (2) and 143 of the RFC.

3.5 The Discrepancy between the Federal RFC and the FDRE Constitution together with the CRC

According to the FDRE Constitution and Convention on the Rights of the Child, every child has the right to identity, the right to know and be cared for by his/her parent or legal guardians. In all actions concerning children, the primary consideration shall be the best interest of the child. Children born out of wedlock shall have the same rights as children born of wedlock. But, in contradiction to the constitution and the CRC, the RFC under Art 107(2), provides that children born out of marriage and irregular union shall have juridical bond only with their mother, except acknowledged or adopted by some body. By providing so, it contradicts the following constitutional principles and the CRC provisions:

- Child right to identity Art. 36(1)(b) of FRDE Constitution and Art. 8 of the CRC. This is because of his fatherlessness.
- Child right to know and be cared for by his/her parent-Art. 36(1)(c) of the FDRE Constitution and Art. 7 of the CRC.
- The principle of non- discrimination between a child born in wedlock and out of wedlock- Art. 36(40 of the FDRE Constitution and Art. 7 of the CRC.

- The Principle of the best interest of the child-Art. 36(2) of the FDRE Constitution and Art. 3 of the CRC.

In accordance with Art 9(1) of the FDRE Constitution, any law which contravenes the Constitution shall be of no effect. Since Art. 107 (2) of RFC is in contradiction with the Art.36(b), (c), 36(2) and 36(4) of the FDRE Constitution, it is unconstitutional and it must be amended.

Art. 143 of the RFC, as we listed above under the gap left by the RFC, create the probability of being without a father. Any probability that creates fatherlessness is against the Constitution and the CRC. So it must be modified and any probability which creates fatherlessness must be avoided.

Conclusion

Marriage and irregular union are the only legally recognized relations by Federal Revised Family Code. Other relation has no juridical effect attached to them. The children that born either from marriage or irregular union can establish their paternal filiation by the presumption of paternity. To apply the presumption of paternity the child should conceived and born in the prescribed period of pregnancy.

Even if it is Constitutional rights of children to know their parents and be cared for by them, the RFC which is basically devoted to this issue, does not adequately protect the right to paternity for children's born out of marriage and irregular union

According to Art 107(2) of the RFC, the child that was born out of marriage and irregular union cannot have father unless acknowledged and adopted by some body. It excludes the application of judicial declaration of paternity. It also discriminates between children that born of legally recognized relation and out of legally recognized relationship. Hence, it against the basic principles of the Constitution and the CRC which guarantees the non-discrimination of children born in wedlock and out wedlock.

Chapter Four

Conclusion and Recommendation

4.1 Conclusion

It is in 1989 that the UN-CRC was formulated as the most comprehensive legal instrument to protect child's right. The Convention has embodied the child's right to know his/her parent which includes the right to paternity.

The Constitution of FDRE has come up with the same right as one of fundamental right of the child. In accordance with this Constitutional right, the RFC has a room to promote such a right. Without discrimination of any kind including status of birth, every child is entitled to enjoy the blessing of the right.

Art 107(2) of the RFC is not consistent with Article 36(1) c and 36(4) of FDRE Constitution and Convention on the Right of Child. It also contradicts with Article 143 of the same code since it excludes judicial declaration of paternity.

There is no single rule universally accepted by which a child's father is established. Modes for ascertainment of paternity, for this reason, have been adopted. Accordingly, paternity can be ascertained by a one of the three method of establishing child-father relationship. The law presumes that the man which has married the mother of the child or engaged in an irregular union with the mother of the child at the time of conception or birth of the child as the father of the child. If paternity cannot be ascertained by this presumption, the child may have as father the man who voluntarily acknowledges the child. Finally, the child's father may be he whom the court declares to this effect based on evidences brought before it

which are reliable such as to justify the declaration in accordance with the law. In our RFC, there are provisions which curtail the establishment of child-father relationship where child born out of marriage and irregular union. The first is to do with the period of pregnancy. As principle the period of pregnancy was applicable to relation recognized by the law. Exceptionally it is applicable for children who claim ascertainment of paternity by the judicial declaration. However, children can sometimes be born less than 180 days and more than 300 days

4.2 Recommendation

1. Art 107(2) of the Federal RFC is unconstitutional and must be amended. Art 107(2) of the RFC is not consistent with Article 36(1) c and 36(4) of FDRE Constitution and Convention on the Right of Child. It also contradicts with Article 143 of the same code since it excludes judicial declaration of paternity
2. Art 143 of the RFC needs modification to avoid any probability which creates fatherlessness and court should be vested with a power to evaluate any evidence relating to period of gestation. As principle the period of pregnancy was applicable to relation recognized by the law. Exceptionally it is applicable for children who claim ascertainment of paternity by the judicial declaration. However, children can sometimes be born less than 180 days and more than 300 days.

References:

Laws

- Civil code of the Empire of Ethiopia, proclamation No. 165 of 1960
- Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577
- Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proclamation No.1, Federal Neg.Gaz. 1st Year, No.1
- The Revised Family Code of 2000, Federal Negarit Gazeta Extraordinary Issue No1/2000,
- The African Charter on the Rights and Welfare of the Child

Books

- *Girmachew Alemu and Yonas Birmet, Handbook on the Rights of the Child in Ethiopia,*
- *Hodgkin and Newell, Implementation Of Handbook for the Convention on the Rights of the Child (3rd edn, UNICEF, Geneva, 2007)*
- Mehari Redae ,YeteshashalewnYebetesebHigLemegenzebYemireduAndiAndiNetibocch, volume 2, 1999
- Sharon Detrick, A Commentary on the United Nations Convention on the Rights of the Child(Martinus Nijihoff,Hague,2009)

Others

•AschalewAshagrie& Martha Belete, Family Law Teaching Material, 2009

•Demalesh Shiferaw andYonasTesfa Human Rights Law Teaching Materials 2009