

Child Participation: A Forgotten ‘P’ Under the Ethiopian Legal System?

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Abstract

The Federal Democratic Republic of Ethiopia’s 1995 Constitution has been praised for its long and relatively comprehensive list of human rights, providing for the rights of the child under Article 36. However, it has not categorically specified the principles underlying these rights, which are enshrined in the United Nations’ Convention on the Rights of the Child, 1989 (CRC), and the African Charter on the Rights and Well-being of the Child, 1991 (ACRWC). Thus it is logical to question the constitutional placement of these principles. This article analyzes one of the basic principles upon which the rights of the child are established, i.e., participation. The author attempts to evaluate the place of children’s right to participation within the hierarchy of the Constitution and the legal system it establishes.

Although the Constitution does not explicitly provide for participation as one of the principles underlying the rights of the child in the CRC and the ACRWC, Ethiopian legislation as well as practice in the legal system afford opportunities in which children’s right to participate may be implemented. Thus, the author recommends that the Constitution be read critically where the rights of the child are concerned, and further recommend the strengthening of practices that recognize children’s right to participation and the creation of more space to accommodate it properly, as there are limitations at present in these areas. Finally, the author advocates proper utilization of the rule of interpretation provided under the Constitution, as this rule has great significance in the realization of the right to child participation and general protection of this right.

Key Terms: Child participation, Rights of the Child, Child participation in Ethiopia

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Introduction

It has been said that children's views should be listened to and respected, as they are people with dignity.¹ However, children have long been denied their right to participation for various reasons.² This problem has been taken seriously in modern times.³ Today, in various countries, there are attempts to enable children to express their views on matters that concern them.⁴ The CRC provides for the right of child participation in different contexts, under various articles.⁵ The same holds true for the ACRWC.⁶ This paper focuses on Article 12 of the CRC and Article 7 of the ACRWC and discusses child participation in Ethiopia in light of these provisions.

Child participation is important in almost all areas of law, policy and practice, but the author will focus specifically on child participation under the FDRE Constitution, the Revised Family Code of Ethiopia (2000), the Criminal Procedure Code of Ethiopia (1961), and the Civil Procedure Code of Ethiopia (1965). Accordingly, Section 1 examines the concept of child participation. It closely examines the meaning, nature, scope and rationales of child participation. Section 2 reviews the legal framework dealing with child participation in Ethiopia. Section 3 will attempt to give a highlight of child

¹ ROOTS, *Child Participation*, Tearfund, Teddington, UK, 2004, p. 5.

² Id. at p. 17; H. Matthews et al., 'Young people's participation and representation in society,' *Geoforum*, vol. 30, 1999, p. 136.

³ For reasons and forms of child participation, see G. Lansdown, The evolving capacities of the child, 2005, UNICEF, pp. xiii-xiv; ROOTS, *supra* note 1, pp. 11-20; UNICEF, The state of the world's children 2003: Child participation, available at: <http://www.unicef.org/sowc03/contents/childparticipation.html>, accessed on 20 September 2008.

⁴ ROOTS, Id., pp. 23-37.

⁵ H. Matthews et al., *supra* note 2.

⁶ See Articles 4 and 7 of the ACRWC.

participation practice in Ethiopia. The article then concludes with conclusions and recommendations.

1. Child participation: Meaning, nature, scope and rationales

1.1 Meaning

Child participation has no single, consistent definition in international law. The lack of a generally accepted definition has emanated not only from the advocates' practice of defining the concept in various ways, but also from the fact that the concept is relatively new, representing a paradigm shift in beliefs relating to children in society. Child participation has been ignored for a long time, unlike the other cardinal principles of child rights. Thus, it has been defined by many scholars in different ways, based on the element(s) that they wanted to emphasize and the context in which they wanted to use the concept. The definitions of some writers even "seek to go beyond simply defining participation by focusing on the quality and genuineness of... participation."⁷ As noted above, child participation is a right envisaged in various provisions of the most important documents on the rights of the child, i.e., the CRC and the ACRWC. And so in this work, participation is defined based on Article 12 of the CRC, as this is the provision most commonly identified as portraying the right of child participation,⁸ and Article 7 of the ACRWC, which may be regarded as the African version of the former. Under

⁷ L. Jackson, *Citizenship education through community action: The potential for effective human rights education through community participation*, 2008, p. 5, available at: http://www.citized.info/pdf/commarticles/Lee_Jackson.doc, consulted on 9 September 2008.

⁸ M.S. Pais, *Child participation*, *Documentação e Direito Comparado*, No. 81/82 2000, p. 94, available at: <http://www.gddc.pt/atividade-editorial/pdfs-publicacoes/8182MartaPais.pdf>, consulted on 9 September 2008.

the CRC, child participation is defined as the right to freely express views in all matters affecting the child available to every child who is capable of forming his/her own views on such matters.⁹ The ACRWC also defines child participation as the right to express opinions in all matters freely available to every child who is capable of communicating his or her own views.¹⁰ Upon first reading, the definitions given under these instruments seem similar. But it is important to note that there are differences between these definitions. The differences relate to the scope of child participation.

With regard to the CRC definition, Chawla defines child participation as:

... a process in which children and youth engage with other people around issues that concern their individual and collective life conditions. [...] Formal processes of participation deliberately create structures for children's engagement in constructing meaning and sharing decision making.¹¹

By way of conclusion, one may say that child participation is a right that is meant to ensure that children influence "issues affecting their lives, by speaking out or taking action in partnership with adults" and each other.¹²

1.2 Scope

As explained above, the concept of child participation under the CRC and the ACRWC differs in scope. First, the CRC confers the right to

⁹ Article 12 (1), Convention on the Rights of the Child (CRC), adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 on 20 November 1989, entry into force 2 September 1990, in accordance with Article 49.

¹⁰ ACRWC, Article 7.

¹¹ L. Chawla, Evaluating children's participation: Seeking areas of consensus, p. 1, available at: <http://pubs.iied.org/pdfs/G01959.pdf>, consulted on 10 August 2013.

¹² R. Blackman (ed.), Child participation, p. 5, available at: http://tilz.tearfund.org/webdocs/Tilz/Roots/English/Child%20participation/Child_participation_E.pdf, consulted on 8 September 2008.

participation on every child that is capable of *forming* his or her own view, whereas the ACRWC confers the right to participation on every child who is capable of *communicating* his or her own view. This difference becomes significant particularly when considered in light of the possibility that the ACRWC may be interpreted to apply only to children who are capable of communicating their views in certain modalities, such as speech or writing. Thus the ACRWC may exclude children who are capable of forming their own views but unable to communicate them in particular ways.

Should we resort to an interpretation that holds that the word *communicating* is general and should be understood to refer to all possible modalities of expression that children may employ to convey their views? Although this argument seems to minimize the undesirable effects of limiting the formulation of the concept of child participation in the ACRWC, there are also problems with this line of argument. Such a broad approach also has an undesired result, as it may incorporate an unlimited category of children. Even infants could be entitled to the right to participation, as they may communicate their views in various ways, by crying or covering their faces or laughing.

The CRC, on the other hand, explicitly entitles all children capable of *forming* their views to participation. Thus the scope of the entitlement is wider than the scope under the ACRWC, applying to all children regardless of their ability to communicate their views. This further complicates things as it covers all categories of children. Even a newborn is arguably able to form his/her own opinions, as all human beings possess conscious minds as of

birth. Therefore, practically speaking, the ACRWC is framed in a better manner than the CRC, as it could be put into effect if all the reasonably understandable and clear modalities of communication were defined and listed. This might benefit all children who are able to express their views by using any one of these means of communication. Theoretically speaking, however, the CRC is framed in such a way that it benefits many more children, including those excluded by the ACRWC.

The CRC also entitles children to participate *in all matters affecting the child*.¹³ Hence, it allows children to take part only with respect to issues that affect them. This rule does not govern the participation of children in other matters. The problem that centers around this distinction is that governments, families and other pertinent bodies ignore the fact that almost all actions taken by such organs affect children in one way or another, and thus qualify as *matters affecting the child*. Therefore such organs should take all the necessary cautions when categorizing any matter they are going to decide. It is worth mentioning that the CRC guarantees the right to participation to the child at all times and in all instances and places, so long as the matter under consideration is regarded as a matter affecting the child.

Under the ACRWC, the right to participation is provided for children *on all matters*.¹⁴ This provision seems to be free of the qualification relating to the matters in which children are entitled to participate under the CRC. The ACRWC seems to enable children to participate in many more issues. This may be taken as one of the innovations of the ACRWC. This is in line with

¹³ CRC, Article 12 (1).

¹⁴ ACRWC, Art. 7.

the submission that almost all matters to be carried out by governments, families and relevant bodies affect the child in one way or another.

Thirdly, the CRC and the ACRWC provide for specific matters in which children *must* participate, in addition to the matters generally referred to, as discussed above. Under the CRC, it is stated that children *shall in particular be provided [with] the opportunity to be heard in any judicial and administrative proceedings affecting the child.*¹⁵ Children shall be able to participate in judicial and administrative proceedings provided that the proceedings affect their interests individually or collectively. It is useful to distinguish this provision from the *matters affecting the child* contemplated under the CRC as discussed above. Moreover, these proceedings are just two fora for child participation. This is to say, children shall be provided with the opportunity to take part in proceedings before the courts of law if such proceedings have to do with actions in which their interests are involved. Similarly, children shall be granted an opportunity to participate in administrative decisions affecting them. Thus children shall be provided with the opportunity to express views when any issue affecting them arises in the judicial and executive branches of government.

The ACRWC has similar rules. It provides that the child shall be granted the opportunity to be heard in administrative and judicial proceedings affecting him or her.¹⁶

Fourth, with regard to the judicial and administrative fora where matters involving children are decided, under both the CRC and the ACRWC,

¹⁵ CRC, Art.12 (2).

¹⁶ ACRWC, Art.4 (2).

participation in such proceedings may be carried out by the child directly or through a representative or an appropriate body.¹⁷ But the ACRWC is distinct in two ways here. First, the ACRWC requires that indirect participation be carried out by an *impartial* representative,¹⁸ whereas the CRC is silent on this point. The ACRWC emphasizes the objectivity of the representative. Second, the ACRWC is not clear with regard to the manner of participation, unlike the CRC, which provides that the manner of the indirect participation must conform to the domestic procedural laws of the respective signatory states.¹⁹ However, this lapse may be overcome through the ACRWC's requirement that orders the relevant bodies to take the views of the child into account in such proceedings, in accordance with the relevant domestic laws of states.²⁰ The CRC does not have such rule.

Fifth, the CRC and the ACRWC do not require the relevant bodies to take all children's opinions into account and give effect to the same. The CRC requires that the views of the child shall be *given due weight in accordance with the age and maturity of the child*.²¹ The higher the age and level of maturity of the child, the more weight his or her views shall be given. This is in line with the concept of the evolving capacities of the child. According to this concept, the scope of the enjoyment of the rights provided under the CRC shall expand as the child grows. In the language of the CRC:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as

¹⁷ CRC, Art.12 (2), ACRWC, Art.4 (2).

¹⁸ Ibid.

¹⁹ ACRWC, Art.4 (2).

²⁰ Ibid.

²¹ CRC, Art.12 (1).

*provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*²²

On the basis of the Recommendations issued during its 37th Session in Geneva on 17 September 2004, the Committee on the Rights of the Child has clearly enunciated the concept of evolving capacity of the child with respect to child participation. In the Committee's own words:

*States parties must take all appropriate measures to ensure that the concept of the child as rights-holders is anchored in the child's daily life from the earliest stage: at home (and including, when applicable, the extended family); in school; in day care facilities and in his or her community. States parties should take all appropriate measures to promote the active involvement of parents (and extended families), schools and communities at large, in the promotion and creation of opportunities for young children to actively and progressively exercise their rights in the everyday activities. In this regard, special attention must be given to the freedom of expression, thought, conscience and religion and the right to privacy of the youngest children, according to their evolving capacity.*²³

From this paragraph of the Recommendation, two crucial points can be deduced. First, the undertaking to facilitate and ensure child participation begins from the earliest involvement of the child in both family and community life.²⁴ Article 12, in particular, requires states to consider children and young people as citizens with both the capacity and the right to exercise agency rather than construing children as awaiting transformation into mature,

²² Id., Art.5.

²³ A. Graham et al., "Progressing Participation: Taming the Space between Rhetoric and Reality." *Children, Youth and Environments*, vol. 16, no. 2, 2006, p.233. The full text of Recommendations issued by the Committee on the Rights of the Child during its 37th Session in Geneva on 17 September 2004 is available at: www.crin.org/docs/resources/treaties/crc.37/Recommendations.doc.

²⁴ Id., p. 234.

rational and competent adults.²⁵ Moreover, in terms of policy and practice, it is important to understand that the right to participate is not static or fixed. Instead, the right to participate expands with the increasing maturity of the child, which implies that the processes enabling participation must be adapted according to the child's evolving capacity.²⁶

Second, a substantial proportion of the participation right afforded by the CRC can only be exercised if mechanisms are in place to facilitate the participation of children. These mechanisms are required to negotiate access to the personnel, bureaucracies, policies, processes, systems and facilities that govern these areas of public life.²⁷ Many commentators have pointed out that Article 12 of the CRC poses serious challenges, both in practical terms concerning how to hear and act upon what children say and in conceptual terms vis-à-vis how to elevate their social status in ways that take account of their rights, their contributions to the social order and their citizenship.²⁸

At this juncture, it is important to note that the CRC adopts an approach that recognizes the development of the individual and his or her evolving autonomy, in contrast to the status approach that focuses on chronological age alone.²⁹ In the real world, due to various factors, children of

²⁵ Ibid.

²⁶ Ibid.

²⁷ Id., p. 235.

²⁸ Ibid.

²⁹ M. Brazier and C. Bridge, 'Coercion or caring: Analysing adolescent autonomy,' in M. Freeman (ed.), *Children, Medicine and the Law*, USA, Aldershot: Ashgate, 2005, p. 8 [hereinafter Freeman, *Children, Medicine and the Law*.]; G. Van Bueren, 'Children's rights: Balancing traditional values and cultural plurality,' in G. Douglass and L. Sebba (eds.), *Children's rights and traditional values*, Brookfield, USA: Ashgate, Dartmouth, 1998, p. 21. Philosophers also label children as incompetents "because they are supposed to be incapable of 'cognitive-complexity, to have unstable, transient values, no real concept of 'the good', of

the same age may have different capacities to form and express their views. These factors can generally be categorized as biological, internal or natural factors and external factors.

Although the ACRWC requires the relevant bodies to take the views of the child into account in judicial and administrative proceedings, in accordance with the relevant domestic laws of states, it does not deal with the application of the concept of evolving capacities of children and the right to participation. This distinguishes it from the CRC.

Based on all of the above, it is possible to conclude that children's right to participation not only requires states to protect this right and allow children to express their views, but also to provide various fora or opportunities for their participation. It is also significant to note that the right to participation may be exercised directly or indirectly. The right to participation does not guarantee children that their views will be admitted and considered in all cases, nor does it oblige states to do so. Rather, it entitles children to express their views on the matters that affect them, and it requires the relevant organs to take the views of children so expressed into account, in good faith or reasonably,³⁰ while making decisions.

1.3 Rationales

Under this subsection, the author will discuss some of the rationales for child participation. The central issue is: Why? In the 1980s and 1990s,

death, of their future, or of their likely future values." See P. Alderson, 'In the genes or in the stars? Children's competence to consent,' in Freeman, *Children, Medicine and the Law*, p. 551.

³⁰ CRC Art. 3 (1), ACRWC Art. 4 (1).

citizens' participation increased in most states in the contemporary world. At the same time, the concept of child participation was included in the CRC and the ACRWC as one of the cardinal principles of these instruments, central to the rights of children. Various writings on the concept of child participation proliferated, and persistent attempts were made to promote this right. All of these developments have been influenced not only by the children's rights agenda but also by emerging theories of the new social studies of childhood that emphasize children's capacity as well as their dependency.³¹

Be that as it may, why do we need child participation? What is its benefit? This question reveals the rationale for child participation, and in fact, it has been suggested that there are several. The well-established ones include enhancement of skills, competence, capacity and self-esteem;³² improved self-efficacy;³³ strengthening of social, judgment and negotiation skills through compromise, trial and error;³⁴ and increased protection, due to the existence of the opportunity to identify issues and be heard.³⁵ In addition, child participation is important from the point of view of the benefits that can result from adults and children talking together while making decisions. This

³¹ A. Graham et al., *supra* note 24, p. 233.

³² *Ibid.*, P. Alderson, *Young Children's Rights, Exploring Beliefs, Principles and Practice*, Jessica Kingsley Publishers and Save the Children, 2000 [hereinafter Alderson, *Young Children's Rights, Exploring Beliefs, Principles and Practice*].

³³ *Ibid.*, V. Morrow, 'We Are People Too: Children and Young People's Perspectives on Children's Rights and Decision-Making in England,' *International Journal of Children's Rights*, 1999, vol. 7, 1999, p. 150.

³⁴ *Ibid.*

³⁵ *Ibid.*, Alderson, *Young Children's Rights, Exploring Beliefs, Principles and Practice*.

enables adults and children to mutually propose and agree to decisions, thereby improving the chances of the decisions working.³⁶

More often than not, rights and social justice discourses underline the identified benefits of child participation. These benefits also show us the importance of recognizing children's need for care, protection and guidance in the milieu of warm, respectful and reciprocal relationships.³⁷ This is most evident from the fact that the participation of children provides opportunities for them to learn that they have rights and responsibilities, to discern what their rights and responsibilities are, to make out which rights predominate in what contexts, and to become more cognizant of the idea that one's rights and freedoms can affect the rights of others.³⁸ It has also been argued that child participation has social benefits, as it contributes to an increased understanding of the democratic process and to the development of notions of citizenship.³⁹

Legally speaking, the concept of children's right to participate in decisions on matters that affect their lives is firmly enshrined in the CRC on the basis of any one of the theories discussed above.

³⁶ Ibid.

³⁷ Ibid., B. Neale, 'Dialogues with Children: Children, Divorce and Citizenship,' *Childhood*, 2002, vol. 9, no. 4, p. 455; N. Taylor, *Care of Children: Families, Dispute Resolution and the Family Court*, PhD thesis, University of Otago, Dunedin, 2005; C. Smart, 'From Children's Shoes to Children's Voices,' *Family Court Review*, 2002, vol. 40, pp. 307-319.

³⁸ Ibid., G. Lansdown, *Promoting Children's Participation in Democratic Decision-Making*, Florence: UNICEF Innocenti Research Centre, 2001; R. Hart, *Children's Participation from Tokenism to Citizenship*, London: UNICEF, 1992; P. Kirby, 'Involving Young People in Research,' in B. Franklin, (ed.), *The New Handbook of Children's Rights*, London: Routledge, 2003.

³⁹ Ibid.

2. Child Participation in Ethiopia

The Ethiopian population is very young, with an average age of about 17 years.⁴⁰ Children constitute about 50% of the total population. This can be estimated based on the fact that, children aged under 15 years of age constituted 44% of the population in 2004.⁴¹ As this statistic left out children between 15 and 18 years old, it is easy to see that the proportion of the child population in the country reaches approximately 50% of the population if the number includes children up to 18 years of age. This makes the implementation of the regional and international conventions on the rights of the child especially significant. For this reason, the country ratified the CRC in 1991 and the ACRWC in 2000.⁴² Ethiopia has also ratified some of the other instruments pertaining to child rights. It has ratified the Convention on the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182, and the ILO Convention on Minimum Age (1973), No. 138.⁴³

⁴⁰ National Population Policy of Ethiopia, available at: <http://www.un.org/popin/regional/africa/ethiopia/policy/policy.htm#AGE>, consulted on 8 September 2008.

⁴¹ Population Council, Child marriage briefing: Ethiopia, available at: <http://www.popcouncil.org/pdfs/briefingsheets/ETHIOPIA.pdf>, consulted on 8 September 2008.

⁴² S. Yohannes and A. Assefa, Harmonization of laws relating to children Ethiopia, p. 3, available at: <http://www.africanchild.info/index.php?file=Ethiopia%20final%20Sarah.doc>, consulted on 18 September 2008.

⁴³ Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia, p. 13, available at: [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/512c282017f34921c12570b2003f5410/\\$FILE/G0544522.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/512c282017f34921c12570b2003f5410/$FILE/G0544522.pdf), consulted on 10 September 2008 [hereinafter Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia].

The country has submitted all its required reports to the Committee on the Rights of the Child in accordance with Article 44 of the CRC. It submitted its first report in 1995, a second report in 1998, and a third periodic report in 2005.⁴⁴ In its concluding remarks about the second report, the Committee appreciated some of Ethiopia's developments with respect to the right to be heard, but also expressed concern that this right was not sufficiently respected, particularly in rural areas.⁴⁵ It expressed further concern about the fact that young children and adolescents are not always permitted to express their opinions freely. On the basis of these concerns, the Committee recommended that Ethiopia strengthen its efforts to ensure that children's views are given due consideration in the community, the family, schools, courts and relevant administrative and other settings, in accordance with Article 12 of the convention.⁴⁶

With all of this as background, the paper will engage in an examination of Ethiopia's legal regime relating to child participation. However, this examination must be preceded by a discussion of the challenges of child participation in this country, as this will provide context

⁴⁴ Id., p. 7; Committee on the Rights of the Child, Twenty-sixth session, Consideration of reports submitted by State Parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child, available at: <http://www1.umn.edu/humanrts/crc/ethiopia2001.html>, consulted on 10 September 2008; Ethiopia Reporting History, available at: http://www.bayefsky.com/pdf/ethiopia_t3_crc.pdf, consulted on 8 September 2008.

⁴⁵ Committee on the Rights of the Child, Twenty-sixth session, Id.; Committee on the Rights of the Child, Forty-third session, Report on the Forty-third session, Geneva, 11-29 September 2006, p. 30, available at: http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC_C_43_3.doc, consulted on 10 September 2008 [hereinafter Committee on the Rights of the Child, Forty-third session, Report on the Forty-third session].

⁴⁶ Ibid.

for the study. The cultural set-up is central to these challenges in Ethiopia.⁴⁷ Generally speaking, the country's culture is not favorable for child participation.⁴⁸ Although children are viewed as needing care and protection, their participation is not welcomed. Sayings such as '*lij yabokaw le'erat ayibekam*'⁴⁹ '*lelij kesakulet*'⁵⁰ and '*lelij fit atistu*'⁵¹ have dominated and shaped the parent-child and community-children relationships for centuries.⁵² As a result, children have been viewed as knowing nothing. They are treated as if they would be rude or go beyond limits if given the chance to say something. These are the connotations of these sayings. In the words of Teklemariam, the culture in Ethiopia shows that 'children are not seen as ones that have views and opinions.'⁵³ Moreover, a child who challenges others to express his or her views is regarded as undisciplined.

⁴⁷ Teklemariam, S. The concepts of SC Norway, at WWW https://www.reddbarna.no/default.asp?V_ITEM_ID=11777&bandwidth=low , (consulted on 15 September 2008) [Teklemariam, herein after].

⁴⁸ Ibid. This is also observed by the Committee on the Rights of the Child. In the third country report, 'the Committee remains concerned that traditional societal attitudes appear to limit children in freely expressing their views in the community, schools, courts, or within the family.' Committee on the Rights of the Child, Forty-third session, Report on the Forty-third session, Geneva, 11-29 September 2006; 'The Committee recommends that the State party strengthen its efforts to ensure that children's views are given due consideration in the community, the family, schools, courts and relevant administrative and other settings, in accordance with article 12 of the Convention.'

⁴⁹ This means that a child does not know even what amount of food is enough for a family for a dinner, let alone other things.

⁵⁰ If you are not serious with children, they will fail to respect you.

⁵¹ Do not give opportunity to children.

⁵² For more sayings, see Save the Children, Child situation analysis for Ethiopia, May 2004, p. 45, available at: <http://www.savethechildren.org.nz/ethiopia/publications/CHILDSITUATIONANALYSIS.pdf>, consulted on 18 September 2008.

⁵³ Teklemariam.

In addition to a deep-rooted tradition that does not welcome child participation, the “lack of understanding of ... the concept of child participation” and the shortage of both financial and human resources present a great challenge in Ethiopia.⁵⁴ Therefore a great deal of work is required from all parties interested in child rights. A coordinated effort has the best potential to bring a sustainable and radical shift in the life of children in Ethiopia.

In the subsequent parts of this article, I will focus on the legal regime relating to child participation in Ethiopia. The study relates to the status of the CRC and ACRWC in relation to the FDRE Constitution, the Revised Family Code of Ethiopia (2000), the Criminal Procedure Code of Ethiopia (1961), and the Civil Procedure Code of Ethiopia (1965).

2.1. The status of the CRC and the ACRWC

As treaties or conventions become part and parcel of the law of the land upon ratification, the CRC and the ACRWC have become part of Ethiopian domestic law.⁵⁵ But their place in the hierarchy of the domestic laws of Ethiopia is a subject of controversy among scholars. Some argue that human rights conventions have higher status or, at least, equal status to the FDRE Constitution. This is based on the fact that Article 13 (2) of the Constitution requires that the human rights section of the Constitution,

⁵⁴ Ibid.

⁵⁵ Federal Democratic Republic of Ethiopia (FDRE) Constitution, Proclamation No.1/1995, Federal Negarit Gazeta, 1st Year No.1, Article 9 (4) of the

Section Three, be interoperated in conformity with international human rights instruments.

Others argue that human rights conventions ratified by Ethiopia have the status of ordinary legislation because they are adopted in the same organ that makes ordinary legislation.⁵⁶ However, they may be said to be lifted to a constitutional status as some of their cardinal principles have been included in the FDRE Constitution.⁵⁷ Unfortunately, the right of child participation is not clearly incorporated into the Constitution. Therefore the status of this right is much more controversial. Some argue that it is a right emanating from ordinary legislation, while others see it as a fundamental right having equal status with others provided for in the Constitution. Given the rank of the organ that adopts international human rights instruments, I believe the former view is more strongly supported, as participation rights are not clearly embodied in the text of the Constitution.

Another point worth noting is that the CRC and the ACRWC are significant as the most important documents guiding child rights in Ethiopia. Together with the other human rights documents ratified by Ethiopia, they shall be used as an instrument of interpretation of child rights under the supreme law of the land, the Constitution.⁵⁸ The Constitution obliges any organ of the state, at the federal and regional levels, and particularly the executive and the judiciary, to respect, protect and enforce the rights of the child as provided therein and interpreted according to the CRC and

⁵⁶ *Id.*, Article 55 (12). This placement is controversial. Others say it has equal status with the Constitution. See Ethiopian Law and the Convention on the Rights of the Child: A comparative study, p. 33, unpublished.

⁵⁷ *Id.*, Article 36.

⁵⁸ *Id.*, Article 13 (2); *Ibid.*

ACRWC.⁵⁹ The judiciary and the House of Federation are obliged to interpret the rights of the child under the Constitution in light of these international instruments.⁶⁰ The Constitution also nullifies any act, law, practice and decision of the government at any level if found to be contrary to the Constitution in general and the rights of the child provided therein in particular.⁶¹ At this juncture, it is important to see whether by failing to make explicit reference to child participation, the Constitution fails to attach such significance to this right in a clear manner.

2.2 Child rights and the FDRE Constitution

The FDRE Constitution deals with the rights of children under Article 36. This article provides for some of the basic principles of the CRC and the ACRWC. The principles enshrined therein are the principles of the right to life, survival and development, as well as protection rights and the best interests of the child.⁶² The Constitution also provides for the principle of non-discrimination based on the status of birth, in particular. It prohibits discrimination against a child based on whether she or he is born within wedlock.⁶³

As far as the other cardinal principle of the CRC and ACRWC and the focus of this article is concerned, the Constitution makes no explicit reference. Hence, the constitutional nature of the right is disputable as

⁵⁹ *Id.*, Article 13 (1).

⁶⁰ *Id.*, Article 13 (2).

⁶¹ *Id.*, Article 9 (1).

⁶² *Id.*, Article 36.

⁶³ *Id.*, Articles 36 (5), Article 25; Rights under the Convention on the Rights of the Child, at WWW http://www.unicef.org/crc/index_30177.html, (consulted on 18 September 2008).

aforementioned. However, the Constitution has some important provisions that imply a right to child participation. To begin with, a general right of participation has been recognized as one of the fundamental rights and freedoms for persons of all ages and sexes under the Constitution.⁶⁴ Child participation can be inferred from this general participation right, as it is guaranteed to all persons regardless of their age, among other things. The Constitution not only provides the right to participation but also clearly states that the government has the duty to respect, protect and enforce this right.

The Constitution is also significant as it expressly states that, sometimes, the obligation of the state is not limited to allowing and protecting the participation right of the people. It goes farther to impose rules regarding mandatory consultation of the people.⁶⁵ By implication, this may be taken to mean that children have the right to participate and the government has the duty to respect, protect, and enforce this right. This is acceptable, as these rights are stipulated to apply to all regardless of age, and they should be harmoniously interpreted as applying to children just as '[t]he principles outlined in ... the international human rights framework apply both to children and adults.'⁶⁶ The only provision in the FDRE Constitution that limits child participation is Article 38 (1) (b). This provision sets participation in voting for elections only upon attaining 18 years of age.⁶⁷

⁶⁴ Id., Articles 27, 29 (1) (2) (3), 30, 31, 35 (3) (6), 38, 39 (2), 43 (2), 89 (6) (7).

⁶⁵ Id., Articles 35 (6), 43 (2).

⁶⁶ UNICEF, Understanding the Convention on the Rights of the Child, at [WWW \[http://www.unicef.org/crc/index_understanding.html\]\(http://www.unicef.org/crc/index_understanding.html\)](http://www.unicef.org/crc/index_understanding.html), (consulted on 12 September 2008) [Understanding the Convention on the Rights of the Child, herein after].

⁶⁷ Children are also not allowed to hold public office. See FDRE Constitution, Article 38 (1)(a). Any person is eligible for candidature at the age of 21. See the Proclamation to ensure the conformity of the electoral law of Ethiopia with the Constitution of the Federal

From the above arguments, it is possible to conclude that children's right of participation and right to be consulted are recognized in the Constitution, and that the rights recognized in the Constitution shall be understood in light of the CRC and the ACRWC. As indicated above, the Constitution situates these instruments, placing them in the position of providing the guiding principles of interpretation. The Constitution unequivocally imposes a duty on any organ of government to interpret the rights under the third chapter of the Constitution, including the right to participate and be consulted, in conformity with the relevant international instruments ratified by Ethiopia. Accordingly, all the elements of the relevant provisions of the CRC and ACRWC need to be considered in order to interpret the concept of child participation under the Constitution so that the Constitution itself accommodates children's participation rights.

Finally, it is important to note that the FDRE Constitution has room and flexibility for inclusion in the Ethiopian legal system of child participation rights according to the CRC and the ACRWC, with all its developments. This is because the mechanism of interpretation requires the interpreter to see the developments at the global, regional and domestic levels relating to child participation rights in order to give sound current interpretation of the rights under the Constitution, in case of confusion and absurdity during enforcement of the rights.

Democratic Republic of Ethiopia, Proclamation No.111/1995, Article 38 (1)(c). They can, however, form associations if the special and general requirements of some associations allow them to do so. See *Id.*, Article 38 (2)-(4). A person less than 18 years of age cannot recall an elected representative. National Electoral Board of Ethiopia, Regulation No. 2/1999, Article 5 (2)(c).

Be that as it may, it is advisable to make explicit reference to Article 36 of the Constitution in order to avoid possible arguments and confusion for failing to explicitly include participation rights, and in order to be in accordance with the international practice and rationale for adopting a separate Convention on the Rights of the Child. In addition, such explicit reference lifts the status of the right to a constitutional level within the legal system.⁶⁸

In the next subsection, this paper will discuss the importance or status given to child participation under the federal laws. As a result, the discussion is limited to the FDRE Constitution, the Revised Family Code of Ethiopia, the Criminal Procedure Code of Ethiopia, and the Civil Procedure Code of Ethiopia.

2.3 Child participation in court proceedings

One of the areas where child participation should be sought is in the case of court proceedings involving children. This is provided for explicitly as one of the venues for child participation under Article 12 (2) of the CRC and Article 4 (2) of the ACRWC. However, the former specifies this venue as one of the most significant, using language that emphasizes its importance, i.e., “the child shall *in particular* be provided the opportunity to be heard in any judicial ... proceedings affecting the child.”⁶⁹ The opportunity to be heard in

⁶⁸ A separate Convention on the Rights of the Child is necessitated by and is provided to modify or adapt international human rights standards to meet the needs and concerns surrounding the rights that are distinct for children. The CRC, for instance, brings the human rights of children articulated in other international instruments together, articulates them more completely and provides a set of guiding principles that greatly shapes our outlooks towards children. See Understanding the Convention on the Rights of the Child, *supra* at note 67.

⁶⁹ *Ibid.* Emphasis mine.

such proceedings may be taken in accordance with the procedural laws of the respective countries' domestic laws, as noted above. Furthermore, the participation may take two forms. The child may participate in such proceedings directly, by himself, or indirectly, through a representative.

Following this line of analysis on the theme of child participation in court proceedings, the subsequent sections discuss the federal laws of Ethiopia.

2.3.1 The FDRE Constitution and child participation in court proceedings

The FDRE Constitution clearly entitles “[e]very one to bring a justiciable matter to ... a court of law or any other competent body with judicial power.”⁷⁰ However, this constitutional principle entitling every person to bring a legal action is restricted under the procedural laws to mean capable persons.⁷¹ A person who is less than 18 years of age lacks capacity under the Ethiopian law, as she or he is a minor.⁷² The child is “placed under the authority of a guardian” “as regards the proper care of his [or her] person” and “is represented by his [or her] tutor” “concerning his [or her] pecuniary interests and the administration of his [or her] property.”⁷³ Therefore, under

⁷⁰ FDRE Constitution, Article 37 (1). Emphasis mine.

⁷¹ The Civil Procedure Code of Ethiopia, Decree No. 52/1965, *Negarit Gazeta*, Extraordinary Issue No. 3 of 1965, Articles 31-33 [hereinafter, Civil Procedure Code]; The Civil Code of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, Extraordinary Issue No. 2 of 1960, Articles 193, 197 and 198 [hereinafter, Civil Code]; The Federal Family Code of Ethiopia (FFC), Proclamation No. 213/2000, *Federal Negarit Gazeta*, 6th Year Extraordinary Issue no. 1, Article 310 (a).

⁷² FFC, Article 215.

⁷³ *Id.*, Article 216.

this principle, a child cannot bring a legal action under these laws to protect his rights, although the Constitution seems to entitle such right to “[e]very one” regardless of age. Though one may imagine that such a restriction under the procedural laws is unconstitutional, in the light of Art 9 (1) of the Constitution, the vast majority of practice shows otherwise. There are instances, however, where children were allowed to bring actions to protect their interests or rights despite their legal incapacity.⁷⁴ To cite one such example, a direct action was brought when six children filed an action claiming their share from the inheritance of their deceased father and the case went up to the Supreme Court of the Addis Ababa City Administration.⁷⁵

When the procedural laws prohibit a child from bringing a legal action to the courts, how can he or she enforce his or her rights? This can be done only through a representative. As far as the FDRE Constitution is concerned, representation can be made by legal counsel in the following manner. A child may be represented by a legal counselor. This legal counselor may be appointed by the persons who can represent the child in order to enter into legal service contracts in case of civil proceedings, and either by such persons or by the state in criminal cases.⁷⁶ In civil cases, since a child has no capacity

⁷⁴ Save the Children Alliance, *Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia*, 2001, p. 17, available at: <http://www.aidsalliance.org/graphics/OVC/documents/0000206e00.pdf>, consulted on 10 September 2008 [hereinafter, *Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia*].

⁷⁵ *Ibid.* It is important to note that although the case is important to participation, it is not without defects. It has been criticized because the judgment disregarded the best interests of the child. *Ibid.*

⁷⁶ FDRE Constitution, Article 20 (5).

to enter into a contract,⁷⁷ he or she cannot hire the service of a legal counselor by him- or herself. This limits the right of children to participation to cases in which the child has a guardian and/or tutor that is willing to represent the child or hire a person to exercise such power or a legal counselor, or where the legal counselor is willing to provide his or her service regardless of the legal effects of such representation or contracts, as he may be prevented from requiring the performance of the contract from the minor child

In criminal cases, the same story is true, save for the addition of the possibility of appointment of a legal counselor. The government may appoint a legal counselor. The FDRE Constitution provides that a state-appointed legal counselor is available, but only where the child⁷⁸ has no “sufficient means to pay for” such service and “miscarriage of justice would result” unless represented by a counselor.⁷⁹ At this point, it is possible to see that these two requirements silence the voice of the child if they are applied cumulatively. Unless a child is represented by a legal counselor in criminal proceedings, the likelihood of miscarriage of justice is greater. A number of reasons can be provided to substantiate this argument. First, it is difficult for any layman to understand the law to a reasonable extent, and argue and challenge the evidence introduced against him or her by a public prosecutor,

⁷⁷ Civil Code, Article 1678 (a).

⁷⁸ FDRE Constitution, Article 20 (5). In criminal cases, children less than nine years old are not criminally liable, children above nine and below 15 years are responsible and tried with special procedures, and children above 15 years of age are tried in the same way as adults. See The Criminal Procedure Code of Ethiopia, Proclamation No. 185/1961, *Negarit Gazeta*, Extraordinary Issue No. 2 of 1960, Article 171 [hereinafter, The Criminal Procedure Code] and The Criminal Code of the Federal Democratic Republic of Ethiopia, *Proclamation No.414/2004*, Article 52.

⁷⁹ FDRE Constitution, Article 20 (5).

who is a legal expert. This difficult technical task requires proper knowledge of the law. Children are even less likely to be equipped for this than adults. Hence, a child is always given the right to participate through a state-appointed counselor in a criminal case.

Secondly, although there is a special procedure for young offenders in Ethiopia, practical adherence to this procedure is minimal.⁸⁰ Most children are being “tried in the same court of law that tries adult cases by the same judges.”⁸¹ For this reason, it has been submitted that although it may be theoretically possible to think so, it is “difficult (if not impossible) for members of the bench to be ‘double faced’” in practice.⁸²

Thirdly, most of the judges are not experts in child law. Therefore they may need assistance in ascertaining, promoting and enforcing the best interests of the child, as the courts must also be guided by this constitutional principle. In this, the presence of a legal counselor in all criminal cases will help the court to discharge its duty to promote, protect and enforce the best interests of the child while dispensing justice in child-related cases. This reasoning may also be forwarded to argue that children with no guardian, tutor or volunteer legal counselor should be represented by an institution, not necessarily the state, in civil cases.

Fourthly, although the law has a special informal procedure for criminal cases involving children, such cases are not always entertained in

⁸⁰ Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, p. 14.

⁸¹ Ibid.

⁸² Ibid.

informal ways.⁸³ Though the country has made an effort to establish child-friendly courts in all regions, in practice cases involving children are decided in formal proceedings in many courts.⁸⁴ These formal proceedings are intimidating to children, making it more difficult for them to express their views properly. They need the assistance of a legal counselor.

For the aforementioned reasons, a child who cannot pay for legal services in criminal cases has to be represented by a state-appointed counselor so that justice will be served properly. An interpretation of the Constitution is advisable for any organ entrusted with such interpretation and committed to promoting and enforcing the best interests of the child.

2.3.2 The Revised Family Code of Ethiopia (2000) and child participation in court proceedings

The Revised Family Code of Ethiopia (2000)⁸⁵ provides some space for child participation in court proceedings. It allows for both direct and indirect participation. Direct participation refers to the direct involvement of the child in court proceedings with no representation. This happens in adoption cases, custody cases and appointment of guardian or tutor cases. In other cases, however, children may participate indirectly through their representatives. Let's begin with the case of direct participation:

2.3.2.1. Direct participation

⁸³ Ibid., p. 15. See Criminal Procedure Code of Ethiopia, Article 176 (2).

⁸⁴ Orphans and Vulnerable Children Affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, p. 15.

⁸⁵ The Revised Family Code Proclamation, No. 213/2000, *Federal Negarit Gazeta*, Extraordinary Issue No. 1/2000 [hereinafter RFC].

a) Adoption cases

Under chapter ten, the Revised Family Code of Ethiopia regulates issues relating to adoption. In adoption cases, this Code provides that a child to be adopted must be given the right to be heard before the court under specific circumstances.⁸⁶ The child has the right to express his or her opinions about the adoption, and the court is obliged to seek them. Furthermore, the court has the duty to take the opinion of the child, if any, into consideration in making decisions about the adoption of the child, among other things.⁸⁷

However, the law-maker has not clearly provided for the child's right to be heard. Articles 191 (3) and (4) and 194 (3)(a) are confusing on this matter. It seems that the child is primarily entitled to be heard in adoption cases if two conditions are satisfied. The first condition is that the consent of both parents cannot be obtained. This may happen where both parents are there but one is not willing to give his or her consent to the adoption, where one of the parents is "dead, absent, unknown or incapable to manifest his will,"⁸⁸ or where the child has no ascendant who is capable of giving his consent.⁸⁹ The second condition is that the child be above 10 years of age.⁹⁰ A close reading of Article 194 (3)(a) makes matters clear. It requires the court to hear what the

⁸⁶ *Id.*, Articles 191 (3) and 194 (3)(a).

⁸⁷ *Id.*, Article 194 (3).

⁸⁸ This is not stated clearly, but if the child should be heard when one of the parents is unwilling to consent, there is an even stronger reason that he or she should be allowed to participate when one of the parents is dead, incapable or unknown. In this situation, only one parent is consenting, which is a situation similar to when both parents are present but one is not willing to give consent.

⁸⁹ In such situations, hearing to the child's opinion may be very helpful to the court in adjudicating what is in the best interests of the child in the case at hand.

⁹⁰ RFC, Article 191 (3).

child thinks of the adoption in all cases except where the adopter is the government or a private orphanage, or where the adopter is a foreigner.⁹¹

Finally, in relation to adoption, it is important to understand that a child may bring action to a court for revocation of adoption by himself.⁹² The Revised Family Code does not provide a minimum age for the exercise of the right to participation by the child in revocation of adoption cases. Regardless of age, “the adopted child” is entitled to petition the court of law for revocation of his or her adoption.⁹³ The court is also obliged to receive such petitions and evaluate the genuineness of the claim.⁹⁴ This may be lauded as being progressive insofar as it allows a wider range of children to benefit from the right to participation. This approach clearly reflects Article 12 and Article 5 of the CRC, which are not based on age but on the evolving capacity of the child.

b) Custody of children

The other area where child participation is reasonably expected is in cases of child custody. Under the Revised Family Code of Ethiopia, the court handling divorce proceedings is required not only to decide on the divorce itself but also on its consequences, particularly on the “custody of children, care of their education, health, maintenance and the rights of the parents and the children to visit each other,” if any.⁹⁵ While deciding on the latter issues,

⁹¹ Cumulative reading of RFC Articles 192, 193 and 194 (3)(a).

⁹² Id., Article 196 (1).

⁹³ Ibid.

⁹⁴ Id., Article 196 (2).

⁹⁵ Id., Article 113 (1).

the court must take some factors into consideration. These factors are related to the parents' situations, i.e., their income, age, health and living conditions, and to the children, i.e., their age and interests.⁹⁶ In discharging its duty, the court is required to know the opinions of the children as to, for instance, their preference of custodial parent, before deciding upon the same. The court can discover the opinions of the children only if the children's right to express their views and to be heard is respected. Otherwise it is very difficult for the court to decide what is in the best interests of the child. Hence, one can and should introduce a reasonable degree of the right of the child to be heard into such proceedings.

c) **Appointment or removal of guardian or tutor**

Child consultation should also be conducted by the court in cases of someone's appointment or removal as a guardian or tutor of a child.⁹⁷ However, such consultation is left to the discretion of the court. The court is to consult the child only "[w]here it thinks fit."⁹⁸ Such open vagueness has both advantages and disadvantages.⁹⁹ The advantage lies in the fact that it gives the court broad discretion to allow child participation, which is not permissible in cases where a certain age limit is set. For instance, a 10 year old child may be as capable of forming and expressing his or her opinion as a 15 years old child. In such cases, a court handling matters relating to the appointment or removal of a guardian or tutor has the power to consult the

⁹⁶ Id., Article 113 (2).

⁹⁷ Id., Article 249 (2).

⁹⁸ Ibid.

⁹⁹ See G. Lansdown, *Promoting Children's Participation in Democratic Decision-Making*, 2001, Florence: UNICEF Innocenti Research Centre, pp. 49-53.

child. The disadvantage is that courts may prejudice the right of the child, as the court also has full discretion to decide on his or her fitness to be consulted. When is a child considered “fit” to be consulted? But Ethiopia’s third report stated that “the views of the child shall be invariably heard in the case of decisions regarding the appointment or removal of guardian.”¹⁰⁰ But such an interpretation is far from what the law says on its face. If the intention of this provision is as indicated in the report, judges should interpret it in the same manner.

2.3.2.2 Indirect participation

The Revised Family Code provides for indirect participation of the child. The child is to be represented in expressing his or her views and opinions in matters that concern him or her. The manner in which children’s views are to be expressed is examined below.

a) Participation through parents, relatives, public prosecutors and other interested parties

In principle and by law, parents are the guardians and tutors of their children.¹⁰¹ Therefore parents are responsible for the necessary care of their children and their pecuniary and property interests as guardians and tutors. In exceptional cases, guardianship and/or tutorship may be assigned to one

¹⁰⁰ Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia, p. 21.

¹⁰¹ RFC, Articles 219-220.

parent, to relatives or to other persons, as the case may be.¹⁰² These persons may represent a child in any action relating to the protection of matters of the child. For instance, the tutor can represent a child in bringing a legal action relating to the child's property. The question is: How can a child enforce his rights if the action or omission of his or her tutor infringes upon them? To deal with such occurrences, a rule that allows children direct participation should be devised. Similar concerns may be raised about a guardian as well.

At this juncture, it is important to consider the times when relatives of a child, as representatives, play an important role in protecting the child's rights, even if they are not legal guardians or tutors. A child's ascendants, brothers and sisters above 18 years of age can represent the child before an Officer of Civil Status in opposition to marriage due to violation of one of the essential conditions of marriage, i.e., consanguinity or affinity.¹⁰³

A public prosecutor can also represent a child, but not in court proceedings. Rather, the public prosecutor can represent a child before an Officer of Civil Status where a marriage is to take place in violation of any one of the essential conditions of marriage, for instance, in cases of marriage at an early age.¹⁰⁴

Other organs may also represent children in court proceedings and before an Officer of Civil Status.¹⁰⁵ Such organs include non-governmental organizations or government institutions working on behalf of children's rights. If, for instance, a child is to marry before reaching the legal age, such

¹⁰² *Id.*, Articles 219-234.

¹⁰³ *Id.*, Article 18 (b).

¹⁰⁴ *Id.*, Article 18.

¹⁰⁵ *Id.*, Article 18 (a).

interested parties can oppose the marriage and bring an action before the Officer of Civil Status and courts.¹⁰⁶ The same applies in revocation of adoption cases.¹⁰⁷

Finally, a government organ authorized to monitor the well-being of the child may appear before a court to help ensure that the rights of the child are protected by the court of law. This is particularly important in adoption cases.¹⁰⁸

2.3.2.3 The Revised Family Code and child consultation in all important matters: The case of the tutor

A child must be consulted by a tutor “in all important acts concerning him” or her, provided that the child is not less than 14 years of age.¹⁰⁹ Although this may seem like a good thing, this participation is very limiting. In particular, it fails to address the following issues which may be used against the consultation right of the child. First, it does not specify what constitute “important acts concerning” a child. And secondly, it does not indicate who is to decide whether a certain act is “important.” Thirdly, the child to be consulted must be at least 14 years of age, which does not necessarily conform to the evolving capacity of the child standard as provided in Article 5 of the CRC.

2.4. The Civil Procedure Code of Ethiopia

¹⁰⁶ Ibid.

¹⁰⁷ Id., Article 196 (1).

¹⁰⁸ See Id., Articles 192-196.

¹⁰⁹ Id., Article 291 (1).

The issue of who can be a party to a civil action is addressed by the Civil Procedure Code of Ethiopia.¹¹⁰ According to this law, a person is required to be capable under the law to sue or be sued.¹¹¹ One of the grounds of incapacity under Ethiopian law is minority.¹¹² A minor is a child “who has not attained the full age of eighteen years.”¹¹³ Therefore, a person under 18 is not allowed to bring legal action.¹¹⁴ Therefore the only way for children to sue or being sued is through a representative.¹¹⁵ In the absence of such representation, a court cannot proceed to entertain the case. In such situations, “the case shall be stayed until a legal representative is appointed in accordance with the relevant provisions of” applicable laws.¹¹⁶

2.5. The Criminal Procedure Code of Ethiopia

The Criminal Procedure Code of Ethiopia obliges the lower courts to appoint a legal counselor for a young person, but only in limited instances. Such appointment is required only if one of the following conditions is fulfilled: the child has no parents, guardian or “other person *in loco parentis*” to represent him or her; or the offence the child is charged with is a serious one, i.e., “carries a penalty of over 10 years rigorous imprisonment or death as a possibility.”¹¹⁷

¹¹⁰ Civil Procedure Code, Article 32.

¹¹¹ *Id.*, Articles 3 (h) and 32.

¹¹² Civil Code, Article 172; RFC, Articles 215-156.

¹¹³ RFC, Article 215.

¹¹⁴ It is important to note at this juncture that a child may be emancipated and be deemed an adult in some instances. See *Id.*, Articles 310-314.

¹¹⁵ Civil Procedure Code, Article 34 (1).

¹¹⁶ *Id.*, Article 34 (2). The applicable law, in our case, is the RFC.

¹¹⁷ Criminal Procedure Code, Article 174.

This shows that children with no parents, guardians or “other person *in loco parentis*” are to be represented in all criminal proceedings, regardless of the nature of the crime and whether or not miscarriage of justice may occur.¹¹⁸ Such representation is paid by the state, and the understanding is that a case involving children should always be treated as a case in which “miscarriage of justice” is a risk in the language of the Constitution. However, children with parents have more limited representation options, as a state-appointed legal counselor is available only if the crime they are charged with is a serious one.

With respect to children with parents, two points are also worth considering. First, the representation is to be made regardless of the parents’ ability to pay for legal services in all serious offence cases. This is slightly different from the Constitution. Second, children charged with other offences are not guaranteed representation. For such children, interpretation of the Constitution as suggested above is beneficial. For instance, a child charged with a crime carrying imprisonment for nine years, whose parents cannot pay for legal counsel, should also be given the chance to have a representative appointed. The laudable part of the Criminal Procedure Code, however, is the part that guarantees that when a child offender is charged and has no other person to represent him or her, the court is obliged to inquire into the

¹¹⁸ Save the Children Alliance, Orphans and vulnerable children affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, 2001, p. 14 [hereinafter, Orphans and vulnerable children affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia].

existence of a parent, guardian or “other person *in loco parentis*” with a view to the child’s representation.¹¹⁹

Finally, practice shows that children are not participating or represented at the investigation stage of criminal cases.¹²⁰ This also curtails their interests and could expose them to violation of their rights, because they may be interrogated without the help of any representative. Any statement a child gives without any legal counseling may be presented against him or her before the court per Article 27 (2) of the Criminal Procedure Code.

During the hearing, a child is given the chance to answer the charge or accusation and also to request the appearance of witnesses.¹²¹ In assessing the guilt and deciding the punishment in criminal cases, the court is expected to hear the views of the accused.¹²² This equally applies to the case of children.¹²³ However, children should preferably be assisted once again by a legal counselor who can help them to express their views. This is useful not only for the protection of the child, but also for the court. The child gets his or her views considered by the court and the court also discharges its duty to promote, protect and enforce the best interests of the child, and serve justice.

1. Child participation in court proceedings as witnesses

Book 4, Title One, Chapter 4 of the Criminal Procedure Code of Ethiopia does not fix the minimum age for a child witness. A child can be a

¹¹⁹ Criminal Procedure Code, Article 173.

¹²⁰ Orphans and vulnerable children affected by HIV/AIDS: Policy vs. Practice Review for Ethiopia, p. 14.

¹²¹ Criminal Procedure Code, Article 176(3)(6).

¹²² *Id.*, Articles 176 (7), 177, 148 and 149.

¹²³ *Ibid.*

witness based upon his level of maturity. If she or he is mature enough to express him- or herself about what happened or what he or she has seen, the court may allow the child to be a witness. This has also been confirmed in practice.¹²⁴ The same is true for cases under the Civil Procedure Code.¹²⁵ However, it must be noted that for such participation to take place, the discretion lies with the court. In its first report, the government stated that it is committed to providing a minimum age by which children may participate as witnesses in court proceedings.¹²⁶ As the drafting of a new procedural code is underway, consideration of the age cut-off may be made and we may have a defined minimum age in the future. But this matter requires a cautious approach. It should not be taken to mean that age is to be set as regards matters concerning the child. In such matters, the evolving capacity of the child rule under Article 5 of the CRC should be used.

3. Child Participation in Practice in Ethiopia

The Federal Government of Ethiopia is working towards enabling children to participate in different ways. The most significant development is the establishment of a Child Parliament in Konso, in Southern Nations, Nationalities and Peoples' Region of Ethiopia in 2006.¹²⁷ This is a model

¹²⁴ Committee on the Rights of the Child, Fourteenth session summary recording of the 350th meeting at [WWW](http://www.unhcr.org/refugees/WWW) [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/a073212afe95a37ac12564290032b932?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/a073212afe95a37ac12564290032b932?OpenDocument), (consulted on 15 September 2008) [Hereinafter, Committee on the Rights of the Child, Fourteenth session summary recording of the 350th meeting].

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Institution of the Ombudsman, Ethiopia, Konso Children Parliament [sic] available at http://ethombudsman.org/am_publications.php?id=17, accessed on 15/09/08.

parliament to be established throughout the country in the future.¹²⁸ It was established in recognition of “the need to raise the participation of children in development issues thereby increasing their confidence.”¹²⁹ A number of child parliaments have been established since then in various parts of the country. There are now nearly 80 children’s parliaments in major cities of the country, each consisting of about 100 child members, and the representatives of these parliaments often attend meetings in the regional parliaments, regional and city council meetings in order to express their views and concerns.¹³⁰ Children also have the opportunity to express their views in public associations and Community Care Coalitions (CCC), as well as orphan children clubs.¹³¹

The Ministry of Education is also “actively encouraging the establishment of Student Councils in schools; as a result, children are now given the opportunity to get involved in the decision-making process of the

¹²⁸ Ibid.

¹²⁹ Ibid. ‘The major objectives of the Konso Child Parliament include: To provide a platform for the children for interaction and collective participation in local forums and decision making processes; [t]o help them develop and run specific projects and events that demonstrate ways in which the rights of the child, as enshrined in the Convention the Right of the Child (CRC), can be practically implemented; [t]o create opportunities for children to meet and exchange their views on what matters to them and what is happening in to their surrounding; [t]o share their opinions, experiences and ideas and learn from each other; [t]o present the voices of children in Woreda and Regional forums and in discussions and actions on child issues; [t]o transform events into processes of empowerment among the children in order to allow them to develop self-confidence, self awareness and self-esteem.’ Ibid.

¹³⁰ Combined 4th and 5th Periodic Reports of the Federal Democratic Republic of Ethiopia to the UN Committee on the Rights of the Child (2006 – 2011), April 2012, p. 12 [hereinafter, Combined 4th and 5th Report of the Federal Democratic Republic of Ethiopia]

¹³¹ Ibid.

educational system.”¹³² Furthermore, “children are participating in an education contest broadcast weekly on Ethiopian TV;”¹³³ children are given airtime to broadcast their own programs. Radio *Fana* and Ethiopian Radio also have a space for child participation. In addition, children were given the chance to participate “in the coordinating body and in the preparation of the National Plan of Action for Children.”¹³⁴

In addition to the aforementioned venues, various events and forums solicit the participation of children in affairs that affect them, such as the discussion of the draft comprehensive child policy, and events and celebrations such as the Day of the African Child and Universal Child Day.¹³⁵

However, it is significant that child participation was omitted in the Poverty Reduction Strategic Program (PRSP) at the stage of formulation and implementation.¹³⁶ Furthermore, there was no reaction from NGOs on exclusion of children from participation in the PRSP consultation process.¹³⁷ Civil society and government actors reacted only to “a narrow range of

¹³² Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44 of the Convention, Third periodic report of States Parties due in 2003, Ethiopia, p. 21.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Combined 4th and 5th Report of the Federal Democratic Republic of Ethiopia, p. 12.

¹³⁶ N. Jones et al., Mainstreaming children into National Poverty Strategies: A child-focused analysis of the Ethiopian Sustainable Development and Poverty Reduction Program (2002–05), pp. 20-25, available at:

<http://www.idrc.ca/uploads/user-S/11345271331WP22Mainstreaming-final.pdf>, consulted on 16 September 2008.

¹³⁷ Ibid.

issues” relating to the child.¹³⁸ There seems to be no improvement in this regards as far as the Growth and Development Plan (GDP) is concerned.

In addition to the aforementioned practices of participation, children are given some additional space for participation and free expressing. Children are empowered to employ different mechanisms to be heard. There are non-governmental organizations (NGOs) that are helping children to report abuse¹³⁹ and neglect, and child-led groups that participate in protecting child rights.¹⁴⁰ This includes school child rights clubs and child parliaments. To mention a few examples, the Association for Nation-wide Action for Prevention and Protection against Child Abuse and Neglect (ANPPCAN) has established 400 school child rights clubs and children’s parliaments in three parts of Addis Ababa: Addis Ketema, Arada and Yeka sub-cities.¹⁴¹ These clubs and parliaments have children as their members.¹⁴² This NGO also allowed children to participate in all of its program offices in relation to the preparation, monitoring, evaluation and implementation of its child projects.¹⁴³ Children are also getting the NGO’s assistance to prepare a children’s magazine called Children’s Voice, to be put out by children

¹³⁸ Ibid.

¹³⁹ ANPPCAN-Ethiopia, Main Intervention Areas, available at <http://www.anppcan-eth.org.et/index4.html>, consulted on 16 September 2008 [hereinafter ANPPCAN- Ethiopia, Main Intervention Areas].

¹⁴⁰ Ibid.

¹⁴¹ Ibid.; A. Wandega, We need meaningful child participation, Daily Monitor, 17 June 2008, available at: http://www.monitor.co.ug/artman/publish/opinions/We_need_meaningful_child_participation.shtml, consulted on 17 September 2008.

¹⁴² ANPPCAN-Ethiopia, Main Intervention Areas, *supra* note 142.

¹⁴³ Ibid.

themselves and focusing on their rights.¹⁴⁴ Children are also participating in trainings about child rights, tutorial classes and experience sharing with the help of ANPPCAN-Ethiopia.¹⁴⁵

The effort to encourage and realize child participation through groups such as school club is also part of the project plan of Save the Children Norway.¹⁴⁶ Child participation is said to be one of the main principles guiding their project in Ethiopia.¹⁴⁷ The Ethiopian Teenagers Forum in Addis Ababa is also an important forum for child participation.¹⁴⁸ The Forum consists of 200 young people and children from different elementary and high schools in Addis Ababa.¹⁴⁹

4. Conclusions and Recommendations

4.1. Conclusions

It has been said that as children are people with dignity, their views should be listened to and respected. However, children in Ethiopia have been denied their rights to participation for various reasons. This problem has become a serious concern in modern times. Today, there are attempts to enable children to express their views on matters concerning them in many

¹⁴⁴ Ibid.

¹⁴⁵ ANPPCAN-Ethiopia, Annual Report, 2007, p. 17, available at: <http://www.anppcan-eth.org.et/ANPPCAN%20ETHIOPIA%20ANNUAL%20REPORT%20FOR%20THE%20YE%20AR%202007.pdf>, consulted on 18 September 2008.

¹⁴⁶ Teklemariam.

¹⁴⁷ Ibid. The author has no access to resources on how the project is being implemented.

¹⁴⁸ The Ethiopian Teenagers' Forum Recommendations and Action Plan on the Millennium Development Goals (MDGs), 20 October 2004, available at: http://www.unicef.org/ethiopia/ET_media_PR_MDG.pdf, consulted on 16 September 2008.

¹⁴⁹ Ibid.

countries. Therefore Ethiopia has adopted the CRC and the ACRWC and has made them part and parcel of the law of the land.

The FDRE Constitution (1995), which has been praised for its long and relatively comprehensive list of human rights, provides for the rights of the child under Article 36. However, it does not specify the principles underlying the rights of the child in general and the principle of child participation in particular. Thus the constitutional placement of the principle of child participation is subject to argument.

However, an evaluation of the place of children's right to participation in the Constitution and the legal system it establishes shows that there has been a steady move towards the right of child participation. The rules of interpretation of human rights under Article 13 (2) and the rights of participation available to all persons as enshrined in the Constitution, the Revised Family Code, the Civil Procedure and the Criminal Procedure Codes and other legislation, as well as the practice of the legal system, all evidence opportunities for child participation to be given effect.

4.2. Recommendations

First, the culture in Ethiopia has been unfavorable to child participation. Therefore, the government has much to do in order to create an acceptable environment in line with its international obligations. It has to involve adults, families and the community in changing perceptions concerning child participation. Second, the work done thus far, although

appreciable, is insufficient.¹⁵⁰ Particularly, exclusion of children from participation in policy formulation is unacceptable for any reason. The government must consider child participation in such cases.

Third, laws such as the Revised Family Code, the Civil Procedure Code, the Criminal Procedure Code, the CRC and the ACRWC need to be implemented in full. In addition, the Civil and Criminal Procedure Codes and the laws that affect the interests of children should be amended in such a way that the manner, issues and scope of child participation is dealt with properly. The amendments should also be oriented to avoid uncertainty relating to child participation under existing law. Children have the right to participate in matters that concern them, and their participation should be an integrated part of government programs and plans. The government and NGOs should encourage child participation in all social and institutional spheres.

Some courts have made a good start in mainstreaming the professional assistance of social workers and psychologists in court proceedings, and significant improvements have been observed in ensuring child participation. This is because less intimidating court environments enhance children's participation in criminal and civil cases.

Finally, as child participation requires resources, the role of international and local NGOs is significant. The government and the NGOs in Ethiopia must cooperate for the full-fledged realization of child rights in general, and the right to participation in particular.

¹⁵⁰ Committee on the Rights of the Child, Forty-Third Session, Report on the Forty-third session.