Inter-Country Adoption of Ethiopian Children by Foreigners of Ethiopian Origin: Best Interests of the Child at Crossroads

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Abstract

*A*doption is an age-old customary practice in Ethiopia. Parallel to the customary practice, the 1960 Civil Code and then the Revised Federal Family Code gave legal recognition to both domestic and inter-country adoption. However, in 2018, the House of Peoples' Representatives issued Proclamation No. 1070/2018 amending the Revised Federal Family Code, which banned inter-country adoption. In 2020, the Federal Supreme Court Cassation Division Bench gave an interpretation to the ban as not applicable to foreigners of Ethiopian origin. Further, in another recent decision, the Court extended the interpretation as not applicable to foreigners who are adopting their Ethiopian spouse's child(ren), introducing a new approach of relative inter-country adoption. Following, this article examines the policy choice that resulted in the ban of inter-country adoption and the *raison d'etre* of the Cassation bench's landmark decisions in light of the best interest of the child and Ethiopia's international human rights commitments. In doing so, it employs a doctrinal analytical approach focusing on case analysis. The article ends with a conclusion that, the current legal stance of the legislature and the judiciary need redirection towards a stringent assessment for permission than a blanket ban, which needs investment in institutional infrastructure and the socioeconomic aspect of domestic alternative care but is definitely respectful of children's best interests and compliant with Ethiopia's international human rights commitments.

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Introduction

Adoption, in general, refers to a type of family placement where parental duties of biological/birth parents are fully and irrevocably transferred to new parents (adoptive parents).[260] Such mechanism is deemed to provide similar family environment for children deprived of parental care. Historically, adoption served the interests of adults and not children, supporting the needs of childless couples, providing an heir or continuity of a family's lineage or for religious purposes. Today, the focus has changed into a more child-centered approach where emphasis is given to providing a home or family environment for a child rather than providing a family with a child.[261]

Inter-country adoption (ICA), also known as international adoption, can be defined as: "a practice in which children in a position of need, and/or in the absence of their biological parents, are sent from their country of origin to an awaiting adopting family in another country, usually in the developed world".[262] It can be considered a legal transaction in which the formal legal responsibility for a child is transferred to the adoptive parents; thereby terminating the legal status of the biological/birth parents or legal guardians and tutors. Accordingly, ICA can be perceived as a permanent alternative care resorted to after reasonable efforts[263] have been made to determine that a child cannot remain with his/her family of origin, cannot be cared for by members of the foster or adoptive family, or cannot be

260 See The Revised Family Code Proclamation, Proc. No. 213/2000, Neg. Gaz. Extra Ordinary issue, Year 6, No.1. Article 180-196.

261 See the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993.

262 By judicial decision, in both definitively severs all ties with the child's biological family and equates his/ her status to that of a biological child of the adopters. See the RFC of Ethiopia, Supra note 1, Article 181.

263 There are two steps, checking availability of alternative care at home and then assessing capacity to parenting of the adopter.

cared for in the child's country of origin in any suitable manner.[264]

As a country with a significant number of orphans and highly vulnerable children, Ethiopia has been a major sending country in ICA (Selman 2013). Data analyzed by the central authorities of 23 receiving states revealed that Ethiopia ranked third among the top 10 sending countries for inter-country adoption between 2004 and 2013 (Ballard et.al. 2015). Orphaned children in Ethiopia are not necessarily deprived of a family environment as the country has strong and age-old cultural coping mechanisms, where kinship care and customary adoption are known to provide family environment for such children (Bunkers, Rotabi and Benyam 2016). However, it is argued that ICA is threatening these traditions where extended families that have the responsibility of bringing up and caring for such vulnerable children are targeted to give up the children for ICA.[265] While ICA is claimed to exploit vulnerable and poor families, it is also argued to be an effective way to find permanent homes for millions of orphans, institutionalized children, and street children. Where kinship and orphanage center based alternative care options, which have been relied upon for long, are not found to be adequate to cope up with the enormously increasing number of children in need of an alternative care, ICA is seen as the unsurpassed option (Phillips 2013).

The international human rights legal regime also provides for ICA in the absence of alternative care mechanism in the country of origin. This requirement, a well-established principle known as *the principle*

264 The definition of inter-country adoption, which can be derived from the Hague Convention, is: The creation of a permanent and legal child-parent relationship between a child habitually resident in one country (State of origin) and a couple/person habitually resident in another country (receiving State). See the Hague Convention, supra note 2, Article 2.

265 Adoption statistics from the French and US embassy in Ethiopia revealed that 245 out of 392 ICA cases processed in 2009, 81 % of the adoptions were relinquishments respectively. 39% and 18% of these were relinquishments by extended family members respectively. Of these 59 % (43 from Oromia and 16 from Amhara) where the indigenous practice of *gudiffacha* is known to be strong. See Kelley McCreery et. al. (2016)

subsidiarity,[266] emphasizes that children should be raised in a family environment and remain in the care of their birth family or kinship and they could be taken for ICA placement only up on verification that the biological family and kinship group is not able to care for the child, or there is no opportunity for a domestic adoption, and that the child meets the nation's criteria (McCreery et.al. 2016).

ICA is accepted as a child protection measure and a lifesaving act by some while others oppose it owing to the fact that, it is not in the child's best interests to be removed from his/her family and community, and should be legally banned. The foremost argument for ICA relies on the moral ground, which views the practice as a humanitarian or philanthropic response to impoverished children in developing nations who do not have the means to ensure the recognition of their basic rights in their birth environment (Olsen 2004). Proponents also point out the inadequacy of orphanage and foster care facilities in sending countries as, "children abandoned, killed, left in dismal orphanages, or living on the streets bear horrific testimony to the pressing need for adoption" (Smolin 2005:281).

Through the legalization accorded to it by international human rights instruments, particularly the 1989 Convention on the Rights of the Child (CRC), the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption (Hague Convention) and the 1990 African Charter on the Rights and Welfare of the Child (ACRWC), and its formal nature, ICA is argued to provide a 'permanent' family environment in a way that informal coping mechanisms cannot. Hence, ICA is preferred over long-term foster care and other informal arrangements, which may not constitute being cared for 'in a suitable manner' serving 'the best interest of the child'.

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[266] Note that the principle of subsidiary is well established principle throughout the world that adheres and advocates for the protection of children. And hence the principle of subsidiary should be adhered to. According to the preamble to the UN Convention on the Rights of the Child, children should grow up in a family environment, in an atmosphere of happiness, love and understanding. Birth family, which may also be referred to as the biological family, consists of the birth mother, birth father and the constellation of genetically related family members that includes siblings, aunts, uncles, grandparents, etc. See, Guidelines for Action on Intercountry Adoption of Children in Africa Draft Preamble p.1.

On the other hand, opponents of ICA argue that the adoption of children of impoverished families to citizens of wealthy and powerful nations is morally unjust and only "serves the interests of those adults who want to become parents" (Bartholet 2008:151). Further, it is believed that children are best served in their own community of origin, enjoying their racial, ethnic, and cultural backgrounds. Placing children in the hands of adoptive parents, from foreign countries, who are largely dissimilar, can lead to loss of identity thus fostering an environment of potential ethnic, racial, and other forms of discrimination. The dangers of child laundering, child trafficking, and the coinciding exploitation and abuses of adopted children is also another concern (Dillion 2003).

There is a growing concern among countries and children's rights advocates as serious risks and challenges have presented themselves. The ICA system has been criticized in its entirety for having no effective means of preventing the practice from degenerating into illicit child trafficking. ICA does not in fact provide a "guarantee of permanency" when some adoptions break down. In Liberia, for example, a significant increase in the number of cases in which adoptive parents decided to terminate their relationship with the children they adopted was cited as one factor in the decision to temporarily ban ICA.

The law is instrumental in governing the procedures and dealing with the risks and controversies surrounding it. The Ethiopian legal regime has recognized ICA as an alternative for forsaken children since the adoption of the Civil Code in 1960 and explicitly regulated it under the Revised Federal Family Code (RFC), receiving both support and opposition. The opposition gained momentum especially after the catastrophic death of an Ethiopian child named Hanna Williams by her adoptive parents in the U.S. in 2011. Following, the House of Peoples' Representative banned ICA by issuing the Revised Family Code Amendment Proclamation No. 1070/2018. Regardless, in two cases, the Federal Supreme Court Cassation Division Bench (FSC Cassation Bench) interpreted the Proclamation as not prohibitive of ICA by foreigners of Ethiopian origin and foreigners adopting the children of their Ethiopian spouses by referring to the best interests

of the child. The sections below thus explore the controversies and the discontent thereof by examining the texts of the Proclamation and the interpretation of the FSC Cassation Bench decision in light of the principle of the best interest of the child and pertinent human rights norms Ethiopia is bound by.

Inter-Country Adoption and the Best Interest of the Child: Literal analysis

The principle of the best interests of the child is a notion that dates back to the 1959 declaration of the rights of the child and one of the four fundamental principles[267] guiding the realization and implementation of the CRC (Wouter and Gamze 2020). The principle is laid down in Article 3(1) of the CRC as: "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."

The same notion is also expressed in several other provisions of the CRC. Article 9 refers to the best interest of the child in light of separation from parents while Article 20 indicates care and special protection to be accorded to a child who is deprived of his/her family environment. Article 37(3) also provides for the separation of a child prisoner from adults unless it is considered it is not in his/her best interest.

Nonetheless, the main problem in this regard is the literal meaning, the context and the contest of the phrase "*the best interest of the child*". In determining what it means to make the best interests of a child a primary consideration, it should be noted that the term is vague

[267] Fundamental principle that underpins the interpretation of the entire convention are the principles of non-discrimination, participation, and survival. The Vienna program of action links and gives equal weight to the principles of non-discrimination, best interest, survival and development and the view of the child in respect of the CRC. See office of the High commissioner for human rights, fact sheet No 10 (Rev 1), the rights of the child, http://www.unhchr.ch/htm/menu6/2/fs10/htm These principles are the anchoring principles guiding each and every rights implementation in the promotion and protection of the rights of the child.

and there is no authoritative and universal definition providing clear meaning (Wouter and Gamze 2020). In this regard, the notion is said to have issue of indeterminacy, which subjected the interests of children to be manipulated and used as a disguise for other adverse agendas (Cantwell 2014). However, the legislative history of the CRC and General Comments of the Committee on the Rights of the Child (CRC Committee) provide guidance on how States are to implement the principle as per their obligations under article 3(1) and the convention in general. In this regard, the following key points should be taken into consideration.

First, children's interest needs to be *a primary consideration*.[268] This shows that determination of the best interests of a child is evaluated by several factors and balancing different competing interests. The CRC Committee has emphasized the principle is dynamic and flexible and that any assessment of a child's best interests must be individualized (Tobin year?). In addition, when balancing different interests, state parties have to be willing to prioritize children's interests as a rule, especially in cases of actions with patent effects on the children in question.[269] By requiring the interests of children to be prioritized, the CRC is the only treaty requiring interests of a particular group to be treated as a primary consideration (Tobin year?). States have, therefore, granted a special status to children's interests and this supports the idea that in the event of equivalency between competing interests, those of children's interests should prevail (Ibid). Second, the principle of the best interests of the child is to be applied as a fundamental interpretative legal principle, guiding the interpretation of legal provisions towards the choice that most effectively serves the child's best interests.[270] Third, in all matters affecting children, assessing possible impacts on how and why the final decision is respectful of the child's best interests should

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268 The 1980 working group text had referred to the best interests to be *"the paramount consideration"* but this phrase was changed as several states considered it to be too broad due to concerns that the competing interests of other parties may be at least as important as or more important than children's best interests. Similarly, the formulation of the children's best interest being the primary consideration was rejected in favor of the less decisive wording, *'a primary consideration'*.

269 CRC General Comment 14 and CRC Article 1 para. 3.

270 See CRC General Comment 14.

become an integral part of the decision-making process.[271] Finally, the best interests of the child is substantive right on its own.[272]

The obligation to make children's best interests a primary consideration applies to both public and private bodies and parents as well. The application of children's best interests as a primary consideration and the balancing of competing interests therefrom is based on predictions about the impacts of present decisions on children's futures, which is necessarily speculative (Tobin year?). While states and parents enjoy the margin of discretion with respect to the determination of their children's best interests, future impacts of current decisions and balancing competing interests for the case of ICA, however, receives a relatively clearer parameter under the CRC and AWCRC (Ibid). Article 21 of the CRC provides;

> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall; […] (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. (emphasis added).

Similarly, article 24 adoption of the ACWRC provides;

> State Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall: […] (b) recognize that inter-country adoption *in those States that have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's* care, if the child cannot be placed in a foster or an adoptive family or *cannot in any suitable manner be cared for in the child's country of origin* (emphasis added)

[271] Ibid
[272] bid

Both instruments have narrowed down the margin of determination of the future impacts of ICA on adopted children, which is considered only where there is no suitable alternative means of childcare in the child's country of origin.

It is also important to note that the CRC articulates a stronger obligation of protection in that a child's best interest must be *'the paramount consideration'* in the case of adoption, a term that was rejected as being too decisive to be a general norm/rule under Article 3. This shows that a strong emphasis is given to the best interests of the child as trumping all other competing interests in the case of ICA. The ACRWC provides for a peculiar safeguard by requiring a child should not be placed in a country outside the ambit of the CRC or the ACRWC by way of inter-country adoption.

Both the CRC (Article 20(3)) and the ACWRC (Article 25(3)) also requires best interests should be balanced with continuity in the child's upbringing and in due considerations of the child's ethnic, religious or linguistic background. The instruments therefore call for ICA as a last resort, entrenching the principle of subsidiarity. The Hague convention also discourages ICA, however ensures that where such adoptions take place, it will be regulated to secure the best interests of the child concerned while respecting his or her fundamental rights (Article 1(A)) (Trynie 2010). This principle of subsidiarity, however, should be applied in the context of the best interest principle and should not lead to rigid administrative practices (Ibid).

To enable the successful operation of the subsidiarity principle, responsible bodies processing ICA must be capable of exploring domestic solutions and alternative care in the child's home country (Trynie 2010). Further to ensure subsidiarity in the process of ICA, applying the best interest of the adopted child as '*the paramount consideration*' demands the final decision and the entire process of ICA to be directed at the enhancement of the growth and development of the child. The interest, in this regard, include, but is not limited to, the capacity of the adopter to parent. Therefore, ICA cannot be considered against the best interest of the child principle. Even though the concern over ICA was in the international arena, the

regulation of it through the legal and policy mechanisms emerged late in the late 1980s.[273]

The Legal and Policy Framework of Inter-Country Adoption in Ethiopia

The CRC, ACRWC, the Federal Democratic Republic of Ethiopia Constitution, the RFC, Proclamation No 1070/2018, the FSC Cassation decisions and the 2017 National Children's Policy are the major legislative and policy frameworks regulating adoption in Ethiopia. The section below discusses the interplay of these legal and policy documents in light of the principle of the best interests of the child.

The Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child

Article 20 of the CRC provides that state parties "shall provide special protection and assistance to children who no longer have a family or who are temporarily deprived of their family". These children have the right to alternative care, provided by the state. Article 20 lists four possible types of alternative care: foster care, *kafalah* (a form of open adoption recognized in Islamic law),[274] adoption, or placement in a suitable institution when other options are not available. Both Article 24 of the ACRWC and Article 21 of the CRC explicitly declare that the best interests of the child should be '*the paramount consideration*' in any adoption procedure. Furthermore, the article provides that ICA may only be considered "as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".

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273 In this regard, it could be emphasized that the first leap that was taken to protect the best interest of the child in time of adoption was in 1997 World Conference on Adoption and Foster Placement. Following on this conference, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally was drafted and subsequently adopted by the UN General Assembly in 1986. See UN General Assembly, A/RES/41/85, 3 December 1986.

274 See for more, Assim, Usang Maria, (2009), In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option.

Laying the normative base, the CRC requires that the best interests of the child be "the paramount consideration" in any adoption decision and sets the principle of ICA as subsidiary to all suitable domestic solutions to the child's situation. While echoing, for the most part, the wording of the CRC, Article 24 of the African charter demonstrates a more peculiar approach in obliging states to "establish a machinery to monitor the wellbeing of the adopted child" once he/she is in the receiving country. The Hague convention,[275] on the other hand, sets out principally

> to establish safeguards to ensure that ICA takes place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law, […] to establish a system of cooperation among contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.

It is thus designed to build upon the basic obligations enshrined in the CRC by putting in place guarantees, procedures and mechanisms that facilitate states, individual and collective compliance with those obligations. It thus sets minimum standards for ICA on the basis of a number of principles.[276]

The Federal Democratic Republic of Ethiopia Constitution

The FDRE Constitution under Article 9(4) states, "all international agreements ratified by Ethiopia are an integral part of the law of the land". In this regard, the provisions of the CRC and ACRWC, regarding ICA are an integral part of the laws of Ethiopia. The Constitution is by far an advanced document when it comes to the right of a child. In addition to its mechanism of incorporating

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275 Ethiopia is not a state party to the convention but it could provide interpretative guide for the CRC implementation.

276 See, in this regard CRC Committee General Comment No. 6

the international human rights instruments,[277] it also dedicated a specific provision to extend its protection to the rights of children.[278] Under Article 36, it provides protection to the rights of the child by the right to know and be cared for by their parents. In addition, the Constitution under Article 36 obliges the government to provide an alternative means of care and allocate resources to facilitate rehabilitation and assistance to children who are left without parents or guardian under Article 41(5). More importantly it specifically incorporates the phrase 'best interest of the child', stating: "in all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child". The Constitution addresses the principle of the 'best interest of the child' by calling for 'primary consideration' than 'a primary consideration' in decisions affecting children.

The Revised Federal Family Code

The RFC designates the father and mother of the child as the primary care takers. In the absence of parents, the RFC gives the responsibility to guardians and tutors. In its provisions governing adoptive filiation (Articles 180-196), the RFC recognizes both domestic and ICA while putting stringent precautionary requirements for the latter.

> *Article 193. — Where the Adopter is a Foreigner.*
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> 1) Where the adopter is a foreigner, the court may not approve the adoption unless an authority empowered to follow the wellbeing of children, after collecting and

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277 FDRE Constitution Article 9 (4) makes all international human rights documents that the country adopted the integral part of the law of the land. And hence, the child right documents that were adopted by the country are now the integral part of the law of the land-both the CRC and the ACRWC. It has ratified the CRC on 14 May 1991 without any reservation and it was proclaimed by Parliament on 19 January 1992. Following the ratification, the statement of accession was published in 1992 in the Negarit Gazeta, which was the official law gazette of the then existing Government, and made its first initial report in 1995, and the second report 1998, and the third in 2005, and its latest and combined 4th and 5th Periodic report in April 2012. Ethiopia also became a party to the ACRWC, after it accede it on 2 October 2002. 2001.

278 The FDRE Constitution, Article 36 (5)

analyzing relevant information about the personal, social and economic position of the adopter, gives its opinion that the agreement is beneficial to the child.

2) Notwithstanding the provisions of Sub-Art. (1) of this Article, where the court thinks that the agreement is not beneficial to the child, it may disregard the opinion of the authority and reject the agreement.

3) Where the court finds that the information provided by the concerned authority is insufficient, it may order the authority to conduct further investigation and submit additional information. It may also order other individuals or organizations to provide any relevant information in their possession or to give testimony.

Article 194. — Power of the Court.

1) An agreement of adoption shall be of no effect unless it is approved by the court.

2) Before approving the agreement of adoption, the court shall decisively verify that the adoption is to the best interest of the child.

3) Without prejudice to the provisions of Articles 192, 193 and Sub-Art. (2) of this Article, the court, before approving the agreement of adoption, shall take the following into consideration:

(a) the opinion of the child about the adoption,

(b) the opinion of the guardian or tutor of the child if he has not previously given his consent;

(c) The capability of the adopter to raise and take care of the child;

d) *where the adopter is a foreigner, the absence of access to raise the child in Ethiopia*; (emphasis added)

e) the availability of information which will enable

the court to know that the adopter will handle the adopted child as his own child and will not abuse him.[279]

4) The court shall take special care in investigating the conditions provided in

Sub-Art. (3) (e) of this Article, where the adopter is a foreigner.

The RFC echoes the ACWRC and CRC's stance that ICA should be a last resort. It also bestows the ultimate decision to the courts notwithstanding concerned administrative bodies' opinion on the benefits of ICA in a given case; courts verify that adoption is to the best interest of the child and may disregard ICA agreements that are otherwise recommended by the concerned administrative bodies. However, these provisions of the RFC are now repealed by proclamation 1070/2018, which also in effect repeals the specific sections of alternative childcare guideline of 2009 that deals with ICA "in order to harmonize the RFC with the National Child Policy".[280]

The Revised Family Code (Amendment) Proclamation No. 1070/2018: The Bases for Exclusionary Approach

The 2017 National Child Policy with which the RFC is sought to be harmonized through Proclamation 1070/2018 provides as;

> Children separated from their family temporarily or permanently for various reasons are receiving different care and support services through the expansion of domestic alternative care options. ICA was one alternative child care option, though in addition to not fully compensating for the love and care the children

[279] This assessment shall include cautious verification of availability of legal frameworks that protect the child and enable his/her treatment as one's own child in the foreign adopter's country. See RFC's Hateta ze mikniyat p. 50. Such approach is in line with the ACRWC's stipulation that ICA should happen where the adopter's country is either in the CRC's or ACWRC's scope of application

[280] See preamble of the Revised Family Code (Amendment) Proclamation No. 1070/2018, Neg Gaz., Neg Gaz.,24th year, No 26.

> have missed in their natural homes, there is a downside of children experiencing identity crisis and other problems that will affect them psychologically and socially. It is *advisable* to support orphan and vulnerable children only through domestic alternative care options instead of pursuing the option of ICA.[281] (emphasis added)

In dealing with children in difficult circumstances, the policy recognizes government's efforts in alleviating vulnerability as a result of loss of parents but success has not been achieved at the desired pace.[282] The question then is, where there is no such success of strong domestic alternative care, who takes the responsibility for the children?

The proclamation banned ICA to enable children to be raised in their own culture, saving them from identity crisis as provided in the National Child Policy. Yet, this extended presumption only works where there is enabling environment in the domestic arena, availability and adequacy of domestic alternatives for significant number of forsaken children, while due consideration to the child's ethnic and linguistic background and maintaining domestic adoption in this regard is in line with the requirements of ACWRC and CRC. It is, however, not a sole factor to consider ICA. Such a ban is also not cogent as it is wrongly premised on homogeneity of Ethiopian society. Otherwise, domestic adoptions should raise a concern for children's identity crisis since Ethiopia is a multi-cultural, multi-religious and multi-ethnic country.

Compatibility of the Supreme Court's Decisions: Problematizing the Paradox?

In the process of the ICA, the courts play a paramount role to make sure that the best interest of the child is guaranteed. All actions of the judiciary need to be in line with the four fundamental CRC principles. However, in most cases the courts only take into consideration the absence of option for national adoption.

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281 See FDRE National Child Policy, April 2017, Section 1.1.5 page 7.

282 Ibid Section 1.1.6, page 9.

In Ato Wondossen Tadesse Yisma et. al. case the court reasoned that the diaspora proclamation allows foreigners of Ethiopian origin to actively take part in the country's concern and the RFC amendment proclamation, which bans ICA, has no intention of excluding them from such benefits although the minute of the proclamation had not raised issues in that aspect and direction. Further, in the W/ro. Arsema Elias et.al case, the court interpreted the proclamation as not applicable to a foreigner who adopts his Ethiopian wife's child. In doing so, the court held that the proclamation has not been intended to ban foreigners who adopt their spouse's children, thereby introducing a new approach called "relative inter-country adoption".

Thus, in the above two cases, where the applicants challenged the banning of ICA on the ground of similar origin, it seized the opportunity to equate foreigners of Ethiopian origin with Ethiopians reasoning that they have similar culture and social outlook with the adopted child citing the diaspora proclamation-assimilative approach.

In Wondossen Tadesse Yisma et. al. and Arsema Elias et. al., the FSC Cassation bench interpretatively sets an exception to the ban as follows. In Wondossen Tadesse Yisma et. al, (File No 189201, March 11, 2020), the application was filed by parents to have their daughter adopted by her maternal aunt who is an Ethiopian born American citizen. The lower courts rejected the application stating that the new proclamation 1070/2010 had intentionally left out Ethiopian born foreigners from its ban on the basis of the National Child Policy, which is designed with a view to enable children maintain their Ethiopian (surrounding's) culture, and social values, despite the country's exceptional treatment of such foreigners in other social, administrative and economic affairs.[283] The applicants argued the adopter has been supporting the child throughout her life and wants to take her as per the 'culture' and has indicated in all forms at her country of citizenship that the child is hers.[284] The FSC

283 See FSC File No. 189201, Para 1.
284 Ibid Para 2.

cassation court framed the issue of including or excluding foreigners of Ethiopian origins in the ICA ban in light of Proclamation 270/1994 that state governing benefits accorded to the Ethiopian diaspora (Articles 3, 5 and 6). It reasoned that the formulation of the benefits accorded and restrictions placed on the Ethiopian diaspora under the proclamation is indicative that the lists of rights and restrictions are not exhaustive.[285] Hence, it would be inappropriate to consider that they be treated as other foreigners[286] provided that foreigners of Ethiopian origin are given responsibility for Ethiopia's growth and prosperity because their birth place is Ethiopia and its people are their people.[287] The court then stated that prohibiting foreigners of Ethiopian origin from adopting their relatives by consanguinity is a result of not comprehending the responsibilities bestowed upon the Ethiopian diaspora.[288]

As per the court's analysis, the difference between Ethiopian born diaspora and Ethiopian children is only that of citizenship; they have common culture and identity and should not be assumed to have desire/tendency to change the children's identity. Noting that the adopter, being the aunt of the child, has been providing while she has no legal obligation and had her registered as her own child in the US, the court stated that this reveals she has respect for the Ethiopian culture of supporting each other "የመረዳዳት ባህል". Having common cultural background, being a relative by consanguinity, and living in the USA where there are many Ethiopians or Ethiopian born people, the child can grow in a conducive environment without relinquishing her Ethiopian identity.[289] Having stated all these factors, the court rests its judgment concluding that the lower courts have committed a basic error of law by not realizing the role of the diaspora in Ethiopia's growth and prosperity and improving

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285 This interpretation is however contradictory to the legislature's intent, which is to completely ban ICA. See The Federal Democratic Republic of Ethiopia, the 5th House of Peoples' representatives, the 3rd year tenure, 2nd regular meeting, unpublished Minute, the FDRE parliament's library.

286 See FSC File No. 189201, Para 8

287 Ibid

288 Ibid

289 Ibid

the lives of their fellow Ethiopians and not making the child's best interest a primary consideration.[290]

While the final decision creates an exception for foreigners of Ethiopian origin subject to evaluation by the lower courts that the criteria for adoption are fulfilled by the applicants, the reasoning and implementation of the decision are problematic for different reasons.[291] The first problem in this regard is, the basis and criteria for assessment by lower courts. Where the sections of the proclamation providing guideline are repealed and the amendment proclamation failed to formulate the ban in a clear legislative text, instead of providing the relevant provisions are repealed, it would be important to clearly provide how the lower courts committed a basic error of law and how they shall interpret the proclamation. The court's reasoning also falls short of making the best interests of the child at the center of analysis and the paramount consideration in the courts interpretative endeavor. Framing the issue as to whether or not the Ethiopian diaspora is eligible to adopt pays little regard to the interests of children and rather promotes the best interests of the diaspora falling short of making the final decision respectful of children's interests as required under Ethiopia's international obligations. Cultural similarity of the adopter and adoptee are only a piece of the puzzle in evaluating ICA in light of the best interests of the child.

The argument based on citizenship also does not hold water for different reasons, at least theoretically. From the perspective of state's obligation, to ensure children's wellbeing and best interests, a child adopted by a foreigner residing in Ethiopia could be argued to be in a better situation of 'safety' than a child adopted by an Ethiopian diaspora living in the US, a non-state party to the CRC, by the mere fact that the state has a better vantage point to ensure the rights of children in its territory.

290 Ibid

291 The cassation bench returned the case to the lower courts to make an assessment of the adopter's capacity and fulfillment of the legal criteria

Further, in the W/ro. Arsema Elias et.al case (File No 215383, May 30, 2022), the court interpreted the proclamation as not applicable to a foreigner who adopts his Ethiopian spouse's child. The court, in doing so, held that the proclamation has not been intended to ban a foreigner who adopts his wife's child recognizing 'relative inter-country adoption'.[292] While the decision of the court might have been able to exert a strong signal, its seemingly proactive effort in protecting the rights of the child from different considerations deserves commendation. Indeed, the jurisprudence emanating from the cassation court can be of great importance to the judicial organ of the government in the interpretation of the rights of the child in respect of ICA. However, it did not take into consideration the best interest of the child in the deliberation. Central to any case is the arduous task of analyzing the key principle 'the best interest of the child'. The exclusion of the Ethiopian diaspora and foreigners married to Ethiopians does not solve the problem created by the legislature, except problematizing the already existing paradox.

Conclusion

The adoption of the Revised Family Code Amendment Proclamation No. 1070/2018 affirms Ethiopia's government position of the need to ban the practice of ICA. Significantly, however, the adoption of the proclamation has not totally precluded ICA with the particular socio-cultural considerations of the diverse actors, which have subscribed to its normative framework. The call for abandoning the practice has been justified in terms of the social and cultural diversity between the child and the adapting parents, but not in the best interest of the child.

It has been argued that an approach, which is a solution to these differences, infuses legitimacy to the ban and therefore efficacy to

[292] Relative adoption refers to situations in which a stepparent adopts the child of his or her spouse, or a member of a child's extended biological family adopts the child whose parents have died or become unable or unwilling to parent. Such adoptions are largely noncontroversial: children stay within the traditional biological family network, and the adoptive parents are generally thought of as acting in a generous and caring manner by taking on the responsibility for these children.

the whole institutional arrangement of ICA. The practice of ICA is expected to be in line with the internationally accepted principles and standards. The defining character of ICA as an alternative care system is its being the last resort. The corollary of this is that a rule or norm, which does not command adequate legitimacy, will not enjoy sufficient observance or support. However, the National child Policy's stance on ICA should be construed as a call for strengthening domestic alternative care system that would eventually abolish ICA and not a demand for its immediate ban without providing strong suitable alternative in the child's country of origin.

In the context of ensuring the best interest of the child, the desire for appropriate and full protection has called for a rigorous measure (including repealing the new proclamation and reinstating the previous family law provisions), not only founded upon adoption of laws, but also strict post adoption follow-up. This approach decries the trumping of ensuring the best interest of the child in favor of protecting the rights of the child. However, the call for a distinctively child friendly approach to the implementation of the rights of a child call into question some practices, which impact negatively on the rights of the forsaken child. The challenge, therefore, is how to guarantee the rights of children adequately while at the same time ensuring illicit ICA practices are not protected under the guise of the best interest of the child.

This article suggests that the success of ensuring the best interest of the child in the context of ICA depends to a large extent on the level of the pre and post adoption follow-ups by the appropriate organs, rather than banning or allowing the practice via legislation, which is against the four fundamental principles of the CRC, mainly of the best interest of the child. It demonstrates that the best interest of the child is a paramount consideration in the process of ICA. It argues the ban and exclusion of foreign adopters of Ethiopian origin, rooted in various sociopolitical and cultural justifications, is not as centered on the principle of the best interest of the child as required of Ethiopia under its international human rights obligations.

However, the exclusion of the ban for foreigners of Ethiopian origin will in some cases be similar with other foreigners, which

could have enjoyed the privilege but are incompatible with the general principles of the international and regional children rights standards. It is therefore suggested that the general privilege accorded to foreigners of Ethiopian origin should be invoked in order to revoke the legitimacy of these discriminatory practices that go against the best interest of the child. This approach calls for a two-stage process: first repealing the proclamation and making it compatible with CRC and ACRWC; and secondly, reinstating the repealed RFC provisions specifically article 193 and 194.

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