

Federal Supreme Court Cassation Decisions on Child Rights in Light of the CRC and Ethiopian Laws

Abreha Mesele Zinabu*

Abstract

Even though Ethiopia acceded to the Convention on the Rights of the Child (the CRC) about eight months after it entered into force, the Federal Supreme Court (FSC) Cassations Bench took a long time to cite provisions from the CRC in its decisions. The Supreme Court has recently started citing provisions from the CRC to substantiate its binding interpretation and decisions. In its cassation division, the Ethiopian Supreme Court is mandated to render binding interpretation of legal provisions as stipulated under Article 10(2) of the Federal Courts Proclamation No. 1234/2013. So far, the Federal Supreme Court has published 25 volumes on different subject matters including family, criminal, civil, labour, and tort cases. This article explores the influence of CRC provisions in interpreting children's rights before the Supreme Court's cassation division. Moreover, this article assesses the attention given to CRC's provisions in the Supreme Court's binding interpretation process and decisions. The article also notes the significance of binding interpretations of child rights in light of their contribution to the development of the scope of legal protection bestowed toward children's rights domestically.

Keywords:

Children's rights, Ethiopian Federal Supreme Court, cassation decisions, binding interpretation, the Convention on the Rights of the Child

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* Abreha Mesele Zinabu: LLM (Addis Ababa University), LLB (Mekelle University), Assistant Professor of Human Rights Law at Mekelle University, School of Law
Email: expansion97@gmail.com
ORCID: <https://orcid.org/0009-0003-6706-637060>

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1. Introduction

On 14 May 1991, Ethiopia acceded to the CRC, which entered into force for Ethiopia on 30 January 1992 as per Article 4 of the ratification instrument, Proclamation No. 10/1992. The Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) was signed on 28 September 2010 and ratified on 14 May 2014. On 25 March 2014, Ethiopia also acceded to the Optional Protocol on the Sale of Children, Child Prostitution, and Pornography (OPSC). It has not yet signed the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC).

The Ethiopian legal system is predominantly a civil law legal system.¹ The legislative organ codifies laws and the judiciary interprets them in its decision-making process, with no judge-made law or jury system. The litigation type is mainly an inquisitorial system² where the role of judges is very much engaged in the rendition of justice. Although the Ethiopian legal system is predominantly civil, the *interpretative precedent* is introduced under article 10(2) of Proclamation No.1234/2013. Yet, as Simeneh notes, the binding

Frequently used acronyms:

CRC	Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
FDRE	Federal Democratic Republic of Ethiopia
FSC	Federal Supreme Court

¹ Ethiopian laws are based on proclamations (including codes of law), regulations and directives. See, FDRE Constitution Articles 55(1) *cum* 79(1), 77(11) & 77(13).

² René David & John E.C. Brierley (1998). *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*. The Legal Classics Library Division of Gryphone Editions, Inc.

interpretation of the Federal Supreme Court's Cassation Division does not constitute case law or *stare decisis*:

Judicial decisions that are binding on lower courts in subsequent litigation regarding parties in similar standing are referred to as binding legal interpretation. This varies from case precedents in common law systems which cite cases as laws, while binding cassation decisions in the Ethiopian context merely relate to the interpretation of a specific provision by a cassation bench in matters that involve similar issues and comparable facts and circumstances.³

Binding legislative interpretation is different from judicial precedents (*stare decisis*). While the former empowers the judiciary to provide lines of interpretation that bind other subsidiary courts, the judicial precedents (*stare decisis*) are considered as case laws.

So far, the Ethiopian Federal Supreme Court has published about 25 volumes containing different issues that provide binding interpretation by the cassation division of the Supreme Court on different subject matters (criminal, property, family, succession, labour, and commercial and insurance cases). These interpretations by the Federal Supreme Court Cassation Bench are binding on all regional or federal courts. The binding interpretation made by the Federal Supreme Court on various cases helps to uphold the rule of law, assure legal uniformity and certainty, and guide other courts when such courts are confronted with such cases⁴.

This article explores the extent to which the Federal Supreme Court Cassation Division has referred to the provisions of the CRC in its jurisprudence while exercising its power of binding interpretation in child-related cases under its various cassation decisions. Moreover, the influence of the CRC provisions in the Cassation Bench's decisions concerning children is briefly assessed. This article also identifies the subject matters where the cassation bench invoked provisions from the CRC to solve litigations concerning child rights.

Section 2 highlights children's rights under the FDRE Constitution, regional constitutions and the CRC. Section 3 delves into the different laws of Ethiopia that domesticate the provisions of the CRC in different subject matters including but not limited to family law, criminal law, tort law, and

³ Simeneh Kiros Assefa (2024). "Binding Interpretation of Law in Ethiopia: Observations in Federal Supreme Court Cassation Decisions", 18(1) *Mizan Law Review*: 1-40, p. 4. DOI <http://dx.doi.org/10.4314/mlr.v18i1.1>

⁴ Preamble of the Federal Supreme Court Cassation Procedure Directive No. 17/2015.

contract law. Section 4 discusses access to justice and the Federal Supreme Court's binding interpretation in light of extending protection to children's rights in the Ethiopian legal system.

Section 5 is the bedrock of the article, and it deals with different child-related cases before the Federal Supreme Court Cassation Division and examines the extent to which the Court makes reference to the provisions of the CRC. Specifically, this section discusses child-related cases by categorizing the cases into different subject matters; filiation (Section 5.1), custody (Section 5.2), adoption (Section 5.3), maintenance (Section 5.4), juridical acts (Section 5.5), and criminal matters (Section 5.6). Section 6 picks up laudable cases from Section 5 to show better lines of interpretation adhered to by the Supreme Court. Section 7 forwards a conclusion.

2. Children's Rights under the FDRE Constitution and Regional Constitutions

International human rights instruments in general and the CRC, in particular, are incorporated under the 1995 FDRE Constitution. One-third of the FDRE Constitution embodies human rights provisions.⁵ The FDRE Constitution has a separate provision (Article 36) that embodies the rights of children. Article 36(1) provides:

“Every child has the right:

- (a) To life;
- (b) To a name and nationality;
- (c) To know and be cared for by his or her parents or legal guardians;
- (d) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health, or well-being;
- (e) To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children.”

Sub-articles 2 to 5 of Article 36⁶ deal with the best interests of the child, juvenile offenders, children born outside wedlock, and special protection to orphans.

⁵ See Chapter Three titled ‘Fundamental Rights and Freedoms’ (Articles 14-44).

⁶ Rights of Children’

“2) 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.

Likewise, the CRC, “represents a high watermark of legal protection”.⁷ The status of the CRC under the FDRE Constitution is treated as other categories of international human rights instruments⁸ ratified/acceded by Ethiopia. According to the FDRE Constitution, “[a]ll international *agreements ratified* by Ethiopia are an *integral* part of the law of the land.”⁹ This appears to follow the monist approach¹⁰ where international instruments ratified by the country will have direct application without the need for further legislation. Based on this provision, the CRC will be an integral part of the law of the land, and courts at any level will be obliged to take judicial notice¹¹ of the CRC’s provisions to adjudicate cases related to children in the CRC.

The CRC was ratified by the legislative organ by Proclamation No. 10/1992 during the Transitional Government of Ethiopia (TGE). The following was expressed in support of the ratification:

Ethiopia ratified the UNCRC in 1991. Since then, the government has carried out numerous activities geared towards ensuring the protection and promotion of the rights and welfare of children. The Convention was domesticated through a national legislation (Proclamation No 10/1992) and then translated into 11 nationality languages for dissemination. Further, other conventions such as the African Charter

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- 3) Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults.
 - 4) Children born out of wedlock shall have the same rights as children born in wedlock.
 - 5) The State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education.”

⁷ Ursula Kilkelly and Ton Liefwaard (2019). “Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa”. *De Jure Law Journal* 521-539. DOI: <http://dx.doi.org/10.17159/2225-7160/2019/v52a30>

⁸ For a general understanding on the issue of comparative constitution and human rights instruments *see* Mesenbet Assefa (2024), “Current Trends in the use of International Instruments in Ethiopian Court Decisions: Potential Lessons for Comparative Constitutional Law”, 18(1) *Mizan Law Review*: 41-64.

⁹ FDRE Constitution, Article 9(4).

¹⁰ Takele Soboka Bulto (2009). “The Monist – Dualist Divided and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia”. Vol. 23 *J. Eth. L* No. 1, pp 132-160.

¹¹ Proclamation No. 3/1995, A Proclamation to Provide for the Establishment of the Federal Negarit Gazeta, Article 2(3). To take judicial notice this proclamation requires the publication of any law in Federal Negarit Gazeta.

on the Rights and Welfare of the Child (Ratification Proclamation No 283/ 2002) and ILO Convention 182 on the Worst Forms of Child Labor were ratified by the government. The children's affairs department within the Ministry of Labor and Social Affairs is the leading organ to coordinate and spearhead the translation of the international commitment into concrete actions and results.¹²

Based on the monist approach under Article 9(4) of the FDRE Constitution, one may argue that the Convention on the Rights of the Child could have been enforceable even in the absence of a ratification proclamation (which represents the dualist approach)¹³. Yet, the ratification proclamation has enhanced the focus of courts on the CRC and has resolved the problem of hesitation on the part of courts to invoke the Convention in the absence of a ratification proclamation. The CRC Ratification Proclamation No. 10/1992 has only four articles dealing with citation, ratification, delegation of power, and date of enforcement¹⁴ without details of the CRC, and this shows that the dualist approach is problematic thereby rendering direct reference to the CRC inevitable.

The FDRE Constitution stipulates that the fundamental rights and freedoms under Chapter Three of the Constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and international instruments adopted by Ethiopia. One can, however, argue that this provision is not about the status of international instruments ratified by Ethiopia in the hierarchies of laws in the Ethiopian legal system. This provision is rather about a tool of interpretation that requires the judiciary and all other organs to adhere to the principles of international instruments ratified by Ethiopia.

This provision is not about the entirety of human rights instruments but rather the principles¹⁵ that could guide decision-makers including the judiciary to discover the true spirit of the provisions of the international

¹² *Federal Democratic Republic of Ethiopia Country Response to the Questionnaire on Violence against Children*, The Federal Ministry of Labor and Social Affairs, Submitted to: The UN Secretary General's Independent Expert on the Study on Violence against Children (May 2005), p. 9.

¹³ *Ibid.*

¹⁴ Tilahun Teshome (1997). "The Child and the Law in Ethiopia: The Case of the UN Convention on the Rights of the Child". Vol. 18 *J. Eth. L* No. 1.

¹⁵ For example, we have four umbrella principles in the CRC (non-discrimination, the primacy of the child's best interests, the child's right to survival and development, and the child's right to participate and to have his or her views considered under articles 2, 3, 6 and 12 respectively of the CRC).

instruments ratified by Ethiopia. For example, the Committee of the CRC has a general comment on the interpretation of the best interest of the child and this line of interpretation adopted by the CRC Committee, according to the FDRE Constitution Article 13(2) should be adhered by Ethiopian courts. This sub-article is not only about the CRC provisions but also about principles/jurisprudences developed by the exercise of interpretation by different judicial or quasi-judicial organs concerning international human rights instruments including the CRC. Yet, as Mesenbet indicated, there is no legal clarity if this sub-article implies whether Ethiopian courts can apply decisions of international human rights supervisory bodies, general comments, and a number of other sources of international human rights law.¹⁶

I argue that the CRC shall be a self-executing treaty in the Ethiopian legal system on two grounds: (i) if we follow the line of reasoning that the CRC is a non-self-executing treaty, then the domestic legislation will be a proclamation which will be hierarchically below the Constitution as per Article 9(1) of the Supremacy clause of the Constitution and this line of interpretation will defeat the very purpose of the Vienna Convention on the Laws of Treaties 1969; and (ii) the proclamation that ratified the CRC cannot justify domestic legislation as it only addresses issues outside the substantive parties of the CRC and practically, the Federal Supreme Court of Ethiopia has been invoking provisions directly from the CRC in its adjudication in child-related cases¹⁷.

The 1995 FDRE Constitution has introduced federalism where there are two tiers of government; the federal government and regional governments as per Article 50(1) of the Constitution. And both federal and regional governments have legislative, judicial, and executive powers (Article 50/2). Consequently, all regional states have their regional constitutions. Most regional state constitutions embody similar provisions with the FDRE Constitution save exceptions to accommodate regional contexts including language, regional flag, and other cultural aspects in areas other than the rights of children.

The five sub-articles of Article 36 of the FDRE Constitution are embodied in every regional constitution. Therefore, regional constitutions have to protect and defend the values and norms of the FDRE Constitution as

¹⁶ Mesenbet Assefa, *supra* note 8.

¹⁷ For example, in cassation decision no. 23632, 35710, 118130, 92020, 98541 the Federal Supreme Court has invoked provisions from the CRC and African Charter on the Rights and Welfare of the Child to substantiate over respective arguments and decisions.

stipulated under Article 52(2)(a) of the FDRE Constitution. Likewise, this applies to the values, principles, and norms of the CRC.

3. Children's Rights in Ethiopian Laws

Legislative measures concerning the implementation of children's rights protection are stipulated under different laws of Ethiopia. As indicated in Section 2, children's rights are recognized as part of human rights under Article 36 of the FDRE Constitution. This enables the judiciary to exercise its power in the interpretation and implementation of children's rights because the rights of children are justiciable Article 37(1) of the FDRE Constitution.¹⁸ Moreover, the FDRE Constitution imposes obligations on decision makers; whether private or governmental, to give priority to the interest of children at all times by inserting the phrase '*the*' primary consideration under Article 36(2) of the FDRE Constitution.

This is unlike the CRC which uses '*a*' under its Article 3 which implies the prioritization of other outstanding interests other than the interest of the rights of children in extreme cases. In the use of indefinite article '*a*' the interest of the rights of children could be sacrificed to other outstanding interests (for instance, the right of the woman in abortion cases). For example, in the case of abortion, the FDRE Constitution protects the life of a merely conceived child at all times (following the pro-life paradigm) without exception to the pro-choice (the right of the woman approach) in extreme circumstances.¹⁹ This is also complemented by Article 2 of the Civil Code of Ethiopia which protects a child merely conceived.²⁰

Moreover, the rights of children are found in regional constitutions, regional family laws, the FDRE Criminal Code, and other subsidiary laws. For example, Articles 215 to 318 of the Federal Family Code protect minors. Article 215 defines a minor as *a person of either sex who has not attained the full age of eighteen years*. The Code emphasizes the best interest of the child as guidance for determining cases as clearly portrayed under Articles 266(2), 312(2), and 194(2).

¹⁸ A justiciable matter is the right of any person to bring his/her case to the attention of ordinary courts to get remedy as courts are the guardians of rights.

¹⁹ Christopher Kaczor (2011). *The Ethics of Abortion Women's Rights, Human Life, and the Question of Justice*. Routledge, Taylor, and Francis group

²⁰ Article 2 of the 1960 Civil Code provides "A child merely conceived shall be considered born whenever his interest so demands, provided he is born alive and viable."

The FDRE Criminal Code also regulates criminal cases involving children. The Criminal Code regulates children's conflict with the law or as victims of criminal action by others (perpetrators) against them. For example, Article 4 of the Code provides the principle of equality, and age is considered an exception that must be considered as a ground for "difference in treatment" in cases of criminal liability. This is about children who must be treated differently from adults in both the substantive and procedural criminal laws. Taking this provision into account, Articles 52, 53, and 56 of the Code deal with such treatment of infants, young offenders and persons under the age of eighteen.

Article 52 exonerates children below the age of nine (infants) from criminal liability stated under Articles 57(1) *cum* 23(2) of the FDRE Criminal Code because children in this age group are not considered as blameworthy –due to their immaturity– and they cannot thus offend the criminal law. Article 53 provides that young persons between the ages of nine and fifteen will be treated differently from adults. According to this provision, young persons in this age group "shall not be subject to the ordinary penalties applicable to adults, nor shall they be kept in custody with adult criminals." In addition to these provisions, Article 56 of the Code regulates criminal acts of persons above fifteen and below eighteen years, and courts may at their discretion evaluate the sentence in light of age.

The other issue regulated under the Criminal Code is the life of the unborn under Articles 545 and the provisions that follow. The provisions give protection to the life of the unborn by criminalizing the act of terminating pregnancy as a punishable offense. Yet, Article 551 of the Code provides exceptions where terminating pregnancy is not punishable. This is where: (a) "the pregnancy is the result of rape or incest", or (b) "the continuance of the pregnancy endangers the life of the mother or the child or the health of the mother or where the birth of the child is a risk to the life or health of the mother"; or (c) "where the child has an incurable and serious deformity"; or (d) "where the pregnant woman, owing to a physical or mental deficiency... suffers from or her minority, is physically as well as mentally unfit to bring up the child."

Here, the Criminal Code varies from the FDRE Constitution and the African Charter on the Rights and Welfare of the Child (ACRWC)²¹ by following a flexible approach that leans toward the interest of the mother in such extreme cases. This makes it similar to the CRC's formulation of the best

²¹ Article 4(1) *the* primary consideration in the African Charter on the Rights and Welfare of the Child

interest of the child that has flexibility to safeguard other outstanding interests such as the interest of the mother rather than the child in case of legal abortion.

Almost all regional family codes²² also protect children by way of legislative measures for implementation purposes. The provisions on the protection of children (in the regional family codes) are drafted in tandem with the Federal Family Code.

4. Access to Justice and the Federal Supreme Court's Binding Interpretation

Article 37(1) of the FDRE Constitution provides that “[E]veryone has the right to bring a *justiciable matter* to, and to obtain a decision or judgment by, a *court of law or any other competent body with judicial power*”. This shows that judicial power is vested in courts of law (Article 79(1) of the FDRE Constitution); whether federal courts or regional courts in addition to other organs²³ having judicial power.

Judicial power is established at two tiers; the federal and regional states as stipulated under Article 78(2 & 3) of the FDRE Constitution. The federal government has three levels of courts: the Federal Supreme Court, the Federal High Court, and the Federal First Instance Court. The regional courts also include the Regional Supreme Court, Regional High Court, and Regional First Instance Court. Moreover, *a contrario* reading of Article 78(4) implies that special or *ad hoc* courts could be established in addition to the religious and customary courts that can handle judicial matters.

The Federal Supreme Court is given the power of cassation over any final court decision containing basic error of law as enshrined under Article 80(3)(a) of the FDRE Constitution. This constitutional provision and Article 10(2) of Proclamation No. 1234/2013 empower the Federal Supreme Court to interpret and bind any other subsidiary courts under its cassation decision. Based on their subject matter jurisdiction, child-related cases²⁴ that commence

²² For instance, Family Code of the Tigray region, the Family Code of the Amhara region, the Family Code of the Oromia region

²³ Including city courts, military courts, sharia courts and ADR mechanisms.

²⁴ To be a party to a suit, one is required to have the legal capacity as enunciated under article 33(1) of the Ethiopian Civil Procedure Code and article 193 of the Ethiopian Civil Code listed the grounds of incapacity one of which is age. Therefore, a child cannot sue on his behalf but rather should be represented by an adult in any legal proceedings (article 34(1) of the Ethiopian Civil Procedure Code. Articles 299 and 300 of the Federal Family Code show the incapacity of the minor to perform one or more juridical acts and if performed more than the child's capacity, such acts will be nullified.

at regional courts or federal courts could be appealed to the cassation bench of the Federal Supreme Court if such a decision contains basic error of law.

By virtue of Article 80(3)(a) of the FDRE Constitution and Article 10(2) of Proclamation No. 1234/2013, the Federal Supreme Court has the power of cassation to review any final decision of any court in Ethiopia. By doing so, the court will help interpret laws including the CRC, and guide other subsidiary courts. Binding interpretations of the Federal Supreme Court indeed reinforce children's rights, and such decisions have the advantage of elevating their status in a legal system.²⁵ The exercise of cassation power by the Federal Supreme Court brings the twin advantages of entrenchment (making them harder to erode) and supremacy (making it possible to enforce children's rights in the face of conflicting lower laws and policies).²⁶

The line of interpretation rendered by the Federal Supreme Court in its cassation division shall bind²⁷ other subsidiary courts of the country; whether federal or regional courts. The line of interpretation rendered by the Federal Supreme Court concerning the right of children under the CRC shall be considered as binding for other subsidiary courts to adhere to when they face similar cases. The Federal Supreme Court's line of interpretation is not only a vital contribution to the advancement of the legal system but also enhances the opportunity for the dissemination of knowledge about child rights to all judges and prosecutors working in different levels of courts.

5. Overview of Federal Supreme Court Cassation Cases that Invoke the CRC

An earlier academic work has discussed the CRC, the ACRWC, and the Bill of Rights in relation to the Ethiopian Federal Court Cassation in light of the principle of the best interest of the child, the right to life, and the right to be heard.²⁸ This section goes beyond the temporal scope of earlier research works and it addresses all aspects of children's rights by categorizing the rights into subject matters (filiation, adoption, contractual, supply and maintenance, custody (guardianship and tutor), criminal matters (children in conflict with

²⁵ Julia Sloth-Nielsen. (2019). Children's rights jurisprudence in South Africa – a 20-year retrospective. *De Jure Law Journal*, 501-520

²⁶ Ibid

²⁷ Article 10(2) of the Federal Courts Proclamation No. 1234/2021

²⁸ Solomon Abegaz Teclé (2016). *The Influence of Human Rights Instruments on Children's Rights Jurisprudence: An Appraisal of the Ethiopian Federal Cassation Court* (Department of Public Law, Faculty of Law, University of Pretoria, South Africa)

the law and victims), etc. Moreover, this section makes specific reference to the CRC.

The Federal Supreme Court Cassation Bench has exercised its power of binding interpretation over 16 child-related cases²⁹ most often by citing a few articles from the CRC and ACRWC. The court's cassation decisions so far are concerned with filiation, maintenance, adoption, criminal matters, and civil matters (contractual and extra-contractual matters). The most widely cited provision by the court (as a tool of interpretation) is Article 3(1) of the CRC on *the best interest of the child*. In the court's cassation decisions, the second most widely cited provision is Article 12 of the CRC on the participation of children in their cases depending on the respective maturity of the child.

Sometimes the court simply cites articles from the CRC or the ACRWC; and in some cases, the court explains the spirit of the provisions relevant to specific cases at hand. Yet, the court simply cites articles from the CRC without unpacking the spirit and meaning of the provisions, and the court heavily relies on very few articles of the CRC without reference to other relevant articles from the CRC.

Out of the 25 volumes that have been published by the Federal Supreme Court, 10 volumes contain cases concerning the rights of children where the court invoked provisions from the CRC. The subject matter before the Federal Supreme Court cassation so far includes filiation (particularly paternal filiation), adoption, maintenance, custody, and criminal matters (in cases where children conflict with the law or children who are victims of crimes). The next sub-sections discuss these subject matters and show the court's tendency to cite the CRC in various decisions rendered by the Federal Supreme Court.

5.1 Filiation

As per Article 7(1) of the CRC, the child has the right to know and be cared for by his or her parents. The right to know and be cared for by parents may

²⁹ Ethiopian Federal Supreme Court Cassation File No. 22243 on Filiation, File No. 23632 on determining guardianship and tutorship, File No. 35710 on guardianship and tutorship, File No. 44101 on adoption, File No. 45819 on Maintenance, File No. 54827 on contractual (contractual agreement to sale an immovable property- house), File No. 54129 on the scope of contract of tutorship, File No. 46412 on criminal matters(Juvenile offender), File No. 98552 on Maintenance, File No. 90089 on criminal matter(the life of the unborn), File No. 116950, File No. 118130 on criminal matter(rape), File No. 172784 Maintenance, File No. 189201 on inter-country adoption, and File No. 177216 criminal case (imprisoned father) and responsibility of parents to their children.

conflict with the rights of parents for privacy in cases of anonymous adoption, cases of artificial insemination, or surrogacy in cross-border agreements.³⁰ The *best interest of the child* shall be used in addressing the dilemma between parents' rights to privacy and the right of the child to know and be cared for by parents.

Article 123 and the subsequent provisions of the Federal Revised Family Code provide the mechanisms for ascertaining maternity or paternity. The Family Code provides that the woman who has given birth³¹ to the child is the mother to that child, and there is no single case in the Federal Supreme Cassation about the issue of maternity. All cases concerning filiation decided by the Federal Supreme Court Cassation are related to the ascertainment of paternity.

Paternity is ascertained through three legally specified mechanisms: (i) presumption of law, (ii) acknowledgment, and (iii) judicial declaration as stipulated under Article 125 of the Federal Family Code. *Presumption of law* is a scenario whereby any child born during a recognized marriage has a father who is a husband in the marriage. *Acknowledgment* is a process of determining parenthood by any person who confesses that the child is his son/daughter. *Judicial declaration* of paternity is a decision of parenthood by any court having jurisdiction.

For example, the Federal Supreme Court (File No. 22243 published in Volume 4) ascertained paternity by strictly following the provisions of the law under Article 125 of the Family Code. The lower court, according to the case, ascertained paternity by way of judicial declaration. The Federal Supreme Court revised the decision of the lower court and decided that the lower court has to first ascertain paternity by using the presumption of law because the child was conceived during a legally known marriage between the man and the woman. But the child was conceived during a brief time when the man was separated for work.

In deciding over paternity cases, should the court take into consideration the best interest of the child? The best interest of the child principle has played a significant role in litigation on paternal affiliation³² in many jurisdictions.

³⁰ Stefanie Schmahl (Editor, 2021). *United Nations Convention on the Rights of the Child, Article-by-Article Commentary* (Bloomsbury), page 132

³¹ Article 124 of the Federal Family Code Proclamation No. 213/2000

³² Wouter Vandenhoele (2015). "The Convention on the Rights of the Child in Belgian Case Law". In: Liefaard, T., Doek, J. (eds) *Litigating the Rights of the Child* (Springer, Dordrecht).

However, some argue that the principle should not be too elastic and expansive³³ thereby covering every issue concerning children.

However, the European Court of Human Rights (ECtHR) specifically underscored the importance of the best interest of the child as “the bottom line that must always be placed at the heart of decision-making”³⁴ concerning paternity. In this case, the ECtHR flexibly decided the case by placing the best interest of the child as a decision-making instrument and rebutted legal parenthood by favoring social parenthood which satisfies the best interest of the child. When any court faces between the right to parenthood and the interest of the child for further care and growth, it shall choose the interest of the child for its future care and proper growth not the right to parenthood.³⁵ This line of interpretation is also adhered to by the CRC Committee.³⁶

5.2 Custody (guardianship and tutorship)

Article 18 of the CRC gives the primary responsibility of upbringing children to parents (both the mother and the father). The best interest of the child is enunciated in this article as a basic concern of the parents. The Federal Supreme Court, in its various cassation decisions, cited the best interest of the child from the CRC. For instance, under Federal Supreme Court Cassation Decision No. 23632, the court assigned guardianship and tutorship to the aunt of the child rather than his father. The court reasoned its judgment based on the best interest of the child. In this case, the mother of the child passed away and the child was left alone. The court decided in favor of the aunt of the child rather than the father for the following reasons:

The father of the child wants to be a guardian and tutor to his son to inherit the property of the mother of the child while the father had contributed nothing to the child until the death of his mother. Due to this intention of the father and the best interest of the child, the court

³³ Stephen Parker (1994). “The Best Interests of the Child; Principles and Problems”. *International Journal of Law, Policy and the Family*, Volume 8, Issue 1, April 1994, Pages 26–41.

³⁴ *Mandet v France*: application no. 30955/12 which stated that a presumed biological father wanted to have his paternity recognized vis-à-vis a child who already had a legal and social father and asked the judges not to change his established family ties. As cited in Claire Fenton- Glynn. (2021). *Children and the European Court of Human Rights*. Oxford University Press.

³⁵ Claire Fenton-Glynn (2021). *Children and the European Court of Human Rights*. Oxford University Press, page 145.

³⁶ Supra note at 24, page 132.

ruled out the father from being a guardian and a tutor to his son and placed the child with his aunt.³⁷ (*Author's translation*).

Although the right to be guardian and tutor is accorded to parents (the father in this case), the court reasoned that placing the child with his father is detrimental to the wellbeing and dignity of the child and will not promote the best interest of the child. In another case, Federal Supreme Court Cassation Decision No. 35710³⁸, the court adhered to the same reasoning by invoking the best interest of the child under Article 3(1) of the CRC and Article 4(2) of the ACRWC in determining guardianship and tutorship. In this decision, the court, in addition to the best interest of the child, utilized the opinion of the child in the determination of custody of the child by invoking Article 12 of the CRC. The father placed his son to be with his aunt by testamentary will but the mother of the child opposed the testamentary will upon the death of the father. Therefore, the court decided and placed the child with his mother taking into consideration the best interest of the child and by taking the child's opinion into account.

Under the Federal Supreme Court Cassation decision File Number 177216 (which was a criminal case), the court followed a very innovative approach concerning the interest of the child whose father was imprisoned and whose mother was in serious health problem.³⁹ The Federal Supreme Court cited Articles 7(1) and 18(1&2) *cum* Article 3(1) of the CRC to release the father of the child so that he can serve the remaining years of imprisonment on probation and thereby satisfy the interest of the children. Therefore, the Federal Supreme Court compromised the criminal punishment imposed upon the father in favor of the best interest of the child on the ground that the child should be cared for by the father as this entitlement for parental care is clearly stipulated under Article 36(c) of the FDRE Constitution.

5.3 Adoption

According to Article 21 of the CRC, adoption should be decided by courts or quasi-judicial bodies with judicial authority, by taking into account the best interest of the child. Moreover, the body authorized to decide on such adoption issues must follow rigorous procedures in order to realistically evaluate the

³⁷ Federal Cassation Decision No. 23632 Vol. 5, October 26, 2000 E.C between *W/ro Tsedale Demissie v. Ato Kifle Demisie*.

³⁸ Federal Supreme Court Cassation No. 85831 on October 2003 E.C between *W/ro Tiruayehu v. Ato Gashaw Andargie* is also an additional case the Court followed similar reasoning fetching provisions from the CRC.

³⁹ The mother had contracted cancer and was using chemotherapy and was not able to render her responsibility towards her children whose father was imprisoned.

conditions that necessitate the care of the child outside the family environment.⁴⁰ The child's welfare and best interests represent the highest overarching principle in the adoption proceeding.⁴¹

Adoption particularly inter-country adoption has to be a measure of last resort as per the CRC, the Federal Family Code, and the FDRE National Children's Policy. Federal Supreme Court Cassation Decision No. 189201 involved inter-country adoption. The Federal Family Code provides procedures for adoption. However, Proclamation No.1070/2018 –an amendment to the Federal Family Code– has repealed Article 193 and has entirely banned inter-country adoption.

However, the adopter in the case is a woman of an Ethiopian origin who has acquired US citizenship. Proclamation No.1070/2018 prohibits inter-country adoption to foreigners. In this case, even though the woman is a foreigner holding US citizenship, she is originally from Ethiopia. The adopter lost Ethiopian nationality because she has acquired American nationality and double nationality is not allowed in Ethiopia.⁴² Therefore, the court differentiated foreigners in this light. Moreover, the court took into account the policy of the country towards Ethiopian Diasporas in exercising some juridical acts with Ethiopian nationals including adoption.

The court concluded that such adoption between Ethiopian Diasporas and Ethiopian citizens would promote the best interest of the child in maintaining identity, cultural, linguistic, and other Ethiopian values despite living abroad. To arrive at this decision, the court cited the best interest of the child based on Articles 3(1), 21(1/b) of the CRC, and Articles 24(b & f) of the ACWRC.

The other case concerning adoption is the Federal Supreme Court Cassation Decision in File No. 44101. The case involved the revocation of an already permitted contract of adoption as a result of post-adoption monitoring to the conditions where the child was placed. Article 195(2) of the Federal Family Code clearly provides three grounds of revocation. They are: (i) if the adopter handles the child as a slave, or in conditions resembling slavery, (ii) the adopter makes the child engage in immoral acts for gain, or (iii) handles him in any other manner that is detrimental to his future.

The court revoked the adoption by interpreting the third ground expansively in which the court interpreted the phrase detrimental to his future to encompass the best interest of the child from the CRC. Therefore, the court

⁴⁰ *Supra* note at 24, pages 297-308.

⁴¹ *Ibid*

⁴² Proclamation No. 378/2003 Ethiopian Nationality Proclamation article 20.

interpreted the meaning of the phrase ‘detrimental to his future’ in the light of the best interest of the child. It decided to revoke the adoption based on the best interest of the child in assessing the future of the child in that particular adoptive family context. This interpretation protects children from falling into a situation that is detrimental to their livelihood and upbringing.

5.4 Maintenance

In determining the issue of maintenance,⁴³ the court (in various files) invoked the best interest of the child from the CRC as the best tool in rendering decisions in different cases of maintenance. Article 27 of the CRC imposes the responsibility of supplying maintenance primarily upon parents; and according to Article 18 of the Convention, parents have joint responsibility for bringing up the child. Most of the Federal Supreme Court cassation cases concerning children involve issues of supplying maintenance. In this regard, Article 197 of the Federal Family Code provides that supply of maintenance includes the responsibility to feed, lodge, clothe, and to care for health and education, as the case may be, in a decent manner having regard to social conditions and local customs.

Federal Supreme Court Cassation Decision No. 45819 involved the sale of a special movable property (car) that provides maintenance supply to children. Here, the father of the children wanted to sell the car to pay debts to other creditors. The court gave two options to the father of the children: (i) to sell the car and save an amount of money (in a bank) enough for the children until they attain eighteen years of age, or (ii) not to sell the car because earnings from the car is a guarantee for the sustained supply of the maintenance to the children. Therefore, the court rejected the sale of the car in favor of the interest of the children by prioritizing the rights of children over the rights of creditors.

5.5 Juridical acts: Capacity for contractual agreements

There are acts minors can perform legally taking into account the age and maturity of the minor. Minors are not totally precluded from performing one or more juridical acts. Entering into contractual agreements and employment are some of the areas in which minors may participate. The CRC makes a differentiation among children taking into account their respective ages. The CRC follows a midway approach between welfare theory (patriarchal approach) and liberal theory (autonomous approach) depending on the age and maturity of the child under Article 32(2)(a).

⁴³ Federal Supreme Court Cassation Decision File No. 98552, File No. 130931, and File No. 172784.

Accordingly, Article 299 of the Federal Family Code states that “acts performed by the minor in excess of his powers shall be of no effect” and will be subject to nullification by the application of the minor, his heirs, or his representatives. This implies that minors can perform juridical acts within the scope of permitted powers. The juridical acts that are beyond the power of the minor will be handled by the tutor according to Article 305(1) of the Federal Family Code.

Federal Supreme Court Cassation decision File Number 116950 involved the sale of a house that is jointly owned by the children of the deceased including *Mahider Yemane* who was 15 years of age. In this case, the tutor of one of the children wanted to sell the house and divide the proceeds among the children. The lower court rejected the sale of the house and an appeal was lodged to reverse this decision. The Federal Supreme Court Cassation Bench underscored the importance of selling the house in promoting the best interest of the child by citing provisions from the CRC Article 3(1). The proceeds of the house will cover expenses concerning food, education, clothes, and related expenses which in turn can promote the development of the child.

In another case, Federal Supreme Court Cassation decision (File No. 54827), the litigation involved a contract of sale of an immovable property (house) between an adult buyer and three children aged 12, 14, and 10 years (Elesi/Elsabet, Fasil, and Derje). The buyer had already paid some amount of the price. The buyer brought a suit that the house be transferred to him. The lower court which adjudicated the case nullified the contract and ordered that the parties shall be reinstated to their previous position.

However, the High Court reversed the decision of the lower court and ordered the performance of obligations (by the respective parties) under the contract. The Regional Supreme Court of Oromia (File No. 31454) confirmed the decision of the High Court. The Federal Supreme Court in its cassation bench (under File Number 100903) decided that the contract should be nullified by invoking the provisions of the CRC that provides special protection to children. Therefore, the Federal Supreme Court underscored once again that special protection shall be given to children in any juridical act exercised by the children by invoking provisions from the CRC.

5.6 Criminal matters

Article 40 of the CRC⁴⁴ deals with the issue of criminal responsibility and the procedure that must be adhered to by courts where children are accused of

⁴⁴ General Comment No 10(2007): Children’s rights in juvenile justice.

Available at: <https://digitallibrary.un.org/record/599395?ln=en&v=pdf>

infringing the criminal law. Moreover, Article 40(3)(a) of the CRC requires states to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Accordingly, Article 52-56 of the FDRE Criminal Code provides the age categories for criminal responsibility. As indicated earlier in Section 3, Article 52 of the FDRE Criminal Code exonerates children who have not attained the age of 9 years from criminal responsibility due to the required cumulative material, moral and legal elements for criminal responsibility stipulated under Articles 23(2) *cum* 57(1) of the FDRE Criminal Code. Article 53(1) of the FDRE Criminal Code requires special procedures for young persons between the ages of nine and fifteen years for penalties and measures to be imposed on children. Moreover, Article 56 of the FDRE Criminal Code sets criminal responsibility to begin at the age of fifteen years.

Federal Supreme Court Cassation decision File Number 46412 involves a rape case committed by sixteen year old boy against fifteen year old girl. The lower court exonerated the child from criminal responsibility. However, the Federal Supreme Court invoked Article 56 of the FDRE Criminal Code and held the child criminally responsible as an offence committed by a child. Therefore, the Federal Supreme Court found the boy criminally responsible as he was sixteen years old, i.e., outside the minimum age of criminal responsibility.

On the other hand, in File No. 118130, the Federal Supreme Court Cassation rendered a decision on a rape case by eleven years old boy against 4 years old female child. As the crime of rape is committed by an eleven year old boy the case falls under Article 53 which requires special procedures. However, the lower court without following a special procedure convicted and punished the child by 10 years of imprisonment. Moreover, the court placed the child in a prison cell shared with adult criminals.

The Federal Supreme Court Cassation Bench decided that the lower court has failed to observe serious procedures that ensure the interest of the child. Therefore, the Federal Supreme Court ordered the lower court to follow Article 168(1&2) of the FDRE Criminal Code so that the child can either be sent to a corrective institution (Article 162 of the Criminal Code) or to a penitentiary detention institution. The Federal Supreme Court based its reasoning on Articles 3(1) of the CRC and Article 4(1) of the ACRWC together with Article 36(2&3) of the FDRE Constitution.

However, the absence of such institutions, envisaged under the 2017 FDRE National Children's Policy, hampers the effectiveness of such sentences. The establishment of such corrective institutions is thus imminent so that they can

reform and rehabilitate young offenders as required by the FDRE National Children's Policy.

In another criminal case decision rendered by the Federal Supreme Court Cassation Bench (File Number 90089), a pregnant woman was hit on her belly. The lower court in the Regional State of *Benshangu/Gumuz* decided that the act constitutes attempted homicide, and this was confirmed by the Federal Supreme Court. However, the Federal Supreme Court did not consider the life of the unborn child (which is given protection under the CRC preamble (paragraph 9) and Article 1) as the act of hitting the pregnant woman has caused the death of the unborn child. The cumulative reading of preamble (para) 9 and Article 1 of the CRC indicate that special protection is given *before as well as after birth*. Therefore, the Federal Supreme Court could have invoked the issue of the unborn child. The Federal Supreme Court should have given due attention to the life of the unborn child who is given protection by the CRC and the FDRE Criminal Code Article 544(3).

6. Examples of Laudable FSC Cassation Decisions and an Issue of Concern

In File No. 189201 that involved inter-country adoption, the Federal Supreme Court (as highlighted in Section 5.3 above), innovatively differentiated between foreigners of an Ethiopian-origin and it permitted the adoption based on the best interest of the child despite a total ban on inter-country adoption by foreigners under Proclamation No.1070/2018. The justification of the court in permitting the adoption is due to shared culture, language, psychological makeup, etc. between the adopted child and the adoptive parent.

Another example of a laudable decision (highlighted in Section 5.2), is the Federal Supreme Court cassation decision in File No.177216 in which the court ordered the release of an imprisoned father to enable the father to discharge his responsibility of caring for his children as the mother of the children faced health problems. Here, the court prioritized the interest of children.

There are issues of concern that need due attention. One of these issues relates to an issue that was addressed in Federal Supreme Court Cassation File No. 20938 in which the court had introduced what the literature refers to as *a de facto* divorce. This refers to *ipso facto* separation of husband and wife in the absence of a court's decision of divorce in accordance with Article 117 of the Federal Family Code. Under Article 75, the Federal Family Code lists the causes of the dissolution of marriage. These causes include death or declaration of absence of one of the spouses, dissolution by the court for violation of essential conditions of marriage, and divorce. By introducing *de*

facto divorce, the Federal Supreme Court in its cassation decision had introduced recognition of divorce outside what the law enunciated under the Federal Family Code Article 75.

One may argue that the FSC cassation did not introduce a new ground for divorce but merely offered *a wider interpretation of divorce*. According to this line of argument, absence of death certificate does not mean that a deceased who has died is still alive. This line of argument further notes that most divorces in rural areas do not involve court decisions. Likewise, supporters of this argument⁴⁵ state that separation of spouses for a long period and the formation of new marital relations with other persons, for example, is *divorce in reality* (de facto divorce) even if there is no court decision to that end.

Yet, there is the need to pay due attention to the interest of children. Divorce is a case where the interest of children could be significantly affected and as a result, should be handled by courts to safeguard the interest of children as courts are constitutional guardians of rights. However, the Federal Supreme Court Cassation Bench had (in File No. 20938) focused on the issues related to property.

The case was brought before the FDRE House of Federation (HoF) for constitutional interpretation. The FDRE HoF (Decision No. 49/10 of the FDRE HoF) stated the following as ground for its ruling on the Federal Supreme Court Cassation decision File Number 20938:

... the reason the law exclusively mandates courts with the power to pronounce divorce is mainly related to the consequences of divorce. Following divorce, the court has to determine common property and the *issue of children's custody*.⁴⁶ (Author's translation)

The FDRE HoF also invoked Article 34(2)⁴⁷ of the FDRE Constitution to show the consequences of divorce. The Federal Supreme Court seems to have recognized *de facto* divorce to the detriment of various side-effects including the rights of children. Yet, in view of the practices of divorce and remarriage (outside the ambit of courts) in many parts of rural Ethiopia, there can be an argument that marriage may not continue to exist merely because a court has not pronounced divorce. This can be analogous to the literal and purposive

⁴⁵ See, for example, Filipos Aynalem (2008). “ሳይፋቱ ፍቺ (De facto Divorce)”, *Mizan Law Review*, Vol. 2, No.1, 110-136.

⁴⁶ See FDRE House of Federation, Constitutional Interpretation Decisions, Vol. 4(2022), page 26.

⁴⁷ The family is the natural and fundamental unit of society and is *entitled to protection* by society and the state.

interpretation of the law. Yet, the principle of the *best interest of the child* should be taken into consideration even where spouses have ceased to live together.

7. Conclusion

As indicated in the preceding discussion and analysis, the Federal Supreme Court has begun citing articles and principles from the CRC by encompassing the principles and provisions into its decisions that have binding interpretation for all courts in the country. Therefore, the Federal Supreme Court in its cassation decision has commenced citing provisions of the CRC and this influences other courts to adhere to the values of the CRC. However, the Federal Supreme Court is expected to go beyond reference to articles from the CRC and address the real spirit of the provisions. It is also expected to give further attention to important principles and provisions from the CRC.

For example, the Federal Supreme Court can make reference to judicial or quasi-judicial decisions to substantiate its cassation decisions. It is imperative for the court to refer cases from other supranational courts or quasi-judicial organs to appreciate the reasoning and experience of these courts in adjudicating child-related cases. The court is also expected to give due attention to provisions outside the usually cited ones such as the best interest of the child (Article 3(1), participation (Article 12), and the right to know and be cared for by parents (Article 7(1)).

Future Federal Supreme Court cassation decisions can indeed benefit from other provisions from the CRC (in addition to the abovementioned ones), the work of the CRC Committee, and other child-related provisions outside the CRC (including the Optional Protocols on the CRC). The court is also expected to adopt the relevant procedural standards from the CRC Committee and other supranational human rights courts in its adjudication process related to children. ▬

Ethiopian Federal Supreme Court Cassation Decisions that involve cases on children

Volume 4 File No. 22243 and File No.20938

Volume 5 File No. 23632

Volume 8 File No.35710

Volume 10 File No. 4410 and File No. 45819

Volume 11 File No. 54827, File No. 54129, and File No. 43988

Volume 12 File No. 46412

Volume 15 File No. 90089

Volume 16 File No. 98552

Volume 20 File No. 118130

Volume 21 File No. 130931

Volume 24 File No. 172784 and File 189201

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