

COMMENT

***Secular* Interpretation of the Best Interest of the Child: CCI's Decision on Child Custody in the Context of Divorced Parents
(Case Comment)**

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Abstract

International and regional human rights instruments state that the child's right to freedom of religion must be entrusted to the adult parents or guardians and the instruments do not allow state intervention. Likewise, the Ethiopian Constitution allows parents to make sure that their children have religious education; and it gives jurisdiction to religious courts over matters of custody. However, such laws can be insensitive to human rights issues when religious courts and human rights clash. This comment evaluates the recent interpretation by the Council of Constitutional Inquiry (CCI) in light of international and regional practices. The comment examines whether CCI's decision constitutes an advanced, child rights-based approach in interpreting what is in the best interest of the child in the context of divorced parents whereby the parent who has custody embraces a different religion after divorce. The analysis shows that this line of interpretation can be considered as an advanced way of child rights-based approach for interpreting best interest of the child.

Keywords

Best interest of the child; CCI; freedom of religion; parental guidance

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1. Introduction

International and regional human rights instruments almost unanimously give freedom to adult parents/guardians with regard to the religion of a child. Likewise, the Ethiopian Constitution allows parents to make sure their children have religious education and the Constitution gives jurisdiction to religious courts over matters of custody.

The Constitution and the Sharia Courts Establishment Proclamation No.188/2000 entrust Sharia courts to entertain family cases including child custody issues provided that the parties to the case agree to its jurisdiction. Unless there is a safeguard mechanism to protect human rights issues, these laws will be oblivious to human rights interests where a clash ensues between the latter and religious laws. Unlike the above stated laws, however, the CCI took a different approach in defining the best interest of the child which equally affects the meaning of parental guidance and the religious rights of the child. Therefore, if freedom of religion of the child should give priority to the interest of the child, the conflict between the state and parental power should be clearly identified.

This case comment highlights recent interpretation by the Council of Constitutional Inquiry in light of international and regional practices, to determine whether it constitutes an advanced, child rights-based approach for interpreting what is in the best interest of the child. The next section discusses the background of the case, and Section 3 explores the link between parental guidance and child rights. The fourth and fifth sections examine parental guidance and child rights and the implication of the CCI's decision for mainstreaming child rights-based approach to legal interpretation respectively, followed by conclusion.

2. Background of the CCI Recommendation on the Best Interest of the Child in the Context of Divorced Parents

The Ethiopian Council of Constitutional Inquiry (CCI) rendered a jurisprudentially novel decision¹ on the custodial rights of the child in the context of divorced parents and the role of parental guidance to educate the child in conformity to their religious and moral conviction. It reversed a decision of the cassation bench which started in the lower Sharia courts.

The case involved custody of a child whose Muslim parents were divorced in Sharia courts by designating the mother to assume custodial power and the father a duty of maintenance equivalent to ETB 2,500. Later, the mother changed her religion to Christianity as the result of which the father challenged her custodial right invoking the Sharia law principle: “the parent which assumes the custody of the child should have a firm religious integrity and should not abandon the Islam.”

Although the mother challenged the jurisdiction of the Sharia court, the court transferred custody to the father and entitled the mother to visit her child every 8 days. This case was confirmed by the Cassation Bench of the Supreme Court from which an application for constitutional interpretation was sought. The facts of the case show that the applicant mother contested the constitutionality of the decision of the sharia court invoking Articles 9(1), 27(1&3), 34(), 35(1&2) and 36(2) of the FDRE Constitution.²

The CCI framed the following issues:

- i) Whether the entertainment of the case by the Sharia court disregarding the objections raised by the applicant is constitutional? This is extended to the civil courts including the Cassation Bench which reviewed the sharia court’s decision;
- ii) What criteria should be given priority in deciding cases of child custody?³

Frequently used acronyms

ACHPR	African Charter on Human and Peoples’ Rights
CCI	Council of Constitutional Inquiry
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights

¹ W/ro Sara G/sillassie vs. Ato Ahmed Karu, FDRE Council of Constitutional Inquiry, File No. 5573, May 14, 2021

² Ibid.

³ Ibid.

On the first issue, the CCI decided that assuming jurisdiction contrary to the objection of the litigating parties is unconstitutional as per Articles 9 and 34(5) of the FDRE Constitution.⁴ The Council cited W/ro Kedija Beshir's case resolved by the House of Federation to interpret preconditions that need to be satisfied before Sharia courts assume jurisdiction over family matters.⁵ One of the preconditions is consent of the parties as provided under Article 34(5) of the FDRE Constitution and Article 4(2) of the Federal Courts' of Sharia Consolidation Proclamation No.188/2000 (hereinafter Sharia Proclamation).⁶

With regard to the second issue it reasoned that any action by the public authority, private charitable organization, court or administrative organ or legislature should consider the *best interest of the child* (emphasis added)⁷ while entertaining children's issues. The Council cited an HOF decision in Ato Berhanu Regasa vs. Meskerem Mitiku which states that cases involving child custody and upbringing should give priority to the best interest of the child.⁸ This decision challenged the power of the parent or guardian of a child to guide and direct his/her child in manifesting and exercising religious rights which is recognized in the international and regional instruments with some or no variations.

There are interesting issues that need further consideration in this pioneering decision:

- What is the *raison d'être* behind the best interest of the child? Can religious consideration be the overriding consideration in determining child's best interest in the context of divorced parents?
- What is the proper power of the parents/guardians in the direction or guidance of their child's right to manifest or exercise religious rights in conformity to their moral or religious convictions?
- What does the international HR jurisprudence say when parents do not agree which religion the child should follow?
- What is the extent of the state's power in respecting or protecting the power of parental guidance of their children's religious matters as stipulated in international law?

⁴ Proclamation of the Constitution of the Federal Democratic of Ethiopia, No.1, year 1, 1995, Art. 9(1) & 34(5).

⁵ Sara G/Sillassie, *supra* note 1, at 5.

⁶ FDRE Federal Courts of Sharia Consolidation Proclamation No. 188, 6th year, No.10, 2000, Article 4(2).

⁷ Sara G/Sillassie, *supra* note 1, at 4. See also the Constitution, *supra* note 4, Art. 36(2)

⁸ *Id.*, at 4.

Though the case has an enormous potential to contribute to the analysis of rights of women, this short analysis is confined to the implication of the CCI's decision on the rights of the child in the context of divorced parents. The author believes that the decision enriches the application of the principle of the best interest of the child in future similar issues.

3. Religious Rights and the Best Interest of the Child under International Law

International and regional human rights instruments almost unanimously position the freedom of religion of the parents above and over the child's freedom of choice including making its freedom to hold religion at the care of the adult parents/guardians of the child. This can be inferred from Article 18(4) of ICCPR⁹ and UDHR,¹⁰ Article 13(3) of ICESCR,¹¹ Article 9 of ECHR,¹² Article 10 of ECfHR,¹³ and Articles 8 & 12(4) of ACHPR.¹⁴ According to these provisions, the right on freedom of religion of the child is given to the parent.¹⁵ They make the child's right subsidiary and parental guidance a primary consideration making the religious education and practice of the child within the parents' discretion.

Although the provisions of the Convention on the Rights of the Child (CRC) recognize the right of autonomy and participation of the child,¹⁶ they still empower parents to guide the religious education and upbringing of their children according to their conviction. However, the CRC seems to provide the child more agency¹⁷ than what is included in the other instruments. What is provided under Article 14(2) of the CRC is unique to the Convention and

⁹ International Covenant on Civil and Political Rights, United Nations, 1967 (entry into force 1976), Art.18(4)

¹⁰ Universal Declaration of Human Rights, United Nations, 1948, Art. 18(4).

¹¹ International Covenant on Economic, Social and Cultural Rights, United Nations, 1966 (entry into force 1976), Art.13/3

¹² European Convention the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1970, Art. 9.

¹³ European Human rights Commission, council of Europe, 1999 Art. 10.

¹⁴ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), Articles 8 & 12(4).

¹⁵ This is, in fact, true for other rights of the child too, though the freedom of conscience and religion involve unique abstract right which call for a special consideration. Even more consideration is needed when these freedoms bring about an effect more visible to the economic and health needs of the child.

¹⁶ Convention on the Rights of the Child, United Nations, 1989 (entry in to force 1990) *See* Arts. 3, 5, 12, 13-17.

¹⁷ *Ibid*, Art.3, 12(1) &14(1)

contrasts with Article 9 of ACRWC which states parental duty than right.¹⁸ With respect to parental guidance or duty, most international instruments stipulate that parents have the right to ensure their religious education.

Under Article 14(2) of the CRC, the phrase “the parents’ right for the education of the child in a manner consistent with the evolving capacities of the child”¹⁹ seems to consider parental guidance as auxiliary to the child’s evolving capacity to exercise freedom of religion. This may be the case where parents should exercise their duty jointly. However, if there is no agreement between them, especially when the parents are divorced, issues of autonomy in the light of the child’s evolving capacity or the principle of the best interest of the child would come to consideration. It also does not answer what courses will be taken if the child rejects their way of conviction.

It is still unclear whether the state can interfere with the religious rights of the child. Moreover, the CRC Committee in its concluding observation stated that “the human rights of children cannot be realized independently from the human rights of their parents and society as a whole.”²⁰ Even under Article 12(4) of the ACHPR and Article 11(4) of the ACHRC, parental guidance right is protected.

In this respect the 1960 UNESCO Convention against Discrimination in Education, Article 5(1)(b) seems better as it states that “no one can be compelled to receive religious instructions inconsistent with his/her own conviction.”²¹ This imposes an obligation against state imposition and against parental imposed instruction irrespective of the interest of a child. Though

¹⁸ African Charter on the Rights and Welfare of the Child, African Union, 1990 (entry into force 1999) Art. 9.

¹⁹ CRC Article 14:

- (1) States Parties shall respect the right of the child to freedom of thought, conscience and religion.
- (2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

²⁰ CRC Concluding observations on the combined third and fourth periodic reports of Uzbekistan, adopted by the Committee at its sixty-third session (27 May–14 June 2013)

²¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), Convention against Discrimination in Education Adopted by the General Conference at its eleventh session, Paris, 14 December 1960, Art. 5(1)(b).

Article 14(1) of the CRC imposes on the state an obligation to respect the religious right of children, it is not clear as what the term respect connotes.

The ECHR (while interpreting Article 9) provided a broader meaning to the term respect to include positive obligations.²² If we, for example, interpret it in a manner that allows the child to adopt or change religion in line with Article 18(1) of the ICCPR and UDHR, the controversy would be whether there exists the child's own religious rights vis-à-vis his/her parents (though it seems clear in relation to public authorities).

There seems to be no problem in interpreting Article 14(3) of CRC in line with Article 18(1) of the ICCPR. However, neither CRC nor other instruments show clearly as to whether the child has the right to change his religion though freedom of religion includes the freedom to change one's belief. This can be seen from the perspective of child-state relationship. However, Article 14(2) of the CRC fails to give the child a full autonomy regarding religion as far as the child's relation with its parents is concerned especially when the parent who has custody embraces a different religion.

4. Custodial and Religious Rights of the child under Ethiopian Laws

The Ethiopian Constitution²³ and the Revised Family Code²⁴ are pertinent to the rights of the child and parental roles including custodial rights. For example, Article 27(4) of the Constitution states that the parents of the child have the right to bring up their children ensuring their religious and moral education in conformity with their own moral convictions. This provision is similar to the stipulations under Article 18 of the ICCPR and UDHR and Article 13 of the ICESCR.

In all the laws it is not clear whether the right should be exercised when there is a disagreement between the child and its parents especially when the child attains an age when they are capable of expressing their own interests. Nor does Article 36 of the Constitution say anything about the rights of autonomy or participation of the child. We do not find any other provision

²² European Court of HR, No.8160/78, X vs UK, 12, March 1981. *See* G. Van Bueren, *International Rights of the Child*, Section C: Children and the Justice System, University of London 2006.

²³ FDRE Constitution, *supra* note 4, Arts. 27, 34, 36.

²⁴ The Revised Family Code of Federal democratic Republic of Ethiopia, Proclamation No. 213, no.1, 2000, Art.219 and *ff.*

which states as to what extent this parental guidance should be respected and at what point the state should intervene in the exercise of parental authority.

However, Article 27(4) of the Constitution seems to give emphasis that the state has a negative obligation and should respect the right of the parental guidance over their children. Articles 34(4) and 5 recognize customary and religious marriages and adjudication of personal and family laws in accordance with religious and customary laws. Reading this provision in relation to Article 36(2) of the Constitution (which stipulates that “any action and decision related to children should always consider the best interest of the child,”) there will be problem of interpretation when there is a conflict between these two legal grounds. As Ethiopia is a party to the regional and international conventions on the rights of the child, it is possible to invoke the relevant provisions of these instruments. However, invoking these conventions can still be futile in view of their relevance to the case at hand.

Article 244 of the Revised Family Code empowers the court to revoke guardianship where a guardian is sentenced for a criminal offence. However, it does not recognize change of one’s religion as a ground of revocation of guardianship. And Article 234(2) of the Civil Code says nothing about what criteria a public prosecutor can employ when the latter applies for the revocation of the guardianship. Religious freedom of children seems the most problematic and controversial issue in comparison to the other rights of the child.²⁵

5. The Implication of CCI’s Decision on the Definition of Best Interest of the Child

Unlike the above stated laws, the CCI took a different approach in defining the best interest of the child which equally affects the meaning of parental guidance and the religious rights of the child. If freedom of religion of the child should give priority to the interest of the child, the conflict between the state and parental power should be clearly identified. If the child can express its concern, it doesn’t matter that the right to be heard may be considered. If this is not the case, a secular interpretation of the best interest of the child may be considered.

The dilemma, however, is which (the state or the parent) is the proper agent representing the best interest of the child when the child cannot express its concern and when a conflict arises between parental guidance and other rights

²⁵ Geraldine Van Bueren (1998). *The International Law on the Rights of the Child*, Martinus Nijhoff publishers.

of the child? By applying secular interpretation, on the case at hand, the state may restrict the right of the parent to guide his child on the one hand the right to change ones religion on the other.

However, respecting the decisions of the Sharia Court and the lower courts can be challenged in two ways. Firstly, these decisions commit discrimination based on religion when they prefer the religion of the father over the mother's right to change her religion. Secondly, the decisions failed to consider other interests of the child including the best interest of the child while weighing on what issues should be given priority. The writer, therefore, argues that the right of the parent to guide his child in conformity with his moral or religious conviction should be respected only if it enhances the best interest of the child and when it is not in contradiction to the child's consent or other interests of the child. After all, the state should not take sides on religious issues.

This does not mean that religious courts should be left free on the determination of custody issues: in fact, there must be a limit to their power where the issues are sensitive including custodial issues. By so doing, they are not enforcing religious issues but ensuring the protection of human rights. That is what is envisaged under the principle of the separation of state and religion, as stipulated under Article 11 of the Constitution. By implication, the state should not allow third parties including parents or other groups to subordinate the health, survival, development and economic rights of the child to religious and moral rights/convictions in which the child has not participated in the first place. Doing so puts the state at a more paternalistic position but only for a good reason. In this respect, the decision of the CCI can be considered as an example of a child rights-based approach to legal interpretation.

6. Conclusion

International and regional human rights instruments and their committees often prioritize the right of parents to guide their children in accordance with their religious or moral convictions over the rights of the child to hold or change their religion. In contrast, the CCI has taken a more secular and progressive approach by placing the best interests of the child at the forefront. This interpretation does not pursue a rigid interpretation of the parental right to guide their child, and instead prioritizes other interests such as the child's development, education and economic wellbeing. Therefore, the state should take a paternalistic role in protecting the best interests of the child, rather than a strictly age-neutral view that may allow for children's rights to be violated in the name of religious or moral conviction. ■

Laws and International Instruments

Laws

FDRE Federal Courts of Sharia Consolidation Proclamation No. 188, 6th year, no.10, 2000

Proclamation of the Constitution of the Federal Democratic of Ethiopia, No.1, year 1, 1995

The Revised Family Code of Federal democratic Republic of Ethiopia, Proclamation No. 213, No.1, 2000.

International Instruments

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986)

African Charter on the Rights and Welfare of the Child, African Union, 1990 (entry into force 1999)

Convention on the Rights of the Child, United Nations, 1989 (entry in to force 1990)

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