

Locating Culture in the Best Interest of the Child

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Abstract

The best interest principle is one of the umbrella principles embodied under the CRC which assures the overall development of children to their fullest potential in order to maximize their capacity and become adulthood. Though this principle is a paramount important for the rights of the child, its vagueness impeded its implementation stage due to different wavering concept it has. And the principle of the best interests of the child has been the subject of extensive consideration in academic, operational and other circles.²

Member States, parents, communities or any other organs or individuals, who are in charge and care of children and obliged under the CRC, use this legal loophole, which is left undetermined for implementation purposes, interpret it in different ways. As a result of this, the best interest principle left unrealized due to its vagueness, culture, religion and other considerations taken in the implementation of the rights of children. These factors may not always bring about the positive impetus to children in their overall development as was intended by the UN CRC but rather in most of the cases, these factors are seen contravening the spirit and philosophy of the CRC. Furthermore, the roles of parents given under the CRC towards their minor children are determined by parents' perspectives, culture and religious understandings which many times found contravening the interest of children.

In addition to the above factors, the problems of assessment on the effects of the actions taken towards children are thorny under human understandings. So, obligations towards states, parents or other individuals or institutions imposed by CRC are complicated and difficult to implement because whether the actions taken are best or not to children are unknown at least time wise.

In my discussion, I will address the interpretation of best interest principle in different culture specific actions taken towards children concerning problems of assessment, compatibility of culture and spirit and philosophy of the CRC and the possible legal lacunae created under article 3(1) and article 41 of the CRC. Lastly, Ethiopian laws will be explored in this regard.

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² UNHCR. (2008). UNHCR Guidelines on Determining the Best Interest of the Child. (1211 Geneva, Switzerland). Available at <http://www.unhcr.org/4566b16b2.pdf> (Last Visited on November 04/2012)

1.1. Locating Culture in the Best interest of the Child

Culture is a pattern of behavior, thinking and attitudinal understanding of a certain community, which is created, shared and learned by others in the interaction of a day to day social life.³ Cultural norms may be seen into two perspectives: 1) positively as a right by itself to develop some personal traits and nurturing mechanism to children for their moral, mental and spiritual development and 2) as an impediment to children's right for the exercise of their rights articulated under international, regional and domestic legal frameworks. In order to fully appreciate the influence, whether positively or negatively, of culture in upbringing children, it is worthy important to know and scrutinize culture in the light of the best interest principle. Here, what are included under the best interest principle should first be deciphered so that culture will be either characterized as inimical to the best interest of children or helpful in the realization of the former for children.

The best interest principle can include, *inter alia*, positive actions taken to child's physical, mental, spiritual, moral and social development in the course of upbringing the child to adulthood. This can be inferred from the *contrario* readings of article 15(1) of African Charter on the Right and Welfare of the Child (hereinafter called ACRWC) and article 32(1) of the United Nations on the Rights of the Child(hereinafter called the CRC). The best interest principle is negotiating cultural norms on one hand and physical, mental, spiritual, moral and social development of the children in the process of adulthood. This is due to some cultural norms which are very dangerous for the abovementioned best interests of children. Africa, in this manner, is very vulnerable as it is a continent of deep and diversified culture which sometimes put children in a hazardous situation to their best interests. Hence, government machineries, social welfare institutions or any other person are under duty to take actions which could be compatible in bringing positive inputs for children's overall development.⁴ Under CRC and

³ Bodley, John H. (2008). Culture. Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation.

⁴ Article 3(1) CRC and Article 4(1) of the ACRWC

ACRWC a wide range of roles are given to children themselves in deciding on the actions that can be taken for the assurance of the best interest of children⁵.

But the actions that are taken may not always be positive and compatible with the best interest of the child for various reasons. One among the reasons is the existence of diversified culture. Different cultures and societies have myriad understandings towards childhood and the ways of upbringing children may also differ in the same fashion. At this juncture, children's best interest may be at stake due to difference of undertakings towards childhood and method of caring.

Furthermore, roles, rights and duties of children may be different other than the universalities of roles, rights and duties of children given by international, regional and domestic legal frameworks due to the existence of various cultural norms. For example a certain community's culture may encourage children to marry early or forced marriage and arranged marriage, to practice FGM, to support parents, to attain religious education, and others which totally restrict children's participation. As a result of this, dichotomies of understanding towards childhood and mechanisms of caring are created among the developed and the developing world.⁶

The determination of best interest of the child would be very difficult in cases of alternative cares where the child is faced with a new environment and new families with different cultural backgrounds. Furthermore, for different reasons alternative care-giver may deviate from assuring the best interest of the child by manipulating the undetermined and fluid concept of the best interest principle under the article 3(1) CRC and article 4(1) of the ACRWC.

Generally, it can be said that every culture which is inimical to the overall interests, as mentioned hereinabove, are prohibited and culture should be approached from the perspectives of children's interest. Parents, governmental authorities or private institutions who are in charge of caring and protecting children should take actions by allowing children to participate and to the best advantage of the children as articulated under article 4(2) of ACRWC.

1.2. Responsibility of Parents in Ascertaining Best Interest of the Child

The primary responsibilities and rights are given to parents under article 20(1) of the ACRWC and articles 3(2) cum 27(1) of the CRC. The responsibilities and rights of parents or guardians, as the case may be, to children is one of the difficult tasks in ascertaining the best interest of the

⁵ M, Freeman. (2007). Article 3. The Best Interests of the Child , in: A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden), P 33. Furthermore, under article 12 and 13 of CRC and article 7 and 9 of the ACRWC are examples which treat children as participatory on their own affairs which is very different from traditional society's look towards children's ability in participation of their lives.

⁶ W, Ncube. (1998). Prospects and Challenges in Eastern and Southern Africa: The Interplay Between International Human Rights Norms and Domestic Law, Tradition and Culture' in (ed.) W. Ncube, *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Aldershot, Dartmouth), p. 5

child. The problem will be worse if the parents or guardians are practicing different types of cultural norms inherited from their ascendants. Who is going to decide upon the cultural values of the children in such scenario will be a thorny task. It will be easy questions if our consideration is in the developing countries because parents are dominantly deciding over their minor children's future fate. But the difficulty comes over the reconciliation of culture and the best interest of the child. Furthermore, the decisions of parents may emanate from lack of resource for the implementation of rights of the child. Both the CRC and ACRWC bestow the responsibilities and rights of children without denying the opportunities of children for participation to realize autonomous exercise of life in the future. The judgments taken by parents towards their children may be subjective or objective. And to assess the possible effects of judgment taken to children would be much more problematic humanely because future is too unsure and uncertain. In such case, the following statement is of much help.

The capacity to judge is a specifically political ability in exactly the sense denoted by Kant, namely the ability to see things not only from one's own point of view but in the perspective of all those who happen to be present.⁷

The claims of validity of judgment is very subjective but the CRC and ACRWC articulate judgment taken by parents, governmental authorities or private institutions to be objective and universal in bringing overall positive aspects to children. However, this is impossible again to human beings and the consideration of culture. Furthermore, whose standpoint is to be considered, by whom?⁸ Settling these questions will help the threshold of the best interest requirement under the CRC and ACRWC to be realized consistently. Do we have any mechanism to control over parents or government authorities who deviate from the requirement set under the CRC and ACRWC taking their cultural norms?

Generally, whether, subjective or objective judgment of parents over their minor children, the center focus is the threshold given under the CRC and ACRWC to secure mental, physical, spiritual, moral and social development of children. But this does not mean culture is totally to be banned in the care of children. If culture is to be found very important to children's overall development, the action should be taken. Furthermore, parents are not only obliged to take actions to the best interest of children but also inaction if this is found to be the best interest of the children again.

1.3. Responsibility of States in Ascertaining Best Interest of the Child

Responsibilities of states are also indicated under the CRC and ACRWC as to actions to be in the best interest of the child. This can be done by states by taking appropriate legislative, judicial and administrative measures. But focus is given to the incorporation mechanisms of states into their

⁷ H, Arendt. (1982). *Between Past and Future* (New York, Viking Press, 1961); *Lectures on Kant's Political Philosophy* (Chicago, University of Chicago Press), p. 221.

⁸ Supra note at 3, p 37

domestic legal systems. The CRC articulates under its article 41 that more conducive conditions can be made under international or domestic systems. During incorporation, culture is a challenge for countries which are multiethnic and diversified in cultures. This problem is more discernible in Africa, Asia and Latin America.

The obligations of states under the best interest of children could be assured if states consider the best interest in their political, economical and social policies. States are characterized as failed to discharge their obligation under article 3(1) of the CRC and article 4(1) of the ACRWC if they did not consider the best interest of children in their overall policies and laws that could actually and potentially affect children's interest.

The best interest of children under discussion is a narrower version of the debate between states as to the universality and cultural relativism of human rights in general and children's right in particular, in the actions of states towards caring and protecting children. The obligation of states for the determination of the best interest of the child may be buttressed by different NGOs and other non-governmental organizations like UNHCR, UNICEF, UNESCO, WHO, and ILO.⁹ These organs will influence and assist government in the actions taken to children to be in conformity with the best interest of the child and thereby tackle cultural norms which are against the interest of the child and determine the best interest of the child. Furthermore, states should provide an opportunity and access of participation of children in policy formulations and enacting laws domestically.

1.4. Autonomous of Children and Its Limitations in the Best Interest Principle

Both the CRC and the ACRWC did not consider children as an empty-vessel rather as holders of rights to participate over their life and other related issues. Moreover, there is a growing recognition that participatory rights do not just have intrinsic value themselves, but are instrumental in securing other rights.¹⁰ If children are given an opportunity to participate over their affairs, the determination of the best interest principle can be conveniently put in place. Yet what should be the extension of the participation in the determination of the best interest, will be again a difficult task.

Article 12 of the CRC and article 7 cum article 4(2) of the ACRWC introduce profound challenge to traditional attitudes which deny the active role and participation of children in their life in particular and the interaction of the society at large. This right has a far-reaching scope to the realization of other rights. The traditional exclusion of children from participation in decision-making has been predicated on a presumption, on the one hand, of incompetence on the

⁹ Supra note at 1 p 13

¹⁰ Iain, Byrne. (2003). Participation: the Forgotten 'P' in the Convention on the Rights of the Child. (A Review of the International Centre for the Legal Protection of Human Rights, *INTERRIGHTS Bulletin*, Volume 14 No 2, p45). Available at www.interights.org (Last Visited on October 12/ 2012)

part of children and, on the other, of the wisdom and willingness of adults always to take decisions in children's best interests.¹¹

Children's participation cannot be a total relief to determine over the best interest principle in cases of cultural norms because of the mental immaturity and lack of experience to appreciate decisions. The following note is worthy quoting.

The traditional exclusion of children from participation in decision-making has been predicated on a presumption of incompetence on the part of children and of the wisdom and willingness of adults always to take decision in child's best interests. In reality, as history shows, these presumptions are flawed.¹²

Taking children's decision for grant may be futile due to their inexperience and immaturity but involving them in the decision-making is a paramount importance for a better decision and tackling cultural norms which contradict the best interest principle.

1.5. Legal Pluralism and Children's Rights in Ethiopian Context

Ethiopia, one of the Eastern African countries, has ratified many international treaties in general and human rights treaties in particular. Coming to the CRC¹³, Ethiopia is an acceding country to the CRC on 14 May 1991 and hence, ratifying country to the CRC. The status of international agreements ratified by the country domestically is crafted by the Constitution as all international agreements ratified by Ethiopia are an integral part of the law of the land as depicted under Article 9(4) of the FDRE Constitution keeping in mind Article 13(2) of the FDRE Constitution which demands the interpretations of human rights under Chapter three of the Constitution in conformity with international principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia. These two Articles bring the debate between monism and dualism-self executing or non-self executing treaties into life.

The country's obligations with regard to the CRC *inter alia*, includes taking appropriate legislative, administrative and others measures for the implementation of the rights recognized in the Convention as per Article 4 to the maximum extent of availability of resources. Above these, the country is expected to submit an initial and periodical report as per Article 44 of the CRC.

¹¹ Id. p48

¹² Id. P49

¹³ Adopted by resolution 44/25² of 20 November 1989 at the Forty-fourth session of the General Assembly of the United Nations. The Convention is open for signature by all States at the Headquarters of the United Nations in New York.

Individual complaint to the Human Rights Committee is impossible against the government of Ethiopia due to the country's failure to ratify the *First Optional Protocol*¹⁴ to the ICCPR which allows individual complaints.

Legal pluralism according to John Griffith¹⁵ is the presence in a social field of more than one legal order. It is, therefore, a mechanism of accommodating or tolerating value plurality. Beyond the secular values, recognition is made towards religious and customary values in the constitutional arrangements. Moreover, legal pluralism, in most cases, is contrasted with that of legal centralism where value plurality is cursed by silencing or denying their existence in constitutional framework under the belief that recognition to value plurality will have the effect of undermining national unity and consensus¹⁶. According to legal centralist, the best way to bring about effective social change is to make values universal and thereby to have universal legal norms across the nation.

The 1995 FDRE Constitution introduces federalism where, *among others things*, power devolution and plurality are given wide recognition in order to hold the nation, nationalities and peoples together acknowledging the pragmatic value plurality. To reinforce the pragmatic reality of value plurality, the FDRE Constitution, *among other things*, give official recognition to religious and customary dispute resolution mechanism under Articles 34(4 and 5) cum 78(5). The FDRE Constitution under Article 36(2) in verbatim of the CRC states that *[i]n 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*. However, the CRC uses indefinite article "a" whereas the FDRE Constitution utilizes the definite article "the" where the later is inflexible to accommodate profound interests in extreme cases between the interest of the child and other interests. Hence, the under the FDRE Constitution there is no opportunity to deviate to secure other interests than the child at all times and circumstance. Moreover, the Federal Family Code is geared towards the

¹⁴ The Protocol was opened for signature at New York on 19 December 1966 and entered into force on 23 March 1976, in accordance with Article 9.

¹⁵ John Griffith. (1986). What is Legal Pluralism? *Journal of Legal Pluralism*

¹⁶ Brian Z. Tamanaha. (2008). *Understanding Legal Pluralism: Past to Present, Local to Global*. SYDNEY LAW REVIEW. Vol.30

protection and promotion of the right of the child putting culture inferior to the interest of the child.

However, the FDRE Criminal Code, there is a provision implicating the deviance of interest towards other interests in extreme cases under Article 551 where the interest of a conceived child is sacrificed to other interests. Moreover, recently the Federal Cassation Bench has introduced *de facto divorce* where the interest of children can be threatened outside the court allowing culture to regulate the affairs and interest of children. Disciplining children is not prohibited but what is prohibited by the FDRE Constitution is corporal punishment. Yet, due to the fact that the FDRE Constitution follows the process based legal pluralism, where cultural practices are hard to regulate, cultural practices are threatening the interest of the child pragmatically. This is despite the Constitutional Supremacy Clause under Article 9(1) of the FDRE Constitution which outlaws any practice in contradiction to the principles of the Constitution itself. Above this, the FDRE Constitution, in order to better protect human rights, introduces horizontal responsibility as per Article 13(1) where government officials can be accounted for any violations of the human right chapter. And the Constitutional amendment clause is very rigid with respect to human rights which are kept under the impartial tribunal, the judiciary as per Article 105(1) and 78 respectively.

1.6. Summary and Concluding Remarks

Though the concept of cultural norms is difficult to locate and determine in the best interest principle, there are some considerations to be taken by states, children and parents or care-givers. The following important considerations should be taken in the actions for children to secure their best interest.

- Allow and create access of participation of children by states and parents in the formulations of policies, laws or any decisions that can affect children's interest.
- Concession to the right of culture and religion should be evaluated in the light of the best interest upon the personality; mental, physical, moral, spiritual and social development of children.
- Allow and create access of participation of NGOs and other UN special agencies like UNESCO, UNICEF, WHO, UNHCR and ILO for the determination of the child's best interest and culture in their respective areas.
- Ethiopia should introduce a protective mechanism to children to safeguard children from the possible abuse of culture by listing criteria in decision making.

Reference

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2. Laws

African Charter on Rights and Welfare of the Child, 1999

United Nations Convention on the Right of the Child, 1990

Federal Democratic Republic of Ethiopia Constitution Proclamation No. 1/1995

Federal Democratic Republic of Ethiopia Criminal Code Proclamation No. 414/2004

Federal Family Code of Ethiopia Proclamation No.213/2000

3. Cases

- *cassation No. 43988/2003 W/r Saniya Sheh Temam vs. W/r Belaynesh Matebo & Ato Sherif Ahmed)-de facto divorce vs. BIP(it violates the Constitutional Provision on BIC)*
- *Cassation Decision No. 35710/2001(W/r Etsegenet Eshetu vs. Selamawit Nigussie)- BIP- Child Natinael*
- *Hana Williams case(2008-2011)- inter-country adoption (Larry and Carri Williams adoptive parents from Ethiopia). Husband and wife are sentenced to 28 and 37 years of imprisonment respectively. Immanuel, adoptive brother of Hana, was taken by another foster mother, Sheila Jackson.(The Role of the Court in the inter-country adoption should be prominent)- Poor communication networks between the sending and receiving states.*

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