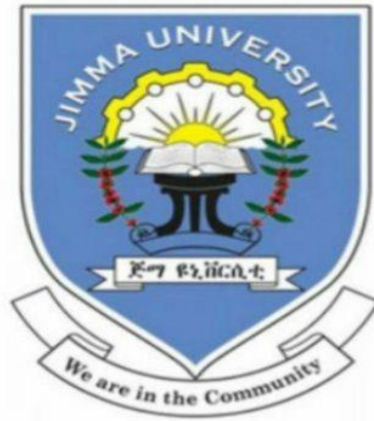


**JIMMA UNIVERSITY**



**COLLEGE OF LAW AND GOVERNANCE**

**SCHOOL OF LAW**

**Cultural and Judicial Practice of “*The Best Interests of the Child*” In the Custody;-a Case Study of Anywaa Ethnic in Gambella Regional State**

**A Thesis Submitted in the Partial Fulfilment of Master’s Degree in  
International Human Rights and Criminal Law (LL.M)**

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**AUGUST, 2024**

**JIMMA, ETHIOPIA**

## **Declaration**

I hereby declare that, this finding which is titled as cultural norms and legal realities: safeguarding the best interests of the child in Gambella regional state, the case study of Anywaa ethnic community, is my original work and has not been made before at any other degree or examination in any other university or in any other institution. And that all the sources I have used or quoted have been indicated and solely acknowledge as complete references.

By: Owiti Oboya Ajer

Signature: \_\_\_\_\_ date: \_\_\_\_\_

Advisor \_\_\_\_\_

Signature \_\_\_\_\_

**APPROVAL SHEET**  
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**HUMAN RIGHTS AND CRIMINAL LAW PROGRAMME**

As thesis research advisor, it is certify that I have read and evaluate this thesis paper under my guidance, by Owiti Oboya entitled cultural and judicial practice of the “*best interests of the child*” in the child custody;-a case study of Anywaa ethnic in Gambella regional state. I recommend that it be submitted as fulfilling the thesis requirement.

Advisor \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

As member of the Board of Examiners the LL.M thesis open defences examination, we certify that we have read and evaluated the thesis prepared by Owiti Oboya. We recommended that the thesis be accepted as fulfilling the requirement for the Master of Law Degree (LL.M).

Chairperson \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

Internal examiner \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

External examiner \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

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## **Abbreviations**

|        |                                                                         |
|--------|-------------------------------------------------------------------------|
| GDRC   | Geneva Declaration on the Rights of Child                               |
| UDHR   | Universal Declaration of Human Rights                                   |
| ICCPR  | International Covenant on Civil and Political Rights                    |
| ICESCR | International Covenant on Economics Social and Cultural Rights          |
| UNCRC  | United Nations Convention on the Rights of Child                        |
| VCLT   | Vienna Convention on the Law of Treaties                                |
| ACRWC  | African Charter on the Rights and Welfare of the Child                  |
| ACERWC | African Committee of the Experts on the Rights and Welfare of the Child |
| FDRE   | Federal Democratic Republic of Ethiopia                                 |
| PDRE   | People Democratic Republic of Ethiopia                                  |
| CvCd   | Civil Code                                                              |
| FRFC   | Federal Revised Family Code                                             |
| EFCC   | Ethiopia Federal Court Cassation                                        |
| GRFC   | Gambella Regional Family Code                                           |
| GFIC   | Gambella First Instance Court                                           |

## **Abstract**

*The principle of the best interests of the child, a cornerstone in United Nations Convention on the Rights of Child (CRC), holds a paramount important when making decision involving children. Despite global cultural norms privileging fathers in family matters, the historical impact of fathers' dominion over children become evident during the aftermath of the world wars. This led to the recognition of the child's best interests as a fundamental principle, prompting the creation of legal instruments such as the Declaration on the Rights of the Child and the subsequent CRC. Despite the acknowledged primacy of the best interest principle, contemporary debates persist. These debates primarily revolve around the clash between the recognition of culture as a human right and the challenge of choosing between legal and culturally rooted decisions for the child's best interests. Additionally, on-going discussions involve the lack of a precise legal definition for the principle, leading to a vague understanding of its true meaning. Lastly, debates encompass qualitative and quantitative determinations in the decision-making process. As Ethiopia is a signatory to the CRC, an analysis of its domestic legislation in the context of international standards is imperative. This study focuses on the Gambella Regional State within Ethiopia, delving into the cultural practices of the Anywaa ethnic community in alignment with human rights instruments. The findings reveal a contradiction between the Anywaa culture and the principles enshrined in legal instruments, resulting in the violation of children's rights under both international and domestic laws, subject to varying interpretations. Employing a combination of doctrinal and non-doctrinal legal research methodologies, the study analyses the qualities of international, regional, and domestic instruments in their recognition of the best interests' principle. Simultaneously, a non-doctrinal approach explores the cultural practices of the Anywaa ethnic community in relation to the law. The research emphasizes the need to re-evaluate and reconstruct cultural norms, promote awareness of harmful traditional practices, and update judicial interpretations aligning with human rights principles. On this basis, it recommends measures such as fostering community awareness, challenging harmful practices, and promoting judicial education for a more rights-oriented interpretation of laws.*

**Keywords:** *principle of the best interests of the child, legal instrument, judicial practice, custody of Anywaa ethnic*

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# Chapter one

## Introduction

### 1.1 Background of the Study

The concept of child's rights that we understand it today is relatively a recent development in legal frameworks at international, regional and domestic level.<sup>1</sup> However, the imperative to afford proper protection to children has deep historical roots, originating from customary practice observed across diverse cultures worldwide. Many of these practices primarily revolved around child custody emphasizing "*the best interests of the child*". At the early times, for example, during feudal Europe, fathers were given primary rights of child's custody in divorce case, considering it as part of their patrimony.<sup>2</sup> This practice was notably prevalent in various European countries such as Holland where the father was perceived as a competent caregiver capable of raising a child in a suitable manner.<sup>3</sup> During this period, fathers enjoyed the presumption of custody unless evidence presented by the wife could demonstrate the husband's unfitness to responsibly care for the child. Ground for challenging the father's custody right included factors like insanity or other compelling reasons that unequivocally indicated the father's incapacity to fulfil child's needs.<sup>4</sup>

The British parliament modified the concept of paternal preference by "*tender year's doctrine*" in 1839.<sup>5</sup> That doctrine stipulated that, those children under seven years of age should not be separated from their mothers. It was based on the premise that, mothers are so important for younger children: due to special natural bond existing between them and the fact that young children are often looked after by their mother.<sup>6</sup> This doctrine was

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<sup>1</sup> U.S. Bureau Of Labor Statistics, History of child labor in the United State-part 2: the reform movement (January 2017); Kaitlyn Sacotte, Brandon Tomlin (...) Luca Brunelli, A History Of Children's Rights: The Evolution Of Global Child Rights (10 November 2023), Springerbriefs In Public Health (Unpublished) Online

<sup>2</sup> Melina, M.B, "Louisiana family law: the visitation of non-custodian parent" (1985), *Tulane law review*, Vol.59, p.489.

<sup>3</sup> Kidist Alemu *Post-Divorce Decision of Child custody in Ethiopia in light of the Best interest of the child* , LL.B thesis, AAU, faculty of law (1997), (unpublished), p. 6.

<sup>4</sup> Ibid, p.11

<sup>5</sup> Aron Degol and Shimelis Dinku, NOTES ON THE PRINCIPLE "BEST INTERESTS OF THE CHILD": MEANING, HISTORY AND ITS PRACTICE UNDER ETHIOPIAN LAW, *Mizan Law Review*, Vol. 5.No.2, December 2011. P.3, para. 4.

<sup>6</sup> Ibid p. 4; Cynthia Mabry, Blending Cultures and Religions: Effect that the Changing Makeup of the Families in our Nation Have on Child Custody Determination, *Journal of the American Academy of matrimonial lawyers*. Vol. 26, 2013. P.4; Debra Gold, The Family Law Review, Cultural Consideration in Custody Litigation in our

subsequently developed by common law countries like U.S.A. through case law in 1900s. This development considered mother as the primary provider for child care due to the fundamental status they have in the child's mind and the natural affection existing between them.<sup>7</sup> That standard later spread throughout European jurisdiction including civil law countries like France. It is this concept of *tender year's doctrine* together with the subsequent adopted practice that led to the development of international concept of "*the best interests of the child*".

The history of children's rights, leading to the creation of human rights instrument at the international standard, is traces back to 1920s, when Eglantyne Jebb founded Save the Children Organisation at the end of the First World War.<sup>8</sup> Jebb drafted what was to become the 1924 Declaration of the Rights of Child/Geneva Declaration that contained a list of five rights.<sup>9</sup> The motivating force for drafting that Declaration was the result of the War, which saw enormous suffering of children. The emphasizing material needs addressed in the Declaration were providing food for hunger, nursing for the sick, due attention for the shelter, and physical and emotional support for the orphans.<sup>10</sup> Preamble of that Declaration encapsulates "*the best interests of the child*" as follows:

By the present declaration of the rights of child, men and women of all Nations, recognising that mankind owe to the child best interests that it has to give, declare and accept as their duty...<sup>11</sup>

This indicated the imperative for the need of protecting the rights of the child by human being irrespective of the sexual status that person has. In such case, nations are fixed as primary duty bearer for implementing children's rights and extending it to individual persons.

After the horror of the World War II, a new international organisation the: -United Nations (UN) adopted in 1959 what is known as the Declaration on the Rights of Child that accorded ten (10) rights to the children. This instrument affirmed the principle of the best interests of the child enshrined in the Geneva Declaration and particularly emphasized the safeguard and

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Diverse Community: *Culture's Role in Custody and Visitation Cases*, Spring (2019), (State Bar of Georgia). P.2.

<sup>7</sup> Supra note 6, p. 7.

<sup>8</sup> Verheellen [2006]

<sup>9</sup> Office of High Commissioner for Human Rights (OHCHR),(2007) legislative history of the convention on the rights of child. Available at: <https://www.ohchr.org/document/publication/legislative/historycrc1en.pdf>

<sup>10</sup> Geneva Declaration on the Rights of the Child (adopted 26 September, 1924, League of Nations) sec 1, 2 § 3.

<sup>11</sup> Ibid Preamble Para. 1.

care of the children. A third paragraph in its preamble provides physical and mental immaturity as basis for requiring special protection and care of for the children that include both before and after birth. Article 2 of this Declaration recognizes “*the best interests of the child*” that:

The child shall enjoy special protection and shall be given opportunities and facilities, by law and by others means, to enable him to develop physical, mentally, morally, spiritually and socially in healthy and normal manner and in condition of freedom and dignity. In the enactment of law for this purpose, “*the best interests of the child* shall be paramount consideration-”.<sup>12</sup> (Emphasis added)

It could be understood that the enactment of 1959 UN Declaration on the Rights of Child is a result of the WWII. Because of this, the devastating impact of the war is perceived as a push factor due to actual suffering faced children’s vulnerability to the situation. Moreover, the physical deficiencies, mental incapability and others incidents were considered as grounds for providing special treatment by anybody who is in a position to take care of the children.

It considers “*the best interests of the child*” as a primary guiding principle for child’s education and guidance.<sup>13</sup> While Declaration established the primacy of the principle, it remained non-binding. This led to the adoption of Convention on the Rights of the Child (CRC) in 1989.<sup>14</sup> Convention recognizes “*the best interests of the child*” as a primary consideration in the same way as the Declaration. This Convention also expands the duty bearers by including public or private, social welfare institutions courts of law, administrative authorities and legislative bodies.<sup>15</sup>

At the regional human rights systems, one finds that African Charter on the Rights and Welfare of Child (ACRWC) which was adopted in 1999.- Article 4 (1) states that: in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.<sup>16</sup>

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<sup>12</sup> Supra note 10, art 2. Para. 2.

<sup>13</sup> Ibid.

<sup>14</sup> Equality and Human Rights Commission (EHCR) (2016) glossary of terms. Available at: <https://www.equalityhumanrights.com/en/secondary-education-resurces/useful-information/glossary-terms> [accessed on January/11/2023]

<sup>15</sup> Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry in to force 2 September 1990, in accordance with article 49. Article 3 (1).

<sup>16</sup> African Charter on the Rights and Welfare of the Child, Adopted by the 26<sup>th</sup> Ordinary Session of the Assembly of Heads of state and Government of the OAU, Addis Ababa, Ethiopia – July 1990, entered in to force on 29 November, 1999.

Under Ethiopian legal system, the first legal framework that recognized the principle of the best interests of the child is the Civil Code of 1960 and replaced by 2000 Revised Family Code. Those domestic instruments clearly designated the notion of the principle in conjunction to international legal regimes. The straightforward and primary authoritative instrument is the FDRE Constitution that recognizes the rights of the child. However, the issue of the child rights is optionally, entrusted to customary court by the Constitution.<sup>17</sup> This kind of prescription has an impact on the principle of “*the best interests of the child*”. Such issue has also a potentials and actual impacts in Gambella regional state to specific area.

As a party to CRC, Ethiopia is expected to follow and apply it throughout its jurisdiction including in Gambella Regional State.

Gambella Regional State is located in south western part of Ethiopia bordering South Sudan with an estimated size of 30,063 square kilometres<sup>18</sup> and population number of 307,096 inhabited<sup>19</sup> comprises by *Anywaa, Mejangier, Opuo, Kumo and Nuer* ethnic groups. According to the current federal form of state structure, the region is divided in to three counties (zones) on the basis of three major ethnic groups: Anywaa zone, Nuer zone and Majang zone. Those three zones are further divided in to thirteenth (13) districts (*woredas*) and one special *woreda* (Itang) that is directly accountable to the Regional State Council. Among those *woredas*, Anywaa zone comprise five *woredas* that account 30,499 population number of *Anywaa* ethnics group with 27 percent of regional portion. This ethnic group/zone is the one with respect to which the researcher chose to conduct the study. The main reason why the researcher chose this area is because this particular zone has experienced great divergence in applying the best interests of the child. On many occasions, it is not uncommon by seeing children often being considered as an object and relegated to other family interests and not given priority when issue of child custody after divorce arises.

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<sup>17</sup> Constitution, *Federal Negarit Gazetta of the Federal Democratic Republic of Ethiopia* (1<sup>st</sup> year No.1, Addis Ababa-21<sup>st</sup> August/1995), art 34(5)

<sup>18</sup> Dereje Feissa, *Playing Different Games in Gambella: the Paradox of Anywaa and Nuer Identification Strategies in Gambella Region*, Ethiopia, (2011). New York, NY: Berghahn Books; Samuel Zewdie, *Refugees and Local Power Dynamics: The case of Gambella Region of Ethiopia*, (Discussion Paper, Nov/25/2021). (German Institute of Development and Sustainability), p.3

<sup>19</sup> Central Statistics Agency, *Population and Housing Census of Ethiopia*, (2007). Gambella Regional State’s Bureau of Finance and Economic Development.

## 1.2 Statement of Problem

The concept of “*the best interests of the child*” remains undefined at international, regional and domestic human rights instruments; leading to on-going debate in academic, administrative and judicial circles. The root of this on-going debate is traced back to cultural consideration where traditionally, fathers were often deemed better suited as marital partner to take care of the child upbringing compared to mothers.<sup>20</sup> The recognition of culture as human rights coupled with lack of precise definition for the best interests of the child, has introduced a risk in determining the proper judgement in this context.<sup>21</sup>

The disputability of this concept under international laws revolves around both quantitative considerations taking in to account other rights and qualitative examination which involves ascertaining the interests of specific right in question for determination of child’s rights. These disputable factors have the potential for both negatives and positive impacts in establishing the best interests of the child. Consequently, the case-by-case determination of the principle manifests its disputability as legal issue that warrants exploration.<sup>22</sup>

From domestic perspective, culture -introduces an additional layer of complexity in assessing the best interests of the child. The challenge lies in deciding whether to select cultural-based considerations or rely on legal instrument to determine the one that best aligns with the principle of best interests of the child.<sup>23</sup> In this vein, it is important to underline that, Ethiopian society in general and that of Gambella Regional State are highly influenced by cultures and traditions. Like others tribes, the Anywaa family exhibits a patriarchal structure with the father holding the dominant authority over all the family members. As a result, children’s interests are often overlooked or disregarded when marriage falls apart. This has the unwanted consequence that most of the Anywaa children whose parents are divorced tend to engage in criminal behaviour and develop abnormal mental status (drug and sexual abuse), and become exposed to social stigma, poverty and lack of access to education.<sup>24</sup> It is because

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<sup>20</sup> Supra note 6, p.7.

<sup>21</sup> Cynthia R. Mabry, Washington and Lee Journal of Civil Rights and Social Justice, the Browning of America-Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child custody Dispute, *Volume 16* (Spring 3-1-2010). P.5. para.2.

<sup>22</sup> Robert Mnookin, in the interest of child advocacy law public policy (1985), (New York: W.H. freemen & Co.) p.17.

<sup>23</sup> Ibid, p.19

<sup>24</sup> Gambella Healthy Bureau, *Statistical Data on Child Health and Rehabilitative Measure* (2017); see also Interview with Oduru Oman, (Gambella Town Prison Administration: Rehabilitation & child abuse officer) (2021).

of this that this research seeks to explore the rationale and consequence of father's privilege over the child custody after divorce as a cultural practical problem. The research specifically intends to evaluate the consequences of such privilege in the development of the children's physical, emotional, mental, economic and spiritual wellbeing. Finally, an analysis of domestic legal gaps and their alignment with human rights laws; -enshrined in both international and regional instruments were conducted. In order to effectively address this complexity, this research makes analysis of the UN Convention on the Rights of the Child (CRC), African Charter on the Rights and Welfare of the Child (ACRWC) as well as provisions of Federal Democratic Republic of Ethiopia (FDRE) Constitution. In this regard, the research focuses on the Article 34(5) of the FDRE Constitution which provides that: this constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particularly shall be determined by law.<sup>25</sup>

Similarly, researcher also examines the contents of Article 113 of 2000 Revised Family Code of F.D.R.E and Article 88 of 2008 Gambella Regional Family Code concerning child custody for determining the compatibility of those with international standard outlined in the CRC.

This is the principal rationale behind the researcher's decision to carry out this study on the ethnic with a view to suggesting solutions to alleviate potential and actual negative cultural impact on the children's growth and their development in the society at large.

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<sup>25</sup> Supra note 18.

## 1.3 Objective of the Research

### 1.3.1 General Objective

The general objective of this research is to elucidate the cultural norms and legal realities influencing the protection of “*the best interests of the child*” within the Anywaa custody affair in Gambella Regional State, one of the constituting members of Ethiopian federation.

### 1.3.2 Specific objectives

- To examine the Ethiopian legal regimes relating to the best interests of the child in the custody in line with international human rights laws.
- To explore and find out the justification behind the father’s privilege to take care of the child’s custody.
- To explore the consequences of selective child’s custody on development and upbringing of the child.
- To analyse the impact of divorce on the ethnic’s children of Anywaa community.

## 1.4 Research questions

The main question this research seeks to address is: how cultural practice concerning custody in Anywaa community impacts the interpretation and application of the “*principle of the best interests of the child*”.- Under this umbrella, the researcher specifically attempts to address the following questions:

- How do international human rights instruments particularly, those related to children’s rights, inform and influence the development and enforce the child custody laws in Ethiopia?
- What are the social consequences of father’s custody privilege on the relationships and interactions of children within the Anywaa community?
- What does cultural norm in divorce matter contributes to the children’s well-being
- How do legal professionals and authorities interpret and apply existing Ethiopian legal frameworks regarding child custody in cases involving the Anywaa ethnic community?
- Are there any observed variations in the implementation of child custody laws within the Anywaa community, if so, what factors contribute to these variations?

## **1.5 Significance of the study**

This study holds paramount significance by providing the reader, policy makers and the concerned ethnic community with profound understanding of the cultural impact of selective custody on the upbringing and development of the children. It aims to sensitize the judicial bodies, inspiring them to prioritize the best interests of the child, and fostering more nuanced approaches aligned with international human rights laws. Additionally, the research contributes to jurisprudential development within the judicial enforcement bodies, offering insight in to reconciling cultural norms with legal frameworks. Ultimately, this study serves as a guiding tool, navigating the intersection of cultural practices, international human rights standard, and legal interpretation ensuring a more informed and rights-oriented approach to child custody decision.

## **1.6 Scope of the study**

This study focuses on Anywaa ethnic group residing in Gambella Regional State. The geographical scope encompasses the entire region, recognizing the cultural practices as inherently tied to the ethnic identity. However, the study was selectively engage with specific remote areas where elder community members could provide with pertinent information, ensuring a representative understanding of cultural norms. Additionally, information was gathered from town inhabitants for a comparative analysis. The study scope also extends to analysing the Ethiopian legal system relating to international human rights instruments aiming to delineate the values attributed by the legal regime to the best interests of the child in the context of both cultural norms and human rights principle, and their impact on the children's well-being.

## **1.7 Limitation of the Study**

The limitation of this study is the failure of conceptual definition and precise meaning of the principle concerned; in legal as well as literatures. This creates critics in certain bodies like, private organisations, legislative authorities and judicial organs to interpret the principle in a manner that contradicts the principal objective of the principle itself. The cultural element provides complexity in assessing what is best for the child.

This study encountered significant hurdles in data collection, particularly due to the reticence of children to divulge information about their circumstances, fearing potential repercussions

regarding their custody situations. Despite the researcher's efforts to create strategies aimed at fostering an open environment conducive to sharing genuine insights, some children opted to present only positive aspects, lacking a neutral standard for assessing the credibility of the research. Moreover, many lacked familiarity with academic findings, complicating the process further. Consequently, the researcher redirected their data collection efforts to the Bureau of Women and Child Affairs. Additionally, security concerns in the Gambella Region restricted the researcher from delving deeper into remote areas to gather comprehensive information as originally intended.

## **1.8 Research Methodology**

### **1.8.1 Approach of the Study**

This research employs a dual approach, integrating both doctrinal and non-doctrinal legal research methods. The doctrinal approach involves evaluating the protective measures for the principle of the best interests of the child within the Ethiopian legal frameworks, focusing on key legislations such as the FDRE Constitution, Revised Family Code, and relevant criminal procedure laws. This assessment extends to a comparison with international and regional legal regimes, scrutinizing their contents, nature, and purposes regarding the best interests of the child. By contrasting the two dimensions, the research aims to identify the more protective legal regime.

The non-doctrinal qualitative legal research approach delves into practical aspects, specifically investigating cultural practices. This phase explores the cultural context, shedding light on the significance attributed to child rights and the rationale behind the selective choice of custody in separated families. This method proves valuable in providing real-world evidence of cultural experiences. Additionally, the study examines judicial judgments, exploring whether decisions are influenced more by cultural practices or legal provisions based on their protective consequences.

### **1.8.2 Data Collection Tools**

The methods of data collection used are focused group discussions, interview and cases review.

The focused group discussion \_ involves both male and female spouses who have experienced divorce. Leading them in group discussions, participants were asked to share

insights into the changes observed in their children's development within their respective custodial arrangements. Questions explored their feelings regarding their children's well-being and experiences in different households. The group setting facilitated diverse perspectives and open expression, enabling comprehensive insights into the reasons guiding their approaches to child upbringing. Elders also participated, offering deeper cultural insights into child custody practices.

Furthermore, individual interviews were conducted with children affected by custody disputes resulting from their parents' divorce. These interviews delved into the children's behaviours in their respective custodial homes, seeking explanations for their actions. Questions explored their emotions, happiness levels, preferences for living arrangements, and justifications for their choices. This method aimed to uncover the unique circumstances and needs of each child, providing valuable insights into the impact of divorce on their lives and perspectives. In addition to this, the Regional Bureau of Child and Woman Affair was also interviewed through head of bureau and director of child about the circumstances they possess as -documentary evidences and because of special job that they have experienced.

Lastly, Gambella Regional First Instance Court was selected, where the review of court cases was made. Such data collection is significant for understanding the way in which the principle of the best interests of child is being understood and interpreted by the court.

### **1.8.3 Sampling and Study Area**

Considering the cultural nature of the research, the study encompasses the entire ethnic group, totalling 30,499 thousand individuals. However, the targeted population consists specifically of elders, divorced individuals (both men and women), and children from divorced families. Non-probability sampling, specifically purposive sampling, was employed due to the cultural context. The sampling involved gathering three to five participants. In that discussion, eleven (11) elders were gathered in case of focused group discussion. Three (3) sessions were organised in a way that: the first one comprised five (5) members who are two men and three women. The second session was made with three (3) women while the last one constituted three (3) men. The reasons of using that number was because, cultural matter is being clearly collected from the elders due to their knowledge and experience they expose.

The interviewees were only six (6) children interviewed separately. For interviews, three children from each woredas were selected. Three (3) children were boys and others were

girls. The rationale behind those limited number of informant is because of the fact that: they fear and failed to provide accurate information about what they were asked for. In that instant, the researcher implicated that, their fear of revealing families' matters and lack of knowledge about the finding might reduce the credibility of the actual data then, the researcher shift the basis of data collection to Regional Bureau of Child and Woman affair.

In terms of the study area, Gambella town was chosen for the review of court cases and practical observation of judicial pronouncements for its cultural significance. For interviews and focused group discussions with elders, two woredas in the Anywaa zone (district), namely Abol and Pinyudo were selected. Each woreda was carefully chosen to ensure a representative portion of the concerned population, allowing for a nuanced understanding of cultural practices in different contexts.

## **1.9 Ethical considerations**

The ethical considerations in this research prioritized individual permissions and relevant authorities.\_ -The researcher sought explicit permission from individuals involved, emphasizing the confidential treatment of collected data. A formal letter from the School of Law of Jimma University was obtained to seek approval from government bodies, NGOs, international organizations, and other relevant administrative entities, as well as individual participants. Throughout the data collection process, the researcher maintained a polite, accurate, and neutral approach to ensure the reliability and credibility of the research. The names of key informants will not be divulged unless exceptional circumstances dictate otherwise.

## **1.10 Structure of the paper**

The research paper is organised in-to four chapters taking into account the nature and purpose of the study. The first chapter offers introduction highlighting the background, objective, methodology of the research. The second chapter provides conceptual and normative frameworks. The third chapter is dedicating on data collection and data analysis. The last chapter contains conclusions and recommendations.

## Chapter Two

### Conceptual and Normative Frameworks of “*the Best Interests of the Child*”

As we have seen in the previous chapter, the conceptual and normative framework governing the principle of the best interests of the child have undergone significant evolution, driven by the imperative to address cultural practice while uphold human rights globally. In the aftermath of the World War II, the establishment of United Nations aimed at ensuring protection of human rights, grounded on the fundamental principles of human dignity. This historical juncture led to creation of crucial International Bills of Human Rights, including Universal Declaration of Human Rights (UDHR)<sup>26</sup> and paired covenants: the International Covenant on Civil and Political Rights (ICCPR)<sup>27</sup> and International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>28</sup> Despite its formal acknowledgement within those international instruments, the dynamic nature of the “*principle of the best interest of the child*”, necessitate continual interpretation. This chapter provides an in depth and nuanced exploration, conducting a comprehensive review of legal instruments and pertinent literature. It seeks to unravel the multifaceted dimensions of this principle, particularly, as it intersects with diverse cultural practices and broader landscape of human rights.

The rationale behind the merger a literature review with legal frameworks under the same chapter is because of the fact that, the human rights instruments haven’t provide the precise definition for the principle. Moreover, literatures also do not provide any clue for determining the principle, but they rely on qualitative and quantitative assessment as the laws provide. In such case, the researcher try to combine them in order to maintain the consistency and precision application and interpretation of laws in light of decisions provided.

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<sup>26</sup> United Nations General Assembly of Universal Declaration Of Human Rights (Adopted 10/December/1948 UNGA Resolution 217 A (III).

<sup>27</sup> International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19/December/1966.

<sup>28</sup> International Covenant on Economic, social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (xxI) of 16 December 1966, entry in to force 3 January 1976, in accordance with article 27.

## 2. Legal frameworks

### 2.1 Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights was drafted and adopted in 1948 by the United Nation General Assembly not out of the intention to create legal obligation on the states member of United Nations but to set international normative standard for protection of Human Rights.<sup>29</sup> Unfortunately, this standard does not covers particular categories of persons like children, women and the likes, but it designates human being in general as a subject of protection. Despite its general terminological recognition of human rights, there are some generic provisions whose interpretation addresses the special protection need of children. For example, Article 25(1) states that, everyone has the right to adequate standard of living for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the rights to security in the event of unemployment, sickness, disability, widowhood, old age or others lack of livelihood in circumstance beyond his control. Sub (2) of the same provision stipulates that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The first sub article underscores the general entitlement of every individual due to their inherent humanity, acknowledging the progression of independent adulthood to dependency during certain circumstance such as childhood. On the other hand, the second Sub-article specifically target children affirming their entitlement to distinct protection in economic, social, cultural, civil and political rights. These protective measures extend to both natural and adopted children within familial settings. From a legal standpoint, the state is obligated to enact legislative measures, as articulated in Article 26(1), to ensure the realization of such care. This includes providing educational facilities for everyone, ensuring free access to elementary education, and mandating technical and professional studies in a compulsory manner. Sub-article (3) grants the parents a freedom to choose the educational path for their children.

In essence, these provisions in the UDHR reflect a dual commitment: one that recognizes *“the principle the best interests of the child”* as a guiding principle and another that

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<sup>29</sup> However, most of the elements of the declaration have obtained a binding effect as a principle of customary international law

emphasizes the state's responsibility in ensuring special care and assistance, particularly, in educational and familial domains.

## **2.2 International Covenant on Civil and Political Rights (ICCPR)**

Similar to the UDHR, the ICCPR does not explicitly prescribe the principle of the best interests of the child. However, it contains some provisions that have direct relevance to the protection of children. One of such provisions is Article 23 (4) of the ICCPR, which declares that: States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any child.

Similarly, Article 24 (1) of the Covenant provides that 'every child shall have, without any discrimination as to race colour, sex, language, religion national or social origin, property or birth, the right to such measure of protection as are require by his status as a minor, on the part of his family, society and the state'.

It should be perceived that the first provision imposes duty on states to provide a mechanism for the spouses to take appropriate step for the care of their children. These provisions offer a direct entitlement in which the consideration of "*child best interests*" is expected primarily during divorce: where the custody of the child becomes an issue. The prescription of discrimination is also crucial for children as it ensures that they are not exposed to factors affecting their growth because of their social, economic or family status. It is instrumental to materialize the principle of best interests of the child.

## **2.3 International Covenant on Economic Social and Cultural Rights (ICESCR)**

Article 10 (1) of the ICESCR states that: the widest possible protection should be accorded to the family which is the natural and fundamental group unit of society, particularly, for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered in to with free consent of intending spouse. Sub-article (2) also provides that special protection should be accorded to the mother for a reasonable period before and after birth, including provision of paid leave or leave with adequate social security benefits. Furthermore, sub-article (3) of the same stipulates that special measure of protection and assistance should be taken on behalf of all children and young person without any

discrimination for reason of percentage or others condition. Specifically, children should be protected from economic exploitation and forcing them to engage in an employment that is harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by the law. The covenant also underscores that States should set age-limit below which the paid employment of child labour should be prohibited and punishable by the law. Article 13 (3) further provides that state parties to the present covenant undertake to have respect for the liberty of the parent and when applicable, legal guardian to choose for their children school, other than those established by public authorities, which conform to such minimum educational standard as may be laid down or approved by state to ensure the moral and religious education of their children in conformity with their own conviction. This provision can be understood in conjunction with article 26 of UDHR as mentioned above of the same prescription. In all those provisions, the *principle of best interests of the child* is the implicit consideration as far as the protection of children is concerned including with regard to the issue of custody.

## **2.4 United Nations Convention on the Rights of Child (UNCRC)**

The Convention on the Rights of Child (CRC) was adopted by the UN General Assembly on November 26/1989. The first draft of convention was in the form of proposal submitted by the Polish government in 1978. The aim was to seek the non-binding 1959 United Nations Declaration on the Rights of Child replaced by binding treaty.<sup>30</sup> As we discussed in the previous chapter, the Declaration on the Rights of Child was the first UN instrument for the protection of child rights. That Declaration recognized the best interests of the child in its Article 2. However, as a result of its non-binding nature, there was a glaring need to the creation of new instrument which lead to –adoption of 1989 Convention on the Rights of Child.

Article 3 (1) of the convention requires that-, in all action concerning children whether undertaken by public or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Sub-article (2) of the same underlines that states parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking in-to account the rights and the duties of his or her parent, legal guardian, or others individual legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. Furthermore,

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<sup>30</sup> Steiner and Philip Alston, *International Human Rights in Context: Law Politics and Moral* (2000), 2<sup>nd</sup> ed., (Oxford University Press), p.512.

sub-article (3) stresses states parties shall ensure that the institutions, services and facilities responsible for the care or protection of the children are in conformity with the standard established by competent authorities, particularly in the areas of safety, health in the number and suitability of their staff as well as competent supervision.

The concept of this provision indicates fundamental and grounding standard for the application of all children's rights under any authority including: states, legal and physical person to be bound by it. It demands any action taken in a manner involving children to be made in a sense that children's preference is the necessary condition for resolving the issue.

The UN Human Rights Committee identified that, Article 3 paragraph-one, is among the four principles of the convention for implementing and interpreting all the rights of child,<sup>31</sup> and its application is dynamic as it requires an assessment that is necessary to the specific context. It also aims to ensure both full as well as effective enjoyment of all the rights recognized in the convention and the holistic development of the child.<sup>32</sup> The committee has also pointed out<sup>33</sup> that 'an adult judgement of the best interests of the child cannot override the duty to respect all the child's rights under the convention.' In such elaboration, it recognizes that there is no hierarchy among those rights mentioned in the convention. The Committee has also underlined that the concept of "*the best interests of the child*" has threefold dimensions: substantive right, fundamental interpretative legal principle and rule of procedure.

A) *Substantive right*: the fact that the principle of best interests of the child is a primary consideration qualifies its substantive character are to be involved so as to reach on the matter at stake, and the guarantee that this right will be implemented whenever decision is to be made concerning child, a group of identified and unidentified children or children in general. Sub-article (1) of Article 3 indicates the substantive nature of the notion creates an intrinsic obligation for and states is directly applicable and should be invoked before the court.

Some specific provisions of the same convention can be assessed to reaffirm this dimension like Article 18 (1), which obliges state parties to ensure the recognition of the principle to be considered by parents and guardian during the upbringing of the child, sub-article (2) and (3)

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<sup>31</sup>Committee on the Rights of the Children: General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).

<sup>32</sup> Committee expect states to interpret development as "holistic concept embracing the child's physical, mental, spiritual, moral psychological, and social development" (General Comment NO. 5 para. 12.

<sup>33</sup> General Comment No. 13 (2011) on the right to protection from all forms of violence, Para. 61.

to ensure institution, facilities and service, Article 21 recognizes the best interests of the child to have a primary consideration for adopted child. Those provisions demonstrate the dimension of substantive nature of the best interests of the children expresses children's preference.

B) *Fundamental, interpretative legal principle*: this means that, if the legal provision is open to more than one interpretation, the interpretation which must serve the best interests of the child should be chosen. Most provisions of UNCRC and its optional protocols are characterized by fundamental, interpretation legal principle.

Additionally, UDHR, ICCPR, ICESCR and other human rights instruments in which the child's privilege is indirectly prioritizes when the issue involves child, constitute fundamental, interpretative legal principle which implicate the protection of the principle. Such texts of the instruments are expressed in vague or ambiguous notion nature.

C) *The rule of procedure*: when the decision is to be made that will affect a specific child, an identified group of children, or children in general, the decision-making process must include an evaluation of possible impacts (positive or negative) of the decision on the child or the concerned children. It also requires justification to be shown for the decision with indication that the right of child has been explicitly taken in-to account. In such a case, the state is expected to explain how the right has been respected, what has been considered to be in the best interest of the child, what criteria it is based on, and how the child's best interests has been weighed against other rights, be the broad issues of policies or individual matter.

This rule provides the method that the decision-maker should fix as an evidence for the effectiveness of the inclusion of the principle. However, such dimension is a guiding rule rather than concrete procedure due to the differences and special characters of individual children, differences circumstances of the cases and differences of matter that to be resolved. In this case, article 23 (4) of the ICCPR, requires consideration of children's protection during divorce case, Article 24 sub-article (2) and (3) of the covenant need registration and acquisition of nationality as part of a procedural rule for the application of child's best interests. Optional Protocol to the Convention on the Rights of the Child also enshrines procedural rules for preserving the best interests of the children. In other words, other human

rights instruments that provide a basis for the implementation and enforcement in certain institutions can flexibly fall under this dimension of best interests of the child.

By contextualizing the application of the principle in custody aspect, here are incidents that need to be examined that reveal the actual or potential impacts either positive or negative connotation. In such case the “definition of child” and the value given to “custody” should be investigated.

Beginning from the definition of child in this convention, Article 1 states that: for the purpose of the present convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 9(1): states parties shall ensure that child shall not be separated from his or her parent against their will, except when competent authority subject to judicial review determine, in accordance with applicable law and procedure, that such separation is necessary for the best interests of the child.

In those provisions, article one is not an absolute in nature, because, it prescribes reductive choice to minimum standard of the child below eighteen years of age. This definition provides a room for domestic legislations to perpetuate the child rights’ violation. Because of this, it needs to be aligned with primary objective of the principle irrespective of its legality by the person that is in authority deciding the custody matter. The last article stipulates in a strict sense that it intends to ensure the effective realisation of the principle recognized under article three within the custody affair. This restrictive guarantee is indicated by an “*exception*” and “*subjection to judicial review*”. The implication behind such restriction shows that, custody is a principal and necessary aspect which covers the vast portion for realisation of the principle comparing to others aspects of children’s rights.

## **2.5 African Charter on the Rights and Welfare of the Child (ACRWC)**

The justification for having a separate Charter on the rights and welfare of the African child include the more elaborate legal regime that should provide a better protection to the African child and the need for an African touch to the overall concept of child’s rights.<sup>34</sup> Some authors believe that the ACRWC has a similar feature as the UNCRC while it has the same differences as its duty on more persons that are in the authorities to decide what is best for the

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<sup>34</sup> Supra note 5, 16.

child.<sup>35</sup> In comparison to UNCRC: Article 4 (1) of ACRWC states that: in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. To reduce it to custody affair, the two consulted provisions have been analysed:

Article 2 underscores that: for the purpose of this charter, a child means every human being below the age of 18 year.

Article 19(1): no child shall be separated from his parent against his will, except when a judicial authority determine in accordance with appropriate law, that such separation is in the best interests of the child.

The definition of child is an absolute, capable of providing positive implication for the effective protection of the best interests of the child in a manner that below the required minimum years of age is not allowed. In case of recognition of the best interests of the child, it provides the living implication on institutions in a sense that: the phrase in ‘all actions’, and those listed ‘*persons*’ are deduced to any ‘*person and authority*’. It does not mention any specific bodies that apply the principle. For this matter the duty to apply the principle rest on every institutions or any other bodies in an illustrative explanation. Scholars also argue that, UNCRC simply require the best interests of the child to be considered while the ACRWC make it a primary and mandatory consideration.<sup>36</sup> Others imminent scholars in field also noted that UNCRC is silent in term of imposing some obligation on state parties while the ACRWC extend its protective scope to such areas like the protection of internally displaced children in Article 23 (4). ACRWC also prohibits the recruitment of child soldiers under the age of 18 whereas the UNCRC sets the age-limit above 15 years.<sup>37</sup> From the area of custody, the restrictive manner is in a sense that “judicial body” is the only authority that determines or entertains the custody matter. While the regional charter entrusts the custody matter to be decided by judicial body alone, it is a biases since it exclude female child from being subject of legal protection.

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<sup>35</sup> Ibid, P.17.

<sup>36</sup> Rachel Muray, *Human Rights in Africa: From The OAU To The AU (2004)* (Cambridge University Press), p.167.

<sup>37</sup> See Article 22 (2) ACRWC and Article 38 (2) and (3) of UNCRC

## **2.6 The Best Interests of the Child,- under the Ethiopian Legal Regime**

The modern Ethiopian legal regime was established in 1931 when the constitution of the Ethiopian empire was enacted. In that constitution, the whole idea of human rights was not recognized. There were also no institutional guarantees for realisation of the expelled provisions in the constitution.<sup>38</sup> The issue of children's rights was also not addressed in the 1955 revised constitution. However, there were provisions that provided protection to the family as it was a basic unit for the source of maintenance and development of the empire.<sup>39</sup> Later, the Ethiopian Civil Code of 1960- stipulated some specific provisions that reflect the idea of "*the best interests of the child*".<sup>40</sup> Article 2 of the Code considers a conceived child as born when his/her interests is so demand. Moreover, Article 805 states that adoption may take place only if there is a good reason which takes the benefits of the child in to account. In case of succession, Article 842 of the Civil Code also renders children of the deceased the first intestate successors and other provisions require annulation of the will of testators if a descendent is born after the making of will and where the descendent accept the succession.<sup>41</sup> It also prescribes the invalidation of a contract if one of party to the contract is a minor.<sup>42</sup> In those major provisions and other interpretative articles, "*the best interests of the child*" is an implicit element. The CVCD is now replaces by Federal Revised Family Code. The main differences that exist between Civil Code and the Revised Family Code centre on the flexibility and nature of the notion of the concept of principle of best interests of the child itself: unlike the Civil Code which entrusts the custody of the child to his/her mother until five years, the Revised Family Code entitles the court to decide on the custody of the child by taking into account the interest of the child.<sup>43</sup> However, the court may revise its decision as it thinks fit due to the change of the circumstance of the custody situation of the child.<sup>44</sup> In case of adoption, the 1960 Civil Code requires the consent of both adopted and adopter for concluding the contract of adoption. The Revised Family Code also requires the court to investigate the capability of the adopter to raise and take care of the adopted child.<sup>45</sup> Moreover, if the adopter is a foreigner; the court may investigate the option of raising the

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<sup>38</sup> See for example, (Chapter 3, Article 18-29 and Chapter 6, Arts. 50-54 of 1931 Constitution)

<sup>39</sup> See Article 48 of 1955 Revised Constitution of Ethiopia.

<sup>40</sup> Tilahun Teshome, "The Child on the Law in Ethiopia: the case of UN Convention on the Right of Child," (1997) *Journal of Ethiopian Law*, Vol. 18, August 1997, p. 43.

<sup>41</sup> See, Art. 904 (1) and (2). Please read the *corrigenda* of the civil code with regard to sub-art 2 of Art. 904.

<sup>42</sup> Ibid, Art. 808 (1)

<sup>43</sup> See Article 681 (2) CvCd and 113 (2) The Revised Family Code (2000): Federal Negarit Gazetta extra ordinary issue No. 1/2000 the Revised Family Code Proclamation No. 213/2000.

<sup>44</sup> Ibid, sub-art (3)

<sup>45</sup> Ibid, Article. 194 (3(c))

child in Ethiopia and seek personal information about the adopter to ensure that s/he will not abuse the child. The court may also require positive recommendation from the authority that has mandate to make follow up about the well-being and life of the child in a foreign country to make sure that the adoption will effectively benefit the adopted child.<sup>46</sup>

The 1974 draft constitution-, incorporated some provisions on the rights of child such as non-discrimination of children born in or out of the wedlock with respect of rights and duties,<sup>47</sup> prohibition of child labour,<sup>48</sup> and parental obligation to get their children at least primary education.<sup>49</sup> Despite the recognition of those specific rights, it did not provide broad protection to children in their detail aspects of life. The Constitution of People's Democratic Republic of Ethiopia (PDRE) which was adopted in 1987 provided the protection of children born in or out of wedlock<sup>50</sup> and compulsory primary education to children.<sup>51</sup>

Speaking of the current legal frame work, the Transitional Government of Ethiopia in 1991 (TGE) established the overarching application of Universal Declaration of Human Rights (UDHR) within Ethiopian jurisdiction. While the UDHR serves as broad instrument, offering general protection, it lacks specific provision for the rights of children. To address this gap, the Federal Democratic Republic of Ethiopia (FDRE) constitution incorporates distinct rights for children, notably, outlined in article 36. Within Article 36, sub-article (2) directly incorporates the verbatim text of the UN Convention on the Rights of the Child, emphasizing the paramount consideration of the best interests of the child. It states that: in all actions concerning children undertaken by Public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. However, the replacement of “or” with “and” by domestic constitution creates contradictory with CRC. CRC stipulate an alternative duty toward anybody that is in authority to apply the principle while FDRE constitution introduces cumulative bodies to apply the principle of the best interests of the child. This seems irrational because, jurisdiction is a matter that entitles one body to decide specifically.

To specific scenario, Article 113(1) of FRFC establishes that, when deciding the dissolution of marriage, also decide as to which spouse shall have custody of the children, care of their

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<sup>46</sup> Supra note, Art. 193 and 194

<sup>47</sup> Art. 30 (3) of the 1974 Draft Constitution.

<sup>48</sup> Supra note 41, Art. 49 (1).

<sup>49</sup> Ibid, Art. 56 (2).

<sup>50</sup> Article 37 (2) of the People Democratic Republic of Ethiopia Constitution, 1987.

<sup>51</sup> Supra note 42, art. 40 (2).

education, health, maintenance and the rights of the parent and the children to visit each other. Sub (2): when deciding the custody, the court shall take into account the income, age, health and condition of the living of the spouses as well as the interest of the child. This incorporation demonstrates Ethiopia's commitment to aligning legal framework with international standard specifically dedicated to children's rights.

Nonetheless, a potential tension arises with article 34 (5) of the constitution which empowers the adjudication of family and personal matters to customary laws. According to this provision, the constitution does not prohibit the resolution of disputes related to personal and family laws in accordance with religious or customary laws. This is permitted as long as all parties involved in the dispute provide their consent as specified by the law.

This dual approach in the constitution raises questions about the potential conflict between internationally recognized children's rights, as outlined in the UN Convention on the Rights of the Child, and the application of customary laws in specific legal matters. Striking a balance between respecting cultural practices and ensuring the protection of children's rights remains a challenge, and it underscores the importance of vigilant legal interpretation and ongoing efforts to harmonize domestic laws with international standards.

In doing this, Article 9(1) of FDRE constitution which states that, any law, customary practice or decision of an organ of state or public official which contravenes the constitution shall be of no effect, should be understood in alignment with Article 13(2) of the FDRE which underscores that: the Fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principle of Universal Declaration of Human Rights, international conventions on Human Rights and international instruments adopted by Ethiopia. In such case, the human rights instruments should be treated as an exclusive from the texts of article 9 of the constitution and be considered in light of article 13(1). This interpretation is internationally presupposed by Vienna convention on the law of treaty; article 27: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. It also reaffirms article 31(1): A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>52</sup>

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<sup>52</sup>Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Francisco Forrest Martin, *International Human Rights and Humanitarian Law*:

Deducing it to specific area, the last legal authority is the Gambella Regional Family Code. Article 88 \_of the code deals with child custody (English text) <sup>53</sup>—

- 1) The court approving the dissolution of the marriage based on the mutual consent of the spouses shall decide the custody of the children that are born in wedlock and in doing so, it shall take in-to account the protection and care of the children, the best interests of the children and their future developments.
- 2) Unless there are conditions that may compel the court to decide otherwise, children who have not yet reached 7 years of age, shall remain in the custody of their mother.<sup>54</sup>

The preceding comprehensive examination of human rights instruments, in international regional and domestic regimes, reveals a consistent recognition and emphasis on the principle of the best interests of the child. This reaffirms the importance of the principle and its crucial role in safeguarding the welfare and development of the children. It specifically implies how crucial does the custody of the child has in ensuring the realisation of the principal objective of the principle of the best interests of the child. Because of this, the researcher intends to delve in to the intricacies of the custody matter within the cultural and legal context of the Anywaa ethnic community of Gambella regional State.

## 2.7 Related Literature Reviews

As we have seen above, the “*principle of best interests of the child*” is recognized both in domestic and international human rights instruments.- Despite such recognition, there is no common accepted meaning or a functional definition to the concept of the best interests of the child principle. The main reason is the prevalence of cultural differences and values existing in the world.<sup>55</sup> However, there are some authors who have attempted to offer some meaning to the concept of best interests of the child. The literature provides qualitative and quantitative (rights based approach) determination of best interests of the child.

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*Principles of Interpretation, TREATIES, CASES and ANALYSIS* (2006), (Cambridge University Press), The Centre for International Human Rights Law. P.48.

<sup>53</sup> The Researcher’s own translation

<sup>54</sup> Gambella Negarit Gazeta of the Gambella Peoples’ National Regional state 1<sup>st</sup> Year No.1 Gambella-5<sup>th</sup> feb. 2008; Nigussie Afesha, Legal and Practical of Child Custody, Visitation and Maintenance: A Case Study in the Former SNNP Regional State, *Mizan Law Review*, Vol. 11, No.2 (December 2017). P.3. para.2.

<sup>55</sup> Philip Alston, “The Best Interest Principle: Toward Reconciliation of Cultures and Human Rights, reconciling cultures and human rights (1994),” *international journal of law, policy and family*, Vol. 8, issue 1. P.4.

### 2.7.1 Qualitative Basis

The qualitative aspect of the principle of best interests of the child is said to have been difficult to discern. In regard to this, James R. Himes observed that:

The challenge of interpreting the best interests of the child principle is complicated by many powerful forces at work in the world: from the poor and conflict-torn societies of Africa to the bewildering legal and ethical concern about technological manipulation of human genes and the human reproductive systems.<sup>56</sup>

It has also been said that the concept is subjective, while its interpretation is a something to be left to the judgement of the authority or organisation that applying it. Robert Mnookin shared this view by stipulating that societies in general lack any clear-cut consensus about the value which should be used to determine what is best for the child.<sup>57</sup> In fact the most common issue of the principle of best interests of the child revolve around the difficulty of fixing the criteria that should be used to examine possible options to act in the best interests of the child. He asserts that:

The choice of criteria is inherently value laden; all too often there is no consensus about what value should inform this choice. These problems are not unique to children's policies, but they are especially acute in this context because children themselves shall not speak for their own interest.<sup>58</sup>

Philip Alston on his part raises the following points regarding the difficulty of having a definite meaning to the principle of the best interests of the child.

... [i]n some highly industrialized countries, the child's best interests are obviously best served by policies that emphasis individuality and autonomy to the greatest possible extent. In more traditional societies, the link between family and local community might be considered to be of paramount importance and the principle that "the best interests of the child shall prevail" will, therefore be interpreted as requiring the sublimation of individual child preference to the interest of family or even the extended family.<sup>59</sup>

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<sup>56</sup> Supra note 1, P.7.

<sup>57</sup> Ibid, p.17.

<sup>58</sup> Supra note 22, p.9.

<sup>59</sup> Supra note p.11.

It is also assured in the case laws that the best interest of the child is determined on the basis of qualitative approach in the case laws. Some decisions reveal it from difference dimensions respectively.

*a) Committee on the Rights of Child*

The qualitative determination of the best interests of the child is supported by some jurisprudential decision. Despite lack of binding effect of UNCRC commentary on the principle, some court like European court of human rights provide binding decision for qualitative basis in make reference to CRC was *E.B v. France*.

An Applicant Lesbian applied for her individual adoption that she is not interested anymore to stay with the woman who adopted her. The application was rejected while she insisted that the reason for her application was based on discriminatory treatment by woman on the basis of sexual orientation infringes on Article 14 in conjunction with Article 8 of European Convention of Human Rights. The respondent claimed that the applicant's reason is invalid instead; she insisted that her application is her ambivalence lack of paternal commitment to her adoption plan. She further argued that the granting of her application by the court will affect her identity which consequently affects the best interests of the child applicant's.

In that case, the court however, ruled by considering child's health in conjunction to sexual orientation by confirming Articles in line with CRC as measure to protect the best interests of the child.<sup>60</sup>

In its General Comments, the UN Committee on the Rights of the Child emphasized that the notion of the best interests of the child is to be understood and applied holistically.<sup>61</sup> However, UNCRC Committee has recently provided general comment for the child involving the child criminal justice system. The main objective of this Comment is to promote the re-integration and rehabilitation of juvenile child to the community. To achieve such objective, certain measures require to be employed: preventing child from early intervention in the

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<sup>60</sup> Anna Juhlin, *The Best Interests of the Child under International Law: The Right to Respect for Private Family Life in the Formation, Multifunctioning and Disruption of a Family*, Department of Master Thesis (2023 Stockholm University).

<sup>61</sup> *Supra* note 30.

proceeding, reducing harmful effect of the proceeding, encouraging use of non-stigmatized language and expanding the non-custodial measures.<sup>62</sup>

*b) African Committee of experts on the Right and welfare of the Child*

The case was brought by the *Centre for Human Rights at University of Pretoria* and *Rencontre African Pour La Defense des Droits de l'Homme* on behalf of 100,000 children aged 4-12 known as (Talibes) against the Senegalese Government. Those students studied in *Doraac School* (one of the qura'anic private school) in Senegal. Summarily, while students are studied, they were forced by their teachers (*Marabouts*) to go to streets for begging in Senegal urban areas while they were sent by their parents for educational reason to study there. As a result, students spent much of their time on begging than in class room. During trial, the government insisted that it had passed criminal law that abandon such kind of practice in schools and made an effort to implement it while it faced many challenges for realising such measures. In that matter, the ACERWC concluded that the failure of government to enforce the law is a violation of Article 5, 11, 14, 15, 21 and 29 of the right to survival and development, education, health, freedom from labour, freedom from sale, trafficking and abduction and protection from harmful practices respectively.<sup>63</sup> The decision of the committee fully explained that all violated articles are surrounding the protection of the best interests of the child under article 4 of ACHWC.

Another case was between *Centre for Reproductive Rights and Legal and Human Rights Centre of Tanzania* against the *United Republic of Tanzania*. The African Committee of Expert on the rights and welfare of the Child heard the case filed by rights organisations against the republic of Tanzania for the systematic discrimination of girl within the country's school system. The case was concerning the expulsion of six Tanzanian school girls from the school for being pregnant. The goal of the action was to end the regressive and discriminatory school policies for Tanzanian female students.<sup>64</sup> The case challenges factors like mandatory pregnancy testing, expulsion of pregnant and married girls, denial of educational post-childbirth, illegal detention of pregnant girls and etc. while the case is yet decide, the major intent expected from ACERWC is to provide decision that protect the principle of the best interests of the child in school's custody.

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<sup>62</sup> General Comment No. 24 (2019) on children's rights in the child justice system.

<sup>63</sup> ACERWC, Senegal in Violation of Rights to Education in Talibes Children Case. (31 may 2015)

<sup>64</sup> Centre for Reproductive Rights: Case Challenging Tanzania's Discriminatory Expulsion of Pregnant Schoolgirls and Others Human Rights Violation, (Nov, 22, 2021).

### c) Ethiopian Federal Courts

The concept of the best interests of the child has also been considered and applied by federal Ethiopian courts, notably, the Federal Supreme court. There are some important cases concerning the principle of the best interests of the child decided in Ethiopian courts.

#### 1. *Ms Tsedale Demissie (applicant) V Mr Kifle Demissie (respondent)*

The case was first initiated before the woreda first instance court of Bonga Keffa Zone involving a dispute over child's custody. Tsedale sought that she is entitled to be guardian and tutor of the minor child because Kifle is unable to take care of the minor child, while Kifle is the child's father. The court ruled by rejecting the applicant's entitlement of taking custody of the child as aunt while minor's father still alive.

The applicant then appealed to the higher court of Keffa Zone and Supreme Court of the former Southern Nations, Nationalities and the People (SNNP). The two courts reaffirmed the same decision ruled by the lower court.

Lastly, the applicant filed the case before Ethiopian Federal Supreme Court Cassation (EFCC) division. After examining the record, the court relied on the principle of the best interests of the child stipulated under Article 3(1) of UNCRC, and Articles 36(2) and 9(4) of FDRE constitution. In that decision, the notion of the best interests of the child was determined in a manner that affords better protection for the child custody.<sup>65</sup>

#### 2. *Mr Francis (applicant) V Mr Duckman vino and Ms Barbot Letitiya (respondents)*

The case was initiated before the Federal First Instance Court (FFIC) of Addis Ababa by applicant against the cancellation of adoption agreement signed with the respondent. The respondent reported change of mind not to adopt the child. The lower court ruled that the respondent's change of mind would not pose a risk to the child.

The applicant then appealed to the higher court while the higher court reaffirmed the decision of the lower court on the basis of the same ground.

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<sup>65</sup> Federal Supreme Court Cassation Division) Case File 23632, judgement 6 November 2007. The Constitution employs the Phrase 'primary consideration' in this sense, it exhibits similar wording with ACRWC and UNCRC.

The applicant later appealed to the EFCC on the ground that the decision of the lower court constituted a fundamental error of law. In that stage, the court ruled that the principle of the best interests of the child should be primary consideration by citing UNCRC, ACRWC and FDRE constitution as ground for determining the case concerning children's rights.<sup>66</sup> In such case, custody was assessed in a sense that the applicant has better status to provide child protection in it upbringing.

From the above cases, it can be inferred that the best interests of the child is applied and conceptualized in a qualitative form because, the need to protect specific right had determined by considering it and the factors contributing for it.

### 2.7.2. Quantitative Approach

The right-based approach is an approach of determining what is best for the child in a given matter. In this approach, some scholars establish that, the best interests of the child must be construed in the light of other rights of the child.<sup>67</sup> It can also be seen in the light of general social welfare, moral, religious and cultural inclination of the parent that may tend to compete with the child's best interests in some situations. There is thus the need to check the compliance of a particular set of values with the rights of the child before using it in the determination of the case at hand. This position is strengthened by the argument that these rights in general are part of the best interests of the child as they are intended to be used in its realisation and to be applied along with the principle.<sup>68</sup> This line of interpreting the best interests of the child in light of rights of the child leads to the conclusion that the standard exceeds the traditional notion of child upbringing which is found in any societies.<sup>69</sup> In other words, the traditional conception may be employed only so long as they are in conformity with other rights of the child. The exact content of the right is to be determined having regard to the socio-economic and others relevant factors involved.<sup>70</sup> This indicates that quantitative

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<sup>66</sup> Solomon Tekele Abegaz, Appraisal of the Ethiopian Federal Supreme Court, Department of Public Law (2016), University of Pretoria, South Africa. Also available at: [https://repository.up.ac.za/bitstream/handle/2263/60149/Abegaz\\_Influence\\_2016.pdf;jsessionid=7CD8ABA7E4871DBEC14CC312B5843C6B?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/60149/Abegaz_Influence_2016.pdf;jsessionid=7CD8ABA7E4871DBEC14CC312B5843C6B?sequence=1) [accessed on march/3/2024]

<sup>67</sup> Michael Freeman and Philip Veerman (ed.) *The Ideology of Children's Rights* (1992), (Dordrecht: Martinus Nijhoff publishers), p.24.

<sup>68</sup> Supra note p.4.

<sup>69</sup> Kidist Alemu supra note 3, p.12.

<sup>70</sup> P.M. Bromely and N.V. Lowe *Bromely's family law* 7<sup>th</sup> ed (1987). (London: Butterworths), p.317.

approach is a matter of policy consideration which has no valuable standard for decision maker in individual child's matter.<sup>71</sup> In this case, this study focused deeply on qualitative.

In summary, despite formal recognition of the principle of best interests of the child by domestic, regional and international legal instruments, literature and case laws reveal that there is no binding criteria or content attached to it. As a result, assessing what is best for the child can be fixed based on *case-by-case* basis from either of the two approaches depending on particular context of a given reality.

The exploration of custody affairs within the Anywaa ethnic community was approached with a keen focus on three distinct aspects derived from the human rights instruments: international, regional, and domestic. These aspects serve as lenses through which the researcher has analysed and interpreted the data concerning child custody within the cultural and legal realities of the Anywaa community.

The research aims to unravel the intersections between cultural practices and legal norms in the context of child custody. By applying the principles enshrined in the aforementioned human rights instruments, the researcher seeks to identify areas of alignment, potential conflicts, and areas where protective measures for the best interests of the child may be strengthened. This analysis intends to discern which aspects of the international, regional, and domestic legal frameworks provide the most robust protection for the principle of the best interests of the child, especially within the specific context of child custody in the Anywaa ethnic community in the Gambella Regional State.

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<sup>71</sup> Josimar Antonio Alcantara mendes, *the Best Interests of the Child: an integrative review of literature* (August 2017, University of Oxford)

## CHAPTER THREE

### 3. Data Collection and Data Analysis of the Child's Custody Protection

#### Introduction

It has been recalled that the main objective of this study is to elucidate the cultural norms and legal realities in safeguarding “*the best interests of the child*” of Anywaa ethnic community. In order to achieve this general objective, the researcher employed focused group discussion, interview and review of court cases as principal tools to gather information concerning the cultural practice in concerned ethnic community. In using those tools, one aspect of information that need to be collected is the justification for giving the-father a privilege to take care of the child custody and to explore the consequences on the children.

#### 3.1 The Justification for Father's Privilege to Take Care of the Child

##### Custody

The Anywaa cultural practice is unique from other ethnic groups in Gambella Regional State since it is one of the Luo's sub-family. Because of its uniqueness, their marriage is pre-mediated by exchange of means for its conclusion and celebration. Those dowries (bride price) are mainly called *dimuuy*.<sup>72</sup> They are paid by the male's family to the female's family. Upon paying those dowries, the male will take the female as his wife and the whole affair of the couple's family will be considered as the responsibilities of the husband including children and parents' properties.

It should be highlighted that the wife has her own share in the management of the family. ,\_ A woman partner is under responsibility to take care all domestic errands including *cooking* food, grinding maize or sorghum, washing husband's clothes as well as children and all other domestic activities. Yet the wife is perceived as incapable of owning the children because of her purported inability to upbringing the child in a productive manner in custody without the assistance from the father, due to the wrong stereotype that she is physically weak.<sup>73</sup> Because of this factor, woman is understood as member of family simply without being considered as an owner of family's affairs like the way husband is understood in the society.

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<sup>72</sup> Opiew Owar, Head of Elders, explains ‘something resembles to silver that can be wearied and put on the neck having two hundred units roped once in the same rope’ (Abol District, 21 December 2023).

<sup>73</sup> Appolo Nyigwo Ojulu, Participant of Focused group Discussion, (Pinyudo Town, Gog District, 17 September 2023)

The husband, he is primary dominant in which the higher responsibilities of the family rest on him that include, bringing food at home either through cultivating or buying, building family houses and fence, caring for the health issues and all others matters which promote the continuity of family. Because of such higher responsibilities he assumes and the bride prices he paid as a means of exchange to obtain his wife, he is entitled to the ownership of children in the family setting.<sup>74</sup> This perception of the wife as holder of children: while father as an owner is called *dak*.<sup>75</sup> The condition for the conclusion and celebration of marriage and the cultural division of responsibilities of both partners in family affairs also make the issue of the custody the prerogative of the father. The father having primary ownership over the children and whatever the issue is raised pertaining to the child, he retains the right to have the first say on custody of the child.

From the aspect of the law, it is clear from the constitution and other laws that the best interests of the child should be given primary consideration in any matter concerning children. It should be recalled that Article 36(2) of the FDRE constitution is an affirmation the provisions of UNCRC by declaring that:

In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration should be the best interests of the child.

With specifically regarding to the custody of the child, Article 113 (1) of Federal Revised Family Code stipulates that:

The court shall, when deciding, the dissolution of marriage, also decide as to which spouse shall have custody of children, care of their education, health, maintenance and the rights of parent and the children to visited each other.

Sub (2) of the same provision also provides that:- when giving decision under sub-art (1), the court shall take in to account the income, age, health and condition of living of the spouses as well as the age and interest of the children.

The same stipulation is reaffirmed by article 88 (1) \_of Gambella Regional State’s Family Code, which provides that:-

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<sup>74</sup> Akwatta Didumo Omod, Focused Group Discussion Participant, (Pinyudo town, Gog District, 20 September 2023)

<sup>75</sup> Supra note, 66, ‘One of the Anywaa proverb that explain that woman is a pot where the beverage can be prepared and distilled while the hotel owner is the one who put it in the pot’.

The court overseeing or approving the dissolution of a marriage based on mutual consent shall determine the custody of children born within the marriage. In doing so, the court shall consider the protection and care of the children, prioritizing their best interests and future development.

All the above-cited provisions provide guarantee the protection of children based on the principle of the best interests of the child in general and specifically, concerning their custody. However, there is a clear disparity between the cultural practice of the Anywaa ethnic group and the protection provided in international human rights instruments and the domestic legislations. The cultural norms focus on protecting the interest of father while the law prioritizes the best interests of the child dictated by the concept of human dignity and wellbeing of the child. As a result, it may be submitted that the cultural practice of exclusively relinquishing matters of child custody to the father is incompatible with the human rights standard set out in the law.

### **3.2 Consequences of selective custodies**

There are two aspects of children's custody in this paper where the best interests of the child become an issue. Those two aspects of custody are: custody as a result of divorce and custody due to lack of cohabitation of spouses because of some differences existing between the couple. Despite the existence of those two forms, the researcher has primarily considered the custody as a result of divorce case due to the fact that their consequences converge to the same results.

#### **Custody as a result of divorce**

The discussion surrounding custody in divorce cases has revealed a prevailing normative cultural basis favouring fathers as the privileged recipients of child custody. This preference has given rise to discernible consequences. Specifically, when the child in question is a girl, she tends to assume a disproportionately heavy burden of domestic responsibilities within the family, irrespective of whether her father remarried. Access to financial resources for basic needs, such as clothing, becomes contingent on her direct requests to her father, fostering a sense of dependency and inferiority. This lack of financial autonomy contributes to feelings of neglect and inadequacy within the custodial arrangement. Consequently, seeking to escape this perceived constraint, the girl often resorts to initiating relationships with males, seeing it as a pathway to marriage—an institution synonymous with attaining status, freedom, and

independence. This critical juncture introduces the possibility of the girl facing one of three distinct consequences.<sup>76</sup>

- 1) **Sexual exploitation and health risks:** in case of girl she becomes involved in prostitution. As a result, she faces a heightened vulnerability to Sexually Transmitted Diseases (STDs), including HIV/AIDS. The lack of responsible custody plays a role in this vulnerability, as proper upbringing is essential in preventing such risky behaviour.
- 2) **Early marriage as an alternative:** In some cases, early marriage becomes a consequence of the father's custody. This scenario may unfold if the girl decides not to undergo an abortion. The prospect of marriage is seen as an opportunity for her to transition away from an indecent lifestyle, with the expectation that the person who impregnated her will assume the role of a responsible husband by providing immediate dowries.
- 3) **Drug abuse:** Another potential outcome of inadequate custody is the girl turning to substance abuse. Many individuals in similar situations resort to using drugs, often influenced by environments where alcohol consumption is prevalent. Seeking solace in bars, where males are easily accessible, becomes a coping mechanism. While the initial intention may not be alcohol consumption, the chaotic circumstances can lead to engaging with males in the hope of forming future spousal connection.

Those three consequences that children face result in to social impacts: exclusion through stigma leading to psychological impact like schizophrenia (mental disorganisation) on the children who are in this coverage of societal area in the society is one among the prevailing consequences in the community.

Some children might try their best not to engage in any of those activities. However, while the financial problem could force them to interrupt their education, this has leads to high level of illiteracy rate of the children. There was evidence revealed by the data gathered in 2022 by United Nations Children Emergency Fund (UNICEF) in cooperation with the Gambella Regional Bureau of Children and Women Affairs. In that data, 4% of girls dropped from high

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<sup>76</sup> Interview with Ochar Obuul Ochar, director of child affair, *Bureau Of Child and Woman Affair* (Gambella Regional Bureau of Child and Women Affair, 22 December 2023)

schools as a result of lack of school support from the custody they lived. By evaluating that data, all of those who dropped from the schools are children who are within custody of their father's household whose family were divorced. This is a prevailing reality exacerbating poverty which certainly has long term impact on economic situation of the community.<sup>77</sup>

In the case of boys, distinct behavioural patterns emerge, notably involving theft as a prevalent practice. Unlike the consequences faced by girls due to inadequate custody post-divorce, boys engaging in criminal activities, particularly theft, are often influenced by different circumstances. Strikingly, this behaviour is observed not only among boys with divorced parents but also among those whose parents cohabit as spouses.<sup>78</sup>

The prevalence of this immoral lifestyle, primarily characterized by theft, has become a persistent issue in Gambella town, affecting a significant number of boys over the years. The consequences of this behaviour extend beyond theft, eventually leading to more serious criminal activities such as robbery and even public hangings, often carried out openly in broad daylight within the town. This alarming trend poses a severe threat to social stability, the survival of communities, and the continuity of social justice, primarily fuelled by male children within the town.<sup>79</sup>

The rise of criminal activities, including hangings and robberies, over the past three years in Gambella town has prompted regional executive bodies to face mounting pressure from ethnic communities. In response, formal administrative measures are being considered to address and alleviate this issue at a regional standard.<sup>80</sup>

The unique consequences of the lack of reasonable care for children in their custodies by parents manifest in some ways while in divorced parents in most cases among boys. Some of these consequences include the emergence of street boys prone to drug abuse, disobedience to fathers and other family members, and an increased vulnerability to HIV/AIDS infection. These behavioural patterns underscore the urgent need for comprehensive strategies and interventions to ensure the proper care and upbringing of boys, mitigating the social,

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<sup>77</sup> Supra note, 70.

<sup>78</sup> Supra note, 77.

<sup>79</sup> Ibid

<sup>80</sup> Interview with Kirimisi Lero Ogwol, Cabinet Regional Head of Bureau of Child and Woman Affair (Gambella Regional Bureau of Child and Woman Affair 2 January 2024), Conference in Gog District about the Displacement of Cultural Integrity from Honour to immoral value organized by ethnic's elders on 21 February 2021

psychological and health-related risks associated with their involvement in criminal activities.<sup>81</sup>

All are the consequences of father's privilege to take care the upbringing of the child as a result of spousal divorces in the ethnic community.

### **Non-cohabitants parents**

Non-cohabitation of spouses within the Anywaa society can arise from various differences stemming from the current life situations influenced by global changes, economic shifts, trade dynamics or other natural factors that result in human suffering. A primary contributor to this lack of cohabitation is the social security capability that would otherwise enhance the standard of living. In such instances, it is observed that male partners may choose to leave their female counterparts and relocate elsewhere, while the wife remains at a specific residence, shouldering the responsibility of caring for the children alone. This situation contributes to increases the suffering of the mother, particularly in terms of providing for the children. Those include,

The repercussions extend beyond the economic realm, impacting psychological well-being, social dynamics, exacerbating poverty levels, influencing the overall economic situation, and affecting the spiritual well-being of both male and female children, as well as the mothers within the domestic family; Notable hindrance in accessing educational opportunities and healthcare facilities within certain custodial arrangements.

Female partner, left to navigate the challenges alone, may develop negative perceptions about her husband's behaviour. This includes feelings of neglect towards her and the children, a sense of irresponsibility on the part of the father, and a perceived rejection of the children by their father. These negative perceptions, in turn, foster feelings of hatred and hopelessness among the children, potentially leading them toward unlawful behaviours as they grapple with the emotional and social implications of their family situation.<sup>82</sup>

All are the problem faced by children in their custodial domestic family that they live in Anywaa cultural norm in their way of life.

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<sup>81</sup> Focused Group Discussion with divorced males and females, (23 November/ 2023) pinyudo village of Gog district.

<sup>82</sup> Supra note 75.

### 3.3 Judicial Application of the Principle “*the Best Interests of the Child*”

The Anywaa cultural norm regarding custody matters persists as an absolute practice, unaffected by the global movement towards understanding human rights and freedom. Despite the increasing recognition of these concepts on the global stage and in various world cultures, the prevailing force of ethnic’s believe and positive attitude for their cultural norms have prevented any child custody issues from being brought before the courts within their ethnic community. Interestingly, however, courts have dealt with numerous cases involving child custody brought forward by residents from other ethnic backgrounds.

Within the legal framework of the Federal Democratic Republic of Ethiopia (FDRE) constitution, the principle of the best interests of the child is explicitly prescribed, reaffirming the texts of the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). While these legal documents do not provide a specific definition of the best interests of the child, they emphasize its flexible application by the legal authorities empowered to make decisions.

Notably, the Gambella Regional First Instance Court (GRFIC) interprets the principle of the best interests of the child as a "choice of the child".<sup>83</sup> Some of the cases in which they applied the best interests of the child in such understanding are:

#### **Civil case- File No.01946/2015 E .C**

< The defendant had abandoned his wife and child\_-while he started to live with a new wife, then the former wife brought the child support case against the defendant. However, the defendant raised a counter-claim to take the custody of the child by living with them together in his new household >.<sup>84</sup>

#### **Civil case- File No.01935/2015 E.C**

<< The child support case was filed by the plaintiff following the defendant’s failure to provide child support to his children after the dissolution of the marriage in 2013

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<sup>83</sup> Interview with Ojulu Okello, President of GRFIC, (Gambella Town, 2 Nov 2023).

<sup>84</sup> *Mrs. Adanech Tufa V. Mr. Mohammed Molla* [2023] Civil Case- File No. 01946/2015 E.C (GFIC Elisabeth Tilahun)

E.C. However, the defendant raised a counter-claim to take the custody of the child >>.<sup>85</sup>

In those two cases, court gave ruling to the issues presented by the parties by applying the principle -of the best interests of the child. The court offered the children the option by to choose one of their parents they wished- to live with- once the children were above seven years of age.

However, it is important to underline that the principle of the best interests of the child is necessarily not the “choice of the child”, but, it is a consideration by decision maker of who appreciates which parent is able to provide better care for the child by considering many factors for the upbringing of the child.<sup>86</sup>

It has investigated that; here are only two cases that the practice of Gambella Regional First Instance Court is reviewed about a way it applies and interprets the principle. The ground for those two cases only is because, the president of the GRFIC was interviewed about the application and interpretation of the concept of the “*the principle of the best interests of the child*” in his interview, he affirmed the manner in which the cases are decided about custody.

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<sup>85</sup> Mrs. Abebaye Getahun V. Mr. Debebe Demissie [2023] Civil Case- File No. 01935/2015 E.C (GFIC Adanech Mekonen)

<sup>86</sup> Cf Article 36(2) of FDRE, Article 113 (2) of Revised Family Code of Federal proclamation and Article 88 (1) of GPNRS/ Family Code.

## **Chapter Four**

### **4. Conclusions and Recommendations**

#### **4.1 Conclusions**

This thesis meticulously explored the intricate relationship between the cultural norms of Anywaa ethnic community and legal realities influencing the application of the best interests of the child principle in child's custody in Gambella Regional State. The study scrutinized the legal concept of the principle referring to international, regional and domestic frameworks such as UNCRC, ACRWC and FDRE Constitution and FRFC proclamation. The absence of precise definition for the best interests of the child across these frameworks has sparked debates on whether to interpret it qualitatively or quantitatively. The cultural norm recognizes as a facet of human rights, has contributed to a discourse on a cultural rights versus human rights, especially when certain cultural practices contradict human dignity. In the context of the Anywaa cultural practice, the researcher identified a potential threat to realising the human rights of the child best interests in custody matters, giving the prevailing privilege of fathers in custody arrangements. The debate over whether to apply a qualitative or quantitative approach and whether to prioritize cultural practices or legal human rights instruments adds flexibility to the determination of this principle.

Despite the intention to apply the best interests of the child principle in Ethiopia, the dominance of cultural practices in the Anywaa ethnic community complicates its implementation. Disputes over children's rights have reached the courts in Gambella Town, where the court has interpreted the principle as the "choice of the child" central to the dispute. While the UNCRC allows domestic laws to set minimum age limits below eighteen, the ACRWC establishes an absolute age limit below which no deviations are allowed, indicating a more protective measure. Domestic legal instruments, however, permit harmful traditional practices that impede the application of the principle, as the constitution allows disputes to be adjudicated based on customary laws. The interpretation of the FDRE Constitution must align with the Universal Declaration of Human Rights and the Vienna Convention on the Law of Treaties to ensure the protection of the rights in question.

## **4.2 Recommendations**

### **For the Anywaa Ethnic Community**

Based on this finding, the researcher recommends the following to be considered by Anywaa ethnic community in this cultural norm:

- The Regional government and ethnic elders should engage in discussion to find suitable solution for the upbringing children in the custody.
- Justification and reconstruction of dowry payment (dimuuy) should be explored.
- Children should be distinguished from paid prices emphasizing their inherent value.
- Future child's development should be prioritized, considering social relations, economic status, educational accessibility, health, morality, mental and emotional well-being and spiritual growth.
- Encourage the ethnic community to bring their cases concerning children before court.

### **For Effective Legal Implementation:**

- Emphasize a flexible and holistic understanding of the best interests of the child principle.
- Empower judges to analyse and interpret the principle in accordance of its objectives by considering social, psychological or well-being of the child.
- Sensitizing judges by consulting international human rights instruments that favours child's preference in selecting custody.
- Encourage the judge to rely on jurisprudential implementation of the best interest of the child that ensures better development of child in the custody.

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2. *Ms Tsedale Demissie (applicant) V Mr Kifle Demissie (respondent)* (EFCC March 2006). Also available at: [https://repository.up.ac.za/bitstream/handle/2263/60149/Abegaz\\_Influence\\_2016.pdf;jsessionid=7CD8ABA7E4871DBEC14CC312B5843C6B?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/60149/Abegaz_Influence_2016.pdf;jsessionid=7CD8ABA7E4871DBEC14CC312B5843C6B?sequence=1) [accessed on March/3/2024]
3. Equality and Human Rights Commission (EHCR) (2016) glossary of terms. Available at: <https://www.equalityhumanrights.com/en/secondary-education-resources/useful-information/glossary-terms> [accessed on January/11/2023]
4. ACERWC: *Covid-19 and its Implication on Children's Rights and Welfare- Guiding Note to Member States of the African Union*, (Done on 08 April 2020). The Document is available at: <http://en.unesco.org/covid19/educationresponse/solutions>.

#### V. Legislations

##### a) International Instruments

1. Geneva Declaration on the Rights of Child (adopted 26 September, 1924, League of Nations
3. Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
4. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)
5. International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1966
6. International Covenant on Economic, social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (xxI) of 16 December 1966, entry in to force 3 January 1976
7. Convention on the rights of child (1989)
8. African Charter on the Rights and Welfare of the Child [1999]

##### b) Domestic Instruments

1. Constitution, *federal negarit gazetta of the federal democratic republic of Ethiopia* (1<sup>st</sup> year No.1, Addis Ababa-21<sup>st</sup> August/1995)
2. Draft Criminal Law procedure and Evidence code, Article 371 (1)

3. Gambella Negarit Gazeta of the Gambella Peoples' National Regional state 1<sup>st</sup> Year No.1 Gambella-5<sup>th</sup> feb 2008.
4. The 1974 Draft Constitution Art 30 (3)
5. The People Democratic Republic of Ethiopia Constitution 1987, Article 37 (2)
6. The Revised Family Code (2000): Federal Negarit Gazetta extra ordinary issue No. 1/2000 the Revised Family Code Proclamation No. 213/2000

## **VI. General Comments**

1. However, most of the elements of the declaration have obtained a binding effect as a principle of customary international law.
2. Committee expect states to interpret development as “holistic concept embracing the child’s physical, mental, spiritual, moral psychological, and social development” (General Comment NO. 5 para. 12.
3. General Comment No. 13 (2011) on the right to protection from all forms of violence, Para.
4. Committee on the Rights of the Children: General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).
5. General Comment No. 24 (2019) on children’s rights in the child justice system

## **VII. Cases**

1. Centre for Reproductive Rights: Case Challenging Tanzania’s Discriminatory Expulsion of Pregnant Schoolgirls and Others Human Rights Violation, (Nov, 22, 2021).
2. Federal Supreme Court Cassation Division) Case File 23632, judgement 6 November 2007. The Constitution employs the Phrase ‘primary consideration’ in this sense, it exhibits similar wording with ACRWC and UNCRC.
3. *Mr Francis* (applicant) V *Mr Duckman vino and Ms Barbot Letitiya* (respondents) (EFCC...)
4. *Mrs. Abebaye Getahun V. Mr. Debebe Demissie* [2023] Civil Case- File No. 01935/2015 E.C (GFIC Adanech Mekonen)
5. *Mrs. Adanech Tufa V. Mr. Mohammed Molla* [2023] Civil Case- File No. 01946/2015 E.C (GFIC Elisabeth Tilahun)

6. *Ms Tsedale Demissie (applicant) V Mr Kifle Demissie (respondent)* (EFCC March 2006).

## **VIII. Others**

1. Central Statistics Agency, (2007), Population and housing and housing census of Ethiopia. Gambella Regional State's bureau of Finance and Economic Development
2. Gambella Healthy Bureau (2017), *statistical data on child health and rehabilitative measure*; see also interview with Oduru Oman (Gambella town Prison Administration: Rehabilitation and child abuse officer 11 January 2021)
3. The researcher's own translation

## **Appendix**

### **A. Focused Group Discussion**

1. Appolo Nyigwo Ojulu, Participant of Focused Group Discussion, (Pinyudo Town, Gog District, 17 September 2023)
2. Akwatta Didumo Omod, Focused Group Discussion Participant, (Pinyudo town, Gog District, 20 September 2023)

## **Interview**

1. Interview with Ojulu Okello, President of GRFIC, (Gambella Town, 2 Nov 2023)
2. Opiew Owar, Head of Elders explains 'something resembles to silver that can be wearied and put on the neck having two hundred units roped once in the same rope' (Abol District, 21 December 2023); 'One of the Anyuak proverb that explain that woman is a pot where the beverage can be prepared and distilled while the hotel owner is the one who put it in the pot'
3. Interview with Ochar Obuul Ochar, director of child affair, *Bureau Of Child and Woman Affair* (Gambella Regional Bureau of Child and Women Affair, 22 December 2023)
4. Interview with Kirmis Lero Ogwol, Cabinet Regional Head of Bureau of Child and Woman Affair (Gambella Regional Bureau of Child and Women Affair, 2 January 2024), Conference in Gog worda about the Displacement of Cultural Integrity from honour to immoral value organized by Ethnic Elders on 21 February 2021