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SCHOOL OF LAW

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**Title: Adequacy of Revised Family code in Establishing Paternity of
child born Out of Legally Recognized Relation.**

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Declaration

I declare that this thesis, entitled The Adequacy of Revised Family code in establishing paternity of child born out of legal recognized relation. Which I am submitting for the award of the degree of bachelor of laws (LL.B) is my research work carried under the guidance of Mr. Endalamaw chekol (LL.B,LL.M), Wolkite University. Ideas and expressions borrowed from other authors and materials are duly acknowledged and properly cited. I further declare that, this thesis, whole or in part, has not previously formed the basis for the award of any degree, diploma or other similar titles

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List of Abbreviation

CRC_____ Convention on the Right of the child

FDRE_____ Federal Democratic Republic of Ethiopia

RFC_____ Revised Family Code

UNCRC_____ United Nation Convention on the Right of the child

Abstract

The right to paternity are protected under international convention on the right of child and FDRE constitution and FDRE revised family code as well. According to the convention on the right of child, every child has the right to paternity without discrimination of any kind irrespective of child parents race, color, sex,origin.The purpose of this thesis is to examine by the ways of establishing paternity of child under federal revised family code incase whether the child born out of marriage and irregular . The researcher by using a qualitative data through a doctrinal method, analyzed whether the provision federal revised family code contradict each other. moreover, this thesis aims at shows inadequacy of revised family code in establishing paternity of child born outside legal recognized relationship and inconsistency of federal revised family code with the FDRE constitution and convention of the right of child.

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The paternity right of child is one of basic rights of child that recognized at international level by the Convention on the Rights of the Child, which is adopted by United Nation General Assembly. According to this convention, every child has the right to paternity without discrimination of any kind, irrespective of the child's parent's race, color, sex, origin, birth, language, political, ethnic or social origin property, disability, and other status.¹ This aimed at ensuring the applicability of principle of non-discrimination in so far as children concerned.

The recognition of the right by international community by stipulating the right to paternity in the CRC with a view to safeguarding the full and harmonious development of the child's mental, psychological and physical personality he/she should grow up in family environment in atmosphere of happiness, love and understanding. It was added that the child by reason of his/her both physical and mental immaturity, needs special care and assistance which is the primary responsibility of parents including appropriate legal protection. CRC states: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'²

The FDRE Constitution, which is the supreme law of the land, provides that, every child has the right to know and be cared by his/her parents.³ It also mentions that children

¹ Convention on the Rights of the Child(1990) , Art. 2

² Id. Art 3

³Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proclamation No.1, Fed. Neg.Gaz. 1st Year, No.1,Art 36(1)c

whether born in wedlock or out of wedlock, the same rights shall be granted and no discrimination between children based on that status.⁴

The Federal Revised Family Code recognized three modes of establishment of paternity.⁵ The first mode is the presumption of paternity. It is applicable to children born from legally recognized relationships such as marriage and irregular union.⁶ The second mode is acknowledgement of paternity. It is a voluntary declaration of paternity. This voluntary declaration of paternity can be used to establish paternal filiation if paternity is not possible to establish using the presumptions of paternity.⁷ The last mode is a judicial declaration of paternity. Under this mode of establishment of paternity, a child who does not have a father either through the operation of the presumption of paternity or by acknowledgement can have a father only if the court declares a certain man to be his father.

The court makes such declaration where it is satisfied that one of the grounds which justify judicial declaration of paternity is found.⁸ The above three modes of ascertainment of paternity are mutual exclusive and exhaustive at the same time. To elaborate the idea, they are exclusive in a sense that, the other two modes of ascertaining paternity will not be resorted, unless the first mode is proved to be impossible. At the same time, the third mode of establishing paternity will not be preferred, up until the second mode of establishing paternity is founded to be impossible. Should the paternity of child is ascertained, through presumption, the other two mode of ascertaining paternity would become rendered unnecessary. The exclusiveness of the three mode of paternity can be understood from phrase “Where, after applying the preceding Articles” as inserted under article 131 and Art.143 of the RFC which stipulates that when the father of the child is not determined by applying the provisions of the preceding articles, the paternal filiation of a

⁴ Id. Art 36(4)

⁵ FDRE Revised Family Code of 2000, Fed. Neg. Gaz No1/2000, Article 125

⁶ Aschalew Ashagrie & Martha Belete, Family Law Teaching Material, 2009, p 164

⁷ Id , p 172

⁸ Id, p 180

child may be established by acknowledgement of paternity and judicial declaration respectively⁹

Furthermore, the three mode of Establishing Paternity in general and the ways of acquiring paternity through judicial declaration in particular are Exhaustive as provided under article 125 and 145 of revised family respectively. The exhaustiveness nature of this mode can be inferred from the word “may” which is inserted under sub articles of article of 125 of Ethiopian revised family code. Thus, in no way certain child can have paternal filiation other than those mode listed under article 125 of RFC.¹⁰ The exhaustiveness of ways of acquiring paternity through judicial declaration is clearly provide under article 145 of RFC. Therefore, at least one conditions specified under art, 143 must be fulfilled for a child to have paternity through judicial declaration¹¹.

Nevertheless, the requirements listed under art 143 of RFC are something incongruent with the reality. Among other things, the article requires continues sexual relationships between man and woman for the occurrence of pregnancy, albeit continuous sexual intercourse is not must for fertilization to takes place. Still, it fail to come up with solution incase certain woman is being raped two or more persons within legally presumed period of pregnancy and the mother the could decisively prove that she had sexual relationships with another man within presumed period of pregnancy. Not only these, the code stipulate the presumed period within which certain child has to born, So that he would have father and that period is from 180-300 days. The code proceed to fix these minimum and maximum days without saying nothing about the fate of the child who born outside this period. Contrary to the presumption of code, however, there is a situation whereby a child born before or after the aforementioned period. Thus, this unlucky child will not be benefited from the presumption and he is going to lose his father as a result.

However, even though the judicial declaration of paternity was recognized as one mode of ascertainment of paternity, its application has been excluded by article 107 (2) of the Federal Revised Family Code, provided that the child born out of wedlock and hence, it

⁹FDRE Revised Family Code,cited above at note 5,Article 143 and 131

¹⁰Id. Art 125

¹¹ Id. Art 143

contradict with article 143 of the same code which clearly underscore that, the child can have paternity through judicial declaration, whenever the requirement provided under the same article is complied with. Thus, while the main aim of article 143 is to become shelter for a child who born outside legally recognized relationships, Article 107 incidentally exclude the application of judicial declaration of paternity on a child born outside legally recognized relationships.

1.2 Statement of the problem

The right of paternity is protected under international convention and FDRE Constitution and under federal revised family code as well.. The federal revised family code exhaustively list three mode of ascertainment of paternity (paternal filiation) under Art 125. The first mode is the legal presumption of paternity. It is applicable if a child was conceived or born within a marriage or within an irregular union, the law presumes that the husband is the father. The second mode is acknowledgement it occurs when a man comes forward with a declaration that a certain child (be it already born or just merely conceived) is his own. The last mode is judicial declarations, if the child who does not have a father either presumption and acknowledgment a judicial declaration of paternity may be ascertained through a court declaration if the mother has been raped, has fallen victim “to seduction accompanied by abuse of authority, promise of marriage or any other similar act of intentional deception. Paternity may also be ascertained through judicial declaration if documents are discovered that are authored by the person claimed to be the father which “unequivocally prove” paternity, or the person claimed to be the father was involved with the mother in a “continuous sexual relation” even if there was not any legally recognized. The court make such declaration when the exhaustive condition of art 143 of RFC is fulfilled. However, there is a situation whereby child may born out of legally recognized relationship under revised Family code and became fatherless as a result. Infact, for a child who born outside legally recognized relationships we do have acknowledgment and judicial declaration of paternity respectively. Among them, judicial declaration of paternity is the most important one in ascertaining paternity, since mans are always feel reluctant in declaring themselves as father of certain child. However, certain child will not have paternity through judicial declaration, unless conditions listed under art.143 is fulfilled. Be that as it may, however those conditions are far from recognizing

reality and stringent enough to be complied with. Due to this, certain children are obliged to remain without having their natural father. To threaten those conditions differently, a child may be conceived without the existence of continuous sexual intercourse outside a legally recognized relationship. One day sexual intercourse may give rise to birth, unlike a judicial declaration of paternity which requires a continuous sexual intercourse for a child to have paternity through a judicial declaration. Apart from this, within a judicial declaration of paternity there may be a situation whereby a certain woman may be raped by two men within a legally presumed period of pregnancy. In such a case, ascertaining the paternity of a child may be impossible and a child may remain without having paternal filiation. Still, there is a possibility of fatherlessness under RFC in case a child is born outside the period of pregnancy which is provided by the code. So this research paper tries to analyze whether the provision of RFC is adequate to ascertain the paternity of a child born outside a legally recognized relationship. It also attempts to show inconsistency between provisions of RFC on one hand, and provisions of RFC and FDRE, CRC on the other hand.

1.3 Research Questions

This senior thesis answers the following major research questions;

- Whether article 107 of the Federal Revised Family Code is contradicted with article 36 of FDRE Constitution?
- Whether there are impediments of a child to have his/her father in a relationship not recognized by law and possibility of fatherlessness according to the Federal Revised Family Code?
- Whether the Revised Family Code is adequate or not in establishing the paternity of a child born outside a legally recognized relationship?

1.4 Objective of the Study

1.4.1 General objectives

The main objective of this thesis is to analyze whether the provision of the Federal Revised Family Code is compatible with the FDRE Constitution which is the supreme law of the land and with the Convention on the Rights of the Child which is ratified by Ethiopia, with regard to the establishment of the paternity right of children.

1.4.2 Specific objectives

The specific objectives of this thesis;

- To analyze whether Art 107(2) of Federal Revised Family Code is amicable with Art 36 FDRE Constitution and Convention on the Rights of the Child
- To proof weather Revised Family code is adequate or not.
- To analysis whether there are impediments for child to have his/her father and possibility of fatherlessness under the Federal Revised Family Code where born out of legally recognized relation.

1.5 Literature Review

The FDRE Constitution under Art, 36 provides that every child has the right to name and know and be cared by his her father. The Federal Revised Family Code also found this right by provided three modes of establishment of paternity to enforce the constitutional guarantee of the right to paternity. However Art 107(2) of RFC excludes the application of judicial declaration of paternity on one hand and it discriminate between children born of legally recognized relation and out of legally recognized relation on the other hand. Since, it discriminate between children born of legally recognized and out of legally recognized relation, it contradicts with the constitution and CRC.

Mehari Redae tried to discuss on the issue of ascertainment paternity under Federal Revised Family Code.¹² In his book he discussed possibility of fatherlessness of child born out of legally recognized relation. However, he failed to raise inconsistence between Art 107(2) of Federal Revised Family Code and Art 36 of FDRE Constitution.

Aschalew Ashagrie& Martha Belete, writers of Family Law Teaching Material, discussed three modes of establishment of paternity under Federal Revised Family Code. However, they failed to raise the discrimination between children born of relation recognized and out of relation not recognized by law. The writers had not risen whether Art 107(2) excludes application of judicial declaration of paternity or not.

Generally, this thesis unique and sought to fill gaps that mentioned above. The study be conducted to sought solution to the problem that left untouched by the above scholars

¹²MehariRedae, YeteshashalewnYebetesebHigLemegenzebYemireduAndiAndi Netiboch,2002, p 8

1.6 Significance of the Study

The thesis give some hints to the future researchers for further analysis. It can also help the potential claimants to argue in certain possible ways for their rights. Furthermore, it can be used for the concerned body to make necessary measures to rectify the inconsistency. so as to comply the Federal Revised Family Code with the FDRE Constitution and with CRC which ratified by Ethiopia.

1.7 Research Methodology

This research is a doctrinal research. It has employed qualitative data which are collected from primary and secondary sources. The researcher used some relevant laws regulating paternity, as primary sources such as FDRE constitution, Convention of the Rights on the Child, FDRE Constitution, Federal Revised Family Code, Civil Code of 1965, Regional family laws. Books, articles, journals, researches and the internet sources were also used as secondary sources. The researcher analyzed the collected data using explanatory and logical reasoning method of analysis because the data collected by the researcher is qualitative data which doesn't involve the generation of data in terms of numbers, which can be subjected to procedural quantitative analysis. The research has also complied with data usage and collection ethics by duly acknowledging all sources used and citing them in the reference.

1.8 The scope of the study

The scope of this research is limited to analysis of federal law, and convention.

1.9 Limitation of the study

It is obvious that preparing research paper could not be free from some challenges from those, time constraints one of the major problem in the conducting this research as there is studying for exit exam, final exam and doing research come together and unfortunately in this year the period given for preparing research is too short unlike previous years. Beside shortage of time lack of sufficient publication on this area were the other limitation of the study.

1.10 Organization of the Study

This senior thesis has four chapters .The first chapter is a proposal part. The second chapter deals with the definition, commencement and end of childhood and the ways of the establishment of paternity under RFC. Chapter three deals analysis of the Revised Family Code on the establishment of the paternity bond in relations other than marriage and irregular union. The conclusion and recommendation part are provided under the last chapter.

CHAPTER TWO

PATERNITY RIGHT OF CHILD

2.1 INTRODUCTION

The Paternity is legal fatherhood and its one of the most important step in the child support process. Establishing paternity will benefit the child, the father and the entire family. This chapter contains two parts. The first part is the commencement and end of childhood. The second part is ways of establishment of paternity under Federal Revised Family Code.

Determining paternal filiations is difficult, because it is not easy to exactly know who the biological father of the child is. Hence, the law has provided certain important modes of establishment of paternity. Because, these modes are very much relevant particularly from the view point of the rights of the child, due attention has been given to them.¹³ Under Ethiopian Law, paternity (paternal filiation) may be ascertained through three ways those are Legal Presumption; Acknowledgement; and judicial declaration. Under this chapter we will discuss in detail.

2.2 Definition of childhood

Childhood is understood in very different ways in different contexts. Childhood is a social and cultural construction, not merely a stage in physical and psychological development. The Convention on the Rights of the Child (hereinafter the “CRC” or “the Convention”) defines “child” as every human being below the age of eighteen years.¹⁴

The term “child” is not specifically defined under Ethiopian law. Instead, Ethiopian laws make use of such terms as “minors”, “infant”, “young workers” or “young persons”. Chapter Twelve of the Revised Family Code deals with minors. The Revised Family Code defines a “minor” as a person of either sex who has not attained the full age of eighteen years old.¹⁵ So we can say the majority age of our country is 18 years.

¹³ Aschalew Ashagrie Martha Belete, cited above at note 6, p. 157

¹⁴ Convention on the Rights of the Child, cited above at note 1, Art 1

¹⁵ FDRE Revised Family Code, cited above at note 5, Art (215)

2.3 The Constitutional Principles on Children's Rights

All children, whether born in or out of wedlock, shall apply the same social protection, this entitles every person the socio economic right that are important for his life and wellbeing. In particular, children are entitled to get special care from the law and society. There are four constitutional principles mentioned in the Convention on the Rights of the Child (CRC). These are first principle of non-discrimination, second principle of best of child, third the right to identity fourth, the right to maintenance.

2.3.1 The Principle of Non-Discrimination

Article 2 – an overarching principle of the Convention – prohibits “discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”¹⁶

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.¹⁷

The principle of non-discrimination enshrined under the CRC needs to be read in conjunction with other instruments affirming the same protection.¹⁸ The obligation to respect implies the negative duty to refrain from any actions detrimental to the rights of children, whereas the obligation to “ensure” implies affirmative obligations to enable individual children to enjoy and exercise the rights enshrined in the Convention.¹⁹ In a similar vein, the FDRE Constitution provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The provision goes on to state that, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status.”²⁰ Moreover, the Revised Constitutions of Regional States prohibit any form of

¹⁶ Convention on the Rights of the Child, cited above at note 1, art 2(1)

¹⁷ Id, art 2(2)

¹⁸ International Covenant on Civil and Political Rights (1966).art.2, 26 and 24(1).

²⁰ FDRE Constitution, cited above at note 3, Article 25

discrimination on the basis of race, nation, nationality or other social origin and color and other prohibited grounds. And also art 36(4) of FDRE constitution provides that “children born out of wedlock shall have the same right as children born of wedlock. Therefore, children born out of wedlock shall have the same right with children born in wedlock.

2.3.2 The Principle of the Best Interests of the Child

The criteria used to determine what is in a child's best interests must be carefully examined, along with the question of who decides what is in a child's best interests, to ensure they do not constitute age-based, or any other form of, discrimination, and that they take into account children's evolving capacities²¹. The Best Interests of the Child are determined by a variety of individual circumstances, such as the age, gender, level of maturity and experiences of the child. Other factors also determine well-being, such as the presence or absence of parents, the quality of the relationships between the child and their family or caregivers, the physical and psychosocial situation of the child and their protection situation (security, protection risks, etc.). The interpretation and application of the best interest's principle must conform to the CRC and other international legal norms, as well as to the guidance provided by the Committee on the Rights of the Child.²² The principle of the best interests of the child is derived from Article 3, paragraph 1 of the CRC, which gives the child the right to have their best interests assessed and taken into account as a primary consideration in all actions or decisions that concern them, both in the public and private sphere: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”²³ The best interests' principle applies to all children without discrimination. This means that it applies whether children are citizens of a State, foreign nationals (including asylum-

²¹ Guide to non-discrimination and the CRC (2020),p.37

²² UNCHR Best interest of child procedure guideline(2021),p.39

²³Convention on the Rights of the Child, cited above at note 1, Art 3

seekers or refugees) or stateless. The principle also applies whether children are with their family members or are unaccompanied or separated.²⁴

Article 36 of the FDRE Constitution is devoted to the protection of the rights and welfare of children.²⁵ In all acts by public and private welfare institutions, courts of law, administrative authorities or legislative bodies concerning children, the primary consideration should be the child's best interest.²⁶ The Revised Family Code (2000) article incorporated the principle of the best interest of the child in 194(2) which states that: 'Before approving the agreement of adoption, the court shall decisively verify that the adoption is to the best interest of the child'. The best interest principle is also mentioned in the same code in relation to disagreement between a father and mother. Article 266(2) decrees that the court shall decide in the child's best interest, and article 312(2) explains that the court may decide to emancipate the child if it is in the child's best interest.²⁷

2.3.3 The right to maintenance

Article 6(2) of CRC declares that state parties shall ensure to the maximum extent possible the survival and development of the child. Similarly article 27(1) of CRC requires contracting states to recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. In any event, Article 27(2) of the convention specifies that the child's parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. Article 27(4) of the convention on the right of the child provides that;

State Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, State Parties shall promote the accession to international agreements or the conclusion of such

²⁴ Ibid

²⁵ The FDRE Constitution, cited above at note 3, art. 36.

²⁶ Id. art. 36(2).

²⁷ FDRE Revised Family Code, cited above at note 5, Arts. 194(2), 266(22) & 312(2).

agreements, as well as the making of other appropriate arrangements. In Ethiopia children rights matters are covered by laws scattered in different laws such as the FDRE Constitution, RFC, the Criminal Code, the Labor Proclamation, other laws and international instruments ratified by Ethiopia. Ethiopia is signatory to many international human rights instruments which address issues of children, including the CRC acceded on 14 May 1991 and it was proclaimed by Parliament on 19 January 1992, the ACRWC on 4 July 2004, the Convention on the Rights of Persons with Disabilities (CRPD) on 7 July 2010, International labor organization (ILO) Conventions No. 182 on the Elimination of the Worst Forms of Child Labor, and No.138 on Minimum Age of Employment. Since Ethiopia has ratified these international human rights instruments, it is obligatory to enforce these rights of children mentioned under those international instruments. Article 36 of the Constitution is exclusively devoted to the various aspects of child rights protections that are in harmony with the international human rights obligations Ethiopia is a party. According to article 36(1) (c) of the FDRE constitution, every child has the right to know and be cared for by his or her parents or legal guardians. This means both parents are responsible for the upbringing of the child and they have to give maintenance for their children. In addition to this the child's right to survival and development is enshrined in the Constitution in terms of access to food, health care, education and leisure. The right to get maintenance for a child is dealt with the RFC articles 219 and 220 provide that both parents have the responsibility for the proper upbringing of their children. The obligation to supply maintenance is a typical example of legal obligation. Therefore, those persons identified by law to discharge such obligation are bound to meet their obligations irrespective of their consent.

2.3.4 The Right of the Child to Identity

Article 8 of the CRC assures the rights of children to identity and to have their identity preserved, and where necessary re-established. The provision covers three elements of identity including nationality, name and family relations. These rights of children are also enrolled in the International Convention on the Protection of All Persons from Enforced Disappearance adopted in 2006. Any legislation, which prevents children from assuming the nationality of their parents, is likely to be incompatible with the CRC. For instance, this is a situation likely to occur in countries, which prohibit dual nationality.

Article 9(4) of the CRC obligates States Parties to inform children and parents of the whereabouts of each other if the State has had responsibility for their separation through, for example, imprisonment, deportation and death.²⁸ Accordingly, Ethiopian laws have detailed rules concerning ascertainment of paternity and maternity. The Revised Family Code stipulates that the maternal filiation is ascertained from the sole fact that the woman has given birth to the child.²⁹ On the other hand, the Code provides that paternal filiation can be ascertained through different ways. To begin with, paternal filiation flows from the maternal filiation when a relationship recognized by the law has existed between the mother and a certain man at the time of the conception or the birth of the child.³⁰ Secondly, paternal filiation may also result from an acknowledgement of paternity made by the father of the child.²⁰⁰ Thirdly, paternal filiation may also result from a judicial declaration.³¹ Thirdly, paternal filiation may also result from a judicial declaration.³² These provisions are of utmost importance for the protection of the rights of children to know the identity of their birth parents.

The Revised Family Code stipulates that the adopted child shall retain his or her bonds with the family of origin.³³ The Code goes on to provide that this also applies to the spouse and descendants of the adopted child.³⁴

2.4 The Establishment of Paternity under Federal Revised Family Code

In Ethiopia, whether a child is born in or out of wedlock is legally inconsequential. Paternity may be ascertained through legal presumption, acknowledgement or judicial declaration. A marriage contract between parents of a child does not in itself establish paternity.

2.4.1 Paternal filiations

Establishing both maternal and paternal filiations is important, among other things, to protect the

²⁸ Hodgkin and Newell, *Implementation Of Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF, Geneva, 2007) p. 116

²⁹ FDRE Revised Family Code, cited above at note 5, Article 124

³⁰ Id., Article 125(1)

³¹ Id., Article 125(2)

³² Id., Article 125(3)

³³ Id., Article 183(1)

³⁴ Id., Article 183(2)

rights of the child.³⁵ Ascertaining mother of the child is less difficult than ascertaining the father

of the child.³⁶

Under Ethiopian Law, paternity (paternal filiation) may be ascertained through:

1. Legal Presumption of paternity
2. Acknowledgement; or
3. Judicial declaration.

Adoption is also one way through which children get artificial paternity which will be discussed.

2.4.1.1 Legal presumption of paternity

This is the first mode of ascertaining paternity which is provided under RFC (Arts.126-130). Logically, paternity ought to result from the begetting of a child by a certain man. But, there is a problem in determining biological paternity. If a child was conceived or born within a marriage or within an irregular union.³⁷ The law presumes that the husband is the father.³⁸ Accordingly, paternal filiation is established if at the time of conception or birth of the child the mother had relations provided by law with certain man. Only children born or conceived within such relationship could benefit from the presumption of paternity.³⁹ According to Art.126 and 130 of the RFC the relationship capable of ascertaining the presumption for the purpose of establishing paternal filiations are marriage and irregular union.

The second element of presumption is birth or conception within the legally provided union. Art.126 of the RFC provides that” a child conceived or born in wedlock has the husband as a father. “By the same token “a child conceived or born during an irregular

³⁵ Aschalew Ashagrie & Martha Belete, cited above at note 6, p 138

³⁶ Ibid

³⁷ FDRE Revised Family Code, cited above at note 5, Art.198

³⁸ Id. art. 126

³⁹ Aschalew Ashagrie & Martha Belete, cited above at note 6, p 139

union has as father the man engaged in such union, according to Art. 130 of the same code⁴⁰ Duration of pregnancy is strictly limited under the Ethiopia family law and can be used as a test.

for paternity. “A child shall be deemed to have been conceived in wedlock if it is born more than

180 days after the celebration of marriage and less than 300 days, after its dissolution and no proof shall be admitted against the presumption.⁴¹ Ethiopia gives the presumption of paternity a wider scope. In Ethiopia, irregular union is seen on equal footing with marriage in respect to the presumption of paternity both under the 1960 Civil Code and the current Family Laws.

As far as children born in a wedlock is concerned, there are strong reasons to justify the presumption. Most of the time, it is possible to maintain that a child born in marriage is the child of the husband because of the duties of cohabitation and fidelity. But the presumption in Ethiopia equally applies to irregular union. This invites the question whether or not, the duties in the marriage bond also apply to irregular union.⁴²

To shed light on the matter briefly; let us take a woman who remarried before the end of her period of widowhood as provided under Article 16(1) of the revised family code. Here there is a possibility that the woman may have conceived during the former marriage as well as the next one in cases where the woman remarries before the lapse of time indicated. If we apply time of conception it might not be possible to determine in which of the marriages the child has been conceived unless the mother discloses the matter. One will therefore be with uncertainty if we apply the wordings that attribute the paternity of the child to the husband or the man who lives with the mother at the time of conception in preference to the husband or the man who lives with the mother at the time of birth of the child. To avoid such uncertainty however, it is advisable to apply that which attributes the paternity of the child to the husband or the man with whom the mother is living at the

⁴⁰FDRE Revised Family Code, cited above at note 5, Art, 130

⁴¹ Id. Art, 128

⁴² Aschalew Ashagrie & Martha Belete, cited above at note 6, p 178

time of birth in preference to the husband or the man with whom she is living at the time of the conception.

2.4.1.2 Acknowledgement of Paternity

Acknowledgement occurs when a man comes forward with a declaration that a certain child (be it already born or just merely conceived) is his own. A declaration may be made before an officer of civil status, by a will or by a document filed before a competent authority. Because the law prescribes a particular formality for establishing paternity through acknowledgement, the mere act of marrying a woman who has children does not amount to an acknowledgement of paternity. To establish paternity, the man must express his intention. An acknowledgement cannot be inferred.⁴³

Acknowledgement of filiation under our law is possible only by the father of the child. Acknowledgement is a personal act by which the acknowledger declares that the child is his son or daughter. Since it is a personal act, any one can not make the acknowledgment for the father as he pleases, except in cases provided by law. The law does not require any capacity from the putative father by whom the acknowledgment is to be made. The law recognizes the acknowledgement made by a minor, or by a person subject to judicial interdiction or in his name by a legal representative with the permission of the court upon the death of the father or when he is not in a position of manifesting his will, the acknowledgement of paternity is to be effected in his name by one of his/her parents.⁴⁴

Acknowledgement of paternity may be effected by the mother of the child provided that it has been made on well founded ground father.⁴⁵ if the mother of the child is dead or is not in a position of manifesting her will, the acknowledgement of paternity may be made by the maternal grand father or grand mother of the child and in default of maternal grand parents, it may be accepted by another maternal ascendant or by the guardian of the judicially interdicted person.⁴⁶ Any one other than those exhaustively enumerated can effect acknowledgement or if so happens will be to no avail.

⁴³ FDRE Revised family code, cited above at note 5, art 132

⁴⁴ Id.art 1

⁴⁵ Id. Art 136 (1)

⁴⁶ Id. Art 136

2.4.1.3 judicial Declaration

When paternity of the child can not be established by the application of the articles and materials indicated earlier i.e. where the child does not have a presumptive father attached to as marriage or an irregular union (Article 126, Article 130(1)) or self acknowledged father (Article 131), the paternity of the child may be established by a judicial declaration of paternity incase when the requirement of the following article are fulfilled.

Art.143 of the RFC, for instance, provides that: :

(a) In the case where the mother has been the victim of abduction or rape at the time of the conception of the child.

(b) In the case where at the time of the conception of the child, the mother has been the victim of seduction accompanied by abuse of authority, promise of marriage, or any other similar act of intentional deception.

(c) In the case where there exists letters or other documents written by the claimed father which unequivocally proves paternity.

(d) In the case where the claimed father and mother of the child have lived together in continuous sexual relation, without having a legally recognized union in the period regarded by law as the period of pregnancy.

(e) In the case where the person claimed to be the father of the child participated in the maintenance, care and education of the child in the capacity of a father.

Despite the above grounds of establishing paternity by judicial declaration, an action brought for declaration of paternity shall be of no effect where the conditions enumerated under Art.145 of the RFC are proved to exist.

(a) In case where the mother of the child had sexual relationship with another man in the period regarded by law as the period of pregnancy unless it is proved by medical or other reliable evidence that such man is not the father of the child.

(b) In case where the claimed person could not be the father of the child because he was absent or has been a victim of accident during the period regarded by law as the period of pregnancy.

(c) In case where the person claimed to be the father of the child decisively proves by blood examination or other reliable evidence that he could not be the father of the child.\

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2.4.1.4 Adoption

Adoption is the creation of parent-child relationship by judicial order between two parties who usually are unrelated.⁴⁷ Planiol defines the concept as: A solemn contract which creates relation between two persons analogous and those flowing from legitimate filiation/⁴⁸

Under Ethiopian law, filiation is a grouping of persons based on blood relationship. Adoption is, therefore, acceptance of the rules of filiation in which such relationship is created artificially.⁴⁹

⁴⁷ Black's Law Dictionary, 8th edition, 2004, p. 52

⁴⁸ Aschalew Ashagrie & Martha Belete, cited above at note 6, p.

⁴⁹ Aschalew Ashagrie & Martha Belete, cited above at note 6, p 224.

In general, adoption is a way of home finding to children who have lost their natural parents by death, desertion, or their misconduct, and in a secondary degree for children whose parents are unable or unwilling to maintain them. And it is the practice of absorbing a child into a family that a child is not born into and giving it the legal rights and duties of a child that is naturally born to the adoptive parents.⁵⁰

Article 36(5) of the FDRE Constitution also affirms that the state shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education. The Ethiopia Civil Code defines “adoption as a bond of filiations created artificially by a contract of adoption between the adopter and the adopted child”.⁵¹ The RFC followed the same. An adopted child shall, for all purposes, be deemed to be the child of the adopter.⁵² In case of succession its equal right with natural born child. Because adoption establishes an artificial filiation, the provisions of the Civil Code dealing with succession both intestate and testate do apply to the adopted child. However, there is no provision under our law which permits or prohibits an adopted child from inheriting his natural parents. But we can raise here two arguments. First the child is considered as a child naturally born into the family of the adoptive parents, he forfeits the right of inheriting his natural parents, for Art. 836 says “adopted children shall be assimilated to the other children in case of succession.” The other argument is, as the adopted child shall retain his bonds with his family of origin, if so his right to inherit is not in jeopardy as his relation isn’t dissolved. However, there is no a provision in the Civil Code which prohibits the adopted child from inheriting his natural parents. With regard to the inheritance of the property of the adopted child, it is the family of adoption that is the ascendants, descendants and collaterals of the adoptive parents who have the right to inherit. Since Art. 183(3) of the RFC states that, ‘wherever a choice has to be made between the family of adoption and the family of origin, the family of adoption shall prevail.’⁵³

⁵⁰ *ibid*

⁵¹ Civil code of the Empire of Ethiopia, proclamation No. 165, Art ,796(1),1960, Fed.Neg.Gaz,year 19,No.2

⁵²FDRE Revised Family Code,cited above at note 5 , Art 181

⁵³ *Id*, p, 229

Adoptive parents are duty-bound to support and care for the adopted child. Since the adopted child has an equal right as a naturally born child, it is also incorporated in both the FDRE Constitution and UN Convention on the Rights of the Child that the child is entitled to acquire care of his/her guardian. Hence, the mother and father are during their marriage jointly guardians and tutors of their minor children. The guardians or tutors of a child are duty bound to exercise different functions related to different needs as to residence, health, education, social contacts and correspondence, and income, etc. of the child. And the parents are responsible to maintain the child and give all the necessary material support within their capacity.⁵⁴

In return for support and care, a child who is capable, has reciprocal duty to give maintenance to his adoptive parents. As expressly put under Art. 198 of the RFC an obligation to supply and maintenance exists between relatives by consanguinity or affinity in the direct line and between brothers and sisters. However, the adopted child, his spouse and his descendants may not claim maintenance from the family of origin of the adopted child unless the adoptive family isn't in a position to supply such maintenance. They aren't also bound to supply maintenance to ascendants of the family of origin unless the latter can't claim maintenance from another member of their family. With regard to obligation to supply maintenance to natural parents, there is no provision which obliges or prohibits. So it is at the discretion of the parties to supply maintenance or not.⁵⁵

2.5 conclusion

The children right to know his/her parents are recognized under UN Convention on Right of Child and also under FDRE Constitution. Childhood is understood in very different ways in different context. Childhood is a social and cultural construction, not merely a stage in physical and psychological development. The convention on the of child (CRC) defines child as every human being below age of eighteen years. The definition of child is not specifically defined under Ethiopian law, Ethiopian laws make use of such terms as “minors”, “infant”. “Young workers” or “young persons”. Chapter Twelve of the Revised Family Code deals with minors. The Revised Family Code defines a “minor” as a person

⁵⁴ Id, p,130

⁵⁵ ibid

of either sex who has not attained the full age of eighteen years old. Based on the Revised Family Code and Family Codes adopted by other Regional States in Ethiopia, it is possible to assert that the general age of majority in the country is 18 years. The FDRE Constitution stipulates important provision on the rights of children. The Constitution devotes special section specifying rights pertaining to children solely. In particular, Article 36(1) (c) of the Constitution incorporates every child has right to know and be cared for by his or her parents or legal guardians. Therefore, the FDRE Constitution recognizes the rights of children to life, to name and nationality, and to know and be cared for by his or her parents. Under Ethiopian Law, paternity (paternal filiation) may be ascertained through three ways those are (1) presumption of paternity, 2 Acknowledgement and 3, judicial declaration. The first occur If a child was conceived or born within a marriage or within an irregular union , the law presumes that the husband is the father. The second is occurs when a man comes forward with a declaration that a certain child (be it already born or just merely conceived) is his own. The third is judicial declaration Under this mode of establishment of paternity, a child which does not have a father either through the operation of the presumption of paternity or by acknowledgment can have a father only if the court declares ascertain man to be his father. The judicial declaration Paternity may be ascertained through a court declaration if the mother has been raped, has any other similar act of intentional deception.

In normal circumstance filiation created natural parent relation bond. However, exceptionally an artificial filiation is established by agreement between an adopter and an adoptee for several reasons. The Ethiopia Civil Code defines adoption as a bond of filiations created artificially by a contract of adoption between the adopter and the adopted child. The RFC followed the same. An adopted child shall, for all purposes, be deemed to be the child of the adopter.

CHAPTER THREE

Analysis of adequacy of the Revised Family Code on the Establishment of the Paternity Bond in Relations Other than Marriage and Irregular Union

3.1 INTRODUCTION

In the earlier chapter we have seen the right of child which recognized under international convention (CRC) and also FDRE constitution recognized such right and the revised family code found issue by establishing three mode of paternity. Despite the existence of such right in the constitution and CRC, there are some provisions under the RFC that shorten the effectiveness of the right. In this chapter we can see those problem with regard to paternity.

3.2 legal recognized relation under revised family code

There are two legal recognized relation under revised code those are marriage and irregular marriage. The child that was born of legally recognized relations establish his/her father by application presumption of paternity⁵⁶ whereas the child that born out of legally recognized relations establish his/her father by application of acknowledgment and judicial declaration of paternity⁵⁷.

3.2.1 Marriage

In Ethiopia, marriage is regarded in both the Civil Code. The Revised Family Code and the regional family codes as an institution, rather than a contract.⁵⁸ However, when it comes to defining this institution, neither laws are helpful. Hence, to have a common understanding of the institution, it is necessary to resort to the definitions given by other Foreign laws.

In the English legal system, marriage, as defined by Sir James Wilde in the land mark case of Hyde Vs Hyde, is the voluntary union for life of one man and one woman to the exclusion of all others.⁵⁹ This same definition is also upheld under the Australian

⁵⁶FDRE Revised Family Code, cited above at note 5, Art 126 and 130

⁵⁷ Id. art 131 and 143

⁵⁸ Tilahun Teshome, *International survey of family*, p.157

⁵⁹ Aschalew Ashagrie & Martha Belete, cited above at note 6, p.

Marriage Act of 1961. The definitional part as well as Section 46 of the Australian Marriage act defines marriage as the voluntary union of one man and one woman for life to the exclusion of others. This definition has been taken from the English definition of marriage. Both definitions contain three common elements. First, the marriage has to be concluded between a man and a woman, there is no legal marriage between same sex persons. Secondly, the institution of marriage is to be entered into with the absolute consent of the parties i.e., voluntarily. In addition, the marriage is expected to last for a life time, death being the only cause for dissolution.⁶⁰ Asper art 126 of revised family code a child conceived or born in wedlock has the husband as a father.so the children that are conceived and born with in marriage acquire their father by presumption of paternity;

3.2.2 Irregular union

In Ethiopia Irregular union is recognized both under civil code and revised family code and also regional family code. Asper Art 98 it defined as An irregular union is the state of fact which is created when a man and a woman live together as husband and wife without having concluded a valid marriage.so Children that were born and conceived in the irregular union establish their father by presumption of paternity.

3.3 Limitation with regard to judicial declaration of paternity

Where the child does not have a presumptive father attached to as marriage or an irregular union (Article 126, Article 130(1)) or self-acknowledged father (Article 131), the paternity of the child may be established by a judicial declaration of paternity incase when the requirement of art 143 of revised family code is fulfilled. But there are some limitation under art 143 of revised code.

- Asper Art 143(a) of the RFC judicial declaration of paternity is possible in case where the mother has been the victim of abduction or rape at the time conception of the child. But what if the mother of the child has been the victim of abduction or rape by more than one person during period of conception? Accordingly what if he can show that the mother of child has sexual relation with another man at time

⁶⁰ Aschalew Ashagrie& Martha Belete,cited above at note 5, p 37

of conception? The spirit of the law does not at least apparently, seems it difficult to determine who would be the father of the child in such case. so there is possibility of fatherless of child and there are restriction on the paternity of child with regard to judicial declaration under revised family code.

3.4 The Inconsistence between the provisions of revised family code

According to art 107(2) of revised family code without prejudice to the provision of this code relating to acknowledgment of paternity or adoption, children born of such relationships shall have a juridical bond only with the mother. Asper this article children born without wedlock or irregtheular union cannot have father except by Acknowledgment and Adoption. But under art 143 of the revised code there are no such restriction, even a child born without wedlock can get paternity through judicial declaration. So there is inconsistency between art 107(2) and art 143 of the same revised family code.

3.5 The Disparity between the Federal RFC and the FDRE Constitution together with the CRC

Under the Convention on the Rights of the Child and the FDRE constitution, every child has the right to identity, the right to know and be cared for by his/her parent or legal guardians. Even, the Children born out of wedlock shall have the same rights as children born of wedlock. But, under Art 107(2) of revised family code say that children born out of marriage or irregular union shall have a juridical bond only with the mother, unless acknowledged or Adopted by some body. so this article are paradox with the FDRE constitution of Art 36 and the Convention on the Right of Child (CRC). So the Art 107 (2) of revised code paradox with the following principle which is listed under FDRE constitution and international convention on the right of child (CRC) which Ethiopia is a part. Those are

- The Principle of the best interest of the child which is listed under Art.36(2) of the FDRE Constitution and Art.3 of the CRC.

- The principle of non-discrimination under Art of 36 (4) of FDRE constitution and art 3 of CRC. According to this principle there no discrimination between children born out of wedlock and in wedlock. The children born out of wedlock the same right with children born in wedlock.
- Art 36 (1)(b) of FDRE constitution with related to right of identity and Art 8 of CRC.
- Art 36 (1) (c) of FDRE constitution which related to the child right to know and be cared for by his or her parents or legal guardian and Art 7 of CRC.

To sum up, according art 9(1) the constitution is the supreme law of the land. Any law which is contravene with this constitution shall be of no effect and under art (9) (4) all international agreement ratified by Ethiopia are integral of the law of the land. Art 107(2) of revised family code is contradict with the Art 36 of FDRE constitution and international convention of child (CRC), why because it is Against the right of chld and principle listed under FDRE constitution and (CRC) which Ethiopia as a part. So Art 107 (2) is unconstitutional and it need to be amendment and also under Art 143 of revised code there is probability of fatherless and some restriction on paternity. This article against the FDRE constitution and CRC. So it need to be modified

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1 CONCLUSION

The UN Convention of the child (CRC), was formulated as the most comprehensive legal instrument to protect child's right. The Convention has embodied the child's right to know his/her parent which includes the right to paternity. The Constitution of FDRE has come up with the same right as one of fundamental right of the child. In accordance with this Constitutional right, the RFC has a room to promote such a right. Without discrimination of any kind including status of birth, every child is entitled to enjoy the Blessing of the right. But Art 107(2) of the RFC is not consistent with Article 36(1) c and 36(4) of FDRE Constitution and Convention on the Right of Child. It also contradicts with Article 143 of the same code. Whereas it excludes judicial declaration of paternity.

There is no single rule universally accepted by which a child's father is established.

Modes for

Ascertainment of paternity, for this reason, have been adopted. Accordingly, paternity can be ascertained by a one of the three method of establishing child-father relationship. The law presumes that the man which has married the mother of the child or engaged in an irregular union with the mother of the child at the time of conception or birth of the child as the father of the child. If paternity cannot be ascertained by this presumption, the child may have as father the man who voluntarily acknowledges the child.

Finally, the child's father may be he whom the court declares to this effect based on evidences brought before it which are reliable such as to justify the declaration in accordance with the law. In our RFC, there are provisions which shorten the establishment of child-father relationship where child born out of marriage and irregular union. The first is to do with the period of pregnancy. As principle the period of pregnancy was applicable to relation recognized by the law. Exceptionally it is applicable for children who claim ascertainment of paternity by the judicial declaration. However, children can sometimes be born less than 180 days and more than 300 days. And they became fatherless merely

because of their birth outside the fixed days. The second is the requirement of continuous sexual relation, albeit one day sexual intercourse may result in pregnancy. The third encumbrance is when mother of the child is raped by two or more person or else the mother of the child clearly shows she had sexual relationships with another man within legally presumed period of pregnancy. Thus, unless DNA brings the matter to an end the child may became fatherless, since in such case there is possibility of fatherless and the provision of RFC it may limitation on Art 143 of RFC.

4.2 Recommendation

Based on the above mentioned finding, the writer forwards the following points as recommendations.

- Art 107 (2) of revised family code is not compatible with art 36 (1) (3) and sub (4) of FDRE constitution and convention on the right of child. It also contradict with art 143 of the same code why because it exclude judicial declarant of paternity. So I recommend Art 107(2) of revised family code is unconiostitutional and as per art 9 of FDRE constitution any law which contradict with this constitution it shall be no effect, since art 107(2) OF RFC is against the constitution, it shall be amended.
- Art 143 of the RFC need to be modified why under there is restriction with regard to paternity of child. so it need modified to avoid any probabality which creates fatherlessness.

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