

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD: Linking Principles with Practice

By

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Foreword

This research project covers the core principles of children's rights; best interest of the child, non-discrimination, survival and development and participation rights of the African child as enshrined in the African Charter on the Rights and Welfare of the Child (African Children's Charter). The Charter - the first regional treaty on the human rights of the child which was adopted by the Organization of African Unity in 1990 and entered into force in 1999, is a real positive step towards securing the protection of children's rights in Africa. The human rights of African children are violated every day of their lives, with severe consequences which extend well beyond their childhood. The African Children's Charter provides a basis for the promotion and protection of the rights of children at the national and regional level and codifies the responsibilities of the state, community and individual in the protection of the civil, cultural, economic, political and social rights of the child.

OSIWA is committed towards the protection, promotion, respect and realization of children rights in Africa, and especially in West Africa. The findings of this research therefore provide all of us with the opportunity to experiment with advocacy initiatives and a consultation process with children across the African continent. It is hoped that this report will cause a major sea change in the evolving normative legal, institutional and policy framework for the protection of children's rights.

OSIWA wishes to express its warmest gratitude to Miss Priscilla Yachat Ankut for undertaking this very necessary and important research work.

1. Introduction

In April 2005, the Open Society Initiative of West Africa (OSIWA) awarded a grant to support research on the African Charter on the Rights and Welfare of the Child (Children's Charter). The grant covered the period April 2005 to March 2006. Specific objective of the grant was to enable the exhaustive study of the Children's Charter with a focus on the mechanisms put in place by the African Committee on the Rights and Welfare of the Child (Children's Charter implementing body) for the promotion and protection of children rights in Africa. The research was to also cover the core principles of children's rights- best interest of the child, non-discrimination, survival and development and participation rights of the child within the specific socio-cultural and economic context of Africa.

2. Research outcome

The research links the four core principles of child rights discourse- best interest of the child, non –discrimination, the child rights to survival and development and the participation rights of the child with practice in the in the African continent where diverse economic, social and cultural practices abound. The author demonstrates that in many instances, the socio-economic and cultural realities of the African States challenge the notional application of the rights of the child and thus tries to offer the 'way out' for child rights activists when such challenges arise. The book is structured in a way that it can accommodate those with specialised interest who may wish to read only some chapters or indeed, some sections in chapters. I highlight below some of the major findings in the research work.

2.1 Background to the adoption of the African Charter on the Rights and Welfare of the Child

The first chapter provides the background to the adoption of the Children's Charter and discusses the mandate of the African Committee on the Rights and Welfare of the Child within the framework of its procedural mechanism. The author affirmed that the idea of drafting a Charter to protect Children and their rights in Africa was borne out of the general feeling that African interests were being inadequately represented during the drafting process of the United Nations Convention on the Rights of the Child (CRC)

conducted under the auspices of the United Nations (UN) in Geneva. The concern was that since few African countries were participating in the process, issues pertinent to African children were not likely to be articulated in as strong and enforceable terms as deserving of problems of such magnitude. A regional meeting was thus recommended to examine the draft UN Convention from an African perspective.

The regional meeting was convened by the African Network for the Protection Against Child Abuse and Neglect (ANPPCAN) with the support of the United Nations Children Fund (UNICEF). The objective of the regional meeting was twofold; first, there was a need to deliberate and take a clear position on the CRC regarding its general application to children globally and its specific application to African children given the unique factors of their socio-economic, cultural and developmental circumstances. Secondly, the meeting was to consider the comprehensiveness of the UN instrument and determine whether it was necessary to supplement it with an African Charter.

There seemed to have been a consensus that although the CRC is comprehensive in its approach to children and their rights, the world community is so diverse, economically, socially and culturally that it could not understand, interpret and apply these rights in the same way. The outcome of the meeting was thus a recommendation to draft a Charter that would pay special attention to the issues prevailing in Africa as well as complement the CRC. In view of these, a working group composed of African specialists, constituted jointly by the Organisation for African Unity (OAU) and ANPPCAN, met and after various deliberations and discussions came up with the African Charter on the Rights and Welfare of the Child (Children's Charter)¹ which was adopted by the OAU Assembly of Heads of States.

The motivations for the adoption of the Children's Charter amongst other things are that the CRC, which was adopted a year earlier than the Children's Charter, was a product of numerous political compromises as a result of which issues pertinent to Africa were not addressed. Such unaddressed issues included the situation of children living under apartheid, prevailing practices such as female genital mutilation, socio-economic

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¹ The African Charter on the Rights and Welfare of the Child was adopted in 1990. OAU Doc/CAB/LEG/24.9/49.

conditions like illiteracy and low levels of sanitary conditions- all of which pose threats to the survival of children. The African conceptions of community responsibilities and duties for children were also neglected. Specifically, the ability of the community to engage in meaningful participation in the planning and management of basic programmes for children was not taken into account. Other issues such as the use of child soldiers and the role of the family were not strongly articulated.

A critical look at the Substantive provisions of the Children's Charter in direct comparison with the CRC shows that in a number of respects, it sets a higher level of protection than its UN equivalent. Notable amongst these is in the area of participation of children in hostilities,² child marriages,³ child refugees⁴ and the best interest of the child principle.⁵ Each of these aspects resonates with the precarious position in which children find themselves in Africa.⁶ Procedurally, the Children's Charter established the African Committee on the Rights and Welfare of the Child (African Committee) as its implementing body with a mandate that is wider than the one conferred on the UNCRC. While the UNCRC has the mandate to consider reports from state parties, the African Committee in addition to state reporting has put in place an individual complaint and an investigative procedure as additional mechanism for protecting children.

Additional interesting information is provided in this chapter on the work of the African Committee from its establishment in 2001 to date. This is useful as many child rights NGOs have very little information about the work of the committee and also don't know how to access the committee when they need to.

2.2 The principle of the best interest of the child under the African Children's Charter

² Under the Children's Charter no person under the age of 18 is allowed to take part in hostilities (article 22(2)). The CRC allows children between 15 and 18 to be used in direct hostilities (article 38 (2)).

³ Child marriages are not allowed under the Children's Charter (article 21(2) read with article 2). The same does not apply to the CRC in terms of which majority may be attained below the age of 18 (article 1).

⁴ The scope of protection of child refugees is broader under the Children's Charter which allows for internally displaced children to qualify for refugee protection (article 23 (4) the causes of internal dislocation are not restricted but may take any form, including the breakdown of economic social order.

⁵ Under the Children's Charter, the best interest of the child is 'the primary consideration' (article 4 (1) not merely 'a primary consideration' as provided for in the CRC (article 3(1)).

⁶ F Viljoen, ' Africa's contribution to international human rights' (2001) *1 African Human Rights Law Journal* 22.

This chapter deals with the principle of the best interest of the child and analyses the contextual difficulties that are latent in its determination and application particularly in Africa. Though the best interest of the child is considered the most important basis for seeking to protect children and their rights under international law, the author makes it clear that the principle is the most difficult to either comprehend or apply since international law does not lay down any criteria for its application. The author insists that the solution to the definition problem could be found through a holistic reading of all the articles in the African children's charter rather than reading articles of the charter in isolation. A paradigm of how culture and cultural practices has an implication on the best interest of the child is traditional acts such as virginity testing and female genital mutilation (FGM). Practically article 24 of the Children's charter if read alone suggests that a parent can take his /her child for virginity testing or FGM just because he/she believes it to be culturally in the best interest of the child. In order to dispel this misunderstanding, the provisions of article 21 of the Children's charter which prohibits harmful social and cultural practices will have to be read together with article 24.

2.3 The principle of non-discrimination under the African Children's charter.

Here, the author addresses the principle of non-discrimination in relation to child rights. The Children's Charter prohibits, *inter alia*, discrimination on grounds of the sex of the child. This is particularly relevant in the context of the African society where there is a preference for male children, whereby female children are subjected to discrimination just by virtue of their being female. This provision also has a bearing on the view and position of women without male children in the African society, where they are maltreated and subjected to unfair discrimination with their children. Very closely related to this issue is inheritance in the African society, where the male child is often the one who inherits the father's property. Although, these cultures and traditions are preserved, for instance in Commonwealth African countries such cultures are tested against the famous 'repugnancy test' whereby they are declared invalid if they are found to be repugnant to natural justice equity and good conscience.

Relevant to the discussion on non –discrimination is the important review of the concept of discrimination and its relationship with the concept of equality which pre-supposes that all children (male and female) should be treated equally. An offshoot of the analyses

provided in this chapter points to the distinction between formal and substantive equality where formal equality means sameness of treatment regardless of circumstances and substantive equality takes circumstances into account and requires the law to ensure equality of outcome. In effect, formal equality simply requires that all persons are equal bearers of rights, and does not take actual disparities (physical, social, economic et al) between groups and individuals into account. Substantive equality, on the other hand, requires an examination of such disparities in order to determine whether the relevant law or policy's commitment to equality is being upheld. Hence, the results of the effects of such are highlighted rather than the mere form.

For example, on a formal conception of equality, equality is achieved if all children are given equal access to education or educated according to the same curriculum. Substantive equality on the other hand would require equality of outcome. If children with disabilities (deaf children, for example) undergo the same school program as other children, they may very well end up receiving an education that is inadequate for their special needs. Blind children might be able to cope given the necessary learning aids such as Braille, tape recorders to play lectures over et al, but there's no denying the fact that they would be most likely slow in catching up with the rest of their mates. To realize the right to equality of such children, it may therefore be necessary to treat them differently.

2.4 The Principle of survival and development of children under the African Children's Charter

This is perhaps the highlight of the research as it seeks to input the concept of responsibility for the care and upbringing of the child to the community. Children in traditional African societies do not belong exclusively to their parents. They have obligations to the wider society, which likewise bears responsibility for their proper socialisation. The concept of 'parent' is wider than the men and women who are biological parents, and the idea of 'family' assumes an extended group of kin. It is in this context that it is often said that the child in an African community is the child of everyone, conveying the notion that traditional solidarity requires that a variety of persons exercise different and varying functions over children and that children are important and valuable members of any community over whom all must, and ought, to take responsibility. A

child may not be seen to be suffering just because the natural parents may be unable to take responsibility for him or her in the African set up.

Thus, within the context of the extended family, various persons who may not be the natural parents of a particular child discharge, in relation to that particular child, some parental functions within the general rubric of the concept that a child belongs to everyone. In this way, the definition of parenthood may be obscured by the fact that a number of persons perform or discharge parental responsibilities which, in the narrow nuclear families of the West may be performed by natural parents. This position raises difficulties in the sense that it may not be possible to impose real legal duties of a socio-economic nature on people who care only *de facto* for a child.

The author however, recognises the dynamic nature of society and notes that with changing social and economic conditions, the practices of the community or extended family responsibility for the welfare of the child are fast changing in Africa. Extended families have become increasingly separated geographically due to the overriding influence of urbanisation. Rights and expectations have also become more individualised and social interaction with family members less immediate, so the role of the biological parents' increases while the role of the other extended family members decreases. Similarly, widespread poverty, warfare, famine and HIV/AIDS have further weakened the African kinship care system that would ordinarily be expected to assist in fulfilling the responsibility of parents towards the provision of the socio-economic needs of their children.

While the author supports the idea of strengthening communities to participate in the traditional support care of children as contemplated under the Children's Charter, she concluded with an insistence that modern governments are active participants, not passive spectators, in the events that fundamentally impact the ability of children to lead meaningful and dignified lives. It is thus recommended that states should undertake the development of comprehensive strategies for family and child support in order to sustain the resource base of the family to safeguard the rounded well-being of children. This will make governance meaningful in assisting the majority of African families who find themselves in situations where they cannot appreciate the value of life let alone enable their children enjoy it.

2.5 The Principle of Child Participation under the African Children's Charter.

This discusses the right of the child to participate in decisions that affect them and the nuances of applying such a principle within the socio-cultural set up of most African States where the child is expected to be seen and not heard. In this wise, the fundamental question is raised as to whether child participation in the African Context will be tantamount to a rape of culture or is to be seen as a welcome development.

While childhood and adult-child relations are evidently construed and experienced in a wide variety of ways across the globe, it appears a universal fact that children generally enjoy less social power than adults, and the negative consequences of such inequality of power are witnessed in the marginalization of children in different spheres of the society. Traditionally, children have been relegated to the world of the muted – along with groups such as women, the disabled, indigenous and minority peoples. They have been regarded as chattels, the property of their parents or guardians.

Specifically within the African context, adults, social and political structures, culture and socio-economic factors are all frequently cited as the main barriers to child participation. Children are not perceived as autonomous, and are normally considered to be deficient in their decision-making capabilities, hence, deserving of protection. Whereas adults believe that children have rights such as those to life, shelter, clothing, health and education, many do not believe that children have the right to participate in such community issues as decision-making. Yet there are hundreds of thousands of children participating in conflicts across the continent and millions working and contributing to the family income. By this selective attitude, are communities implying that while they may accept the participation of children in conflict and child labour, they cannot condone their involvement in decision-making?

The research notes that this contradiction is central to the problem and the discourse on child participation in Africa is further complicated by the fact that all forms of family relationships are stratified and role expectations are clearly defined. Within families there are belief systems, customs and traditions that inform how relationships between parents and children are governed. Consequently, in most African communities children

are not allowed to speak among adults without permission. Doing so can bring disgrace on the parents of the child and is therefore punishable. Thus, in many cases children have no say in decision making, even when the decision will affect them.

These barriers are especially important in Africa where children under 15 years of age constitute nearly half of its 500 million inhabitants. A situation in which nearly half of a population has little, if any, say in the decisions that directly affect their lives every day could lead to a serious disenfranchisement of a significant percentage of a society. Furthermore, at the same time as the proportion of young people is increasing rapidly, so also are the challenges affecting them. Across the continent children are being used in conflicts, engaged in coercive labour or living on the streets. The increasing numbers of children living on the streets, often fleeing abuse at home, are especially vulnerable to commercial sexual exploitation as well as HIV/AIDS. This combination of factors makes the need for child participation in Africa critical.

In view of the participation rights contained in the Charter, this realization that the interests of children may differ from those of adults, including parents', leads to the need for reconsideration of power relations between the children and adults. Authentic and meaningful child participation requires a radical shift in the traditional adult thinking and behaviour — from an exclusionary to an inclusionary approach to children and their capabilities. This would involve putting the requisite structures in place that facilitate child participation in order to empower children in a world where they are relatively powerless in comparison to adults

In facilitating child-participation, adult interaction with children is suggested to be neither intimidating nor patronizing and should be based on the recognition of children as individuals, with rights and responsibilities of their own; playing an active role in the lives of their families, communities and societies; and having interests, views and priorities which may differ from those of the adults with whom they interact. This does not mean that adults no longer have responsibilities towards children, particularly for their protection, or that whatever children say must be complied with. Rather, it urges an attitude of respect for the capacity of children to contribute to decisions that affect them, whilst avoiding shifting excessive responsibilities, costs or workloads onto them under the guise of participation.

Conclusion

This research as its title implies, attempts to link these four principles of children's rights with practice on the African continent within the context of its diverse economic, social and cultural practices. The Children's Charter in its preamble stated boldly that it intends for the virtues of cultural heritage, historical background and the values of the African civilization to inspire and characterize the reflection on the concept of the rights and welfare of the child on the continent, though it went on to introduce the qualifier in article 1 (3) that any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter shall to the extent of such inconsistency be discouraged. This is in recognition of the fact that upholding some cultural practices vis-a vis child rights could create unhappy results and run contrary to the notion of universal application of human rights. The intention of this book is to provide a guide in understanding and interpreting the Children's Charter as well as facilitate its application by all those involved in children's rights promotion and protection especially on the African continent.

It is hoped that the book will be of interest to Members of the African Committee on the Rights and Welfare of the child whose mandate it is to interpret and ensure compliance with the provisions of the Charter; to international and national non-governmental organisations engaged in child rights promotion and protection, and to academics, lawyers and others concerned with child rights and related law and policy more generally.