



AN OVERVIEW

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# REALISING RIGHTS FOR CHILDREN

## Harmonisation of Laws on Children Eastern and Southern Africa

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## BACKGROUND

Laws are the foundation of social policy and central to the promotion and defence of child rights and welfare. They articulate a society's vision and define individual rights and obligations on the one hand and the nature and limits of state action on the other. This is not to say that problems such as child labour, sexual exploitation of children, and violence against children can be solved by laws alone. But they are a sine qua non for state action, for the advocacy of nationally and universally-held values and for recourse to legal protection when rights are violated and abuse is perpetrated. They are undoubtedly the single most powerful instruments for the protection of human rights, especially child rights. Therefore, the absence or otherwise of national legal instruments consistent with international conventions on children's rights impacts directly on child rights promotion and protection.

Every country in Africa, with the exception of Somalia, has ratified the United Nations Convention on the Rights of the Child (CRC) thus committing themselves to the principle that the provisions of these treaties are respected and observed in law and practice. More recently, the African Common Position providing for an 'Africa Fit for Children' adopted in Cairo in 2001 urged that the provisions of these two treaties be "treated as State obligations, in the framework of a rights-based approach to child survival and development. There is urgent need to provide a peaceful enabling environment for the achievement of these rights through the establishment of appropriate structures for implementation and monitoring"

Yet the gap between international obligations and national action and between laws and practice remains wide. There are many and different reasons for this but one explanation is the lack of harmonised legislation, for example in the form of a single Children's Act, in the majority of African countries. The absence of such a legal edifice makes implementation and advocacy complicated.

Knowledge or assessment of the extent to which national law corresponds to international and continental standards is further made difficult by the fact that one often has to consult many sources of law to obtain a coherent picture of the legal entitlements and rights of children<sup>1</sup>. The multiplicity of enactments can be explained by the fact that national legislation has often followed a piece meal approach thereby resulting in a contradictory legal stance where, for example, both the definition of a child and their rights may be muddled and even contradictory. Thus a child may be defined as a person under 15 or under 14, even 13, in legislation dealing with child labour, and a lower one in the context of marriage or at the higher threshold of 18 in those provisions anchored to CRC and African Charter on the Rights and Welfare of the Child.

Further, advocates of child rights have to deal with yet another problem – the complexities and challenges posed by the plurality of African legal systems arising from the power and prevalence of customary laws. African customary law reflects and defines attitudes toward the status of children, their rights and entitlements<sup>2</sup>. Thus any effort at enhancing the rights and welfare of children cannot ignore and indeed

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<sup>1</sup> South African Law Commission: *The Harmonization of the Common Law and the Indigenous Law*. Discussion Paper 74: Customary Marriages 1997; South African Law Commission: Issue 3 Project 90: *Harmonization of the Common Law and Indigenous Law (Customary Marriages)*: 1999; South African Law Commission: Customary Law. *The Report on Traditional Courts and the Judicial Function of Traditional Leaders*: Project 90: 2003; Erlank, N., Bonthuys, E., 'The Best Interests of African Children in the Allocation of Custody: Gendering the Current Models' 2002 *RAU Sociology*; Philippe Lavigne Delville, 'Harmonising Formal Law and Customary Land Rights in French-Speaking West Africa' *CNASEA/AFDI/FNSAFER*, 1998;

<sup>2</sup> Bennett, T.W., *A Sourcebook of African Customary Law for Southern Africa* (JUTA, 1991a); Bennett, T.W., *Human Rights and African Customary Law* (JUTA 1995); Elias, T.O., *The nature of African Customary Law* (Manchester Press, 1996); Letuka, Puleng and Armstrong, Alice., "Which Law? Which Family? Which Women? Problems enforcing CEDAW in Southern Africa" 207 in Lowe and Gillian (Eds) *Families Across Frontiers*, 1996; McClendon, Thomas, V., "Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-era Natal" 1995 *The International Journal of Historical Studies* vol. 28(3); Nhlapo, Ronald Thandabantu "Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law" 35 in Eekelaar and Sarëviæ (Eds) *Parenthood in Modern Society*, 1993; Costa, Anthony "The Myth of Customary Law" 1998 *South African Journal on Human Rights* 525; Chancock, Martin "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform" 1989 *International Journal of Law & the Family* 72.

must reckon with the parallel operation of customary law.

It is for this reason that The African Child Policy Forum considered a project to examine the harmonisation of national legislation on laws on children, with the CRC and ACRWC. This idea followed concerns raised at the International Policy Conference on the African Child and the Family organized by the African Child Policy Forum in May 2004, which brought together participants from governments, international agencies and over 130 NGOs around Africa. A recommendation from that Conference was the need to harmonise national laws including the appropriate incorporation of customary laws. Thus, for example, Professor Jaap Doek, Chairman of the UN Committee on the Rights of the Child, urged the African Child Policy Forum to “encourage the sharing of experiences of success and failure stories”<sup>3</sup>. And there are experiences that can be shared.

A project examining the harmonisation of laws in Eastern and Southern Africa was then conceptualised and undertaken in partnership with the UNICEF Eastern and Southern Africa Office (ESARO) based in Nairobi.

A regional report examining the status of harmonisation of laws on children in 18 Eastern and Southern African countries shall be the culmination of the project. The countries covered in the review include Botswana, Burundi, Comoros, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

The Executive Summary and Recommendations from the review are summarized below while the Report shall be released in September 2007, to coincide with the Second Pan-African Forum on the Declaration and Plan of Action on Children – Mid-Term Review Meeting.

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<sup>3</sup> Footnote 3 of the Proceedings of the International Policy Conference on the African Child and the Family, p.41

## EXECUTIVE SUMMARY

### CHILDREN RIGHTS COME OF AGE.

Children's rights have come full circle - at least in principle.

Eighteen years ago, the UN Convention on the Rights of the Child (CRC) came into force. This Convention established eighteen years as the age at which childhood ends.

Eight years ago, most of the countries in Africa sat down to sign their own African Charter on the Rights and Welfare of the Child (ACRWC – or 'The African Charter').

Largely thanks to those ground breaking accords, the notion that children have rights is no longer an issue of debate or contention in Africa. However other issues of debate and contention still remain.

**How are those precious rights being protected in practice? How are the provisions of the CRC and the African Charter being harmonised with the legislation of individual countries in Africa? And how well are child-centred laws actually being implemented?**

As the UN's Committee on the Rights of the Child has emphasised, all countries signed up to the CRC need to ensure that their legislation is 'fully compatible' with the provisions and principles of the CRC. That process requires a comprehensive review of all existing legislation.

A regional report by the African Child Policy Forum reviews and analyses how far 18 Eastern and Southern African countries<sup>4</sup> have gone in implementing the principles of the CRC and the African Charter, and how well they have built the recognition of children's rights into their legal systems.

The report is targeted primarily at governments and organisations in the countries researched. However, it is hoped that other stakeholders in children's rights at the regional and international level will also find it useful. Beyond that, it is hoped that the report will provoke debates on the harmonisation of laws relating to children across the whole of Africa.

## THE CHALLENGES

### CHILDREN ARE NOT A PRIORITY

Children are still not a top priority in Eastern and Southern Africa, despite the number of countries that have become party to the CRC and the African Charter.

This lack of urgency about children's rights is demonstrated by the number of child-centred bills that have been pending for significant periods in signatory countries, including Lesotho, Malawi, Namibia and South Africa.

It is also shown by the time it has taken countries to report back on their progress in meeting the provisions of the CRC and the African Charter. Only Madagascar, Namibia and Rwanda submitted their initial reports to the CRC Committee within the two-year deadline. The rest sent their reports, on average, four years late. Only Rwanda has submitted an initial report to the African Charter's overseeing committee.

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<sup>4</sup> Botswana, Burundi, Comoros, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

## LAWS ARE STILL NOT FULLY HARMONISED

There is a complex patchwork of existing legislation relating to child rights across Eastern and Southern Africa. The sheer complexity of this situation is a significant barrier to the effective harmonisation of laws and legal protection of children.

Provisions relating to children's rights are found in a broad range of laws – from penal codes and specific legislation on adoption, education, social welfare, and divorce, and separation proceedings. The problem is further compounded by the pluralist nature of legal systems in the region, where common and civil law co-exists with customary and religious law. While child-centred provisions remain in this fragmented and complex state, legislation relating to children will continue to be conflicting and poorly implemented.

On the positive side, this review shows that nine out of eighteen surveyed countries - Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, and Uganda - have undertaken comprehensive reviews of their legal systems. As a result, they have either enacted or drafted a comprehensive Children's Act or grouped their rights into thematic legislation, such as Child Justice and Child Welfare.

However, these reviews should not be seen as a one-off exercise. Rather, reviews, amendments and enactments should be an ongoing process that continually addresses new or emerging issues, gaps and challenges in law and practice. It is particularly encouraging to see Uganda has decided to have a fresh look at its landmark Children's Act ten years after its first enactment.

## NO AGREEMENT ON THE DEFINITION OF A CHILD

According to both the African Charter and the CRC, a child is anyone aged under eighteen. However there is still no region-wide agreement on the definition of a child. There are also significant inconsistencies in setting various minimum ages such as for criminal responsibility, sexual consent and marriage.

Without these fundamental definitions and limits, young people will continue to suffer from inconsistent and ineffective protection under the law.

- Nine of the eighteen surveyed countries – including Burundi, Ethiopia, Madagascar, Mozambique, Namibia, Swaziland, Tanzania and Zimbabwe – have **no official definition of a child** in their legislation or constitution. Others, such as Malawi, set the age limit at sixteen.
- Many of the surveyed countries have set **the age of criminal responsibility very low and some do not have additional special measures to recognise the age and discernment of the child**. In Lesotho, Malawi, Namibia, South Africa and Swaziland, children as young as seven can be held legally accountable for their acts under penal law. All these countries have legislation pending to change this situation, which needs to be enacted.
- In many countries the **set age of sexual consent** - the minimum age at which a person can voluntarily agree to sexual acts with full knowledge of the consequences and risks involved - **is either too low or is inconsistent with other legislation, such as age of marriage**. For example, in Tanzania, the age of sexual consent is higher than the age of marriage for girls. There are also gender differences for example in Malawi where the age for sexual consent is thirteen for girls and twelve for boys.
- There are **considerable variations in the age that people are allowed to get married**. In almost half the countries reviewed, it is below eighteen years and in two countries, Madagascar and Tanzania, it is below sixteen years. There are differences in minimum ages of marriage for boys and girls in Burundi, Madagascar, Malawi, Mozambique, South Africa, Tanzania and Zimbabwe. There are also age differences under different laws; for example, under marriage laws and under customary law.

## DISCRIMINATION REMAINS

There should be no discrimination on any grounds regarding protective provisions and rights for children. However, discrimination against children frequently still exists under the law on grounds of sex, ethnicity, disability and especially parentage.

For example, there are countries with different minimum ages of marriage and/ or sexual consent for boys and girls. In Zimbabwe it is sixteen years for girls with no minimum set for boys, unless it is a rebuttable presumption of eighteen years. Discrimination on the grounds of parentage applies to children who are orphaned or born out of marriage: children born out of marriage where religious laws apply have no right to their father's name in Comoros and Tanzania, for example. There are also discriminatory laws regarding use of corporal punishment where it is either still a legal penal sanction or permissible under the defence of 'reasonable chastisement' in several countries e.g. Lesotho, Kenya, Malawi and South Africa.

## BIRTHS GO UNREGISTERED

One of the most fundamental rights enunciated in both the CRC and the African Charter is the right of a child to a name and nationality. If a child does not have an officially registered name, nationality and birth date, it is difficult for any legal system to protect that child effectively.

The review shows that in the majority of the countries surveyed there are inadequate vital registration systems, including registration of birth. In Ethiopia for example, there is no formal birth registration system. This has consequences for many children's rights, such as their legal identity and proof of lineage. Children who have no formal proof of age are at risk of not benefiting from protective minimum ages related to marriage and compulsory enlistment, among others.

## CHILDREN CAUGHT UP IN CRIMINAL SYSTEMS

While there has been progress in developing appropriate justice systems for children, there are still significant gaps in dealing with children caught up in the criminal justice system. Low ages of criminal responsibility mean that children as young as seven can be held criminally liable, while children as young as twelve can be imprisoned. In South Africa, life imprisonment is a possible sanction for children below the age of 18 and there are several children currently serving this sentence.

Corporal punishment is also legally sanctioned both within the penal system and alternative care institutions, particularly for boys in a number of countries. South Africa is the only country that currently specifically prohibits the use of corporal punishment in alternative care systems where children are diverted from the formal justice system.

**Twelve of the eighteen countries reviewed have established children's courts:** Botswana, Comoros, Ethiopia, Kenya, Lesotho, Madagascar, Mozambique, Namibia, South Africa, Tanzania, Uganda and Zambia. However, there are concerns that currently these courts tend to be limited to capital cities and other major urban areas. Children outside these areas have to be accommodated within the mainstream judicial system. Furthermore, the courts are hampered in effective administration of justice for children on several grounds, including the lack of alternative care centres for diversion of children. **In ten of the eighteen countries, there are no alternative centres for children.** Children are regularly sent to formal adult prisons and detained alongside adults. Diversion from the formal criminal system is not an option of first resort in the majority of countries, even where provision has been made for diversion. For example, the Children's Act in Kenya provides for diversion at the post trial but not pre-trial process. Justice systems in the region are primarily focused on child offenders, with little or no attention to victims or witnesses of crime.

## CHILDREN SUBJECTED TO VIOLENCE

All the countries studied have laws that confer protection on all citizens in general or on children in

particular against abuse, inhumane and cruel treatment, and torture. However, children in the region are still being subjected to violence in homes, schools and other institutions, as well as within the justice system. For example, corporal punishment in the home is legal in all the eighteen countries in this review, which means there is no country with an absolute prohibition on corporal punishment in all spheres, from the home to schools and other institutions, and as a punishment for crime.

In countries where harmful cultural practices like female genital cutting (FGC) and early marriage are still prevalent, such as Ethiopia, Kenya and Tanzania, there is specific legislation prohibiting the practice. However, there is need for awareness on these laws and child rights education for communities, in order to change attitudes and behaviour regarding such violence towards girls.

There are some notable initiatives in the region, such as the Women and Child Protection Units in Namibia that provide free assistance, including medical, legal and psycho-social services, to survivors of violence 24 hours a day. Special Gender Police Units do similar work in Lesotho. However, these projects are the exception rather than the rule across the region.

The recent UN Secretary General's Study on Violence against Children has highlighted the extent to which violence prevents realisation of children's rights.

### **CHILDREN'S VOICES REMAIN UNHEARD**

There is need for changes in cultural and societal attitudes about children from the current situation where children's voices are seldom heard. One of the most innovative features of the CRC is the child's right to participate and to be heard at all levels and to have their views considered.

The Constitutions of most countries covered in this review include the right to freedom of opinion and expression for all citizens, including children. However, there are few formalised institutional mechanisms for children's participation. In Malawi for example, there is specific legislation on children's and youth participation in national matters. Several countries however, have national youth policies whose objectives include facilitation of youth participation. There are also youth forums and parliaments, often spearheaded by civil society, in some countries, including Uganda and Zambia. These forums and parliaments are not institutionalised, but nonetheless provide a space for children's voices to be heard. Lesotho provides a good example of institutionalising child participation, via their child law committees which actively participated in a national review of laws relating to children.

All the countries reviewed have legislative provisions for limited participation of children in court proceedings. These are mainly in civil proceedings on family matters, such as divorce and adoptions. However, there are also provisions for a child to be heard in criminal proceedings where they are accused of a crime, or victims or witnesses of crime. Nonetheless, all these provisions limit participation either on grounds of age or context, so do not follow the principle of allowing children to participate in accordance with their evolving capacity.

## WAYS FORWARD

### Approaches to harmonisation

The review identifies common approaches or practices garnered from the experience of countries that have attempted to harmonise their laws relating to children.

- It is evident that harmonisation is an ongoing process and no country can claim to have fully harmonised its laws relating to children. Harmonisation is a process that calls for constant review, monitoring and evaluation.
- The common and recommended start in the harmonisation process is a comprehensive and consultative review of existing legislation, which can be either broad-based or thematic.
- The review process should be open, inclusive and participatory. Therefore institutional mechanisms for the participation of various stakeholders should be established to give the process momentum, validity and societal ownership.
- The harmonisation process should uphold the principle of child participation. It should include recognition of children's perspectives solicited in child-friendly and creative ways.
- Capacity building for a wide range of role-players and stakeholders, from government representatives and parliamentarians, police and judiciary officials, should be an integral part of the process. This may involve training, briefing, information sharing, study tours, sharing of good practices and participation in local and international conferences on various aspects of children's rights.
- Even the best-drafted legislation will have gaps. It is therefore necessary that all relevant laws expressly state that, where omissions emerge, outstanding issues and cases should be interpreted in the light of provisions of the CRC and the African Charter.
- There are a number of ways to pursue harmonisation. Some countries have passed a single comprehensive Children's Act. In other cases, legislation can be grouped into thematic issues, such as Child Justice and Child Welfare, in accordance with the specific requirements of the country concerned and its system of jurisprudence.
- Finally, there should be an institutionalised monitoring mechanism established by law to ensure implementation. This may be seated in the Attorney General's office, a Law Commission or other suitable institution. It could also be responsible for the coordination and implementation of children's rights in the country, including advising government on preparation of state reports, and institutionalise child participation in key decision making. Many very disparate models exist and countries could draw best practice from each other according to the needs of their specific context.



## CONCLUSION AND RECOMMENDATIONS

This review demonstrates the gaps that continue to exist between standards in the CRC and African Charter on the one hand, and the realities of children's lives and the state of legal protection in Africa on the other. There is a need to devise and share strategies that will bring about harmonisation of laws and their effective implementation for the realisation of child rights.

The law does not operate in a vacuum and having a comprehensive legal framework on children's rights will not automatically lead to full observance of these rights. There must be accompanying political, economic, social and financial support for their effective realisation.

Governments must keep the promises they made when they ratified the CRC and African Charter, and citizens and stakeholders must keep them accountable to their promises. Reforms in Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa, Swaziland and Uganda are encouraging. However, there is need to complete the reform cycle and urgently enact pending legislation on children's rights in a number of these countries, including Lesotho, Madagascar, Malawi, Mozambique, Namibia, Rwanda, South Africa and Swaziland.

The following recommendations cover the most pressing steps that need to be taken to bring about major changes for children's rights in the region.

**1. Audit and review existing legislation on children:** where audits of laws relating to children have not been undertaken, the first step should be a holistic, multi-sectoral and inclusive review.

Even where comprehensive assessments have been undertaken, there is need for continuous review and revision of laws.

All processes must entrench the principles of non-discrimination, the best interests of the child and participation of children in accordance to their evolving capacities. Ensuing legislation may either be in a consolidated statute or in thematic based statutes. However, it is recommended that laws relating to child justice and child welfare should be separated and not merged.

**2. Adopt and enact on a priority basis pending bills relating to children rights** that have been submitted to parliament. Time and resources have been expended in undertaking reviews, and revising and drafting new legislation - this must not be in vain. Pending draft legislation in countries including Lesotho, Malawi, Mozambique, Namibia and South Africa should be enacted without further delay.

**3. Ensure national mechanisms and bodies** with wide representation from government and civil society to promote and own the process of harmonisation, including coordination and monitoring. These could be existing bodies with the mandate to review and revise laws, such as Attorney Generals' offices or Law Commissions.

**4. Adopt a standard definition of a child:** countries should ensure that they adopt an overarching definition of a child as any person below the age of eighteen. Particularly in regard to protective provisions, there should be consistency in the minimum age of eighteen; for example, conscription into armed forces and marriage. In all other legislation where age limits may be set in regard to children, e.g. in regard to medical consent, the principle consideration should be the best interests of the child and their participation in accordance with their evolving capacity.

**5. Repeal Discriminatory laws** that discriminate against children on basis on parentage (e.g. children born outside of marriage) and on sex and ensure equal protection and enjoyment of rights of all children within state jurisdictions.

6. **Review and harmonise the age of sexual consent and the age of marriage for both genders.** The age of **sexual consent should be sixteen**, in the interest of protecting childhood. The best interests of the child require that children are protected from early marriage so, **the minimum age for marriage should be eighteen for both genders.**

7. Review and if necessary **raise the minimum age of criminal responsibility to at least twelve years**, with allowances for lower presumption within defined parameters to take into account special circumstances.

8. **Ensure universal free and compulsory primary education** and ensure progressive access and completion of secondary education.

9. **Abolish corporal punishment** in homes, schools and any other institution.

10. **Develop legislative provisions for the protection of orphaned and vulnerable children;** in particular, the facilitation and promotion of national adoptions. Countries should also ratify the Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoptions (Hague Adoption Convention).

11. **Reform child justice administration** and:

a) Adopt and encourage restorative justice and remedial schemes for child offenders, focusing on diversion from the criminal justice system at all stages. In addition to the CRC and African Charter, states should implement the UN Rules for the Protection of Juveniles Deprived of their Liberty (1990), where detention is the option of last resort. Countries should also implement the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2005) and accordingly adjust their systems to also focus on victims and witnesses of crime.

b) Legislate the right to free legal representation for child victims and offenders and ensure access to this right.

c) Apply the principle of the best interests of the child and the child's right to be heard in adjudicating all cases involving child rights.

d) Establish child-friendly benches nationally, in both urban and rural areas, to adjudicate on all cases relating to children with closed proceedings and quick adjudication time-lines.

e) Apply stiff and effective sanctions and penalties for perpetrators of abuse against children.

12. **Ensure an institutionalised mechanism to monitor application and implementation of laws.**

13. **Timely reporting on application of laws** to the treaty committees and ensure children's participation in the reporting process.

14. **Strengthen regional monitoring and peer accountability** under regional processes such as the Africa Peer Review Mechanism and within institutionalised regional blocks such as Southern Africa Development Community and the East African Community. Integration of regional policies and agendas should also include standards on children's rights in the respective countries.

15. The African Union should ensure that all member states **ratify the African Charter on the Rights and Welfare of the Child** (Zambia and Swaziland in the region included in this review) and **fulfil their obligations by submitting reports** to the African Committee of Experts.

## THE AFRICAN CHILD POLICY FORUM

The African Child Policy Forum is an independent, not-for-profit pan-African policy advocacy centre based in Addis Ababa, Ethiopia. Its mission is to put the African child on the public agenda focusing on the development and implementation of effective policies and laws. The work of the Forum is rights-based, inspired by universal values and informed by global experiences and knowledge. The Forum aims to provide opportunities for dialogue, contribute to improved knowledge of the problems facing African children, identify policy options and strengthen the capacity of NGOs and governments to develop and implement effective pro-child policies and programmes.

The Forum was founded in September 2003 and is guided by an **International Board of Trustees** that includes distinguished institutions as well as individuals with exceptional experience in world development and child rights advocacy work. Institutional members include: the African Union; Plan International; UNICEF; Save the Children; Chairperson of the UN Committee on Children's Rights and Chairperson of the African Committee of Experts on the Rights and Welfare of the Child.

The **Chairperson** of the Board is H.E. Dr. Salim A. Salim, the distinguished African statesman, former Prime Minister of Tanzania and Secretary-General of the Organisation of African Unity (1989-2001).

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