

The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections

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Summary

The Convention on the Rights of the Child has been almost universally ratified. The author argues that its implementation depends to a large extent on the level of cultural legitimacy accorded to children's rights norms in a society. In Africa, children are seen as a valuable part of society. Despite this, cultural practices that are detrimental to children exist, such as female genital mutilation and inappropriate initiation rites. The Convention is underpinned by four principles: non-discrimination, participation, survival and development and the best interests of the child. Each of these principles can come into conflict with cultural practices. However, culture is not static and harmful practices can be overcome. This requires that the reasons for the existence of a practice are clearly understood, that solutions are found in consultation with practising communities and that adequate social support is given to individuals who choose to abandon the practice.

1 Introduction

The near-universal ratification of the Convention on the Rights of the

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Child (Convention or CRC)¹ affirms a shared recognition of the universality of children's rights and indicates increasing support and acceptance by the world community of the need to promote and protect children's rights.² Significantly, however, the universalisation of children's rights has not precluded attempts to temper the implementation of CRC with the particular socio-cultural experiences of the diverse societies which have subscribed to its normative framework.³ The call for 'culturalisation' has been justified in terms of the economic, social, cultural and political diversity that characterises the community of states.⁴ It has been argued that an approach which is sympathetic to these differences infuses cultural legitimacy and therefore efficacy to the whole enterprise of children's rights.⁵ Cultural legitimacy denotes the quality of being in conformity with the accepted principles or rules and standards of a particular culture. The defining characteristic of cultural legitimacy is the authority derived from internal validity.⁶ A culturally legitimate norm, rule or value is respected and observed by members of the particular culture, presumably because it is assumed to bring benefits to the members of that particular culture. The corollary of this is that a rule or norm which does not command adequate legitimacy will not enjoy sufficient observance or support.

In the context of Africa, the desire for culturally appropriate norms has led to calls for a regime of children's rights, not only founded upon CRC, but also informed by African cultural heritage.⁷ This approach

¹ Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990). CRC has been ratified by every state in the world except the United States of America and Somalia. See Office of the United Nations High Commissioner for Human Rights 'Status of ratifications of the principal international human rights treaties' <http://www.ohchr.org/english/countries/ratification/11.htm> (accessed 12 August 2005).

² See B Rwezaura 'Law, culture and children's rights in Eastern and Southern Africa' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 289; M Santos Pais 'A human rights conceptual framework for UNICEF' *Innocenti essays* (1999) 5 <http://www.unicef-icdc.org/publications/pdf/essay9.pdf> (accessed 22 September 2005).

³ See eg A Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) 3 *International Journal of Children's Rights* 333-368; B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838-839.

⁴ See F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 214-218, noting that CRC failed to address some issues which were particular to Africa due to the need for consensus. See also JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309.

⁵ See generally the essays collected in P Alston (ed) *Best interests of the child: Reconciling culture and human rights* (1994).

⁶ See AA An-Na'im 'Problems of universal cultural legitimacy for human rights' in AA An-Na'im & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) 331-336.

⁷ Viljoen (n 4 above) 218-219.

decries the trumping of traditional African practices in favour of practices and ideologies perceived or described as non-African. However, the call for a distinctively African approach to the implementation of children's rights calls into question some cultural practices which impact negatively on the rights of children.⁸ The challenge, therefore, is how to implement children's rights in a culturally appropriate manner, whilst at the same time ensuring that harmful practices are not protected under the guise of cultural propriety.

This contribution argues that the success of children's rights implementation strategies in Africa depends to a large extent on the level of cultural legitimacy accorded to children's rights norms. It demonstrates that the protection and promotion of children's rights are culturally legitimate goals. However, the implementation of universal norms respecting children's rights within African cultures⁹ will in some cases be impeded by practices or values which enjoy cultural legitimacy but are incompatible with the children's rights. It is, therefore, suggested that the general legitimacy accorded to the protection of children within various African societies should be invoked in order to revoke the legitimacy of these deleterious practices. It is submitted that such changes will be achieved only through the adoption of culturally legitimate and acceptable forms of discourse.

2 The cultural legitimacy of children's rights within African societies

The fundamental value underlying the International Bill of Rights¹⁰ is the notion of the inherent dignity and integrity of every human being, whether child or adult.¹¹ All the civil, political and cultural rights recog-

⁸ It must be noted that the tension between culture and children's rights is but part of a larger interaction between culture and human rights in general. In this respect, Ibhawoh observes that '[q]uestions remain, however, as to how best to strike the delicate balance between individual human rights standards guaranteed by the state and collective cultural rights claimed by groups'. See Ibhawoh (n 3 above) 843-844.

⁹ In this discussion, culture is defined in its widest meaning, that is the 'totality of values, institutions and forms of behaviour transmitted within a society . . . this wide concept of culture covers *Weltauschauung* [world view], ideologies and cognitive behaviour'. See R Preswick 'The place of intercultural relations in the study of international relations' (1978) 32 *Year Book of World Affairs* 251. For other definitions of culture, see AL Kroeber & C Kluckhohn (eds) *Culture: A critical review of concepts and definitions* (1963).

¹⁰ The International Bill of Rights refers to the compendium of documents comprising the Universal Declaration of Human Rights, adopted 10 December 1948, UN GA Res 217 A (III) (1948); International Covenant on Civil and Political Rights (CCPR), adopted 18 December 1966 (entered into force 23 March 1976), UN Doc/A/6316 (1966); and International Covenant on Economic, Social and Cultural Rights (CESCR), adopted 16 December 1966 (entered into force 3 January 1976), UN Doc A/6316 (1966).

¹¹ See An-Na'im (n 6 above) 356.

nised by the Universal Declaration of Human Rights (Universal Declaration),¹² and elaborated on in the International Covenant on Civil and Political Rights (CCPR)¹³ and the International Covenant on Economic, Social and Cultural Rights (CESCR),¹⁴ are the necessary implications or practical manifestation of the inherent dignity and integrity of the human person.¹⁵ The intrinsic value attached to human dignity and the integrity of individuals may be traced throughout the value and belief systems of those cultures that constitute the human race.¹⁶ Thus, all human beings and societies share certain fundamental interests, concerns and values that may be identified and articulated as the framework for a common culture of universal human rights.¹⁷

In Africa, traditional value systems recognise human dignity and integrity of the individual as fundamental values.¹⁸ The concept of human dignity entails that all humans, by virtue of being human, are entitled to humanity, respect and dignity.¹⁹ These principles and ideals manifest themselves in traditional society's responsibility to provide for the security and survival needs of its members.²⁰ Although the protection of human dignity is not structured in terms mimicking western human rights discourse, African traditional culture supports the idea and practice of human rights.²¹

In relation to children, the African view of human rights manifests itself in the recognition that children are a valuable part of the society.²²

¹² Universal Declaration (n 10 above).

¹³ CCPR (n 10 above).

¹⁴ CESCR (n 10 above).

¹⁵ Santos Pais (n 2 above) 1, noting that all human rights, civil, political, economic, social and cultural, are inherent to the dignity of every person. See also An-Na'im (n 6 above) 357.

¹⁶ See generally A Pollis 'Cultural relativism revisited: Through a state prism (1996) 18 *Human Rights Quarterly* 316-320, noting that the 'universalisation [of human rights] ... can be located not in rights notions, but in the fact that all societies have conceptions of morality, justice, and human dignity'. See also A Dundes Renteln *International human rights: Universalism versus relativism* (1990).

¹⁷ See AA An-Na'im 'Toward a cross-cultural approach to defining international standards of human rights: The meaning of cruel, inhuman, or degrading treatment or punishment' in AA An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1991) 19.

¹⁸ See generally DM Wai 'Human rights in sub-Saharan Africa' in A Pollis & P Schwab (eds) *Human rights: Cultural and ideological perspectives* (1979) 115.

¹⁹ See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339-346-358; FM Deng 'A cultural approach to human rights among the Dinka' in An-Na'im & Deng (n 6 above) 261-266.

²⁰ Pollis (n 16 above) 342. See also RA Baah *Human rights in Africa: The conflict of implementation* (2000); PJ Magnarella 'Assessing the concept of human rights in Africa' (2001) 1 *Journal of Human Rights and Human Welfare* 25.

²¹ See generally AS Preis 'Human rights as cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 286.

²² Armstrong *et al* (n 3 above) 336.

Capturing the essence of such recognition, the Swazi proclaim that *bantwana bangulimba loya embili*; the Nyanja declare *ana ndiwo tsogolo lathu*; the Banyarwanda insist *abana nibo rwanda rwejo*. Translated literally, these expressions mean that 'children are the future' and they convey the notion that children must be protected and nurtured, else society will die. Thus, African traditional culture recognises the intrinsic worth of children and the need to protect them.

More importantly, however, African culture recognises childhood as a special, precarious and fragile stage of the human being which requires special protection.²³ This perception is translated into the traditional responsibility to provide for the security and survival needs²⁴ of children and ensure their physical and psychological well-being.²⁵ The survival and development of children are legitimate goals of traditional society.²⁶

Based on the above observations, it is concluded that the protection of children's rights is not a concept alien to traditional African culture. Consequently, international human rights principles relating to the protection of the child find support within the African cultural conception of human rights and the construction of childhood.

3 The relationship between culture and children's rights: Problematising the paradox of cultural primacy

Although CRC gives individual rights to children, it also emphasises relationships.²⁷ Consequently, the survival, development and protection of children are dependent upon their families.²⁸ This is hardly surprising, considering that the majority of children are nurtured, socialised, developed and trained into adulthood principally within the confines of the family environment, interacting with other social institutions, such as schools and churches.²⁹ To this end, CRC proclaims

²³ W Ncube 'The African cultural fingerprint? The changing concept of childhood' in Ncube (n 2 above).

²⁴ Thus, eg, the birth of a child will be greeted with elaborate procedures whereby ancestors who live in the spirit world are called upon to take care of the child as it makes its journey through life. Ceremonies which ensure this protection are conducted throughout the child's life.

²⁵ See I Kellner 'Under the knife: Female genital mutilation as child abuse' (1993) *Journal of Juvenile Law* 118.

²⁶ See generally T Lindholm *The cross-cultural legitimacy of human rights: Prospects for research* (1990) 4.

²⁷ See V LeBlanc 'The implementation of the 1989 Convention on the Rights of the Child and the work of the United Nations High Commissioner for Refugees' in E Verhellen (ed) *Understanding children's rights: Collected papers presented at the First International Interdisciplinary Course on Children's Rights* (1996) 401 404.

²⁸ It is in recognition of this that CRC deems the family as deserving of the necessary protection and assistance by the state; Preamble CRC para 5.

²⁹ Ncube (n 23 above) 13.

that the family is the foundation of society and the natural environment for the growth and well-being of its members.³⁰

Furthermore, CRC acknowledges the rights and duties of the family to nurture, socialise and develop their children in a manner consistent with local values, customs and traditions.³¹ In this regard, CRC stipulates that state parties shall respect and protect the rights, duties and responsibilities of parents or members of the extended family or community, as may be regulated by local custom, in ensuring the proper socialisation of the child in the exercise or enjoyment of the rights recognised by CRC.³² The Convention further recognises the role of parents and the family in providing appropriate direction and guidance in the exercise by the child of his or her rights, in a manner consistent with the child's evolving capacities.³³ Thus, it is firmly acknowledged within CRC that the family is the first environment where the children are introduced to the values and norms of society.³⁴

Significantly, CRC is not alone in emphasising the role of family and culture in the upbringing of children. Africa's own human rights documents have a special place for family and cultural values. Thus, the African Charter on Human and Peoples' Rights (African Charter)³⁵ not only states that the family is the natural unit of society which shall be protected by the state, but also declares that the family is 'the custodian of moral and traditional values recognised by the community'.³⁶ The African Charter imposes a duty on the state to assist the family in safeguarding such morals and traditional values.³⁷

The appeal to family, tradition and African values is stressed further by the African Charter on the Rights and Welfare of the Child (African Children's Charter),³⁸ which, apart from reproducing the above provisions of the African Charter in article 18, affirms in its Preamble that the African approach to children's rights takes cognisance of the virtues of African cultural heritage and the values of African civilisation which should inspire and characterise the content of the rights of the African child.³⁹

³⁰ Preamble CRC para 5.

³¹ Santos Pais (n 2 above) 5.

³² Arts 5, 18(1) & 27(2) CRC.

³³ Art 14(2) CRC.

³⁴ Santos Pais (n 2 above).

³⁵ African Charter on Human and Peoples' Rights, adopted 27 June 1981 (entered into force 21 October 1986), OAU Doc CAB/LEG/67/3 Rev 5.

³⁶ Art 18(1) African Charter.

³⁷ Art 18(2) African Charter; Ncube (n 23 above) 13.

³⁸ African Charter on the Rights and Welfare of the Child, adopted 11 July 1990 (entered into force 29 November 1999) OAU Doc CAB/LEG/24 9/49 (1990).

³⁹ Preamble African Children's Charter, para 6.

The above analysis demonstrates the consensus that the family is central in the socialisation of children from childhood to adulthood.⁴⁰ It is equally recognised that such socialisation shall take place with due regard to each society's cultural context. Thus, according to Mutua, the implementation of CRC within the African context must bear what he terms 'the African cultural fingerprint'.⁴¹

In view of the foregoing, it is submitted that, under international law, children's rights, family and culture are related in a dynamic and symbiotic relationship intended to achieve the rounded growth and development of the child. However, this happy relationship is endangered when practices which are considered 'cultural' conflict with the standards set by international human rights norms. Significantly, practices inconsistent with CRC, such as son-preference, are often invoked under the pretext of proper cultural upbringing. The question, then, is: What values are to take precedence: cultural values or children's rights?

CRC addresses this conflict in part by providing in article 24(3) that state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.⁴² In addition, it has been suggested that a holistic reading of the provisions of CRC indicates that the substantive rights guaranteed under it supersede cultural considerations or practices which negate the essence of the rights.⁴³ Consequently, under CRC, it is the rights of children that are primary over culture and not *vice versa*.

The African Children's Charter is even more unequivocal with regard to the relationship between culture and children's rights. The African Children's Charter explicitly asserts its supremacy over any custom, tradition, cultural or religious practice inconsistent with the rights and obligations guaranteed under it.⁴⁴ This supremacy is elaborated further under article 21(1), which stipulates that:

⁴⁰ Ncube (n 23 above) 14.

⁴¹ Mutua (n 19 above) 351.

⁴² There are many traditional practices which are harmful to the child, but no one is in doubt that this provision targets female circumcision. During the drafting of CRC, delegates of Canada, the United Kingdom and United States of America were in favour of formulations referring specifically to female circumcision. For a record of the debates, see S Detrick *A commentary on the United Nations Convention on the Rights of the Child* (1999) 415-419. See also D Johnson 'Cultural and regional pluralism in the drafting of the United Nations Convention on the Rights of the Child' in M Freeman & P Veerman (eds) *The ideologies of children's rights* (1992) 95 109-110; M Freeman 'The morality of cultural pluralism' (1995) 3 *International Journal of Children's Rights* 1 6.

⁴³ Ncube (n 23 above) 15.

⁴⁴ Art 1(3) African Children's Charter. See also DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157 158; Viljoen (n 4 above) 219.

States parties shall take all appropriate measures to abolish customs and practices harmful to the welfare, normal growth and development of the child and in particular:

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

Thus, the approach in international law is to favour those cultural practices which advance the promotion and protection of children's rights and override those cultural practices which are considered deleterious to the protection of children's rights. It is intended that such an approach upholds children's rights, whilst at the same time maintaining the cultural integrity of the societies involved in such practices.⁴⁵

However, such an approach is simplistic and its effectiveness is hampered by some pervasive cultural practices and attitudes which command even more legitimacy than the universal standards for the protection of children. The challenge, therefore, is to find a way to secure a re-evaluation of these competing interests to ensure that legitimacy is bestowed on the values in CRC, as opposed to the harmful practices.

This process calls for a two-stage process: first determining whether the cultural practice in question is consistent with CRC; and, secondly, where the practice is found wanting, finding a suitable method of challenging the practice.

In the following review, I examine the role of general principles regarding children's rights in determining the compatibility of cultural practices with CRC.

4 Determining the compatibility of cultural practices with children's rights: The role of general principles

Although the rights and duties in CRC cover almost every aspect of the child's life, there are four principles that are so fundamental that they may be considered as underpinning the whole Convention. These include non-discrimination, participation, survival and development and the best interests of the child.⁴⁶ Since these are the anchoring principles, it is submitted that the compatibility of cultural practices

⁴⁵ See AA An-Na'im 'Cultural transformation and normative consensus on the best interests of the child' (1994) 8 *International Journal of Law and Family* 62-64; Ibhawoh (n 3 above) 839-842-843.

⁴⁶ The Vienna Programme of Action links and gives equal weight to the principles of non-discrimination, best interests, survival and development and the views of the child in respect of CRC. See Office of the High Commissioner for Human Rights, Fact Sheet No 10 (Rev 1) 'The rights of the child', <http://www.unhcr.ch/html/menu6/2/fs10.htm> (accessed 12 August 2005).

with the promotion and protection of children's rights may be gauged with reference to one or more of these principles.

4.1 Non-discrimination

Article 2 of CRC guarantees every child the enjoyment of the rights set forth in the Convention without discrimination.⁴⁷ This provision obligates state parties to ensure to all children within their jurisdictions the rights guaranteed in the Convention.⁴⁸ This not only implies that states must prevent discrimination, but also that they must ensure the positive enjoyment of the rights which enable all children to be recognised as equally valuable members of the society. In other words, every child within the state's jurisdiction holds all the rights guaranteed under CRC, without regard to her sex or other status.⁴⁹ It is, therefore, submitted that any cultural practice or notion which restricts the exercise or enjoyment of any of the rights set out in the Convention on the basis of the sex or gender of the child is not in conformity with international standards relating to the rights of the child.

Examples of practices that discriminate between girl children and boy children on the basis of their sex include son-preference and female circumcision. With regard to son-preference, Rwezaura notes that the practice is usually a symptom of a deeper form of discrimination that has come to be viewed as part of the community's culture and way of life.⁵⁰ Such discrimination manifests itself in the unequal allocation of family resources between the girl child and her brothers. This gender bias often results in the girl child's fettered access to other rights, such as play,⁵¹ health services,⁵² educational opportunities⁵³ and ultimately her career choices.⁵⁴ In short, the socialisation of girls to accept an inferior position without question impacts negatively on their potential for development and has life-long repercussions.

Female circumcision, on which a plethora of literature exists,⁵⁵ is another cultural practice which is structured along gender lines. Female

⁴⁷ See generally Detrick (n 42 above) 67-84.

⁴⁸ G van Bueren *The international law on the rights of the child* (1995) 40.

⁴⁹ J Kabeberi-Macharia 'Reconstructing the image of the girl child' in Ncube (n 2 above) 47; B Rwezaura 'Domestic application of international human rights norms protecting the rights of the girl child in Eastern and Southern Africa' in Ncube (n 2 above) 28.

⁵⁰ Rwezaura (n 49 above) 32.

⁵¹ Art 31 CRC.

⁵² Art 24 CRC.

⁵³ Arts 28 & 29 CRC.

⁵⁴ CK Rwezaura 'A path analysis of factors affecting girls' choices and careers in Tanzania' MEd thesis, Brandon University, Canada, 1991 quoted in Rwezaura (n 49 above) 33.

⁵⁵ For a sample of the literature, see M Dembour 'Following the movement of a pendulum: Between universalism and relativism' in JK Cowan, M Dembour & RA Wilson (eds) *Culture and rights: Anthropological perspectives* (2001) 56-79;

circumcision is described as 'female genital mutilation' in most human rights literature. However, some scholars are opposed to this description. They argue that the term 'female genital mutilation' implies a value judgment and biases the discussion in favour of those opposed to the practice of traditional forms of 'genital surgery'. They suggest that 'female circumcision' or 'clitoridectomy' is more appropriate because the intention of the practitioners is not to mutilate, but to circumcise.⁵⁶ Whilst noting that it makes no difference to the girl child whether she has a clitoridectomy or genital surgery, I will use the term female circumcision in deference to these arguments. The practice is intended to preserve the moral purity of women, ensure the fidelity of wives, enhance feminine hygiene and make the genital area more aesthetically pleasing.⁵⁷ Thus, the ritual is carried out on girl children on the basis of their gender.⁵⁸ Apart from its discriminatory effects, female circumcision impacts negatively on other rights of the child. These include the right to health,⁵⁹ the right to be protected from physical or mental violence or injury⁶⁰ and the right to privacy.⁶¹

Thus, it is clear that, although the above practices are premised on gender discrimination, their impact results in more general violations of the rights of the child. It is, therefore, critical for the success of the children's rights project that cultural practices which discriminate between children must be addressed effectively and eradicated.

4.2 Participation

CRC recognises children as autonomous beings and guarantees them participation rights.⁶² Thus, the Convention requires that in all matters affecting children, their views must be given due weight in accordance

H Lightfoot-Klein *Prisoners of ritual: An odyssey into female genital mutilation in Africa* (1989); H Lewis 'Between Irua and "female genital mutilation": Feminist human rights, discourse and the cultural divide' (1995) 8 *Harvard Human Rights Law Journal* 1; AT Slack 'Female circumcision: A critical appraisal' (1988) 10 *Human Rights Quarterly* 437; A Finder '*De minimis non curat lex*: The clitoris, culture and the law (1993) *Journal of Transnational Law and Contemporary Problems* 417.

⁵⁶ See I Gunning 'Arrogant perception, world travelling and multicultural feminism: The case of female genital surgeries (1992) 23 *Columbia Human Right Law Review* 189 193; LM Thomas '*Ngaitana* (I will circumcise myself): The gender and intergenerational politics of the 1950 ban on clitoridectomy in Meru, Kenya' (1996) 8 *Gender and History* 338-363; Mutua (n 19 above).

⁵⁷ See S Simms 'What's culture got to do with it? Excising the harmful tradition of female circumcision' (1993) 106 *Harvard Law Review* 1944 1949.

⁵⁸ See J Kabebiri-Macharia 'Female genital mutilation and the rights of the girl-child in Kenya' in Ncube (n 2 above) 249 256.

⁵⁹ Art 24 CRC.

⁶⁰ Art 19(1) CRC.

⁶¹ Art 16(1) CRC.

⁶² Chirwa (n 44 above) 160.

with their age and maturity.⁶³ CRC concretises this requirement by providing children with the right to freely express their opinions.⁶⁴ Consequently, it is submitted that cultural practices or notions which prevent the child from expressing his or her views or which do not give due weight to the views of the child must be considered as inconsistent with the rights of the child.

In this respect, it is worth noting that, in many African traditional societies, the autonomy of the child is often heavily constrained.⁶⁵ Notions of the child and childhood are generally premised on the idea that it is only adults that know what is best for children.⁶⁶ From an early age, children are taught to defer and revere the elderly.⁶⁷ Thus, the relationship between children and adults is characterised by enormous 'filial respect and, in turn, is reinforced by the ethic of dominance'.⁶⁸

The denial of participation rights to children results in a paternalistic and problematic construction of child-adult relationships. Such a situation is not conducive to the realisation of the rights enshrined in CRC and only serves to facilitate the continuation of other practices which are harmful to the child.⁶⁹ It is submitted, therefore, that practices and notions which have the effect of directly or indirectly impinging on the child's participation rights must be challenged. To this end, the success of the children's rights agenda in Africa depends to a large extent on a reconsideration of the position of children *vis-à-vis* their parents and the development of a culture of listening on the latter's part.

4.3 Survival and development

Article 6 of CRC guarantees the child the inherent right to life and

⁶³ Art 12 CRC.

⁶⁴ Art 13 CRC. See also Chirwa (n 44 above) 160.

⁶⁵ However, see J Harwin in B Franklin (ed) *The handbook of children's rights: Comparative policy and practice* (1995) 227 230, noting that this aspect is not peculiar to African society. She states that 'in virtually all societies, children's rights to determine their upbringing are extremely limited, particularly in the case of young children'.

⁶⁶ See Chirwa (n 44 above) 160, noting that '[c]hildren are normally considered to be deficient in their decision-making capabilities and deserving of protection' and that consequently '[d]ecisions concerning children are often made by a group of male elders'. See also B Rwezaura 'The duty to hear the child: A view from Tanzania' in Ncube (n 2 above) 57; C Himonga 'The right of the child to participate in decision making: A perspective from Zambia' in Ncube (n 2 above) 95.

⁶⁷ B Rwezaura 'Changing community obligations to the elderly in contemporary Africa' in JM Eekelaar & D Pearls (eds) *An aging world: Dilemma and challenges for law and social policy* (1989) 113 116.

⁶⁸ Rwezaura (n 66 above) 59.

⁶⁹ With respect to female circumcision, Kabeberi-Macharia notes emphatically that '[t]he issue of the girl child having a right to decide whether or not she wants to undergo the operation, or expressing her views does not arise'. See Kabeberi-Macharia (n 58 above) 260.

obligates states to ensure to the maximum extent possible the survival and development of the child. The duty on the state to ensure to the maximum extent possible the survival and development of the child emphasises the need to guarantee correlated rights that ensure the enjoyment of the right to life.⁷⁰ Amongst these associated rights are the right to enjoy the highest attainable standard of health,⁷¹ and the right to food, water and an adequate standard of living. Since survival is a precondition to the enjoyment of any rights accorded to children, it is submitted that any cultural practices which impact negatively on aspects of the child's survival rights are contrary to CRC.

Thus, practices such as female circumcision, which impact negatively on the child's health rights and hence her survival rights, should be addressed.

4.4 Best interests of the child

Article 3 of CRC emphasises that, in all actions affecting the child, the best interests of that particular child must be a primary consideration. The best interests principle demands that any decision taken in respect of children must be directed at the enhancement of their growth and development. It does not entail the adoption of a paternalistic or know-all attitude on the part of parents or guardians,⁷² but rather a careful balancing of the values and interests 'competing for the core of best interests'.⁷³ These interests include, but are not limited to, the opinions of the child, the needs of the child and the risk of harm.⁷⁴ Consequently, cultural practices which threaten or harm the growth and development of the child cannot be said to be in conformity with the best interests principle.

In this regard, it is submitted that cultural practices which perpetuate or are premised on discrimination, or which severely circumscribe the child's participation, cannot be properly permitted to compete for the core of the child's best interests. Similarly, practices which stand in the way of a child's development and growth cannot be described as being in the best interests of the child and these, too, must be eradicated.

The preceding analysis demonstrates that general principles of CRC are crucial in determining the contribution, whether negative or positive, that African cultural values make in the protection and promotion of children's rights. In this regard, it is imperative that these principles

⁷⁰ Van Bueren (n 48 above) 303.

⁷¹ Art 24(1) CRC.

⁷² Van Bueren (n 48 above) 47, noting that the best interests principle challenges the concept that 'parents are always capable of deciding what is in the best interests of their children'.

⁷³ Van Bueren (n 48 above) 47.

⁷⁴ See generally Detrick (n 42 above) 85-99.

must be worked into the African cultural norms of children's rights so that the determination of compatibility comes from within African cultures themselves, as opposed to externally.

However, it is worth noting that most of the cultural practices which are contrary to the above principles are accepted and legitimate within the various communities in which they are practised. Fortunately for African children, though, these practices are not immutable. It is possible to defrock them of their legitimacy, as such practices are incompatible with the general cultural legitimacy accorded to children's rights. To this end, culturally appropriate interventions for the legitimisation of children's rights and the de-legitimisation of the practices must be resorted to.

5 Challenging harmful cultural practices: Process and prospects

Like all societies, traditional African societies are not culturally static, but are 'eclectic, dynamic and subject to significant alteration over time'.⁷⁵ They are susceptible to, and respond to, influences by social, economic and political forces. Thus, traditional cultural beliefs are neither monolithic nor unchanging. In fact, one of the apparent paradoxes of culture is the way it combines stability with dynamic continuous change.⁷⁶ As Herskovitz correctly observes:⁷⁷

Culture is flexible and holds many possibilities of choice within its framework . . . [T]o recognise the values held by a given people [at any given time] in no way implies that these values are a constant factor in the lives of succeeding generations of the same group.

Thus, culture and cultural practices are not immutable, but are rather inherently responsive to new ideas and ways of doing things suggested by external influences and demanded by internal needs.⁷⁸

The relevance of these observations to the present discussion is that traditional cultural practices which are inimical to the protection of children's rights are not cast in stone. On the contrary, these practices are open to challenge, reformulation and substitution.⁷⁹ Consequently, the legitimacy enjoyed by practices such as female circumcision, son-preference or such like is open to challenge and substitution by the universal human rights norms which inform children's rights.

However, it must always be appreciated that the degree of flexibility permitted by a culture and the range of choices which it offers its

⁷⁵ Ibhawoh (n 3 above) 841.

⁷⁶ An-Na'im (n 17 above) 27. See also GJ Herskovitz *Cultural dynamics* (1964) 4 6.

⁷⁷ Herskovitz (n 76 above) 49-50.

⁷⁸ Ibhawoh (n 3 above) 841.

⁷⁹ An-Na'im (n 45 above) 64.

members are themselves determined and controlled by what An'Naim calls the 'internal criteria of legitimacy'.⁸⁰ In other words, the procedures and the substantive arguments adopted to challenge the validity of cultural notions must themselves enjoy acceptance by members of the culture. Thus, in attempting to alter or replace the various cultural practices like the ones we have referred to in this discussion, it is critical that the methods of contestation or challenge do not negate the integrity of the various cultures within which such practices are condoned.

In this respect, it is worth noting that a large part of the debate concerning harmful cultural practices has been conducted in an elitist, top-down manner.⁸¹ This has involved the evaluation of practices without regard to the social context or cultural justifications.⁸² Alternatively, where social context and cultural justifications have been taken into consideration, these have been dismissed quickly and easily as misconceptions.⁸³

This approach has resulted in the rejection of the processes themselves, thereby forestalling the opportunity for substantive discourse. Thus, for example, the practice of female circumcision has remained prevalent in many African societies, notwithstanding extensive national and international legislation against the practice.⁸⁴ This trajectory has not been observed in respect of female circumcision alone, but also in the case of forced marriages, child marriages and gender discrimination.⁸⁵ Consequently, the design and implementation of culturally legitimate procedures for eradicating these practices are critical to the success of the children's rights project in Africa.

⁸⁰ An-Na'im (n 17 above) 27. See also Ibhawoh (n 3 above) 841.

⁸¹ In literature, this type of discourse has been variously termed 'arrogant perception', 'moral arrogance' 'cultural imperialism' or 'cultural chauvinism'. However, all these colourful expressions refer to what is commonly known as ethnocentrism. Gunning (n 58 above) 189; Mutua (n 19 above) 357.

⁸² Freeman (n 42 above) 2-4, reporting on the consternation of some English gentlemen at the idea of child marriage.

⁸³ Eg, in *In Re Oluloro*, Kendall Warren J suspended the deportation of Lydia Oluloro from the USA on the ground that if returned to her country of citizenship, Nigeria, she would be subjected to female circumcision. In his judgment, Warren was of the opinion that the practice is 'archaic, cruel and dangerous'. It is inconceivable that the mothers who let their daughters undergo female circumcision perceive the practice in the same terms as Kendall. (*In Re Oluloro* is cited in PD Rudloff '*In Re Oluloro*: Risk of female genital mutilation as "extreme hardship" in immigration proceedings' (1995) 26 *St Mary's Law Journal* 877).

⁸⁴ See V Oosterveld 'Refugee status for female circumcision fugitives: Building a Canadian precedent' (1993) 51 *University of Toronto Faculty of Law Review* 277 299-300, reporting that laws in Egypt, Guinea, Tanzania, Sudan and the Central African Republic prohibiting female circumcision have had little or any effect. See also K Boulware-Miller 'Female circumcision: Challenges to the practice as a human rights violation' (1995) 8 *Harvard Women's Law Journal* 155; Ibhawoh (n 3 above) 894.

⁸⁵ Ibhawoh (n 3 above) 848-849, noting the continuation of harmful cultural practices despite their prohibition in African constitutions.

Apart from procedural legitimacy, it is also important that there is substantive legitimacy. Thus, proposed alternatives must be perceived by the societies concerned as relevant to their needs and expectations.⁸⁶ In other words, the proponents of change must not only demonstrate that they have a valid claim for change within that particular culture, but they must also adopt arguments and means of presentation which are accepted as internally valid or legitimate.⁸⁷

In this respect, it must be observed that a significant part of the debate surrounding practices harmful to the child has not been structured in African cultural terms, but has rather relied on language and symbols alien to the societies where the condemned practices are sanctioned.⁸⁸ The illegitimacy of this approach is evidenced by the resilience of the condemned practices despite the full-fledged attacks against them. Consequently, it is essential that the discourse against harmful cultural practices is structured in a way that does not nurture resistance to cultural change, but is rather designed in a manner that promotes the substitution of harmful practices with notions of children's rights.

A good illustration of the effectiveness of culturally appropriate procedures and arguments is provided by the manner in which some communities in the south of Malawi have attempted to deal with the practice of *fisi* (hyena) during girls' initiation ceremonies. The practice entails that, at the end of formal instruction during the initiation period, the *fisi* goes into the compound where the initiates are ensconced to 'examine' whether they are able to practise the concepts and theories which they have been taught regarding sex and sexuality. Since *afisi awiri sapasula khola limodzi* (two hyenas cannot attack the same kraal), one *fisi* would necessarily administer the examination to all the initiates. Given the prevalence of HIV/AIDS in Malawi,⁸⁹ the harmful nature of the practice cannot be gainsaid. Although it is very difficult to get concrete and accurate data regarding the effects of the practice due to the secretive nature of the initiation process, its consequences on the socio-economic fabric of the community are no less dire. Long and cumulative illnesses, such as those associated with HIV infection, not only ravage the patient, but also deplete already meagre resources as poor families attempt to provide care for their sick. Household economic productivity falls because sick children can no longer fulfil their roles and other family members' time is spent in looking after the sick

⁸⁶ An-Na'im (n 45 above) 67.

⁸⁷ An-Na'im (n 45 above) 68.

⁸⁸ I hesitate to call this mode of discourse 'western' or 'eurocentric', although it has frequently been so termed in literature.

⁸⁹ At the end of 2001, it was estimated that 15% of Malawians aged between 15 and 49 were HIV positive. See UNAIDS/WHO *Epidemiological fact sheet on HIV/AIDS: Malawi: Update 2002*, http://www.who.int/emc-hiv/fact-sheets/pdfs/Malawi_EW.pdf (accessed 22 September 2005).

child. These factors only serve to exacerbate the already inadequate support during illness. The impact on the girls themselves is grave. They can no longer continue their education due to ill-health. They have to face discrimination because of the taboos associated with HIV-related illness. For most, the resulting AIDS infection is a slow, agonising and often lonely death.

Consequently, the village elders were approached and advised that the practice must be done away with, as it endangered the lives of many. The elders, however, remained adamant, arguing that the initiation of girls was crucial as nobody wants an 'untrained' wife. They argued further that the marriages of women who had not been 'properly trained' frequently ended in divorce and that nobody 'wanted a wife they were sure to divorce a few years down the line'. These arguments were met with the response that a divorced wife was better than a dead wife or, worse still, no wife at all (because all the girls had died from HIV/AIDS). To emphasise this point, it was contended that the whole initiation process was directed at ensuring a happy family life and this ideal would be shattered if the wife fell sick or died during the marriage.

Conceding the logic of these arguments, the elders relented and advised the women who manage the initiation ceremonies that examinations by *fisi* were no longer necessary. Although there are reports that the practice continues in some communities, a lot of *afisi* have lost their jobs. It is unlikely that these results would have been achieved if the elders were told that the practice was 'archaic, cruel and dangerous'⁹⁰ or that it was contrary to the provisions of CRC to expose children to this kind of harm.

The preceding analysis may lead some to question whether international norms respecting the rights of the child have any place in the eradication of harmful practices when so much depends on the internal dynamics of those cultures which observe practices inimical to the growth and development of the child. The obvious answer is that international norms, appropriately presented, constitute a substantive challenge to the legitimacy of the practices which are harmful to children. They are the alternatives to be utilised in the process of cultural change towards a greater respect for children's rights. Without the articulation of these international norms, there would be no alternatives to female circumcision, son-preference or like practices.

These norms already enjoy support within African societies by virtue of the way the protection of children is viewed. The incorporation of these new ideals is, therefore, a struggle for greater protection than is currently available. Admittedly, the process is not easy, given the

⁹⁰ See n 81 above.

deep-rooted nature of most of these practices.⁹¹ However, the adoption of correct procedures and the formulation of legitimate arguments should demonstrate the need to expand current ideas about children and childhood within African societies and should prove instrumental in bringing about cultural change which advances the struggle for children's rights.

6 Conclusion

The acceptance by African states of international standards on the promotion and protection of children's rights is the first step towards the eradication of practices and beliefs harmful to children. However, there is a need to concretise the aspirations embodied in these standards through the implementation of programmes, projects and other interventions which result in positive norm change. In this regard, governments, practitioners, academics and community members should take heart in the fact that traditional African values generally support children's rights. However, it must also be appreciated that there are some practices which militate against the implementation of children's rights within the African cultural context. These practices cannot be eradicated by a simple process of legislation of alternative norms. There is a need for an appropriately structured internal discourse directed at the re-evaluation, reformulation and replacement of values. This process, it is submitted, must be done in a manner which is neither culturally offensive nor results in the loss of African cultural integrity.

There are several practical steps which may be taken to ensure that international standards promote the eradication of harmful cultural practices, such as female genital mutilation, inappropriate initiation rites and others. Firstly, cultural values and the reasons for the existence of a practice must be clearly and adequately understood before embarking on a programme of eradication.

Secondly, governments and civil society need to design 'original' interventions against the practices. By this it is meant that the solutions towards achieving eradication must be sourced and drawn up in consultation with practising communities, as opposed to being merely copied from outside standards. In this regard, governments and children's rights practitioners must be aware that the mere cloning of external legislation or standards formulated in other contexts has a greater chance of failing than those that are grounded and localised.

⁹¹ Eg, female circumcision is described as a '2000 year-old practice' in some literature. See B Breitung 'Interpretation and eradication: National and international responses to female circumcision' (1996) 10 *Emory International Law Review* 657 658.

Thirdly, governments and children's rights practitioners must be alive to the fact that individuals or families who choose to abandon an entrenched practice in favour of the alternative view in support of children's rights may face considerable hostility from other members of their own community. Consequently, adequate social support for these individuals and their families must as a matter of course be built into any intervention model or programme.

Finally, it must be appreciated that eradicating deep-rooted cultural practices and customs cannot be achieved through the adoption of one method or policy stance. There is need for multi-sectoral approaches and collaboration. Such a stance avoids duplication and strengthens intervention efforts. This, therefore, calls for constant dialogue and collaboration between government, community members, local leaders, non-governmental agents and, of course, children in changing attitudes and beliefs for better protection of children's rights.