

Regional Symposium on Harmonisation of Laws on Children in Eastern and Southern Africa, 9-10 May 2007

*Christopher Mbazira**

Lecturer, Department of Public and Comparative Law, Makerere University; PhD Candidate, Community Law Centre, University of the Western Cape, South Africa

1 Introduction

From 9 to 10 May 2007, the African Child Policy Forum (AFCPF), supported by UNICEF, Eastern and Southern Africa Office (UNICEF-ESARO), organised a Regional Symposium on Harmonisation of Laws on Children in Eastern and Southern Africa (Symposium). This Symposium was preceded by a project that studied the extent to which 18 countries in the Eastern and Southern African region had harmonised their laws on children with the United Nations (UN) Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). The Symposium brought together about 70 children's rights experts, academics and advocates from over 15 countries. This is in addition to experts from regional and international organisations such as UNICEF and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). In attendance were Mr Jean Baptiste Zougrana, who is the Chairperson of the African Children's Committee, Professor Jaap Doek, who is a former Chairperson of the UN Committee on the Rights of the Child (UN Children's Committee) and Dr Laila Gad, the Director of Social Affairs at the African Union (AU) Commission.

While almost all African countries have signed and ratified CRC and the African Children's Charter, only a handful have harmonised their laws with these instruments. However, even those countries where the laws have been harmonised, full realisation of the rights of the child is

* LLB (Makerere), (Dip LP) (LDC), LLM (Human Rights and Democratisation in Africa) (Pretoria); bazzira@yahoo.co.uk

yet to be attained. The purpose of the Harmonisation Project, therefore, was to conduct a comprehensive review of how well African countries were harmonising their national laws on the rights of the child in response to CRC and the African Children's Charter. The Symposium, which was the second held under this project, was intended to discuss the findings of the project and to chart the way forward. The first symposium, held in Nairobi on 26 to 27 October 2006, brought together the experts from 18 countries that had been contracted to analyse and provide information on the state of children's laws in those countries. The project also involved the identification of good practices from six of the countries that could be emulated by those in the process of reviewing their laws on the rights of the child.

2 Preliminary findings of the Harmonisation Project

A preliminary report, presented at the Symposium, disclosed that children's rights are not given priority in most countries. This, amongst others, is evidenced by the number of children's rights-related legislative bills that have been pending for significantly long periods before legislative bodies of such countries as Lesotho, Malawi, Namibia and South Africa.¹

Laws on children in some of the countries surveyed have not fully been harmonised with CRC and the African Children's Charter. Out of the 18 countries, only 10 have undertaken a comprehensive review of their laws to align them with CRC and the African Children's Charter.² The study unearthed practices in a number of countries that violate children's rights in ways inconsistent with both CRC and the African Children's Charter. Both CRC and the Children's Charter require that the main aim of juvenile justice should be to reform and reintegrate into the community children in conflict with the law.³ This, though, is not the case in some countries. Children in conflict with the law are still subjected to the same criminal justice system as adult offenders. Yet the detention of children is not a matter of last resort.⁴ Only five of the 18 countries have established separate children's courts and have put in place legal guarantees that are consistent with the UN Standard Minimum Rules for the Administration of Juvenile Justice.⁵

Both CRC and the African Children's Charter, in very clear terms, define a child as anyone under the age of 18 years.⁶ In spite of this,

¹ The African Child Policy Forum, Draft Report *Realising rights for children. Harmonisation of laws on children: Eastern and Southern Africa* (2007) 1.

² n 1 above, 23. The ten are: Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, Swaziland and Uganda.

³ Art 40 CRC & art 17 African Children's Charter.

⁴ n 1 above, 76.

⁵ Adopted by General Assembly Resolution 40/33 of 29 November 1985. The countries with children's courts include Botswana, Comoros, Ethiopia, Kenya and Uganda.

⁶ Art 1 CRC & art 2 of the African Children's Charter.

there was no agreement on the definition of a child in many countries. This is in addition to there being inconsistencies in setting the minimum ages of criminal responsibility, sexual consent and marriage. In Malawi, for instance, a child is defined as a person under the age of 16 years, while in Zambia it is a person under the age of 15 years.⁷ The other problem related to age is the inconsistencies that exist in many countries between the minimum age of marriage and the minimum age of sexual consent. In Madagascar and Tanzania, for instance, the minimum age for sexual consent is 21 and 18 years respectively, in contrast with the minimum age of marriage, which is 14 and 18 years respectively.⁸

Discrimination against children on such grounds as sex, ethnicity, disability and parentage still persists in many countries. In Tanzania, for instance, children born out of wedlock are not entitled to familial relationships with their fathers.⁹ Discrimination also exists between girls and boys when it comes to inheritance and marriage. In many countries, for instance, there is a distinction in the minimum age of marriage and consent to sexual intercourse between boys and girls. In Swaziland, the minimum age of consent to sexual intercourse for girls is 16 years and 14 years for boys.¹⁰

Births still go unregistered in many countries. Although most countries have laws that mandate compulsory birth registration, these laws have not been implemented in some countries. In Eritrea and Ethiopia, for instance, there are no registration systems put in place. Yet in such countries as Burundi, Comores, Kenya and Madagascar, the registration process has been affected by the insufficiency of resources for this purpose. This is in addition to ignorance and a lack of awareness of the process.¹¹

Both CRC and the African Children's Charter protect children from physical or mental violence and abuse. While many countries have provisions that prohibit such violence, children are still subjected to violence and abuse. Many countries, for instance, have legal provisions that recognise corporal punishment as an acceptable form of administering discipline. A significant number of countries, though, have banned corporal punishment as a form of sentence for a crime and as a form of punishment in the education system.

While a number of countries have harmonised their laws with CRC and the African Children's Charter, in some countries these laws are yet to be fully implemented.

⁷ n 1 above, 24.

⁸ n 1 above, 26.

⁹ n 1 above, 30.

¹⁰ n 1 above, 2.

¹¹ n 1 above, 37.

3 Good practices

In spite of the above negative findings, a number of positive observations were made. Most notable are the good practices identified in six of the countries as outlined in the report on good practice.¹²

3.1 The inclusive and consultative children's rights law reform process in Lesotho

The process of law reform was multi-sectoral; it involved researchers, members of the community (including traditional leaders and people from rural areas), academics, government officials (including parliamentarians) and members of the judiciary. The process also involved listening to children's voices, in a number of ways. The most notable of these was the formation of a Junior Committee of the Child Law Reform Project. This forum organised a number of activities and events through which children's views on the proposed reforms were sought.¹³ The Lesotho reform process has resulted in the Child Protection and Welfare Bill, yet to be promulgated.

3.2 Free and compulsory primary education in Kenya

Section 7 of the Kenyan Children's Act, 2001, provides that every child is entitled to free basic education. This right was implemented in 2003 when government introduced free primary education.¹⁴ The government has assumed the responsibility of providing for all direct costs and overheads for primary education. Parents continue to bear the responsibility for such indirect costs such as feeding their children, the provision of school uniforms and sports equipment, and transportation of the children from home to school.¹⁵ This programme has resulted in the rapid increase in enrolment in primary schools, which has allowed many children to access education.

3.3 Promoting adoption and alternative care in Madagascar

Madagascar has promulgated the Law on Adoption, 2005, to guarantee the protection of children in cases of adoption, whether national or international.¹⁶ The Act establishes a Central Authority which is mandated with the duty to implement and monitor the implementation of the Hague Convention on Protection of Children and Co-operation in Respect of

¹² The African Child Policy Forum *Realising rights for children. Good practice: Eastern and Southern Africa* (2007) http://www.africanchildforum.org/Documents/Good_Practice.pdf (accessed 22 June 2007).

¹³ n 12 above, 5.

¹⁴ n 12 above, 11.

¹⁵ n 12 above, 12.

¹⁶ n 12 above, 18.

Inter-country Adoption.¹⁷ The Central Authority is responsible for monitoring all adoptions and had by December 2006 facilitated over 90 adoptions. The authority also monitors the activities of adoption agencies.

3.4 Recognition of the need for separate courts for children in Mozambique

Mozambique acknowledged the need for children to have a separate court as early as 1971 under the Statutes on Jurisdictional Assistance to Minors.¹⁸ Although the jurisdiction to decide children's matters lies with ordinary courts, these courts are designated as *Tribunale des Mineurs* (children's courts) when handling such matters.¹⁹ The purpose of these courts is to help children in the field of crime prevention through the application of measures of protection, assistance or education on their rights. This is in addition to the adoption of several civil measures.²⁰ This system has created an appropriate environment for children in line with international standards.²¹

3.5 Diversion from the criminal justice system in Uganda

The Children's Act of Uganda has established a system that allows children in conflict with the law to be diverted away from the formal justice and to ensure that their detention is a matter of last resort.²² Diversion in Uganda takes place at three levels: at the community level; the police station; and at the Family and Children's Court (FCC). At the community level, local administration councils have powers to try criminal offences that are not of a serious nature and are committed by children. These councils have powers to order compensation, reconciliation, restitution, apology and to issue a caution.²³ At the police station, police officers have the powers to release children without a formal charge and to dispose of cases without a resort to formal proceedings.²⁴ They are required to use detention as a measure of last resort. The FCC also has criminal jurisdiction over children and has the power to order a discharge, caution, compensation and restitution, amongst others.²⁵ Yet the procedures in the FCC are informal and avoid stigmatising a child before the Court.

¹⁷ Adopted 29 May 1993, entered into force 1 May 1995.

¹⁸ 417/71.

¹⁹ n 12 above, 24.

²⁰ n 12 above, 25.

²¹ n 12 above, 26.

²² Children's Act, ch 59, Laws of Uganda, 2000.

²³ n 12 above, 30.

²⁴ As above.

²⁵ n 12 above, 32.

3.6 Judicial activism in implementing children's rights in South Africa

The South African judiciary has, in an activist manner, played a very important role in protecting the rights of children.²⁶ The South African courts have protected children from violence, ordered fulfilment of their socio-economic rights, such as the right of access to health care services.²⁷ The courts have also protected the rights of children placed in rehabilitation centres by decreeing that the conditions in these centres improve.²⁸ The courts have used constitutional litigation to clearly flesh out the principles of international law in domestic law.²⁹

4 Conclusion

There were a comprehensive discussion and an exchange of views at the symposium. This was followed by charting the way forward. It was observed that while a comprehensive review of legislation was necessary, child rights advocates had to guard against over-ambitious reforms that would be hard to implement once the laws were adopted. This could be because of financial and human resource constraints, such as the lack of enough social workers on the continent. The need to carry out similar harmonisation projects in other regions of Africa and for countries to share their experiences was stressed. It was also emphasised that a number of instruments dealing with children's rights exist at the regional level and that there are problems with their implementation.

The findings of the project and the discussions at the Symposium will be disseminated widely. For further information on the Harmonisation Project and the symposium contact:

The African Child Policy Forum
PO Box 1179
Addis Ababa, Ethiopia
Telephone: + 251-11-662 8192/96
Fax: +256-11-662-8200
Email: info@africanchildforum.org
Website: www.africanchildforum.org

²⁶ n 12 above, 37.

²⁷ n 12 above, 39.

²⁸ n 12 above, 40.

²⁹ n 12 above, 41.

UNICEF ESARO
UN Complex
Block E Room 206
PO Box 44145 00100
Nairobi, Kenya
Tel: 254-20-762 2140
Fax: 254-20-7622686/622008