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Assessing the Compatibility of Article 20 and 31 of the African Children's Charter in Light of the International Standards: Focus on the Girl-Child

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Abstract:

In the African traditional conception of human rights, individual rights cannot be understood devoid of his duties toward the group, so that end up with articulation of ranges of duties owed to the group. The same notion of understanding is reflected under the African Children's Charter which provide reciprocal duties and responsibilities between a child and his/her family. However this feature of the Charter has attracted a considerable criticism, thus it is noted that this phrase may create environment gratuitous for invasion of child rights granted under the charter. This paper dedicated to explore the implication of this approach on the human rights enjoyment of girl-children, who are one of the most marginalized members of the society because of their age and sex. It is emphasized that the way in which a girl-child experience the world is often prejudicial and detrimental to her equal enjoyment of human rights. By way of conclusion, the provisions are the reflection of African conception of human rights, and seek to promote positive aspects of African child-rearing practices, and therefore they can be deployed to reinforce rights enshrined under the charter. Nonetheless it is noted that it may have an unintended impact of posing a threat to protection of human rights of girl child. Apart from this, the paper suggests that the committee of experts has a big role to play in elaborating the practical meaning of the provisions.

Key words: Human Rights, Child, African Charter

1. Background: Overview

There is a general consensus that Children are in many respect more susceptible to human rights violation than adults. Their being helpless, defenseless, and powerless rendered them vulnerable. However, it is emphatically noted that cause of human rights violations like warfare and poverty do have a disproportionate impact on the African children than their counterparts on other continents¹. Even more in African traditions, children were only supposed to be seen, not heard; as result their views and interests often did not matter². Though it appears to be a universal fact that African children generally enjoy less social powers, hence, left marginalized, the double burden of being female and young relegates millions of African girls to the margin of society where, unseen and unheard, their rights disregarded and their safety is denied. Various researches conducted across a world revealed that cultural practices and beliefs undermine girl's safety and wellbeing- compared to boys, thereby forbid them from enjoying human rights equally³. This is especially true in the African context, where there are Variety of cultures which appeared to be hostile to girl child's enjoyment of human rights. Africa is a home of widespread traditional practices like early marriage, female gentile mutilation, Trokosi⁴ which exemplifies the treatment of African women as a chattel property; and many others which remained to be a significant protection threat to child girls in the region. According to recent studies conducted under auspices of UNICEF, Africa has the highest rate of female genital mutilation, early marriage and child labour⁵. Reports have also indicated that child migration and trafficking is growing problem in the region. Nonetheless, in the majorities of instance it is female children who are the main victims. At the root of many of traditional

¹ . Eric Ngongi Njungwe, "international protection of children's rights: an analysis of African attributes in the African charter on the rights and welfare of child" 2009 Vol 3 Cameron Journal on democracy and human rights, pp 5

² . Priscilla Yachat Ankut, the African charter on the rights and welfare of the child: linking principles with practice(2006), pp 9

³ . Jeanne Ward, From invisible to indivisible: promoting and protecting the girl children to be free from violence (2007) part of the UN study on the violence against children

⁴ . Jwele Amoha, "the world on shoulder: the rights of girl in the context of culture and identity", (2007) Vol 4 Essex human rights review, pp 9

⁵ . 2011 statistical report of UNICEF

practices that prey on the marginalization and vulnerability of girl-child is the belief that they are not as valuable as boys⁶. Thus, the combination of poverty, conflicts and drawback cultures continue to deny African girl child enjoyment of her human rights. It is against this background the then OAU (AU) has adopted the African Charter on the Rights and Welfare of Children⁷ (henceforth, African children's charter). It is the first and the only regional human rights treaty on the right of child. Before the adoption of African Children's Charter, it is the UN Convention on the Rights of the Child⁸ (henceforth, CRC), that guarantee protection of children's rights. The conventions covers a wide range of rights (civil and political and socio-economic and cultural rights), and establishes legally binding obligations by laying down international standards, which state parties must observe. It is widely ratified document with all UN members, except USA. However it had been argued that at the time of drafting, the CRC lacks regional specificities, therefore, insensitive to many of concerns peculiar to Africa⁹. The reasons mainly attributed to underrepresentation of Africa in the drafting process of CRC, and less attention lent to issues pertinent to African children. Thus there was a general feeling that African interests and priorities are not adequately addressed, which in turn, raised the need to have more protective regional human rights instruments that identifies and priorities issues specifically affecting African children in addition to globally recognized and generally applicable standards¹⁰. Accordingly, the Children's Charter which accounts African socio-cultural values and historical backgrounds was adopted¹¹. Meanwhile, it should be noted that the Charter draws a great deal from the CRC, and they are wholly complementary. Both are also based on the four key principles within the child rights. Furthermore, the African Children charter mirrors its UN equivalent, thus, it guarantees all the rights recognized in the CRC. However, there are features distinctive to the Charter. The African Children Charter has clearly defined who children are, and creates state obligations with no distinction regarding the class of rights. It has also dealt with issues like protection against harmful practice, involvement in hostiles and apartheid from a broad perspective. Even more important, the critical look at the substantive provisions of the Children's Charter in direct comparisons with the CRC shows that in number of respects, it sets higher level of protection than its UN equivalent. Notable amongst these is in the area of participation of children in hostilities¹², child marriage¹³, child refugees¹⁴ and best interest of the child principle¹⁵. Each of these aspects resonate the realities of lives of children in African. In fact, this is the robust and appreciable side of the African Children's Charter. Though the Children's Charter has brought better protection regarding these aspects, it is sharply contrasted the UN equivalent regarding the domestic discipline and duties of the child¹⁶. These points have attracted major critics against the African Children's Charter. Proponent of this approach argues that imposition of domestic discipline as well as duties upon the child should never be understood as enabling environment for gratuitous invasion of their rights¹⁷. Rather it is reflection of positive African traditions where the family (parents) plays crucial role in proper socialization of the child, which likewise bears responsibility for the latter toward their society¹⁸. Here the point is that provision of both the domestic discipline and duties of children can play important role to foster their upbringing and overall development, hence, help them to participate in the society. Nonetheless, some have argued that these provisions may leave the door open to abuse of children's rights, thereby would make the rights enshrined under the Children's Charter illusory¹⁹. This is truly be a concern and real fear, in the case of African girl-child since the way she experience the world is traditionally negative, as it is characterized by disadvantage, marginalization and discrimination, vis-a-vis other member of her society. Thus the girls are often the victims of traditional beliefs which are deeply entrenched in the African culture. It is also to our common knowledge that the way family treats a girl is most often discriminatory- impedes realization of their human rights. In most cases a girl child are not allowed to go school, get married early, deprived their bodily integrity (eg,FGM) because of the traditional beliefs, the likes of a girl supposed to assist family (domestic works), respect family order and expected to be more ethical. Thus her duty toward the family and community left her vulnerable. So this paper dedicated to explore whether these provisions (art 20(1) and 31) would legally perpetuate the marginalization of girl child, or would be understand as part of positive African culture which intends to reinforce the rights granted. After introducing the subject matter of the discussion, the second section of this paper starts with the premise that in order to understand the languages of the provisions, one needs to have an informed view of African conception of community and individual responsibility. With this background the section deals with the notion of duties from the wide

⁶ . supra note 4,pp 8

⁷ . the African charter on the rights and welfare of the child, adopted by OAU on 1990 and entered into force 1999

⁸ . The United Nation Convention on the Rights of the Child, adopted on 1989 and entered into force on 1990

⁹ . Frances Sheahan, *advancing children's rights: a guide for civil society organizations on how to engage with the African committee of experts on the rights and welfare of child*, (2nd ed,2010), pp 9

¹⁰ . supra note 1, pp 12

¹¹ . the preamble section of the African Children's Charter

¹² . the African children's charter Art 22 totally denies a child, whose age is below 18, from taking part in hostilities while the CRC allows children whose age is 15-18 to participate directly

¹³ . Children's charter, Art 21(2), prescribes that the minimum marriageable age is 18 while. The same does not apply in CRC

¹⁴ . The African Children's Charter extends the protection to internally displaced children too

¹⁵ . Children's Charter has more strong reference to the best interest of the child principle

¹⁶ . Children's charter Art 20(1) c cum Art 31

¹⁷ . J Sloth-Nielsen and BD Mezmur ,“Dutiful Children: the implication of Article 31 of the African Children's charter” (2008),52,2 journal of African law 159-189. See also

¹⁸ . supra note 2 pp 7-8

¹⁹ . supra note 9

spectrum of the African human rights system, particularly ACHPR. Following this, the third section will assess the compatibility of the provisions in light of international standards with the assumption that the African Children's Charter provides better protection for the girl child, in comparison with its UN counterpart.

2. African Conception of Community and Individual Responsibility

The African children charter considers the African child as occupying a unique and privileged position in the African society and he deserves to grow up in family environment providing an atmosphere of happiness, love and understanding²⁰. To this end, the charter regards family as natural unit and basis of society; and deserves state protection and support²¹. It should be noted that, in the African context, the concept of parent is wider than the man and the woman who are biological parent and the idea of family assumes an extended group of kin²². That is why it is often thought that the child in African community is not just a child of his/her parent's but the child of everyone. This is also evident from the African Children's Charter which reiterates that children have duties to the wider society, which likewise bears responsibility for their proper socialization²³. The reciprocal nature of duties and responsibilities between child and family in the community context stress the importance of communal element in the African societies. In the African traditional societies, human being cannot survive independently, without the community²⁴. It goes to say that the inclusion of parental responsibility in one hand, and child responsibility in the other, is the manifestation of traditional African understanding of human rights concept. The same notion of understanding is reflected under the African Charter on Human and People's Rights (henceforth ACHPR), which is at the heart of the regional human rights system. Thus the African concept of human rights recognizes the importance of the group simultaneously with the significance of individuals²⁵. This springs from the distinctive feature of traditional African culture, which is attached to the "idea of communitarianism", thus, the emphasis placed on "the group", not 'the individual' which is western notion²⁶. In the traditional Africa, the individual is part and parcel of the groups, and depends on the group which obliges him to assist and to be assisted²⁷. Thus is not possible to understand the individual without the group. That is why it is been quoted that:

"The African conception of Man is not that of an isolated and abstract individual, but an integral member of the group animated by a spirit of solidarity"²⁸.

This notion of understanding is there behind the African conception of human rights which considers individual rights within the realm of the group. It is with this assumption that the ACHPR has dealt with group (people's) rights in detail. Even more important is the articulation of individual duties²⁹. The inclusion of duties has attracted some level of criticism. Some argued that these provisions can be construed as justification for a state power to override individual rights³⁰. Thus the explicit provision of duties may provide fertile grounds for the violation of rights. While others argued that imposition of duties never mean to make enjoyment of rights 'conditional', rather it should be understood as reinforcing rights. They stressed that in the African context the cause of massive violation of human rights is not attached to notion of duties. So there no way for the 'duties' could legally be used to prompt violation of human rights. It is also mentioned that the progressive construction of the provisions may leave no rooms for possible abuse of the ACHPR, given the fact that in modern global environment, the key actors are not necessarily be states, rather, non-state actors.

Of course there is a justified concern that human rights could be curtailed on the base of article 29 of the ACHPR. There are several instances where the sweeping nature of "duty provisions" used as a tool to deny the enjoyments of rights granted under the charter³¹. Thus these cases revealed that the fears and concerns regarding the negative outcome of the provision are not groundless. It is my firm belief that it can plausibly be argued that these provisions are susceptible to be abused by the state agents, given the fact that scope and limit of duties is not clearly provided and hostile socio- political conditions of the African states. In fact it seems fair to lent credence to the African Commission which played a pivotal role in elaborating the notion of "individual duties" through its evolving interpretation, practice and jurisprudence. Accordingly, from its jurisprudence³² it can be traced that "far from duties creating environment gratuitous for invasion of rights, duties should be understood as reinforcing the rights."³³ Thus it has mentioned that duties should never understood to mean that rights are conditional, it should be earned first, or enjoyed after fulfillment of duties.

²⁰ . Children's Charter, preamble paragraph 4

²¹ . Ibid, art 18

²² . supra note 2, pp 7-8

²³ . African children's charter, Art 20, Art 31

²⁴ . Supra note 1,p

²⁵ . The African charter on the human and people's rights enshrined several group or people's rights, Art 19-24

²⁶ . Supra note 17,p 164

²⁷ . Supra note 1, p 18

²⁸ . Ibid

²⁹ . ACHPR, Art 27-29

³⁰ . Supra note 17,p 167

³¹ . Civil liberties organization (in respect of Bar Association)v Nigeria (2000)AHRLR186(ACHPR), constitutional rights project and Another v Nigeria (2000)AHRLR191(ACHPR 1998), Interights and Others V Mauritania

³² . Interights and others v Mauritania (2004)AHRLR 87 (ACHPR)

³³ . Supra note 17, p 169

Rather “it is said to indicate the exercise of rights which are natural and valid, may be limited by duties of individual.”³⁴ It is also affirmed that duties shall not be deployed in the manner that would defeat rights granted under the ACHPR. The next section deals with whether or not, similar, duties imposed on a child could be regarded as legally sound, and as reinforcing rights.

3. Parental Duty to Ensure Domestic Discipline: It’s Implication on the Enjoyment of Child Human Rights

Family occupies special place in the African traditional setup. This is evident from the provisions of the African Children’s charter which assigns greater role regarding the upbringing and the overall development of the child³⁵. Thus it is part of parental responsibilities, to ensure domestic discipline in order to bring up properly mannered child. The law has clearly mentioned that domestic discipline must be administered humanely, and in a manner consistent with inherent dignity of the child³⁶. Here it is hotly debated that, for one thing one does not find similar provisions, in its UN equivalent, CRC. For stronger reason, provisions like that may leave door open for child abuse like corporal punishment. It is known fact that, most often, violence against girl like corporal punishments take place behind closed doors. Though it is a family of children who holds greatest potential to protect them from all forms of violence, this potential has been far from realized for countless girls³⁷. In many instances and in relation to many forms of violence, the family is site of violence, and members are perpetrator³⁸. This is particularly holds true in the African tradition where there is sex preference which involves favoring the social, intellectual and physical development of a boy child over that of girl child³⁹. Sex preference manifested through attitudes that “a son represents a boon to his family while a girl is perceived as affliction.”⁴⁰ A culture expects a girl child to be calm, well-mannered and ethical so as not to be ‘a misery’ to family. Any acts other than being like that may cause punishment against her. Thus a girl child will more likely be punished than boy child even if they commit similar offence. From this, it follows that a girl child is more susceptible to domestic discipline than a boy child. Here what I want to emphasize is that explicit permission “to use of domestic discipline” may appear to be violent to a girl child since she lives in the world which is more discriminatory and abusive. The point is that one should be cautious about the implication of such provision. Perhaps one may plausibly argue that since the African Children’s Charter has clearly dealt with protection against child abuse and torture⁴¹, use of domestic discipline does not in any way legitimize any acts other than reasonable chastisement. And it is clear from the text of the provision that any domestic discipline which is administered short of humanity may fall under Art 16, hence, will be abuse of child rights. Of course, theory of progressive construction demands such way of interpretation. Furthermore, it could be argued that since the African Children’s Charter rooted in the ACHPR and CRC, and article 1(2) of the Children’s Charter gives precedence to application of any provisions that are more conducive to the realization of rights contained in the international convention, thus, the provision shall draw inspiration from international standards. It goes to say that any form of domestic discipline that falls short of humanity is condemned under the African women Protocol⁴². It might also be against the human rights standards set under Convention against torture and CEDAW. More importantly, the UN committee on the right of child came up with a general comment which prohibits any form of corporal punishment both in private and public setting⁴³. It is also recognized that the need to keep positive concept of discipline. Thus children may be subjected to disciplinary a measure which is only important to their well-being. The aforementioned arguments suggest that the Children’s Charter provision should not be interpreted as guaranteeing less protection. Rather it should be understood as reinforcing children’s right to grow up properly. But I venture to suggest that much more remains to be done by the Children’s Charter monitoring body (committee of experts on the rights and welfare of the child) in elaborating the provision, hence, to make sure that the provision would not be legally used to perpetuate marginalization of girl child.

4. Responsible Children: Enhancing Rights, or shrinking it?

Article 31 of the African children’s charter provides a range of duties which a child owes to family, society, and wider community. Needless to say, it is reflection of African conception of human rights. This provision has attracted considerable criticisms. But those who are optimistic about the outcome of the provisions argue that it has valuable contribution to enhancement of child participation⁴⁴ in the life of society, which in turn is consistent with the principle of child participation. Unlike CRC, it encourages children’s practical participation. It is emphasized that bearing responsibilities at childhood level will give them prior experience, help them acquire skills and make them ready for life itself⁴⁵. Moreover it had been noted the fear that the inclusion of duties may defeat the rights enshrined under the charter is misplaced, given the internal limitation set out in the very article and provisions elsewhere in the

³⁴ . Ibid

³⁵ . The African Children’s Charter, Art 20.

³⁶ . Children charter, Art 20 (1)(c)

³⁷ . supra note 3, p 24

³⁸ . Ibid

³⁹ . supra note 4

⁴⁰ . supra note 3

⁴¹ . African children charter, art 16

⁴² . Protocol to the African Charter on Human and people’s rights on the Rights of women in Africa, Art 4

⁴³ . Committee on the rights of Children, General Comment, 8 on the protection from Corporal punishment and Other degrading treatments, Para 12-14

⁴⁴ . supra note 17, pp 171-172

⁴⁵ . Ibid

charter⁴⁶. So here, I am going to assess these views from perspective of the girl child situations by taking some points of the provision in to account. Specifically I would like to focus on Art 31(a) and (d), which appears to be very relevant and critical in the protection of girl child human rights.

5. Duty to Respect

Giving respect to parent, elder and superiors is part of positive African tradition. Some argues that this obligation may affect children's right to participation, especially their right to express their opinion. The proponent of this approach has stressed that "the intention of the charter was not silence children, rather to celebrate positive aspect of African child-rearing practice in nurturing a respectful society"⁴⁷. It has also been noted that this duty does not in any way justifies children's obedience to despotic or repressive orders which curtail their rights. Here it is mentioned that given internal limitation clause entrenched in the very article and other provisions such type of orders are impermissible, hence, children are licensed to disrespect⁴⁸. However, it seems that this argument failed to properly appreciate "the hard to say no" parts, given the social position of children and the deeply entrenched "respect elder" culture of the African traditions. This is particularly true for girl child, traditionally, who have been relegated to the world of muted. In most culture her duty to respect the words of her parent, clan leader or superiors subjected her to traditional practices like FGM, early marriage or Trokosi⁴⁹. Hence the duty to respect parents could easily be relied upon curtail girl child's rights to freedom of expression, participation and decision-making, thereby perpetuates her vulnerability. In fact the provision is intended to promote positive African culture that is traditional respect for elders. Perhaps theoretically, it can be argued that this duty should not be construed in negative, given the internal limitation clause⁵⁰ under the article and others provisions of the Children's charter the guarantee protection of girl child from abuse. However, one has to be cautious that practically it could have the repercussion of reinforcing discriminatory practices against women.

6. Duty to Assist

In contrast to the CRC, the African Children's Charter has clearly established that parents and families are owed not only a duty of respect but also maintenance by their children. This encompasses both material (economic) and emotional assistance. Some scholars have argued that it is the manifestation of positive African culture which asserts support to parents at all level of their life. Here children don't be a substitute to adult; rather they should help them in performing the functions. It is also mentioned that this is essential given the fact that most African states don't afford providing the programme of welfare state⁵¹. Equally important point to rise is its implication on the enjoyment of child rights. It is common knowledge that in socio-cultural setup of most African countries, girl child expected to render domestic service, assist their mother, stay home and supervise her young siblings. According to studies, one of the underlying cause for high dropout rate and low school enrollments of girl child is their active involvement in the domestic social sphere. Moreover domestic works have prevented a girl child from engaging in play and recreational activities, hence, affected their positive childhood development. Duty to assist may also intensify child labour. According to data released by ILO and UNICEF, an estimated 90 percent of girls are engaged in domestic services worldwide⁵². In face of these facts, explicit provision of duty to assist may be manipulated to legitimize traditional practices which impede enjoyment of human rights. However, the possibility that article 31 of could legally be used to abuse girl child rights is minimal in face of internal limitation clause and a number of provisions that proscribe the practices. The committee of experts has a lot to regarding the specific limit of the duty provisions

7. Duty to Preserve and Strength African Cultural Values in Relation with Other Member of Society

One of the most contentious features of the duty clause of the African Children's Charter is its provision regarding duty to preserve and strength African culture. As I attempted to show, most of African culture is hostile, prejudicial and insensitive to girl child's human rights. The Children's Charter has clearly stipulated that any custom, tradition, cultural or religious practices that is inconsistent with the rights enshrined under the African charter should be discouraged⁵³. Moreover the children's Charter has already proscribed traditional practices like harmful traditions, child marriage and others⁵⁴. Thus the children's charter takes strong stance against hostile traditional practices. The reading of this phrase does not in any way open the way to justify harmful traditional practices. Hence, duty to preserve and strength culture only goes to 'positive' traditional practices. But stills what remains to be

⁴⁶ . Ibid

⁴⁷ . supra note 17, p 177

⁴⁸ . Supra note 17. PP 176-177

⁴⁹ . UN study on violence against women revealed that one of the reason behind FGM and early marriage, beside parent, girl child maintains the same culture because she thinks that her parent are right, and obedient to their order even if she does not like it. See supra note 24-27

⁵⁰ . Article 31 of the Children's charter states that bearing responsibilities depends on the age, ability of the child, and to limitations contained in the charter, the likes of protection against traditional practice.

⁵¹ .supra note 17,PP 177-178

⁵² . supra note 3 p 66

⁵³ . African Children Charter, Art 1(3)

⁵⁴ . Ibid art 21

debatable is what standard is to measure positive culture, and who have the mandate to test its repugnancy. Given the fact that Africa has a diverse cultures, it would be hard to come up with this standards. This may leave a room for discriminatory practices.

In general, from the discussion in the third section, I should conclude that both Art 20 and Art 31 of the African Children's Charter seek to promote positive aspects of African child-rearing practices. Meanwhile it should be noted that some loopholes which implied from the duty provisions, may have a practical impact of posing a threat to protection of a girl child's human rights.

8. Conclusion

Conventional western perspectives on children and childhood have tended to view children as vulnerable, passive and dependent, and they should, therefore be protected from work, hardship and misfortune. The experience and circumstance of children in Africa give raise to the idea of having regional instrument on the right of children which takes the unique features of African children into account. Accordingly, the African children's charter came to picture. The charter conveys, and sensitive to issues specific to African child, thereby provide better protection than its UN counterpart. Nonetheless, its explicit provision of domestic discipline and duties of a child has attracted considerable criticism. This paper has explored the implication of those provisions in the girl children's enjoyment of human rights, given the fact that the double burden of being a woman and young relegated them to margin of societies, where their rights are disregarded and their safety are neglected. By way of conclusion, the provisions are the reflection of African conception of human rights, and seek to promote positive aspects of African child-rearing practices, and therefore they can be deployed to reinforce rights enshrined under the charter. However, the paper has also mentioned that it may have an unintended impact of posing a threat to protection of human rights of girl child. Finally, it is emphasized that the committee of experts on the right and welfare of the child has a lot to do in elaborating the practical meaning of the provisions.

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