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ZIMBABWE CHILDREN'S ACT ALIGNMENT WITH INTERNATIONAL AND DOMESTIC LEGAL INSTRUMENTS: UNRAVELLING THE GAPS

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ABSTRACT

This paper identifies shortfalls in the Children's Act (Zimbabwe) which reduce its alignment with the international and domestic legal instruments such as the United Nations Convention on the Rights of the Child (UNCRC), the African Charter on the Rights and Welfare of the Child (ACRWC), Child Protection Model Law, Constitution of Zimbabwe and the Zimbabwe National Orphan Care Policy. These gaps relate to definition of a child, child protection committees, corporal punishment, child participation, child labour and pre-trial diversion. The examination of these gaps is informed by child rights fundamental principles: best interest of the child, survival and development, participation and non-discrimination.

KEY TERMS: *children's rights, participation, child protection, harmonisation, legislation, gaps*

INTRODUCTION AND HISTORICAL BACKGROUND

This article examines the shortfalls of the Children's Act (Chapter 5:06) in Zimbabwe. The shortfalls such as lack of clarity around the definition of child, creates disharmony between the Children's Act and the provisions of both international and domestic legal instruments. The paper starts by giving a historical background of the Children's Act, identifies gaps in the Children's Act and then provides recommendations.

This section covers the historical background of the Children's Act, UNCRC and ACRWC. The Children's Act (Chapter 5:06) was adopted in 2001 in order to domesticate the various international standards in as far as the care and protection of children is concerned in Zimbabwe. It replaced the Children's Protection and Adoption Act (Chapter 5:06). This Act's foci include providing care and protection to all children in Zimbabwe and establishing of children's court and registration of institution for reception and custody of children. Therefore, the Children's Act fulfils the aspirations of the UNCRC.

The UN General Assembly adopted the UNCRC in 1989, and Zimbabwe ratified it in September 1990. It was developed in recognition of the fact children that children have specific needs and entitlements that differ from those of adults.

According to Mbagua (2002) the ACRWC was born out of a concern by the African member states to the United Nations that the UNCRC missed important socio-cultural and economic realities of the African experience. The ACRWC was adopted by the Assembly of Heads of States and Government of the Organisation of African Unity (now known as the African Union) in 1990 and it came into force in November 1999. Mbagua states that the ACRWC is not opposed to the UNCRC, instead it complements the UNCRC. The ACRWC stresses on the need to include African cultural values and experience whenever discussing or considering issues pertaining to the rights of the child in Africa. Zimbabwe signed this charter in January 1992.

In Zimbabwe, there are several pieces of legislation dealing with the issue of child protection but at times, these laws have conflicting views regarding particular issues, for example, the definition of a child. Laws with different positions regarding an issue, create avenues for child abuse. The Children's Act is not sufficiently in line with new trends and structures in child protection in order to meet the demands of global trends.

GAPS IN CHILDREN'S ACT

The definition of a child as given in the Children's Act is not in line with other legal instruments such as ACWRC and the Constitution of Zimbabwe. The Children's Act defines a child as a person under the age of sixteen years while the ACRWC defines a child as every human being below the age of eighteen years. Both the Constitution of Zimbabwe (section 81) and the Zimbabwe National Orphan Care policy define a child as any person below the age of 18 years. There is thus a discord in the definition of a child which may pose some challenges when it comes to the implementation of child welfare issues.

Despite the discord, one finds that the UNCRC gives leeway for member states to come up with an age limit which is lower than eighteen. Therefore, definition of a child in the Children's Act could have been developed on this premise.

The Children's Act does not provide for the establishment of Child Protection Committees (CPCs) despite the fact that article 19 of the UNCRC states that states parties should establish social programmes and structures for the identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment. The Child Protection Model Law (2013) also provides for the establishment of CPC at various levels of governance. Furthermore, the Child Protection Model states that at national level, CPCs will be known as the Highest Child Protection Agency (HCPA) and in Zimbabwe it can be likened to the Working Party of Officials. The HCPA is responsible for advising on national child protection formulation, monitoring of CPCs at regional level and developing programmes aimed at protecting children. It further explains that the CPCs at regional shall be responsible for organising formal response system to receive and coordinate reported cases of child abuse, managing programmes of assistance, administering a system of safe accommodation for actual or potential survivors of abuse, coordinating the system of free legal assistance to children and establishing programmes for reintegration and rehabilitation.

The Children's Act does not provide for the establishment of CPCs despite that they are critical structures in child protection issues. The CPCs are established in terms of the Zimbabwe National Orphan Care policy but it needs to be supported by providing for it in the Act of parliament. The Zimbabwe National Orphan Care policy provides that Child Welfare Forums now known as CPCs are to be found at all levels of governance: national, provincial, district, ward and village level composed of entities concerned about the care and protection of children. CPCs are responsible for identifying children in need of care and protection, providing assistance where possible, referring to appropriate service providers and mobilising resources. The absence of this important structure in the Children's Act is an indicator of failing to align with the requirements of international legal instruments.

Another gap is the lack of pre-trial diversion. The Children's Act does not provide for pre-trial diversion although it is being implemented as a pilot project in the country. The pre-trial diversion is provided for in article 40 of the UNCRC, which states that, "wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected." Justice for Children (2012) notes that pre-trial diversion seeks to make offenders responsible and accountable for their actions, provide an opportunity for reparations, identify underlying problems motivating offending behavior through personalized services, prevent offenders from receiving a criminal record and being labeled as criminals. Pre-trial diversion also seeks to open up the judicial process for educational and rehabilitative procedures to come into action to the benefit of all the parties concerned, and reduce caseload on the formal justice system. This programme targets children and young offenders (below 21 years old) who would have committed none serious offences which would attract sentence of up to twelve months' imprisonment. The child or young person must be a first time offender and willing to take part in the activities identified by the diversion officer.

It can be seen therefore, that pre-trial diversion is an important programme that should be provided for in an Act of parliament rather than using many legal instruments to address pre-trial diversion as is currently the case. Pre-trial diversion guidelines can be contained in the children's Act. However, there is need to first harmonize various legal provisions dealing with children justice (Justice for Children, 2012). There is therefore, a strong rationale for amending the Children's Act so that it can incorporate the provisions for pre-trial diversion.

Whereas both the UNCRC and ACRWC regard the administration of corporal punishment as torture and inhuman treatment of children, the Children's Act however, is silent about this issue. What is more, the Criminal Law (Codification and Reform) regards corporal punishment as one of the sentencing options for male children in conflict with the law. Article 37 of UNCRC states, "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment," and it calls for its abolishment. In the same spirit, Section 53 of the Constitution of Zimbabwe prohibits the subjection of people to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. Therefore, the Children's Act is misaligned with the provisions of both international and domestic policies in as far as the treatment of children is concerned.

The need to protect children from institutionalized violence cannot be over-emphasized. The UNCRC calls for rehabilitative sentencing options for child offenders; article 40 recommends sentencing options such as counseling, probation and vocational training. The administration of corporal punishment may deter the occurrence of antisocial behavior but it is not the proper way of fostering acceptable behavior in a child. Furthermore, the Defense for Children International (2005) notes that in cases of deviant behavior, societal laws tend to emphasize protection of society or the maintenance of order or stability in society rather than protecting the rights and welfare of individual children who have violated societal norms.

Yet, while the Children's Act talks about the prohibition of child labour in section 10A, the same Act tends to defend perpetrators of child labour as stated in section 10A (3), "It shall be a defense to a charge...for the accused person to prove that he believed on reasonable grounds that the child or young person whom he employed was not of school-going age." This statement exposes children to abuse in terms of labour. The focus of Children's Act should be on protecting children rather than providing controversial statements which can be used to defend perpetrators.

The Children's Act does not cover the issue of children's education as stated in both the UNCRC and ACRWC. The issue of children's education is only found in the Education Act; the Children's Act should have provided for children's rights to education since it is one of the most important children's rights. Article 28 of the UNCRC states that primary education should be compulsory and free and in Zimbabwe soon after independence primary education was provided free of charge. However, the policy was changed due to economic hardships; 'free' primary education is only provided in rural areas. Kaseke (1993:12) notes the introduction of school fees in primary education resulted in some children failing to access education. In rural school's primary education is said to be free but there some levies charged which are beyond the reach of some of the children and as a consequence, some children drop out of school. It is very difficult to enforce free primary education because it is not provided for in the Children's Act. There is need therefore, to have this provision on education in the Children's Act so that it can align with the provisions of both the UNCRC and ACRWC.

Child participation is central in both the UNCRC and the ACRWC. Although the Children's Act provides for the participation of children in issues affecting them in Children's Court (section 3), enquiries may be held in the absence of the child (section 19). Although holding enquiries and hearings in court during the absence of the child can be in the best interest of the child, there is a danger of sidelining the views of the child. Consequently, the decision may not be suitable for the child. The Children's Act is supposed to be clear on the need for child participation and providing platforms for child participation. The Constitution of Zimbabwe (section 61) is explicit about the right to freedom of expression and the Children's Act is supposed to be crafted along this way so that the right to participate is not compromised.

CONCLUSION

In conclusion, it can be said that there is need to amend the Children's Act so that it can be aligned with the provisions of both the international instruments like UNCRC, ACRWC and Child Model Law and domestic instruments such as the Constitution of Zimbabwe and the Zimbabwe National Orphan Care policy. There is also need to consolidate various laws found in various pieces of legislation in order to come up with a comprehensive Children's Act; this will eliminate conflicts and confusion in the development and implementation of policies and programmes for children. The Children's Act should be a one-stop shop for all issues related to children. Aligning the provisions of the Children's Act with the provisions of these legal instruments will go a long way in facilitating the realization of children's rights.

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