
AFRICAN VALUES AND THE PROBLEM OF THE
RIGHTS OF THE CHILD: A SEARCH FOR
EXPLANATIONS

Jackson Wafula Muyila



Research Partnership 3/2006
The Danish Institute for Human Rights

African Values and the Problem of the Rights of the
Child: A Search for Explanations

Jackson Wafula Muyila

African Values and the Problem of the Rights of the Child: A Search for Explanations
Jackson Wafula Muyila

Research Partnership 3/2006, The Danish Institute for Human Rights

This research paper has been produced as a part of the Research Partnership Programme at the Danish Institute for Human Rights, with financial assistance provided by Danida.

However, the statements, facts and opinions expressed in the publication are the responsibility of the personal author and do not necessarily reflect the position or opinion of the Danish Institute for Human Rights or Danida.

© 2007 Jackson Wafula Muyila

Parts of the report may be photocopied or otherwise reproduced if author and source are quoted.

Editorial preparations: Alex K. Tonnesen

Print: Det Samfundsvidenskabelige Fakultets Reprocenter

ISSN 1600 5333

ISBN 87-91836-15-8

Bibliographic information according to the Huridocs Standard Format

Title: African Values and the Problem of the Rights of the Child: A Search for Explanations

Personal author: Jackson Wafula Muyila

Corporate author: The Danish Institute for Human Rights

Series title: Research Partnership 3/2006

Index terms: Africa / human rights / values / child

Printed in Denmark 2007

The Danish Institute for Human Rights

56 Strandgade

1401 Copenhagen K

Tel: + 45 32 69 88 88

Fax: + 45 32 69 88 00

E-mail: center@humanrights.dk

Contents

1 Introduction.....	7
2 The Problem	9
3 Perceptions of Childhood in African Communities.....	13
4 Stages in the Child’s Upbringing and the Attendant Practices.....	17
4.1 Child involvement in work.....	18
4.2 Child “lending”/ informal foster care	20
4.3 Child discipline.....	23
4.4 Initiation rites	25
4.4.1 Circumcision.....	26
4.5 Child marriage	33
4.6 The best interest of the child.....	37
5 The Problem of Informal Actors	40
6 Intergenerational Power Imbalance	42
7 The Past in the Present.....	47
8 Conclusion	51

1 INTRODUCTION

On 20th November 1989, the convention of the rights of the child (CRC) was adopted by the United Nations General Assembly, and a year later, it entered into force as an international law.¹ The CRC has been hailed as an innovative global human rights instrument for its new definition of a child as a rights holder and not a mere object of protection and domination. It recognizes a child as a distinct individual with needs and intrinsic worth, and sets out universal standards for states parties to adopt in their efforts to realize the rights of the child. The CRC is a reflection of a new emergent perception of childhood and promotes the idea that children should now be seen to “own themselves” with the rights to determine their own choices rather than being seen as passive recipients of cultural values and adult instructions.² The CRC does however, recognize the fact that childhood is a delicate stage in the child’s development and that this requires special protection.

The adoption of CRC by the UN General Assembly in 1989 was followed closely in Africa by the adoption of the African Charter on the rights and welfare of the child (ACRWC) in 1990 which entered into force nine years later, in 1999. The charter was justified on the basis of the fact that the situation of the African child was different from other regions given the unique socio- political, economic and cultural realities in the continent. It became necessary to have a more specific regional instrument to address these realities in relation to the rights of the child.

The African charter however, is not opposed to the principles and provisions of the CRC but only goes further to emphasise respect to and guidance by traditional African values in the efforts towards the realization of children’s rights. Respect for the family and a child’s duties to the same are fundamental provisions in the charter, which also goes a head to address harmful practices common in many African countries that violate the rights of the child. Its radical departure from these negative practices while seeking to protect and preserve positive traditional African values should be praised. Brems points out that one of the major concerns in Africa for sometime now is the evident conflict between individual rights and certain deep rooted traditional customs and practices³ which the charter now addresses.

¹ Dejo Olumu, “Protecting children’s rights in Africa: A critique of the African Charter on the rights and welfare of the child” in, *The international Journal of children’s rights*,10,2002, PP.127 – 136.

² Ibid.

³ Eva Brems, *Human rights: Universality and diversity*, The Hague, Martinus Nijhoff publishers,2001.A

See also, Michelo Hansungule, “Administering the African society through the living law” in, Lindholt, L. and Schaumburg-Muller, S., *Human rights in development: Human rights and local/ living law*, yearbook,2003, Leiden/Boston, Martinus Nijhoff pub. 2005, PP. 371 – 401.

The African charter must be seen as an important step towards the realization of the rights of the child in a continent that has been dogged by many cases of human rights problems. Indeed, it is noteworthy that the charter seeks to discourage traditional customs and practices that have been at the centre of debates on the rights of the child in Africa. The conflict between some traditional customs and practices and human rights law has gained a lot of importance in the human rights discourse of late. They are partly responsible for the emotionally and value laden debate between the so called Universalists on the one hand and relativists on the other.

In this paper, we do not wish to enter into this seemingly endless debate, whatever its value. We take the position that the question of universality of human rights should be seen as an ultimate aim of the international community that will be attained when the rights will be achieved globally. Universality should be treated as a kind of project or aim to be carried out or attained.⁴ It is important to note that all human cultures have beliefs and practices that are consistent and inconsistent with human rights.⁵ Human rights universality will require an eventual levelling of all cultures so that they can be consistent with human rights.

⁴ George Ulrich, “Universal human rights: An unfinished project” in Kirsten H, (ed), Human rights on common grounds: The quest for universality, The Hague, Kluwer law international, 2001. See also Eva Brems, *op.cit.* PP. 195 – 223.

⁵ An- Naim A. A., “problems of universal cultural legitimacy for human rights” in An- Naim A. A. , and Deng F. M. , Human rights in Africa: Cross-cultural perspectives, Washington DC, the Brookings institution, 1990, PP. 331—367.

2 THE PROBLEM

Despite the raging debate between the Universalists and Relativists, on the ground there some noticeable attempts by some African states that are introducing legislations that outlaw customs and practices that are inimical to human rights.⁶ In Africa, traditional customs and practices present an immediate challenge, and the attendant fact that violations are in some cases are not perpetrated by States but individuals and communities.⁷

This fact has made it even more difficulty to realize the rights of the child in Africa given the many deep-rooted traditional customs and practices some of which play important social roles from the perspective of the practicing communities. Bonny Ibhawoh points out this difficulty in reference to the problem of female genital mutilation. Many African countries that have enacted legislations against this practice find it difficult and challenging to enforce the legislations.⁸

No African country that has banned female Genital mutilation, including Senegal, Egypt, Ghana and Burkina Faso dares enforce the law. In Guinea, female genital mutilation carries the death penalty but it has never been applied. Early attempts to enforce legislation against female genital mutilation in Sudan caused such popular outcry that enforcement was subsequently abandoned.⁹

As Kisaakye points out, there is usually no political commitment by governments in Africa to fight certain practices and beliefs that are harmful to the rights of the child.¹⁰ The few attempts have been resisted by the concerned communities and have threatened the political power bases of certain governments and politicians in Africa. According to Kisaakye, the eradication of harmful practices has proved difficult. The practice, she adds, is said to be so deeply rooted in the value systems of the concerned communities such that any attempts to eradicate them is tantamount to attacking the very identity of the communities involved.¹¹

⁶ Bonny Ibhawoh, “ Between culture and constitution: Evaluating the cultural legitimacy of human rights”, in *Human rights quarterly*, vol.22,2000, PP. 309 – 331.

⁷ Eva Brems, *op.cit.*

⁸ Bonny Ibhawoh, *op.cit.*

⁹ Bonny Ibhawoh, *Ibid.* p.857

¹⁰ Esther Kisaakye, “Women, culture and human rights: Female genital mutilation, polygamy and bride price” in Benedek, W., Kisaakye E. M., and Oberleitner, (eds.), *The human rights of women: International instruments and African experiences*, London, Zed books,2002, PP. 268 – 285.

¹¹ G. V. Bueren, “ Children’s rights: Balancing traditional values and cultural plurality” in Douglas, G., and Sebba, L., (eds.), *Children’s rights and traditional values*, Aldershot, Ashgate/ Dartmouth pub.co.,1998, p.17, (PP. 15 – 30).

Bueren has doubted the capacity of legislations to eradicate these practices, the reason being that,

Certain traditional practices by their very nature reach down into the heart of a community and may even be regarded by members of that community as important in defining that communities' identity.¹²

These practices do in fact have important social functions that make it difficult to eradicate them. For Bueren, there may be a need to come up with possible alternatives instead of seeking to completely eradicate such customs and practices.¹³

Rhoda Howard, puzzled by the persistence of the traditional practice of FGM wonders why even adult educated women still voluntarily choose to undergo the practice. She argues that “these cases serve as evidence for the proposition that people value cultural practices even when they seem to be irrational”.¹⁴ The fact however is that the women in practicing communities do not see the practice as being irrational as Howard does.

Kenya ratified the CRC on the 31st of July 1990 and 11 years later the convention was domesticated through the enactment of the Children's Act of 2001. Prior to this, an attempt by the judiciary to push through parliament a children's Bill in 1995 failed due to criticism from parliamentarians and local NGOs. Redrafting of the Bill eventually resulted into the Children's Act of 2001.¹⁵ Before the coming into force of the Children Act, a legislative proposal to criminalise female genital mutilation (FGM) in 1996 was defeated in the Kenyan parliament. The opposition came mainly from parliamentarians who represent FGM practicing communities.¹⁶

The children Act was enacted by parliament in 2001 and came into force on the 1st of March, 2002. It domesticates the provisions of the CRC and the African charter on the rights and welfare of the child. It further establishes childcare institutions, children's courts, gives provisions for juvenile justice and puts in place statutory institutions to

¹² Ibid.

¹³ Refugee women's resource project, Asylum Aid, Feb., 2001, the human rights of Kenya.

¹⁴ Rhoda Howard, “ Women rights in English-speaking sub-Saharan Africa” in Welch, C.E., and Meltzer, R.I., (eds.), Human rights and development in Africa, Albany, State university of New York press, 1984, p.67. (PP. 46 – 74).

¹⁵ Godfrey O. Odongo, “The domestication of international standards on the rights of the child: A critical and comparative evaluation of the Kenyan example” in The international Journal of children's rights, 12, 2004, PP. 419 – 430.

¹⁶ A. Rahman, and N., Toubia, (eds), Female Genital Mutilation: A guide to laws and policies worldwide, London, Zed Books, 2000.

implement the Act.¹⁷ The Act recognizes the operations of customary law in relation to children as long as it is not injurious to the rights of the child. It outlaws all traditional customs and practices that are harmful to the rights of the child.

The enactment of the Act has been a boost to the efforts to implement children's rights in the country, given the fact that Kenya is one of the countries where traditional customs and practices have continued to harm children's rights.

In Kenya, social workers have indicated that Female genital mutilation continues unabated despite the legislations to the contrary. In most communities that practice the mutilation, women are its main supporters. For elderly rural women in these communities, female circumcision is not negotiable.

According to the second country CRC report (2000), three out of every ten Kenyan women have been circumcised on a national average.¹⁸ Female genital mutilation is practised in almost 26 tribes in Kenya among them the Kisii, Kalenjin, Kamba, Maasai, Meru, pokot, Samburu, Somali, Taita, Borana, Kuria, and others. In 1984, the then president of Kenya, Daniel Arap Moi, issued a presidential decree banning Female circumcision after 14 girls died after undergoing the practice. He issued yet another one in 1990. ¹⁹ And now, we have the children Act (2001) outlawing the practice but all these efforts, have not succeeded in eradicating the vice in the country. Some NGOs in Kenya have even been forced to try out alternative rites that could serve the social functions of the rites without the mutilation of the genitals.²⁰

Traditional practices that are harmful to the rights of the child have simply refused to die. Although so much changes have taken place and many more people than ever before have come up to fight the practices and are abandoning them, the practices continue to thrive in rural areas. It is this persistence and resistance to change of traditional African practices, despite the many efforts at both the international and local levels to change or eradicate them that is puzzling.

Despite all changes that have occurred, these practices seem determined to survive and where governments have cracked hard on them, they have only managed to drive them underground making outreach educational awareness impossible.

¹⁷Godfrey O. Odongo, *Ibid.*, See also, Tina Ojuka, Highlights of the workshop to review the children Act, held by the Kenya law reform commission in Naivasha, 28th to 29th , June, 2006, See also, *The Children Act, 2001*, Kenya.

¹⁸ Eva Palmqvist, *Children's rights in Kenya: An analysis based on the CRC reports*, Save the children, Sweden, 2006.

¹⁹ Kabeberi-Macharia, J., "Female genital mutilation and the rights of the girl-child in Kenya", in Ncube, W., (ed.), *Law, culture, tradition and children's rights in eastern and southern Africa*, Aldershot, Ashgate/ Darmouth, 1998, PP. 249 – 265.

²⁰ Bonny Ibhawoh, *Op cit.*

If change is to be facilitated in the African villages and against the practices, the cause of this resistance to change must be understood and dealt with accordingly. We cannot understand this unless we go beyond just focusing on the traditional customs and practices and how they promote or harm children's rights, or as is the case in many studies, women's rights.

This paper argues that a proper understanding of the challenges facing the efforts to realise the rights of the child in Africa requires more than the knowledge or lists of actual customs and practices and how they violate the rights of children in the African communities. These beliefs and practices and their persistence are themselves a manifestation of deep rooted societal values and circumstances, orientations and perceptions whose understanding is important in the efforts to eliminate them and therefore facilitate the implementation of children's rights in Africa. In this paper, an attempt is made to unveil and examine some of these factors. The paper will examine a few selected practices to show their social functions and how the underlying factors nurture and sustain them.

This research paper is mainly library based with data collected from the university of Nairobi library in Kenya and the Danish Centre for International Studies and Human Rights' library, Denmark.

In the next part, we provide a comprehensive analysis of the African conception of childhood in order to show its centrality in the realization children's rights or lack of it in Africa. In this part, we also try to show that the African conception of childhood is not in congruence with the conception of childhood conceived by the CRC.

3 PERCEPTIONS OF CHILDHOOD IN AFRICAN COMMUNITIES

We talk about the perception of childhood to refer to the way society views children.²¹ By childhood we will be referring to that particular nature that defines a child and distinguishes it from the adults. Of particular importance will be how adults think about, treat and relate with children. The way society thinks about them, treats and relates with them has implications on their human rights realization

In African societies there was a vivid feeling and demonstration of solidarity, which was exemplified in traditional culture by the harmony between the individual and the group. Individuals were seen in terms of groups or collectivity from the family level, the clan, the village to the tribe. The family was the most basic social unit and exhibited the strongest sense of solidarity. The family was the extended one, which brought quite a large group of individuals, mostly related by blood. Hansungule describes such a family as “a very large baobab-like institution” where virtually nobody is excluded.²² The larger units, the clan and tribe had a string of relatedness that bound the members of each towards the others. The units were held together by the biological bond of kinship and the immanent spirit of the tribe. Towards ones family, clan or tribe, there was deep sentiment, affection and loyalty. According to Nyasani, in the extended family set up no person can starve if neighbors have food neither can a child be orphaned since children belong to the community. The child’s welfare is not just an obligation of its family but every member of the community. In actual fact, everybody was responsible for the other.²³

Ncube emphasizes this solidarity stating that the individual was tied to the group in such a way that he or she was inseparable and that the idea of individual autonomy was absent.²⁴ Echoing the same opinion, Mutua Makau argues that the Africans conceive an individual as an integral member of the group rather than as an isolated or atomic individual in society.²⁵

This mode of social organization has a direct effect on the way society views its children which in turn has implications on the rights of children in Africa. In communalistic societies, the child is put in contact with a larger kinship group and is socialized into

²¹ Veerman P. E., *The rights of the child and the changing image of childhood*. Dordrecht, Martinus Nijhoff publishers, 1992.

²² Michelo Hansungule, *op.cit.*, p.382.

²³ *Ibid.*

²⁴ Ncube, W., “The African cultural fingerprint? The changing concept of childhood”, in Ncube, W., (ed), *Law, culture, tradition and children’s rights in eastern and southern Africa*, Aldershot, Ashgate/ Darmouth, 1998, PP. 11 – 27.

seeing beyond members of his or her immediate family. The group has responsibilities towards the child and the child in turn also has duties towards, not just to his or her immediate family but to the community as well. The child has to submit not just to parental authority but also to the communal authority and its laid down patterns of child development. The communal authority applies to the child as much as to the parents who are required to conform to its forms of child upbringing. At most of the stages in the child's development, the demands and requirements of the community weigh heavily on the child. The pre-eminence of the community requires that a child abandons personal interests and subscribes to group interests. In societies where communal structures are still very strong and where individual's duties to the community and obedience to authority are emphasized, the notion of individual rights or children's rights becomes difficult to be accepted.²⁶

The notion of individual rights is in itself alien in a collective oriented society. Attitudes and behavior promoted within the rights discourse, like "to claim your rights", are far from the ideals of a society more inclined towards the individual's duties to the community, and to obedience to authority.²⁷

African culture like any other, values the integrity and dignity of its children quite in line with the underlying principles of the international law. It recognizes the fact that childhood is a precarious state where children must be protected and provided with guidance in line with the cultural ends. As Ncube rightly argues, the African culture, from its own perspective, is committed to the proper development of children and to their protection from all forms of harm. The value for children in Africa is high and the efforts to ensure their survival and proper growth are no doubt fundamental. And therefore, the underlying philosophy of the CRC or the value attached to children is as much western as it is African. The universal acceptance of the CRC is largely due to this universally shared philosophy.²⁸ This however remains at the fundamental level, and differences begin to surface as every culture has its own perceptions of what constitutes proper growth and child care practices.

All cultures would want the best for its children; the fundamental difference, however, lies at the level of what constitutes the best and the means adopted to attain this "best."

²⁵ Makau Mutua, "The Banjul Charter: The case for an African cultural fingerprint" in An-Naim, A. A., (ed), Cultural transformations and human rights in Africa, London, Zed books, 2002, PP. 68 – 107.

²⁶ Mai Bente Snipstad, Globalization, modernization and the HIV/AIDS epidemic in sub-Saharan Africa: Consequences for children, care conditions, A Draft paper presented at the Annual NFU conference in Oslo, Sept., 2006.

²⁷ Ibid. P. 11

²⁸ Ncube W., Op cit PP. 11 – 27.

The means and the ends adopted are greatly influenced by the conceptions and perceptions of children in different societies. These conceptions and perceptions do vary from one culture or group to the other.

The fact that perceptions of childhood are diverse and varied, presents a key problem to the universal implementation of the CRC. Conceptions and perceptions about children determine the way adults and generally communities treat and relate with children. This in turn has implications to the roles, entitlements and obligations that children are given.

A closer examination of the African conception of childhood appear to indicate that it is still largely the traditional paternalistic one and treats children as *tabula rasa* in need of protection, and training for adulthood. Strictly speaking, the conception of childhood as a state of immaturity, dependence and training is universal and therefore cuts across all cultures; and which Casas calls a kind of “not-yets” where children are seen as lacking the qualities of adulthood and with it by extension not qualified for many rights that adults lump on themselves.²⁹ This conception of children has however, undergone a tremendous change in developed countries and now children are seen as bearers of rights in their own right.

The general perception of children in most African communities remains that of viewing childhood as lacking in many capacities and therefore the need for their control and improvement through education and training. In the minds of most adults in Africa, this perception of childhood is still very strongly held and in the words of Casas, “what is in the minds of people influences reality”.³⁰ The attitude of domination over children and perception of children as not – yet have continued to determine the destiny of the African child. Under these circumstances, participatory rights in the CRC and the ACRWC are seen to be most radical and therefore difficult to realize in such societies. They provide a direct challenge to the traditional Adult – child relationship and threaten to tilt the traditional generational power structures.

Empowering the child through increased participation rights inevitably entails that someone else’s authority and power over the child is altered in the way that it can be exercised. That a child has a right to freedom of expression and information, to respect for his or her views, with those views being taken into account, are in many ways contradictory to traditional child rearing attitudes of parents or carers and go beyond what many families in most cultures would accept.³¹

²⁹ Ferran Casas, op.cit.

³⁰ Ibid. P.283

³¹ R. Stern, “The child’s right to participation – Reality or Rhetoric?”, A PhD dissertation presented at Uppsala University, Uppsala, Sweden, 2006., P. 142.

Reactions such as that such changes would lead to lack of respect for parents and threatening the stability of families and communities are bound to be raised. It also strengthens the resolve to maintain cultural values, practices and norms that are supportive to traditional structures and authorities.³² The dominant Authorities in Africa- the parents and elders in general- still determine the cultural norms and patterns in child upbringing. In the part that follows, we look at the general stages of child upbringing in order to unveil the attendant perceptions and their corresponding roles, practices and possible impact on the rights of the child. The aim here is not just to understand the perceptions and their consequences but also to explain their social functions and persistence.

³² Ibid.

4 STAGES IN THE CHILD’S UPBRINGING AND THE ATTENDANT PRACTICES

Erny Pierre gives us the stages that the African child goes through before attaining adulthood. By looking at these stages, one is able to see how the adults related with and perceived children. There are roughly four stages identified and.

Stage and approximate ages	Roles, Activities, Practices
Stage one 1 day to 2years	Birth and the naming ceremony; Close mother – child contact
Stage two From 2 to 5 years	A period of freedom for the child to play and learn from other children
Stage three From 5 to about 11 years	A period of apprenticeship and moral development. Child participation in home food production processes, care of babies, herding of animals and related activities. Inculcation of virtues of respect and obedience Obligated to avail themselves to stay with and help other members of the extended family, especially the elderly.
Stage Four From 11 to about 17 years	A period of initiation and graduation into adulthood and eventually marriage. Puberty rites such as Circumcision, Excision of teeth, Tattooing, etc

Table showing an approximation in the stages of child upbringing in most African communities

In the first stage the child is almost exclusively within its mother’s domain. This is the stage when the child is most delicate and needs utmost care and protection.

This is the stage when the members of the extended family and the neighbors come at their own time to see the new born and congratulate the mother for giving them yet another member in the family and neighborhood. The community welcomes the child in their communion. In the very early stages, they bring some food for the mother and some stay around to help in the cooking. The community begins to invest in the child and tie it to the community through its mother. In most cases the child is with its mother, and the visitors are usually women. The men and even the father rarely appear in the picture at this time. The child is also given a name at the earliest part of this stage.³³ Different methods are used in identifying appropriate names for a child but the preferred names are those of the child’s ascendants.

³³ Erny Pierre, OP cit.

By giving the child a name, the family confers membership rights and identity to the child. In all communities, the child was entitled to a name that was used to confer on the child an identity and nationality. Child naming ceremonies in African communities are therefore partly in conformity with the modern requirements by international human rights instruments that require immediate birth registration and the right to a name. Registration of births is a recent phenomenon which has not been very successful in most rural parts of Africa, partly because it is new and state services are not readily available. The CRC and the ACRWC however, assume that such services are or can be readily available in all states parties, which is not the case given the wordings of the articles 7(1) of the CRC, and 6 of the ACRWC.

The second stage is the post-weaning stage, where the child is slowly plunged into a wider environment within the extended family, clan and even neighborhood. In the early part, the child is in the domain of the other children mostly the older ones. The child learns from other children through play and other interactions but with the supervision of adults. This is perhaps the stage when the child can be said to be truly free but under parental watch to enjoy the right to rest and leisure, to engage in play and recreational activities appropriate to his or her age.

4.1 Child involvement in work

The third and one of the most important stages in a child's development is the apprenticeship stage that roughly begins from the age of six when the child begins to participate in family tasks especially at the family level. The child gradually becomes an active participant in the domestic and other productive duties of the family.

The child begins to participate in family work as a contribution to the welfare and survival of the extended family. In most communities such as the Masaai, Meru, Borana, Samburu, Luyha and many others in Kenya, the boy child begins to look after the cattle while the girl child helps the mother in household chores. In fact, part of the reason for the desire of children in African families stems from the traditional need for their labor by the concerned families. Agriculture and Animal husbandry in Africa to date are labor intensive, and the many tasks involved require many hands which children can readily provide. Added to these are the household chores that include among other things, the care of the new borns. As Levine and others point out, the role of children in caring for their younger siblings was and is still widespread and necessary in Sub Sahara Africa.

More precisely, children 5 to 11 years old (though occasionally younger and older), usually girls, are regularly assigned the task of providing daytime care for their infant siblings, particularly after the

infants reach 5 months of age, when their mothers are working outside the home or attending to household tasks.³⁴

This participation is necessary for the survival of the concerned families, without which survival would be threatened and the parents, and in particular, the women would find it impossible to cope. In Africa, children's work is an important contribution to women in their daily struggle to feed and maintain their families. In families where other sources of labor cannot be afforded, it becomes necessary that the child joins early in the collective efforts to sustain the family. The participation of children also serves to train them for their future roles, which is a major concern of parents in Africa.

The involvement of children in family related duties especially if it interferes with the child's general welfare are bound to elicit condemnation from a human rights perspective. In the absence any viable alternatives, this practice is bound to continue as long as its function remains necessary in the families concerned.

The use of children in domestic work and other economic activities like food production and herding of livestock in their families does affect children's welfare and education. There are many cases of children engaged in family work on a full time basis without rest or education throughout their childhood years. A majority of these cases are found in developing countries. The CRC did not however capture this nature of child work as it appears to concern itself with paid work and hazardous occupations involving children. Article 32 seeks to protect the child from "economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." The article refers to paid employment rather than what has been described above. Article 36 may be more appropriate and goes beyond economic exploitation and work, and seeks to shield the child from "all forms of exploitation prejudicial to any aspects of the child's welfare." The ACRWC in article 15 also appear to exclude any reference to the use of children's labor in their families and instead focuses on paid work. Perhaps this form of work was not envisaged to be of a scale that can harm the welfare of children. It is however, important to know that the above provisions do not say that children should not work at all but rather that they should not be exploited and forced to work under conditions that are detrimental to their health, education and general well being. This is not to say that family-related work cannot be exploitative or detrimental to the child. One of course can cite the low level of school enrolment rates and high levels of school drop outs especially among the pastoralist/nomadic communities as being partly the result of child involvement in the economic activities of their families.

Engagement of children in domestic work can also impact negatively on their "right to rest and leisure, to engage in play and recreational activities". This right has been

³⁴ R. A. Levine, et al, Child care and culture: Lessons from Africa, Melbourne, Cambridge

identified as being an essential part to the proper development of the child and is well articulated by both the CRC and ACRWC in articles 31 and 12 respectively. This right is only recognized with regard to children and only by the two human rights instruments.³⁵The provisions require that an appropriate environment be created to assure this right to children by states parties and other responsible actors.

However, as Ncube argues, if we look at it from the perspective of children's participation in the work activities of their communities, especially when such participation does not prejudice their welfare and development, the African conception appear to grant more participatory roles to their children as compared to the west.³⁶

Accordingly, the idea of a totally dependent child who is fed, clothed, educated and generally brought up at the expense of his or her parents is a concept which is alien to the traditional African setting³⁷.

It can be argued that when children participate in adult work, it makes them feel needed and necessary which in turn increases their self confidence and the feeling of competence from an early age.³⁸The child in Africa therefore is not a dependent but active participant in the economic activities of his or her families.

From the above perspective, the CRC can be criticized for promoting the idea of pushing children out of work until they attain majority as stated by the convention. This, as we have argued, would be too much for parents whose main economic activities is in subsistence agriculture and survival is a daily struggle. The economic situation in Africa cannot sustain this new approach. The African perspective involves the child gradually before releasing him or her into the actual adult world.

4.2 Child “lending”/ informal foster care

Another common practice at this stage is child “lending” or informal foster care, where members of the extended family can request that a child goes to stay with them for companionship and to help them in the domestic work tasks. The child's grand parents would, for example, have no problem in getting children to help them in their old age. Families were more than willing to lend a hand in this regard by releasing their children

University press, 1994. P 39.

³⁵ D. Paulo, A commentary on the United Nations Convention on the Rights of the Child, Article 31: The right to leisure, play and culture, Leiden, Martinus Nijhoff publishers, 2006.

³⁶ Ncube W., in Ncube, W.,(ed), Op.cit.

³⁷ Ibid. P. 21

³⁸ M. G. Flekkøy, “Attitudes to children – Their consequences for work for children”, in , Freeman M., and Veerman P., The Ideologies of children's Rights, Dordrecht, Martinus Nijhoff Publishers, 1992, PP. 135 – 147.

to go and stay with their grand parents. The service was also extended to childless couples. This is a culturally sanctioned practice to take care of the aged members of the extended family. Individuals had the responsibility either directly or through their children to provide this assistance. In the absence of state social security arrangements for the elderly, extended family members have to step in so that the elderly are not abandoned to loneliness and starvation. In virtually all African societies there are no state social security provisions to take care of this category of people. The grand parents and generally elderly members of society are credited for being very good in training children for their future roles. Sometimes therefore, children would be sent to them mostly for this purpose. In some cases this is also done as a way of cementing the kinship relationships.³⁹

The fact that most children now go to school and spent most of their time there leaves them with little time for such arrangements. This is bound to affect the practice of child lending in communities that practice them. The arrangement however, in some cases accords a child better educational opportunities and other needs than is otherwise the case in their own families.

The practice of child lending raises a number of issues when analyzed from the international human rights perspective although the CRC does recognize the role of the extended family in child care in Article 5,

States parties shall respect the responsibilities, rights, and duties of or, where applicable, the members of the extended family or community as provided for by local custom , legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention.

It is doubtful that it has the same broad conception of parenthood as is understood and practiced in the African communities. One is that the child's consent is rarely sought and when it is ever sought, the child is not expected to withhold it, yet this is a matter that directly concerns the child's life. Article 12 binds State parties to ensure that children who are able to express their opinion do so freely, to either give or withhold consent on all matters that affect them. Secondly, this practice also involves a separation of a child from his or her actual parents even when it is done only within the extended family. This separation is done with express permission of the child's parents. The CRC appear not to have a direct provision on this nature of child separation and therefore, its Article 9 only refers to separation without parental permission.

³⁹ T. W., Bennet, op.cit.

The drafters of ACRWC had a more appropriate provision in Article 19 (1), where states parties are urged to undertake necessary steps to ensure that,

Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his or her will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interests of the child.

This provision gives the child the right to give or withhold consent to any act of separation from his or her parents and therefore can serve as a good provision against the practice.

The practice of child lending when seen from the African perspective serves to challenge the very concept of parenthood in the CRC and ACRWC even though these instruments recognize the extended family framework. In fact, the idea of child lending ceases to be so once we understand the intricate responsibilities in the upbringing of children in the extended family. In the extended family and generally communal set up, the concept of parenthood was not limited to one's biological parents. In the African set up, a child does not, for example, restrict the title 'Father' to his/her male parent but extends its application to his father's brothers and all his age mates. One's father's age mate is to be referred to as 'father' as well. One's mother's sisters and age mates have to be referred to as 'mothers' as well. The idea of stepbrothers or stepsisters and cousins are foreign to traditional societies, as these people are seen as full brothers or sisters. These individuals, although not your actual physical relatives, relate to you as actual relatives. There is therefore, no need of using terms that could show division or disrespect to them. The terms for father, mother, brother, sister, son, daughter, and others that related to in-law relationships refers not just to the real physical relatives designated by these various terms but to all members of the clan and society who, because of their sex, age and generation correspond to the physical relations to whom the respective terms primarily apply.⁴⁰ To enhance these relatedness and communal upbringing of children, community members have to look at each other in the above classificatory usage of kinship terms. The idea of guardianship as understood by the International law does not exist within the precept of the extended families in Africa.

Towards every person whom one addresses by the same kinship term, one displays in principle, the same legal, economic, ritual and social behavior towards him or her. It ensures that children, wherever they are, they are under the supervisory "eyes" of their 'fathers' 'mothers', 'brothers' or 'sisters'. A child can be disciplined by any of these people without eliciting any complaints from its biological parents. This is a mode of

⁴⁰ K. Kaunda, *A humanist in Africa*, London, Longman, 1996. , See also, M. Hansungule, *op. cit.*

child care derived from the traditional structure where children belonged to the clan and the society and all its members had the responsibility of bringing them up into responsible members of the society. This relationship also ensured that a child could not become socially or economically destitute in the absence of their biological parents.

In these communities, a child belonged to the lineage group rather than just to his or her actual parents. The welfare of such a child is the responsibility of all and in turn, the child is obliged to all members of the lineage.

This form of child care is still a life in a number of rural villages in Africa although it is reducing in intensity. When one looks at the childhood lives of most people from Africa, one will be surprised that most of them have at one time or another, been raised by their Uncles, grand parents, aunts, older brothers or sisters and other members of the extended family. The responsibility of parenting children goes beyond the biological or actual parents and therefore one may be tempted to argue that there was no question of separation from parents when a child moves from ones actual parents to another “parent” within the extended family set up.

4.3 Child discipline

During the second stage in the growth of the child, emphasis is also given to the cultivation of good manners in the child. Children are perceived as individuals from whom respect and obedience to other members of society is required. The child is taught to respect and obey his or her elders. Discipline of the child is very important at this stage and sometimes a child can be subjected to harsh disciplinary measures if he or she misbehaves.⁴¹ African traditions vest the right to punish a child not just in the hands of his or her parents but also to the other members of the community. Every member of the community has a responsibility to direct, guide and whenever necessary to punish a wayward child with due consideration to the child’s age. Such punishments are not seen as a form of abuse or torture but as necessary for the moral improvement of the child. What is important in most African communities is what children will be when they become adults. According to Levine, among the Abagusii community,

Parents expect to benefit from having children who are easy to manage as infants, participate in domestic production during childhood, and continue to help their parents as adults; they also expect the children to benefit from their acquisition of moral virtues prized in the Gusii community.⁴²

⁴¹ Emy Pierre, Op.cit.

⁴² R. A. Levine, et al, op.cit., p.264.

Inculcating the virtues of respect and obedience in children was and remains a cardinal responsibility of parents and others members in the community.

The modern approach embraced mostly by the western world is based on the understanding that the moral development of children can be achieved through dialogue with the child, guidance and counseling instead of punishments such as corporal punishment that is still widespread in African families and schools. Disciplining of children in Africa mostly involves the use of corporal punishment and other forms of smacking which is based on the perception of children as wayward individuals in need of moral development who should be constantly put in line with societal expectations and morality through the cane, slap and guidance. Even though Kenya officially banned corporal punishment in schools in April 2001, the practice continues unabated; while in juvenile systems, care institutions and in families, corporal punishment is the order of the day for the African child. Ending corporal punishment may require that we change the “mindset” of the local communities and the attitudes towards children. Corporal punishment in these communities is part of the culture of child care which is seen as an efficient way of molding children into responsible adults.⁴³ In the international arena, corporal punishment is increasingly being recommended for eradication since it constitutes a form of torture to children. The CRC committee has in fact expressed its concern to states parties that attempt to draw a distinction between acceptable and unacceptable forms of corporal punishment and has urged member states to prohibit the practice in the family, schools and the juvenile penal systems.⁴⁴ It further includes excessive chastisement as an educational or disciplinary measure in its list of child punishment that should be abolished. The committee against torture has from time to time pointed to the fact that this practice must be prohibited as it constitutes torture of the child.

Article 37(a), of the CRC obliges all “states parties to ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” The ACRWC, in articles 11 (5) and 20 (c), informed by the realities in the continent appear to tolerate the disciplining of children in schools and by parents, but urges states parties to take appropriate measures so as to ensure that such discipline is humanely administered with respect for the inherent dignity of the child and in conformity with the charter. Article 11 (5) urges States parties to “take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present charter”. Article 20 (C) urges parents and other persons responsible for the child to “ensure that domestic discipline is administered with humanity and in a manner consistent with the

⁴³ Mai Bente Snipstad, Et al, “Reviving child care practices: Can a child be disciplined without a stick?”, Forthcoming Article in Lothe, E.A.(ed), *Strength in Broken Places: Marginalization and Empowerment*, Oslo, Uipub forlag, 2006.

⁴⁴ UNICEF, *Implementation Handbook*, p.493

inherent dignity of the child”. What constitutes “humane administration” is not spelt out and is more or less left to the discretion of individuals or institutions involved. The CRC, on its part, in Article 28 (2), does not completely rule out child discipline but also urges that it must be “administered in a manner consistent with the child’s human dignity and in conformity with the convention”. In its general comment 1 (2001), the CRC committee rules out the use of corporal punishment as a form of school discipline.⁴⁵ From an examination of both the CRC and the ACRWC, one would conclude that both do not rule out the discipline of children but require that whenever it is necessary, it must be administered in a humane way and in consistent with the spirit of both the human rights instruments.

4.4 Initiation rites

The final major stage in the child’s upbringing is the initiation stage which on average begins at age 13. This is the stage when community puts its fingerprint on the child and marks a major development in the life of the child concerned. The stage is marked by initiation rites that usher the initiate into adulthood. During the ceremony, the child undergoes a kind of physical test to prove his or her readiness for what awaits him or her. The most common initiation ritual for both girls and boys is circumcision where an individual is supposed to endure the pain as a sign of readiness to enter the adult world. Although the act is said to test endurance and prepare the child for the functions expected of him or her in the adult world, for the girl child in particular, there were other hidden social functions.

The rites are carefully designed and the procedures involved affect the initiates psychologically binding them to the rites with emotional intensity.

A period of seclusion, immediately after circumcision is set aside mostly for the boy initiates, where learning and instructions about the adult life expectations, societal morality, family life and sexuality are given. Among the Bukusu community of Kenya, the instructions are done by carefully selected elders who visit the initiates at certain intervals to educate them. Since children now have to go to school, the intensity of this education has been affected and can now only be done after school and during the weekends.

After this stage the child is now considered an adult and begins to assume roles required in this stage. An important rite in this stage, as we have said is circumcision, which in a number of communities in Kenya involves both male and female circumcision. Due to its importance in this stage, its analysis will be useful in helping us to understand the social functions and persistence of the practice.

⁴⁵ The CRC committee’s General comment 1 (2001): The aims of Education.

As we move on to look at circumcision as an initiation rite, it is important to note that it is the nature of communal societies to require sameness or uniformity in the methods of child upbringing and development. The stages in a child's development are therefore clearly marked and ought to be the same for all. It is the responsibility of all to ensure that children are brought up in this socially defined way for the good, identity and survival of the community involved.

4.4.1 Circumcision

The history of circumcision is long and is said to have began for different reasons in different societies. Male circumcision is said to have began much earlier as compared to female circumcision now called female genital mutilation.⁴⁶

Both types of circumcision have eventually become an important aspect in the cultural practices of people in different parts of the world. Female circumcision is concentrated more in Africa than any other continent. It is found in almost 28 African countries among them Egypt, Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Mali, Senegal and Sudan. In the international human rights arena, male circumcision is rarely mentioned, and there appear to be a tendency to accept it as compared to the female one. In this paper we do not want to enter into the debate as to whether or not male circumcision should be allowed. Instead we suggest that the traditional methods of male circumcision subjects the boy child to unnecessary pain and health risks, and should therefore give way to a safer method of circumcision done in hospitals. Perhaps, it is time we put more focus on the "how and where" of male circumcision. Hospital operations are much safer and painless as compared to the traditional ones where no anesthesia is used.

In Kenya, all the communities that practice female circumcision practice male circumcision as well. There are, however, a number of communities that practice male but not female circumcision. The only communities that do not practice male circumcision are the Luo, Turkana, Teso and some Luhya sub tribes (that neighbor the Luo and Teso) that have been heavily influenced by their neighboring Luo and Teso communities. These communities had adopted different initiation rites such as the excision of some teeth and tattooing of the face, arms and stomach. These rites have however, virtually died out since they were not accompanied by elaborate cultural activities and ceremonies as is the case with circumcision. The communities that practice male circumcision still use traditional methods of circumcision. Attempts to change this mode of circumcision to more safer and hygienic methods have largely been resisted.

⁴⁶J. Smith, "Male circumcision and the rights of the child", in Mielle Bulterman, Aart Hendriks and Smith,J., To baer in our minds: Essays in human rights from the heart of Netherlands,(SIM special no.21), Netherlands Institute of human rights(SIM), University of Utrecht,Utrecht, Netherlands,1998, PP. 465 – 498.

Whether it is male or female circumcision, the fact is that these practices can not easily be wished a way.

Efforts to alter or eradicate these practices are often met

with suspicion or hostility from those communities practicing them, particularly when efforts originate from outside the community. For many members of these societies, ending their traditions is unimaginable as such practices constitute an integral part of the socio-cultural fabric⁴⁷

These practices are deeply rooted in the culture of the communities concerned. They define a community's identity and serve as media through which generational transmission of values is done and communal cohesion perpetuated. As Smith argues, in the eyes of parents and other community members, circumcision, male or female, is not done to hurt or abuse children. It is not seen, both by the child and the other members of the family as an abuse in any way and most will not understand why others think otherwise.⁴⁸ Circumcision is only a norm in the long process of child care and growth which everybody goes through, and it is done, in the eyes of the community, for the best interest of the child. This is one area that is problematic when dealing with traditional customs and practices. Whereas practicing communities see no problem with the customs and practices, outsiders are able to point out the inherent problems within the customs and practices. Bridging this divergence in the judgment of these customs and practices has not been an easy one.

The children do not see any problem with it either. They, after all, do not know any other alternatives rather than the one prescribed for them by society and which everybody goes through. The children are not forced, but culturally tailored into conformity with societal norms. They are the reality they cannot escape from.⁴⁹

In order for the children to be accepted in society and to receive the desired response from others, they have to conform. As Robin Horton argues, traditional African customs had no developed awareness of alternatives to the established cultural and thought systems. The lack of this awareness makes for absolute acceptance of the only available tenet and removes any possibility of questioning it. Everybody remains faithful to the only present tenet, the only reality they know.⁵⁰

⁴⁷ Advocates for Youths, "Giving up harmful practices, not culture", <http://www.advocatesforyouth.org/publications/iag/harmfulprac.htm>.

⁴⁸ J. Smith, op.cit.

⁴⁹ Ministry of foreign affairs, Danida guidelines on the prevention of female genital mutilation, October, 1996.

⁵⁰ R. Horton Patterns of Thought in Africa and the west. Cambridge, Cambridge University Press, 1993.

In the societies that practice male and female circumcision, and given the circumstances, it can be argued that it is in the best interest of the child to conform to the customary requirements rather than risk being ostracized and branded as an outcast.⁵¹

Ostracization from ones group has very severe consequences. Those who dare to break with tradition are often cruelly teased, humiliated, mocked and looked down upon.⁵²

Every family tries all it can to direct its own to conform so that they become accepted members in their societies.

In some communities, circumcision is the ritual, which confers this full social acceptability and integration upon the females (and males). Without it they become estranged from their own kith and kin and may lose their right to contribute to, or participate in, the community life of their homeland, to own property, to vote or to be voted for⁵³

No child would also want to miss the opportunity to enjoy the advantages of friendship based on the family and age-sets systems.

Through family ties, an individual finds himself joined to people of different generations within the framework of a limited social unity. Through the ties woven by the age fraternity, he enters into relationships with peers in a larger geographical area; the village, region and ethnic group.⁵⁴

Among the Bukusu community of western Kenya, there were eight (8) age-sets each of which comprised a period of approximately six circumcision years. Each of these groups was given a distinct name.⁵⁵

<u>Age group name</u>	<u>Period of circumcision</u>
Bakolongolo	1900 - 1910

⁵¹ Eva Brems, “ Children’s rights and universality” in Willems J. C. M., (ed), Development and autonomy rights of children: Empowering children caregivers and communities, Antwerpen, Intersentia, 2002, PP. 21 – 45.

⁵² “Traditional and cultural practices harmful to the girl child, African centre for women, Occasional paper, no.1, 1997, p.1

⁵³ Ibid. P.69.

⁵⁴ Ermy Pierre, op.cit., P,55.

⁵⁵ M. Fortes, et al, (eds), African political systems, London, Oxford university press, 1940.F:E:, Makila, An outline History of Babukusu, Nairobi, Kenya Literature Bureau, 1978.

Bakikwameti	1912	-	1922
Bakananachi	1924	-	1934
Bakinyekeu	1936	-	1946
Banyange	1948	-	1958
Bamaina	1960	-	1970
Bachuma	1972	-	1982
Basawa	1984	-	1994
Bakolongolo	1996	-	2006

Members of each age group greet each other as “Bakoki” a term that expresses togetherness, friendliness and good will. The proper use of the word “Bakoki” is however restricted to persons who belong to one of the two consecutive circumcision years - usually referred to as “Chimbaga”.⁵⁶

Persons, for example who were circumcised in the years 1900 and 1902 call each other “Bakoki”. They had a special relationship towards each other and each other’s children. This created a strong bond of relationship among ‘Bakokis’ who included their families as well. This relation brought many families into some form of relationship, which helped to built mutual assistance and friendship among the families involved. People in the same age grade enjoy a special relationship of mutuality, support and reciprocal obligations. All forms of conflicts among members of the same age set were culturally prohibited.

In the socio-political organization, the eldest circumcision age group at any one time was the one that society could turn to for guidance and leadership whenever there was need and they are most respected in the society.

A part from serving as a rite of passage into adulthood and bestowing upon the initiates a stamp of acceptability in their community, initiation rites therefore, help a child to cultivate strong lifelong bonds, support and reciprocal obligations with the people outside his or her family and clan.

The circumcision ritual for the boys in some communities, but more particularly among pastoralist communities, is also used to test the brevity of the boys as future warriors of their society. It is used to test the initiates’ ability to withstand pain and therefore their readiness to defend their communities and participate in raiding neighboring

⁵⁶ Ibid.

communities for cattle. This is reason is common in the North rift and North eastern region of Kenya inhabited mostly by the Pokot, Marakwet, Borana, Rendille, and Samburu where cases of cattle rustling are very common. These communities depend on their livestock for livelihood. During circumcision the boys have to brave the operation without making any movement. They must stand still until the operation is over, however, long it takes. To cry or make any cowardly movement will bring one lifelong shame and exclusion from certain societal ceremonies.

The Maasai and Pokots of Kenya even require the initiates, once they have healed, to raid other communities for cattle or kill a fierce animal like a lion to exhibit their bravery.

On the other hand, among the Maasai, for example, girls are allowed to cry as much as they want but they must allow the operation to go on otherwise they are pinned down on the ground with the help of the communities' warriors.⁵⁷

Underlying all the above is a more fundamental reason for all types of initiation rites as captured by Mircea Eliade and that is "to produce a decisive alteration in the religious and social status of the person to be initiated".⁵⁸

Indeed as Monyenye explains, the intention of circumcision is to make a momentous change in the boy or girl's life. It creates a permanent mark on the body of the initiate to serve as "a stamp that is put on the certificate of entry into the new group."⁵⁹ In the thinking of practicing communities, if adulthood is to be valued and those in it to be respected, those who want to acquire it must be subjected to some pain in order to know that it is a special stage and difficult to acquire. This is why all types of puberty initiation rites involve some pain to the initiates. The most common rites include, circumcision, removal of the teeth, decoration of the face with permanent scratches, tattooing of the stomach and the arms.

The rites serve the communities, analogically, like baptism among Christians. If one suggested that baptism should be stopped, one is likely to get a similar reaction from Christians like that given by communities practicing circumcision, whenever they are told to stop or modify the practices.

If a girl, for example, misses circumcision, she will not only be ostracized but may find it hard to marry and form a family especially in her own community. The rite bestows honor not just on the girl but her whole family as well. In a society where women derive

⁵⁷ <http://www.circlist.com/rites/african.html>

⁵⁸ Mircea Eliade as quoted by S. Monyenye, in "Rites of passage: Controversy over the role of initiation ceremonies for cultural identity among some Kenyan societies, with special reference to Abugusii community of south-western Kenya., undated article, p.5.

⁵⁹ Ibid. P. 6

their only value as wives and mothers, nothing is more fulfilling than attaining this goal. Parents want their children to go through the rites so that they can fulfill their life dreams.

For the people practicing these rites, the traditions are part of their culture and identity, and probably they lack any other viable alternative. As far as they know and can remember circumcision has been part of their traditional requirement.

The elimination of the practice could mean the disturbance of the cultural balance, and the attempts of outsiders to alter or eliminate the practice are often seen as an irresponsible interference in a people's culture and as moral imperialism.⁶⁰

The proponents of Female genital mutilation have advanced a variety of reasons to defend its continuity. They have cited religious reasons, social acceptance and increased prospects of getting married, hygiene, aesthetics and reasons related to fertility among others.

In a sample of respondents in the Sudan, the primary reason given by women for undergoing FGM was tradition, and was the secondary reason given by men. Other reason given for following this practice are: Religion, cleanliness, better marriage prospects, greater pleasure for the husband, preservation of virginity, and the prevention of immorality and, increased fertility.⁶¹

These of course are reasons carefully crafted to win acceptance of a practice that serves a much more hidden purpose, but the reasons, also provide hints to the understanding of the purpose. Female genital mutilation is a gender based practice meant to control women's sexuality and by extension societal sexuality. This control is seen to be necessary for the maintenance of unity and cohesion in the extended families and the community at large.

The removal of the clitoris is seen as both beneficial and necessary to preserve a harmonious society as it is believed that the clitoris provokes married women to make uncontrollable sexual demands on their husbands and will encourage them to seek sexual satisfaction elsewhere.⁶²

⁶⁰J. Smith, op.cit. P. 9.

⁶¹ African centre for review, "Traditional and cultural practices harmful to the girl- child", African centre for women occasional paper no. 1, 1997, P.67.

⁶² C. Breen, Op.cit., P.99.

In societies where polygamy is common and where extra-marital affairs can provoke anger and vengeance even among close relatives, the control of women's sexuality becomes an important weapon in the hands of men. In addition, extra marital affairs when discovered as Breen rightly points out can attract severe penalties.⁶³ Such penalties could easily drive some families into poverty and disrepute. In the minds of the people behind the practices, the occurrence of the above problems will be minimized if women's sexual desire is controlled.

Pre-marital sex is also thought to be minimal with young un-married but circumcised girls as compared to those who are not circumcised.

Although the maintenance of unity and cohesion in a family or society is a universal desire and aim of all, how this is to be achieved becomes crucial in justifying the end. When the means appear discriminatory and harmful, then there is cause for concern. This discriminatory approach is a consequence of women's social and economic powerlessness in patriarchal societies where men control virtually everything. The search for societal unity, cohesion and morality should not be the responsibility of only one sex.

From another angle however, these rites have been classified as harmful practices that have far reaching consequences on the rights and health of children. The harmful effects of FGM as compared to male circumcision are now well documented. This is mainly due to the fact that male circumcision is rarely a subject of debate as compared to FGM.

Most governments where male circumcision is traditionally practiced have tended to focus on its safety and hygiene rather debate whether or not it should be banned. A lot of studies have therefore focused on FGM making it possible to document its health and human rights implications to the girl child.⁶⁴ The current numerous observational studies indicating that HIV prevalence is lower among male circumcising communities as compared to non circumcising ones have complicated the attempts to address the human rights implications of male circumcision. Although research is still going on and therefore there are no conclusive findings yet, the observational studies have tended to influence a positive view of male circumcision.⁶⁵ Although CRC and ACRWC do not directly mention FGM in their provisions, it is one of the main traditional practices targeted for abolition. The CRC through its Articles 24 (3) on the abolition of traditional practices that are prejudicial to the health of children and 37 (a) on torture or other cruel, inhuman or degrading treatment or punishment becomes an important instrument in the fight against the practice.

⁶³ Ibid.

⁶⁴ Smith J., Op. cit

⁶⁵ Joint UNAIDS, UNICEF, UNFPA, and WHO Fact sheet on male circumcision, July, 2005.

Article 24 (3) of the CRC is the most important in the sense that at the drafting level attempts were made to specifically mention FGM as the main practice targeted for abolition. This was however opposed by other representatives notably from Senegal, and it was eventually decided not to mention the practice directly. The main inspiration behind this article was the abolition of FGM, and it is highly doubtful that the drafters ever thought of traditional forms of male circumcision while drafting the article.

The regional instrument, the ACRWC in Article 1 (3) states that “any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present charter shall to the extent of such inconsistency be discouraged”. Article 21 (1) specifically deals with traditional customs and practices and urges states parties to take appropriate measures to abolish all harmful traditional customs and practices. The children’s Act (2001), of Kenya, goes a step further than both the CRC and the ACRWC to specifically provide for the abolition of Female circumcision.

Human rights activists and scholars have been vocal in advancing arguments against FGM but the same is lacking with regard to traditional forms of male circumcision. Although there are noticeable changes, FGM continues to thrive in most practicing communities. A number of NGOs have adopted alternative rites that do not involve the mutilation with some level of success. The resistance of the practice has forced such NGOs to adopt alternative measures where the girls are taken through most of the rituals except the mutilation. The practice is also wearing out among the urban dwellers, affluent and educated families.

In communities that practice female circumcision, the circumcised girls are now considered ready for marriage. The boys however, would take a little bit longer before marrying. In the next part, we complete our analysis in the stages of development of the child by looking at one particular marital practice in Africa that has been classified as a harmful traditional practice to the rights of the child. Child marriage is one of those practices that have persisted despite attempts to eliminate them.

4.5 Child marriage

The practice of child marriage is common in sub-Saharan Africa, Asia and some parts of the Middle East. Cases of the youngest marital age in child marriage practicing societies have been reported in West and Eastern Africa and South Asia.⁶⁶

In most countries, there is a set minimum age when children may marry, with or without parental consent. In many of the international human rights instruments and most national laws, the minimum age of marriage is 18. In Kenya, the Children Act (2001), which came into effect on the 1st of March, 2003, defines a child as any human being

⁶⁶ Unicef fact sheet, no.23.

under the age of 18 and therefore indirectly outlaws marriage of any person below this age. There are however other relevant statutes that do not fit perfectly into the above definition. The Marriage Act, for example, puts the minimum age of marriage for girls at 16 with parental consent and 18 without parental consent. Under customary law, a person is deemed ready for marriage after undergoing puberty rites which sometimes are done when the child is still very young. There is therefore, generally no clear legislation on the minimum age of marriage in Kenya.⁶⁷

In Kenya, there are many cases of child marriage usually involving cases where young girls are married to men who are much older than them; some of them, the age of the girl's grandparents. Between January and August this year, 250 girls had been rescued from child marriage in Malindi district which is just one of the many districts where the practice is rampant in Kenya.⁶⁸

In communities where child marriage is practiced like the Maasai and Mijikenda of Kenya, the practice runs deep into their culture and it is rarely seen as harmful to the girl child. Such a practice entrenches itself and becomes part of the accepted societal norms. Even the "victims" begin to see it as part of their culture that they should all go through.

In the communal organization of the African societies, children are expected to obey the decisions of their parents and other elders. The girl child therefore has an obligation to respect and obey her parents decisions without questions.⁶⁹ A child who refuses to submit to such requirements is bound to face the wrath of society and would be ostracized by others especially in societies where children do not question their parents decisions.

In these societies, a girl attains her full value and status in society when she becomes a wife and a mother. Girls grow up expecting to be wives but in most cases they have no control on whom and when they will marry.⁷⁰ Marriage and motherhood is considered the ultimate goal of a girl. The Swahili of Kenya even give instructions to the bride on how to please her husband.⁷¹ As a wife, three things are admired in a woman, fertility, obedience and hard work. Besides these, girls are regarded as transitory members of their families, they are bound to move a way and join another family.

⁶⁷ Eva Palmqvist, Children' rights in Kenya – an analysis based on the CRC Reports, Save the Children, Sweden, 2006.

⁶⁸The Daily Nation Newspaper, 3rd, Sept. 2006.

⁶⁹Alston, P., and Gilmour- Walsh, B., The best interests of the child: Towards a synthesis of children's rights and cultural values, Unicef publication, Innocenti studies,1996.

⁷⁰ Ulku et al, op.cit.

⁷¹ <http://www.africaguide.com/culture/weddings.htm>

The value of a girl therefore is shared by two families, in her original family she brings in bride wealth, in her destined family, she gives it children and realizes her full value there. Her family of birth is not the sole beneficiary of her being and therefore she is bound to receive less attention as compared to the boy child. This is an attitude in line with the Asian proverb –“bringing up girls is like watering the neighbors’ garden”⁷² A son is treated as the pillar and continuity of the family. He is the medium and custodian of the family’s heritage and his parents’ security in old age. In communities engaged in intermittent warfare or cattle rustling with their neighboring communities, the boys are the warriors on whom the survival of their community is pegged.⁷³ In fact, most pastoralist communities in Kenya for example, practice child marriage showing that they hold less value for the girls except for the bride wealth they are able to bring. The fact that these communities depend on livestock for their livelihood may make them want to marry off their girls early so as to get more animals. Bride price is usually paid in form of cattle. Wealth in these communities is measured in terms of the number of animals that one has.

Another reason advanced frequently for child marriage results from the high premium placed on virginity at marriage. Virginity of a bride at marriage was highly valued and could earn her family more bride wealth and honor. In order to earn more bride wealth and honor, families would marry off the girls for fear that when she grows up she can easily mess around and lose her virginity.⁷⁴ This was also done to avoid premarital sex and sometimes to avoid a situation where a grown up girl could challenge her parents decision to marry her off to a person the girl does not like. Such girls could also very easily elope with men that the family does not approve.

In a number of cases, girls are also married off early for economic survival of the family. Poor families, especially during periods of drought and famine could trade off their girls for bride wealth to enable them survive.

Another common reason is to enable a family acquire bride wealth so that the boys can use it to marry as well. In many communities bride wealth is used by girl’s brothers to pay the same for their wives. Bride wealth or dowry as it is sometimes called, serves to promote child marriage.

Then there is the value that societies attach to children. In traditional African societies the more children one had the more respect one earned. The children are valued because they could provide labor that would help in increasing their family’s wealth. As a result of this, girls had to married off early so that they begin their reproductive life early.

⁷² Unicef facts sheet no. 23.

⁷³ Ibid.

⁷⁴ “Traditional and cultural practices harmful to the girl child”, African centre for women, Occasional paper,no.1,1997.

When this is not attainable, then the man, in most cases, would resort to marrying more than one wife. The value for many children and the need to maximize on the reproductive capacity of the girl child is also necessitated by health problems and more specifically the high child mortality rates among the practicing communities.

Be it that may, the issue in child marriage is that the child does not have the power to consent to or withhold consent on this matter, yet the decisions have a direct impact on the child. It is generally a reflection of how society views childhood and by extension, the girl child, and women. Gender discrimination that is pervasive in the African societies also underpins practices like child marriage and female circumcision.

It is important to note that child marriages are mostly carried out for economic reasons – the need to acquire bride wealth for use by a family as a form of wealth, for survival, to enable the boys to marry and to have more children as sources of labor. This means that decreasing levels of poverty among the practicing communities will be an important step in the fight against the practice. Education and economic empowerment of the communities and especially the girls can help in changing the attitude that the value of girls lie in marriage and motherhood. Provision of health facilities to help in reducing child mortality rates will also be important. Our argument here is that if we want to reduce cases of child marriage then we should focus on its socio-economic functions that help in retaining the practice. Once these functions are rendered irrelevant through the introduction of better alternatives, then the practices will begin to wear out.

Child marriage has been seen as a faceless violation of the rights of the child. It has far reaching social, economic, health and even political implications for the girl child. Among other things, it compromises the child's self actualization and health. Child marriage violates a child's human rights including the right to education, leisure, and good health, freedom of expression and freedom from discrimination.⁷⁵

Given the fact that these girls are married off when they are still very young and usually to older men, once in marriage they have little power if any over their husbands.

The practice of child marriage violates several provisions in a number of international human rights instruments. The Universal Declaration of human rights (UDHR) in Article 16(2) emphasizes the need for free and full consent of the intending spouses to a marriage and only men and women of full age should be allowed. The CRC is also emphatic in urging states parties, in Articles 12(1) and 24 (3) to ensure that the child's views on matters affecting his her life are heard and considered, and to abolish all traditional practices considered prejudicial to the child. The ACRWC requires states parties, in article 21(1) to take appropriate measures to eliminate all harmful customs and cultural practices to the child. In 21(2), it singles out child marriage and betrothal of boys

⁷⁵ Unicef facts sheet no. 23., See also Unicef statistics.

and girls for abolition. It fixes the minimum age of marriage at 18 and requires that all marriages be registered. Similarly, the convention on the elimination of all forms of discrimination against women (CEDAW) emphasizes the same in part IV, Article 16, which requires the equal rights for both men and women in entering a marriage and choosing a spouse. It also outlaws child marriage and betrothal.

Although international human rights law extends respect to traditional customs and values, it is however, categorical that all harmful customs and practices be abolished or eliminated.

This is more so when it is realized that most of the children subjected to these practices and customs have no knowledge about the harmful consequences of these practices and customs. Where such children are purported to have consented to the customs and practices, the truth is that they have no choice and alternatives.

4.6 The best interest of the child

Let us now examine the main principle underlying the CRC on the “best interests of the child”. Article 3 (1) states that,

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

According to An-Naim, the principle of the best interests of the child is bound to attract diverse and even contestable interpretations in different cultural contexts. He argues that the meaning and implications of this principle need to be receptive to “challenges, reformulations and requirements” through what he calls “the processes of internal discourse and cross cultural dialogue.”⁷⁶ Eva Brems also mentions this problem with the principle,

When traditional practices are judged according to the best interests standards, in many cases the outcome will depend on the weight attached to cultural factors. If the society in which he or she lives is organized in a certain way, it may be in the best interest of the child to conform to that pattern rather than breaking with it and becoming an outcast or suffering adverse

⁷⁶ An-Naim, A., “Cultural transformation and normative consensus on the best interests of the child” In Alston, (ed), *The best interests of the child: Reconciling culture and human rights* , Oxford, Clarendon press, 1994., P.64 (PP. 62 – 81.

consequences in other spheres that are directly or indirectly linked to the rejected practice.⁷⁷

It may be argued that when we condemn traditional male circumcision, female genital mutilation and child marriages, then we will be implying that the parents who allow or arrange for their children to participate in these rites are “incompetent and abusive parents who do not love their children.”⁷⁸ This as Breen notes, will be in conflict with community’s and parents’ understanding of the best interests of its/their children. The parents are after all bound by the same cultural requirements. The parental thinking appears to accord more priority to the future interests of the child while downplaying the pain or harm inflicted in the present. As Breen points out, in reference to female genital mutilation, it could be that we are perhaps only focused on the physical pain and forgetting the post mutilation benefits that accompanies the girl such as positive feeling, increased chances of marriageability, social acceptability, escape from rejection, and ostracization associated with the uncircumcised.⁷⁹ From the perspective of the child who has to continue living in her community wouldn’t circumcision be seen to work in her best interests? Yet, from our perspective we will condemn it but still abandon the girl to her community’s wrath. The health implications of FGM to the girl child are well documented and too serious to subscribe to this line of argument.

For Breen, conclusions that a rise from the above arguments should be avoided until we examine the values attached to them and the reasoning on which they are based. If the long term purpose of such practices is subjugation and oppression, then we should be hesitant to conclude that the principle of the best interest can indeed justify such practices.⁸⁰ Eva Brems notes the importance of the principle in the interpretation of the entire convention but also blames it for its “elastic language” that allows for contextually determined interpretations.⁸¹ The elastic language may have been necessary to create a margin of appreciation and compromise among the parties that were involved in the drafting of the document. The problem however, arises when the principle of the best interest is interpreted in isolation from the entire document (the CRC). When this is avoided, then cultural based interpretations will cease to be a problem and harmful traditional practices and customs will be seen for what they are. The fact however, is that in isolation, the principle of the best interests of the child is open to contextually determined interpretation. These challenges and problems do make a compelling case for a re examination of the principle. The committee on the rights of the child has not given

⁷⁷ E. Brems, Children’s rights and universality, in Willems, J.C.M.,(ed), Developmental and autonomy rights of children: empowering children. Caregivers and communities, Antwerpen,Intersentia,2002, P.38.(PP. 21 – 45)

⁷⁸ C. Breen, Op.cit.

⁷⁹ Ibid.

⁸⁰ Ibid.

a specific criterion of interpreting the principle other than insisting that it should be interpreted in the spirit of the whole convention and that particular reference be made to the general principles in articles 2, 3, 6, and 12. The committee has insisted that states parties should not allow relativistic interpretation of the principle that may be used to justify traditional practices or punishments that violate the rights of the child.⁸²

Throughout the stages in the development of the child, one notices a paternalistic approach in the way society relates with children. Children are treated as “not-yets” and therefore, in need of care, direction, education, and practical training through participation in the activities of the family and community. In the child’s stages of development, we also see that development into adulthood is not determined by chronological age as the ACRWC requires but by the rites of passage. A person will not be considered and treated as an adult unless he or she has gone through the defined stages in the child development. A particular age defined in years does not determine one’s ascendancy to adulthood. Ascendancy to adulthood requires one to go through certain stages and acquire appropriate skills and knowledge and finally a demonstration of one’s physical readiness through a puberty rite. Generally however, adulthood is attained after the initiation and seclusion period but there is attendance to recognize one as a full adult after marriage. Given the African charter’s definition of children, it would mean that in many African communities, children are treated as adults even when they are still within the charter’s childhood framework. The CRC definition of children accommodates cases where persons under the age of 18 can be treated as children if “under the law applicable to the child, majority is attained earlier.” Although the convention addresses states parties, this definition can very easily encourage traditional values to influence legislations that allow adulthood under the age of 18.

Certain key issues can be discerned from our above discussions as additional explanatory factors to the persistence of traditional practices and as actual violations of the rights of the child in Africa. These are the role of informal actors, the intergenerational power imbalance and the people’s apparent orientation towards the past. The prominence of these factors in Africa especially in the vast rural villages has served to entrench harmful customs and practices.

⁸¹ E. Brems, *Op.cit.*.P.38.

⁸² R. Hodgkin and P. Newell, *Implementation Handbook for the Convention of the Rights of the Child*, New York, UNICEF,2002

5 THE PROBLEM OF INFORMAL ACTORS

When a state party ratifies a convention such as the CRC, then it accepts the obligation to begin the process of putting the convention's provisions into practice in the areas under its jurisdiction. It is an undertaking to transpose the convention's principles into domestic law. The most difficult part in Africa with regard to the elimination of harmful traditional customs and practices is twofold. First, there is the issue that the perpetrators of children's rights violations are not states but private individuals, families and communities herein referred to as informal actors. These groups are distinct from state and non-state actors. Secondly, there is lack of political will brought about by the fear that the private violators (mostly communities) are powerful enough to threaten the political survival of the ruling elite.

The proponents of harmful traditional customs and practices are neither targeted directly by the CRC or ACRWC nor participants in the debates on these customs and practices. Yet at the domestic level, they are too powerful a force for states parties to ignore in the implementation of the convention or charter. The CRC and ACRWC are only binding to states parties, who in turn are obligated to take appropriate measures domestically to secure and promote the rights of the child. Even when legislations have been put in place, it is usually difficult to deal with the informal actors as there is a likelihood of them going underground to continue their practices unnoticed. In communal societies where the practices are supported by many, the practices will remain underground until or unless occasionally, something tragic happens to the initiates. Among the Abagusii community of Kenya, attempts to crack down on the practice has made women to resort to circumcising their girls immediately after birth in order to conceal the practice. In fact, many cases of FGM are only reported when the operations become tragic otherwise they are always hidden a way from outsiders.

Legislating against the practices, especially FGM, has also unveiled another problem from the political front. In Kenya for example, the first attempt at legislation against FGM in 1996 was defeated courtesy of legislators from FGM practicing communities. The legislators could not afford to be perceived by their people as opposing a practice that is at the heart of their communities. Legislators from the Abagusii community that practice both FGM and traditional male circumcision have been very outspoken against any attempts to criminalize female circumcision. Related to this is the fear by the ruling elite that they will lose the political support of certain communities if they legislate against their traditional customs and practices. Even in cases where legislations have been done, there is reluctance by the government to enforce the law for fear of antagonizing itself with the practicing communities. The proposed land reforms (2006) that are meant to allow women have equal access to land ownership with their husbands and daughters to have equal rights to the inheritance of their parents' property, is being delayed because of political consideration. The opposition to the reforms has forced the government to delay the reforms probably until after the 2007 elections.

The proposed land reforms should be suspended until the 2007 general election, a cabinet minister has said. Trade and Industry minister, Dr. Mukhisa Kituyi said the reforms were too sensitive and might be used by the opposition to campaign against President Kibaki, and thus deny him a second chance.⁸³

Opponents of the land reforms have argued that they are likely to spark chaos since different communities have different rules governing inheritance. Almost all Kenyan communities do not recognize the right of girls and women to property inheritance. With over 41 ethnic communities with their own customary laws, the Kenyan government finds it difficult to enact legislations that are nationally acceptable. In addition to this and given the communitarian nature of the Kenyan communities, opposition to reforms or legislations that upset the traditional ways of doing things, usually win a near unanimous support in the communities concerned. Very few women in such communities will be daring to speak against the prevailing communal position.

In Kenya and many other African countries, the role of the informal actors, especially the communities is very crucial in the realization of children's rights. Yet in Africa, this fact has not been given due considerations by the international human rights instruments neither have states parties from Africa acknowledged this problem. Many of the African human rights scholars have also tended to pay more attention to human rights violations at the formal sphere while neglecting the informal sphere. The cooperation or lack of it from these actors will determine the speed at which harmful traditional customs and practices will be eliminated. The CRC can in fact be criticized for appearing as if it targets a child in a developed world and thus ignores the particular disadvantages and circumstances faced by children in developing societies, especially the problems perpetrated by informal actors.

⁸³ The Daily Nation Newspaper, 17th October, 2006.

6 INTERGENERATIONAL POWER IMBALANCE

In traditional African societies power and knowledge were vested in old age. Advancing age means continual improvement and accessibility to more rights, power, knowledge and wisdom. The child at the lowest end is conceived in the opposite way as one without rights, power and knowledge. A child is like “a man in the state of nature, not yet changed by society, naked like the first human beings, without a feeling of shame, ignorant, unconscious of his condition and destiny, with an intact body and an intelligence which is still opaque and veiled”.⁸⁴ The crying of a child attracts very little concern since this is part of their nature, walking naked is considered okay as they have no sense of shame; listening is their best virtue as recipients of education in a one direction flow, respect of and obedience to elders is their best admired characteristics.

Age was the criterion of respect, knowledge and wisdom. Children have no claim to wisdom which is largely based on experience, and if left alone, they are bound to make mistakes that will not be in their own best interests and those of their families and community at large.⁸⁵

The belief that only elderly people have knowledge and wisdom is referred to by Kapaghawani, as epistemological authoritarianism; a situation where only the older members of society see themselves as the custodians of knowledge and that they deserve the most respect as a result of this fact. Kapaghawani contends that epistemological authoritarianism was rampant in African communities because elders were the only ones held to have all knowledge and wisdom, so that whatever they said or wanted is to be without question.⁸⁶ These arrangements are usually common in societies where knowledge is orally transmitted. With the adoption and spread of the written culture, this intergenerational imbalance may begin to tilt.

Otherwise it is the eldest members of society whose opinion carries the greatest weight in matters concerning society. They have acquired, due to their age, profound experience of things and societal matters. Knowledge constituted of the totality of all that successive generations had accumulated since the dawn of time both in spiritual and practical life, while wisdom entailed the proper application of this knowledge for the benefit of the society. The elders are perceived as the only people who know what is good or right for society so their guidance is taken very seriously especially by children. Children are not expected to question any directive from their elders. It is the elders to determine the

⁸⁴ Erny Pierre, op.cit

⁸⁵ C. Breen, Age discrimination and children's rights: Ensuring equality and acknowledging difference, Leiden, Martinus Nijhoff publishers, 2006.

⁸⁶ Kaphangawani In J. M. Nyasani, Philosophical Focus on Culture and Traditional Thought systems in Development. Nairobi, Evans Brothers, undated.

direction that society takes and are effective in keeping traditions alive among the young generations.

At the family, clan, and community levels, it is the elders that are the custodians of the norms and traditions of the community. This management style puts leadership in conservative hands to ensure continuity of past practices. The control of society by elders helps in most cases to cement traditionalism and thus keeping past practices alive.

Children, as Veerman suggests, have to leave all decisions about their lives to be determined by a different age-group with very different interests and outlook to life without their input. This, for Veerman is sociology of knowledge problem that has not been explored. In Africa, Knowledge and power is the preserve of those with advanced age; and it was generally familiarity with the traditions of ones community and their applications. Tying knowledge and power to old age disadvantages not only children but young adults as well. There is also a conception that knowledge has some kind of independent existence and has formidable power. A person who possesses knowledge, as Pierre puts it, “inspires awe, whatever the domain in which he exercises his knowledge”⁸⁷

A consequence of this is the need for children to give unqualified respect and obedience to those who are older than them. At the family, clan and community levels, every adult expected respect and obedience from children. This was vigorously enforced and internalized in children. Age based distribution of power and knowledge becomes a problem when the advantaged group uses its position to unjustifiably disadvantage the other group.

We may also need to understand that children, especially in their early stages of development may not be able to make informed decisions and this may justify certain unequal treatments as is the case in political participation where children under certain ages are not allowed to participate in the voting process. But when children who are able to form and express their opinions on matters that concern them are refused these rights, then it becomes an issue of human rights concern.

We would like to argue that in the African genentocratic structure, children can be said to be victims of inter-generational power imbalance especially when they are refused certain rights on the basis of their age, even when they have evolved the capacity to enjoy such rights. This imbalance is widespread and is culturally sanctioned.

In the Bukusu community, children are not supposed to question decisions made by their parents and elders even when such decisions directly concern them. Advanced age is taken as the criterion of not only the truth but also reliability and therefore whatever decision is made by people of advanced age should be taken as it is. It is assumed that such decisions will always be in the best interests of the child, who in any case is

perceived to be incapable of making informed decisions. It is noteworthy that the ACRWC in article 31 (a), requires that the child, subject to his or her age and ability, should “ work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need”. This article captures the paternalistic Adult-child relationship in traditional Africa that is vulnerable to abuse at the detriment of the rights of the child.

As a result of this, in African communities,

Old age will not be something tragic; there is no fear of growing old, no fear of life. Ones prestige increases; he has new roles to play which are specific to this state; new sentiment are born out of a reinforced contact with the invisible world.⁸⁸

Pierre compares the fate of the aged in Africa and their counterparts in the west in their current social structures,

While in the west, the older generation would be at a loss of changing realities, in the African case, the older generation is better integrated and feels more at ease in genentocratic traditional societies where all is based on an experience and knowledge whose transmission is an essentially oral mode.⁸⁹

In Africa this situation still rules the lives of people in the vast rural areas of the continent. This prompts a need in Africa for a renewed interest in Janusz Korczak’s call in 1929 in Europe that we should begin to,

Demand respect for the clear eyes, smooth foreheads, youthful effort and confidence. Why should dulled eyes, a furrowed brow, untidy grey hair, or bent resignation command greater respect?⁹⁰

The traditionally sanctioned inter generational power imbalance in Africa disadvantages children especially with regard to the enjoyment of autonomy rights. Autonomy rights sometimes referred to as empowerment rights refer to the rights that enable an individual to be heard on all matters that concern or may affect his or her life.⁹¹ The ACRWC covers these rights in Articles 7 (freedom of expression), 8 (freedom of Association), 9

⁸⁷ Erny Pierre, op.cit., p.1

⁸⁸ Erny Pierre, op.cit.,pp.8 – 9.

⁸⁹ Ibid. P.11

⁹⁰ Janusz Korczak, as quoted by Veerman, P. E., in op.cit., p. 95, The quote is from Korczak’s 1929 article , “The right of the child to respect”.

⁹¹ L. J. LeBlanc, The convention on the rights of the child: United nations law making on human rights, Lincoln, University of Nebraska press,1995.

(freedom of thought, conscience and religion). According to the charter, these rights should be enjoyed subject to the restrictions provided for in the national laws. For children, their evolving capacities will determine the extend to which they can enjoy these rights. It may be too much to expect very young children to have the capacity to enjoy or exercise these rights, but as their capacities evolve, they should be able to exercise and enjoy these rights. The principle of the evolving capacities of children simply requires that as the child grows from infant to his or her late adolescence, autonomy rights should assume greater importance for the child. It requires age appropriate autonomy rights for children.

The principle of “evolving capacities of the child” is well articulated by the CRC as compared to the ACRWC.

Article 12 of the CRC gives a child, who is capable of forming his or her views, the right to freely express them on issues that affect him or her and that such views should be given due weight in accordance with the age and maturity of the child. This article in essence gives children the right to be involved in anything that concerns them depending on their age. A child can therefore consent or withhold consent or suggest alternative cause of action on any matter that affects him or her. The idea of consenting or not for children has not been under the domain of children. In some communities this is a privilege but only for the adults and mostly men. Children in such communities cannot be expected to demand for such rights. For them everything looks okay and they see no problem with the state of things. This, after all, is what they know. Children in these communities have to follow what is required of them and thus their alleged willing participation in their society’s rites of passage.

The same applies to Articles 13 on the child’s right to freedom of expression and 14 on the right to freedom of thought, conscience and religion. In a number of communities in Kenya, when there is an urgent issue, a child may be heard by his or her parents only indirectly through the aunties, uncles or grand parents especially on matters to do with sexuality, marriage, and family issues. The freedom is even more limited in the presence of certain community elders, where ideally a child should keep away or remain quiet. The issue of a child’s evolving capacities did not matter when it came to serious societal matters. Given the communitarian nature of life and the rigid upbringing of children, the right to freedom of thought can only operate within the limits of the society’s traditional framework.

In any case, the freedom of thought and expression comes to nothing other than a reflection of the adults determined thought systems. For society, as Ncube ably puts it, expects “a continuous period of self-effacing obedience to traditional authority” from children that make it difficult for them to exercise these rights.⁹²The CRC promotes the

⁹²Ncube, W., in Ncube, W., (ed), op.cit.

idea that children should be given space to be heard and respected too. The relationship between children and adults should now adopt a more democratic approach where children are seen as active participators depending on their evolving capacities.

The above kind of generational power structure makes it easy for society to control the young who could otherwise be more receptive to new changes. The elders are often seen as the custodians of a society's traditions; they are equally the most conservative and would prefer continuity rather than change in order to preserve their *status quo*. This conservatism translates into support for tradition practices even when they disadvantage some groups. The main supporters of traditional practices in Africa are old men and women. With power tilted in their favor, they are at the centre of the persistence of traditional customs and practices. Their sense of conservatism is fuelled yet again by the African romanticism of their traditional past and therefore their implicit need to relive it in the present. The romantization of the past and the desire to hang on traditions is our last and next factor of discussion that also accounts for the persistence of traditionalism in Africa.

7 THE PAST IN THE PRESENT

It was Zahan, who observed for the first time that traditional African societies appear to be oriented towards the past and the people prefer living on the basis of past traditions than new ones. Due to this orientation, the Africans found the justification and meaning of their actions not in the future but in the past. The ideal for a traditional African lay not in the future but in the past. The ideal involved the indefinite repetition of the normative past.⁹³

The idea of orientation towards the past was taken up by Mbiti, who, from his research findings among the kikuyu and Kamba communities of Kenya, concluded that Africans did not even have a word in their local languages for the future. Although lack of such a word does not mean that people do not plan for the future as Mbiti tried to opine, the point is that the people were more interested in ensuring that the present and future look like the past.⁹⁴

Things had to remain and be done the way they were done in the past. The future was to be like the past. It could, therefore, be argued that the future that the Africans were preparing and planning for was to be as similar as it was possible to the past. The preparation and planning were meant to ensure this similarity.

Thinking almost in a similar line is Robin Horton, who argues that reliving the past becomes inevitable when a society has no developed awareness of alternatives. This forces the African people to remain loyal to the only ways they know and are sure of.⁹⁵

Advancing time, with its inevitable element of non-repetitive change, is the vehicle par excellence of the new and the strange. Hence, its effects must be annulled at all cost.⁹⁶

Traditional African societies therefore had in place elaborate activities and practices to ensure that their present and future are, as much as possible, lived as the past was lived.

The element of Mbiti's contention that the 'Zamani' (the past) served as the ideal, a golden age by which the present and future ages should live is largely true. The idea of the future is largely silent, not because the Africans do not think and plan for it, but because much of the efforts were aimed at making it similar as far as possible to the

⁹³ D. Zahan The religion, spirituality and thought of traditional Africa. Chicago, The University of Chicago Press, 1970.

⁹⁴ S Mbiti African religions and philosophy. Nairobi, Heinemann, 1969.

⁹⁵ R. Horton , op.cit

⁹⁶ A. G. Mosley , African Philosophy: Selected Readings. New Jersey, Prentice Hall, Englewood Cliffs, 1995, p.335.

golden past. The future was full of uncertainties and the Africans thought that the more similar it looked like the past, the better for their societies.⁹⁷

Traditional Africans lived in constant fear of the contingent ills of life, sickness, famine, starvation and accident. The struggle for life was severe and harsh, so much so that conservatism became a necessary impulse for the survival of society. Yet speaking from the contemporary perspective, the situation in Africa is still harsh and thus conducive to conservatism. The unfamiliar is revered and avoided while the usual and habitual on the other hand is to be zealously adhered to. What was once done was done for all time; as things were in those days of long ago, so they should remain being so today. Things remain, they don't pass away, and they don't change. As parents found them, so their children should find them; and leave them as they found them, uninterrupted⁹⁸

Most rites of passage are done following a strict formula and any utterances are recited with absolute accuracy. Rhythms, mode of utterance and singing, details of religious activities have to be done properly and in accordance with established tradition. It is for this reason that only elders are allowed to oversee and carry out these rites. Things have to be done exactly the way they were done in the past and only elders have the necessary knowledge to perform them in accordance with this requirement.

It is because of this that the procedure of certain rites of passage such as circumcision among certain communities has remained traditional and resistant to change. Even the availability of better circumcision procedures provided by hospitals and the prevailing health implications has not fully convinced certain communities to change their circumcision rituals. They have religiously stuck on the procedure which they are convinced was put in place by their ancestors. A popularly used proverb among the Bukusu community of Kenya used to justify this orientation is "*Where a Buffalo passes, its young ones have to pass through there too*". The Bukusu youths are therefore encouraged to follow the same cultural route taken by their parents or ancestors. Following such a route is the surest guide to a more certain and risk-free future.

According to Deng,

the Dinka value system is essentially backward-looking in that the idealized view of the ancestral past forms and reinforces the present value system so as to facilitate the future. The Dinka never claim to have done better than their fathers, and even if they have, they never voice pride in that achievement⁹⁹

⁹⁷J. S. Mbiti, *op.cit.*

⁹⁸ N. Miller, *The Child in Primitive Society*. New York, Publishers Brentano, 1928.

⁹⁹ F. Deng, "A cultural approach to human rights among the Dinka" in An-Naim, A. A., and Deng, F. M., (eds), *Human rights in Africa: Cross-cultural perspectives*, Washington DC, The Brookings institution, 1990, P.277.(PP. 261 – 289.

Writing generally about traditional Africa, Pierre, describes the manifestation of the orientation,

The past is a sure guide for the present; the view is more retrospective than prospective, and it is from the past that one finds adequate models to conform to.¹⁰⁰

Where the established traditions have absolute and exclusive validity for those who hold them, any challenge to them is a threat of chaos, of the cosmic abyss, and therefore evokes intense anxiety. People are not given the latitude to think freely and inquire into new and untried things. Progress and ventures into new areas are impeded by the over weaning prestige of the old and tried ways, and the uncertainty of the new and untried ways.¹⁰¹

The orientation towards and the glorification of the past has ensured that communalism and traditional conceptions of childhood and the attendant practices remain as a way of life in Africa for a long time. This orientation makes it possible for people to resist new changes to the way they do their things. The environment can be of a nature that make for change, call insistently for adjustment, but the above orientation remains powerful to be defied.

Quite a number of anachronistic practices, including practices such as FGM and wife inheritance among a number of communities, have refused to die due to this orientation towards the past. They have strived due to the philosophy of looking to the past for an ideal in order to have a more certain future.

This has made it difficult for positive changes to take root in the continent especially in rural areas where the resistance is still very strong. When people believe that inherited practices can assure them of survival in the future as they were in the past, they are less willing to expose themselves to added risks by abandoning their practices and adopting new ones. The orientation towards the past has been nurtured by both man and nature. Apart from the hostile natural environment, the interlude of colonialism in the history of Africa and the atrocities it visited upon the African people has nurtured distaste for a alien and new values. The colonial values were a grim reminder of the suffering, humiliation, oppression and exploitation on the people of Africa. Post independence Africa therefore evolved a sense of revivalism towards their cultural values which had been eroded by colonialism. The sorry state of the African economic performance coupled with both natural and man made misfortunes have combined to make the future for the African people uncertain. This in turn nurses a past ward orientation when people begin to look to their past with nostalgia. And the consequence is that traditional customs and practices

¹⁰⁰ Ermy Pierre, op.cit., P.11

¹⁰¹ R. Horton, op.cit

remain attractive to the communities despite their negative impact on certain individuals in the communities concerned.

8 CONCLUSION

We would like to conclude that in African communities, children are brought up as part of the larger group, the extended family and community at large. The communal structure in African communities still has a lot of influence on the child's upbringing and in several ways as we have seen, on the rights of the child. Most African communities still hold onto the traditional paternalistic approach in the upbringing of children where the parents and elders in the community had absolute authority over the children. Through this approach, the community creates its own images of childhood which determines how the defined group is treated. Children are generally seen as lacking in the requisite characteristics of adulthood; and in order to achieve these characteristics, they had to go through certain elaborate rites that eventually confer adulthood on them. From the perspective of the concerned communities and families, these rites were part and parcel of the socially recognized and necessary elements in the process of child care, upbringing and development. From the human rights perspective, some of these rites are inimical to the rights of the child despite the practicing communities' contrary opinion. Practices such as FGM and child marriages have been classified as harmful tradition practices to the rights and welfare of the child. Some of these practices however, are endemic practices and run deep into the cultural and value systems of the practicing communities. The practices are seen to serve important social, political and economic functions and they help to define the identity of the communities involved. The fight against harmful customs and practices in Africa must focus its attention to their social, political and economic functions. Better alternatives to these functions will be useful in the attempt to eliminate the customs and practices.

The role of the informal actors in Africa appears to be stronger than it was initially envisaged. Their capacity to resist change and threaten the *status quo* of the political elite in Africa has made domestic legislation and enforcement of international standards more difficult. They have served to shield harmful traditional customs and practices from external interference. Within these communities lies yet another problem where intergenerational power imbalance puts the child at a major disadvantage in its relationship with the adults and more so the elders. Power, knowledge and wisdom are vested in old age and the elders are therefore the determinants of the direction that their communities take. Children therefore find their lives solely determined and directed by people with different interests and who only expect respect and obedience from the children. The oldest members in any society also happen to be the most conservative lot who are likely to resist changes to the traditional ways of doing things.

The practices have also persisted thanks to the African people's evident orientation towards the past which is now fueled by the prevailing socio-economic and political problems facing the continent. The harsh economic and political problems, the civil wars, the HIV/AIDS epidemic, famine and many other related problems in the continent create some kind of nostalgia for traditional values. When the future appears so uncertain

and with so many problems, people begin to value their past and look to each other for survival.

It becomes obvious that the CRC, and in fact the ACRWC, did not envisage the enormity of the problems posed by cultural practices, diversity and poverty in their attempt to protect and promote the rights of the child. These human rights instruments appear to have had too much trust in the capacity of states parties to handle the above problems. Yet, on the ground, it is increasingly being realized that states parties alone may not be able to handle the problems. Perhaps the international community should support the CRC with some robust social, political and economic development intervention in the less developed societies so as to create structures that are in tandem with the CRC's assumed socio-political and economic levels of the target states parties. Until then, some of the CRC's provisions will remain only relevant and realizable in the developed world even when they are very clear in pointing out customs and practices that are inimical to the rights of the child in the developing world.

Looking at it carefully, economic empowerment of the people in the remote parts of the African villages may hold the key to the weakening of communitarian structures and its attendant generational structures and practices. In the meantime, it is a fact that the facilitation of change in rural Africa lies with elderly members of these areas. For Houndondji, there may be need for intervention, to create what he calls "internal criticism" within these African cultures. Waiting would be worst, for although cultures change, the rhythm of change in African villages is very slow. It is however, difficult to find anti-conformist internal voices especially among the elders who hold most of the power in their communities.¹⁰² The power they hold can be tapped and used positively to create child friendly environment in Africa. Otherwise, traditional practices will continue to harm the rights of the child, at least for sometime. Eventually, as Bueren observes, a new culture of listening to children will require adults and more specifically elders to relinquish some of their power.¹⁰³

"Traditions are not written on stones"¹⁰⁴, "culture is not static"¹⁰⁵, "values are no ones property; they flourish under favorable conditions"¹⁰⁶. Nothing would be more exaggerated than if we were to present African cultures as if they are static, non-evolving and shielded from external influences. All human cultures are dynamic and this is usually propelled by both internal and external forces. The pace of change may however, vary from culture to culture, or from region to region and from time to time due to a

¹⁰² Ibid.

¹⁰³ G. V. Bueren, Children's rights: Balancing Traditional Values and cultural plurality, In Douglas, G. and Sebba L., Op cit.

¹⁰⁴ Cohen, R., op.cit., P.12

¹⁰⁵ <http://www.advocatesforyouth.org/publications/iag/harmfulprac.htm>

variety of prevailing circumstances and conditions. The ability of internal agents of a culture to adopt and embrace changes is determined by the openness of the culture in question. The African culture was more closed and tended to discourage new things. This has had its impact on the pace of cultural change in most African societies.

Despite this conditioning, there is evidence that many changes are taking place in Africa, even in the deep rural villages. New cultural elements and values are being introduced into both the rural and urban areas of Africa that are undercutting the old belief systems, the social structures and the intergenerational and sex-based power structures that nurture and sustain harmful practices and customs. The spread of formal education, cultural mix in urban areas, better methods of communication and the emerging alternative avenues to individual survival different from the traditionally defined ones, are undermining the old ways of doing things. The changes however, are more in urban areas than is the case in rural areas where there is still a stronger attachment to traditions. The fact however, is that communal structures and traditional customs and practices that affect the rights of children in Africa have not died out.

¹⁰⁶ P. Houndondji, as quoted by compass magazine,9/2003.



ISSN 1600 5333
ISBN 87-91836-15-8