

# THE STRUGGLE FOR CONTEXT IN THE PROTECTION OF CHILDREN'S RIGHTS: UNDERSTANDING THE CORE CONCEPTS OF THE AFRICAN CHILDREN'S CHARTER

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## Introduction

Many African children have to negotiate different social spaces adapting to various roles to suit their situation. Consequently, any proposed framework for the promotion and protection of their rights must be flexible enough to take into account and be of relevance to the specific circumstances of each particular child. In this regard, Africa's pre-eminent document on children's rights, the *African Charter on the Rights and Welfare of the Child* (the 'African Children's Charter', 'the Charter') must propound principles that are general enough to address the multiple configurations of meaning and perspectives that are and inform children's rights and which emerge from the contexts in which children live.

Although the rights and duties in the African Children's Charter cover almost every aspect of the child's life, there are four cross-cutting principles that may be thought of as underpinning the entire instrument. These include the rule against discrimination (African Children's Charter 1990: art. (3)), the 'best interests' rule (African Children's Charter 1990: art. 4), the rule promoting the child's survival and development (African Children's Charter 1990: art. 5), and the rule requiring the child's participation (African Children's Charter 1990: arts. 4(2) & 7). The African Children's Committee has also identified these principles as constituting

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the central focus of the rights and duties contained in the Charter and of the reporting system under it (African Children's Committee n.d. The African Children's Charter 1990: art 43(1) requires every state party to submit to the Committee reports on the measures that they have adopted which give effect to the Charter. Cf UN Committee on the Rights of the Child 2003: para. 12). The Committee, therefore, requires that relevant information, including the principal legislative, judicial and administrative or other measures in force or foreseen, should be provided in respect of the general principles (African Children's Committee n.d.: para. 11). In addition, states parties are advised to provide relevant information on the impact and application of these principles in relation to the implementation of the other provisions of the Charter (African Children's Committee n.d.: para. 12). However, the relevance of the general principles transcends their application to the state reporting mechanism. Given their generality and extensive scope, they apply to all considerations relating to the promotion and protection of the rights and welfare of the child and, therefore, serve as an ideal starting point for any analysis of the substantive provisions of the Charter as well as the situation of children in different contexts.

Since the core concepts of the African Children's Charter are derivative concepts, inquiries into their development, meaning and scope are more or less settled. There will, therefore, be much less contestation with regard to the meaning, scope and applicability of these principles. However, the case is different when it comes to the operation of these principles at the local level. In this regard, universal norms must be tempered with and operate within the parameters of local observation and custom (Hellum 1999: 71-79).

### The General Principles and Cultural Context: The Basis for an Ethnographic Approach

By taking into account the specificities of children's lives, this analysis reinforces the perspective on the relationship between culture, children's rights and law, and therefore cements an approach to children's rights that avoids the age old dichotomies between human rights universals and cultural absolutes. Instead, we must focus on the multiple configurations of meaning representing "a network of perspectives" (Hannerz 1992: 11) that emerges from the situated contexts in which children and their guardians live. This type of analysis allows us not only to investigate how the general principles of the Charter have manifested themselves but also to go further and see how these basic principles structure and effect power

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relations between children and their guardians.

However, a grounded approach to the implications and relevance of the general principles raises difficult methodological problems. Such constraints arise in part because of the model of law that informs law at the national as well as international level (A. Griffiths 2001: 103). This model is one which promotes a uniform view of law and its relationship to the state and citizens (J. Griffiths 1986: 3). It establishes boundaries between the legal and social domains and the rules associated with them. These domains exist in a hierarchical relationship so that the legal rules are not only set apart from, but acquire greater authority and precedence over social rules (Roberts 1979: 29) and are used to determine outcomes when conflict arises (Comaroff and Roberts 1981: 5). Consequently, the law is removed from the domain of social life and posited as an autonomous field with immunity from the kind of considerations that permeate every day existence (A. Griffiths 2001: 104).

In reality, however, life offers a multiplicity of legal orders (Tamanaha 1995). Thus, explicitly announced legal rules such as the general principles of the African Children's Charter are not the only vehicles of normativity; these legislative artefacts complement a variety of indigenous and customary rules and practices through which they find expression. Viewed in this manner, it is clear that the general principles may be viewed not as law *simpliciter*, but also as a species of cultural practice. Describing children's rights as cultural practice calls for a view of children's rights as an essentially porous multi-polar regime constituting an array of intersections where distinct processes crisscross and are coloured by cultural context.

In order to achieve this rendering of children's rights, it is important to formulate a dialogue that is capable of accommodating the diversity of children's situations whilst at the same time emphasising their shared experiences. Whilst elucidating the meaning and scope of the core principles of the African Children's Charter is an appropriate starting point, the process needs to be complemented with a form of knowledge that goes beyond abstract propositions that are constitutive of children's rights norms at international law, a form of knowledge that is grounded in the specific contexts of children's lives. To acquire such knowledge, concrete data from the lived reality of children's situations is required. Such endeavours afford a grounded approach to the promotion and protection of the rights and welfare of the child.

Taking account of this, the following analysis of the African Children's Charter departs from orthodox legal analysis and attempts to present a picture of the general principles in action in the lives of the children and adults of Magombo and Ndalama village where I conducted fieldwork between July 2004 and May 2005. The two villages are located in Thyolo District in southern Malawi and the majority of their inhabitants belong to the Lomwe tribe. In total, I held one-to-one interviews with 47 children and 56 adults. Of the 47 children, 32 were boys; and of the 56 adults, 41 were women. 35 of the children were in the age range between 11 and 18 whilst the rest were between six and 10. Further to that, I recorded 11 conversations with families which I defined for my notes as group conversations with either a mother and a father or each one of these or both and a child or children. I also maintained two focus groups at Thyolo Secondary School and Mpinji Community Day Secondary School with eight and 11 participants respectively. I recorded eight sessions with each of the focus groups. It cannot be claimed that the picture presented is comprehensive but nonetheless it does raise significant issues that inform discourse when it is brought from the 'global to the local.'

### Non-Discrimination: Concepts, Context and Contests

The African Children's Charter purports to extend all the rights set forth in the instrument to each individual child. It stipulates that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his or her parents' or legal guardians race, ethnic group, colour, sex, language, relation, political or other opinion, national or social origin, fortune, birth or other status (African Children's Charter 1992: art. 3).

Article 3 applies to *every* child and is applicable with reference to *all* the rights and freedoms guaranteed by the African Children's Charter. In other words, it is a non-autonomous provision of the Charter (Bayefsky 1990: 3-4). It has no independent existence, yet it qualifies all of the other substantive provisions of the Charter as if it were a part of each one. Thus, it governs all of the rights and freedoms recognised and guaranteed in the Charter, hence its status as a general principle.

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However, although it is relatively easy to delineate the meaning and scope of the non-discrimination clause of the Charter, conceptualising child discrimination within Lomwe social space is not an easy task. This is because the cultural construction of the child is synonymous with the idea of *mphatso* or gift. According to Lomwe cosmology, *mphatso* must be treated with the utmost care and should not be abused lest the spirit of the giver is offended and causes ruin. In the case of the child, the giver is no less than *chisumphu* or God himself. All Lomwe know that when *chisumphu* is not pleased, his anger has devastating consequences. Consequently, no parent or guardian would own up to treating any child under his or her care in a discriminatory fashion.

The situation is compounded even more because the word that expresses discrimination amongst the Lomwe is *kusankha*. Used in this context, it always carries a negative connotation. Thus, according to Lomwe custom *kusankha* of any type is wrong. According to Village head Ndalama, any one who perpetrates *kusankha*, whether at home or at the work place, is essentially provoking the displeasure of the spirits. *Kusankha* is, therefore, roundly condemned within Lomwe cultural space. Consequently, in order to investigate more thoroughly the conception and incidence of discrimination as it relates to children, it is important to adopt terms of discourse that do not put the matter beyond discussion as is the case with the concept of *kusankha*. It is in view of this that different terminology was used in order to fully investigate the conception and incidence of discrimination. The term that was adopted is *kusiyantsa*. The English equivalent of *kusiyantsa* is differentiation. Although used in the context of discrimination, it is less value-laden than *kusankha* and, therefore, does not immediately invite a reproachful finger. *Kusiyantsa* may sometimes be justified, and often is, and therefore does not convey the negative connotations associated with *kusankha*. Thus, after encountering the almost unanimous opinion regarding *kusankha* and the limited possibilities it presented during the early stages of the fieldwork, I subsequently employed the concept of *kusiyantsa* to inquire into various aspects relating to discrimination in the context of children.

However, although *kusankha* is described as culturally unacceptable, it does not mean that discrimination against children is non-existent. My conversations with different children as well as parents and guardians revealed the existence of discriminatory practices on various grounds. For example, participants pointed out instances of discrimination predicated on the grounds of poverty, disability, age, sex and gender. Amongst all these, the most identified ground was discrimination on the ground of sex and gender. However, regardless of the nature or basis of the

discrimination, it is clear that its impact on children is significant.

There were other cases where boys and girls were turned away from school because their parents could not afford to buy uniforms for them even though I was informed that the government had issued a directive instructing teachers not to turn back students due to inability to purchase a uniform. In all these cases, there was a consensus that the lack of economic capacity should not have been used as a ground for *kusiyanitsa*.

Whereas discrimination within institutional settings such as school or the local hospital is easily identifiable and relatively easy to tackle, such is not the case with discrimination that takes place within the family. This is because a child's questioning of discriminatory practices is labelled as insubordination and may lead to curtailment of other avenues of support. In this context, the most prevalent example of discrimination reveals itself in the form of practices that encourage the practice of son-preference and the subordination of girl-children. Son-preference is a form of sex or gender based discrimination that reveals itself through a host of socio-cultural and religious attitudes perpetuating the supposed superiority of the male child whilst consigning his sisters to disadvantage. For example, when Mercy Kanama and her brother, from Ndalama village, were selected to pursue secondary education at Mpinji Community Day Secondary School in Ndalama village, it presented a financial problem to their father. The father subsequently resolved the situation by paying school fees for Mercy's brother and ordering Mercy to drop out of school. The following year another brother was selected to a different secondary school outside Ndalama village and her father was able to put money together for his school fees. When I asked Mercy's mother about the *kusiyanitsa* between Mercy and her brothers, she said:

We are all brought up differently. Sometimes it's just that the person is not kind hearted.... But it is also true that some people believe that girl-children will not be helpful in future. So, to them, I say to them, it makes sense not to spend money on their daughters.

It is instructive that during our conversation, reference to Mercy's father was sanitised and relegated to an allusion to *munthuyo* or *anthu ena*: 'the person' or 'some people', terms which are befitting of references to strangers. It is this aspect of intra-family alienation that makes it difficult to tackle *kusiyanitsa* within the family. The wrongs of family members holding power are 'othered' in a way that

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not only limits avenues for redress but provides a fertile environment for sustaining a discriminatory attitude.

Thus, it is clear that, despite an underlying belief that *kusankha* or discrimination is essentially inconsistent with Lomwe cultural practices and beliefs, there still persist practices that go against this sanction. It is, therefore, crucial to go beyond the conception of discrimination and unpack the socio-cultural basis of the practices and discover why they still occur. In this regard, it is important to point out there are two opposing viewpoints that inform attitudes relating to discriminatory practices relating to children. On one hand, there are arguments to the effect that some forms of *kusiyantsa* are acceptable whilst on the other, there is the view that any form of *kusiyantsa* that results in unfairness is unacceptable. Although the former view had comparatively fewer proponents than the latter, its existence justifies serious consideration. Consequently, in the subsequent two sections, I examine the issue of *kusiyantsa* along these two paradigms.

*Maybe not good but justifiable: Analysing the pro-distinction narratives*

As has been explained, *kusankha* automatically has negative connotations. Consequently, instances of discriminatory practice veiled as mere *kusiyantsa* usually carry with them some form of justification. One of the most common justificatory explanations was economic incapacity. In this regard, it is suggested that, when parents or guardians find themselves in difficult economic circumstances, they are sometimes forced to make choices that may adversely affect the rights and welfare of some of the children under their care. The intention is not to treat the children differently but it is said that the situation merely forces their hand. A conversation I had with John Mthawira, a tyre smith at Thyolo District Market, highlights this type of justification. He explained how his eldest child, Timothy, dropped out of school and ended up working with him at the tyre repair stall whilst his younger son, Tamando, continued with schooling:

When Tamando was selected to go to secondary school, his brother had just finished his Form Two<sup>1</sup> and was supposed to start the next class. I could not afford to pay fees for the both of them. I, therefore, decided that since Timothy had already

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<sup>1</sup> Form Two is the second year of secondary school and the tenth year of a child's progressive education.

accomplished a bit of secondary education, his brother should also have a taste.

While there is some tragic logic to cases like that of the Mthawiras, this must be contrasted with cases like Mercy Kanama's situation. It is revealing that her father was able to put together funds for her younger brother a year after she had been selected to go to secondary school, yet he would not do the same for her. Thus, in the case of other vulnerable children such as orphans or girl-children, the choice may be more economic than appears at first sight. In the past, an orphaned child was welcomed because it guaranteed steady labour within the household and economic security in old age. However, changes in the modes of production from subsistence farming to a cash-based economy as well as the general mobility of rural populations has put a strain on the children's duty to help parents. Whereas many elders stress this duty, it is becoming more widely recognised that its conceptualisation is changing from that of a duty to that of mere goodwill. Consequently, care for orphans, and in some cases, girl-children is considered by some parents and guardians as a thankless task without any discernible benefit. Mai Nahipa, a community social worker who runs children's rights awareness courses and as well manages an orphanage in Ndalama village, explained the incidence of orphans in Magombo and Ndalama village in the following terms:

Ten years ago... maybe fifteen years ago, there were no orphans in this village. It does not mean that parents were not dying. They were dying. However, taking on the responsibility for such children brought you honour and maybe wealth later on.... Nowadays, if you start bothering with orphans, it just brings you poverty so people see no point in it. Even when the children are their brother's or sister's. All the children that you see here, perhaps except for one or two, have got uncles, aunts and grandparents in this village. But did they take them?

Village head Magombo shares similar sentiments. He points out that under Lomwe custom there is a general duty to help out your kin when they have problems. However, he seems to endorse the poverty plea when he rhetorically asks: 'How can you enjoy sugarcane when you have no teeth?'

Another ground for *kusiyantsa* is the sanitisation of difference and with it the normalisation of practices that perpetuate unjustifiable *kusiyantsa*. A consideration of a series of folk sayings or proverbs reveals this aspect. For example, proverbs



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such as *mwana wa mwini n'gaga, saundika* [Your friend's or neighbour's child is like *nsima*<sup>2</sup> of maize husks, it cannot be moulded]; *kwa eni kulibe mkuwe, mutu wa nkukhu n'chiwalo* [When amongst strangers one does not shout, the head of a chicken is a proper chicken piece]; *ukadya kumadziwa kuti azungu ndi alendo* [While you are eating remember that Europeans are strangers]; and *mbalame ya kwao siiwala* [a bird with a home does not forget such home] indicate that *kusiyanyisa* towards others who are not members of your immediate family is tolerable. Although this sort of attitude stands in stark contrast with the *kuthandizana* or 'help thy neighbour' ethos that is claimed to permeate Lomwe society, it is a candid reminder of the socio-economic changes that have upturned the values and priorities within families.

Furthermore, some elements of Lomwe cosmology also seem to approbate discriminatory actions against children. Lomwe people believe that the universe is finally balanced, and that for any act of goodwill the benefactor will later enjoy a return favour. The antithesis of this belief is also held to be true and is expressed in the proverb *choyipa chitsata mwini* [Evil follows the wrongdoer]. However, the problem with the operation of this concept is that it may not be the perpetrator him- or herself who pays the tariff but even other members of his family including children. Although only two individuals expressed views connecting child discrimination and the inevitable operation of the Fates, the belief in the proposition that *choyipa chitsata mwini* is significant with 56% of all adults and 36% of all children interviewed expressing belief in it.

Whereas poverty and supernatural intervention have been advanced as explanations for various instances of differential treatment of children, the most identified justification and also the basis for the most pervasive type of discrimination, is difference. Although belief in the logic of difference holds sway amongst many older parents and guardians, the belief is not absent amongst younger parents either. One of the latter, Mai Anne Wyson from Magombo village, points out why differential treatment occurs:

Boys are stronger and most of the times they are more intelligent and help their parents more than the girls.... If you asked any woman in this village, they would say they prefer to have a son. Sons help more.

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<sup>2</sup>*Nsima* is the daily food of the majority of Malawians. It is made from maize flour whose husks have been removed.

Mr Davison Wyson concurs with his wife. However, his explanation is more philosophical. He argues that *chisumph* or god made man stronger because he is the one with the duty to look after the family. Parents must, therefore, ensure that boy-children grow up to take up this responsibility. This, he points out, is something no one who is in his right frame of mind can argue against. Consequently, acting to change the way things are entails going against the logic of difference. Such endeavours are not always well received. Mai Malindira frowns upon efforts that seek to renegotiate the position of women and girl-children within the family home. She reckons that such activities only serve to disturb family harmony and bring confusion:

We just look at all these women running about, talking about 'jenda'.<sup>3</sup> Yet, when their husbands beat them like *tchopa*<sup>4</sup> drum, they run to *ankhoswe*.<sup>5</sup> If our way of life was so bad, why then go to the *ankhoswe*?

...If the women of this village stuck to looking after their husbands as they ought to, and minding the kitchen as a good woman should; then their husbands wouldn't be spending their money at the beer hall at the Boma and on the prostitutes in Ndalama village.

The benefits of keeping to one's position within the family are, therefore, obvious and submission to patriarchy is equated with good behaviour. Yet, whether the basis of the discriminatory act lies in the poverty of money or the poverty of the mind, the very fact of it taking place reveals a belief that one particular child is worth less than another; that that particular child is not deserving of equal concern.<sup>6</sup> It is a kind of conviction that is difficult to reconcile with the Lomwe conception of children and childhood. However, this is not an attitude that is

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<sup>3</sup> *Jenda* is the vernacularised equivalent of gender equality and women's rights but it is also used in some contexts to refer to human rights generally.

<sup>4</sup> *Tchopa* is a type of dance much loved by the Lomwe.

<sup>5</sup> *Ankhoswe* are traditional marriage counsellors.

<sup>6</sup> Compare the views of Langa DCJ in *Bhe v Magistrate, Khayelitsha and others*, CCT 49/03 (South Africa) paras 54-59.

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without challenge. Many parents, guardians and children believe that any form of *kusiyanitsa* that is based on unfairness is inherently wrong and, far from being a reflection of Lomwe culture and custom, it is in fact evidence of its breakdown. In the following section, I briefly outline the basis and strength of views supportive of non-discrimination.

*It is not part of our culture: An inquiry into non-discrimination discourse*

One notable aspect relating to narratives that support non-discrimination perspectives is that they are not only based on children's rights discourse but also on an eclectic mix of cultural, religious and spiritual arguments. Consequently, non-discrimination perspectives are not the preserve of 'agenda' or human rights advocates alone but also that of ordinary people who claim no special knowledge of children's rights.

One such ordinary person is Mai Nkhululu who lives in Magombo village. Mai Nkhululu is in her late forties and has four children, the youngest of whom is seventeen years old. Recalling her experience as to the manner in which she brought up her daughter and three sons, she says:

One really does not have a choice as to the kind of children one will have. God gives you a son, you say thank you. You also say thank you if he gives you a daughter....

...[O]ur culture says that children are gifts. Boys and girls, all are gifts. That is how it is. So you care for them in the same way. Whether it is food, clothes or chores around the house.

The equal treatment of children that Mai Nkhululu refers to is at the core of attitudes that do not condone child discrimination. Such a perspective is very much interconnected with the conception of children as gifts. It is a logical extension to a cultural worldview that posits children as special and worthy of equal protection and affection. Mai Nkhululu's views are shared by her neighbour, Mai Sambalikagwa. She argues that subjecting children to discriminatory practice is inherently wrong because it amounts to cruelty [*nkhanza*] and any cruelty goes against the fundamentals of Lomwe culture and the requirements of good parenting.

Pragmatism is another reason that sustains non-discrimination perspectives. For example, in families where all the children are of the same sex, it is difficult to sustain gendered roles in the allocation of family responsibilities. In these families, the allocation of resources and affection does not follow the patriarchal patterns that serve to promote son-preference. One of my key participants, Yaya,<sup>7</sup> who always insisted that I bring a bottle of Fanta for our conversations (on the grounds that my endless questions ‘stole’ her voice), had the ‘misfortune’ as she called it, of having seven sons. Yet, she did not treat them as ‘presidents’ but rather inculcated in them a sense of responsibility both at home and outside it. She had to:

... [T]each them to pound maize, wash plates and clean the house. I would even send them to the maize mill and to draw water. If I had listened to suggestions that boys should not be given girls’ jobs, I would not be walking now. My back would have been broken by now. But as you can see, I can walk.

Furthermore, changes to the modes of production as typified by the shift from subsistence agriculture to a cash economy have exploded the belief that only male children will acquire the capacity to help their families. Since access to cash is now determined by the extent of schooling that one undertakes, it is becoming more widely recognised that the better the opportunities that are given to *all* children within the family, the more extensive the network of resources to which the parents or guardians will have access in old age. Consequently, it serves the parents’ and guardians’ interests not to discriminate against any children that are under their care.

Yet another source of motivation is religious or spiritual conviction. Although most of the Lomwe profess some form of religious faith and are members of one of the various Christian denominations or Islamic sects operating in Thyolo District, they are also a deeply spiritual people. Consequently, the worship of the Biblical and Koranic God is undertaken alongside observation and ceremony honouring the spirits of the ancestors. Integral to these religious and spiritual activities is adherence to various moral codes that demand treating fellow human beings with kindness and fairness.

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<sup>7</sup> *Yaya* is a term of endearment for a grandmother (perhaps corresponding to *nan* in the English language). I visited Yaya on several occasions but she never told me her name, insisting that Yaya was sufficient.

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Another basis for non-discrimination perspectives is the knowledge of children's rights principles, and in particular, of provisions proscribing discrimination against children. In this regard, it is noteworthy that the majority of the young participants knew and could recite a significant number of the principles that are contained in the African Children's Charter. This is because children's rights are taught (if not always followed) as part of the social studies course both in primary as well as secondary school. Parents, guardians and children who do not attend school have also gained knowledge relating to the rights and welfare of the child through the activities of the Mai Nahipa and Ulendo Arts Theatre who frequently hold discussion groups, performances and recitals at the court of Village Head Ndalama. The radio has also proved very informative in relaying children's rights messages. Thus, through these various means, a significant number of children as well as their parents and guardians have come to know of the non-discrimination principle as part of the law of the land that governs relationships between children and their guardians.

It is clear from the foregoing that the principle of non-discrimination has a place within Lomwe cultural space. However, it is also apparent that its legitimacy remains contested. It is in the interests of children's rights practitioners to maintain this contestability because this presents an opportunity for challenging attitudes that encourage discrimination against children. The many bases of perspectives that support non-discrimination present opportunities for tackling inconsistent practices.

### Best Interests: Tracing the Contours of a Shadow-Less Concept

The African Children's Charter enshrines what is commonly known as the welfare or best interests principle. It provides that:

In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration (African Children's Charter 1990: art. 4).

The best interests principle appears in a variety of contexts throughout the Charter. In particular, it is used in relation to the child's freedom of thought, conscience and religion (African Children's Charter 1990: art. 9), with reference to the child's right to the enjoyment of parental care and protection (African Children's

Charter 1990: art. 19), in relation to the parental responsibility for the upbringing of the child (African Children's Charter 1990: art. 20), in relation to the system of adoption or similar practices (African Children's Charter 1990: art. 24), and in relation to measures pursued in the case of children who are permanently or temporarily deprived of their family environment (African Children's Charter 1990: art. 25).

Article 4(1), as just quoted, provides that the best interests principle shall be treated as the primary consideration 'in *all* actions concerning the child undertaken by any person or authority'. This phrase provides significant guidance as to what constitutes the scope of the provision. The reference to 'all actions concerning children' emphasises the fact the principle is meant to be applied widely. In fact, it must be applied in every case where the rights and welfare of the child are under consideration.

The preceding analysis clearly demonstrates that the best interests principle plays a central role in the application of the provisions contained in the African Children's Charter. If the Charter is to have any impact at all in the lives of African children, it is crucial that the principle should enjoy the same centrality in their day to day lives. In the following section, I outline the status of the best interests principle in the lives of children in Magombo and Ndalama village.

#### *Lost in translation? Conceptualising best interests*

Consideration of the principle within the Lomwe social context brings to the fore the difficulties with determining the exact scope and meaning of the principle. Chief amongst these difficulties is the conceptualisation of the principle in terms that accord it the same level of importance as is the case at international law. Fashioning a translation that effectively communicates the essence of the principle is a challenging if not impossible task. In this regard, it is worth noting that the Chichewa version of the CRC omits the principle in its entirety (UNICEF n.d). Consequently, during the early stages of the fieldwork, I employed the phrase *kuyika ana patsogolo* whose literal meaning is 'putting children first'. However, my conversations with Mai Nahipa, the children's rights specialist from Magombo village, revealed that my translation did not adequately cover the scope of the best interests principle. Her principal concern was that my translation did not sufficiently reflect the idea that the principle applied 'to all actions concerning children'. She, therefore, suggested that I adopt the phrase *kuyika zofunikira za*

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*ana patsogolo pa nkhani zonse zomwe zikuwakhudza* [putting the needs of children first in all matters that concern them]. Yet, despite expressing the best interests principle more clearly, the phrase is difficult to work with and proved problematic to introduce during normal conversation. I therefore reverted to *kuyika ana patsogolo* because of the idea of paramountcy that that phrase engendered.

Mai Nahipa further pointed out that although during her training as a children's rights facilitator within the two villages, the best interests principle was highlighted as forming the backbone of children's rights discourse, the principle was absent from the *Chichewa*-based materials that she was given to use in her advocacy work. She is the person who first alerted me to the absence of the principle in the *Chichewa* version of the CRC.

My conversations with primary and secondary school students also revealed a lack of knowledge relating to this most famous of children's rights principles. Although students had been taught many aspects of children's rights and could recite the various rights with ease, the best interests principle remained unknown.

Yet, Mai Nahipa points out that, although there are problems in emphasising the principle in the same terms as is the case under the African Children's Charter, this factor alone does not water down the importance of the principle or suggest that little could be gained by pursuing efforts aimed at its popularisation. She points out that the best interests is more about *zochitika* ['doing' or 'the real stuff'] and less about *pakamwa* ['the mouth' or 'talking']. She says:

It is difficult to teach others about what the best interests principle is. However, it is not as difficult to demonstrate how the principle should apply in the upbringing of children ...Consider the case of the children that we have at the orphanage. We could easily have left them with their extended families. But doing so would have meant that they would have suffered hardship. They would not have been able to go to school or have enough food and clothes. Although it is always nice to be with one's relatives, it is better for these children to live here with us.

Thus, according to Mai Nahipa, one should worry less about translations and focus more on the real lives of particular children and determine a course of action that best serves their needs. But the question remains: how does one discuss the

concept in Lomwe cultural space?

However, it is not just the technical difficulties of translation that make the observation of the best interests principle very complicated. Rather, it is the proposed primacy of the principle and its focus on the individual child's interests that creates problems, for there are other interests that compete with and are considered more urgent than the child's interests. The general Lomwe worldview focuses on family or community interests rather than on the individual. In this regard, it is worth noting that individuals are generally not in a position to claim rights which are separate from and against the family or kinship group of which they are members. Consequently, children do not have special entitlements outside the welfare of the family as a whole. Yaya's views on the primacy of children's rights and interests captures this conception of entitlements very well:

When one buys clothes or food for the children, he or she just buys. One does not stop to consider each child individually. If there is no sugar at home, everyone will not have porridge that morning. If there is money in the home, then everyone will leave the home cheerfully in the morning. But if there is no money, we face it together.

'Facing it together' negates the whole idea of children's best interests being the primary consideration, since by definition primacy under the African Children's Charter requires that the child's interests take precedence. Yaya's views on the ordering of priorities in the home were echoed by other participants. For example, Mai Namame argues that placing the individual child's as *primary* is akin to *kusankha* (discrimination) between family members, and as was argued earlier, *kusankha* is inherently un-Lomwe. She goes on to question the individual focus of children's rights by making observations on its impact on family unity:

These freedoms that children are said to have nowadays are good but sometimes they cause problems. The unity and peace that was in the family is now gone and parents have no freedom any more.... According to our culture everyone should be similarly treated. You cannot take one member of the family and give them special treatment. Yet the freedoms which you describe, especially this one of putting children first requires that we should create gaps between each other. This will just lead to quarrelling within the family.



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Clearly, then, achieving the acceptance of the best interests principle will not be an easy task. The concept is perceived as challenging the very foundation of family relationships which are based on co-existence and the sharing of both the good and the bad.

*The child's best interests in family decision-making*

The structure of Lomwe families has a profound influence on the decision-making process relating to children. Lomwe families are arranged along matrilineal lines. Consequently, adult males from the maternal family are the most influential persons in the decision-making processes relating to the child. Important issues such as those relating to children's education, choice of marriage partners and career paths are not the preserve of the immediate parents or guardians, let alone the children themselves. Since relationships are constructed along the extended family model, various family units are aggregated together along kinship lines to form clans. This system of integration allows a large number of people to be incorporated into the family circle. The aggregation of persons is also matched by a similar diffusion of duties and rights. This arrangement of family relationships has several implications for the best interests of children.

One such implication is the idea that the child belongs to the family or the kinship group. Consequently, parental rights and authority are exercised by a large number of people each one of whom is entitled to make or contribute to decisions relating to the child's best interests. Under this family system, a child has a number of 'fathers' and 'mothers'. For example, all the brothers and male cousins of the biological father are considered the fathers of the child whilst the mother's sisters and female cousins are regarded as mothers. Although there may be no genetic ties between the child and a particular father or mother, the exercise of parental authority for these social fathers and mothers is real. In other words, in terms of the exercise of parental authority, there are no distinctions between the biological mother and father and those accorded such status through extended kinship relations.

Related to the idea that the child belongs to everyone is the principle that decisions affecting the child cannot be taken by one person even when they are the biological parent or the immediate guardian. There is an expectation by members of the extended family who are entitled to exercise parental rights and duties over that

particular child to be consulted in making decisions and choices for that child.

In response to population mobility and changes in settlement patterns, the principle of dispersed parental authority has not been restricted to clan relations. Through the migration of individuals from their villages of origin to places far from their local kin, parents and guardians have found the concept useful in relation to neighbours and friends. Consequently, it is not unusual for parents to delegate and for neighbours to assume parental duties and rights. In some cases, neighbours assume such parental rights and duties even in the absence of direct delegation with full confidence that the parents will approve of the decisions they make.

However, this type of decision-making process does not always serve the best interests of the child. In the first place, since a large number of persons are entitled to make decisions, conflicting solutions to particular problems may arise and it is not always possible to get decisions made as quickly as possible because of the large number of opinions to be solicited even when the best interests of the child require a quick resolution. One obvious example of the latter are decisions relating to the custody of orphans. Family procedures usually make the process very drawn out as an aspect of respect to the dead parents, when a quick resolution would be best for the children.

The second implication of the extended family's structure on deciding the child's best interests relates to the manner in which decisions relating to children's issues are made. In this regard, it should be noted that a person's status as adult or a child has implications for the entitlements that he or she may claim. In particular, it was demonstrated that the acquisition of voice and authority is directly related to one's position in the family hierarchy. As a result, the nature of the relationship between children and those who exercise parental rights often serves to articulate the views of adults without equal regard to those of children. In particular, the relationship between children and their parents is marked with a certain distance and an air of deference. Indeed, during socialisation the ethos of unquestioned respect towards elders is emphasised. One practical consequence of the ethic of respect is that children do not represent themselves on the family council, membership of which is only achieved through the ascription of status related to the achievement of adulthood. The importance of respect is evident from the large number of pulpits from which the message of respect is preached.

The child's duty to respect parents at all times (African Children's Charter 1990: art. 31) is based on the assumption that parents and guardians always act in the

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best interests of children. Consequently, the child's contribution to the decision-making process is suppressed. In a nutshell, the quest for a course of action that serves children's interests is conducted in a manner that promotes adult views of what they feel those interests should be. Whilst this style of decision-making is capable of protecting children's interests, less insistence on respect and its association with silence could improve the process.

The third implication of the communal nature of the extended family system relates to the pre-eminence of family interests over all other interests. In the event of disharmony between the interests of the child and those of the family, custom holds that the latter will trump the former. The principal rationale for this is that the family is regarded as a protective place for all its members and as such, decisions that promote its welfare as a whole will also automatically protect that of its individual members. Consequently, the idea of an individual child's interests gaining paramouncy does not sit well with this logic of inclusiveness. In the majority of cases, choices that further family interests will also favour the best interests of the child. For example, nowadays it is recognised that in order for a child to effectively execute his or her duty of providing support for the family, he or she must attend school. Consequently, parents and guardians make the effort to ensure that children stay in school. In the result, both the family interests as well as the child's interests are preserved. However, where there is conflict, it is obvious that the child's needs have to be suspended.

In closing this subsection, it may be noted that efforts aimed at securing the child's best interests are bound up with the arrangements surrounding the home, kinship ties and decision-making procedures that inform these relationships. Whereas there is a clear recognition that children's interests are an important issue in the management of the family, the customary processes for mediating those interests tend to serve interests 'larger' than those of the individual children. In a way, therefore, the practical difficulties in pin-pointing where the best interests of children lie within Lomwe cultural space mirror the philosophical dilemmas that were highlighted at the beginning of this section.

The primacy of family interests is so well entrenched that the idea of the child's individual interests trumping those is pathologised as being akin to discrimination or *kusankha*. Consequently, the popularisation of the best interests principle as a leading child-rearing tool within Lomwe society must be expected to encounter significant resistance.

## Survival and Development and the Interrelatedness of Children's Rights

Article 5(1) of the African Children's Charter provides that every child has an inherent right to life and that this right must be protected by law. Article 5(2) complements the recognition of this right by obliging states to ensure to the maximum extent possible the survival, protection and development of the child. Since the right to life and the right to survival are essential preconditions to the enjoyment of any of the rights protected in the African Children's Charter, they apply in all considerations relating to the promotion and protection of the rights and welfare of the child. In other words, the right to survival and development is a general principle that serves to reinforce the *raison d'être* of each of the rights enshrined in the Charter.

The survival and development principle enunciated in article 5 of the African Children's Charter engenders two separate but closely related concepts, namely, the right to survival and the right to development. The right to survival is a dynamic concept and incorporates all the necessary steps that a state party must undertake in order to ensure the healthy development of children. Clearly, then, the duty on states parties to ensure to the maximum extent possible the survival and development of the child highlights particular aspects of the right to life. In other words, the codification of the right to survival represents an acknowledgement that rights which protect aspects of a child's survival are interrelated and cannot be protected in isolation (van Bueren 1995: 293). The African Children's Charter reinforces this ideal by making particular provision which protects these interrelated aspects. The Charter achieves this by including within its ambit protections for basic survival needs such as the right to health, the right to adequate nutrition and safe drinking water (African Children's Charter 1990: art 14), and the right to be protected from customs and practices that are prejudicial to the child's life or health (African Children's Charter 1990: art 21).

The right to development, on the other hand, refers to the right of individuals, groups and peoples to participate in, contribute to, and enjoy continuous economic, social, political and cultural development in which all human rights can be realised. The right to development is, therefore, a dynamic concept that stresses the importance of fostering and nurturing the many dimensions of the child. The African Children's Charter concretises this approach by protecting rights and freedoms that enhance the child's developmental attributes. These include

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guarantees relating to the child's right to education (African Children's Charter 1990: art 11); the right to rest and leisure, to engage in play and recreational activities, and to participate freely in cultural life and the arts (African Children's Charter 1990: art 12); the right to be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or interfere with the child's physical, mental, spiritual, moral or social development (African Children's Charter 1990: art 25). In addition, the Charter makes special provision for the development of disabled children by obliging states to provide special care and assistance appropriate to the child's condition in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development (African Children's Charter 1990: art 13).

By recognising the fundamental interdependence of various aspects of the child's life, the survival and development principle highlights the unity of purpose of the African Children's Charter's substantive as well as procedural provisions. The principle does not create new rights for children but merely serves to emphasise the holistic approach that must be followed in the promotion and protection of the rights and welfare of the child. Each one of the elements of the child's survival and development is equally important and states parties should strive to protect them all. For example, it would be counterproductive to protect the girl child from early marriage practices<sup>8</sup> without providing her with sufficient and accessible means to acquire an education.

*Children's survival and development: Partnerships and resource networks*

Due to the broad scope of survival and development rights, the realisation of this principle entails satisfying a whole range of civil and political as well as economic, social and cultural rights. As a result, it takes a multifaceted approach employing different types of legal, economic, political as well as social resources and skills to guarantee these rights. As a matter of necessity, it requires the establishment of workable partnerships between various stakeholders in society, all of whom direct their efforts towards the achievement of the promotion and protection of the rights and welfare of the child. The state is one of these partners. But perhaps the most

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<sup>8</sup> Early marriage is described as "another serious problem which some girls, as opposed to boys, must face". See Office of the High Commissioner for Human Rights n.d.: 17.

important partner of all is the family.

In the context of a developing country economy such as Malawi's, the state is often not in a position to guarantee children essential social welfare services such as free education, free health services, adequate nutrition or access to a reasonable standard of housing. Consequently, most of the responsibility for providing these essential aspects of the child's survival and development falls on individual families. In other words, there exists a partnership between the state and individual family units for ensuring that children's survival and development rights are realised. In this regard, the state through its civil and criminal laws and through the limited provision of social welfare services endeavours to fulfil its obligations. For its part, the family complements these efforts by providing the emotional and material needs of the child. How effectively the family fulfils this role is a function of its perception of the obligations towards children as well as the level of economic resources that it has at its disposal.

The first factor does not pose significant problems, largely because of the conception of childhood. As was discussed earlier, the child is considered a gift and someone who is entitled to special treatment. Consequently, under Lomwe tradition, the family regards itself as being responsible for the survival and development of the child by ensuring that the child is fed, dressed, educated and in good health. However, the level of economic resources at the disposal of the family is closely tied to the structure of kin relationships which in turn affects the type of resource networks that children have for their survival and development rights. In this context, a 'resource network' denotes a concentration of financial, economic, social, emotional, political and informational resources to which members of that network can turn for the satisfaction of different needs.

In this regard, the extended family offers access to different types of resources and capacities for the children within it. Since the guiding principle is that the child belongs to the whole family, it is not uncommon for a child to be looked after by his or her 'other fathers and mothers' on account of the inability so to do by his immediate parents. Parents realise the importance of this duty and children recognise and often enforce their entitlement to be supported by members of the extended family. For example, Caesar Muluta, a member of the focus group from Thyolo Secondary School, does not get financial support for his education at the secondary school from his parents. Rather, it is his elder sister's husband who provides everything for him and to all intents and purposes acts as his parent. Caesar does not need to ask for support, for his sister's husband is well aware of

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his responsibilities.

The duty to support all children within the extended family is not restricted to the provision of economic support but also extends to the provision of moral, spiritual and emotional support. This wide ranging focus on areas of support ensures the well-rounded growth of children who will eventually become well-adjusted adults. For example, when John Biswick's fourteen year-old son became unruly and violent at home, his wife suggested that they send him to the wife's sister's home for a few months. Recalling the incident, he says:

I had tried all options to discipline him but had failed.... It got to the point where he would deliberately engage in discourteous behaviour and then challenge me to chastise him.... I sent him to his younger mother for about four months. When he came back, he was a changed person. All the bad traits that he had demonstrated after getting initiated were gone.

Thus, the extended family system serves to provide a robust network of resources that is able to handle the different needs of children as they grow up. However, this capacity has become tested in contemporary times through changes in the means of economic production and the resultant adjustments in the social organisation of the extended family. The extended family's resource network is premised on the proximity of family members. As individual family units have dispersed in search of jobs, marriage and other things, the ability of the extended family to guarantee children's survival and development rights has suffered some strain.

Consequently the nuclear family has shot into prominence. More and more, children's survival and development rights have become the responsibility of the immediate family. The resource network to which children have access has been reduced, with dramatic effect on the prospects of children's survival and development. Mai Nahipa's observation that 'there never used to be orphans in Ndalama and Magombo village' exemplifies the situation. It is not the case that there were no orphans, but that the resource network used to be robust enough to take care of them. The rising number of orphans is merely a symptom of the breakdown of these networks, as is the incidence of child labour.

Having regard to the unequivocal obligations that the state has assumed in respect of children's survival and development rights, one would have assumed that the

state would step into the breach and supplement where the family is failing. However, the state's intervention has been less than effective and many children still continue to live on the margins. In order to mitigate the consequences of shrinking resource networks and the absence of credible partners, families have developed some supplementary networks which carry the burden traditionally borne by the extended family system. The supplementary networks include: friendships; communal relationships such as those between church members, workmates or neighbours; and informational networks such as gossip networks at the local beer garden or common water source. All of these networks carry the burden for ensuring the survival and development of the child and are premised on the family's obligation to care for its young.

Although there is clear acceptability of the survival and development rights of the child, the manner in which the relevant provisions of the African Children's Charter will be realised in relation to each individual child depends on the strength of the resource network to which such child has access. If it is weak, then it is more likely than not that she may not enjoy protection from discrimination, or that her participation or survival and development rights will not be protected. Access to a network of resources gives the child power. It provides the ability to insist that her best interests are protected. Without the empowering presence of a resource network, the rights and welfare of the child are liable to be violated. In this regard, it is clear that the state should do more in honouring its side of the partnership with the family. Failure to do so is forcing many children to live on the margins of society.

### Participation: A Brief Introduction

There are several participation provisions in the African Children's Charter, which provides:

Every child who is capable of communicating his or her own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws (African Children's Charter 1990: art. 7).

This provision is supplemented by article 4(2) which guarantees that:



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In all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law (African Children's Charter 1990: art. 4(2)).<sup>9</sup>

The participation principle applies to *all* matters including judicial and administrative proceedings. It therefore cuts across the whole spectrum of issues relating to the rights and welfare of the child, qualifying as a general principle which should be considered in all matters relating to the protections provided by the African Children's Charter. Clearly, therefore, the participation principle is a lynchpin in the scheme set up by the Charter. Yet accounts of children's rights in Africa often highlight the absence or restriction of these rights for children (e.g. Chirwa 2002: 157; Himonga 1998: 95). In this regard, a considerable proportion of the accounts emphasise the place of respect in relations between children and adults. This picture, however, is only partially correct and represents only part of the mosaic that is children's participation.

The right to participation is perhaps the best known children's rights principle. In local terms, it is known as *ufulu wamwana wolankhula za kukhosi* (or the right of the child to speak his or her mind). In the local language, the phrase *kulankhula za kukhosi* or speaking one's mind is very descriptive, carrying the image of someone giving vent to something that could otherwise choke them. The right to freedom of

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<sup>9</sup> The other participation provisions include article 8 which guarantees the child freedom of association; article 9 on the child's right to freedom of thought, conscience and religion and article 12 which enshrines the child's right to participate freely in cultural life and the arts. Article 13(1) and 27(2) provide specific detail on the participatory rights of disabled children and children in conflict with the law, respectively. Curiously, however, the African Children's Charter does not make provision for the right to seek, receive and impart information even though this is an integral part of the participation rights regime under the African Charter of Human and People's Rights, art 9(1). The participation principle is also a key theme in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000: preamble, arts 9, 10, 17, 18, 19, 23).

expression is therefore loved by many children because of the notion of freedom that it engenders and loathed by conservative adults because of the seeds of rebellion that it apparently sows.

The oft-cited aphorism that children should be seen and not heard is not representative of the practice in Lomwe society. Since socialisation principally relies on oral traditions, it is almost axiomatic that talking between adults and children cannot be avoided. Consequently, there exist various channels of communication between children and adults. Whilst the existence of these modes of communication is not always indicative that children's views were taken into account, it nevertheless provides evidence that children were not only seen but also heard. Participants cited various arrangements intended to enable children express their views. These included play (which incorporates various modes of expression such as song and dance, recitals and role play), direct communication to parents, and communication through intermediaries. I examine these different types of communication and their role in aiding children's participation below.

Children's play is more than mere amusement and can sometimes convey messages to parents. According to Yaya:

A good parent knows that it is important to lend a good ear to what children are doing outside because through their various activities, one is able to gauge whether they are happy or sad. This is especially necessary in the case of the girls. If during *fulaye*<sup>10</sup> one gentleman's name keeps popping up, or if during tug-of-war, your daughter's friends keep pairing her up with a certain boy, a good parent knows that it is about time you checked her room and prevent events from overtaking you.

This mode of communication was also used to relay important messages. For example, Patrick's mother recalls that Patrick used role play to complain about his father's drink-induced abusiveness:

He would sometimes be the father. He would pretend to be drunk and scold his 'child' in a very harsh manner. I talked to my

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<sup>10</sup> *Fulaye* is a two team game mainly played by girls and which involves one player dodging a ball thrown players of the other team.

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*ankhoswe*<sup>11</sup> to tell his father about it.... Things did change, at least for a while.

In addition to role-playing, song and dance is also used to communicate with elders. Parents often convey instructions to young people in performances during special ceremonies such as those celebrating the birth of a child, a marriage or during initiation. Children are also able to use this mode of communication either during play or initiation ceremonies.

Although the means of communication related to play are often unstructured and may yield no response from the adults concerned, they still represent an important repertoire in the exchange of opinions between parents and children. In a society where respect and distance are expected, this means of communication offers an option to children and their guardians.

Another method of getting children's input into the family decision-making process is through the deployment of intermediaries. In particular, communication through grandparents was identified by many participants as constituting the most reliable channel for children's participation. It is noteworthy that the relationship between children and grandparents is characterised by feelings of friendship and openness. Oftentimes, a child will be closer to the grandparent than he or she is to the parents. Consequently, many important issues, including those considered too taboo to be the subject of a polite conversation between a child and his parents, are proper subjects of conversation between children and their grandparents. The robust nature of this relationship serves to convey important messages during socialisation such as those relating to honour, loyalty, sacrifice, and duty. This is done through the recital of fables, recollections of family traditions and proverbs or simply by letting the child sit through conversations involving the grandparent and his or her friends.

The close relationship between village head Magombo and his daughter's nine year old son, Fred, is typical of these relationships. Describing Fred as his brother, he says:

When I hold court, I make sure he is at my side as long as he is not in school. His mother is somewhat strict with him and he may be too scared to ask questions of her.... During court

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<sup>11</sup> Marriage counselor or advisor.

hearings, he sits quietly and listens but once the visitors are gone, the questions begin. When he goes for initiation, he will not be totally uninformed like his peers.

Another example is that of Esnath Minjere, who elected to discuss the details of her pregnancy with her grandfather only and refused to talk about it with the female members of her family.

Another important intermediary is the mother. A child's relationship with the mother is not only very respectful but also very intimate. Mai Sambalikagwa observes of her relationship with her daughter who is now married:

She is like my sister. We tell each other *zapantondo*<sup>12</sup>. Before she got married and was still our responsibility, I made sure that her father knew of her needs.... She was a very shy girl and would not sit in the same room as her father.

In some respects, the mother's relationship with her children, especially girls, mirrors that between a grandparent and his or her grandchildren. The major difference is that, because of the patriarchal set-up of the family, women who are not advanced in age do not have as much influence on the family decision-making process as do the men or family patriarchs. Consequently, the mother's role in facilitating participation is sometimes limited.

It is therefore clear from the foregoing that the existence of various forms of communication channels demonstrates that Lomwe custom does not prohibit children from expressing themselves. In addition, the wide ranging scope of the kind of matters that could be addressed through these mechanisms indicates that children's participation is not restricted to mundane matters but also includes important issues such as those pertaining to marriage, custody and others. The existence of a rigid repertoire relating to children's participation supports the view that under custom children do not have the freedom to express their views at any time or any place, but by the same token does not indicate the absence of participation structures. The importance of this observation is that the participation rights of the child detailed in the African Children's Charter are not out of place within Lomwe society.

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<sup>12</sup> Tales from the maize mill-denotes gossip and other juicy stories.

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The channels of communication detailed above worked well in traditional society when the extended family lived in close proximity and family decision-making was more or less centralised. However, changes in socio-economic patterns and the resultant mobility of rural folk have impacted on these various modes of participation. One of the most obvious changes is the need for direct communication between children and decision makers within the family. In the following section, I discuss how these changes have affected the participation rights of the child and how family discourse has responded to such changes.

*Adaptation and resistance: A tale of rudeness and freedom*

For the past one hundred and fifty years or so, the traditional Lomwe social structure has had to contend with and in some cases yield to the changes brought about by Christianity, colonialism, independence, democracy, human rights and globalisation. The impact of these various changes on the manner in which the family handles its affairs has been profound. Where a community is organised on the basis of sharing and mutual support, the interests of individual members are subsumed or aggregated with those of the group. Under these circumstances, individual interests are not loudly articulated and this tends to minimise the risk of conflict between group interests and those of the individual (Rwezaura 1998: 84). With such a relatively harmonious social co-existence, the individual's direct participation in important decision making is not seen as crucial in protecting his or her interests. The interests of the community and those of the individual are so interwoven that community leaders who assume the role of decision-makers can be trusted to determine at a general level what best serves the interests of all including children without needing to solicit their views.

However, the social forces that were detailed above have upset this equilibrium. One evident effect of these socio-economic changes in Magombo and Ndalama village is the mobility of family members in search of jobs, marriages and the attractions of a twenty-first century economy. It is therefore the case that children no longer live in the same households as their grandparents. Regular contact between children and their grandparents, which is the bedrock of the latter's intermediary function, is no longer guaranteed. In these two villages, a significant proportion of the village folk are not originally from the village. Many came to Thyolo district to look for work at the nearby tea factories as well as at the government departments at the *Boma*.

Furthermore, the changes in living arrangements have also affected the transmission of the art of communication through song and dance. Irregular contacts between children and the ‘bearers’ of tradition has meant that the opportunity to learn about these modes of communication is sometimes lost. Contemporary consumption patterns have also affected the relationship between children’s participation through song and dance. With western music forms taking hold over many youngsters, the art of imaginative discourse through music, poetry and dance is slowly slipping away.

Thus, changes in the social organisation of the family have profoundly affected the structures that facilitated children’s participation. These changes have made it necessary for supplementary or alternative structures of communication to be developed and utilised. One of these supplementary structures is exemplified by the demands for direct participation. These demands have been bolstered by at least two factors: necessity and the awareness of children’s rights.

In the first place, the metamorphosis of the extended family from a close-knit centralised unit to far flung family units has made the representation models for effecting children’s participation somewhat inefficient in executing that role. Consequently, it has become necessary for persons that are directly responsible for the child’s daily care to provide the participation structures. This state of affairs has elevated the importance of the nuclear family which has found itself at the centre of the child’s participation needs. However, since most parents were brought up under the traditional representation participation regime, they are ill-equipped to handle these new family dynamics.

Secondly, the awareness of the child’s participation rights has encouraged children to demand that they be allowed ‘to speak out what is in their throats’. Recognising the importance of respect between the generations, children are increasingly insisting that their respect will be earned once they are given the opportunity to express their views. However, demands such as these fly in the face of the unequivocal principle of respect for elders at all times (African Children’s Charter 1992: art 31(a)).

Consequently, parents increasingly see the assertiveness now prevalent in their children as evidence of the moral breakdown of society attributable to the neglect of the old way of doing things. In response to the perceived ‘rudeness’ of their children, some parents insist that the traditional modes of participation should be emphasised and that the idea that children should be allowed to air their views is

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too disruptive to be allowed to take root. John Monjeza is one such parent and he puts across his views in the following manner:

Nowadays, if you ask your own child to carry out a little errand for you, he will refuse and tell you in the face that it is his freedom to refuse and yet another freedom to inform you of his refusal. During our time, one could not even think of such a response for fear your thoughts could be heard. If I had dared answer my father in such a manner, I would have been sent for initiation for a second time in order to be taught good manners. Democracy<sup>13</sup> has brought good things but it has also brought so much disrespect.... One could beat this rudeness out of the young people but who wants a visit from the police? It seems to me that democracy is good but only for the young ones.

The equating of the child's participation rights with rudeness has built resistance to the idea that children are entitled to freedom of expression. Thus, parents whose reference point is the traditional model of participation, see the demands for direct participation as a species of discourtesy.

In reaction, this stance has made children's demands for parents and people in authority to respect the right to air one's views even more insistent. For the children, whose point of reference is democracy, freedom and human rights, the reference to the traditional modes of expression seems overly restrictive and inconsistent with the idea of being free. Unedited excerpts from an essay entitled 'Should parents listen to their children' written by Laudon Samson from Thyolo Secondary School captures the frustrations of both parents and children in the attempts by both camps to navigate the treacherous minefield of participation rights in the context of entrenched views on respect and 'proper' modes of child participation:

The parents should not listen to their children just because she/he is young or the children are younger than the parents, so they think that the children cannot talk any wise or meaningful to them since they are young....

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<sup>13</sup> The era of human rights and democracy talk dawned at the same time in Malawi. Consequently the two ideas are sometimes used interchangeably.

The parents should not listen to their children due to the history of children nowadays... the majority of them are smoking... Indian hemp, drinking beer and [taking] drugs. So these things makes the parents to think that children cannot talk anything helpful [and] as a result, they don't listen to them.

Other parents listen to their children but they don't use the things that the children talk to them, because they think that if they use the advice or the things that they heard from their children, those children would think that they are superior. As a result the parents just listen but they don't use it.

Some parents are so cruel and when their children talk to them they start shouting because they think that they are being rude and that since they are grown ups, they should not listen to their children. Some parents even [go to the extent] of chasing their children away from their home.

Other parents listen to their children but at the end they ask you questions. For example, they ask you questions like these: What makes you say so? Who told you to do that? What was your expectation about that? So these questions interfere with the children's [efforts] to talk to them and as a result the children think that the parents do not listen to them.

Some parents accept the advice... their children talk to them but are minor in number and they thank their children about the things they talk to them about.

The essay demonstrates the differing entry points into the issue of participation by both children and parents. At first glance, it may seem that traditional perspectives on participation and the new ideas related to 'democracy' and children's rights are far apart. At the rhetorical level, there is no obvious consensus, with parents decrying the unbelievable insolence of children and the children failing to understand their parents' old-fashioned ways. However, the fact that many families have not been thrown into a crisis is indicative of the fact that the two paradigms are interacting in a manner that is not fatal to family harmony.

The crucial point evident from this is that as long as there is a basis for children's



participation within Lomwe society, arguments about the exact nature of those participation structures are essentially non-fatal, and sooner or later there will be a resolution. The challenge is ensuring that such a resolution favours the promotion and protection of children's rights.

### Concluding Remarks: Children's Rights in Cultural Practice

The protection and promotion of the rights and welfare of the African child is in large part about influencing the day to day child rearing practices of families. If the intention of ensuring the best protection for each and every African boy or girl is to be achieved, the principles of the African Children's Charter must be translated into practice on the ground. The preceding analysis of the Charter's general principles brings into sharp relief the importance of existing cultural logics and categories in the acceptance or rejection of the various principles that make up the international children's rights corpus. The existence of child-rearing practices that are akin to or supportive of particular principles make arguments in favour of introducing or adopting the 'new' principles easier since the relevance of those principles is already culturally accepted. In other words, the cultural legitimacy of children's rights norms is easier to establish in situations where local practice has already laid the ground work for appropriation.

However, even where there are existing narratives which are supportive of children's rights practice, the process is not straight-forward nor predictable. The local appropriation of a transnational institution such as children's rights transforms underlying cultural categories and practices. However, at the same time, the appropriated institution is itself adapted and sometimes radically transformed. As parents and children such as those in Magombo and Ndalama village seek ways of combining their conceptions of family practice and children's rights norms, they not only redefine their cultural landscape but they also redefine the international children's rights corpus itself. Consequently, the image of children's rights that emanates from the process is a rich mosaic of local practice infused with international imperatives. It, therefore, goes without saying that any analysis of this process should avoid essentialising culture or children's rights as constituting strict categories (Merry 2001: 50). Rather than portraying culture and children's rights as exemplifying a conflict between universalist and relativist world views, the data from the fieldwork ably demonstrates that "culture is a field of creative interchange and contestation, often around shared symbols, propositions or practices" (Cowan et al. 2001: 5).

In seeking to determine the cultural legitimacy of the rights and welfare of the child, investigation into such shared symbols, propositions and practices requires a methodology which focuses on detailed case studies so that an analysis of child rearing practice and its intersection with culture and children's rights is not formulated in abstract forms but is located in specific, concrete experiences derived from the lives of children and their families. This requires a deconstruction of the conception of 'child' as a universal and homogeneous category and a consideration of children as rooted in specific cultural and historic categories. The African Children's Charter's insistence on culture and context is supportive of this type of methodology. It is a methodology which is sensitive to context, raises the legitimacy of the principles underlying the children's rights system, and gives rise to a pluralism that is neither universalist nor relativist but grounded in the reality of children's daily lives.

## References

### AFRICAN CHILDREN'S CHARTER

1990 *African Charter on the Rights and Welfare of the Child*. OAU Doc. CAB/LEG/24.9/49, adopted July 1990, entered into force 29 November 1999.

### AFRICAN CHILDREN'S COMMITTEE (AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD)

n.d. *Guidelines for Initial Reports of States Parties*, Cmtee/ACRWC/2 II.Rev2. Available at: <http://www.africa-union.org/child/Guidelines%20for%20Initial%20reports%20%20English.pdf> (accessed 22 December 2008).

BAYEFESKY, Anne F.

1990 'The principle of equality or non-discrimination in international law' *Human Rights Journal* 11: 1-34.

BHALOTRA, Sonia

2003 'Child labour in Africa' OECD Social Employment and Migration Working Paper No. 4 OECD Publishing.

CHIRWA, Danwood Mzikenge

2002 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' *International Journal of Children's Rights* 10: 157.

COMAROFF, John L. and Simon ROBERTS

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Thoko Kaime

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- 1981 *Rules and Processes: The Cultural Logic of Dispute in an African Context*, Chicago: University of Chicago Press.
- COWAN, Jane K., Marie-Bénédicte DEMBOUR and Richard A. WILSON  
2001 'Introduction.' Pp. 1-25 in Jane K. Cowan, Marie Bénédicte Dembour and Richard A. Wilson (eds.), *Culture and Rights: Anthropological Perspectives*. Cambridge: Cambridge University Press.
- GRIFFITHS Anne  
2001 'Gendering culture: Towards a plural perspective on Kwena women's rights.' Pp. 102-126 in Jane K. Cowan, Marie Bénédicte Dembour and Richard A. Wilson (eds.), *Culture and Rights: Anthropological Perspectives*. Cambridge: Cambridge University Press.
- GRIFFITHS, John  
1986 'What is legal pluralism?' *Journal of Legal Pluralism* 24: 1-55.
- HANNERZ, Ulf  
1992 *Cultural Complexity: Studies in the Social Organizations of Meaning*, New York: Colombia University Press.
- HIMONGA, Chuma  
1998 'The right of the child to participate in decision-making: A perspective from Zambia.' Pp. 95-128 in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*. Aldershot: Ashgate.
- HELLUM, Anne  
1999 *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Infertility Management in Zimbabwe*. Oslo: Mond Books.
- MACDONALD, Roderick A.  
1998 'Metaphors of multiplicity: Civil society, regimes and legal pluralism.' *Arizona Journal of International and Comparative Law* 15: 69-91.
- MERRY, Sally E.  
2001 'Changing rights, changing culture.' Pp. 31-54 in Jane K. Cowan, Marie Bénédicte Dembour and Richard A. Wilson (eds.), *Culture and Rights: Anthropological Perspectives*. Cambridge: Cambridge University Press.
- MNOOKIN, Robert H.  
1975 'Child custody adjudication: Judicial functions in the face of indeterminacy.' *Law and Contemporary Problems* 39: 226-293.
- PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA  
2000 *Protocol*, adopted 13 September 2000, entered into force 25 November 2005. CAB/LEG/66.6.
- PRUETT, Marsha K., Kathy HOGAN-BRUEN and Tamara JACKSON.

- 2000 'The best interest of the child: Parents' versus attorneys' perspectives.' *Journal of Divorce and Remarriage* 33: 47-63.
- ROBERTS, Simon  
1979 *Order and Dispute*. New York: St Martin's Press.
- RWEZAURA, Bart  
1998 'The duty to hear the child: A view from Tanzania.' Pp. 57-94 in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*. Aldershot: Ashgate.
- TAMANAH, Brian Z.  
1995 'An analytical map of social scientific approaches to the concept of law.' *Oxford Journal of Legal Studies* 15: 501-535.
- UN COMMITTEE ON THE RIGHTS OF THE CHILD  
2003 *General Comment No. 5: General measures of implementation for the Convention on the Rights of the Child (arts. 4, 42 and 44(6))* CRC/GC/2003/5. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En). (accessed 21 January 2009)
- UNICEF  
n.d. *Mgwirizano wa malamulo pa ufulu wachibadwidwe wa mwana*, Limbe: Montfort Press.
- VAN BUEREN, Geraldine  
1995 *International Law on the Rights of the Child*. Amsterdam: Kluwer Law Publishing.
- WOODMAN, Gordon R.  
1996 'Legal pluralism and the search for justice.' *Journal of African Law* 40: 152-167.