INTEGRATING RIGHTS AND DUTIES: ACHIEVING CHILDREN'S AUTONOMY RIGHTS IN A CULTURALLY DIVERSE WORLD

By

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ABSTRACT

This thesis reviews the current understanding of autonomy rights of the child as communicated by the UN Convention on the Rights of the Child. It examines whether this conception is effective in achieving the fulfilment of the autonomy rights of the child, as well as in responding to the key challenges in the realisation of these rights within some jurisdictions. It proposes a critical look at the negotiations and drafting process of the Convention on the Rights of the Child in order to develop and foster a better appreciation of the basis of the current understanding and, therefore, the existing challenges in implementation. It suggests that there is a need to re-conceive the autonomy rights for children by integrating the notion of duties. Using the example of the Africa Charter on the Rights and Welfare of the Child (ACRWC), it explores the advantages of such an approach.

RÉSUMÉ

Cette thèse examine la compréhension courante des droits d'autonomie de l'enfant tel que transmise par la Convention relative aux droits de l'enfant de l'ONU. Nous examinons si cette conception est efficace dans l'accomplissement des droits d'autonomie de l'enfant ainsi que dans le contournement des obstacles à la réalisation de ces droits qui existent dans certaines juridictions. Cette analyse propose un regard critique sur le processus de négociation et de rédaction de la Convention relative aux droits de l'enfant dans le but de développer une meilleure appréciation des notions sous-jacentes à la compréhension courante et, par conséquent, des défis pour sa mise en œuvre. Cette analyse propose qu'il y aurait un besoin de revoir et de reformuler les droits d'autonomie des enfants en intégrant la notion des devoirs. En utilisant l'exemple de la Charte
Africaine des droits et du bien-être de l'enfant, ce texte examine les avantages d'une telle approche.
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Finally, I am most grateful to God, the source of all inspiration and giver of life.
**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<tr>
<td>ACHPR</td>
<td>The African Charter on Human and People’s Rights</td>
</tr>
<tr>
<td>African Commission</td>
<td>African Commission on Human and Peoples’ Right</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<td>AUC</td>
<td>African Union Commission</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CRA</td>
<td>Child Rights Act (Laws of the Federal Republic of Nigeria)</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>CSOs</td>
<td>Civil Society Organisations</td>
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<tr>
<td>DCI</td>
<td>Defence for Children international</td>
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<tr>
<td>HRLJ</td>
<td>Human Rights Law Journal</td>
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<tr>
<td>IAC</td>
<td>Inter-Action Council</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICJ</td>
<td>International Commission of Jurist</td>
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<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<tr>
<td>IJCR</td>
<td>International Journal of Children’s Rights</td>
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<tr>
<td>IJLF</td>
<td>International Journal of Law and the Family</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
</tr>
<tr>
<td>JAL</td>
<td>Journal of African Law</td>
</tr>
<tr>
<td>NCRIC</td>
<td>The National Child Rights Implementation Committee</td>
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<tr>
<td>NGOs</td>
<td>Non-Governmental Organisations</td>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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</table>
SALJ South African Law Journal
UDHR The Universal Declaration of Human Rights
UN United Nations
UN CRC United Nations Convention on the Rights of the Child
UNESCO United Nations Educational, Scientific and Cultural Organization
UNCHR United Nations Commission on Human Rights
UNICEF United Nations Children’s Fund
UNGA United Nations General Assembly
USA United States of America
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INTRODUCTION

The autonomy rights provisions in the Convention on the Rights of the Child (CRC)\(^1\) (Articles 12-17) — which include the rights to freedom of expression, association, privacy, and freedom of religion—are widely viewed as central to the children’s rights agenda set by the drafters of this instrument.\(^2\) Therefore, these rights are said to be the most important of the rights established by the instrument because they recognise children as independent subjects of the law.\(^3\) However, despite the importance attached to these provisions, they have been the subject of much debate and controversy. For example, the opposition to these provisions by various interest groups led to fierce debates during the drafting process and, as evidenced by the many reservations and interpretative declarations countries have made when ratifying the Convention, these provisions remain contentious to this day.\(^4\) As further instance, a

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declaration by Poland stated that “such rights shall be exercised with respect for 
parental authority, in accordance with the Polish customs and tradition regarding the 
place of the child within and outside the family.”

One of the main concerns is that, unlike other provisions in CRC that are 
geared toward the protection of the child, the autonomy rights provisions represent the 
child as having a separate identity from others. This status entitles him or her to 
consideration and protection under international law as an individual in his or her own 
right. The inclusion of these rights has provoked fear that the rights of the child are 
being promoted at the expense of parents and the family as an institution, and may 
therefore turn out to be detrimental to parent/child relationships. These concerns are 
exacerbated by the silence of the CRC or the lack of provisions, regarding the duties 
and responsibilities of the child within the family and towards others. Thus, some 
critics claim that the CRC does not adequately account for the reciprocal and 
interdependent relationships between the child, her/his parents, and other members of 
her/his family.

Legitimate questions have also been raised as to the desirability and 
applicability of the CRC construction of the autonomous child within those socio-
cultural contexts where the autonomy of the individual is not emphasized as much as 
his/her interdependence and duties within the community. This is especially the case

5 CRC/C/2/Rev.8 at 27 and 35. See R Hodgkin and P Newell, supra note 4, page 90.
6 Deirdre Fottrell, supra note 4, at 5.
7 Stephen Toope, “The Convention on the Rights of the Child: Implications for Canada” in M Freeman, 
See also Isabelle D Cherney, Adams Greteman, Brittany Travers, “A Cross-Cultural View of Adults’ 
with Africa and Asia, and among ethnic migrants and indigenous groups in Western societies.\(^8\)

An examination of the drafting history of the CRC reveals that the inclusion of the concept of duties of the child was considered desirable and canvassed by some of the delegates, but their proposals were not accepted for various reasons.\(^9\) For example, some argued that duties with respect to children were more of a moral obligation and therefore legally unenforceable. As a consequence of the non-inclusion of duties, the practical implementation and effectiveness of the relevant provisions of the CRC are in doubt within some state jurisdictions. The apparent resistance to, and the non-compliance with, these autonomy rights provisions are due especially to socio-cultural differences. For example, the Committee on the Rights of the Child, which is mandated to oversee the implementation of the CRC, has regularly expressed its concerns that states are not giving adequate attention to the promotion of the autonomy rights of the child.\(^10\) This Committee has identified traditional practices, culture, and attitudes as obstacles to the implementation of these rights.\(^11\) Notably, many of the states where the Committee has identified these cultural obstacles are mostly in the African and Asian regions.\(^12\) These states share a worldview that situates

\(^8\) For the Asian perspective, see Vasanthi Raman, “Politics of Childhood: Perspective from the South” (2000) *Economic and Political Weekly* Vol. 35. Raman argues that the CRC provisions on autonomy are based on the assumption that individuation is the norm for all societies. She subsequently presents a view of the Asian context and how it might differ from the CRC model. For the African perspective, see T Mosikatsana, “Children’s Rights and Family Autonomy in the South African context: A Comment under the Final Constitutions” (1993) *3 Michigan Journal of Race and Law*, 341 at 370. Mosikatsana argues that children’s rights without duties or obligations undermine family autonomy.

\(^9\) These reasons why these proposals were dismissed are explored further in the Chapter 2.


\(^11\) R Hodgkin and P Newell, ibid at 163.

the child within the family and community, with an emphasis on communality and duties as necessary corollaries to individual rights. Thus, these states have raised concerns and articulated their rejection of these provisions, especially in the absence of corresponding provisions on duties. This resistance has serious implications for the overall effectiveness of the CRC, and so an urgent need exists to examine these challenges and explore alternative means of promoting the children’s autonomy rights while taking into account the cultural specificities of different societies.

The Importance of this Thesis

Despite the serious implication of the neglect of duty for the overall effectiveness of the CRC, many commentators on it have ignored the problem and focused on the theoretical debate about whether autonomy rights conflict with legal paternalism. Generally, those who have written on the issue have hinted at the need for an integration of duties and rights without expatiating and explaining the ways this integration might be achieved. Furthermore, little research has examined the implementation of autonomy rights within cultures that privilege interdependence and duties in the family, especially in Africa. The research that does exist tends to be largely theoretical with minimal consideration of the practical application of autonomy rights.

130-181. Harris-Short notes that this creates an implication that problematic culture is only found in Africa and Asia. However, other states not within these groups also have indicated to the Committee that they are facing similar challenges of implementation in practice. See also R Hodgkin and P Newell, supra note 10, at 163.


This thesis is a modest attempt to fill this gap in the literature. My theoretical interest pertains to the level of resistance to, and effectiveness of, the current understanding of autonomy rights, especially as this understanding relates to countries in Africa that place emphasis on interdependence and intra-familial duties. Since nearly all countries within this region have ratified the CRC, it is necessary to understand the factors that may play an important role in its success or failure. Thus, the main objective of this thesis is primarily to examine, analyse, and establish whether the current understanding of autonomy rights—without a commensurate consideration of children’s duties—is an effective means of ensuring those rights for children. This study explores the extent to which states are actually meeting their implementation commitments, vis-à-vis the autonomy rights of the child, and suggests ways by which they may more effectively achieve their obligations within their different socio-cultural contexts.

**Research Methodology**

The arguments of this thesis are primarily established through a review of the relevant literature, instruments and legislation, and experiences from the practical implementation of the CRC, using Nigeria and its *Child Rights Act* (CRA) as a case in point. In this thesis, I review the CRC and the main African regional instrument on children’s rights—the *African Charter on the Rights and Welfare of the Child* (ACRWC)—as well as African positions on the related international instruments and processes, and how far these positions have been reflected in the outcomes of the negotiations.
Overview of Thesis

This thesis has four main chapters and a conclusion. Chapter One sets the background for the study by examining the concepts of autonomy as presently understood within the CRC. After providing an overview of the autonomy rights provisions, it highlights the links to the liberal basis of the Convention’s individualistic approach, and presents critiques from the communitarian, feminist, and the African/Asian perspectives, all of which have concerns about the recognition of the duties of the individual alongside his/her rights. This chapter also discusses the concept of duty and its relationship to rights.

Given that integrating rights with duties was a central issue of debate during the drafting of the CRC, Chapter Two takes an investigative approach. It looks back at the negotiation and drafting process of the CRC, especially the articles related to autonomy rights and the questions about duties. This approach is geared towards developing a better appreciation of the basis for the current approach to autonomy rights for children, and the existing challenges with respect to implementation. The chapter investigates evidence of resistance to the Convention provisions on autonomy rights, based on the disjunction between the CRC and the customary values and practices of certain states, in particular as these values and practices relate to the duties of the individual.

To examine further the resistance to these provisions articulated in Chapter Two, Chapter Three provides a case study of Nigeria’s implementation and compliance efforts in relation to the CRC. It highlights the various ways in which the state has attempted to grapple with the application of autonomy rights as adopted, without “duties,” within its domestic laws. This case study illustrates the tensions that
arise as the state seeks to uphold the cultural values of duty and responsibility while attempting to fulfil its CRC obligations to promote the autonomy rights of the child.

Chapter Four discusses alternative approaches to promoting the autonomy rights of the child. By using the example of the *African Charter on the Rights and Welfare of the Child*, which provides that the child has rights as well as responsibilities, this chapter highlights the difficulties as well the benefits associated with integrating rights and duties, and how to achieve this integration. This chapter also examines the underlying precepts and values of duty, and shows that duty and autonomy rights are not mutually exclusive concepts and that they can be, and have been, successfully integrated into the African legal context.

The conclusion summarises the observations made in the previous chapters. In the conclusion, I highlight the salient points emphasised throughout the thesis. The main recommendation is that many benefits can be derived from the integration of the rights and duties of the child. I suggest that the United Nations should take the initiative to pronounce on the importance of the duties of the child by adopting an additional protocol to the CRC that recognizes the benefits of duties to the overall social and developmental needs of the child. This step will help to legitimize and strengthen the concept of the autonomous child as envisioned by the Convention. If this is not immediately feasible, the Committee on the Rights of the Child, which monitors compliance and implementation of the CRC, should make a general statement on this issue as a means of guiding states in the interpretation and implementation of the Convention while taking into account an issue that is of significant concern to them. Furthermore, it is recommended that in the course of the implementation of the CRC, countries may also include the duties of the child where
they do not derogate from or undermine established rights. This is possible because while the CRC did not include duties, it does not prohibit their inclusion in domestic laws or implementation strategies.

In the final analysis, I contend that recognising children’s duties in the children’s rights discourse will achieve several goals. It will, *inter alia*, help bolster the support that the CRC provides for families by ensuring the stability and continuity of the family by emphasising mutuality and interdependence within the family, by directing attention to all the demonstrated benefits to the child’s development. Furthermore, it will make the CRC more relevant for certain regions and consequently improve the implementation efforts of countries that emphasise duty and interdependence, thereby ensuring the enhanced legitimacy and acceptability of the CRC within these regions.
CHAPTER 1

1. THE CONVENTION ON THE RIGHTS OF THE CHILD AND CHILD AUTONOMY

1.1 Introduction

This chapter focuses on autonomy rights, as understood within the Convention on the Rights of the Child (CRC), and highlights the key provisions of the CRC relevant to the notion of autonomy. After an overview of the meaning of “autonomy” within the CRC, the chapter highlights the many concerns expressed in relation to the CRC provisions on autonomy as they relate to the interrelationship between the child and his/her parents, specifically, the legal paternalism arguments, and second, the duties of the child. It discusses the issue of the duties of the child in greater detail. I adopt the liberal/communitarian argument so as to highlight the demand for an alternative approach to promoting autonomy rights. These discussions highlight the difficulties associated with the autonomy rights of the child as currently understood in the CRC.

1.2 Concept of Autonomy

The literal meaning of the word “autonomy” demonstrates the complexity and the challenge it poses in the context of rights and relationships.¹ Several synonyms

¹ Jennifer Nedelsky, “Re-conceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 Yale J.L. & Feminism, 7
associated with the word include “independence,” “self-sufficiency,” “sovereignty,” “volition,” and “self-rule.” Thus, autonomy would seem to be at variance with relatedness, reflecting a tendency towards independence from others rather than interdependence with others.² This conflict is highlighted by the many commentators that have defined autonomy in different ways. For example, Dwivedi writes that autonomy emphasises separateness and “clear boundaries, individuality within relationships.”³ Nedelsky notes that autonomy means to be “governed by one’s own law.”⁴ Similarly, Lansdown, defining autonomy in the context of law, notes that it refers to “the right to assert one’s own personal and physical integrity, to express one’s own view freely, to take responsibility for one’s life and to have decisions regarding one’s choices respected.”⁵ Eekelaar observes that autonomy for a child means “the freedom to choose his own lifestyle and to enter social relations according to his own inclinations uncontrolled by the authority of the adult world, whether parents or institutions.”⁶

All of the above definitions, with their emphasis on “independence” when referring to children, do not take into account the care and nurture that children

⁶ John Eekelaar, “The Emergence of Children’s Rights” (1986) 6 Oxford Journal of Legal Studies 161-182. The author conceptualizes rights in terms of interest and identifies three interests of the child: basic, developmental, and autonomy. He concludes that these interests will likely clash at some point, and when they do, priority should be given to the first two in cases in which the third would not be adversely affected.
require.\textsuperscript{7} As Minow correctly argues, “children in our society are not autonomous persons but instead are doubly dependent. Their dependency is construed by legal rules and also in their lives as lived.”\textsuperscript{8} In other words, children are dependent physically, mentally, emotionally, and psychologically on their families, communities, and the state.\textsuperscript{9} However, scholars like Michael Freeman—while conceding that children are dependent and different because of their lesser abilities, capabilities, and vulnerability—maintain that their dependency should not be a reason to deprive them of their choice and respect.\textsuperscript{10} Freeman argues that children are “not all that different” from adults because both groups face similar social problems and constraints.\textsuperscript{11} For example, he notes that institutions such as the juvenile justice system, the care system, and observations and assessment centres have not lived up to the goals of “protecting” children, and so the need to encourage children to participate in decisions that affect them.\textsuperscript{12} Moreover, according to Freeman, children deserve equal respect and recognition for their present autonomy as well as their capacity for an eventual autonomy as adults.\textsuperscript{13}

\textsuperscript{7} Colleen Sheppard, “Children’s Rights to Equality; protection versus paternalism’ (1992) 1 Annals Health Law at 197. The author notes the conflict: “Children’s rights may take the form of claims for autonomy and non-interference; they may, however, entail claims for care and protection, or claims for relationships with others.” See also Virginia Morrow \textit{supra} note 3


\textsuperscript{12} MDA Freeman, \textit{supra} note 10 at 184.

\textsuperscript{13} \textit{Ibid} at 183.
Similar views are shared by Federle who, in discussing the feminist approach to child rights, cautions about the dangers of focusing on children’s dependency. She contends that the emphasis on the dependencies of children in relationships does not account for the power inequity that exists within the parent-child relationship. In her opinion, the feminist linking of autonomy rights to relationship only succeeds in promoting the idea that children should only have rights because of their incompetence. Thus, Federle and Freeman both maintain that notwithstanding their dependence, children’s capacity for autonomy should be respected. She suggests that a failure to do so will perpetuate hierarchies in parent-child relationships, which will have negative impacts on children.

The Convention on the Rights of the Child seems to adopt the essence of these arguments for recognizing child autonomy because it provides extensively for children’s autonomy or self-determination rights. Nearly one quarter of the substantive rights in the CRC are autonomy and self-determination rights that recognise the child as a person of equal worth, capable of holding and exercising his or her rights independently of others. In this regard, Articles 12 to 17 of the CRC provide a series of autonomy rights, including freedom of expression, rights to privacy, freedom of thought and conscience, and freedom of association and peaceful
assembly. The CRC also obliges states to recognise these rights and support them with the force of law.19

It is important to note that by focusing on the “autonomous child,” the CRC differs from earlier children’s rights documents.20 These previous documents focused largely on the protection of the child and the provision of services for him or her, without recognising her or him as a separate human being with an individual personality and corresponding rights to autonomy.21 This shift from protection to autonomy arose out of the realisation that children “because of their special vulnerability and immaturity, require a higher level of protection in some areas of their lives than were found in existing international instruments.”22 Thus, giving children autonomy rights was seen to yield protection for children’s rights.23 The next section discusses the scope of the autonomy provisions of the CRC.

1.3 Scope of Autonomy Rights

1.3.1 Relevant provisions in the CRC

The preamble of the CRC sets the stage for an autonomous-child vision when it states that “a child should be fully prepared to live an individual life in the

19 Ibid at 29.
society.” 24 This vision is buttressed by a “cluster of rights” 25 contained in Article 5 and Articles 12-17: These specific provisions are:

Article 5, on parental guidance, which emphasizes the responsibility of parents to bring up the child in a way appropriate to his or her developmental capacities. This upbringing will allow the child to exercise his or her right to participate/autonomy.

Article 12 assures children capable of forming their own opinion “the right to express their views freely in all matters affecting (them), the views of the child being given due weight in accordance with the age and maturity of the child.” Also, Article 12(2) provides children with procedural rights to be heard in any judicial or administrative proceeding affecting them.

Article 12 is complemented by Article 13, which secures the right to expression and provides that the child “shall have the right to freedom of expression; this right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers….” A child’s rights to freedom of expression may be exercised by “the child who is capable of forming his or her own opinion.” These views are to be “given due weight in accordance with the age and maturity of the child.”

Article 14(1) provides that states must also secure children’s rights to freedom of thought, conscience, and religion; and Article 15 requires that participating governments recognize the rights of a child to freedom of association and peaceful assembly.

24 Seventh paragraph.
Article 16 establishes the child’s privacy rights: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family.”

Article 17 guarantees the child a right of access to information. It stipulates that state parties “shall ensure that the child has access to information and material from a diversity of national and international sources.”

Commentators on the CRC use varied terminologies to describe these provisions, for example, “participatory rights” and “empowerment rights,” and some have referred to them as “autonomous participation rights.” These conceptions all align to the purpose of ensuring that the child has a say in matters affecting his/her destinies in public life and within the family. For the purpose of this thesis, I use these terminologies interchangeably.

In the next section, I examine the controversies surrounding these autonomy rights. However, first, it is important to place these discussions in the context by examining the CRC provisions on the family. This approach is necessary because the family represents the primary vehicle through which children act on or enjoy their rights, especially their autonomy rights.

26 Although the participatory rights of a child are not explicitly provided for in the CRC as legal rights, they are inferred. For an analysis on why these rights are called autonomy rights or participatory rights, see Esperanza Ochaita and M Angeles Espinosa, “Children’s Participation in Family and Social Life: A Psychological and Development Approach” (1997) 5 Int’l J. Child Rts. 279.


1.3.2 The family and autonomy rights of the child

As previously discussed, the CRC provides extensively for a child’s right to an autonomous life. However, this autonomous identity cannot be secured or achieved in a vacuum, since, as Shauna Van Praagh has reminded us, “children, after all are not looked after, fed, clothed, taught and raised by a United Nations Convention.” 29 Indeed, the CRC acknowledges this and places the child within a “web of relationships” with parents, family, and communities to guarantee the development of the child’s autonomy.30 Many provisions of the CRC describe the role and importance of the family and provide for its protection. For example, the fifth preambular paragraph of the CRC affirms the family “as the fundamental group of the society and the natural environment for children’s growth and wellbeing” and stipulates that “the family should be afforded the necessary protection and assistance so that it can fully assume it’s responsibilities within the community.”31 Similarly, the family is affirmed and receives support from a number of other articles (5, 9, 10, 18, and 28). Thus, it can be concluded that the CRC recognises family relationships and seeks to protect them as an important element in the realization of the rights of the child.

Nevertheless, even though the CRC seeks to protect the family and family relationships, its insistence on child’s autonomy or participation rights both within and outside the family raises many issues, some of which imply the restructuring of

31 CRC Preamble.
family relationships. Critics argue that these rights change the boundaries and power relations between parents and children and effectively re-define the relationship of the family to the child as well as the family to the state and government. Hart succinctly sums up this problem by noting that these provisions “play against the Convention’s respect for the rights and duties of parents to provide direction and guidance for the child.” Thus, despite the provisions of the CRC on the family, the individuation of the child is considered problematic, which has led to endless theoretical debates over whether it is truly for family or “anti-family” and “anti-parents.” In the next section, I explore these challenges by examining some of the criticisms raised against the CRC provisions on autonomy.

1.4 Critique of the Autonomy Rights of the Child

As previously mentioned, the CRC has been the subject of considerable criticisms levelled especially at its autonomy rights provisions. These criticisms can be summarised into two overlapping but distinct arguments: first the debate focuses on the “role of parents in relations to the children’s autonomy rights” (legal paternalism versus autonomy) and the second on the “role of the autonomous child in

34 Stuart N Hart, supra note 18
35 It is interesting to note that the U.S., which proposed the autonomy rights during the negotiations of the Convention, tended to send un-married persons and non-parents to the drafting process. In fact, Cynthia Price Cohen noted that out of the five U.S. representatives from 1983-1989 only one was married, none had children, and only one had any relevant background in children’s rights. The implication of this phenomenon, while not proven, indicates that most of the proposed rights were put forward by people who were not in parent-child relationships and, so were not able to understand the complex nature and the need for reciprocal relationship. For an analysis of the U.S. participation in the drafting process, see Cynthia Price Cohen, “The Role of the United States in the Drafting of the Convention on the Rights of the Child” (2006) 20 Emory Int’l.Rev.185 at 188.
relation to the family” (autonomy rights versus duties). However, in this thesis, I examine in detail only the issues pertaining to the autonomy rights versus duties arguments. Nevertheless, it is useful to discuss briefly some of the issues related to the legal paternalism arguments, since they provide some insight into the controversies surrounding these autonomy rights developed under the CRC.

1.4.1 Autonomy vs. Legal Paternalism

The theoretical debate amongst scholars remains unresolved as to whether a tension exists between the concept of a child’s autonomy rights (rights to make decisions for her/himself) and the issue of legal paternalism (rights of parents and guardians to provide guidance). Critics of autonomy rights argue that these rights entrench the independence of the child and therefore are likely to destabilize the family by disrupting the relationship between children and their parents.36 Hilary Lim and Jeremy Roche call this a “dangerous centre” noting that “the idea of the child having a right to express an opinion, or right of access to information, challenges the relationships within the family”.37 Similarly, Hafen and Hafen, opponents of these rights, identify a possible threat to family life especially with regard to the adult-child relationship, and warn against “abounding the children to their autonomy.”38 They argue that the CRC autonomy rights put children and parents on the same level as co-autonomous persons in their relationship with the state, and this creates an environment for state to step in whenever there is conflict between parents and

36 Hafen and Hafen Supra, n. 33; See also Hafen, Bruce, “Individualism and Autonomy in Family Law: The Waning of Belonging” (1991) 1 BYU L. Rev.7-18 See also MA Glendon, Rights Talk, The impoverishment of Political Discourse (New York: Maxwell Macmillan, 1991) 72. Both authors argue that the impact on the family is negative and detrimental to its unity.


38 Hafen and Hafen, Supra 33
children. In other words, the autonomy rights are interpreted as creating an opportunity for the state to interfere in family life.

Defenders of autonomy rights reject these arguments. They argue that the opposition to autonomy rights for children stems from a failure to read the CRC as a whole. They note, for instance, that Article 5, if read in conjunction with the preamble and other articles such as those discussed previously in this present paper, provides evidence that the CRC adequately takes family relationships into account and therefore does not “pit children against parents.” Regarding the concerns of a child’s ability to assert her/his opinion, they note Article 5 of the CRC, which refers to the evolving capacity of the child, as well as Article 12, act as a limitation to a child’s choices and decision making.

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39 See Lynn D Wardle, “The Use and Abuse of Rights Rhetoric: Constitutional Rights of Children” in MDA Freeman, ed., Children Rights Vol. 1 (Aldershot: Ashgate/Dartmouth, 2004) at 335. “When we infuse the language of Rights into a controversy, we invite some form of Government to become involved...” See also Margaret Otlowski and B Martin Tsamenyi, “Parental Authority and the United Nations Convention on the Rights of the Child: Are the fears Justified?” (1992) Australian Journal of Family Law at 144, where the authors state that even though the Convention provides for the protection of the family and respect for the guidance of parents, this guidance is constrained by the reference to the “evolving capability” of the child. Therefore, it could be argued that a possibility exists that the right of parents to provide guidance and direction to their children might be subject to external scrutiny or open to confirmation by law in the event of a conflict. Thus, this parental right may be overridden in certain circumstances.

40 Margaret Otlowski and B Martin Tsamenyi, Ibid at 146. See also Couzens supra note 27.

41 Ibid at 143.

42 Ibid at 150.

See also Rachel Hodgkin & Peter Newell, Implementation Handbook for the Convention on the Rights of the Child, 3rd ed. (New York: UNICEF, 2007) at 90. Where the authors noted the committee on rights of the stance that granting the child autonomy rights was not a question of seeking “child power.”

43 The Convention provides two different principles for understanding the rights of the child: the principle of the evolving capacity to exercise his or her rights (Article 5) and the principle of the best interest of the child (Article 3). The principle of the evolving capacity of the child is at the heart of the balance, recognising on the one hand that children should be granted increasing autonomy and on the other that protection should be provided due to their immaturity and youth. This principle acknowledges that as children grow and become more competent, the need for direction from their parents is reduced, and the child gains increased responsibilities for issues affecting his or her life. For an in-depth discussion of the evolving capacity of the child see Gerison Lansdown, supra note 5
These disagreements have real ramifications for the promotion of the autonomy rights of the child within and outside of the family, and also for how families perceive the place and role of the child. For example, even the staunchest defenders of autonomy rights acknowledge the challenge that these rights pose within the family. For example, Margaret Otlowski and B. Martin Tsamenyi note that:

Although articles 13-16 of the convention are not primarily directed at allocation of power between parents and children and the resolution of the conflicts that may arise in parent/child relation, it is quite conceivable that cases may arise... Involving a conflict between the child and his parents with regards to the rights contained in Article 13-16 of the convention.  

Similarly Meda Couzens, another defender of autonomy rights, acknowledges that sometimes the protective rights of the child may conflict with her/his autonomy rights. Thus, it is clear that while supporters of autonomy are willing to argue for the value of recognising these rights, they cannot also ignore the reality that, in some instances, family relationships might change due to the enforcement of these rights. Such cases might arise where a child, in a bid to assert her/his autonomy, disagrees with the parents’ strategy for balancing care and control. An example of this situation is a recent case brought before the Quebec Superior court in which a 12-year old initiated an action that challenged the authority of her father to discipline her as he

44 Margaret Otlowski and B Martin Tsamenyi, supra 40 at 158. The authors outline some of likely disputes that can create tensions: “For instance with regards to Article 13, it is possible to envisage a case where a maturing minor makes a claim to access to information or advice of a kind to which the parent object, such as information about safe sexual practice. Or with regards to child rights to freedom of religion protected in article 14, circumstances may well arise in which a child wishes to practice a religion of which the parents disapproves or where the parents’ wishes to involve the child in their religion and the child objects. Similarly with respect to the child’s rights of freedom of association, dealt with in article 15, a dispute may well arise between the child and his or her parents as to the persons with whom the child associates. Also in the area of child rights to privacy, referred to in article 16, conflict may arise as to the legitimacy of the parental interference.”

45 Meda Couzens, supra note 3 at 424. Couzens argues that in such cases, the wishes of the child should be overridden if it endangers his/her future.

46 Smiljka Tomaovic, supra note 32. In this article, Tomaovic identifies the control strategies—“communication, control of influence, structuration, protection and restriction”—that parents use to balance their children’s care and protection needs.
deemed appropriate. The girl took the action against her father after he refused to allow her to participate in a school trip. Her father was attempting to chastise her for posting “inappropriate” photos of herself online and chatting on websites that he previously had tried to block. The court held that the girl’s grounding was unjustified. The father appealed the ruling on the ground that it was for the girl’s “own protection.”

In such instances, where a conflict arises between the rights of the child and the parent’s responsibility to protect him/her, the role of the parents can be undermined as it was in the “grounding” case. Based on the outcome of this case, the cogency of the argument must be recognized that autonomy rights have the “potential” to disrupt family life and therefore need to be reconceptualised.

48 In reviewing Hon. Tessier J.’s Judgement, the Appeal Court Justice, on the question of whether a child can bring a case before the Superior Court, affirmed that the child could do so under the law under several circumstances. He noted that this reflects the modern conception of the child as a subject with rights and not a mere object of law in relations to his parents. However, he pointed out that the court is not a place to resolve quarrels between a dissatisfied child and her parents except in serious circumstance such as health, safety issues.
49 In this case, the family was disrupted, and the child-parent relationship changed. As the defence counsel noted, “We went from a child who wanted to live with her father, and after all this has been done, they're not speaking anymore” See Supra at 47. http://www.cbc.ca/news/canada/montreal/story/2009/04/07/mtl-quebecgirl-sues-dad-0407.html.

The primary focus of judiciary in interpreting the scope of autonomy rights should be to restore family unity in such cases when the rights of the child clash with the parents’ duties to protect him or her. A judgement that results in separation of the family members, where otherwise the relationship was stable, undermines the parental responsibility to raise their children according to their conception of what is in the child’s best interest.

The change in the dynamics of the family relationship means that the child loses the support of the alienated parent. As Michael Wald has noted, in the U.S. evidence exists that an increasing number of parents are unwilling to make the commitment of putting a child’s well-being ahead of children’s autonomy rights, as “many of the parents express doubts about their capability of controlling or guiding their child.” In this regard, Eekelaar’s three interests theory, which articulates the amount of autonomy a child should enjoy, comes in handy. He argues that children have three interests: a “basic interest” (to physical, emotional, and intellectual care), a “developmental interest,” and an “autonomy interest.” Moreover, he proposes that the basic interest should be accorded greater priority than the others in situations where the others are not compromised. See Eekelaar, “The Importance of Thinking Children
These theoretical debates have dominated the discourse and caused children’s rights proponents to take sides on the issue of children’s rights and paternalism; however, the implications of the CRC provisions have received little attention with regard to autonomy rights granted without corresponding duties or responsibilities being outlined for the child. In the next section, I examine this criticism in more detail.

1.4.2 Autonomy Rights vs. Duties

As noted earlier in the preceding section, the CRC acknowledges the role of the family as a necessary institution for the realisation of the rights of the child while adequately protecting him/her and taking certain measures to protect the family unit. However, critics argue that the protection of the family does not go far enough in guaranteeing its success, maintenance, and development.\(^5^0\) Equally important, according to them, is the recognition that family members, including the child within the family, owe duties to one another.\(^5^1\) Indeed, while the CRC provides extensively for the role that parents and the family should play towards the realisation of a child’s autonomy, it does not acknowledge the reciprocal obligations between a child and her/his parents but focuses, instead, on the child’s individual self-realisation.\(^5^2\)

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51 Ibid. 150. See also Martha Minow, supra note 8 at 18 and Laura Purdy, “Why children shouldn’t have equal rights” (1994) 2 International Journal of Children’s Rights 224-41.
The emphasis of the CRC on the rights of the individual child rather than the rights of the child within a group or family is argued to be derived from a model that is largely based on the Western liberal perspective, which values and promotes individuality, the self and rights over responsibilities.\textsuperscript{53} An examination of the drafting process and the CRC, specifically the provisions relating to autonomy rights, support this claim and reveal that indeed the CRC was influenced by Western liberal perspectives.\textsuperscript{54} It has been argued that the clear predominance of the West, accentuated by the strong influence of the United States, in the negotiating process ensured that the concepts founded on Western legal systems formed the basis for the articles of the CRC.\textsuperscript{55} Furthermore, consensus also exists in the literature that the CRC is greatly influenced by the principle of liberalism.\textsuperscript{56} Hence, the CRC faces

\textsuperscript{53} Liberalism subscribes to the idea that a just society supports and protects the individual’s ability to make independent rational life choices. Therefore, the emphasis is on the need to promote, as fully as possible, an individual’s freedom to make autonomous decisions. For an in depth discussion about liberalism see Audrey Chapman, “Reintegrating Rights and Responsibilities; Toward a New Human Rights Paradigm”, in K.W. Hunter & T.C. Mack, eds., International rights and responsibilities for the future (Westport: Praeger Publishers, 1996)at 7.

\textsuperscript{54} The participation history of states as recorded in the Travaux Préparatoires show that the Western world represented by the U.S., Canada, United Kingdom, Australia, and New Zealand was clearly in the majority and in a position of dominance in contrast to the states from other parts of the world, for example, Africa, Asia, the Middle East, and other regions in the Americas. For a discussion of the participation history, see Lawrence J Leblanc, Convention on the Rights of the child: United Nations Lawmaking on Human Rights (Lincoln, Neb.: University of Nebraska Press, 1995).

\textsuperscript{55} See S. Goonesekeere, Children, Law and Justice: A South Asian Perceptive. (Thousand Oaks: Sage Publications, 1997) quoted in V. Raman “Politics of Childhood, Perspective From the South” (2000) 35:46 Economic and Political Weekly 4056. Eva Brems, in her discussion of cultural pluralism in the CRC, agrees with this view and notes that the drafters of the CRC seemed to have focused more on the context and circumstances of Western children than children from the rest of the world. Eva Brems, “Children’s Rights and Universality” in Eugène Verhellen, ed., Understanding children’s rights (Ghent: Ghent University Children’s Rights Centre, 2004) at 27. These criticisms of the CRC highlight the direct impact that participation had on the CRC and would seem to cast doubts on any claims to a global perspective, and support those who argue that the CRC is a liberal document.

\textsuperscript{56} The CRC is perceived by African and Asian countries, and even scholars in the West, as a Convention that originated in the West and that articulates the legal norms and values that evolved in the West. Frances Olsen, in her analysis of post-modern feminism, criticises the Convention as being “unsituated” and as being composed of ”false Universalisms,” which she says account for its shortcomings and focus on “white, male relatively privileged children.” See Frances Olsen, “Children’s Rights: Some Feminist Approaches to the UN Convention on the Rights of the Child” in Philip Ashton, ed, The Best Interest of the Child: Reconciling Culture and Human Rights,(Oxford :Oxford University Press,1992)193. In “Abandoning Children to Their Autonomy,” Hafen and Hafen similarly argue that
similar criticisms as those levelled against liberalism in general: ‘it assumes the
centrality of the individual person, and places an emphasis on the rights of an
individual rather than, or to the exclusion of, his responsibilities.’ It is agreed that
the child is entitled to many rights because of his or her vulnerability, but the issue for
many critics of these rights seems to be the individuation of the child within the
family without adequate recognition of the inherent interdependence and reciprocity
within the family, which can constrain the realisation of these rights, as well as the
important role that this nature of relationship plays in children’s development.

Policymakers, social scientists, and other commentators on the CRC have
raised concerns with this exclusion of duties. For example, Mosikatsana, in her
consideration of the South African constitution, asks some fundamental questions
with regard to the approach of excluding the duties of the child when discussing their
rights: “Is it appropriate to give children rights without cementing their obligations to
their families? Does the protection of children’s rights without protecting the family
as a basic unit erode family autonomy?” She argues that excluding duties from the

the CRC recognises the child as a social actor and gives her/him a bundle of rights more commonly
associated with citizenship in liberal democracies. Supra note 33. Perhaps, the strongest opponent of
the universal child is Norma Lewis who argues that a standard of childhood that is specific to the
“conditions of Western society is established, which becomes a global standard of measurement.” See
Norma Lewis, “Thesis on the Fallacy of the Universal Childhood” in Tony Evans Human Rights Fifty

57 Audrey Chapman, “Reintegrating Rights and Responsibilities: Toward a New Human Rights
Paradigm” in KW Hunter & TC Mack, eds., International Rights And Responsibilities For The Future

58 For example, Geraldine Van Buren argues that the CRC should have included the concept of duty as
a means of achieving autonomy. See Geraldine Van Buren, The International Law on the rights of the
child (Dordrecht, Boston: Martinus Nijhof Publishers, 1995) at 41. Similarly, Laura Purdy, in her
criticism of the CRC, points out that “adding responsibility would serve to limit freedom of children.”
See Laura M Purdy, particularly her conclusions, in “Why Children shouldn’t have Equal Rights”
discourse of autonomy undermines family autonomy. 59 Other commentators, especially in the field of psychology, have reached similar conclusions with regard to this issue. For example, psychologists Bellah, Madsen, Suvilian, and Swidler and Tipton have found that emphasis on independence and autonomy is not beneficial to the individual’s long term best interests because it potentially undermines the support system provided by the family and community. 60

Legitimate questions also have been raised as to the desirability and applicability of the CRC characterization of children as autonomous within other socio-cultural contexts, such as Africa and Asia, and among ethnic migrants in Western societies in which the autonomy of the individual is not privileged as much as his/her interdependence and fulfilment of duties. In these cultures, the concept of the independent and autonomous child without attendant duties and responsibilities is considered a threat to the family unit. For example, the account of childhood in Zimbabwe, described by Alice Armstrong, highlights the tension that exists between autonomy and belonging. Her study shows that a child’s identity is not separate from that of the family. 61 Armstrong argues that in cases of sexual abuse, the tendency to


emphasize the individual and individual rights at the expense of family rights and duties undermines the support that the child receives from the family.62

Indeed, the lack of provision for the duties of the child implies that that the main goal of the family is to benefit the child alone instead of supporting healthy, mutual interactions and reciprocal relationships. As a result, the CRC does not adequately account for the complex relationships between the child, his/her parents, and other members of the family, especially in regions that value the interdependence described above. After having discussed the principles of autonomy rights and their links to duty, in the next section, I present the arguments made in favour of integrating duty and rights, especially those pertaining to autonomy and the duties of the child. Before doing so, however, it is important to explain the concept of duty and its relationship to rights.

1.5 The Notion of Duty

In its ordinary sense, the word “duty” is associated with actions that are due to someone else, for example, the payment of debts to a creditor or the keeping of an agreement or promise.63 According to Alan White, duty is defined as “… something which is due, something which falls to be done, either because it is simply assigned or because it is involved in, prescribed by, part and parcel of, arises out of, and owes its existence to, a particular institutionalised position.”64 In this context, duties are attached to one’s role or job, for example, different duties are prescribed for

62 Ibid at 147.
64 Ibid at 22.
institutional positions such as that of the policeman, teacher, or the military man.\textsuperscript{65} However, duty also is used in a wider sense to indicate that class of moral obligations that is not recognized by the law for the purpose of enforcement or redress, but are only based on an ethical imperative. In this sense, duty connotes a “moral obligation” as differentiated from “legal obligation.”\textsuperscript{66}

An important distinction must be drawn between legal and moral duties. According to Feinberg, a legal duty is not something that we are entreated or advised to do, it is something that is imposed by law or an authority, which we are obliged to do, under pain of penalty.\textsuperscript{67} On the other hand, moral duties can be said to consist of “codes of behaviour” that prescribe our attitude towards others.\textsuperscript{68} This category of duties is to be exercised at the discretion of the duty holder and is based on his/her value judgement,\textsuperscript{69} for example, the duty to tell the truth to one’s spouse.\textsuperscript{70} Unlike legal duties, the beneficiaries of moral duties cannot enforce them legally, although the duty-holder may be the subject of social disapproval and alienation.\textsuperscript{71} Consider, for example, the religious duty to give material support to the less privileged.\textsuperscript{72} In this case, taking action towards the other person is solely the choice of the benefactor who

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Douglas Hodgson, \textit{supra} note 50 at 2.
\item Joel Feinberg, “The nature and value of Rights in David Lyons(ed) \textit{Rights} (1979) at 79
\item Douglas Hodgson, \textit{supra} note 50 at 38.
\item Ibid at 33
\end{enumerate}
\end{footnotesize}
cannot be held accountable for choosing not to exercise this duty. However, some moral duties exist that are related to legal duties and are codified and recognised by law, for example, the moral duty that parents owe to maintaining and educating their child is now regarded as a legal duty. In addition, the duty of the child to support his or her parents is recognised and enforceable in court in certain jurisdictions. The recent rulings on and successes in the enforcement of the Canadian filial responsibility law which allows impoverished parents to initiate action in court against their adult children for maintenance is a good example of moral duty as codified legal duty. Thus, “while there is a distinction between legal and moral duties, there is also some overlap so that a course of action that is ethically correct might also be one that is legally required.”

For the purpose of this thesis, I use the words “obligation” and “responsibility” interchangeably. Although they are semantically different, they both align with the “idea of coercion” because they both are demands imposed on or required of someone. The exercise of moral duties is discussed in greater detail in Chapter 4.

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73 Ibid at 33. The author describes these duties as imperfect and perfect.
74 Ibid at 151
75 Ibid at 154. See also Article 585 of Quebec CC. British Columbia Family Relations Act [RSBC 1996] CHAPTER 128
77 Supra note 70.
78 For example, Alan White makes a distinction between the notion of duty and obligation. According to him, “the notion of something due, which is central to duty, is different from the notion of something bound, which is central to obligation.” This means that duty is optional while obligation is compulsory. However, despite the difference in meaning, these terms, are nevertheless treated as the same in law. See Alan White, supra note 63 at 52
79 Ben Saul, supra note 68, at 582.
1.6 Relationship between Duties and Rights

Historically, for many centuries, the “duties” of the individual formed the core principle of ethics. In their writings, ancient jurists like Aristotle, Augustine, and Thomas Aquinas resisted the idea that a person can be completely autonomous and live a private life. By acknowledging the concept of “community,” they describe the individual’s relationship with others and how he/she should control him/herself for the sake of the interest of the communal unit. For example, Aristotle declared that “it is not right ... that any citizen should think that he belongs to just himself”. According to him ‘...the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole. But he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of a state. A social instinct is implanted in all men by nature.” Similarly, Aquinas emphasises the importance of a person acting through a sense of obligation towards his neighbour. Thus, these early philosophers’ perspectives communicate the idea that the individual owes duties in his or her relationship with others. In the nineteenth century, the emphasis on duty declined with the emergence of liberal democratic theory in the writings of John Stuart-Mill and other social

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81 Douglas Hodgson, supra note 50 at 7.
82 Ibid at 11.
83 Aristotle, Politics, translated T. Sinclair (Harmondsworth, 1962) VIII, i, 1337. See also Devereux supra 83
84 Aristotle, Politics, translated by Benjamin Jowett, online: Available at http://classics.mit.edu/Aristotle/politics.1.one.html accessed 15 May 2011
85 Hodgson, supra note 50 at 11.
contractarians and utilitarians. For example, Stuart-Mill promoted the idea that the state should meddle in the private lives of citizen(s) as little as possible. He also advocated for the empowerment of citizens through a system of civil liberties so to protect them from the unnecessary incursion of the state. Thus, for Stuart-Mill, the liberty of the individual was of utmost importance. With these new ideas, the historical focus on duties was superseded by a greater emphasis on “rights.”

Today, “rights” enjoy a more exalted position than “duties” and have become the preferred means of attaining individual freedom and dignity. This preference is based on many factors, for example, some argue that rights, by nature, are more enforceable. In contrast, “duties” are criticised as lacking content, specificity, and as based solely on “conscience,” which makes them less enforceable. Furthermore, some argue that rights have empowerment capacity because “they define expectation and build security.” Another reason for the preference for rights is that some argue that they have more popular appeal than duty. As Hodgson puts it: “While we like to be fully cognisant of our rights, we may not always enjoy being reminded of our duties which can prove to be an annoyance or intrusion into our individual realm.”

86 Ibid. at 3.
87 Ibid at 3.
88 Ibid at 3.
89 Devereux, supra note 80 at 464.
90 Ibid at 470.
91 Ibid at 471.
92 Ibid at 471.
93 Ibid at 472.
94 Douglas Hodgson, supra note 50 at 3.
Another reason for this preference is that with the decline of the religious command on which duties were based, the focus has shifted to rights.95

The preference of “rights” over “duties” is evident in contemporary human rights law, which historically has laid emphasis on the rights of the individual with hardly any focus on their correlative duties.96 An examination of current human rights documents with respect to their reference to duties and rights shows an imbalance in the provisions of both concepts. Except for the brief reference in Article 29 of the Universal Declaration of Human Rights (UDHR) and the preamble to the International Covenant on Civil and Political Rights (ICCPR), other human rights laws barely refer to the duties of the individual.97 For Example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has fifty references to rights and no reference to duties.98 The Convention on the Elimination of all Forms of Racial Discrimination has forty references to rights and no reference to duties.99 The Convention Against Torture and Other Cruel Inhuman Treatment or Punishment has fifteen references to rights and only one reference to duties (Article

95 Ibid at 3.
97 Article 29 of the UDHR contains a reference to duties when it states that “everyone has duties to the community in which alone the free and full development of his personality is possible.” Morgan-Foster notes that the UDHR does not, however, constitute a binding human rights law, and when the UDHR was codified into two binding Covenants, this reference to duties is now found in the Preambles. Morgan Foster, supra note 96, page 61.
The Convention on the Rights of the Child has seventy-six references to rights and only 3 references to duties. These provisions clearly indicate a preference for the language of rights over duties. Referring to this imbalance between the emphasis on duty and rights, one commentator noted that “we have tried to promote too many societal goals through rights and have given too little attention to responsibilities.” The absence of the principle of duty in human rights discourse has prompted a renewed clamour for duties to be integrated into the discourse of rights. As is shown later in this chapter, many interest groups like communitarians, feminists, and Africans have called for the integration of duties with rights within human rights documents. However, some commentators are sceptical about this renewed call for the recognition of duties. For example, Ben Saul in his article focusing on the Inter-Action Council (IAC) draft Convention argues differently, indicating that domestic laws as well as international human rights laws adequately recognise a range of duties and obligations. He notes that duty is central to contract, tort, equity, and criminal law, and duties also exist in civil and human rights law, as is the case with the UDHR, the ICESCR, and the ICCPR. Therefore, according to him, the clamour for the recognition of the duties and responsibilities of the individual is unnecessary.

101 Articles 3, 5 and 14 of the CRC. Morgan Foster, supra note 96.
103 Ben Saul, supra note 68, at 565.
104 Morgan Foster, supra note 96, at 61.
105 Morgan Foster, supra note 96 at 60.
107 Ben Saul, supra note 68 at 572.
However, Morgan-Foster correctly criticises Saul’s arguments, since the sense in which duties are used within these international instruments is to describe those duties that are correlative to rights. That is, a duty that arises only because of the existence of a right. For example, the right to free speech implies a duty not to interfere with others’ free speech, or the right to be free from torture implies a duty on the state not to torture. These types of duties, as rightly pointed out by Devereux, represent an “inferior system of ensuring the respect of rights,” since duty does not arise independent of rights. The notion of duty that is of concern to this thesis is the one that operates independently of rights rather than as a correlative to a right. These are duties initially imposed on an individual rather than the state. In this case, the private individual owes the duty towards the state as well as to other individuals and her/his community. In the next section, I highlight the various calls for duty to be introduced into the children’s rights discourse. First, by using the liberalism-communitarian paradigm, I present the arguments that advocate for more emphasis on the notion of duty.

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108 For a detailed analysis of duty as correlative of rights, see Morgan-Foster supra note 96 at 61.
109 Jason Morgan-Foster, supra note 96 at 61.
110 Ibid.
111 Ibid.
112 Devereux, supra note 80 at 466.
1.7 Perspectives on the Integration of Duty and Rights

1.7.1 Liberalism vs. Communitarianism

As noted in the preceding section, due to the strong influence of the West, concepts such as autonomy rights were incorporated into the CRC based on the liberal concept of the individual. However, numerous commentators have criticized this autonomy-based focus. Communitarians, for example, reject the notion of the individual bearing absolute rights, and argue that this emphasis separates the individual from “social relations which might constitute it [the individual]” and therefore from “discipline and duty.” Thus, the communitarians’ primary goal is to keep this liberal rhetoric of rights outside the family. The communitarian view is evident in the writings of Selznick and Amitai Etzioni who emphasize obligation. Selznick’s argues that an individual’s rights and freedom are tied to his/her membership in a community or family and therefore he must be willing to accept responsibilities or duties that come as a result of his membership. He attacks the liberal atomic person and promotes the idea of “belonging” instead of independence and freedom as advocated by liberal theory. He does not, however, reject the importance of personhood, since he insists that the concept of “belonging” must

115 P Selznick, “The idea of a communitarian morality” (1987) 75:1 California Law Review at 445. According to Selznick, “Liberalism is much preoccupied with rights, understandably, because it is a philosophy of liberation, not of belonging. This preoccupation has merit, but it too easily separates liberty from association and therefore from discipline and duty. In the process, rights become abstract unsituated, and absolute.”
117 Prof Amitai Etzioni is the chair and founder of the Communitarian Network. His writings focus on America.
118 Ibid at 453.
119 Ibid at. 454.
include respect for the integrity of the person.120 Similarly, Etzioni explains the communitarian view in his article “The Other Side of the Coin” and argues that there is a limit to individualism. To him having rights necessitates accepting the responsibilities that go with them.121 He urges that American society must build a “new social, moral climate for a more communitarian orientation.”122 Thus for the communitarians duty and rights are not mutually exclusive, rather they are considered be complements of each other.

Of course, these challenges have not gone unanswered. Liberal theorists have responded to communitarian critiques by maintaining that the perception of liberalism as absolutely individualist is inaccurate.123 They argue that the tension between collective and liberal theory is only based on misunderstanding and not on any real differences.124 They assert that early liberal theory is consistent with the

120 Ibid at 454. “A communitarian morality, as I have thus far described it, is not at its core a philosophy of liberation. The central value is not freedom or independence but belonging. (This is where it most sharply departs from the liberal tradition.) At the same time, what it means to belong must encompass respect for the integrity of the person.”


124 In “Liberalism and the Communitarian Critique: A Guide for the Perplexed,” supra note 114. Patrick Neal and David Paris argue that the critique of Locke’s Two Treatises of Government as solely liberal individualism is based on a misunderstanding of his theory. See M Freeman, “Human Rights:
communitarian vision and is aware of the connection between the individual and his community, nation, customs, and traditions. For example, some argue that the writings of prominent liberalists like Rousseau and Rawls concede to the communitarian view that the individual is connected to his community. Liberals argue that “individual freedom is tied to collective membership because such membership is intensely relevant to an individual’s sense of identity, self-worth, well-being and sense of belonging.” Therefore, they allege that the notions of duty and obligations as advocated by the communitarians do not necessarily conflict with individual freedom because the individual, in fulfilling his obligation towards the community, often realises his freedom in the process. Joseph Raz puts this argument in perspective in his “Morality of Freedom”:

Personal friendship, marital relations, one’s loyalty and sense of pride in one’s workplace or country are amongst the most valuable and rewarding aspect of many people’s lives. Such relations are culturally determined forms of human interaction and it is through learning their value that one acquires a sense both of the possibilities of one’s own life and of one’s obligation to others.

However, if liberal theorists’ arguments are true, then a real difference would not exist between liberal and communitarian theories as such, and the long debate between the liberals and communitarians would be a false one. Binder provides us with a theory to understand the difference between liberals and communitarians is


125 Ben Saul, supra note 68 at 548.

126 Ibid. Saul argues that “Rousseau’s social contract theory presupposes reciprocal rights and responsibilities and assumed a considerable degree of communal coherence and the existence of a social ethic of public responsibility, as part of the heritage of feudal society.”


128 Ben Saul, supra note 68 at 585.

129 Ibid.

their approach towards the family relationship. Understanding this difference is important because it helps us locate the position of the CRC approach to the autonomous child. According to Binder the difference between liberals and communitarians lies in their approach toward the family relationship. He points out that the “sensitivity communitarians have to the value of relationships has not been adequately incorporated into liberal theory, at least with respect to children.”

Binder argues that if the liberal theorists were sensitive to the family relationship they would have come to the conclusion that the protection of a child’s right to autonomous self-definition necessitates protecting that child’s relationship with her/his parent. This relationship is one that involves interdependence and mutuality that invariably constrains the autonomy. This approach differs from the one adopted by the CRC because it locates the autonomous child within the family and the community out of necessity, but insists that the child’s individuality remains separate. This would seem to deflect the criticism that the CRC has totally overlooked the relevance of relationships. However, a difference exists between recognising relationship ties and acknowledging that reciprocal obligations and constraints exist within relationships. The CRC emphasises the rights of the child but does not acknowledge the duties of the child within the relationships it recognises. Therefore, the criticism levelled against liberalism—that it assumes the centrality of the individual person and places an emphasis on rights to the exclusion of

132 Ibid at 1154.
responsibilities—rings true for the CRC. Africans also reject the liberal claim that it is possible to achieve autonomy within the family/community without acknowledging duties and responsibilities. This problematic issue is discussed in the following section.

1.7.2 The African/Asian Perspective

The communitarian views discussed above suggest an understanding that is central to the African perception of individual autonomy, even though the African perspective regarding duty is itself distinct. Communitarians argue for the need for responsibilities on the basis of morality as opposed to the very nature of rights. For example, according to Audrey Chapman, the effect of this communitarian position is a reduction of the argument to “private persuasion and exhortation as a means to encourage voluntary fulfilment of duties,” This stance differs from the African perception of duty, in the context of individual rights, which is not regarded as “voluntary” but rather considered obligatory backed by legal as well as moral expectations. As Alston suggests, the African perceptive goes beyond the notion of duties owed to the state to include duties to individuals and other groups. These differences between communitarian and African perspective notwithstanding, it is

135 Ibid at 4.
136 Ibid at 4.
138 Henry J Steiner & Philip Alston, supra note 113 at 496.
agreed, both in the body of literature and practice, that they share similar viewpoints about the role and place of the individual.139

Like the Communitarians, Africans are at the forefront of calling for the recognition of duties alongside rights. This is their position because customary law and practices and African legal systems recognise the individual, and at the same time, emphasize individual duties and obligations so to reiterate his/her position as part of a community or the larger society.140 Within most African societies, family includes extended family members- grandfather, brothers, aunty and cousins, and emphasis is placed on interdependence, co-operation, and collective responsibility.141 Hence, relationships between individuals are conceptualised in terms of duties. Several concepts used within the African continent capture this emphasis on duties in relationships. For example, Makua notes that the Dinka concept of Ciang promotes human values such as “loyalty and piety, compassion and generosity and unity and harmony, and therefore attunes individual interest to the interest of others.”142 Another example of this emphasis on duty is seen amongst the Bantu peoples of eastern and southern Africa; the concept of Mundu in Kikamba or Mtu in Kiswahili makes reference to the individual who is at peace with, and is helpful in, his/her community.143 All these concepts emphasize the ties between the rights of the individual to those of the group. In this regard, Ncube writes that “the idea of an

141 Ibid at n.176.
143 Ibid.
autonomous and fully independent person outside the framework of the kinship group or family appears alien to the traditional conception of rights” in Africa. This view of the individual is also captured in the report from the meeting that drafted the African Charter notes that “the concept of the individual, completely free and completely irresponsible, and at all times in opposition with society, does not conform with African philosophy”.145

Nevertheless, within this conception of the role of duties, the individual enjoys all his/her civil rights (freedom of expression, freedom of religion, and freedom of movement) but must exercise his duties towards the family and society. This is not to say that an individual’s exercise of his/her rights is contingent on her/his fulfilment of their duties, but rather that the individual’s duties are regarded as equally important as his/her rights. An example of how individual duties and rights can co-exist is described by Wiredu in his discussion of the Akans of West Africa: “On the face of it, the normative layer in the Akan concept of the individual brings only obligation to the individual. In fact, however, these obligations are matched by a whole series of rights that accrue to the individual simply because he lives in a society.”147 Hence, the African emphasis on duty does not exclude individual rights but to “individuate

adequately,” as one scholar puts it, rights have to exist along with social responsibilities within the family and community.¹⁴⁸

The same conception of individual autonomy also governs the rights of the child. African children are not perceived as autonomous individuals with individual interests as such, but are a part of a larger family unit or community and the collective interests it holds.¹⁴⁹ Children have the duty to respect and obey their parents, and to care for them in old age. Evidence of the importance of the concept of the duty of individual members of a community can be seen in the African Charter on the Rights and Welfare of the Child (ACRWC), which extensively provides for the child’s duties.¹⁵⁰ The Constitutions of several African countries also recognise this concept of duty.¹⁵¹ For example, the Democratic Republic of Congo,¹⁵² Eritrea,¹⁵³ and Cape Verde¹⁵⁴ provide that “minors have the duty to obey their parents and respect their authority.” This conception of the child, as one with rights as well as duties, is central to understanding the difficulties of the African delegates to the CRC Committee on the Rights of the Child who argue that since a gap exists between the law and practice in their states, they face major difficulties in implementing their obligations under Articles 12–17, which are intended to create autonomy rights. Hence, the call for the

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¹⁵⁰ Article 31(a) to (f). See African Countries, and a fundamental value is contained in Article 29(1) of the African Charter of Human Rights.
¹⁵² Section 40 provides that “children have a duty to assist their parents.”
¹⁵³ Article 22.
¹⁵⁴ Article 81(5), Cape Verde Constitution.
recognition of duties remains strong within this group. Africans are not alone in calling for duties to be included in the consideration of autonomy rights. Other regions, even in the Western world, have a renewed urge amongst their people to include duties to complement rights, for example, the Asia-Pacific region.

1.7.3 Asia-Pacific Region Perspective

Traditionally, Asian values have emphasised the responsibility of the individual to society and towards other individuals. This emphasis stems from the belief that human beings are not born autonomous; they can only achieve status through society by the performance of duties towards others. This emphasis on the collective rather than the individual is due to the influence of Confucianism in many parts of the region. This ethical approach entails the discharge of duties within relationships, for example, between parent and child, husband and wife, elder and youngster, and friend and friend, etc. Within this behavioural guideline, especially in the relationship between parent and child, a duty is imposed on children to respect and obey their parents and to care for them in old age. The rationale behind this guideline is the recognition that a child owes a duty and must support their parents who gave birth to and scarified for them. The concept that individuals owe duties has been recognised in both government and non-governmental non-legally-binding

155 This is discussed further in the next chapter.
156 Douglas Hodgson, supra note 50 at 53.
157 Ibid at 55.
158 Confucianism is a system of ethics that stresses the importance of acting humanely with an emphasis on the fulfilment of mutual obligations. Douglas Hodgson, supra note 50, page 53.
159 Ibid at 54.
160 Ibid at 55.
161 Ibid.
policy statements. A specific example of governmental effort in Chinese society is the Constitution of the People’s Republic of China of 1982 that provides that “children have the duty to support their parents.” A similar approach was adopted in Singapore when the government launched a “Shared Value” campaign to promote the values of community and interdependence over self/individual interest. At the inter-governmental level, the Regional Council on Human Rights in Asia adopted the Declaration of the Basic Duties of ASEAN Peoples and Governments, which acknowledges in its preamble the correlative relationship between human rights and duties. These Asian campaigns highlight the values of duties and obligations that an individual owes to his/her community, which include discipline, respect, restraint, and obedience.

Other examples of cultures where a strong emphasis exists on interdependence and individual’s responsibilities include Latin America, and a child’s duties also are recognised in the American Declaration of the Rights and Duties of Man of 1948. Similarly, calls to recognise duties and responsibilities have been made within the United States, United Kingdom, Islamic countries, and Europe. For example,

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162 Ibid at 113.
163 Art 46. Ibid at 155.
164 Ibid at 113.
165 Ali Alatas, the Indonesia Foreign Minister, explains the reasons for the “Asian value” campaigns: “Implementation of human rights implies the existence of a balanced relationship between individual human rights and the obligation of individuals towards the community. Without such a balance, the rights of the community as a whole can be denied, which can lead to instability and even anarchy, especially in developing countries...” quoted in Douglas Hodgson, supra note 50, page 124.
166 The duty of children is to always honour their parents and to aid, support, and protect them when they need it. See Douglas Hodgson, supra note 50, page 155.
167 Both political parties in the U.S. now call for “shared responsibilities and citizenship” duties in their policy pronouncements. See Charles P Henry, “On building a Human rights Culture” in Kenneth Hunter & Timothy Mack, eds., International Rights and responsibilities, supra at xxi. See also the writings of M A Glendon (1991). Dr Amitai Etzioni, who has written extensively on the communitarian outlook in the U.S. also expresses similar views. See The Spirit of Community: Rights and Responsibilities and the Communitarian Agenda (New York; Crown, 1993)).
in Bulgaria, the government stated in the Council of Europe that the emphasis on “individualism has undermined personal moral responsibility and resulted in egoism and self-centeredness, a rise in unethical conduct and crime....” These assertions prove that recognition of the important role of duty is increasing in rights discourse. Feminists and some other human rights scholars make a similar demand for the inclusion of duties in rights discourse.

1.7.4 Feminist Perspective

Some Feminist theorist objects to the liberal notion and ideals of autonomy and individuality. It posits that this notion “isolates individuals from one another and reduces the necessary interconnectedness of human beings.” Accordingly, feminists reject the conventional rights rhetoric for a construct that emphasises relationship and interdependence amongst people. An important contribution of feminist moral theory to the debate of autonomy is the insistence that duties and responsibilities must play a role in the autonomous existence of a child. For example, feminists like Martha Minow have argued that individual rights theory, especially as it relates to children, is problematic because it excludes duties and interpersonal connection while emphasising individual autonomy. Discussing the history of America legal system as it relates to children, Minow argues that, the juvenile court system is one example

168 See Ben Saul, supra note 68 at 571.
169 See the Cairo Declaration on Human Rights in Islam 1990, which states that both parents are entitled to certain rights from their children. For a discussion of the Islamic perceptive, see Jason-Morgan
170 See Ben Saul, supra note 68 at 571.
171 Martha Minow, for example, in her discussion of the many pitfalls of rights suggests that duty as a concept can enrich the discussion of rights. According to her, duty “introduces a bilateral dimension of rights that gives them content.” See Martha L Minow, “Rights for the Next Generation: A Feminist Approach to Children's Rights” (1986) 9 Harvard Women's Law Journal 1.
172 See feminist C Gilligan, In a Different Voice (Cambridge: Harvard UP, 1982).
173 Ibid at 255.
174 Martha L Minow, supra note 171 at 11, 18.
of a system that has failed because of its undue emphasis on individual autonomy. In her opinion, the court would have succeeded had it spelled out “not just the rights but duties—including both the duties of adults upon whom the juvenile is dependent and the duties of the juvenile to those entrusted with his or her care as well as to the state and larger society.”\textsuperscript{175}

In Minow’s opinion, the inclusion of duty can help to “introduce a bilateral dimension to rights that gives them content.”\textsuperscript{176} She argues that this approach helps to direct people’s attention to aspects of rights committed to facilitating interpersonal relations.\textsuperscript{177} Minnow’s focus on interrelationships is important to the issue of duties because it perceives children and adults as mutually dependent on one another, which suggests that as adults are responsible to children, so children also owe a responsibility to adults that surround them.\textsuperscript{178} Minow succinctly expresses this view in another of her articles in which she asserts that:

\begin{quote}
[O]bligations within families should be defined as correlates of the very definitions of families and of benefits accorded on the basis of family membership… In exchange for the privileges of family status, each family would carry the same package of obligation.\textsuperscript{179}
\end{quote}

Thus, her thesis offers the concept of “duty” as a “richer notion” that can complement rights.\textsuperscript{180}

\textsuperscript{175} Ibid at 22.
\textsuperscript{176} Ibid at 23.
\textsuperscript{177} Ibid. See also Martha L Minow, “All In The Family & In All Families: Membership, Loving And Owning” (1992-1993) 95: 275 W.Va.L.Rev. 327.
\textsuperscript{179} Martha L Minow, “All In The Family & In All Families: Membership, Loving And Owning,” supra note 177.
Nedelsky holds similar views. Using the metaphor of “childrearing,” she argues for a vision of autonomy that emerges through relationship and emphasizes interdependence with others. In her analysis, Nedelsky does not reject the value of autonomy but argues that relatedness and interdependence must be components of autonomy, and in her view, these are actually what sustain autonomy, which could not be meaningful without them. These feminists seek re-conceived autonomy rights that recognize the place of duty and obligations.

However, this feminist approach of emphasising relationships has been criticised by Federle who argues that relationships merely emphasize children’s dependencies rather than rendering them immaterial in the discourse of their rights. She contends that a focus on the dependence of a child on parents masks the inequalities of power within the relationship. Although this may be true as inequality invariably must exist based on the nature of the relationship, it cannot be said to completely eliminate the parent’s responsibility for care of the dependent child. Moreover, it is really, as Roche puts it, hierarchic in relationships notwithstanding that the feminist emphasis on relationship is about recognising the ‘interconnectedness’ of our lives as adults and family members. Thus, rather than the power dynamics that critics like Federle and Freeman caution about, the feminist

182 Ibid. 11.
183 See also Martha Minnow, supra note 178 at 1860.
184 Katherine Hunt Federle, supra note 14 at 356.
185 Ibid. For Federle, “tying rights to relationship is little more than a sophisticated version of the argument that children should have rights because of their incompetency.”
stance of defining autonomy through a recognition of the relevance of relationships gives a realistic context to the debate insofar as children are concerned.

With respect to the foregoing discussion, the common theme that runs through all the arguments—put forward by the communitarians, Africans, and feminist theorists—against an exclusive emphasis on autonomy and a focus on the individual is the call to link rights to relationships by integrating the duties of the child. Recent developments in the international human rights discourse indicate that a standard is already emerging for the integration of duty and rights. These trends are discussed in the next section.

1.8 Recent Trends Towards Integration of Rights and Duties

Even within the United Nations, the calls are growing for a new focus on the concept of individual duties. For example, in 1995, the United Nations Commission on Global Governance issued a report on individual responsibilities entitled *Our Global Neighbourhood*, which contends that rights must be joined with responsibilities. Declarations also exist by international bodies seeking to codify individual duties, for example, *The Universal Declaration of Human Responsibilities*


adopted by the International Action Council in 1997, 189 The Universal Declaration of Human Responsibilities produced by UNESCO in 1997, The Declaration of Human Duties: A Code of Ethics of Shared Responsibilities produced by the International Council of Human Duties in 1997, 190 The Declaration of Human Responsibilities produced by the United People’s Assembly in 1998, 191 and The Resolution on Human Rights and Human Responsibilities produced by the United Nations Human Rights Commission, which was followed by the appointment of a special rapporteur to study the question of human responsibility and duties. 192 Clearly, this trend points to an awareness that duty must play a role in the general human rights discourse. This is also important in the context of children’s rights since they are established and protected within the broader human rights framework.

In relation to children, the debate in Canada surrounding the law that obligates children to support their parents demonstrates the importance of the concept of duty. 193 However, this law remains controversial, with supporters and critics

191 Ibid., Morgan-Foster at 62 (citing A declaration of Human Responsibilities, United People’s Assembly (1998),
192 Jason Morgan Foster, supra note 96 at 22.
193 The objective of this law is to ensure that elderly parents, who are impoverished, are assured financial support from their children who are capable of providing it. The law allows parents to sue their adult children for support. An example is the 1993 case of Godwin vs. Bolsco, (1993), 45 R.F.L. (3d) 310 (Ont. Prov. Div.); affirmed (1996), 20 R.F.L. (4th) 66 (Ont. C.A.) §327 where a mother sued her adult children for maintenance. The Ontario Court affirmed that the children of the plaintiff owed her a duty of support despite their arguments that an existing interdependent relationship did not exist before the case, and ordered the children to pay her a monthly support allowance. Another case is currently under way, which relies on this burgeoning ground of filial responsibility law. It is noteworthy to mention that all Canadian provinces except Alberta have legislated for filial responsibility.
arguing for and against the actual overall benefits of retaining it. Nevertheless, the frequency and the successes of parental support cases in Canadian courts provide some useful insights. First, a societal recognition and acknowledgment is present that the parent-child relationship entails obligations on the part of parents and children. Second, it can be argued that by passing and enforcing this type of legislation, society supports the “collective interest” of providing support to destitute parents over the “individualistic interest” of their children. Third, it reminds society that the children of today will be tomorrow’s adults.

Therefore, given the increasing acknowledgement of the interconnectedness of rights and duties, even within the so-called individualistic societies, and also given that this interconnectedness is reinforced within collective societies, the realisation is growing as to the important role that duties can play within the discourse of rights, especially in relation to children’s autonomy rights.

194 Terrance A Kline, “A Rational Role for Filial Responsibility Laws in Modern Society?” (1992) 26 Fam. L.Q. 195. Kline argues that the enforcement of filial responsibility laws might also reduce government expenditures and serve to enforce a moral duty between parent and child in those cases where a child has failed to assume the appropriate responsibility for parental support, thereby strengthening family ties by encouraging family members, rather than the government, to care for one another.


196 Ibid at 56

197 Ibid at 57. This is important in light of the growing number of the elderly, homeless, and unemployed, and dwindling government support funds to meet welfare demands.

198 South Korea’s Ministry of Health and Social Affairs established a Filial Piety Prize in 1973. Each year, the prize is awarded to between 150 and 380 of the most filially responsible adult children in Korea. Hosted during Respect for the Elderly Week, this event serves as one of the many incentives for children to provide support to parents (Sung 1990). More recently, China has been in the news for considering a law that will force children to visit their elderly parents (see www.cbc.ca). See also “Filial Responsibility—Filial Responsibility Laws” Online: http://family.jrank.org/pages/632/Filial-Responsibility-Filial-Responsibility-Laws.html#ixzz1Fkhhu3xY.

199 Geraldine Van Buren, supra note 22. She argues that the concept of duty can enhance autonomy and help educate others in the potential value of children’s contribution to society. Similarly, many articles
1.9 Conclusion

The objective of this chapter has been to discuss autonomy rights as they are imagined and conveyed by the CRC. While the inclusion of autonomy rights in the CRC is lauded as guaranteeing the child a voice and the recognition as having separate and individual legal status, a clamour is growing for the recognition of duties and responsibilities of the child from many groups including African and feminist theorists. As has been shown, these groups argue that the exclusion of duty does not adequately account for the reality of the child in relationships. However, a look at the drafting history of the CRC reveals that the inclusion of the duties of children was considered desirable by some of the delegates, but the propositions for their integration were not accepted. In the next chapter, I revisit the drafting process of the CRC so to explore the reasons for the exclusion of duties for children from the document’s final text. This analysis further considers the impact and relevance of the omission of the concept of duty from the central tenets of the CRC.

in the field of psychology argue for the need to reconcile autonomy issues with relatedness concerns as a very important factor for the family and in the development of the child.
CHAPTER 2

2. THE CONVENTION ON THE RIGHTS OF THE CHILD, AND THE CHILD’S DUTIES

2.1 Introduction

In the preceding chapter, I explained how the provisions on autonomy rights (Articles 12-17) in the Convention on the Rights of the Child (CRC) have generated controversy, especially since these rights do not stipulate the responsibilities of the child. This lacuna has attracted significant criticism that casts the CRC as being derived from a model mostly based on a Western liberal perspective, which assumes the centrality of the individual person and places an emphasis on rights rather than, or to the exclusion of, responsibilities.¹ These criticisms have been expressed by interest groups such as communitarians, Africans, and feminists who have argued for the re-integration of duties in the autonomy rights discourse.² Ironically, these discourses were a central point of negotiations during the drafting process of the CRC. A look at the travaux préparatoires of the Convention reveals that while the inclusion of the duties of the child was considered desirable by some of the delegates during the drafting of the Convention, the concept failed to gain sufficient support for an explicit inclusion. Many commentators who have examined the drafting history of the CRC, particularly regarding the exclusion of duties, argue that one of the reasons for this

² See discussion in Chapter 1.
non-inclusion was the overt influence of the dominant group, made up of Western states, on the final provisions that shaped the outcome of the negotiation process.\(^3\)

Others suggest that the urgency to reach consensus ensured that values such as duty were excluded.\(^4\)

In this chapter, I look at the drafting history of the CRC to examine the arguments associated with the exclusion of obligation-based principles during the negotiation processes. Thus, my first goal is to scrutinize the participation history so to investigate the makeup of the “dominant group.” My second goal is to examine the influence of this group with respect to the “consensus” that was reached on many provisions, especially the articles on autonomy rights, as well as the issue of absent duties. An exploration of the power dynamics at play during the negotiation process allows for an assessment of what the drafters intended. It also illuminates the difficulties associated with the implementation of the autonomy rights of the child, as currently understood and applied especially in less-represented states such as the African countries, which argue that the CRC is a western document because it excludes important African values.\(^5\)

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\(^3\) Sonia Harris-Short, “Listening to ‘the other’? The Convention on the Rights of the Child” (2001) 2:2 Melbourne Journal of International Law. 304-350. Harris-Short argues that the dominant groups continued to shape and dictate the outcome of negotiations during the drafting process. See also Afua Twum-Danso, “Reciprocity, Respect and Responsibility: The 3Rs Underlying Parent-Child Relationships in Ghana and the Implications for Children's Rights” (2009) 17:3 The International Journal of Children's Rights. See also the discussion in Chapter 1, footnotes 55 and 56.


The major source for this research is the *travaux préparatoires* documents compiled by Sharon Detrick. This collection contains all the records of the drafting process of the CRC. It provides insight into the process of the development of the CRC and some of the political and conceptual tensions that arose during the negotiation of the duties and rights provisions. The next section considers the participation history of the negotiations of the CRC.

### 2.2 The Politics of Participation—Majority versus Minority

The CRC is said to be the result of the participation of countries from different regions and cultures. Therefore, some claim it is “more responsive to different approaches and perspectives than most of the principal human rights treaties adopted earlier.” Hence, the proud declaration of James Grant, then the Director of UNICEF, that the CRC is the “first truly universal law of Mankind” and the enthusiastic endorsement of Adam Lopatka, the former Chairman-Reporter of the working group responsible for the CRC, who called it a “World Constitution.”

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Ashgate/Dartmouth, 1998) 150. Ncube documents the practical problems the African countries encounter in their efforts to translate the CRC into local reality.


An analysis of the experiences of some of the participants in the drafting process and the *travaux préparatoires* offers a less inclusive image.\(^\text{11}\) Nigel Cantwell, one of the participants who contributed to the meetings of the Open-ended Working Group, points out that there was “widespread apprehension during [the drafting] process that the outcome would be a heavily northern-oriented text because developed nations were significantly over-represented at all stages.”\(^\text{12}\) Eventually, this concern was expressed by a group of NGOs through a written statement submitted to the Committee that highlighted the low level of participation of developing countries, and the importance and need for the participation of these countries.\(^\text{13}\) In this regard, this NGO group drew attention to the fact that the majority of the children in the world live in developing countries, and although many of the issues that affect children are of global concern, the specific needs of children in the developing world needed to be highlighted. As the NGOs saw it, these needs could only be attended to most effectively by representatives of the developing countries themselves.\(^\text{14}\)

Nevertheless, the developing world participants remained few and their contributions limited.\(^\text{15}\) This account of events is corroborated by the participation records of the states as recorded in the *Travaux Préparatoires* as shown below in Fig. 1.\(^\text{16}\)

\(^{11}\) See generally Sharon Detrick, *supra* note 6.

\(^{12}\) *Ibid* at 23.


\(^{14}\) UN CHR, 1985b1-2 in Leblanc *Ibid* at 34.

\(^{15}\) *Ibid* at 34.

\(^{16}\) Sharon Detrick *supra* note at 6.
STATES AS PARTICIPANTS IN THE DRAFTING PROCESS, 1981-1989

<table>
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<td>4</td>
<td>4</td>
<td>6</td>
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<td>(27 states)</td>
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<td>(22.22)</td>
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<td>(11 states)</td>
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<td>(36.36)</td>
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<td>(61.11)</td>
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<td>(17 states)</td>
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<td>2</td>
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<td>2</td>
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</tr>
<tr>
<td>(3 observers)</td>
<td>(33.33)</td>
<td>(66.67)</td>
<td>(66.67)</td>
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<tr>
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<td>13</td>
<td>22</td>
<td>27</td>
<td>33</td>
<td>38</td>
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<td>(162)</td>
<td>(8.02)</td>
<td>(13.58)</td>
<td>(16.67)</td>
<td>(20.37)</td>
<td>(23.46)</td>
</tr>
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</table>

Fig 1: Participation history of state delegates.17

17 This data is compiled by Leblanc and sourced from the reports prepared by the working group on the Convention the Rights of the Child of the United Nations Commission. The classification of countries is based on their geographical locations rather than geopolitical orientations.


Asia and Pacific: (27 states) Australia, Bangladesh, Bhutan, Brunei, Darussalam, Cambodia, China, Fiji, India, Indonesia, Japan, Lao’s People’s Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Samoa, Singapore, Solomon Island, Sri Lake, Thailand, Vanuatu, and Vietnam.
As can be deduced from the records in Fig 1, different regions participated at varying levels of intensity.\textsuperscript{18} The Western delegates represented by Western Europe, Eastern Europe, and North America were in a clear majority and dominance in contrast to the states from the other parts of the world, for example, Africa, Asia, and the Middle East, and other regions in the Americas.\textsuperscript{19} Furthermore, to buttress their dominant participation, the Western states sent their delegates to all sessions of the meetings.\textsuperscript{20} For instance, the records show that France, the Netherlands, Norway, the United Kingdom, Canada, and the United States participated in all sessions from 1981-1989.\textsuperscript{21} Other states with an equally strong presence were Sweden, Denmark, the Federal Republic of Germany, and Italy that attended eight of the nine sessions.\textsuperscript{22} From the East European region, participation rates also were high—delegates from

\begin{itemize}
  \item **Europe East**: (11 states) Albania, Byelorussian SSR, Bulgaria, Czechoslovakia, and German Democratic Republic.
  \item **Europe West**: (18 states) Austria, Belgium, Denmark, Federal Republic of Germany, Finland, France, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, and United Kingdom.
  \item **Latin America**: (21 states) Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.
  \item **Middle East**: (17 states) Afghanistan, Bahrain, Cyprus, Democratic Republic of Yemen, Islamic Republic of Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Omar, Qatar, Saudi Arabia, Syrian Arab Republic, Turkey, United Arab Emirate, and Yemen.
  \item **North America and the Caribbean**: (14 states) Antigua and Barbuda, Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and the United States.
  \item **Others**: (3 non-members) Holy See, Monaco, and Switzerland.
\end{itemize}

\textsuperscript{18} Le Blanc, \textit{supra} note 13 at 31.
\textsuperscript{19} A point of clarity must be included here. The term \textit{West} or \textit{Western} used here refers to Western Europe and the Americas. Even though substantial differences exist in the histories of the different Western countries, they share “sufficient commonality to permit generalization in relations to other traditions.” For an analysis of “Western Categorisation,” see V Leary, “The Effect of Western Perspectives On International Human Rights” in AA An-Na’im & FM Deng \textit{Human Rights in Africa: Cross-cultural Perspectives} (Washington D.C.: The Brookings Institute, 1990).
\textsuperscript{20} As mentioned earlier, the Western states, including Australia, Canada, France, Norway, the United Kingdom, and the United States were always present. Poland and the USSR also were constantly present. See Philip Veerman, \textit{The Rights of the Child and the Changing Image of Childhood} (Leiden: Martinus Nijhoff, 1992) 183.
\textsuperscript{21} Leblanc, \textit{supra} note 13 at 32.
\textsuperscript{22} \textit{Ibid.} at 32.
the then USSR, Poland, and Bulgaria attended all the sessions. In contrast to the Western and Eastern European regions, amongst the developing countries, only Argentina, Brazil, the Central African Republic, the Dominican Republic, and India sent their delegates to all sessions of the Open-ended Working Group. Other countries within the African, South American, and Asian regions had sporadic attendance. Among the developing countries, the African states were the least represented during the drafting process. In the course of the 10-year process that lead to the finalization and adoption of the CRC, only 3 African states out of 51 participated during 5 of the 9 years that it took to draft the final proposal. The Travaux Préparatoires indicate that Senegal, Algeria, and Morocco were the only visible and consistent African states present during the negotiations of the draft Convention for many years. Other countries from the region, many with Islamic legal systems, joined at the last minute in 1988, a year before the adoption of the final document. Many reasons have been attributed to the low participation of developing countries, especially those within Africa, which include lack of resources—both

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23 Ibid at 32. The high attendance of Poland was expected, since it introduced the proposal for the draft Convention on the Rights of the Child. Also, Adam Lopakta, the Chairman of the Working Group sessions, was from Poland.

24 Philip Veerman, supra note 20 at 183.

25 For details about the Working Group, see David Johnson, “Cultural and Regional Pluralism in the Drafting of the UN Convention on the Rights of the Child” in M Freeman and P Veerman, eds., The Ideologies of Children’s Rights (Dordrecht: Martinus Nijhof, 1992). The Working Group on the draft CRC was an auxiliary body of the United Nations Commission, consisting of 43 seats apportioned to five regional caucuses: 10 seats for the West (Western Europe, the United States, Canada, Australia and New Zealand), 5 seats for the East (the Soviet Union and Socialist Europe), 11 seats for Africa, 9 seats for Asia, and 8 seats for Latin America.


27 Senegal attended 7 sessions out of 9; Algeria attended 6 sessions out of 9; and Morocco consistently attended all the sessions for 7 years. See Leblanc, supra note13 at 33.

financial and human— inadequate institutional structures, and indifference to the treaty-making process.\textsuperscript{30}

Undoubtedly, the conclusion to be drawn from the data in Figure 1 is that the Western and Eastern European states dominated the drafting process of the CRC, and therefore, they can be regarded as its principal drafters.\textsuperscript{31} This phenomenon was accentuated by the strong influence of the U.S. during the negotiating process, which had serious implications for the apparent consensus reached on much of the resulting text of the CRC. Goonesekere points out that the dominance of this group ensured that the tenets “emanating from the legal systems of the Western states formed the basis of different articles in the CRC.”\textsuperscript{32} Their influence on the articles has been widely noted in the literature. For example, Alston questioned whether the draft CRC was not unduly geared towards the situation of children in affluent industrialized countries over those living in developing countries.\textsuperscript{33} Similarly, Brems, in her discussion of cultural pluralism in the CRC, notes that the drafters of the CRC “seemed more often to have had the context and circumstances of western children in mind than those of

\textsuperscript{29} On the issue of resources, see Philip Veerman’s comments: “... many developing countries could not participate because their Ministries of Justice and Foreign Affairs were over-burdened. One participant of the working group... said to me, look for instance, at the Ministry of Health in Burkina Faso, there are likely 25 staff members and they have probably no Xerox machine.” P Veerman, \textit{supra} at 182
\textsuperscript{30} See Johnson in M Freeman & P Veerman \textit{supra} note 25 at 96-97. See also where the authors attributed the limited participation and engagement to several factors including a lack of trained personnel, scarce financial resources, indifference, and opposition to “child rights.” See Viljoen, \textit{Supra} note 26
\textsuperscript{31} LeBlanc \textit{supra} note 13 at 32.
\textsuperscript{33} P Alston \textit{supra} note 32.
the children of the rest of the world.”\textsuperscript{34} In the next section, I consider how the process of achieving consensus during the drafting process influenced the final text of the CRC. Then, I make a link to the consensus reached on the issue of duties. However, first, it is necessary to explain the process and nature of the consensus reached on the final text of the CRC.

2.3 Building Consensus—Power, Influence, and Wealth

Some have pointed out that during the drafting of the CRC, the working group operated on the basis of consensus in adopting the text of the individual articles.\textsuperscript{35} This means that a formal vote was not taken on any of the proposals; instead, decisions were reached through debates and compromise.\textsuperscript{36} In writing about the drafting sessions, Sanford Fox describes how the process of achieving “consensus” worked:

... there is no vote taken and nothing is considered as approved if any of the delegations present has some objection to it. This means that each country has a veto. It is not, of course, exercised in those terms: rather a delegate will announce; “Mr Chairman, my delegation cannot join consensus on that language”. That kills the provision in question, although sometimes the Chairman will follow up the exercise of a veto by appointing a small group to try to work out compromise language that will hopefully attract a consensus, but failing that, nothing gets into the Treaty that is not acceptable to all.\textsuperscript{37}

The preceding description would imply that real agreement was reached on the individual articles, since any opposition was enough to overturn a proposed article. However, the account of many commentators and participants of the drafting process

\textsuperscript{34} Eva Brems \textit{supra} note 32 at 27.
\textsuperscript{35} Nigel Cantwell in Sharon Detrick, \textit{supra} note 3 at 22.
\textsuperscript{36} See Leblanc, \textit{supra} note 13 at 26.
suggests that reaching consensus was not that straightforward. Cohen notes that the “entire Convention might collapse if seriously questioned” because the consensuses reached on many of the articles were “delicate” in the sense that real agreements on some of the issues did not occur.\(^\text{38}\) Nigel Cantwell, another participant, agrees with this conclusion and observes that with regard to the consensus, “…one cannot say there is universal approval for the provisions therein; a whole series of articles will violate some or other countries’ national laws.”\(^\text{39}\) A similar opinion is expressed more pointedly by Brash who contends that the “737 explanatory paragraphs inserted during the adoption of the draft Convention reveal the absence of general consensus.”\(^\text{40}\) In this regard, Veerman asserts that the Convention “reflects a negotiated consensus rather than a real consensus”.\(^\text{41}\)

These statements point to the inconsistencies that prevailed in arriving at “consensus” on the different issues. In many instances, the “consensus” developed on some provisions was reached despite clear opposition, or in some cases, without an agreement.\(^\text{42}\) Cohen describes an example of one such “consensus.” During the debate over the text of Article 38, dealing with children and armed conflict, at the second reading, the Swedish government made a suggestion to raise the minimum age for

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\(^{41}\) Philip Veerman, supra note 20 at183.

\(^{42}\) Nigel Cantwell agrees with this and writes that the consensus system resulted in the abandonment of certain proposals, notwithstanding the support of a clear majority. Cantwell, supra note 28 at 22 and 26. See also Cohen, supra note 38 at 191.
participation in combat from fifteen to eighteen years. However, the U.S. refused to support this proposal, insisting that fifteen years was the appropriate age. Despite an agreement by a majority of the delegates in support of Sweden, consensus was not reached due to the persistent refusal of the U.S. Thus, sustained opposition by the U.S. resulted in the adoption of 15 years as a minimum age. Nigel Cantwell’s narrative also supports this account of events:

the final consensus was uncomfortable, to say the least. At the last meeting of the working group, the United States delegate—ostensibly alone but benefiting from the silent support of several other delegations—categorically refused to give such protection to the 15-17 group. Despite vociferous opposition the chairman declared that, since there was no consensus on the upper age limit and no delegation was arguing age-limit under fifteen, this clearly implied that there was consensus on age fifteen. With that, he immediately closed the debate. Uproar ensued, together with the threats of reopening the debate at a higher level.

Another example of how the consensus reached was influenced in the process was evident in the negotiations of the autonomy principles or rights, which is the focus of this thesis. An examination of the Travaux Préparatoires shows that the U.S.-initiated articles include all the autonomy rights provisions under examination in this thesis (Article 13, 14, 15, 16). These proposals were supported by other Western governments including Norway, the Netherlands, the United Kingdom, Finland, Portugal, Argentina, Canada, and Sweden, despite opposition from other delegates. For instance, during the drafting of Article 14, the Islamic states opposed the idea that a child could choose his religion independent of his or her parents. With respect to

44 Ibid 191.
45 The irony of this case is that even though the U.S. significantly influenced the outcome of the CRC, it has not yet ratified the Convention. For a discussion of the role of the US in the drafting process see Cynthia Price Cohen “The Role of the United States in the Drafting of the Convention on the Rights of the Child” 2006 (20) Emory Int’l L. Rev.186
46 See Sharon Detrick, supra note 6.
Article 13, which specifically addresses freedom of expression, the Holy See argued that the statements should be “interpreted in a way that safeguards the primary and inalienable rights of the parents.”\(^{47}\) Similarly, Article 15, on freedom of association, was opposed by China and Poland.\(^{48}\) On the issue of privacy, some delegations considered its inclusion unnecessary, since they posited that the “fulfilment of the child’s basic needs was a more urgent matter.”\(^{49}\) Despite all these oppositions, the autonomy rights proposal under Articles 13 and 15 tabled by the U. S. was accepted.\(^{50}\)

These examples suggest that contrary to the view expressed above by Fox, consensus eventually was reached on many of the articles of the CRC despite some notable opposition to them.\(^{51}\) Clearly, in light of this analysis, a link existed between the clout or influence of certain delegations and the subsequent consensus reached on many articles of the Convention. Sally Engle-Merry explains how countries typically exert influence on the consensus reached in international agreements. In her account of her experience during the drafting of the *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),\(^{52}\) she writes that differential national resources affect the size and experience of national delegations.\(^{53}\) This economic power, as well as political power, in turn affects the capacity of a country to

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\(^{48}\) Sharon Detrick, *supra* note 6 at 232.

\(^{49}\) *Ibid.*, at 256.

\(^{50}\) Leblanc, *supra* note 13 at 158. Leblanc describes the drafting process of the participation rights, and the role of the U.S. in the process.

\(^{51}\) *Ibid.* at 22. The consensus model also resulted in the abandonment of certain proposals despite the clear support of the majority. For example, the provisions on the medical experimentation on children and the participation of children in armed conflict were abandoned.


mobilize allies.\textsuperscript{54} Therefore, those with fewer resources are not able to push their agenda as effectively as richer nations. She notes that one of the drawbacks of reaching consensus with such inequality among participant states is that a “small group of countries can exert its wishes in a way that it could not under majority voting.”\textsuperscript{55} Therefore, she cautions against assumptions associated with consensus building, since inequalities exist between countries and this affects the ability of some to influence the substantive outcomes of an international instrument.

As was clearly the case for the U.S. and its Western allies, such a bloc wielded a disproportionate amount of influence on the substantive outcomes of certain CRC provisions. Some have noted that the U.S. was so influential that “it not only added new rights but it also wielded power throughout the consensus process to prevent other rights from being included.”\textsuperscript{56} According to Cohen, the American influence was so predominant that some referred to the Convention as the “U.S. Child Rights Treaty.”\textsuperscript{57} In contrast, less powerful delegations like Senegal, with its own set of legitimate concerns, had little influence on the outcome of the documents. This point is made by Brash, an observer at the drafting process, who notes that the Senegalese delegation was clearly frustrated by its lack of influence, since many of its proposals were not included during the drafting process.\textsuperscript{58} Therefore, it is no surprise that the

\begin{itemize}
\item \textsuperscript{54} Ibid at 47.
\item \textsuperscript{55} Ibid at 45.
\item \textsuperscript{56} See C Price Cohen, supra note 43 at 191.
\item \textsuperscript{57} Ibid at 185. The irony is that the U.S. is the only Western state that has not ratified the CRC. For an analysis of this development, and an account of the role of the U.S. in the drafting of the Convention, see Cynthia Price Cohen, supra note 43 at 9.
\item \textsuperscript{58} B Russell, “The Draft Convention on the Rights of the Child: A case of Euro-centrism in Standard Setting” (1998) 58 Nordic Journal Int. L. 24 at 24. Some of the suggestions included the proposal of Senegal for an amendment to the 10th preambular paragraph to add the words “collective/community” to the adopted paragraph. The chairman ruled that since paragraph 10 had been adopted previously, the proposal could not be considered. This decision contrasts with the one made when the U.S. wanted to
\end{itemize}
concept of duties was excluded from the final document, since Western legal systems, to which the dominant and influential delegations subscribed, emphasize the rights of the individual and his/her centrality to the exclusion of her/his responsibilities. With these outcomes in mind, the next section examines the way in which consensus was reached on the duties of the child, and contrast this with the way in which consensus was reached on the autonomy rights of the child.

2.4 Contrasting Approaches and Reaching Consensus—Autonomy Rights Versus Duties

2.4.1 Duty Negotiated

At the 1989 session of the Working Group, Senegal proposed the inclusion of the following provision: “The child has the duty to respect and to give assistance to his parents, in case of need.” The Travaux Préparatoires indicate that a number of delegates supported this proposal by the Senegalese delegate. These delegates maintained that, in a number of international human rights instruments, rights were accompanied by corresponding duties, and so certain duties might also be properly recognized within the new Convention. Some delegates supported the inclusion of change paragraph 11, which also was already adopted. The U.S. suggestion was approved by the Working Group. See E/CN.4/1989/WG.1/WP.17 or Sharon Detrick, supra note 6 at 111.


60 Sharon Detrick, supra note 6 at 156.

61 Those in support of the proposal were the Federal Republic of Germany, Libya, Ireland, Egypt, and Bangladesh.

62 Sharon Detrick, supra note 6 at 156.
the article and offered several possible amendments. For example, delegates from Ireland suggested to change the last part to read: “... to accord them necessary assistance.” The observer from Egypt also suggested an amendment to the proposed article. Other delegates who supported the proposal included the Federal Republic of Germany, Libya, and Bangladesh. However, several other delegations were either hesitant to support this proposal, or they expressly opposed it. For example, the delegate from the International Labour Association argued that asking children to give assistance in time of need was tantamount to child labour. Others were of the opinion that “the duty to respect parents was more a moral one than a legal one and that in practical terms, it will be difficult for state parties to report on the compliance of this provision in the Convention.” Amongst those in opposition were the delegates from the U.S. and Australia. The delegate from Canada suggested that Senegal should raise this issue on another occasion within the framework of issues under Article 16, which is now Article 29, on the objectives of education. The reason for Canada’s association of the goals of education and the duty to respect

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63 Ibid.
64 Ibid. Egypt suggested that “if they are capable of doing so” should be included after the word “assistance.”
65 David Johnson, supra note 25 at 111.
66 Detrick, supra note 6 at 156.
67 Johnson, supra note 65 at 111.
68 Sharon Detrick, supra note 6 at 157. Article 29 provides: “State Parties agree that the education of the child shall be directed to
The development of the child’s personality, talents and mental and physical abilities to their fullest potential.
The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of United Nations.
The development of respect for the child parents, his or her cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.
The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, ethnic national and religious groups and persons of indigenous origin.
The development of respect for the natural environment.”

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parents is not given, but as Leblanc notes, in the objectives of Article 29, “schools are important agents of socialisation and transmission of values.”

Hence, the focus for the Canadian delegation may have been on learning within formal and institutional arenas; however, learning also occurs in less formal settings than originally anticipated by the CRC. The insensitivity to this fact supports the claim made by critics that the focus of the original drafters was on the Western child.

The Travaux Préparatoires indicate that the final words adopted in Article 29 (1) refer to the “development of the respect for the child’s parents.” The adoption of the language—“development of respect”—instead of a clear stipulation of a formal duty on the part of the child to respect his or her parents as proposed by Senegalese has the effect of diminishing the concept of legal duty.

Furthermore, the approach adopted in this case to reach consensus contradicts the manner in which some previous articles were adopted. This discrepancy is exemplified during the 1986 Working Group session by the American delegation’s proposal of articles 12 and 13 on freedom of expression. As indicated previously, to garner support for the proposal, the representative of the U.S. adopted two strategies. First, he claimed that “the protection of children’s civil and political rights was of

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69 Leblanc, supra note 13 at 182.
71 Article 13 provides that: “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”
2) The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   a) for respect of the rights or reputation of others or
   b) for the protection of national security or of public order (ordre public), or public health or morals.
fundamental importance to his country."  

Furthermore, he argued that these rights were universally accepted and recognised, since they are included in the *Universal Declaration of Human Rights* and in the *International Covenant on Civil and Political Rights.* Then, he reminded the Committee of the “principle of incorporation” of the previous agreement reached to integrate articles from existing international agreements. Thus, he argued that “the United States’ proposal was intended to complete the process already begun by the Working Group of incorporating provisions from the *International Covenant on Civil and Political Rights* [ICCPR] into the draft Convention.” This American proposal to include the child’s right to freedom of expression was adopted in its “essential details” and subsequently included in Article 12 of the CRC despite intense opposition to these rights by some delegates as discussed earlier in this chapter.

The principle of the incorporation of previous international treaties was used several times. Out of the 39 substantive Articles, 16 mirror the provisions of the ICCPR and ICESCR. The same approach was adopted by the American delegation during the debate on Article 15 on the freedom of association and

72 Sharon Detrick, *supra* note 6 at 231.


74 Sharon Detrick, *supra* note 6 at 233. See also Brash, *supra* note 40 where he noted that “In resolution 41/120 of December 8, 1986, the General Assembly proposed guidelines for the further elaboration of international human rights law. New instruments should be consistent with existing ones, elaborating rights which are of fundamental nature arising from human dignity, and above all they should be implementable.”

75 Sharon Detrick, *supra* note 6 at 233. The Working Group incorporated into the draft convention laws already elaborated in other covenants. See also Leblanc, *supra* note 13 at 161.

76 Sharon Detrick, *supra* note 6 at 232. This occurred despite opposition from many delegations, such as the USSR, China, Algeria, Poland, and Iraq.

77 Some of these articles were paraphrased while others were adopted word for word. For example, Article 2, 6, 7, 10, 13, 14, 15, 16, 30, 37, and 40 of the CRC mirrors Article 26, 6, 24, 12, 19, 18, 21, 22, 17, 27, 6-7, 9, 10 and 14-15 respectively of the ICCPR. For an analysis of these articles, see Russell Brash, *supra* note 40 at 151.

78 Articles 18, 24, 26, 27-28 of the CRC mirrors 10, 12, 9, 11, 13 of the ICESCR. See Russell Brash, *ibid.*
The U.S. representative maintained that freedom of association and assembly was important to his country. He also noted that including this right would be an appropriate complement to the freedom of thought and conscience, and because it is recognized in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Again, these proposals were adopted despite the opposition of several delegations.

Similar arguments were advanced by the Senegalese delegation to garner support for a proposal on the duties of the child. The *Travaux Préparatoires* indicates that the Senegalese delegate, while addressing the Working Group on the draft Convention, appealed to the Committee to accept “this cultural value of Africa and Asia.” Similar to the American delegate, he reminded the working group of the agreed “principles of incorporation,” which require the incorporation of principles already adopted in other human rights instruments. As pointed out previously, other international agreements such as the UDHR, ICCPR, and ICESCR refer to the

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79 Article 15 provides that: 1) State Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2) No restriction may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public health or morals or the protection of the rights and freedoms of others.

80 Leblanc, supra note 13 at 75.

81 UNCHR, 1987, 26-27 in Leblanc, supra note 13 at 173.

82 Delegates from Algeria, China, Iraq, Poland, the Soviet Union, Australia, Norway, Sweden, and the U.K. opposed the U.S. proposition. See Leblanc, supra note 13 at 174.

83 David Johnson, supra note 25 at 111.

84 Ibid.

85 *Universal Declaration of Human Rights*. GA Res 217(III) UNGAOR, 3d Sess, Supp No 13, UN Doc A/810,(1948) 71


duties of the individual as well as her/his rights. Senegal’s proposal was not adopted as tabled; rather, it was watered down, even though the principle of incorporation adhered to during the drafting of the Convention aimed to ensure a direct integration and normative consistency between the Convention and other international human rights instruments.

The argument proposed in the present thesis is that the process, by which one set of provisions was incorporated in the Convention because other covenants had recognised it, should also have been extended to the Senegalese proposal regarding duties. Clearly, as discussed earlier, political and economic influence and clout played a major role in determining which rights were ultimately adopted within the CRC. The limited sway of developing countries, which commonly have a cultural and legal ethos that places greater emphasis on the notion of “duty,” could not push propositions forward as authoritatively as other wealthier and powerful states.

Many commentators on the CRC have noted this downgrade of Senegal’s proposal. For example, Harris-Short calls it “disappointing,” since it falls short of the initial proposal. She notes that given the importance of duty to the value systems of many cultures in the world, especially within the African societies, the CRC missed

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88 Paragraph 5 of the preambles of the ICCPR and ICESCR refers to duties: “The individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of... human rights.”

89 See Leblanc, supra note 13 at 161, 284. Leblanc points out that the U.S. delegate argued successfully against an amendment by stating that the proposed restriction did not appear in the ICCPR, and therefore, it should not also appear in the draft document. See also Sharon Detrick, supra note 6 at 158. Detrick points out that the delegates from the U.S. argued that the family should be protected by adopting the language of the ICCPR.

90 Several articles were adopted by this method, for instance, when Finland, Poland, Senegal, and the U.S. referenced article 19 of the ICCPR. See Sharon Detrick, supra note 6 at 232, 234.

91 S Harris-Short, supra note 3 at 323.

92 The African concept of duty is discussed in Chapter 4.
the opportunity to be truly inclusive by incorporating the duties of the child. Nevertheless, she considers the eventual inclusion of the concept in its watered-down form a compromise that still meets the goal of promoting within the child a sense of responsibility and duty towards her/his parents and community. Van Buren argues that given the international prominence of the CRC, the concept of duty as a tool for enhancing autonomy should have been included. However, other scholars, like Johnson are more positive in their analysis. He notes that a compromise was found without excluding the issues from the agenda. Therefore, he posits that “the legitimate concern of [the] African delegation was recognized and incorporated into the Convention.” Thus, he concludes that “it is perhaps remarkable that such a level of consensus was in fact reached on issues impinging on a culturally sensitive area like family law.”

As suggested by Harris–Short and Johnson, the idea that including duties within the framework of children’s rights connected to their education needs meets the goal of imposing a duty on the child is not accurate. The provision, as constructed, cannot be accepted as an explicit recognition of the child’s “duties” toward his/her parents. It refers only of “the development of the child’s respect toward his parents.” First, the term “duty” is not used in the sentence; however, the various articles in the convention that impose legal duties on parents do make explicit reference to the

93 Harris-Short, supra note 3 at 322.
94 Ibid. 323.
95 See Van Buren, The international Law on the Rights of the Child, at 41. Van Buren notes that the concept of responsibility is particularly important for children, since it helps educate others as to the potential value of children’s contribution toward society.
96 Johnson supra note 25 at 112.
97 Ibid. note at 25.
98 Ibid.
words “duty” or “responsibility.”

Thus, the absence of such language in Article 29 of the CRC indicates that its drafters did not intend to impose a formal duty on the child. Equally significant is the consensus within the academic literature that a legal duty is not imposed on the child. For example, African commentators argue that the regional African Charter on the Rights and Welfare of the Child became necessary because the CRC excludes some important African values such as the “duties of the child.”

As discussed earlier, the reluctance to embrace the concept of duty was mostly based on the difficulties associated with the enforceability of duties. However, these fears are exaggerated because the fact that an obligation is not enforceable did not cause the drafters to refrain from including other provisions that might be idealistic. In fact, the example of the African Charter, which provides for the duties of the individual as well as an obligation on the state to inculcate values, shows that an approach of imposing a formal duty as well as one of the goals of education went hand to hand. Moreover, there is nothing new about these rights. Provisions in Western instruments already impose duties on children, for example, Article 597 of the Civil Code of Québec states that children owe their mother and father a duty of respect.

The American Declaration on the Rights and Duties of Man also enshrines

[99] See articles 3, 4, 14, 18, and 27 which provide for the duties of parents, legal guardians, family members, and other individuals legally responsible for the child.
[100] Some argue that the CRC places an indirect duty on the child by conferring Civil Rights on him/her with restrictions on the exercise of these rights. For example, children have the duty to respect the fundamental rights and freedoms while exercising their own rights. See Douglas Hodgson, Individual Duty within a Human Rights Discourse (Aldershot: Ashgate, 2003).
[103] Art 597 CCQ.
the duties of children towards their parents. Article 30 of the Declaration places a duty on children to “honour their parents always and to aid, support and protect them when they need it.” Essentially, the concept of responsibility was not so unusual that it should have been excluded during the drafting of the CRC.

It is conceded that the text of the CRC could not realistically reflect all the competing demands or interests of all the state parties. However, given that the majority of the children in the world live in the regions that support duty as a means of achieving children’s rights, the CRC should have been more accommodating of that principle. Indeed, as Harris-Short, in her discussion of the drafting process, has rightly argued, “...in negotiations such as those surrounding the CRC’s drafting, all states must not only have their views and insights heard, but they must be treated with equal consideration.”104 In this case, equal consideration was not given to Senegal’s proposal on duties for children. Invariably, by failing to include this fundamental principle, the CRC created a gap between law and reality—a gap that has motivated many writers to insist that the CRC represents primarily Western experiences and values, and thus is not completely acceptable within other regions.105 This omission has engendered doubts about the legitimacy of the CRC in non-Western societies. In my opinion, the inclusion of the concept of community responsibility and duties would have infused the needed local legitimacy to the CRC, especially in African and Asian countries.106

104 Harris-Short, supra note 3 at 314.
105 Eva Brems, supra note 32 at 36. See also Brash Russell, supra note 40 and Harris-Short, supra note 3.
106 Africa’s peculiar situation was not sufficiently addressed by the CRC. Julia Sloth-Nielsen identifies some of these peculiarities: the African conception of community responsibilities and duties, and the particularly difficult economic situation in the continent, the then prevailing apartheid regime in South
2.4.2 States Delegates’ Reactions: Disappointment, Disagreement, and Defensiveness

The dilution and weakening of the Senegalese proposal threatened the acceptance of the CRC by some state delegates: “Many delegates were disappointed, especially Islamic, African and Asian representatives whose societies consider a child’s duties to his or her parents, elders and extended family members to be an important aspect of family life.”\(^{107}\) Delegates from these regions made critical observations concerning the draft Convention at various stages, which reflected their doubt that the cultural differences of their groups were reflected in the CRC.\(^{108}\) For example, during the adoption of the report, the Senegalese representative stated that the drafting exercise did not take into account many of the concerns of developing countries.\(^{109}\) He urged the Working Group to be more receptive to the issues presented by developing countries to ensure a “universal recognition” of the Convention.\(^{110}\) At one point to buttress his stance, he suggested changing the title of the Convention, since he had “doubts whether the present title which read ‘A draft Convention on the Rights of the Child’ faithfully reflected all those concerns which the delegations had

\(^{107}\) Leblanc, supra note 13 at 48.

\(^{108}\) Brash, supra note 40 at 147.

\(^{109}\) For example, concerns raised about the definition reserved for terms such as “guardianship,” “adoption,” “filiations,” “the legal situation of legitimate and illegitimate children,” “protection of the child before birth,” and “custody of children.” This list is indicative rather than an exhaustive, considering that the Senegalese delegate argued for the recognition of other values, such as the concepts of community responsibility, the nature of the family (i.e., the extended family), and duties. All these values were not considered, even though their inclusion would have further infused the needed cultural legitimacy into the CRC.

\(^{110}\) Detrick, supra note 6 at 624.
when elaborating this draft.” Later, he proposed that the title “A draft Convention on the Protection of the Child” be adopted.\textsuperscript{111}

The Senegalese delegate’s reluctance to join in the final consensus also demonstrates his disappointment that the realities of the African child were not adequately taken into account within the CRC. His following statement illustrates this point:

In deciding to join in the “consensus” or general agreement, if the term “consensus” is too strong, this delegation had wished to demonstrate its pragmatism and realism, lest its demands open Pandora’s Box, for each society understands the welfare of children in accordance with its own realities.\textsuperscript{112}

These reactions to the decision to exclude the Senegalese proposal provide a valuable lens through which to view the difficulties associated with the implementation of the CRC. As is shown in the following section, a similar theme echoes through the state parties’ reports to the Committee on the rights of the child. The main issue for them is whether the CRC conceptualisation of the relationship between the child and his/her parents, and the appropriate conduct between the child and other members of the family is applicable within all regions of the world.\textsuperscript{113} The reaction of Senegal to the draft process shines a spotlight on the argument made by many countries, especially from Africa. The next section considers these countries’ complaints to the Committee on the Rights of the Child.

\textsuperscript{111} Ibid at 626.
\textsuperscript{112} Brash, supra note 40 at 158.
\textsuperscript{113} Rwezaura, “The Duty to Hear the Child: A View from Tanzania” in Ncube, supra note 5 at 59.
2.4.3 State Parties’ Reactions—Reservations, Interpretative Declarations, and Selective Application

Despite the omission of “duties” from the CRC, which is a principal value in African societies, practically all but one of the African countries endorsed and ratified the Convention.\footnote{Earlier discussions have alluded to this fact.} In fact, 33 African states became parties and signatories to the Convention as early as 1991.\footnote{Leblanc, supra note 13 at 98.} Even more perplexing is the fact that Senegal, whose delegation had strongly criticized the biased nature of the CRC, ratified it without any reservation. Considering the hesitation and the scepticism expressed towards the CRC and its processes during the negotiations, this overwhelming support within Africa for the Convention and its rapid ratification would have seemed unlikely. Thus, a need arises to consider the reasons behind the ratification of this document, which according to many commentators, might be a mere “public relations exercise.”\footnote{The reasons for ratification are many. Todres suggests that one explanation is that most states do not want to be seen as neglecting children, whereas Sally Engle-Merry sees political benefits, such as from trade relations and foreign investment, as an important motivation. On the other hand, Burman notes that the ‘countries that ratified quickly were often those with the least intention of implementing the CRC in full’. In most cases, there is no doubt that ratification is only a public relations exercise that seeks to open doors of co-operation with lenders or aid from donors. See Jonathan Todres, “Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and its Earlier Cases” in Freeman, ed., Children’s Rights Volume 11 at 140; Sally Engle-Merry supra note 53 at 79; and Erica Burman, “International Local, Global or Globalized? - Child Development and International Child Rights Legislation” (1996) 3 Childhood 45 at 52.}

Several state parties have indicated or exhibited a reluctance to implement the autonomy rights concepts as is.\footnote{“Many countries have implied in their initial reports that implementing children’s civil rights is the most challenging aspect of the convention. This challenge also applies to resource-rich countries.” See R Hodgkin and P Newell, supra note 47 at 163.} Indeed, the Committee on the Rights of the Child, while examining state parties’ reports, repeatedly expressed its concerns that insufficient importance was accorded to the principles established under Articles 12-
17, which speak to the child’s autonomy rights. It notes that while state parties to the CRC have incorporated provisions on the autonomy of the child into domestic legislation, in practice, and as evident in their reports to the Committee, these provisions do not comply with the principles and intent of the CRC. Moreover, the Committee on the Rights of the Child identified traditional practices, culture, and attitudes as obstacles to the implementation of these rights. Notably, many of the states where the Committee has identified this cultural obstacle are within Africa and Asia. These states share a worldview that places the child within the family/community, and puts more emphasis on the community and duties than rights per se.

In their report and during their dialogue with the Committee, the concerned state parties provided a variety of reasons for their non-compliance with the relevant provisions. The common thread that runs through much of their justification is that a

118 The main function of the Committee on the Rights of the Child, is to evaluate the progress made by States in fulfilling their commitments under the Convention. Article 44 of the CRC obliges state parties to submit reports on their efforts at implementing the rights recognised in the Convention. For a list of the states for which the Committee has recommended further action with regard to article 12-17, see Hodgkin supra note 47 at 162. For example, see the Committee’s comments to India, (Initial Report Concluding Observations Add. 115, paras. 34 and 35), Dominican Republic (Initial Report Concluding Observations Add.150, para. 25), Nicaragua (Initial Report Concluding Observations CRC/C/ Add 36, para. 33), and Peru (Second Report Concluding Observations Add. 120, para 20).
119 Ibid.
120 For example, in reference to Costa Rica regarding Articles 12-17, “the Committee notes with appreciation that the state party’s domestic legislation has integrated provisions guaranteeing the participatory rights of the children. However, it remains concerned that in practice these rights are not sufficiently implemented” (Costa Rica 2RCO. Add. 117, para. 16).
121 General comments by the Committee on the Right of the Child, CRC/C/GC/12 (2009) at 6. See also R. Hodgkin and P. Newell supra note 47 at 159.
122 Harris-Short, supra note 3 at 147. Harris-Short notes that the picture this creates is that problematic cultures are only found in Africa and Asia. However, the Committee also has admonished states that are not within these groups for not implementing the provisions of Articles 12-17 in practice. See Mexico (Initial Report Concluding Observations CRC/C/Add. 13, para. 8), Nicaragua (Initial Report CRC/C Add. 36, para. 9), and Ireland (Initial Report Concluding Observations CRC/C/Add. 85, para. 35). For a comprehensive list of states, see Hodgkin supra note 47 at 90.
disconnect exists between the law and their reality\(^{123}\) because, for them, the autonomy rights of the child can only be achieved through his/her ties with the family.\(^{124}\) Many of the delegates also questioned the applicability of these provisions within their states. For example, the remarks of the Togo delegate regarding the obligation under Article 12 of the CRC points to the disparity between the reality of the child with the African family and the CRC provisions. With regards to the fundamental obstacles hindering the implementation of the Convention, she said that, in her view, either the Convention was not suited to the realities of African life or domestic legislation was incompatible with the Convention. Whichever the case, it had to be recognised that certain principles, such as the children’s right to express their views were extremely difficult to put across to people living in remote villages.\(^{125}\)

The delegate concluded that the force of customs and traditions of the Togolese cannot be disregarded.\(^{126}\) Equally telling are the remarks of the delegate from Burkina Faso who identified the gap between the provisions of the CRC and the prevailing values and beliefs concerning a child’s rights to autonomy, especially with respect to Article 15 on privacy:

Mr Ouedraogo said it is difficult, with regards to his country, to speak of the private life of the child, which implied a concept alien to the national culture...


\(^{124}\) Guinea, Initial reports awaited from the States parties for 1992, OHCHR 1997, CRC/C/Add. 48 para 56 & 74

\(^{125}\) Committee on the Rights of the Child, Summary Record of the 420th Meeting; Togo, OHCHR. 1997, CRC/C/SR.420 at 46. See also Initial Reports, Uganda, supra. U.N. Committee on the Rights of the Child, U.N. doc. CRC/C/3/add. 40. See also Sonia Harris-Short, supra note 123.

\(^{126}\) Togo, Ibid. According to the State delegate: “She had personally commissioned a study on the applicability of the Convention, taking also into account the terms of the African Charter on the Rights and the Welfare of the Child, since there was no point in disregarding the force of Togolese custom and tradition.”
With regard to such questions, the situation reflected the reality of traditional attitudes rather than what the authorities desired.\textsuperscript{127}

Tanzania’s position also is clear. In its report to the Committee, the Tanzanian government stated that its laws have nothing to say about Articles 12-16 of the CRC.\textsuperscript{128} Similarly, Ghana, in its \textit{Children’s Act}, which purports to adopt the CRC, omits the provisions of Articles 13-17, and relies instead on the protection of these rights in the Ghana Constitution.\textsuperscript{129} Furthermore, some states expressed to the Committee that the \textit{African Charter on the Rights and Welfare of the Child}, which provides for a child’s duties and responsibilities, is more responsive to the reality and values of the child in Africa.\textsuperscript{130} Therefore, as their reports to the Committee indicate, the strategy they adopted to reconcile the conflict between their reality and the CRC is one that encouraged parents to support children’s rights but also emphasised children’s obligations to their parents and community.\textsuperscript{131} Similarly, many states in West also indicated the difficulty they would face in implementing the autonomy rights of the child. These examples demonstrate that state parties have taken what

\textsuperscript{129} The provisions not included are the child’s right to freedom of expression; right to freedom of thought and conscience; right to privacy regarding the family, home, or correspondence; and the right to not be subjected to unlawful attack on his reputation. See \textit{Ghana Children’s Act}, No. 560, (1998) available at http://www.law.yale.edu/rcw/rcw/jurisdictions/afw/ghana/Ghana_Childrens_Act.htm
\textsuperscript{131} Committee on the Rights of the Child, Summary record Uganda, CRC/C/3/add.40 para18; Togo, CRC/C/3/add.42 para 34; Congo, Initial reports of States parties due in 1999, OHCHR, CRC/C/COG/1. See also Harris-Short, \textit{supra} note 123 at 160.
Deirdre calls an “à la carte” approach to the CRC by selectively integrating and applying its provisions.\(^{132}\)

As reported by Rio-Kohn, the difficulty states are facing in harmonizing their legislation with the CRC was highlighted by the inter-American Court of Human Rights in an Advisory Opinion that was requested by the Inter-American Commission on Human Rights.\(^{133}\) In this case, the Court opined that:

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\text{[e]ven though the Convention on the Rights of the Child is one of the international instruments that has the greatest number of ratifications, not all countries of this continent have harmonized their domestic legislation with the principle set forth in that Convention, and those that have done so face difficulties applying them.}^{134}
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McDowell suggests that a principal obstacle to the implementation of the CRC is that it does not adequately indicate the “duties of the child” and that it contains “cultural biases” (criticisms raised in the Caribbean context).\(^{135}\) According to him, “from a commonwealth’s Caribbean perspective, the Convention ignores certain cultural values in terms of the mutuality of the parent-child relationship.”\(^{136}\)

The effect of this inconsistency between the Convention and the realities and values in many states is also felt at a more local level within communities and

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families. Empirical research undertaken in Zambia\(^{137}\) and Zimbabwe,\(^{138}\) which involved talking to family members, elders, and ordinary individuals about the CRC, shows a clear resistance by citizens to embracing the autonomy rights of the child without duties.\(^{139}\)

The response of Mr Phiri, a participant in the Zambia research, indicates the challenge with regards to the approach of the CRC to children’s autonomy rights:

In our traditional African way of life, individuals had rights and responsibilities they were taught early to recognize through different forms of socialisation that their rights depended on their fulfilling certain responsibilities or roles within the family. But the idea of rights under the Convention is one-sided. It puts no corresponding emphasis on the responsibility of children to the rest of the family. [...] This idea of rights under the Convention is negative, destructive and un-African.\(^{140}\)

This participant’s recourse to “culture” and “tradition” might be met with suspicion in human rights discourse. Some have argued against the powerful use of “culture” as a social or political weapon to deprive vulnerable groups like women and children of their rights.\(^{141}\) It is conceded that historically, culture has been mobilized


\(^{138}\) See Welshman Ncube, “Re-evaluating Law, Tradition, Custom and Practice: Custody and Access to Non-marital Children in Zimbabwe” in Ncube supra note 5 at 170. Ncube presents the results of field research conducted in Zimbabwe, which highlighted the difficulties faced by parents as they deal with a new law on the Legal Age of Majority. The majority of the respondents were convinced that “disintegration of cultural norms was entirely the result of government laws teaching anti-cultural values.”

\(^{139}\) Himonga, supra note 137 at 116. Himonga evaluates the customary values of duty and how it influences the child’s participation in decision making. The author reasons that participation is limited by various other factors, which are not usually considered, for example, poverty.

\(^{140}\) Ibid.

to the disadvantage of these weaker groups, and that culture is not static as sometimes suggested but in constant flux or change.\textsuperscript{142} However, the above-mentioned challenges are real.\textsuperscript{143} As Ncube warns in his discussion on the reactions of elders and families to the changes in culture due to the introduction of new laws on children’s rights in Zambia, “We ignore at our peril, the powerful role played by appeals to culture in the process of resisting transformation.”\textsuperscript{144} Indeed failure to understand and accommodate the important role culture plays poses the danger of a “backlash and resistance” from the people.\textsuperscript{145} Thus, the reference to culture and tradition is relevant for assessing the realistic prospects of an effective implementation of the CRC in settings that were not carefully considered during the drafting process.

2.5 CONCLUSION

This chapter has demonstrated that the drafting process of the CRC produced substantive weaknesses because of the exclusion of the language on duty. Specifically, this omission has fostered some resistance among various states parties, especially within Africa and Asia. This in turn has seriously diluted the effectiveness of the CRC within these regions as witnessed by non-compliance and resistance to the autonomy rights provisions. To examine more deeply such resistance, the next chapter provides a case study of Nigeria’s implementation and compliance efforts with respect to the CRC. It highlights the various ways in which this country has attempted to grapple with the application of the child’s autonomy rights within its domestic

\begin{flushleft}
\textsuperscript{142} Ncube \textit{supra} note 5 at 170.
\textsuperscript{143} Harris-Short, \textit{supra} note 123 at 140.
\textsuperscript{144} Ncube \textit{supra} note 5 at 170.
\textsuperscript{145} Ncube \textit{supra} note 5 at 171.
\end{flushleft}
laws. It shows that Nigeria, through its implementation efforts, continues to promote and include the duties of the child as part of its guiding policy. These findings should serve as a beacon to practitioners and children’s rights advocates as they strive to enhance support for children’s rights within the African region and other developing states with a strong commitment to the concept of duty as a complement of rights.
CHAPTER 3

3. IMPLEMENTATION, EFFECTIVENESS OF, AND COMPLIANCE WITH THE CRC PROVISIONS (ARTICLES 12-17) ON AUTONOMY RIGHTS: THE CASE OF NIGERIA

3.1 Introduction

The United Nations Convention on the Rights of the Child (CRC) is the most widely ratified international treaty on human rights, and therefore, it can be said to have acquired a status of near-universal “legality.” However, questions remain as to whether it has or can achieve an equal level of “legitimacy” with respect to its provisions relating to autonomy.\(^1\) By focusing on Nigeria’s efforts to implement the provisions of the Convention on the Rights of the Child (CRC) on the autonomy of the child, the issue of legitimacy is examined in this chapter. The purpose of this exercise is to investigate whether there is “compliance” with or “resistance”\(^2\) to these provisions within Nigeria and at the various levels implementation is expected to


\(^2\) M Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977 (New York: Pantheon, 1980) 189. Resistance is used here to indicate non-acceptance, defiance, or neglect. The concept of resistance is well articulated in the writings of Foucault who argues that in any relationship of power, such as between the family and the state, “resistance” is bound to exist. According to him, resistances to power are “real and effective because they are formed right at the point where the relations to power are exercised; resistance to power does not come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power, hence, like power, resistance is multiple....” So, according to Foucault, the state and the family are in a power relationship, but resistance occurs only when the specific ways in which each operate is interfered with or not respected by the other. See also J Windborne, “New Laws, Old Values: Indigenous Resistance to Children’s Rights in Ghana” (2006) 14:3 Atlantic Journal of Communication 156, 172. Windborne uses Foucault’s concept of resistance to describe the difficulties associated with implementing children’s rights in Ghana.
occur. Nigeria is chosen as a focus for several reasons. First, it is the most populous country in Africa and significantly influential in the region. Nigeria was among the first African countries to ratify the *Convention on the Rights of the Child* in March 1991, and did so without reservations. It subsequently passed a domestic national law to implement the Convention but, however, faces certain unique challenges as a Federal State, with jurisdictional competences on this and related issues shared between the central-national government and significantly autonomous sub-national authorities.

As discussed in the previous chapter, the earliest resistance to the concept of the “autonomous child” was mounted by the Senegalese delegate during the drafting process of the CRC. He argued that the CRC ignored many African cultural values and cautioned that not recognising these values would be problematic. His concern was that the CRC provisions risked non-observance within Africa. In this chapter, I investigate the extent to which the state party approaches to the stipulations of Articles 12-17 reflect a kind of resistance to these provisions, as they are currently understood.

To investigate the issue of resistance, I adopt an approach that focuses on two levels of implementation, which are critical to the overall execution of the CRC. First, at the national level, I focus on the Nigerian *Children’s Rights Act*, which is the specific domestic legislation to implement the CRC in Nigeria. I examine the extent to

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3 The three existing levels at which the rights of the child are protected and enforced are: the international level, the national level, and the family or the community level. Implementation at these levels is vital to the overall effectiveness of the CRC.


5 *Child’s Rights Act* 2003, hereafter called the CRA.
which this domestic law is in line with the spirit and intent of the CRC. I also look at
examples of communication and correspondence between the State Party and the
Committee on the Rights of the Child so to ascertain to what extent the spirit and
intent of the CRC is respected in Nigeria. Second, I analyse the local perception of
these provisions within families and local communities. Specifically, I examine
whether actual changes occur in behaviour at the family and community levels in a
bid to achieve compliance, or if a resistance to these rules occurs, and if so, the
reasons for the resistance.

The analysis will show that a clear resistance exists to these provisions at the
different levels of implementation, largely because they do not recognize the child’s
responsibilities and duties. This study also shows that despite the legislative direction
of the provisions on autonomy, Nigeria, in its implementation and compliance
strategy, does not eschew the influence of cultural values. For instance, in Nigeria’s
promotion of the autonomous child, both at the national government level and in the
reports to the Committee on the Rights of the Child, the duties of the child are not
been neglected. In fact, it has adopted an integrated strategy that promotes the
autonomy rights of the child alongside the recognition of the child’s duties and
responsibilities. This approach reflects the resistance to the primary focus of the CRC
on the autonomous child.

I do not indicate or show that the provisions on the autonomy rights of the
child are of no value or completely unnecessary. Indeed, they are quite significant in
that they give a new perspective of the child as an individual with a voice. However,
clear evidence shows that most developing country state parties, at most
implementation levels, largely ignore these provisions of the CRC. Therefore a need
arises to reassess the correlation between Articles 12-17 and the duty of the child so to ensure that the child’s autonomy rights align with local norms. I begin by examining the key concepts that are used at various points in this chapter.

3.2 The Concepts of Implementation, Compliance, and Effectiveness

The effectiveness\(^6\) of an international treaty or regime is determined by several factors,\(^7\) which include “the compliance,\(^8\) implementation,\(^9\) and inclusiveness of its provision, the nature of the underlying problems; configuration of state power, public concern; and other exogenous factors.”\(^10\) To ensure effectiveness, most international agreements oblige state parties to report periodically on their efforts to implement their commitments.\(^11\) Some agreements create specific institutions and procedures for monitoring and reviewing reports by state parties.\(^12\) For example, the CRC establishes a mechanism for monitoring and enforcement under Articles 43-45 of the Convention.

\(^6\) Effectiveness “evaluates the extent to which a rule induces changes in the behaviour that furthers the rule’s goal.”


\(^8\) Compliance looks beyond the incorporation of international obligations into local legislation to determine whether the black-letter laws of these states are faithful to the spirit of the Convention. This requires that state behaviour be in conformity with the specified rule. See Jose Alvarez, “Why Nations Behave” (1997-1998) 19 Michigan Journal of International Law 303 at 305.

\(^9\) Implementation is defined as the process by which states translate their international commitments into practice within their domestic legal systems. This usually requires the state parties to adjust their domestic policy so that it conforms to international commitments. This conformity is accomplished through the passage of new legislation and by creating new institutions that will aid application and enforcement of the rule. See Kal Raustiala & Anne-Marie Slaughter, “International Law, International Relations and Compliance” in Walter Carlsnaes, Thomas Risse-Kappen, & Beth A Simmons, eds., Handbook of International Relations (London: Sage Publications, 2002) 539.

\(^10\) Yaw supra note 7 at 102.

\(^11\) Ibid. at 105

\(^12\) Ibid.
In the next section, I examine the role of the Committee on the Rights of the Child as an implementation body.

3.3 Framework for Implementation

3.3.1 The Committee on the Rights of the Child

Article 43 of the CRC establishes the Committee on the Rights of the Child, consisting of 10 experts of “high moral standing and recognised competence in the field covered by the Convention.” The main function of the Committee is to evaluate the progress made by states in fulfilling their commitments under the Convention. Article 44 of the CRC obliges state parties to submit reports on their efforts at implementing the rights recognised in the Convention.

3.3.2 The Reporting Process

The processes established under the CRC stipulate that a state party must provide a comprehensive initial report within two years after the Convention was ratified. This report is to be followed by subsequent reports every five years that build on the recommendations from the previous reports. In its evaluation of the reports of the state parties, the Committee seeks information on general measures of implementation, including those taken to harmonise national law and policies, and existing or planned mechanisms at the national and local levels for monitoring the implementation of the Convention. However, as noted earlier, the Committee is not only interested in legal regulations, but also in the practices of state parties, and has

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13 CRC Article 43(2).
14 CRC Article 44.
15 CRC Article 44(2).
indicated that the mere implementation of the CRC is not sufficient proof that a state is in compliance with its requirements.\textsuperscript{16} For instance, with regard to Costa Rica on Articles 12-17, “the Committee notes with appreciation that the State Party’s domestic legislation has integrated provisions guaranteeing the participatory rights of the child. However, the Committee remained concerned that in practice these rights are not sufficiently implemented.”\textsuperscript{17} Therefore, it recommended that states should not only implement, but also comply with the law. This demonstrates the important role that the state parties must play in the advancement and protection of the rights of the child at the national level. The next section examines Nigeria’s implementation efforts, but first it is important to understand how international human rights instruments such as the CRC can become part of the domestic law of a country.

\textbf{3.4 Incorporating the CRC Provisions into National Laws – Monist and Dualist Theories}

International conventions can be incorporated into national law by using either a monist or a dualist method. According to the monist approach, a treaty is considered a legislative act, and automatically becomes a part of the domestic law after it is ratified by the state.\textsuperscript{18} Thus, upon ratification, this document may be invoked in a domestic court and is accorded a constitutional status.\textsuperscript{19} In the event of a conflict or

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\textsuperscript{17} Ibid.


\textsuperscript{19} \textit{Ibid} at 28.
contradiction with domestic law, the international treaty will prevail.\textsuperscript{20} Primarily, this approach is adopted within civil law jurisdictions.\textsuperscript{21}

By contrast, the dualist method regards domestic and international law as two separate legal systems.\textsuperscript{22} Therefore, international instruments must be expressly incorporated into the national law through legislation before becoming legally enforceable in domestic courts.\textsuperscript{23} As outlined by Rio-Kohn, unless legislative incorporation has occurred, any conflict between the provisions of an international human rights instrument and national legislation will be resolved in favour of the latter.\textsuperscript{24} Moreover, when incorporation occurs, the convention is expected to “function in conformity with the prevailing juristic ideology of the local law.”\textsuperscript{25} These implications are far-reaching and can affect the actual effectiveness of the


\textsuperscript{21} In reality, however, this was not always the case. Guatemala is given as an example where the ratification of the CRC was not automatically applied by local courts. In this case, it took over a decade to get the national law to reflect the standards of the CRC. For a complete analysis of incorporation routes, see Rebecca Rios-Kohn, “A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Civil Law Countries” in UNICEF, Protecting the World’s Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems (Cambridge; New York: Cambridge University Press, 2007).

\textsuperscript{22} This method of assimilation is more commonly found in countries with a common law tradition, for instance, Nigeria. See Emilio Mendez, supra note 20 at 117.

\textsuperscript{23} However, exceptions to this general rule exist, since the international treaty could still influence the interpretation and application of a law. See Rebecca Rios-Kohn, supra note 21 at 52. For example, the recognition of possible exceptions is documented in the Bangalore Principles, which are principles guiding the domestic application of human rights norms in the Commonwealth. One of the principles is that when a treaty has been ratified but not yet incorporated into domestic law, it should still be taken into account by the courts in suits regarding the rights established under that Treaty. (Bangalore Principles No 4).

\textsuperscript{24} Rios-Kohn, supra note 21 at 53.

\textsuperscript{25} Emilio Garcia Mendez, supra note 20 at 120.
international instrument by altering the intent and content of the law as will be seen in the case of Nigeria.\textsuperscript{26}

In the next section, I discuss the way in which the CRC has been adopted in Nigeria and the consequent challenges.

\section*{3.5 The Incorporation and Implementation of the CRC in Nigeria}

\subsection*{3.5.1 Overview}

Nigeria was among the first African countries to ratify the \textit{Convention on the Rights of the Child} in March 1991, and did so without reservations.\textsuperscript{27} This fact is cited by the delegates to the Committee as evidence of Nigeria’s early commitment to the children’s rights project.\textsuperscript{28} However, a mere ratification of the CRC is only an expression of commitment to its principles; the difficult aspect is its implementation, which entails incorporating it into legal and administrative structures as well as the practices and belief systems of a country.\textsuperscript{29} To its credit, the Nigerian government has actually taken several steps to domesticate the CRC within the country. These steps culminated in a consolidated statute entitled the \textit{Child’s Rights Act} (CRA), which was

\textsuperscript{26} See Chapter 4 of the present study.

\textsuperscript{27} The implication of not articulating any reservation, as many other countries did, is that the principles and standards outlined in the CRC are fully accepted by the state and, therefore, it has the duty to ensure that its national legislation conforms to the standards of the CRC. It is conceivable that the quick and unconditional ratification of the CRC by the government of Nigeria was most likely a political exercise, since a military regime was in power at the time and probably was seeking to earn international acceptance and some legitimacy.


enacted in 2003. The National Child Rights Implementation Committee (NCRIC) is the body mandated to oversee the implementation and monitoring of the provisions of the Act as well as the CRC in Nigeria.

3.5.2 Scope and Status of the Child’s Rights Act

Despite this achievement, the pledge to promote children’s rights nationally has not been successful. Since Nigeria is a federation with distinct jurisdictional competencies, the Committee anticipated that the respective states within the country would pass specific enabling laws to bring the Act into effect. However, since 2003 when the Child’s Rights Act was passed into law, only 23 out of the 36 states in Nigeria have passed it; this number includes states that are waiting for gubernatorial (executive) assent to child’s rights laws. Three other states have passed a child’s rights law, but it has not yet received their governor’s assent. A third group of states do not have any law that conforms to the Child’s Rights Act 2003.

This means that since the provisions of the CRC are not yet binding on all the states in the country, they do not have nationwide application. Ample evidence also indicates that even in states in which enabling laws have been passed, variations of

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30 This process took more than ten years, after the ratification of the CRC in 1991, to commence due mainly to political instability and the significant resistance and opposition to the draft bill. See UNICEF Information Sheet available at http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf.


31 NRIC


33 These three states are Bayelsa, Ebonyi, and Kogi.

34 This group of states includes Adamawa, Bauchi, Enugu, Gombe, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe, and Zamfara.
the law exist that cannot be said to be in “compliance” with the intent of the CRC. Hence, the effectiveness of the CRA and its provisions depends on where in Nigeria it was adopted.

This situation is explained by the application of multiple systems of law, the operation of the federal system, as well as the lack of political and public support for some specific provisions of the CRA within the states. Different legal systems and methods—English common law, statutory law, Islamic or Sharia law, and customary law—are concurrently applied with varying degrees of deference to local customs. While these systems exist side by side, integrating them has not been easy. Moreover, these factors account for most of the resistance to the specific provisions of the CRA as evidenced by its current disparate treatment within the country. The next section examines these factors in more detail.

3.5.3 Obstacles to Implementation – Mixed legal System, Federal Structure and Political/Public Support

3.5.3.1 The Legal System

Law reform and the effective implementation of the CRC is complex in Nigeria because the legal system is based on plural legal traditions, including colonial English law, customary law, judge-made (common) law, and Islamic Sharia law, all of which may not always be in harmony with each other on specific principles and issues. This polyjural system has important implications for the implementation of children’s rights, since domestic incorporation and the creation of the legislative support needed for implementation must take into account the interaction between the various systems and the challenges posed by these different perspectives on the issues
at stake. A pertinent example of this conflict of laws is seen clearly in the different interpretations attributed to “age of marriage” requirements. If marriage is contracted under common law, the marriage age is 16. Under customary law, the rules of the community and tribe are applicable. For example, in North West and North Central Nigeria, the age of marriage is fourteen, while in some North Central regions it falls between the 2nd and the 3rd menstruation (in some cases between twelve and fifteen years of age). In the South, it is between sixteen and eighteen. Similarly, under Sharia law, the age of marriage is twelve or thirteen. Hence, the reality on the ground is that most Muslim states in the country have not passed the CRA into state law, since it conflicts with religious tradition and norms. Other states in this category, which have passed the law, make a point or proviso that in the event of any conflicts between the legislation and existing Sharia laws, the latter takes precedence. Thus, by limiting the scope or moderating the applicability of the CRA,

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37 Ibid.

38 Ibid.

39 A recent marriage of a Nigerian legislator to a 13-year-old girl under Sharia law has drawn an international outcry, but this demonstrates the difficulties of different systems existing side-by-side. See “Nigeria—Investigation into Senator’s ‘Childbride’” online: http://news.bbc.co.uk/2/hi/africa/8649035.stm.

40 This problem is demonstrated by the statement made by one of leaders during a meeting of the Supreme Council for Shari’a in Nigeria (SCSN). He observed that “this law (CRA 2003), if allowed to be passed by our state assemblies, will demolish the very basis and essence of the Shari’a and our Islamic culture, and accordingly called on all Muslims and Islamic organisations to take appropriate steps in their States to prevent this from happening.” See “Nigeria: Shari’a Council Kick Against Child Rights Act” This Day Newspaper (21 August 2005). See also Nkoyo Toyo, “Revisiting Equality as a Right: The Minimum Age of Marriage Clause in the Nigerian Child’s Rights Act” (2003) 27 Third World Quarterly 1299.

the provisions of the CRC are consequently restricted in their application in different parts of the country.

3.5.3.2 The Federal System

As previously mentioned, the partial implementation of the CRC in Nigeria is attributable to its federal system of government. The federation is comprised of 36 states, which are further divided administratively into Local Government Areas. This federal structure poses peculiar challenges for the general political governance of the country as well as for the legislative jurisdiction and competencies of the different levels of government. While core human rights issues are within the superior competence of the federal government (through the Constitution), issues relating to children and their welfare are an area of shared responsibilities among different levels, with the states having exclusive jurisdiction over most aspects.\(^{42}\) As a result, the drafters of the CRA anticipated that individual states would pass local laws to implement its provisions, in what effectively amounts to a double-layered domestication of the CRC.

In this regard, the legislative powers conferred on states under the Constitution have several consequences. First, a state can stall the implementation of the CRA within its jurisdiction if it deems it or any part of it unacceptable. For example, as mentioned above, most states in the northern part of the country, which are mostly Muslim, have resisted the call to pass the enabling CRA legislation on the ground that it is not in consonance with Sharia law. Effectively therefore, when a state refuses to pass this law, its residents cannot fully take advantage of or enforce their rights under

\(^{42}\) See section 12 of the 1979 Constitution of the Federal Republic of Nigeria.
the CRA or the CRC.43 Second, the violators of the CRA within non-complying states cannot be held accountable. However, the few northern states that have passed the law insist that the CRA, and hence the CRC, is subordinate to Sharia law, and in cases of conflict, the latter will prevail.44 As a result, the overall effectiveness of the CRC in the country is ambiguous.

Another consequence of local legislative powers is that states choose what goes into their own CRA-enabling legislation. This power has been used in two ways: through selective legislation of provisions or through an adjustment of provisions to conform to local expectations. Thus, states pass only pieces of legislation that cover the various provisions of the CRA that they find acceptable or relevant to their needs, and consequently, fail to fully adapt or implement the provisions the CRC itself. For example, in Bauchi, one of the Muslim states, the state legislature rather than face the opposition and controversy surrounding the CRA opted for and passed the Girl Child Education Law that prohibits the withdrawal of girls from schools.45 In discussing the CRA, Nkoyo Toyo argues that by this approach, the state effectively “de-linked education from rights.”46 This approach highlights the various strategies adopted by states in an effort to domesticate international human right instruments such as the CRC.47

The other approach taken by the states is to adjust “undesirable” provisions to match societal expectations. Many states have adopted this approach. One newspaper

43 This situation is true in all jurisdictions. International law depends on local adoption for enforcement.
44 Falola, supra note 41.
45 Nkoyo Toyo, supra note 40.
46 ibid.
47 Ibid at 1306.
article provided an account of the process of the domestication of the *Child’s Rights Act* in Delta State (in southern Nigeria) where the autonomy rights provisions were being debated. The article raised concerns that the CRA, which was at various stages of passage in the different state legislatures, “was being watered down from its original form.”\(^{48}\) It cited one state legislator who remarked that the aim of the dilution process was to remove “offensive” parts of the CRA that did not accord with local norms.\(^{49}\)

Another example is Rivers State where the autonomy rights of the child law were opposed out of fear that they would “negate” the socio-cultural values of the state regarding family relationships and because the rights were “founded on Western culture.”\(^{50}\) The Resolution passed by the House of Assembly was “to restructure the *Child’s Rights Act* to conform to cultural sensibilities of the state.”\(^{51}\) A similar approach was adopted in Kaduna State where political and public support for a specific provision was lacking. The state Assembly, instead of engaging with this challenge, chose to re-word its own state law to make it acceptable within its


\(^{49}\) *The Tide Newspaper* noted that the CRA was thrown out in 2006 by the State Assembly because of what was described by Chief Ossai Ossai, a former ministry official, as the “over-indulgence of children.” The reason why the CRA was thrown out is encapsulated in the following statement by Chief Ossai-Ossai: “The bill was killed because we felt that it was a foreign practice for child to call the police for his parents or cause his parent to be arrested.” This assertion is based on the notion that the child owes the parents a duty of respect and therefore any complaints or charges against one’s parents can only be brought according to culturally-specified methods of dispute resolution, including reconciliation. This statement understandably provoked considerable controversy. Mrs Osobi, a local representative of a non-governmental organization (NGO) denounced it suggesting that the Legislators are “bringing politics into rights of the child,” and thereafter cautioned that the “rights of the child are a universal declaration that should be domesticated in all States.”


\(^{51}\) *Ibid.*
constituency. This exemplifies the “à la carte” approach referred to in Chapter 2.

Thus, even though the CRC was incorporated into the domestic legal system through the CRA, some aspects of the local legislation were still considered “Western” and so inappropriate.

These different approaches to implementation within the states are supposedly based on the belief that “positive” cultural values such as the duties owed by child, for instance, respect for elders, and responsibilities towards one’s parents are not adequately covered within the CRA and, by extension, the CRC. Therefore, the argument often heard on the floors of the state assemblies is that the ideas embodied in the CRA are “alien” and “foreign” to the culture of the people. Such a dissonance between the law and the reality of a culture is used to justify a departure from the CRC provisions. As a result of the foregoing factors, state laws often are inconsistent with CRC provisions or the federal Child’s Rights Act. This conclusion supports an earlier observation that one of the implications of the dualist method of incorporation is that “an international instrument is expected to function in conformity with the prevailing juristic ideology of the local law.” In other words, any law that purports to legislate on the rights of children must include values and norms that are considered valid under local law, both formal and informal. It also is important to

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52 See Nkoyo Toyo, supra note 40 at 1305.
53 Examples of laws passed specifically to meet particular needs of constituents—seemly to avoid confrontation—include the Adamawa State Secondary Schools Standardization Law, 2006; Adamawa State Maternity Assistance to Women and Child Care Law, 2001; Lagos State Adoption Law, 2003; etc. For a comprehensive list of these laws, see The Committee on the Rights of the Child, Nigeria, Third and the Fourth Periodic Report of State Parties due in 2008, CRC/C/NGA/3-4 at 20.
54 In the Rivers State’s Assembly, a member, in opposing the CRC autonomy rights as embodied in the CRA, reminded her colleagues that these are “foreign.” She argued that “Rivers State practices an extended family system and that going by the provisions of the Bill, it would be difficult for people to render help to family members.” See, Daily Independent, supra note 50.
55 Emilio García Méndez, supra note 25 at 120.
remember that the law-making process is a human enterprise, which means that lawmakers were once children in these societies. Therefore, they find no need to adapt to these new demands of children’s rights, since they already survived their own childhood under these pre-existing conditions.

In all fairness to the states, it must be noted that the majority of them seek to promote values that they believe would positively contribute to family relationships, even though they may be deemed unfavourable to the individual child. It also must be recognized that legislators operate in a political context and most often act according to existing political exigencies or otherwise respond to political signals from their constituencies. The dilemma that confronts the states is obvious: on the one hand, they must honour the international commitments made on their behalf by the federal government, and, on the other, they must affirm local values and beliefs that command legitimacy amongst their constituents.

As highlighted in the previous section, one of the factors that hamper the effective implementation of the CRC within Nigeria is resistance to specific provisions within the CRA. This resistance is further amplified by the existing federal system of government, political exigencies, and a plural legal system. On no other issue is this resistance more clearly seen than with regard to provisions relating to the child’s autonomy. As demonstrated above, some state assemblies have questioned the value of the autonomous vision of the child. The next section considers the CRA and its provisions on autonomy. It shows that although the provisions within the CRA are intended to re-enforce the autonomous child vision of the CRC, the CRA also makes some departures so to accommodate domestically prevalent values.
3.6  Evidence of Resistance to the Autonomy Rights Provisions

This section investigates the issue of resistance. As indicated earlier, I adopt an approach that focuses on two levels of implementation, which are critical to the overall execution of the CRC. First, at the national level, I focus on the Children’s Rights Act (CRA) by examining the extent to which domestic law provisions on autonomy are in line with the spirit and intent of the CRC. Second, to understand the interpretation and meaning given to the CRC provisions by state parties, I analyse their reports to, and ensuing dialogue with, the Committee on the Rights of the Child on the autonomy provisions.

3.6.1  CRA Departures from the CRC

The CRA contains many provisions on the autonomy of the child that are identical to the CRC provisions on the autonomy of the child. For example, Article 14 of the CRC, on freedom of thought, conscience, and religion is identical to Section 7 of the CRA. Article 16(8) of the CRC on the protection of privacy is almost identical to Section 8 of the CRA. However, the CRA makes several departures from the provisions of the CRC on autonomy rights.

3.6.1.1 Privacy

First, the CRA departs significantly from the CRC on the protection of the privacy of the child by emphasising that the exercise of these rights is subject to the control of parents. Section 8 of the CRA reads as follows: “Every Child is entitled to his privacy, family life, home, correspondence, telephone conversation and telegraphic communications, except as provided in subsection (3) of this section.”

Subsection 3 of Section 8 reads: “Nothing in the provision of subsection 1) and 2) of this section shall affect the rights of the parents and, where applicable, legal
guardians, to exercise reasonable supervision and control over the conduct of their children and wards."

The term “reasonable supervision and control” indicates the intention of the drafters to ensure that parents maintain authority over the child’s exercise of his/her right to privacy. This clearly contrasts with Article 16 of the CRC, which implies that children should have this right without any limitations, and the decision-making ability to exercise this right under Section 12. The approach of the CRA in this instance must be seen in the context of the acceptable local norms and culture, which dictate the role and nature of the relationship between the child and her/his parents. The emphasis within the family is on connectedness, interdependence, and loyalty. The societal expectation is that the child within the family can only exercise his or her rights subject to restraints within the family. These attitudes towards socialisation reject the vision of children’s autonomy within the CRC where an individual child can retain her/his rights without encroachment by parents and family members. As will be demonstrated shortly, this approach of tying the child’s exercise of his/her rights to his/her relationship with parents and other family members permeates all aspects of Nigeria’s implementation strategy.

3.6.1.2 Freedom of expression

The CRA also deviates from the CRC in its protection of freedom of expression. Whereas the CRC expressly provides for the child to express his/her

57 This issue will be discussed in further detail in chapter 4. See also, Ibhawoh, Bonny. Between Culture and Constitution : The Cultural Legitimacy of Human Rights in Nigeria. Copenhagen: Danish Centre for Human Rights, 1999.
views freely, the CRA does not specifically recognize this right; however, section 3 of the CRA refers to the constitutional protection of freedom of expression as well as all other civil rights. In the absence of such a provision, the exercise of this right becomes contingent on the constitutional provision on freedom of expression for all citizens. This approach is problematic because, as noted by Hodgkin, constitutional provisions are sometimes “purely aspirational or declaratory, and could be limited in scope.” It is not sufficient that the Constitution simply includes civil rights as fundamental rights for “everyone”; it must indicate how these rights specifically apply to children. Furthermore, to ensure effectiveness, it must incorporate an enforcement mechanism in the event of violation. One inference that can be drawn from the lack of specific mention or provision for the right to freedom of speech in the CRA is that the right itself is controversial in the context of children, since cultural limitations to the exercise of these rights exist within Nigeria, as discussed earlier.

3.6.1.3 Duties and responsibilities of the child

Third, the CRA radically departs from the CRC by acknowledging the child’s rights as well as his/her duties. Section 19 of the Act makes provisions for the responsibilities of children, which include working towards the cohesion of the family, respecting their parents and elders at all times, and assisting them in their time

61 Rachael Hodgkin and Peter Newell, supra note 16 at 187.
62 Ibid.
63 This is consistent with the African Regional Charter on Children’s Rights, the ACRWC, which also provides for the rights and duties of the child.
of need.\textsuperscript{64} In addition to establishing the duties of the child, the CRA obligates the parents and guardians, and institutions and authorities in whose care children are placed to “equip the child in order to secure his assimilation, appreciation and observance of the responsibilities,”\textsuperscript{65} seemingly to underscore the importance of the duties of the child in the exercise of her/his autonomy rights, and the importance of the child’s relationships in helping him/her to take up those responsibilities.\textsuperscript{66} In contrast, the CRC is silent on the duties of the child and instead emphasizes the child’s rights to autonomy. This discrepancy is one reason for the perception within the country that the CRC is an “alien” document, since it fails to take account of family relationships and the responsibilities owed by each family member to the others.

3.6.1.4 Freedom of association and peaceful assembly and freedom of thought, conscience and religion

The approach of CRA to the provisions on the right to freedom of association and peaceful assembly, freedom of thought, conscience and religion is consistent with the provisions of the CRC. In Section 7, the CRA provides that the exercise of these rights must respect the duties of the parents to give guidance and directions to the child. This provision is consistent with the provisions of the CRC in Article 14 paragraph 2 that stipulates that parents and legal guardians have a right and a duty to provide direction to the child. However, the intention of the CRC is that parental guidance has to “remain accessory to the child’s rights and has to recede as the child’s

\textsuperscript{64} CRA Section 19(2h). In this regard, the Act adopts a cultural outlook, which accords with the provisions of the ACRWC. However, this duty to respect parents and elders at all times is criticised as limiting the child’s right to freedom of expression and privacy. The criticisms will be discussed shortly.
\textsuperscript{65} CRA Section 20.
\textsuperscript{66} The CRA Section 19(2) has a limitation—the exercise of the duties of the child is subject to his or her age and ability.
capacities evolve.” Although the text of the CRA aligns with the provisions of the CRC, the real interpretation given to these provisions within the state report to the Committee on the Rights of the Child indicates that the emphasis is on parental control and this is not expected to recede at any time.

From the foregoing discussion, it seems that while efforts have been made to implement the provisions of the CRC, the legislative provisions of the CRA on autonomy rights are not fully consistent with the aspiration and intent of the CRC in Articles 12-17. The departures suggest that the provisions of the CRA on the autonomy rights, even though intended to introduce the concept of the child as an individual, have been “watered down” to conform to prevailing societal norms and values, since the exercise of these rights is linked to the child’s relationship with his or her family, especially with parents. This reluctance to allow the exercise of these rights without the control of the parents reflects a resistance to the CRC. It also is illustrative of the path the state has chosen in its efforts to honour its commitments while responding to societal values and expectations. These examples show that the way in which laws that concern children are made and interpreted by the government is largely influenced by the beliefs and moral codes of the society.

The legitimacy of the CRC provisions on autonomy rights are further questioned by Nigeria’s state report submitted to the Committee on the Rights of the Child and the ensuing dialogue between them. The delegation, while affirming the

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68 I consider the state report shortly.
child’s autonomy rights, did not seem to eschew the influence of cultural values, such as duty of the child, in its implementation strategy. In fact, the Nigerian delegation adopted a strategy that integrates these rights with the duties owed by the child. Again, this is illustrative of a reluctance to accept the autonomous child within these provisions. The next section highlights this resistance and discusses the implications it has had on the effectiveness of the CRC.

3.6.2 State Reports and the Dialogue Between Nigeria and the Committee on the Rights of the Child: Implementing Articles 12-17 of the CRC

Nigeria’s first report on the implementation of the CRC to the Committee on the Rights of the Child was submitted in 1996. Following the consideration of its initial report, the Committee indicated, in its concluding observations, the concerns that the State Party was not giving adequate attention to the provisions of Articles 12-17 on the autonomy rights of the child. The Committee also identified culture, traditional practices and attitudes, and the “prevalence of traditional views on the place of children in the hierarchical social order” as obstacles to the implementation of those rights. In this regard, the Committee recommended that the state ensure that the “best interest of the child and participation of children, not only guide the policy

70 Nigeria has submitted four reports as of 2009. The fourth report contains 186 pages.
71 Committee on the Rights of the Child, Concluding Observations, OHCHR, 1996 U.N. Doc. CRC/C/15/Add.61, para 14. See also Concluding Observation of the Committee on the Rights of the Child, OHCHR, 2005, UN Doc. CRC/C/15 Add.257 para 34. In this report, the Committee specifically expressed its concern that Articles 3 and 12 of the CRA were not duly integrated into the implementation of the policies and programme of the State Party due to the “prevalence of traditional views on the place the children in the hierarchical social order. The Committee was concerned that children’s’ opinions were not given sufficient consideration and respect because the views of the child remain limited within the family and at school, in courts, before administrative authorities, and in society at large.”
discussions and formulation, and decision making, but also are integrated into the development and implementation of all projects and programmes."\(^{72}\)

However, the delegation, in its articulation of the implementation policy and strategy adopted by the state, did not waste the opportunity to express its resistance to the principle of the autonomous child within these provisions. In the delegation’s view, implementing the rights of the child under Articles 12-17 must occur through a child’s relationships with parents and family, with an equal emphasis on the duties of the child. In that sense, the state adopts an integrated approach in its implementation and compliance efforts that promote the child’s rights as well as his/her duties even though this approach may deviate from the intent of the CRC.\(^{73}\) Following are the different articles and the ways in which the state has resisted the inherent principles of the CRC by allowing the influence of local culture to inform its approach.

### 3.6.2.1 Freedom of expression

As noted earlier, the CRA does not expressly provide for the right to freedom of speech or expression, meaning that the exercise of this right must rely on the provisions of the Nigerian Constitution that protects all citizens.\(^{74}\) However, the dialogue between the Nigerian delegation and Committee members is extremely revealing of the state’s position on the right to freedom of expression. In their response to the Committee members’ questions about how the national curriculum is

\(^{72}\) Committee on the Rights of the Child, Concluding Observations, Nigeria, OHCHR, 1996 U.N Doc. CRC/C/15/Add. 61 para 32

\(^{73}\) As is shown in the next chapter, the CRC is criticised for limiting the rights of the child to exercise his/her autonomy.

\(^{74}\) Section 39 of the 1999 of the Constitution of the Federal Republic of Nigeria.
used to develop children’s participation and freedom of expression,\textsuperscript{75} the delegate articulated the state’s integrated approach as follows:

The kind of freedom of expression developed by the curriculum had to take account of cultural norms in Nigeria, for example, respect for elders. The Educational Research Council had worked hard to reconcile the principle of participation and freedom of expression with those cultural norms.\textsuperscript{76}

This implies that the child, in the exercise of his/her rights, must bear in mind that her/his freedom of speech is limited due to her/his position on the hierarchical ladder where elders command higher authority in decision-making. In contrast, the CRC approach is a “non-hierarchical participatory model” in the sense that Article 12 expressly supports the child’s right to freedom of expression in any matter concerning him or her without it being subject to any limitation whatsoever.\textsuperscript{77} The general comment by the Committee on Article 12 reiterates that the child has a right to express his/her views “freely.”\textsuperscript{78} This contrast exemplifies some of the differences in the understanding and interpretation of the provisions of the CRC vis-à-vis the implementation at the national level. Other areas of divergence of perception were

\textsuperscript{75} Committee on the Rights of the Child, Summary records of the 323rd meeting, Nigeria, OHCRC 1996. CRC/C/SR/323 para14 (Mrs Karp “wished to know how the curriculum was used to promote the goals of the convention. Was the teaching of the convention compulsory? Were teachers informed of the meaning of the convention and how they could use it as a teaching tool? What was done to promote the participation of children and to teach them how to exercise their rights under the convention.”

\textsuperscript{76} Ibid at 5& 30.


\textsuperscript{78} In its General Comment, the committee explained the term “freely.” CRC/C/GC/12, para 22 at 10. In a literal analysis of the Article, “freely” means that a child can express her or his views without pressure and can choose whether or not she or he wants to exercise her/his rights to be heard. “Freely” also means that the child must not be manipulated or subjected to undue influence or pressure. “Freely” is further intrinsically related to the child’s perspective; the child has the right to express her or his own views and not the views of others in the family and the community at large.
also evident in the course of the interaction between the Committee and the State Party.

3.6.2.3 Children’s responsibilities

The issue of child labour offers another area where local culture diverges from the CRC. While noting the importance of prohibiting exploitative work in domestic environments, the delegate, however, continued to affirm the duty of the child to support his/her parents. In her words: “... parents would still be entitled to ask their children to undertake light domestic chores in the homes. That was a tradition in (the) African Family.”

It is interesting that the delegate sought to distinguish “exploitative” from “non-exploitative” work. The context of child’s work discussed here is a socially approved means of the child socialisation process. Some argue that giving children responsibilities is necessary to prepare them for future responsibility as an adult, which is in line with the goal of autonomy rights.

The duty of the child was once again emphasised in the state delegate’s response to the Committee’s questions about bullying. While accepting that bullying was a fact of life in schools, Mrs Attah pointed out that to tackle the issue of bullying

79 Committee on the Rights of the Child, Summary records of the 323rd meeting, Nigeria, OHCHR 1996 CRC/C/SR/323 para 71.

Couzens outlines the benefits of child autonomy rights: (1) children develop greater competency when they practice decision-making, (2) consultation increases confidence, and (3) educates the child for responsible adult life, (4) stimulates the child to see him/herself as part of society, (5) may have therapeutic effects, and (6) children feel supported and important and when their views are challenged; they learn to listen, to negotiate, to defend views, and to accept challenge. She concludes that all these benefits are necessary skills for a future autonomous life.
effectively “greater emphasis should be placed on training teachers to make children aware of their rights and also their duties.”

From the preceding discussion, clearly, the child’s duty remains an enduring feature of Nigeria’s implementation strategy. However, at other times during the delegation’s dialogue with the Committee, an express reference to the duties of the child did not occur. Rather, emphasis was placed more heavily on the role of the child and his/her relationships with others—especially parents. For example, when responding to a question about whether the government was meeting practical obstacles in ensuring children’s participation in family or school decisions, the State delegate suggested that there is an age limitation as to when the child can exercise these rights within the family. According to her, the child can give an “opinion on decisions concerning their education from the secondary level onwards.”

The local perception that a child’s right to express his/her views and participate in decision-making is dependent on her/his age is not in concordance with the intent of Article 12 of the CRC. As discussed in the General Comments section, the CRC Committee emphasized that Article 12 does not set any age limit on children’s rights to express their views freely; instead, all children “capable of forming their opinion” have a right to do so in “all matters affecting the child.” However, according to local cultural practices, the views of the child are rarely sought, especially at the early ages. Rather, decisions are made for the child by the

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83 Ibid para 16.
84 Ibid para 25.
85 See General Comments from the Committee on the Rights of the Child on Article 12, CRC/C/GC/12 (2009) at 21. See also Rachael Hodgkin and Peter Newell, supra note 16 at 164.
parents based on both economic and strategic circumstances, such as proximity to social services and costs.\textsuperscript{86} This demonstrates that the idea of a child who is able to express her/his opinion at all levels of her/his education is not realistic within various Nigerian contexts.

Similar issues arose in regard to whether a child can exercise his/her freedom of expression in the area of his/her health or whether an adolescent child could obtain information from health services and have medical treatment without the knowledge of the parents.\textsuperscript{87} The State Party, Nigeria, in its second periodic report disagrees that the child is capable of making his or her own personal decisions in this area by re-emphasising the relationship between the child and his or her parents: “For medical counselling without parent’s consent, no specific age is stipulated. Culturally, throughout Nigeria, there is a bond between parents and children till they die.”\textsuperscript{88} In other words, the State argues that a child of any age cannot be regarded as autonomous and thus empowered to make these decisions concerning his or her health alone. As this indicates, the State continues to adhere to the concept that the rights of the child can only be exercised in the context of his or her relationship with others.

\textsuperscript{86} For example, a child can be kept with a relative whose house is closer to a school. This phenomenon is true in other African countries. The cultural and socio-economic impacts on child rights are captured by Chuma Himonga in his discussion of the child participation in Zambia. See Chuma Himonga, “The Rights of the Child to Participate in Decision making - A Perspective from Zambia” in Ncube, ed., Law Culture, Tradition and Children’s Rights in Eastern and Southern African (Aldershot: Ashgate/Dartmouth, 1998).

\textsuperscript{87} This question was asked during the consideration of the initial report, but an answer was not given at the time; however as indicated, the second report responded to the question. See Summary Record, supra note 82 at 49. For the answer given, see Nigeria Second Periodic Report of the State Party due 1998, OHCHR, 2004 UN Doc CRC/C/70/Add. 24 para 42.

\textsuperscript{88} Ibid.
3.6.2.4 Religion

This emphasis on the relationship between the child and parents also arose with regard to the right to freedom of expression as it relates to religion. Even though this right is addressed in the CRA, the State argues that children can rarely exercise this right on a more practical basis, since parents typically determine a child’s faith at a very early age. With regard to the Muslim religion, according to the state, the child’s expression of this right is impossible, since the child is not allowed to change his religion under the Muslim tradition.

These views notwithstanding, the Nigerian delegation in its various reports highlighted several ways that children’s right to expression is supported in public, including the formation of the children’s parliament. However, the delegation remained largely silent on how this right also could be promoted within the family. From the instances highlighted above, it seems that with respect to a child’s education, health and religion, the child’s exercise of freedom of expression is greatly limited due to the emphasis on her/his relationship with parents.

89 CRA section 3 (1) (2).
90 Supra 87 para 58. In this state report, the delegate notes that “in practice a child’s religion remains that of his /her parents until he/she attains majority or gets married and leaves home. On his own, he may be able to choose his own religion but faces stiff opposition from his parents.”
91 Ibid.
92 The ways that children’s right to expression is supported in public include the inauguration of the Nigeria Children’s Parliament and programmes that promote the capacity of children to express themselves, for example, school debates, the inclusion of children in media discussion panels, and the airing of the results of decisions made at children’s forums. All of these, the delegates argue, have resulted in a “shift from the widespread attitude that children should be seen and not heard.” For a comprehensive list from the State Reports on measures taken to guarantee the child’s right to freedom of expression, see Nigeria, Third and Fourth Periodic State Party Report of due in 2008, OHCHR, 2009, CRC/C/NGA/3-4 para 4.3.1.
93 In its 3rd and 4th Consolidated Reports, under measures taken to deal with cultural practices affecting children, the State says that “there is an on-going effort across the country by NGOs to scale up children participation in decision-making in schools.” However, nothing was said about the family.
3.6.2.5 Privacy

Another area in which the delegation’s articulation of the policy adopted by the State reflects its resistance to the notion of the autonomous child is the child’s right to privacy. During the discussions on this right, the Nigerian delegate, while acknowledging that the CRA provides for privacy, stated that in reality it was a non-issue in the cultural reality of Nigeria as parents have a “right of control” over their children’s privacy. According to the delegate, “the relationship between children and parents is so intensive that the issue of child’s rights to privacy hardly arise, as parents are always interested in the correspondence of their children and the relationships they entertain.”

It is not surprising that the delegation should take this position. In articulating the relationship between the child and parents, the delegate captures the essence of the argument that relationships affect the exercise of these rights. In Nigeria, as in most African countries, children are socialised according to the values and norms of the society and are, therefore, more likely to conform to the norms and roles assigned to them. Accordingly, in societies where norms stipulate the duty of children to respect their parents at all times, it would be inconceivable that a child would sue his or her parents for the violation of his or her privacy. The situation seems to be different in the Western world, as suggested by a recent case in the U.S. suggests in which a boy sued his mother for violating his privacy. The State Party’s second periodic report

94 Section 8 CRA.
96 The prosecutor in this case indicated that the case fell into the legal definition of harassment according to Arkansas law: “A person commits the offense if with purpose to harass, annoy or alarm another person without good cause, he engages in conduct or repeatedly commits acts that alarm or seriously annoy another person.” Accessed June 20, 2011, from http://news.cnet.com/8301-17852_3-
bears out this fact. In response to the concluding observation on the process of receiving complaints in the case of abuse, the report notes that: “Lodging of complaints and seeking redress before the court or other relevant authority without parental consent is not culturally accepted as litigants become enemies for life after the litigations.”

Therefore, the child is encouraged to “exhaust other means of settlement before resorting to the court of law.” In any case, a child cannot be a litigant independently of her/his parents. Children remain economically, physically, and psychologically dependent on their parents, and the right to complain or sue can only be exercised on his/her behalf by her/his parents or authorised adult persons. Thus, for the state party, the emphasis is on maintaining the unity and stability of the parent-child relationship; however, it is doubtful that this approach is in the best interest of the child at all times especially in cases of abuse.

3.6.2.6 Association and peaceful assembly

A similar resistance is evident in the case of the right to freedom of association and peaceful assembly. The State Party’s initial report notes that while all children are guaranteed this right, its exercise is subject to the parents’ guidance and direction. However, the initial report suggests that the extent of control is unlimited because

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97 Committee on the Rights of the Child, Concluding Observations of the 343rd meeting, Nigeria, 1996 UN Doc CRC/C/15/Add. 61 para 23.
99 Ibid.
100 Ibid at 100.
101 Article 15 CRC and Section 6 CRA.
legally “parents and guardians continue to have civil liability for their children.”\textsuperscript{102} Therefore, it is in their interest to “direct the exercise of this right in conformity with the law.”\textsuperscript{103} Again, this position is not in consonance with the CRC, since Article 14(2) obliges the State to ensure that parents and legal guardians exercise their rights of direction “in a manner consistent with the evolving capacity of the child.” This obligation implies that the State has a duty to determine the limits of parental direction of children so to guard against the infringement of their right to freedom of thought, conscience, and religion by their parents. It also is not surprising that the delegation should favour greater parental control, since there are practical and legal reasons for this position. Legally, as indicated in the initial Nigerian delegation’s report, parents in Nigeria bear civil liability\textsuperscript{104} for the wrongful actions of their children, so it is in their best interests to actively monitor what their children are doing and the company their children keep.\textsuperscript{105}

The traditional issue of shame and dishonour to the family and community is another factor, which means that parents are more than willing to interfere in the exercise of these rights to protect their honour and status within society. Based on these grounds, many parents make it their business to check on their children’s

\textsuperscript{102} Nigeria, Initial Reports of States parties due in 1993, OHCHR, 1995, CRC/C/8/Add.26 para 48
\textsuperscript{103} Ibid.
\textsuperscript{105} Ibid. This is the case for freedom of association and of peaceful assembly, but this argument also can be used to support parents interfering in their children’s privacy. In Nigeria, a parent may be arrested for the crime committed by the child, which is a ploy used by the police to encourage the child to confess their crime. This method relies on the existing bond between the child and parents. No law supports this method, but it is a practice I have observed many times.
\textsuperscript{106} This is especially so since the arrest of the Nigerian suicide bomber Farouk Abdulmutallab who attempted to blow up a plane in the U.S. The account given by a local newspaper describes the various tactics that parents are taking to monitor their children’s activities. See “Nigerian Parents Warn Children Abroad—Slow Down On Islamic Activities for Now” Accessed June 16, 2011, from http://allafrica.com/stories/201001090024.html.
\textsuperscript{107} CRA, Section 7.
activities, communications, friends, and general affairs. This action invariably limits rights of privacy as well as freedom of association.

With regard to the rights of freedom of conscience, religion, and of thought, whereas the CRA makes provisions for these rights, the State Report draws a distinction between established law and practice so that the child’s exercise of these rights is, once again, limited by parental control. The state delegate elucidates on this position:

...in practice, the child’s religion remains that of his parents until he/she attains majority or gets married and leaves the home. On his own, he may be able to choose his own religion but faces stiff opposition from his parents.

In the case of Muslim family law, the State Report indicates clearly that this area is non-negotiable for the child since according to Islamic law, a change of religion is forbidden. In the State’s view, its main task is to promote religious tolerance amongst children and not to enforce the child’s right to choose her/his religion.

The difficulties expressed by the Nigerian delegation in promoting the CRC, however, appear to reveal an important point of contention or even contradiction. On the one hand, it blamed autocratic parenting practices and a traditional mode of child protection, as obstacles to the implementation of the CRC, but as one can observe from the guiding policies of the CRC, these traditional controls are promoted as part

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107 Ibid para 98.
108 Ibid.
109 Ibid.
110 Ibid
of its implementation. In fact, the delegation seems to have been promoting the view that no tension exists between the child’s autonomy rights on the one hand, and her/his duties on the other. Instead, rights and duties are to be considered complementary to each other, in that one affirms the child’s rights as enunciated by the CRC and the other promotes an important cultural value, which aids the cohesion of the society. This attitude is clearly evident at one point during a dialogue with the Committee when the State delegate discussing child abuse defended this approach by insisting that customary attitudes and values go further in the protection of the child. According to her, “cultural norms in Nigeria relating to the protection of children were sometimes more advanced than the Convention itself”.¹¹²

These arguments presented by the delegates show clearly that resistance exists to the idea that the child’s autonomy rights can be realised without an emphasis on his/her duty to others in familial relationship with her/him. The next section analyses the Committee’s reaction to the state delegates’ arguments.

### 3.6.3 The Committee's Response to the Nigerian Approach and Position on Compliance with the CRC

The response of the Committee on the Rights of the Child to the clarifications put forth by Nigeria in its charge for non-compliance has been absolute; the Committee insisted that any systems of customary law, cultural practice, and attitude must be made compatible with the Convention, irrespective of any local factors that might affect its implementation. For example, in one case, the Committee insisted that:

... it is the view of the Committee that the traditional attitudes concerning the role children should play in the family, school, the community and the society in general may be frustrating efforts to achieve the fuller participation of children as envisaged in articles 12 and 13 of the Convention.\textsuperscript{113}

It thereafter recommended that:

...the State Party, in undertaking a comprehensive review of the national legal framework and its conformity with the principles and provisions of the Convention, should also take into account the compatibility of the system of customary law and regional and local laws with the articles of the convention.\textsuperscript{114}

The expectations of the Committee could be described as being mostly idealistic and as not fully reflective of the practical realities of actual implementation. In other words, its approach focused on implementing a universal standard of autonomy rights without appreciating diverse approaches that may in fact ultimately support autonomy rights for children. As discussed previously, the insistence on a universal standard is perhaps based on the suspicion by the Committee that raising cultural practices as a defence is merely a political ploy by state parties. However, the extremely detailed analysis by Harris-Short of the actual positions of state delegates debunks the argument that states are only trying to hide their human rights violations by raising cultural practices as a defence.\textsuperscript{115}

Therefore, it is evident that discrepancies exist in approach and perception between the Committee and the State Party. For the Committee, the customary practice of establishing duties for the child is seen as an obstacle to compliance with the CRC, whereas some of the parties involved in the actual implementation of the

\textsuperscript{113} Committee on the Rights of the Child, Concluding Observation, Nigeria, OHCHR. CRC/C/15/Add.61 para 14.

\textsuperscript{114} \textit{Ibid.} at 27.

Convention insist that the establishment of duties serves an important role in society. Given the difficulties associated with implementing rights without duties, as expressed by the state delegates of various countries, it is recommended that the Committee on the Rights of the Child be proactive in its interpretation of child autonomy rights by considering the benefits associated with integrating autonomy rights and duties. It is suggested that the committee should create a General Comments Report as it has done in the past to clarify and reiterate the position of the CRC.116 This action would serve to clarify content and promote an understanding of the concept of duty.

3.7 Conclusions

Although the CRC sets out clear autonomous rights for children, the legitimacy of the autonomy-based provisions in the Convention may be tenuous under the domestic laws of the state. The Nigerian example reveals a resistance to the provisions of the CRC on autonomy rights at various levels of implementation. This has demonstrated that we cannot ignore the complex demands of social relations that invariably prevent the individual child from being able to exercise these rights.117 It also has showed that, given the specific social and cultural context, the perception of these rights both by the authorities and citizenry are different from the expectation of the monitoring organs of the Convention. Similarly, children in this socio-cultural context are socialized according to the prevailing perceptions and norms, and therefore, they accept that rights and duties correspond with each other.


The implications of the foregoing analysis are significant with regard to the theory and practice of autonomy rights of the child. The different cases highlighted show that autonomous rights are greatly limited due to the emphasis on the emotional and supervisory relationship between the child and parents and the corresponding duties on the part of the child. The CRC failure to recognise the emotional aspect of the relationship between parent and the child is central to the conflict between the law and reality, and the tensions between the intent of the CRC and Nigeria’s approaches to implementation and compliance with the CRC. The next chapter suggests ways of balancing the disparity between law and the actual practices of countries like Nigeria so to reach a durable compromise. It maintains the original premise of this thesis that autonomy rights as expressed through a culturally inclusive and implementable framework must be understood within the context of duties. By using the example of the African Charter on the Rights and Welfare of the Child, I demonstrate the benefits of adopting this approach.
CHAPTER FOUR

4. ALTERNATIVE APPROACHES TO PROMOTING THE CHILD’S AUTONOMY RIGHTS: THE EXAMPLE OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRWC)

4.1 Introduction

In the previous chapter, I highlighted the ways that state parties are grappling with challenges associated with the current understanding of the autonomous child endowed with rights but not commensurate duties. I concluded that if the autonomy rights of the child are to be recognised and effective, there is a need to re-conceptualize those rights in order to correlate them to corresponding duties as integrated components of achieving both the developmental and social needs of the child. Using the example of the African Charter on the Rights and Welfare of the Child (ACRWC),¹ which recognises that the child has autonomy rights as well as responsibilities and duties, I shall demonstrate how the integration of rights and duties can be achieved.

In the first section of this chapter, I discuss the history and background of the ACRWC; and compare the ACRWC with the CRC highlighting their differences and similarities in relation to provisions on autonomy rights. The second section discusses what duty means for children and families in Africa. After discussing the concept, I

highlight some of the main criticisms and perceived shortcomings of the concept of “duty”, vis-à-vis children, including its enforceability. This chapter will show that duty and autonomy rights are not mutually exclusive concepts and that they have been successfully integrated in the African legal context. It will make recommendations on how to integrate duty and rights.

4.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

4.2.1 Historical Background

The ACRWC was adopted on 11 July 1990 by the Organisation of African Unity (OAU), now the African Union (AU), and entered into force on 29 November 1999. Following on the heels of the adoption and entry into force of the CRC, the ACRWC sought to reflect and re-establish “African” conceptions of human rights as they relate to children. The need for the ACRWC was predicated on the perceived failure of the CRC to take cognizance of important values and the economic realities of the African region. As indicated in the preceding chapters, an examination of the travaux préparatoires discloses instances of some of these core values that were not adequately considered or incorporated into the final text of the Convention, despite being raised during the drafting process. For example, it was suggested by Senegal that the notion of collectivism be integrated into the text but this suggestion was not

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2 Established on 9 July 2002, the AU was formed as a successor to the Organisation of African Unity (OAU), and consists of 53 African Member States.


4 Many commentators have alluded to this fact. See D. Olowu, ibid. See also, F. Viljoen “Why South Africa should Ratify the African Charter on the Rights of the Child” (1999) South African Law Journal 660, 661; F. Viljoen “State Reporting under the African Charter on Human and People’s Rights: A Boost from the South” (2000) 44:1 Journal of African Law at 110. According to him, “the reasons why a regional charter was adopted were the sidelining of Africans from the UN drafting process and the exclusion of ‘African-Specific’ issues from the CRC”.

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The CRC has also been criticised for the lack of consistent reference to the extended family, or the prescription of legal duties and responsibilities for the child. Indeed, as shown in Chapter 2, the under-representation of the African region during the drafting process, as well as the lack of influence of the few African delegations that attended, ensured that these particular concerns and peculiarities of the African situation were not given adequate consideration. Thus, it is said that the ACRWC places children’s rights issues in the African context, “allowing for the values of African civilization to be given priority.”

### 4.2.2 The Relationship Between ACRWC and the CRC

It is worth noting that the ACRWC mirrors the CRC in many of its provisions. For example, like the CRC, the ACRWC adopts the same Protection, Participation, and Prevention concepts as the guiding principles for defining child rights. Similar to the CRC, the ACRWC protects the child’s right to life; right to equality; the

5 During the consideration of the tenth preambular paragraph the Senegalese representative sought to add the terms “collective/community”, but the Chairperson ruled that since paragraph 10 had already been adopted without objection by the Working Group at a previous meeting, the proposal could not be considered. See Sharon Detrick, ed, *The United Nations Convention on the Rights to Children: A guide to the “Travaux préparatoires”* (The Hague: Kluwer Law International, 1992 at 111.


7 F. Viljoen *supra* note 4. Stephen Toope *Ibid*. Toope argues that the CRC’s focus on autonomy as a model of Human relationship is problematic within Canada.

8 See chapter 1 and 2 for the discussion on the participation history.

9 A. Lloyd, “The African Regional System for the Protection of Children’s Rights” in Julia Sloth-Nielsen, ed., *Children’s Rights in Africa: A legal perspective* (Aldershot: Ashgate, 2008) at 33. Examples of such situations and issues include regional displacement of children due to war, the conditions of children living under the then apartheid regime, the matters affecting the girl-child, and problems of displaced children. Hence the ACRWC was drafted to address these elements and many others that were considered unique and specific to the African region.


11 Article 6 of the CRC and Article 5 of ACRWC.

12 Article 2 of the CRC and Article 3 of ACRWC.
right to a name and nationality;\textsuperscript{13} rights to survival and development;\textsuperscript{14} right to health;\textsuperscript{15} etc.\textsuperscript{16} It also provides for the best interest of the child.\textsuperscript{17} In this context, it has been noted that the ACRWC was developed in “tandem” with the CRC, and not in opposition to it.\textsuperscript{18} In that sense, it strengthens, for the African child, the rights already provided for under the CRC.\textsuperscript{19} Thus, both CRC and the ACRWC together provide the framework within which children’s rights are considered and fostered in the African continent, with the latter aligning more to Africa’s historical and cultural heritage, as well as taking the value systems of the continent into account, as highlighted below.\textsuperscript{20}

However, despite the concurrent provisions, the ACRWC differs from the CRC in many important ways. In some instances, it is said to provide a “higher threshold” than the CRC,\textsuperscript{21} and in other cases it creates new categories of rights and duties, which the CRC does not include.\textsuperscript{22} In line with the overall focus of this thesis, the next section will discuss only the provisions related to autonomy rights and duties in the ACRWC and highlight how these differ from provisions of the CRC.

\begin{footnotesize}
\begin{enumerate}
  \item Article 7 of the CRC and Article 6 of the ACRWC.
  \item Article 14.
  \item Article 16.
  \item See Julia Sloth-Nielsen, \textit{supra} note 9 for a comprehensive listing of comparative rights.
  \item Article 7.
  \item Olowu \textit{supra} note 3.
  \item \textit{Ibid} at 113.
  \item See Lloyd, “Africa Regional System for the Protection of Children’s Rights” in Julia Sloth-Nielsen in Children’s Right in Africa; A legal Perspective \textit{supra} note 9, where the author argued that the Charter “takes a more comprehensive approach than the CRC to the protection of children’s rights”, especially in relation to ‘Best Interest’ principle, rights to life, survival and development.
  \item For example, the approach to the principle of the Best Interest of the Child. Under the ACRWC, the best interest of the child principle is declared to be “paramount” over the other underpinning principles, and is the primary consideration in all actions concerning the child, whereas the CRC provision states that in all actions concerning children, the best interests of the child shall be a “primary consideration”. The difference is the terminologies used, respectively. Thus it is argued that the ACRWC goes further than the CRC by ensuring that all its provisos must be interpreted, first and foremost, in the best interest of the child.
\end{enumerate}
\end{footnotesize}
4.3 Locating the Concepts of Autonomy and Duty in the African Charter

4.3.1 Autonomy Rights

The ACRWC, like the CRC, provides for several participation rights for the child, including the right to freedom of expression; freedom of association and assembly; freedom of thought, conscience and religion; right to privacy; and finally, the right to hold opinions. With these rights the Charter clearly represents the child as an autonomous individual, at least to the extent that the CRC makes provision for such rights. However, a closer look at these provisions indicates that exercise of these rights is limited. For example, the ACRWC only grants these rights to children capable of expressing their views and subjects it to “such restriction as are prescribed by law” (article 7). Similarly, it imposes a limitation on the privacy rights of children by obliging parents “to exercise reasonable supervision over the conduct of their children” (article 10). These qualifiers to the exercise or enjoyment of those rights suggest that children are less considered as autonomous human beings in the ACRWC than in the CRC.

Most significantly, however, the ACRWC makes a clear break from the CRC by prescribing specific duties and responsibilities for the child. These duties will be considered next.

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23 For detailed analysis of the difference between the CRC and the ACRWC, See Danwood Mzikenge Chirwa “The Merits and demerits of the Africa Charter on the Rights of the Child” (2002) 10 International journal of children’s Rights at 157. The inclusion of articles on autonomy rights is argued to represent a “copy-cat” approach by the drafters of the ACRWC, because the principles do not account for the reality of individuals in Africa, since, as Chirwa points out, African children are not considered entirely autonomous beings. For discussions of rights protected only in ACRWC but not in the CRC, see Eva Brems, Human Rights: Universality and Diversity (The Hague; Boston: Kluwer Law International, 2001) at 142.

24 Eva Brems, ibid at 145.
4.3.2 Duties of the Child

In line with the customary (or traditional) African outlook, the ACRWC provides extensively for the duties of the child toward his family, community and society. The penultimate preambular paragraph provides that “the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of every one”. Article 31(a) of the ACRWC explicitly recognizes the duty of the child. It is worthwhile to set out the provision here. It states:

Article 31. “Responsibilities of the Child”

Every child shall have responsibilities towards his family... the child subject to his or her age and ability... shall have the duty:

To work for the cohesion of the family, to respect his or her parents

and elders at all times and to assist them in case of need...

In outlining the duties of the child, the ACRWC mirrors the African Charter on Human and People’s Rights (ACHPR), which imposes responsibilities on the individual towards his family and community. This conception of the individual (whether a child or an adult), as one with both rights and duties, is based on the traditional African view of the individual as part of the community. As such, the

25 Preamble
26 Other duties include the duty to serve the national community by using his intellectual abilities and to preserve and strengthen African cultural values.
28 For detailed analysis of the history and influence of the ACHPR, see Eva Brems, Universality supra 23 at 109.
individual has a responsibility towards the family and society, and to contribute to their greater good. The next section will explain duties as understood in Africa, drawing on three major themes generally regarded as being the fundamental precepts underpinning the African concept of “duty”, namely, respect, responsibility and reciprocity.

4.4 The Meaning of Duty in Africa - Respect, Responsibility and Reciprocity

In most African societies, the norms of respect, responsibility (obligation) and reciprocity are fundamental principles of customary law and practices. As part of customary law, they constitute obligations for members of a community regardless of what the formal law provides or stipulates. In my consideration of these customary law principles, I am guided by Lon Fuller’s questions on customary law. Fuller posits that in considering any customary law, it is important to consider “the social process through which the law came into being and by which it is sustained”. He argues that to understand customary law, certain questions must be asked such as: “What are the processes by which these rules are created?” What functions did “that law serve among those who brought it into being?” “Do the same functional needs exist in our society, and if so, how are we ourselves meeting them”? These questions

33 Ibid at 2
34 Ibid.
are pertinent to the discussions in the next section for a number of reasons; firstly, they direct our attention to the motivations behind the customary values of duty to respect, obligation and reciprocity. Secondly, they help us to identify the strategies a community uses to ensure the cultural continuity and preservation of these values. These observations are critical to understanding the real meaning of the concept of duty in African context.

4.4.1 Respect

In most African societies, respect is the fundamental guiding principle of behaviour within the family.\(^{35}\) It governs relationships among all members of the family.\(^{36}\) Respect is accorded to varying degrees depending upon age, ability, and sex.\(^{37}\) From an early age, children are taught appropriate behaviour, including acceptable language, gestures and mannerisms to be accorded older people.\(^{38}\) These mannerisms are to be observed in greetings, for instance, with bows or curtsies, which indicate the recognition of seniority.\(^{39}\) For example, in the Yoruba culture, young people greet elders by prostrating (lying down) on the ground.\(^{40}\) While in the Igbo culture, a younger person must extend two hands to shake the hand of an older


\(^{37}\) Motala, Ibid at 382.


\(^{39}\) Cobbah supra 35 at 321.

person. These gestures are accepted and widely practiced. For a younger person not to behave thus is a sign of disrespect and considered proof of poor upbringing. The emphasis on gestures that show respect is to ensure that children behave appropriately and show deference to adults. This is because parents’ status in society depends, inter alia, upon their children’s comportment, thus inappropriate behaviour would bring shame upon the family. Another important reason for the emphasis on respect is that it promotes cohesion and mutual supportiveness within the community at large.

To sustain and reinforce the virtue of respect, communities typically adopt a reward or penalty approach. For example, there are several likely consequences of disrespect, which may range from physical sanction (e.g. flogging) to spiritual curse or the threat of future adverse “divine” retribution of some sort. Conversely, there are rewards for respectfulness and obedience. The rewards may, in accordance with the expectations in certain cases, also be spiritual in nature. This is reinforced by a belief system, which emphasises that respect for parents and elders, both living and

44 Ibid at 421.
45 Ibid.
dead, is a precondition for happiness, success and good fortune. The ideology that underpins this perspective is the belief that only an obedient and respectful child would take up his or her obligations to support his or her parents in old age. Such a child would, in return, receive similar rewards as a parent or an adult. Hence the socialisation goal is one that focuses on raising responsible children who obey and respect their parents and elders.

Awareness of their role and duties, vis-à-vis respect, is instilled in children from birth and they accept this as given. Twum-Danso’s findings in her research on the impact of the communal values on children’s right in the West African country of Ghana provide examples of this process. She writes that, in fact, these values are so important that often children see them as rights to which they are entitled to: “children have a right to be obedient”, “children have the right to respect their parents”. Himonga agrees with Twum-Danso’s findings, in his comments on the impact of cultural values, such as respect, on children’s participation rights in Zambia, and from interviews with children in Zambia:

Belita: “It is an obligation for us as young people to respect adults and there should be no question about this; we just have to do it. Our people have always lived and done things in this way”.

Another child agrees

50 Ibid., at 421.
Christian: “Respect is part of the culture. I consider contradicting my parents and other adults disrespectful. I do everything my parents tell me as a matter of respect”. 52

These findings show the importance attached to the concepts of duty and respect, and highlight children’s perception of their rights as being correlated to their obligations. Thus we may discern the important effects of culture on the socialisation of children in Africa. As noted earlier, the importance of these cultural norms and practices were specifically recognized by the drafters of the ACRWC, and therefore informed their incorporation in the text of the Charter.

4.4.2 Responsibility and Obligation

The duty of the child to support and provide care for a needy and deserving parent is a well-known and established norm in indigenous customary law. 53 It is accepted practice that each member of a family or tribe owes duties to protect and promote the well being of others within the extended family. The underlying concept is captured in the phrase, to be one’s “brother’s keeper”. 54 Hence, from infancy, the African child is raised with this notion of duty and the consciousness that he has responsibilities towards others.55

52 Ibid at 114.
53 Chuma Himonga “African Customary Law and Children’s Rights: Intersections and Domains in a New Era”, in Julia Sloth-Nielsen, African Customary Law and Children’s Rights: Intersections and Domains in a New Era (Aldershot: Ashgate, 2008)74 This duty arises prima facie by virtue of membership of the family or community. However, there is also a presumption that the beneficiaries of such a duty deserve of it based on the expectation that they too owe or have discharged the same duties to others (see the following section on reciprocity).
55 Fosi V. Road Accident Fund (N.O.) (Case no. 1934/2005 Cape of Good Hope Eastern Circuit Local Division), cited in Himonga supra 53 at n.14. In this case, “the customary law duty of members of the family to support each other was considered to be an African inborn consciousness of one’s roots, of where one has come from in relation to the role played by other members of his or her family in his own life, as well as actionable wrong”.

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There are two dimensions to this duty and responsibility, one is material/financial support and the other is physical assistance, which also involves emotional support. Jomo Kenyatta, the first post-colonial president of Kenya, describes both the dimensions and essence of this concept in *Facing Mount Kenya: The tribal Life of the Gikuyu*.\(^{56}\) Describing the importance of “duty” in the socialization of Gikuyu children, he writes:

“The Children are also taught definitely at circumcision, the theory, as it were, of respect to their parents and kinsfolk. Under all circumstances they must stay with them and share their joys and sorrows. It will never do to leave them and go off to see the world whenever they take the notion, especially when their parents are in their old age. They must give them clothes, look after their garden, herd their cows and sheep. Build their grains houses. It thus becomes part of their outlook on life that their parents shall not suffer want nor continue to labour strenuously in their old age while their children can lend a hand and do things to give them comfort...”\(^{57}\)

Even though in recent times significant changes have occurred within most communities in Africa arising, from external cultural influences, migration and socio-economic situations, the core values described here still remain valid and prevalent.\(^{58}\) In many African societies children are still taught and expected to perform some form of work from an early age,\(^{59}\) such as looking after younger infants, fetching water,


\(^{57}\) *Ibid*.

\(^{58}\) Neube, *supra* note 46 at 21. Here the author explains the changes and impact of Modernity on family relationships. He agrees that these changes notwithstanding, the traditional ideology of responsibilities toward others have not changed. While the changes are expectedly more pronounced in urban than in rural areas, however individuals living in cities typically maintain strong ties with and, therefore, responsibilities to relatives in rural areas. See also Thandabantu Nhlapo, “Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lesson from the South African Constitutional Debate (1995) *9 International Journal of Law and the Family*, 208 at 214.

cooking and tending herd.\textsuperscript{60} This engagement is considered to be part and parcel of the child’s education, recreation and development,\textsuperscript{61} and leads to the gradual assumption of responsibilities of adulthood. But this is manifestly different in the western world where the child is mostly seen as someone to be fed and who plays all the time.\textsuperscript{62} In this context, much effort is dedicated to the child’s education and development, without commensurate emphasis on engagement in economic activity or other productive endeavour.\textsuperscript{63} In contrast to the African approach illustrated earlier, the western approach results in what Archard describes as a “radical leap from childish play to adult work” which might, in fact, be traumatic for the child.\textsuperscript{64}

Furthermore, in regard to the material/financial aspects of duty, children owe their parents a duty of support or maintenance as outlined by the African Charter. This is based on the understanding that parents, having nurtured and sacrificed for their

\textsuperscript{60} Eva Brems, “Children’s Rights and Universality” in Jan Willems ed, \textit{Developmental and Autonomy Rights of the Children, Empowering Children, Caregivers and Communities} (Antwerp, Intersentia 2002)\textsuperscript{21} at 40. Citing a Lesotho study, the author points out that it is difficult for parents to view child labour as against the interest of the child because of its positive cultural perceptions, i.e. that of educational value and economic contribution to the family.

\textsuperscript{61} \textit{Ibid} at 40.


\textsuperscript{63} J. Boyden & B. Ling, \textit{What Works for Working Children} (New York & Stockholm: UNICEF ICDC & Rädda Barnen, 1998). There are certainly exceptions, where children engage in diverse forms of work from domestic chores to assisting parents at work, and are typically contingent on social status and economic context.

\textsuperscript{64} Archard, \textit{Children, Rights and Childhood} (London: Routledge, 2004) at 30. Armstrong explains the “radical leap” in her discussion of Autonomy and Capacity: “The unarticulated assumption that underpins this philosophy is that upon attainment of 18 years a person would have had extensive life experience to have acquired a level of maturity which is broadly sufficient to enable them to enter the world of legally and socially autonomous individuals ... needless to say the notion that someone by some magic wand on the stroke of a pen turns into a fully competent, mature, wise and autonomous individual upon attaining a certain arbitrarily fixed age has no scientific empirical basis in fact and reality” The point is that children can only acquire the ability to take on adult responsibilities by engaging in activities that promote autonomy. See Armstrong et al, “Towards a Cultural Understanding of the interplay between Children’s and Women’s Rights: An Eastern and Southern African perspective” (1995) \textit{3 International Journal of Children’s Rights} 333 at 337. See also, Julia Sloth-Nielsen, and B.D Mezmur, “A Dutiful Child: The Implications of Article 31 of the African. Children's Charter’ (2008) \textit{52 Journal of African Law} 159 at 177.
children, in return, deserve their children’s support in old age.\textsuperscript{65} In practical terms, the purpose of the “duty to assist” is to provide a safety net, or “social security”, to members of the extended family against sickness and old age.\textsuperscript{66} This is even more significant now considering the economic hardship presently being experienced in Africa. However, many objections have been raised about the approach of the ACRWC in combining rights with the duty to assist. Van Buren, for example, argues that there is a danger of exploitation of the child and that the practice might be viewed as a debt owed to family.\textsuperscript{67} However, she agrees that for the child to have responsibility gives him a “sense of value”,\textsuperscript{68} which, in turn reinforces his sense of belonging and proper adaptation to his community and environment. I shall return to these criticisms shortly.

\textbf{4.4.3 Reciprocity}

The ACRWC does not expressly provide for this principle, but “duty”, in the context of Africa, is reciprocal in its conception. In this sense, he who receives gives, meaning that as the child is entitled to receive the protection and care of the parents he owes the duty to care for them when in need. When he becomes a parent, he is similarly entitled to the support of his own children. Thus the mutually reinforcing cycle of support and entitlement, obligations and rights is sustained. This ensures that everyone benefits from the exercise of their duties to others. This is what Cobbah means when he notes that “as a family member, therefore, the African is made to “suffer” what will be considered an inconvenience by the westerner but at the same

\footnotesize{\textsuperscript{65} Ncube, \textit{supra} 46 at 21.  \\
\textsuperscript{66} Ncube, \textit{supra} 46 at 23. See also Julia Sloth-Nielsen and B.D Mezmur \textit{supra} 64 at 177  \\
\textsuperscript{67} Van Bueren, \textit{The International Law on the Rights of the Child}, (Martinus Nijhoff 1995) at 76.  \\
\textsuperscript{68} Van Bueren, ibid at 78.}
time the African holds an entitlement to visit the same on his kinsmen.”

This means that individuals are willing to sacrifice their comfort for other family members knowing that they too will be beneficiaries of other people’s sacrifices. Reciprocity in this regard ensures the continuity of a system of intergenerational bonds and interdependence in the community. Hence the context and socialisation of a child relates closely to the duties and functions of the child in the community and his later life as an adult in the same community.

4.5 The Co-Existence of Duties and Autonomy Rights in African Legal Systems

In African traditional systems, the notion of rights without responsibilities is virtually inconceivable. It was in recognition of this fact that the African Charter on Human and Peoples’ Rights, adopted in 1981 by the Organisation of African Unity, explicitly declares that:

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone...

The issue of individual duty as well as the relationship between duties and rights is also covered in the writings of many African commentators. Keba Mbaye, for example, argues that rights and duties “are regarded as being two facets of the same

70 Ncube, supra note 46 at 21.
72 ACHPR Preamble.
reality; two inseparable realities".\(^{73}\) This means that the individual is not perceived as possessing legal rights without corresponding duties. But this approach does not mean that the interests, rights and well-being of the individual are subjugated, rather it means that the individual must think carefully about the consequence of his/her action on other members of the family or the community.\(^{74}\) Hence, under this system, individuals still enjoy their various personal rights: freedom of expression, freedom of religion, freedom of movement, freedom of association etc. This is also applicable to the rights of the individual child, which, as described earlier in the chapter, are linked to duties.

The importance of the approach of correlating rights with duties is demonstrated in the constitutional recognition, by several states, of children’s duties towards their families, communities and societies.\(^{75}\) Countries with such provisions include the Gambia, Cape Verde, Guinea, Lesotho, Mali and Nigeria. An example of constitutional provisions placing duties on the child is found in the Constitution of Eritrea, which provides that:

Parents have the right and duty to bring up their children with due care and affection; in turn, children shall have the right and duty to respect their parents and to sustain them in old age.\(^{76}\)

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Similarly, article 16 of the Constitution of Guinea states that children owe a duty to care for and provide assistance to their parents. The Constitution of Cape Verde refers to children’s duty to obey their parents and respect their authority. Equal recognition is also given to the autonomy rights of the child within the African legal system. Nigeria’s Child Rights Act (CRA), Rwanda’s Child Rights and Protection Legislation 2001, and South Africa’s Children’s Act 38 of 2005 are a few examples of African legislation pertaining to children that provide for the child’s autonomy rights while establishing corresponding duties. Thus within African legal culture, rights and duties are not considered opposite but rather as complements of each other.

The approach of combining rights and duties has serious implications for the implementation of the CRC throughout Africa, as demonstrated in the previous chapter with the study of Nigeria. These cultural values will not change easily, as they are very much internalized in the society. As demonstrated previously, they are constantly being reinforced by language, and religious, moral and societal observances. Therefore, the application of the CRC within the region must recognise that the duties of the child must accompany the claim of his/her autonomy rights. In the absence of the recognition of the relationship between rights and duties, the CRC will continue to be viewed within Africa as an alien document that threatens family

77 Beatrice Akua Duncan, supra note 75 at 49.
78 Julia Sloth-Nielsen, supra note 76 at 65.
79 As discussed earlier in Chapter 2 above, many groups view rights and duties as collaborative with each other, including Feminist scholars, even in the West.
80 Hayden, F. Gregory “Values, Beliefs and Attitudes in a socio technical Setting.” Journal of Economic Issues 22, no. 2 (1988): 415-426, at 417. Here the author describes the impact of cultural values in the work place. He notes that “Cultural values are transcendental across all aspects of culture and society. They assert themselves even in the unconscious sphere of existence. Because they are transcendental, it is impossible for human agents to change them.”
relationships. In this context, the challenge for any policy maker or legislative authority within the region is to fashion out how best to derive the benefits associated with these cultural values without amplifying the limitations they may impose on the child, vis-à-vis his autonomy rights. The next section examines critically certain objections that have been raised with respect to integrating duties and rights.

4.6 Objection to the Integration Duties and Rights

Despite the importance and value attached to duties, within the African region, a number of objections have been raised to the ACRWC provisions on duties. The first objection relates to the enforceability of these duties; it is argued that duties for children are basically moral-based and therefore difficult to enforce. The second is that the imposition of duties on children limits their exercise of their rights. I will consider these criticisms in turn.

4.6.1 Enforceability of Duties

As indicated in Chapter Two, one of the concerns raised during the negotiation process of the CRC about Senegal’s proposal for the incorporation of certain precepts was the enforceability of the duties. It was argued that duty, in reference to children, was only moral in nature and, therefore, difficult to enforce. Similar criticisms are also levelled against the ACRWC’s conception of duties. It has also been pointed out that duties as outlined, for example in the African Charter, are merely “principles of

behaviour” rather than “operational or practicable concepts”.\textsuperscript{82} They are therefore termed as “soft” duties, and as such were never intended to be legally enforceable.\textsuperscript{83} The main ground for the non-enforceability argument is the lack of specificity and boundaries in the wording of the provisions.\textsuperscript{84} How, for instance, can the state measure whether the individual is fulfilling his duties to the best of his abilities?\textsuperscript{85} Thus, as suggested by other commentators, more insights and direction are needed from the African Commission on Human Rights as to how these individual duties might be implemented by the state.\textsuperscript{86} It must be noted however, that even though these duties are provided for by the ACRWC, it is not intended that a child should be prosecuted for non-fulfilment of his duties towards others. Viljoen notes, in this regard, that the complaint mechanism provided by the ACRWC is “not instituted to allow for complaints against individuals but only by individuals”.\textsuperscript{87} Therefore, it would seem that the goal of the drafters in including these duties is simply to express the recognition of the African traditional culture and realities,\textsuperscript{88} as well as to place an obligation on the states to promote and instil the principles and ideals of duties in their citizens.\textsuperscript{89} This role of the state, merely to advance these principles, does not diminish the importance attached to duty as can be seen in the case of Africa. Duty retains a

\textsuperscript{83} Douglas Hodgson, \textit{ibid} at 132.
\textsuperscript{84} Eva Brems, \textit{Human Rights: Universality and Diversity} (2001) supra note 23 at 112
\textsuperscript{88} Eva Brems, supra note 23 at 112.
\textsuperscript{89} See U. Oji Umozurike, “The African Charter on Human and People’s Rights” (1983) 77 \textit{America Journal of International Law} 902 at 907
considerable force and significance within African societies, both for its symbolic importance and as a component of “law”. These duties, like other “laws”, are primarily enforced through customary and religious sanctions, and the possibility of social stigmatisation. Compliance is ensured through the intervention of the traditional justice system (chiefs and elders) and societal pressure. Himonga, commenting on the customary legal force behind children’s duty to assist their parents, notes that in cases of non-performance, a parent can lodge a complaint in a tribal court or some community tribunal, or inform the members of extended family about his predicament. The offending child might become shunned from the community, fined or sanctioned in some other way, for example, by being excluded from certain community activities and festivities. Thus we see the role of the individuals and the community as the primary enforcer of these duties.

Undoubtedly, the success and effectiveness of the duty system within the African continent can be attributed to strong communitarian ethics that have become socially internalized and are inculcated from childhood as discussed above. Because children are, from the onset, socialised to accept these duties as “obligatory”, they consider the fulfilment of these “duties” as consistent with their rights. The difficulty, however, lies in how to translate this duty system into enforceable rules at the level of the state. These difficulties can be overcome where it is accepted that rights and duties could fruitfully work together as a means towards affirming the fundamental

91 Ibid at 476.
92 Ibid 476.
93 See Himonga, supra note 53 at 78.
94 Devereux, supra note 85 at 476-477.
rationale for human rights – the achievement of universal respect for and promotion of human dignity.\textsuperscript{95} To this end, as Devereux concludes, “promoting a greater emphasis on individual duties and a community outlook is one means by which the existing system [of human rights] could seek to further ensure respect for human dignity”.\textsuperscript{96}

\subsection*{4.6.2 Duties as limiting Rights}

One of the more direct attacks on the African provision for the duties of the child has been made by Meda Couzens,\textsuperscript{97} whose principal argument is that many elements of African children’s socialisation such as obedience, respect, and responsibilities (discussed above), limit the child’s autonomy rights. In her words:

\begin{quote}
\textquoteleft \textit{while the western world is quite concerned with the legal debates on child autonomy, the developing world is less preoccupied with theoretical aspects but supports child autonomy in the form of taking up social and economic responsibilities…, there seems to be a low level of formal awareness or formal recognition of a child’s capacity for autonomy in developing countries. In the African context, for example, the traditionalist and communitarian organisation of many African communities leave little scope for children to practise their capacity for autonomy in the form of expressing their view.}\textsuperscript{98}
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{95} \textit{Ibid} at 482.
\item \textsuperscript{96} \textit{Ibid}.
\item \textsuperscript{98} \textit{Ibid} at 438. It is interesting to note that Couzens, despite her objections, identified key reasons why children should participate or be autonomous. For example, in her discussion, she observed why children should participate through expressing their opinion. According to her, 1) children develop greater competency when they practice decision-making; 2) consultation increases confidence; and 3) educates the child for responsible adult life; 4) stimulates the child to see himself as part of the society; 5) may even have therapeutic effects; and 6) children feel supported and important and when their views are challenged, they learn to listen, to negotiate, to defend views and to accept challenge. All these, she concludes, are necessary skills for future autonomous life. But if these are the goals of the autonomy rights, Africans achieve this through emphasis on the duties and the responsibilities of children, and through practical experience!
\end{itemize}
Couzens is not alone in seeing duties as problematic. A number of other writers, including African authors, also identify other limitations. For example, Van Bueren articulates her concerns about the duty to respect parents in her analysis of the concept of duty in Africa as follows: “the responsibility to respect parents and elders at all times is too unquestioning and general”.

Similarly, Chirwa argues that duties could undermine the child participatory rights. Himonga agrees that the duty to respect parents translates to “culture of silence” because children become reluctant to question decisions made on their behalf by adults. With respect to the duty to support parents or others, Odongo cautions that the rights of children may be compromised in the exercise of their duties.

These criticisms highlight the tension and conflict arising from the relationships between culture and human rights. Arguments about how to reconcile culture and human rights have been cast in the language of universalism and relativism. I shall not expand or dwell on these arguments as they have been tackled in many other works, and are also beyond the scope of this thesis. However with regard to African values, many authors have sought to proffer solutions on how to reconcile these issues: some suggest that a compatibility test be done by checking if

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100 Chirwa, Danwood Mzikenge “Merits and Demerits” supra note 23 at 169.
cultural norms align with the human rights vision. In that case, where culture fails to comply with the human rights vision, then the human rights standards must prevail over culture. Some have even called for the complete elimination of cultural norms and practices that do not align with current international standards set by the CRC.

I strongly disagree with these positions. Most often the approach of criticising these values is based on a yardstick of measurement, which presupposes that the standards for what is best for the child is derived from the western model which is considered and has been promoted as universal. Critics of these values seem to be seeking a similarity in results when autonomy right principles are tested in different cultural settings. But this is not realistic, as these standards must invariably contend with local values and norms, which enjoy great legitimacy among locals. Moreover, these arguments for a “compatibility test” brings to mind the “repugnancy test” of the colonial era which was used to whittle down customary law and practices that did not align with the prevailing British standard and values. As was the case then, customary practices such as the ones being discussed here, when put to test against western standards outside of context of application invariably fail. This failure is often times mistaken as a ground for change or to eliminate these values. As Glenn suggests in his discussion of ancient and indigenous traditions, there is nothing new about this elimination strategy. Citing Locke, Glenn argued that, customary practices, which

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are recognized by non-western societies, were in the past dismissed as de facto habits and that this disregard continues till date. The reason behind this is the perception that these practices are “habits”, they are therefore said to lack rational justification and are hence not part of rational tradition. Glenn continues that the exclusion of these practices from rational tradition is done by “divorcing the custom from its justification, from the reason and information which lead to its ongoing performance”. This line of argument demonstrates the need for us not to lose sight of the rationale behind the continuity of these practices amongst the local communities that adhere to them.

To suggest that people change their gestures and practices as well as their values to fit a “universal” conception of appropriate code of behaviour is an arrogant ambition that does not value cultural or legal pluralism. Of course, one is not suggesting that African societies should not continuously engage in internal audit of their values, but seeking to diminish that which has given meaning and identity to a people or society will destroy their culture or result in the alienation of members of such societies. The feelings of alienation have already manifested in some African societies because of the perception that the “new rules” do not align with the expectations of the society in terms of what is appropriate between children and parents. Indeed for any meaningful process to be made towards legitimizing children’s rights in the eyes of the local people, their perception of values that are

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at 7, where the author, discussing the resistance to human right instruments in Africa notes that “to this day Africans equate human rights and the need to change customs with that of the repugnance clause”. For similar views see Thandabantu Nhlapo “Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lesson from the South African Constitutional Debate” (1995) 9 International Journal of Law and the Family, 208 at 214.

important must be recognised. As Lopakta, the Chairman of the UN Working Group that negotiated the CRC rightly puts it: “The universality of the rights of the child does not mean that those rights should be interpreted and implemented abstracted from their context. Due account must also be taken generally of the importance of the tradition and cultural values of each specific people for the protection and harmonious development of the child”. 108

It is therefore my opinion that we should not throw the “baby out with the bath water” by insisting on a complete alignment of these cultural values with the CRC. Rather the challenge is to assess how to derive the benefits associated with these values without the limitations that they might impose on the child. The next section takes on that challenge of extracting the benefits.

4.7 Extracting the Benefits of Duty

The argument that the imposition of duties limits the exercise of children’s autonomy rights would appear to have some merit in certain cases, especially in regard to freedom of expression. However, these “limitations” (i.e. recognition of duties and the practice of gestures of respect and deference to parents and elders), in the African context, are not established to hinder the child’s autonomy but, as Armstrong notes, to “reinforce society’s underlying values on and about the relationship between children and their parents”. 109 For instance, this entails that a child cannot interrupt an adult or express, in an adult’s presence, views that may be


109 Armstrong et al supra note 64 at 133.
regarded as insulting. Motala justifies this limitation on the right of speech as similar to what obtains in all societies imposed under the law of slander and libel, and are only conditioned by the place and nature of the speech – it is not absolute. In any case the alternatives may likely not be in the interest of social order and cohesion since, as Sloth-Nielsen and Memzur have suggested, the alternative to duty to respect becomes ‘licence to disrespect’.

With respect to the obligations of the child, opponents or critics of the African approach tend to discuss or conceive autonomy narrowly as achievable only through the ability of children to express their views. As Sloth-Nielsen and Memzur rightly argue, participation means more than expression of opinions, or having a say in matters concerning the individual. The word ‘participate’ conjures an activity of some sort beyond the mere verbal or cerebral. If this meaning of participation is used in explaining the ‘participation rights”, then it is clear that African societies envisage a form of “active participation”, at the practical level, which involves the fulfilment, by children, of their responsibilities. As shown above, the realities that children in Africa experience are such that they are given the opportunity to participate in the tasks, chores and traditions of adulthood before reaching the age of majority so as to learn and develop the skills necessary for autonomy later family life.

\[110\] Ibid at 91. While this expectation may accord with universal requirements of courtesy, there is a more fundamental limit of children’s freedom to speak in public, as they are expected to be spoken for. 

\[111\] Ibid at 91.

\[112\] See Okey Elechi, supra note 74, at 65.


\[114\] Ibid. See, for instance, Meda Couzens, supra note 97, as shown further on in this chapter.

\[115\] J. Sloth-Nielsen & B. D. Mezmur, supra note  113


\[117\] J. Sloth-Nielsen & B. D. Mezmur, supra note 113
It is important to note that although children are given responsibility from early on, the ACRWC provides that these responsibilities are to be given according to physical size, age and abilities of the child.\textsuperscript{118} As the child grows older, more responsibilities are progressively given to him commensurate with his level of development or maturity.

There are several benefits associated with this approach; (1) It increases the child’s self-esteem and confidence in himself and his abilities;\textsuperscript{119} (2) It underscores and reinforces a feeling of inclusiveness in the family by ensuring that the child identifies with the family and community and views them as a vital part of his or her life;\textsuperscript{120} (3) The child becomes an active participant in the family who can contribute to the overall well-being of the family unit is placed and not only as an object of right to be protected and taken care of by the family and community”.\textsuperscript{121}

Another benefit suggested by some authors is that the inter-generational responsibility and reciprocity between adult and children makes the transition from childhood to adulthood within the African context more fluid and less traumatic because children practice to be adults when given responsibilities and are, therefore,

\textsuperscript{118} Article 31.
ready to face future challenges.\textsuperscript{122} Thus, if autonomy is put in wider context of the child’s participation rather than construed as meaning verbal expression only, the traditional African approach, in effect, grants or provides prospects for greater autonomy to children than is common in the West.\textsuperscript{123}

In the final analysis, I agree with Sloth-Nielsen and Memzur that the prescription for duties imposed for the child are a “positive tradition”\textsuperscript{124} and an “asset” in the upbringing of the African child.\textsuperscript{125} Therefore, as has been suggested by commentators on the CRC, the West can also learn from the Afro-centric approach of integrating autonomy rights with duties.\textsuperscript{126} Having discussed the benefits associated with an integration of these rights, I put forward some suggestions on the ways in which we can reduce the limitations imposed by duties on the participations rights of the child as discussion above.

4.8 Moderating the limitations imposed by duties

To effectively curb the adverse impacts that children’s exercise of their duties might have on the enjoyment of their rights, it is important to effect a change of attitude in parents and adults who are in charge of children. It is possible to strengthen the family by including parenting education and support for parents. The goal will be to educate parents on the importance and value of encouraging children’s participation in matters that concern them. Expectedly, this will not be easy given the


\textsuperscript{125} Ibid.

\textsuperscript{126} Ibid. See also R. Intudi, supra note 121 at 27.
culture of respect that exists, which determines when the child should speak on and get involved in matters related to his or her interests. However, it has been reported that parents are more receptive to the idea of children’s rights when it is expressed as children’s “needs”. This demonstrates that one strategy to be adopted in resolving the challenges associated with promoting children’s autonomy rights in societies that favour duties might lie in adopting appropriate language when discussing these issues. This is especially important for policy makers who work in regions where the emphasis is on communality, interdependence and responsibilities.

The next section considers how to achieve the integration of rights and duties and how best to enhance the enforcement of duties or obligations. It makes several recommendations and highlights the benefits of such an approach.

4.9 How can the Integration of Rights and Duties be Effectively Achieved?

Drawing on insights from my earlier discussions on the African approach to correlating rights with duties, it is evident that there is a need for a stronger community ethics than presently exists. This entails a consciousness that everyone holds a duty towards the community or family that has nurtured him or her and should be willing to contribute to it. For the necessary institutional and attitudinal changes to take place, several important actions must be taken.

128 Douglas Hodgson supra note 82 at 258.
4.9.1 Adoption by the UN of an optional protocol on the Duties and Responsibilities of the of the child

There is a need for recognition within the international children’s rights legal regime that children owe duties to others in relationship with them. Since it is very unlikely that the CRC will be redrafted, it is suggested that the United Nations consider and adopt another protocol on the responsibilities of the child (similar to those adopted to protect children from involvement in armed conflicts and from sexual exploitation). If facilitating the process for accepting such an initiative proves difficult, it then falls on the Committee on the Rights of the Child to use its platform as an implementing and monitoring body to make general comments on the duties of the child, as it has done with regard to other provisions in the CRC. The Committee can no longer ignore the importance of duties given the ample evidence it has received from state parties of the difficulties that they face in implementing autonomy rights without duties. The Committee’s general comments and observations have served as the basis for countries to act on, implement and even interpret the provisions of the CRC. Making such a pronouncement will help in two in three ways, first it help articulate a more acceptable context for the concept of duties, vis-à-vis autonomy rights. It will also help educate State Parties on the importance and benefits associated with these duties, providing a rational basis for their legal recognition and implementation. Finally, it will serve as a persuasive


130 See Chapter 2.
authority for courts in interpreting and enforcing the rights of the child, and in their consideration of the scope and nature of such rights and related obligations.

4.9.2 Incorporation into domestic laws and policies

Another step that should be taken is that countries that are members of the CRC be encouraged to include of the concept of duty in their national policies and domestic laws guiding the protection of children’s rights. It should be viewed within such countries as a public policy agenda. Since the CRC already provides, under the article on education (Article 29), for the need to inculcate principles such as respect in children, there should be no obstacles to countries adopting policies that promote the duties of the child as well as his rights. Such an approach will entail integration into the education curriculum to teach children in schools about their roles and duties towards others. This also requires training, discussions and awareness raising with a focus on changing attitudes of those responsible or in direct contact with children, for example, teachers, social welfare officers, judges and parents.

4.9.3 National implementation

As my discussion in the previous chapter shows, incorporation of the concept of duty into laws and policies is not an end in itself, but is key to the actual implementation of the CRC. While the CRC may be said to have established global minimum standards for the achievement of children’s rights, countries operating within the ambit of their sovereign rights can address additional issues, which further enhance or give effect to those rights. The ACRWC, for instance, goes a bit further than the CRC in the underpinning precepts by providing that the best interest of the
child shall be “fundamental”. In this context, countries may also include the duties of the child where they do not derogate from or undermine the rights. This is possible, because while the CRC omitted duties, it does not prohibit their inclusion in domestic laws or implementation strategies. While this is especially relevant for jurisdictions where duty is considered fundamental, it may not particularly resonate in those jurisdictions where duties are not an integral part of the conception of children’s realities. However, the inclusion of duties as and optional part of the implementation measures at the national level would not run foul of Convention but would rather enhance its overall acceptance and legitimacy and, consequently, its effective implementation. A cynic might argue that this approach gives countries too much leeway to include other ideas not prohibited by the CRC but deemed compatible with the local values. The fear is that it might lower or dilute the standard of protection put in place for the child. While this is a legitimate concern however, what this thesis is advancing is the need for a balanced approach to the discussion of rights of the child.

The above discussions have highlighted various ways the law can be used to promote the inclusion of duties in autonomy rights discourse. However, there are also possible non–legal means that could be used to ensure the integration of rights and duties. One of such approaches, as earlier noted, is providing parenting education and support for the parents. In this regard, parents are provided with the necessary education and support, taking into account the biological, psychological, social and cultural stance and needs of both the parent and child. This strategy would not only allow them to understand their children’s developmental milestones but will also

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131 See chapter 3.
highlight the need to integrate the rights and responsibilities of both parents and children. This should ensure that no child is abused or alienated.\textsuperscript{133}

\section*{4.10 Conclusion and Recommendations}

Recognising duties for children within the children’s rights discourse will achieve several goals. First, it will help bolster the support that CRC has provided for families by ensuring the stability and continuity of the family by emphasising mutuality and interdependence within the family. Second, it will help direct attention to all the demonstrated benefits to the child’s development. Third, it will also make the CRC more relevant to regions that already support child’s autonomy through duties, thereby ensuring the enhanced legitimacy and acceptability of the CRC within these regions. Fourth, it will improve the implementation efforts of countries that emphasize duty and interdependence.

The foundation for a system that integrates duties and rights was laid in the Universal Declaration of Human Rights UDHR, (Article 29) (1)). Subsequently, the African regional human rights documents, such as ACHPR and now the ACRWC, have all demonstrated that rights and duty can be effectively integrated. A look at the drafting history of these documents shows the importance that the drafters of these documents attached to the individual’s duties. They recognised, as I have sought to stress in this chapter, that it is not adequate to proclaim individual rights without regard to the social environments in which they are to be exercised.\textsuperscript{134} In this regard, I

\begin{thebibliography}{99}
\bibitem{133} Ibid.
\end{thebibliography}
can agree with Dworkin that “the logic behind these emphases is that because people exercise their rights in society, it was necessary also to stress their duties”.135

This chapter discussed the concept of duty as provided for in the ACRWC and examined the underlying precepts and values of duty in connection with rights of children in the African context. It also highlighted some of the key criticisms against the traditional African approach of correlating children’s rights with commensurate obligations or duties, as ensconced in the African Charter, and provided rejoinders to those critiques. It concludes that the idea of the universality of human rights does not mean strict uniformity of interpretation and implementation, and that it is important to take context into account. Finally, despite the various critiques and alleged shortcomings, the African approach is considered, overall, to be beneficial to the social and developmental needs of the child and could serve as a model worth considering by other societies.

5. CONCLUSION

5. CONSTRUCTING AN ENDURING RELATIONSHIP BETWEEN AUTONOMY RIGHTS AND DUTIES.

Should “duties” play a role in the fulfilment of children’s rights?¹ This question is the underlying premise of this thesis and has been the preoccupation of many books and academic articles.² Not surprisingly the debate has also drawn attention from outside academic circles, albeit in a different context. For example, a recently published but controversial memoir by Yale University Professor, Amy Chua, *Battle Hymn of the Tiger Mother*,³ presents an opportunity to debate what role the child must play within the family as well as what the role of the parents is in promoting the child’s ability to fully function as an autonomous individual in society. In her memoir, Chua drew a contrast between Chinese parents and their western counterparts in America, and argued that Chinese parenting style was superior to western methods in several ways. A prepublication excerpt of the book titled “Why Chinese Parents Are Superior”, published in the Wall Street Journal,⁴ highlighted

¹ This question is adapted from Devereux’s article on duty. See Anne-Marie Devereux “Should duties play a larger role in human rights”? “A Critique of Western Liberal and African Human Right Jurisprudence (1995) 18 University of New South Wales Law Journal, pp 464 - 82. The author argued for the integration of rights and duties.


these differences.\textsuperscript{5} One such difference is the distinct approach to children’s upbringing and their duties towards their parents.\textsuperscript{6} Making her case on why Chinese parents are superior in this regard, she writes:

Chinese parents believe that their kids owe them everything. [T]he fact that the parents have sacrificed and done so much for their children. .....Anyway, the understanding is that Chinese children must spend their lives repaying their parents by obeying them and making them proud.

By contrast, I don't think most Westerners have the same view of children being permanently indebted to their parents. Because they believe that “Children don't choose their parents,” ...it's the parents' responsibility to provide for them. Kids don't owe their parents anything. Their duty will be to their own kids”.\textsuperscript{7}

To Chua, this approach is a “terrible deal for the Western parent”.\textsuperscript{8}

Chua’s argument typifies the difference between expectations of the parent and the role of the child’s duties in non-western cultures. The main thrust of her argument is that there should be a reciprocal and interdependent relationship between parents and children. Chua makes a clarifying point from the onset, that she uses the term “Chinese mother" loosely. According to her, Korean, Indian, Jamaican, and Ghanaian parents share similar values as the Chinese parents in their approach to parenting.\textsuperscript{9} This is significant because all these countries and cultures share the idea that the child owes a duty toward the parents and other members of the family, and to

\textsuperscript{5} Her book provoked considerable controversy, and understandably so, amongst American parents, child development scholars and the media. Many have denounced her approach, suggesting that her parenting approach is tantamount to child abuse; others have embraced her arguments, however, asserting that there is some truth to her memoir. Of interest to me and relevant to this thesis.

\textsuperscript{6} Her prepublication excerpt in the \textit{Wall Street Journal} (titled "Why Chinese Mothers Are Superior") started the buzz. According to a Time Magazine article, the online version has been read more than 1 million times and attracted more than 7,000 comments so far. See Annie Murphy Paul, "Tiger Moms: Is Tough Parenting Really the Answer?" Time (January 20 2011) Time Inc. available online: <http://www.time.com/time/nation/article/0,8599,2043313,00.html#ixzz1FDzbVegF> (accessed 10 February 2011).

\textsuperscript{7} Amy Chua, “Why Chinese Mothers Are Superior”, \textit{supra} note 4.

\textsuperscript{8} Ibid.

\textsuperscript{9} Ibid.
the society at large. Her arguments, though extreme in some cases, advance two very important ideas. Firstly, that there are in fact “other” legitimate ways of successfully raising a child,\(^\text{10}\) which includes the stipulation of duties for the child. The second, and perhaps most salient feature of her argument, is that western parents might and do have something to learn from other cultures.

In this thesis, I make similar arguments, that there is an alternative or complementary approach to the Western notion, especially as it concerns the autonomy-related rights in the Convention on the Rights of the Child (Articles 12 – 17). I argue that the African approach of coupling autonomy rights with duty demonstrates a different approach of conceiving the right to autonomy, and encompasses an approach that promotes the values of “belonging”, “co-operation” and “reciprocity”. This, in turn, supports the family unit, ensuring that each member contributes to and, at the same time, receives benefits from the family membership and consequent relationships.

Whilst other writers have explored the issue of integrating duties and rights, my analysis in this thesis has linked the challenges of the past, arising from the drafting process of the CRC, to the current and possibly future challenges to its legitimacy and effective implementation. A review of the drafting process, as demonstrated in Chapter 2, reveals the overt influence and predominance of Western countries. As I highlighted, this dominant presence ensured that tenets, values and norms, such as individualism and almost total independence – values that do not

\(^{10}\) There are many books that provide researches on child development and parenting across cultures. For an in-depth analysis of the role culture plays, see Meredith F. Small, *Our babies Ourselves: How Biology and Culture Shape the Way We Parent* 1st Anchor Books ed. (New York: Anchor Books, 1998).
necessarily align with or uphold the idea of family obligations and responsibilities — were central to and underpinned the final document. The consequence of this influence is that such concepts or values as “duty” were either excluded from or not given adequate consideration in the final text. This thesis, in chapter 2, establishes that the omission of duty in the CRC has engendered resistance, even apathy, to the autonomy rights provisions of the CRC. This is evidenced by the lack of implementation of and non-compliance with these provisions, as shown in case the study of Nigeria in Chapter 3. The implication of this is that the effectiveness and legitimacy of the CRC is in doubt in regions that emphasise duty, such as Africa, Asia, Middle East and South Pacific regions. Within these regions, as shown in chapter 4, by the example of the ACRWC, autonomy rights and duties are not mutually exclusive, both are considered to be part and parcel of the individual’s attributes as a member of the community. The constitutional recognition by several countries in these regions also demonstrates the importance of this concept from the countries’ perspective. Thus, given the importance of “duty” to the Asian, African and Middle East regions, it is important to further examine how to align or harmonise the CRC with the reality of domestic laws and practices of different peoples and societies. If the CRC must be relevant and enjoy universal appeal, in both theory and practice, it must be recognised by communities around the world as relevant to their reality. One such reality, as demonstrated throughout this thesis, is that there is a role for the duties of the individual in the promotion of autonomy rights of the child. Without this legitimation, as Banda notes, international human rights instruments such as the CRC will remain a “paper ideal, unacknowledged and unused”.\footnote{\textit{Women, Law and Human Right : An African Perspective} (Oxford; Portland, Or.: Hart}
Without a doubt, the question of enforceability of the concept of duty remains open. As noted in Chapter 4, critics of the argument for the integration of rights and duties would be quick to point out the difficulty associated with translating a “moral-based” system into a state enforceable system. They will most likely ask: what are the specificity/contents of these duties? To whom are these duties owed? And what are the means of fulfilment? All these questions are important points that we must continue to explore or examine. However, as was also shown in Chapter 4, with the example of the ACRWC, the foundation for the understanding of the true nature and context of duty, especially in relation to the child, has been laid particularly well at the regional and national level. From this, we can gain several important insights that will guide us toward building a right/duty-based system. One such insight is that first, they community can become an enforcer of duty hence there is a need for “stronger community ethic than currently exist”\textsuperscript{12}. This implies awareness that every individual has a contribution to make and this contribution sometimes entail greater individual sacrifice and some sense of selflessness on the part of everyone\textsuperscript{13}. Another insight that emerges from my discussion in the previous chapters is that inculcation of these values must start early from childhood. Children should be taught that they owe a responsibility towards others especially those who are in direct relationship with them. There is no gainsaying that children of today are the tomorrow’s citizens and, in the long run, society benefits from a citizenry that are aware and willing to take on their responsibilities towards others. Thus, notwithstanding the criticisms and doubts

\textsuperscript{12} See the arguments on the re-emergence of the Communitarian in Chapter 1.

expressed towards these duties, the conversations about the possibility of the integrating duty and rights must continue.

As discussed in Chapter 1, recent developments in the international human rights discourse indicate that there is already emerging, a standard for the integration of duties and rights. For example, the growing call to focus on the individual’s duties to the family and community, even in individualist-oriented countries like Canada and the USA. The debate in Canada surrounding an ancient law called “filial responsibility” demonstrates the importance of the concept of duty. Therefore, given that these shifts in attitude and thoughts are occurring even within the so-called individualistic societies and also being reinforced within collective societies, there seems to be an evolving consensus that duties must play an important role in any children’s rights discourse. Finally, it is submitted that this approach is not merely academic or polemic, but ultimately serves to promote the best interest of the child for which both the CRC and related international agreements profess to stand.

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14 The objective of this law is to ensure that elderly parents who are impoverished are assured financial support by their children, who are capable of providing support. The law allows parents to sue their adult children for support. An example of such cases is the 1993 case of Godwin vs. Bolsco, (1993), 45 R.F.L. (3d) 310 (Ont. Prov. Ct.), affirmed by the Ontario Court of Appeal (1996) 20 R.F.L. (4th) 66, where a mother sued her adult children for maintenance. The Ontario Court of Appeal affirmed that the children of plaintiff owed her a duty of support despite their arguments that there was no existing interdependence relationship before the case and ordered the children to pay her monthly support allowance. Another case is currently under way, which relies on this burgeoning field of filial responsibility law. It is noteworthy to mention that all Canadian provinces except Alberta have legislated support for filial responsibility.

15 In 1973, South Korea's Ministry of Health and Social Affairs established a Filial Piety Prize. A major event during Respect for the Elderly Week, the prize is awarded to between 150 and 380 of the most filially responsible adult children in Korea each year, and serves as one of many incentives for children to provide support to parents (See Kyu-taik Sung, "A New Look at Filial Piety: Ideals and Practices of Family-Centered Parent Care in Korea" (1990) 30:5 Gerontologist 610). More recently, China has been in the news for considering a law that will force children to visit their elder parents www.cbc.ca. Read more, J Rank “Filial Responsibility - Filial Responsibility Laws” in Marriage and Family Encyclopedia (Online: Net Industries, 2011), online: http://family.jrank.org/pages/632/Filial-Responsibility-Filial-Responsibility-Laws.html#ixzz1FkhhU3XY (accessed February 10 2011).
BIBLIOGRAPHY

A. Primary Sources

Legislation


Cases


Fosi V. Road Accident Fund (N.O.) (Case no. 1934/2005 Cape of Good Hope Eastern Circuit Local Division


Treaties and International Agreements


Convention on the Elimination of all forms of Discrimination Against Women, 1979, 1249 UNTS 13


B. Secondary Sources

1. Books, Book sections and Theses


2. Journal Articles


