

Chapter 8

Article 7

Freedom of expression

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Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

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1 Introduction

A child’s freedom to express an opinion is far more complicated and restricted in several settings in Africa than the African Charter on the Rights and Welfare of the Child (African Children’s Charter) anticipates.¹ Impliedly, under article 7 of the African Children’s Charter, children have the right to seek, receive and impart information and ideas of all kinds on all matters that concern them. A child can express themselves in various ways, including oral communication, sign language, writing, print, artistic expression, or any other medium of their choice. As highlighted below, a child’s right to freedom of expression is closely linked to a child’s right to participate; the child is protected under article 4(2) of the African Children’s Charter. These rights are very similar and are jointly interpreted under this chapter as they possess the same objective and empowering process.

¹ E Fokala ‘Calibrating children’s rights to participate in a family setting 30 years after the adoption of the Convention on the Rights of the Child and the African Children’s Charter’ (2020) 34 *Speculum Juris* 188-200.

The central objective of a child's right to express an opinion is to enable the child to have or contribute an opinion to a matter of concern or concerning the child.² Further, it emphasises children's right not to be hindered or retrained by adults (the state and society) and parents in general, in the opinion a child may hold and/or wishes to express. Impressively, the scope of article 7 anticipates no restrictions as to the type of information to which children can or should have access, to enable the child to formulate an opinion. A child simply needs to be interested and concerned about any matter, and that should be enough to activate the child's freedom to expression.³

Technically, a proper interpretation and implementation of article 7 automatically guarantees a child's enjoyment of three interrelated rights, namely, the right to equality before the law;⁴ the right to be involved;⁵ and the right to know.⁶ These rights underpin the central objective of the African Children's Charter and accentuate a child's ability, competence and self-esteem to contribute an opinion on any matter both within a child's private⁷ and public⁸ setting that affects the child. Succinctly, a child's right to freedom of expression forms an essential part of 'everyone is equal before the law'. This is essentially because the right to freedom of expression allows and empowers children to, for example, express their own facts or opinions in any matter of law that concerns them before a decision is made on the matter. Article 7 reinforces the obligation of each state party to the African Children's Charter to establish and guarantee a suitable system of governance that allows and promotes an inclusive approach of 'public opinion gathering' that is also child friendly. It also reinforces the obligation on state parties to ensure that an appropriate system is in place to grant each child the opportunity, the space, the time and attention to challenge the state, parents and anyone else involved in a child's life and upbringing on all matters affecting the child.

The aim of this chapter is to provide a holistic analysis of article 7. To attend to the intricate components of this article, the chapter is divided into eight parts. After the introduction, the chapter analyses the links of article 7 to other Charter articles, links to other human rights treaties, the legal interpretation of article 7, the limitations of article 7, the African Union (AU)'s position on a child's freedom of expression, and the domestication of a child's freedom of expression. The chapter concludes with some thoughts on the state of the protection and enjoyment of a child's right to freely express an opinion in all matters concerning the child.

2 Links to other Charter articles

A child's right to freedom of expression is a central component of one of the four guiding principles (the respect of the view of the child) that guide the interpretation and implementation of children's rights.⁹ A child's right to freedom of expression, alongside a child's right to participate (article 4(2)),

2 L Ehlers & C Frank 'Child participation in African context' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 116-122.

3 Undeniably, the non-limitation on the type of information to which children can have access is brave and indicates the ardent intention of the African Children's Charter to grant children full access to information on all matters that concern them and to allow them to express their opinion thereon.

4 S Liebenberg 'Equality rights and children: Moving beyond a one-size-fits-all approach' 24-31, https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/children_equality_rights.pdf (accessed 21 August 2024).

5 E Fokala 'Implementing children's right to participation in family decision-making processes in Africa' 1-194, https://www.doria.fi/bitstream/handle/10024/144086/fokala_elvis_mukumu.pdf?sequence=2 (accessed 21 August 2024).

6 UNICEF 'I have the right to know my rights!', <https://www.unicef.org/southafrica/stories/i-have-right-know-my-rights> (accessed 21 August 2024).

7 J Sloth-Nielsen 'Seen and heard? New frontiers in child participation in family law proceedings in South Africa' (2009) 2 *Speculum Juris* 1.

8 M Freeman 'The importance of a children's rights perspective in litigation' (1996) 2 *Butterworths Family Law Journal* 84-90.

9 Others are non-discrimination; the best interests of the child; the right to life, survival and development; and increasingly the evolving capacity of the child is also being recognised as a credible guiding principle.

freedom of association (article 8), further analysed in chapter 9 of this Commentary, freedom of thought, conscience and religion (article 9), further analysed under chapter 10 of this Commentary, are part of the family tree of the principle to respect the views of the child (child participation). As a key component of this guiding principle, a child's right to freedom of expression exerts a stronger alignment to the debate around the indivisibility of children's rights under the African Children's Charter. Essentially, it links to every right protected in the African Children's Charter, including, in the execution of the mandate of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the Secretariat of the Committee,¹⁰ analysed further under chapters 33, 34, 35, 36 and 37 of this *Commentary*. Crucially, a child's right to freedom of expression also gels well with all the other sister guiding principles of children's rights and implementation objectives recognised in the African Children's Charter. For example, relating to the best interests principle, it is crucial to note that the best interests principle fortifies the functionality of a child's right to freedom of expression. This means that the decision, or lack thereof, to allow a child to express an opinion on a matter of concern to the child, must be motivated by the best interests of the child concerned, lest it constitutes the violation of yet another right of the child.

In relation to, for example, a child's right to privacy (article 10),¹¹ health (article 14),¹² separation from parents (article 25), adoption (article 24)¹³ and a child's right to be protected against sexual exploitation (article 27) and sale, trafficking and abduction (article 29), also analysed in this *Commentary*, a child's right to express an opinion provides a child an opportunity and right to protect their dignity by outwardly rejecting interference with or agreeing to, for example, an adoption process. See, for example, cases of termination of pregnancy where a child's opinion, though required by law, still requires vetting.¹⁴ However, it is worth acknowledging that in health-related matters, a child's opinion to, for example, a medical procedure is a rare practice in most African countries.¹⁵ This is because, as elaborated further under part 4 of this chapter, in most cases, a health-related matter which concerns a child requires a three-way partnership. That is, involving the child, its parent(s) and the state (assigned physician(s)). Therefore, it is critical to recognise the practical implications of a child's right to freedom of expression as the freedom assigned to children to express an opinion in all matters of concern to

10 African Children's Committee Guidelines on Child Participation, https://www.acerwc.africa/sites/default/files/2022-10/ACERWC%20Guidelines%20on%20Child%20Participation_English.pdf (accessed 30 March 2024).

11 See also art 12 of the Universal Declaration which provides that '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

12 See eg BK Twinomugisha *Fundamentals of health law in Uganda* (2015) 208-212 for the practice in Uganda.

13 This was the case in Uganda in the *Matter of Salem Mukibi and Ashaf Ssemakula (Minors) and the Matter of an Application by Hoffman Edward and Olivia Nakawungu Hoffman, Brother-Law and Sister* (Family Cause No 061 of 2005) (Minors) [2005] UGHC 30 (21 October 2005) 157 (*The Hoffmans*) in which the Court evaluated the application of a single parent (mother of Salem and Ashaf) requesting the Hoffmans (with whom she and her children were familiar) to be appointed as foster parents to her two children, because she could not afford to maintain them. Before the Court made its decision to remove the children, it also evaluated the application of the Hoffmans to be foster parents and, most importantly, to hear the views of the children. After gathering all the facts, the judge made the following order: 'In the circumstances, I will grant this application and appoint Hoffman Edward and Olina Nakawungu Hoffman legal guardians of Salem Mukubi and Ashaf Ssemakula, both minors. The guardians shall have legal custody of the infants and be at liberty to take the infants to any part of Uganda or outside Uganda, so long as the infants remain in their minority or until further orders issued by this court.'

14 Eg, in *Christian Lawyers Association v Minister of Health* 2004 (10) BCLR 1086 (T) para 19 Mojaelo J emphasised that 'the cornerstone of the regulation of the termination of pregnancy of a girl under the Act [CTPA] is the requirement of her informed consent ... no female person, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so'.

15 B Clark 'My right to refuse or consent: The meaning of consent in relation to children and medical treatment' (2001) 64 *Journal for Contemporary Roman-Dutch Law* 605-618. See also E Fokala & A Rudman 'Age or maturity? African children's right to participate in medical decision-making processes' (2020) 20 *African Human Rights Law Journal* 667-687.

them, yet, this freedom could equally overload a child with the daunting task of making sense of a complex medical procedure.¹⁶

3 Links to other human right treaties

The foundation of the right to freedom of expression can be traced to article 19 of the Universal Declaration of Human Rights (Universal Declaration). However, it is common knowledge that the Universal Declaration is not a binding instrument, albeit being the main source of inspiration of the codification of several civil, political, social, economic and cultural rights.¹⁷ Indeed, the right to freedom of expression was first presented as a legally-binding right in article 19 of the International Covenant on Civil and Political Rights (ICCPR)¹⁸ to secure (adult) citizens' freedom of opinion in all matters concerning them.¹⁹ Given the scope and the target group of ICCPR, the right to freely express an opinion was not fashioned for the benefit of children.²⁰ In the same spirit and scope, article 9 of the African Charter on Human and Peoples' Rights (African Charter) recognises and protects the essential right to express oneself, access information, and participate in public discourse.²¹ The AU expanded on the right to freedom of expression by adopting the Declaration of Principles on Freedom of Expression in 2019.²² The Declaration establishes principles for anchoring the rights to freedom of expression and access to information in accordance with article 9 of the African Charter. It further guarantees individuals the right to receive information and the right to express and disseminate information. Akin to the content of article 9 of the African Charter, the Declaration fails to recognise children as beneficiaries of a right to freedom of expression.

Further, the right to freedom of expression also enjoys coverage in other international human rights instruments. Notably, article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)²³ prohibits anyone from being discriminated against based on the opinion they hold. In other words, ICESCR encourages everyone, including children, to freely hold and express an opinion in claiming and protecting their socio-economic rights. Article 21 of the Convention on the Rights of Persons with Disabilities (CRPD)²⁴ is expansive in its protection of the right of freedom of expression as it recognises people with disabilities, including children, as equal beneficiaries. Importantly, CRPD recognises and promotes the use of 'sign languages, braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions'.²⁵

However, after the adoption of CRC²⁶ and the African Children's Charter, it is broadly accepted that children also have a right to freedom of expression, albeit differently, as the scope and the practical

16 C Himonga & A Cooke 'A child's autonomy with special reference to reproductive medical decision-making in South African law: Mere illusion or real autonomy' (2007) 15 *International Journal of Children's Rights* 323.

17 E Fokala, L Lundy & N Peleg 'The UDHR, children's rights, and the Global South' in BU Khan & JH Bhuiyan (eds) *Human rights after 75 years of the Universal Declaration of Human Rights* (2024) part 3 ch 18.

18 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

19 Other examples include art 19 of the Universal Declaration 1948.

20 CE Welch 'The African Charter and freedom of expression in Africa' (1998) 4 *Buffalo Human Rights Law Review* 103-122.

21 Adopted June 1981, entered into force on 21 October 1986.

22 The Declaration was adopted by the African Commission at its 65th ordinary session that was held from 21 October to 10 November 2019 in Banjul, The Gambia.

23 Adopted 16 December 1966, entered into force 3 January 1976, 999 UNTS 171.

24 Adopted 12 December 2006 by the 61st session of the General Assembly by Resolution A/RES/61/106 entered into force 3 May 2008.

25 See also art 23 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted 29 January 2018.

26 Adopted 11 July 1990, entered into force 29 November 1999, CAB/LEG/24.9/49 (1990).

day-to-day implementation of the right for children do not generally allow children to express opinions on all matters. This is because article 13 of CRC and article 7 of the African Children's Charter include caveats such as '[t]he exercise of this right may be subject to certain restrictions ... as are provided by law and are necessary' and 'subject to limitations of the law'. Article 13 of CRC provides an expansive provision on the extent to which such limitation, if any, could apply, that is, in instances where an opinion expressed by a child could violate the rights or reputations of others, or disrupt national security or of public order (*ordre public*), or of public health or morals.²⁷

It is worth noting that, despite the limitations highlighted above, the recognition and protection of a child's right to freedom of expression in itself is a victory for children. Akin to the characteristics of a child's right to participation, their right to freely express an opinion affirms that the children also have in them the ability to substantively and judiciously contribute to all matters.²⁸ The inclusion of 'all matters' under article 7 is also problematic in an African setting because, although children now have a right to freedom of expression, they are not generally allowed to express an opinion in all matters, as most African traditions and cultures bear no underlying intention or gritty ambition of allowing children's opinion in *all* matters.²⁹

4 Legal interpretation

As indicated in the introduction of this chapter, a child's right to freedom of expression is an empowering right. It is also a right that enables children to seek, receive and impart information and ideas of all kinds on all matters. This part of the chapter aims to provide a thorough analysis and breakdown of a children's right to freedom of expression. To ease its understanding and implementation, this section is further divided into requirements, conditions and restrictions on a child's right to freedom of expression. Essentially, this section highlights state parties' obligations under article 7 of the African Children's Charter. As seen below, these requirements and conditions are mentioned, explicitly and implicitly, based on the strength of the relationship article 7 enjoys with other rights protected in the African Children's Charter.

4.1 Requirements

The requirements identified and analysed below constitute the ingredients needed to ensure and justify why, where, when and how a child should be accorded the freedom to express themselves in all matters. Also, the requirements contribute to the validity of a child's opinion and affirm children as right holders with an opinion of how their rights should be understood and implemented, both in the private and public settings of childhood. It is also a strong indication of the fact that children do not only deserve to be cared for, but also to be recognised and respected as individuals who embody in them democratic beliefs and rights. The requirements discussed below include the following:

27 Art 7 of the African Children's Charter appears to casually recognise children as benefactors of the right to freedom of expression and mentions no limits to its limitation, if any.

28 L Krappmann 'The weight of the child's view (article 12 of the Convention on the Rights of the Child)' (2010) 18 *International Journal of Children's Rights* 502.

29 It should be noted that the issue of competence with regard to children's ability to participate in decision-making processes on matters that concern them is not supposed to be in an instructive form. Interestingly, this is not uniquely African as several other scholars from other parts of the globe have highlighted the same practice elsewhere. Eg, the Irish experience in I Coyne and others *Giving children a voice, investigation of children's experiences of participation in consultation and decision-making in Irish hospitals* (2006) 9-17. See also Save the Children's report on children's rights in Ethiopia: A situation analysis (2003) 1.

4.1.1 *The best interests of the child*³⁰

It is inconceivable to sustain a systematic argument and analysis to justify a child's right without demonstrating how it relates to, or how it should take a particular path through the lens of a child's best interests.³¹ This principle has been described by many as a golden thread that runs through the children's rights treaties and should, at all times, sit at the epicentre of any planning, interpretation and implementation of children's rights.³² Indeed, it is in the best interests of a child, for a child to freely express an opinion in all matters. It is in expressing such opinion that the course and cause of a child's concern could be properly addressed.

Despite the intrinsic and indissoluble link that the best interests of the child enjoys with other children's rights as further analysed in chapter 5 of this *Commentary*, admittedly, it is difficult to precisely define the best interests of a child.³³ Nevertheless, the best interests of the child is a crucial requirement for a child's right to freely express an opinion, not only because it aims to ensure a child's best interests, but also because it strengthens the functionality of a child's right to participation by facilitating the critical role of a child in all decision-making processes on matters that affect their life.

Notwithstanding this established link that necessitates upholding a child's freedom of expression, it should be understood that the cultural and traditional fabric of African societies and communities does not favour a child having the freedom of expressing an opinion.³⁴ In this traditional and cultural forum, adults, especially parents and the elderly, have a very strong grip and understanding of what they perceive as a child's ability and competence to express an opinion.³⁵ Even though this perception is not entirely detrimental to a child's right and freedom of expression, as further analysed under part 4.3 of this chapter, it also stands as a justification why it is difficult for children to fully and independently exercise and enjoy their right to express an opinion both in private and public settings of a child's life.

4.1.2 *The evolving capacities of the child*

The second requirement considered in this chapter as crucial in the toolkit to implement a child's right and freedom of expression is the evolving capacity of a child. Indeed, critical to this requirement is the well-known aspects that the state, parents or adult control and guidance over a child diminish as

30 Though protected under arts 3(1) and 4(1) of CRC and the African Children's Charter, respectively, the best interests of the child had formal recognition in the 1959 Declaration on the Rights of the Child, para 2, and in different other instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) arts 5(b) & 16(1)(d).

31 See, generally, CRC Committee General Comment 14 on the rights of the child to have his or her best interests taken as a primary consideration UN Doc CRC/C7GC714 paras 41-45.

32 J Eekelaar 'The role of the best interests principle in decisions affecting children and decisions about children' (2015) 23 *International Journal of Children's Rights* 5. See also CEC Committee General Comment 14 (n 31) paras 1-7. See also E Fokala 'The impact of the best interests and the respect for the views of the child principles in child custody cases' (2019) 88 *Nordic Journal of International Law* 614-635. See also J Eekelaar 'The role of the best interests principle in decisions affecting children and decisions about children' (2015) 23 *International Journal of Children's Rights* 5.

33 A Moyo 'Balancing the best interests of the child and the interests of society when sentencing youth offenders and primary caregivers in South Africa' (2013) 29 *South African Journal on Human Rights* 314-350. See also J Zermatten 'The best interests of the child principle: Literal analysis and function' (2010) 18 *International Journal of Children's Rights* 495-496.

34 There are reputable empirical research studies conducted by legalists, sociologists and anthropologists across the African continent that justify this assertion. See eg T Kaime "'Vernacularising' the Convention on the Rights of the Child: Rights and cultures as analytic tools' (2010) 18 *International Journal of Children's Rights* 637-653; A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 415-443; and RK Hitchcock 'Indigenous children's rights and well-being: Perspectives from Central and Southern Africa' in DJ Johnson and others (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* (2013) 219-223 & 225-232.

35 AB Nsamenang 'Dilemmas of right-based approaches to child well-being in an African cultural context' in D Johnson and others (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* (2013) 18-21.

the child's capacities evolve.³⁶ In other words, the drafters of the African Children's Charter imagined a child's right to freedom of expression as a right, not oblivious to the fact that during some episodes in a child's life or childhood, parental control and guidance could dominate a child's ability to freely express an opinion. Indeed, the intricate implications of article 7 dictate that there is a real need for adults/parents to be consistent in their evaluation and balancing of all aspects necessary to make a particular decision on a matter that concerns a particular child or group of children. This is critical because, as the CRC Committee observes, a child's opinion matures and could change as the child's capacities evolve.³⁷

Article 9(2) of the African Children's Charter bestows on parents and, where applicable, legal guardians, the 'duty to provide guidance and direction in the exercise of [children's rights] having regard to the evolving capacities ... of the child'. In other words, children also have a right to be given direction and guidance, which have to compensate for their lack of knowledge, experience and understanding of certain matters of concern to them or concerning them.³⁸ This is crucial because the bottom line remains, that children must have access to information in order to freely express their opinion on any matter.

4.2 Conditions

It is worth noting that the meaningful interpretation and implementation of article 7 mandates that certain conditions are met to empower a child and to guarantee a child the freedom to express their opinion as they deem fit. The conditions, discussed below, respond to 'what a child needs' to enable a child to freely express their opinion on all matters. These conditions include the following:

4.2.1 Access to information

Generally, access to information is a key condition for anyone (including adults) to make an informed decision, provide consent or express an opinion in any matter of concern to them. In fact, the African Children's Charter and the African Children's Committee, through its work, are persistent on the fulfilment of this condition as it applies to children in the enjoyment of their right to freely express an opinion.³⁹ A child's right to freedom of information reinforces a child's right to freedom of opinion. Indeed, Pais holds that it is through providing a child with adequate information on a particular issue(s) concerning the child, that a child obtains the necessary tools, confidence and maturity required to express their views and possibly influence decisions.⁴⁰

4.2.2 Capable of communicating

Generally, anyone's capacity to communicate is usually spearheaded by the ability and desire to relate with others and the extent to which they are affected by a particular situation or issue. According to McLeod, the ability to communicate is a skill that every human being, irrespective of age and creed, harbours in order to understand and to be understood and also to enable interaction and participation at a family, community, national and global level.⁴¹ It is worth noting that article 7 lays no emphasis on the mode of communication or communication skills. It simply requires a child to display the

³⁶ G Lansdown *The evolving capacities of the child* (2005) 20.

³⁷ CRC Committee General Comment 12 The right of the child to be heard (2009) UN doc CRC/C/GC/12 para 84.

³⁸ CRC Committee (n 37).

³⁹ African Children's Committee Guidelines on Child Participation (n 10) paras 16-17.

⁴⁰ MS Pais 'The Convention on the Rights of the Child' (1997) United Nations manual human rights reporting under six major international human rights instruments 94.

⁴¹ S McLeod 'Communication rights: Fundamental human rights for all' (2018) 20 *International Journal of Speech-Language Pathology* 3-11.

capability to communicate, and this could take the form of speaking, listening, reading and writing, but can include other modes such as sign language, online audio/video communication or non-verbal modes such as crying and touching, facial expressions and other body actions.

4.2.3 Availability of platform or space or opportunity

For a child's right to freedom of expression to be impactful, article 7 implicitly mandates all stakeholders, both in a child's private and public settings, to ensure that a child is given the space, opportunity and an audience to hear the child's opinion and to consider such opinion in taking the final decision on a matter of concern to the child. Within the public setting, state parties are mandated under article 7 to assume and lead the responsibility to create and encourage the private sector to establish child-friendly platforms. These could be through government-led programmes in communities, radio, television programmes, theatre, or simply providing a child with tools such as a paper and crayon for the child to express their opinion through drawings, colouring or writing. On the other hand, within the private space it could also take the form of parents or guardians simply allowing a child to display their feelings through any form of communication of preference indicated above.

It is worth noting that the advent of social and digital media has revolutionised communication, offering both challenges and opportunities.⁴² Indeed, it is common knowledge that while digital platforms empower freedom of expression, they also harbour threats to children.⁴³ For example, radical forces exploit these platforms to suppress opposition, spread regressive agendas, incite violence and, in the worst case scenario, prey upon a child for sexual abuse and exploitation.⁴⁴

4.3 Limitations or restrictions – 'prescribed by laws'

One of the known salient features of African human rights system is the fact that most provisions contained in African human rights instruments have a claw-back clause, and a child's right to freedom of expression is no exception. Article 7 expressly articulates that a child's right to freedom of expression is 'subject to such restrictions as are prescribed by laws'. In other words, a child has a right to freedom of expression but such rights could be limited if national laws restrict the extent to which children are allowed to enjoy the right. For instance, in terms of human rights, such restrictions are generally on expressions that amount to hate speech and defamation. Despite this express claw-back, a child's right to freedom of expression also harbours an implied claw-back which in most cases is based on deep-rooted African cultural practices that do not capacitate or perceive a child as someone able to hold an opinion, let alone express it, on most matters of concern to a child. For example, in a child marriage process, including negotiations, betrothal and related rites, children, especially girls, are generally muted and later 'handed over' to their 'husband' after 'adults' would have agreed on what they have decided is best for the girl concerned.⁴⁵

42 In the digital era, children's privacy is a multifaceted concern. As technology advances, it significantly impacts how children exercise and realise their rights. CRC Committee General Comment 25 on children's rights in relation to the digital environment, published 2 March 2021, CRC/C/GC/25.

43 A Skelton & BD Mezmur 'Technology changing @ a dizzying pace: Reflections on selected jurisprudence of the UN Committee on the Rights of the Child and Technology' (2019) 3 *Peace Human Rights Governance* 275-305.

44 See eg African Children's Committee General Comment 7 on article 27 (sexual exploitation) of the African Children's Charter.

45 A good illustration of the effectiveness of culturally-appropriate procedures and arguments is provided by the manner in which some communities in the south of Malawi have attempted to deal with the practice of *fisi* (*hyena*) during girls' initiation ceremonies. The practice entails that, at the end of formal instruction during the initiation period, the *fisi* goes into the compound where the initiates are ensconced to 'examine' whether they are able to practise the concepts and theories that they have been taught regarding sex and sexuality. T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 221-238.

5 African Union position

The African human rights mechanism, especially through the works and mandate of the African Children's Committee, has generated content and programmes to justify why it is critical for a child to have the freedom to express an opinion in all matters. This of course is built on the strength of the background that children have a right to freely express their opinion in all fora where any matter is being discussed or resolved. Through the lens of article 42(ii) of the African Children's Charter (also analysed in this *Commentary*), the African Children's Committee has a mandate, among others, to 'formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa'. This obligation requires the Children's Committee, through one of its mandates, that is, communications (article 44), investigations (article 45) and interpretation (article 42(c)) which mandates the Committee, to 'interpret the provisions of the present Charter at the request of a state party, an institution of the [African Union] or any other person or institution recognised by the [African Union], or any state party'. It is fair to acknowledge the work of the African Children's Committee so far in interpreting article 7 and further providing a platform for children to express their opinion in three instances.

5.1 Agenda 2040

Among the 10 aspirations in Africa's Agenda for Children 2040: Fostering an Africa fit for children, a child's right to freedom of expression features under Aspiration 10, which seeks to interpret and set feasible targets for the realisation of a child's right to freely express an opinion in all matters concerning the child. The Agenda aspires that by 2040, state parties to the African Children's Charter would have instituted a culture of inclusive participation at the national level to enable the full involvement and engagement with a child on all matters that concern the child, both in the public and private settings of the child's environment.⁴⁶

5.1.1 Guideline on child participation

The African Children's Committee followed through on its commitment to ensure that a child's right to freely express an opinion is properly understood and implemented when it generated and adopted a guideline on child participation in Africa.⁴⁷ It is worth mentioning that at the global level, and specifically at the level of CRC, a more elaborate tool, General Comment 12, was generated specifically to protect a child's right to participate in all matters affecting a child.⁴⁸ These two soft law documents are equally applicable to state parties of both CRC and the African Children's Charter. Although literally and legally a child's right to participate and freedom of expression are not the same, they are similar to the extent that they have similar characteristics and ambitions. Importantly, both instruments are not oblivious of the role that adults, the state and other 'grown-ups' play in the child's life, development and upbringing. Particularly, the Guidelines in its paragraph 13 emphasises that '[s]tate parties and all authorities involved, including traditional, religious, community leaders, and parents [need] to ensure that a fair and balanced consideration is given to the views of the child freely expressed during a decision-making process'. This recognition is critical in the African context, as, to a greater extent contextualises the process of freedom of expression as established in paragraphs 15 to 20 of the Guidelines.⁴⁹

⁴⁶ African Children's Committee Africa's Agenda for Children 2040: Fostering an Africa fit for children 57.

⁴⁷ African Children's Committee Guidelines on Child Participation (n 10).

⁴⁸ CRC Committee General Comment 12 on the right of the child to be heard.

⁴⁹ See also Fokala (n 1).

5.1.2 *African Union platforms*

This chapter recognises and highlights two active platforms at the AU level that promote the practical implementation of article 7. These include the ordinary sessions of the African Children's Committee and the youth programme of the Political Affairs and Security Department of the AU.

The African Children's Committee has made it a habit to allocate and dedicate a slot on its programme during its ordinary sessions to give children's representatives an opportunity to present a statement and hence express an opinion on the theme of the ordinary session. For example, during its forty-second ordinary session held in Addis Ababa, Ethiopia, from the 8 to 17 November 2023, children with albinism attended and expressed their opinion on the paucity of rights-based protection they receive. Further, they requested the African Children's Committee to grant them more time during its forty-third session,⁵⁰ which took place in Maseru, Lesotho, from 15 to 25 April 2024, to enable them to highlight the plight of children with albinism in Africa. The African Children's Committee took this expression of opinion seriously and endorsed, as a consequence, the focus of the day of general discussion during its forty-third ordinary session on the rights of children with albinism.

Elsewhere, the AU's Political Affairs, Peace and Security (the former Peace and Security) Department, since September 2018, has established a platform through which it recruits the youth (including children) to gather their opinion on finding peace in conflict zones in Africa. The principal aim of the platform is facilitating the meaningful participation of African youth in the entire spectrum of peace and security, and dissuading their participation in violence. By empowering young people and recognising their potential as agents of positive change, the youth for peace programme significantly contributes to building a more peaceful and secure Africa through creating opportunities and allowing the youth (including children) to freely express their opinion on peace approaches.⁵¹

6 Domestication of this provision in national legal systems

Although there is some cultural resistance to a child's right to freedom of expression, it is worth noting that, more intensely than before, there hardly is any African state that has not enacted a national law which generally protects children and, particularly, their freedom of expression. In most African countries, a child's right to freedom of expression is protected and implemented in two major settings. These include the traditional setting, which encompasses cultural activities (conventional measures) and the legislative setting, which includes the actual protection in national laws (the statutory measures).

6.1 Conventional measures

Through classic African traditional practices, such as sitting around the fireside, sharing folk lore, storytelling, recitals, songs and dance, the custodians of tradition (elderly) normally give children the opportunity to freely express themselves in performing these practices. Although encouraging, this is not always indicative that children's views were taken into account. It nevertheless provides evidence that children were not only seen but also heard when, for example, they tell stories and participate in

50 For more details, see https://www.acerwc.africa/sites/default/files/2023-12/Communique_42nd%20Ordinary%20Session_ACERWC_English.pdf (accessed 10 April 2024).

51 For more on this platform, see <https://au.int/en/pressreleases/20211105/african-union-select-second-cohort-african-youth-ambassadors-peace> (accessed 30 March 2024).

dance ceremonies.⁵² Seen as a whole, African traditions do recognise children as vital contributors to family, community, and cultural continuity.⁵³

6.2 Statutory measures

As indicated earlier, most African states have indeed domesticated a child's right to freedom of expression both indirectly or indirectly. For example, the Rwandan Law Relating to Rights and Protection of the Child against Violence⁵⁴ is designed specifically to protect children in Rwanda, and it obligates, under article 9, that before any decision is made regarding a child in an administrative or judicial proceeding, the views of the child must be heard, either directly or indirectly through a representative. Further, under articles 11, 13 and 14, the law mandates parents and any other person responsible for children to respect a child's thinking ability. In other words, the law discards any presumptions of irrationality. Also, article 20 of the 2009 Children's Act of Botswana⁵⁵ expressly protects a child's right to freedom of expression. The Act specifically states under article 20 that every child's right to freedom of expression shall be exercised subject to a child's best interests, taking into account a number of factors, including a child's age and maturity, and level of understanding.

In Sierra Leone it is referred to as the right to an opinion under article 31 of the Children's Act of 2007. Specially, article 31 provides that '[n]o person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his welfare'. Other examples include Mozambique, which has adopted a Children's Act, which mandates that the views of the child must be heard and given weight in all situations where the child faces instances of the administration of justice.⁵⁶ The Ghanaian Children's Act specifically mandates that no child capable of forming views shall be denied the right to express those views in a matter that concerns them.⁵⁷ Tanzania has two laws, one applicable in Zanzibar and the other on the mainland. The 2011 Zanzibar Children's Act in section 5 obliges the state to ensure that the 'views expressed by the child may be given due consideration'. Meanwhile, section 11 of the 2009 Law of the Child Act of the Mainland maintains that a child has the 'right of opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being'.

7 Conclusion

Broadly, despite its limitations as discussed earlier, there is a firm belief and understanding within laws, culture and society that children possess the ability to express an opinion. The exemplars, discussed above under parts 4 and 5, establish that such capacity is manifested in both the private and public settings of children's lives. The African Children's Committee in its General Comment on the interpretation of the African Children's Charter confirms that a key challenge regarding a child's right to freely express an opinion 'is how to conceptualise child participation and translate the concept into practice in different contexts'. In order for child's right to freedom of expression to be more effective, the Children's Committee alludes that 'there is an urgent need to integrate the principle systematically into many more official and government processes, as well as to integrate monitoring mechanisms into these governance processes to ensure the accountability of duty-bearers such as policymakers, parents

52 JM Mbaku 'International law, African customary law, and the protection of the rights of children' (2020) 28 *Michigan State International Law Review* 535-690.

53 T Kaime *The Convention on the Rights of the Child: A cultural legitimacy critique* (2011) 18.

54 Law 27/2001 of 28 April 2001, <http://www.refworld.org/docid/46c423cb2.html> (accessed 30 March 2014).

55 Botswana Children's Act 8 of 2009.

56 See, generally, Promotion and Protection Law on Child Rights 7 of 2008, of 9 July 2008.

57 See, generally, sec 11 of Act 560 of 1998.

and educators, and public officials'.⁵⁸ In all, it is crucial to note that freedom of expression is a crucial right of children. It is an empowering right and it is a right that affords every child the opportunity to express an opinion in all matters. In practice, children in earnest have not really enjoyed this right in Africa. This is mostly because, as demonstrated in this chapter, due to the cultural, traditional and religious barriers that consider children incapable of expressing an opinion on all matters. The right is yet to be sufficiently explored, and African states are strongly encouraged to promote and protect the right and freedom of every child to express an opinion any time in all matters.

58 African Children's Committee General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection', https://www.acerwc.africa/sites/default/files/2022-09/GENERAL_COMMENT_ON_STATE_PARTY_OBLIGATIONS_UNDER_ACRWC_%28ARTICLE%201%29_%26_SYSTEMS_STRENGTHENING_FOR_CHILD_PROTECTION_0.pdf (accessed 5 May 2024).