Harmonization of National laws and the CRC: some challenges

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Introduction

First I like to express my deep appreciation for the initiative of the African Child Policy Forum (ACPF) to undertake a study on the harmonization of laws on children in Eastern and Southern Africa. The report of this study is a rich information on legislative measures taken for the implementation of the CRC as requested in art. 4 CRC. It shows that sometimes significant progress has been and that more efforts are underway. But it also shows the shortcomings and difficulties that (continue) to exist.

It is an excellent starting point for further actions and I fully agree with the recommendations. The many individuals who contributed to this review deserve our thanks + commendation. Although tempted to comment on the rich content of the report I will focus on some of the challenges of harmonization of laws on children, related to the HOW + WHAT.

By way of introduction and to avoid misunderstandings one can distinguish two forms of harmonization of laws on children:

- the harmonization of existing national legal provisions on children with the provisions of the CRC (or other international-human-rights-treaties); for instance: the CRC requires that primary education is compulsory and free and if the national law does not contain provision reflecting this, it should be amended to bring it in harmony with the CRC; I call that: external harmonization;

the other form of harmonization, which can be called internal harmonization, is limited to harmonize national laws by eliminating inconsistencies, contradiction or

gaps; for example: harmonize the maximum age of compulsory education with the minimum age for admission to work or try to harmonize national laws with existing customary, traditional and/or religious laws.

In every comprehensive review of national laws/legal provisions on children external and internal harmonization should go hand in hand. But for practical reasons I will limit my presentation to the external harmonization.

2. Harmonization of national laws with the CRC

The study of the ACPF shows that this harmonization is far from easy and that different approaches are possible. Harmonization, in this context defined as bringing national legal provisions in compliance with the provisions of the CRC, is a complex process that will involve various actors at various levels e.g. child rights activists/NGO's, civil servants in different ministries, experts and members of parliament. There is first the issue of how to do this harmonization (the HOW?) and secondly the many substantive issues (the WHAT?). Some observations on each of them based not only on my experiences as the chair of the CRC Committee for 6 years but also on my experience as a then very young civil servant in the legislation division of the Ministry of Justice in my home country.

2a. Harmonization; How?

First and foremost: at the national level a thorough comprehensive and analytical review of existing legal provisions relevant to children is necessary. The analytical part is crucial because it must identify the legal provisions which are not in compliance with the CRC, but also the gaps in the light of CRC

Such a review should preferably come with recommendations on how harmonization with the CRC could be achieved. There is no internationally accepted blue print for this harmonization and rightly so in my opinion. It should be left to the States Parties to do it in the most effective way that best fits into their legal system and culture.

The CRC Committee has recommended to some States Parties the drafting/adoption of a comprehensive children's act, but that may not always be the best approach. Let me make some general observations:

- I fully agree with the ACPF's report opinion that the harmonization is a process that should be conducted in a participatory manner. But drafting a bill cannot effectively/efficiently be done by e.g. 200 interested individuals. So I prefer a process in which a piece of legislation is prepared by the primary responsible ministry and is then subject to a wide consultation/discussion with NGO's UN agencies experts and children, parent and other interested parties like teachers associations. But make sure that it does not result in a process that takes years in efforts to please everybody, often with a very watered-down end-result that satisfies nobody.

- a comprehensive Children's Act that covers all the provisions of the CRC may be a possibility in some countries, but it is a very ambitious goal. I have been the secretary of a Children's Law Review Committee and an argument against one single all encompassing Children's Act was that it would set children apart and not contribute to an integrated approach of the position of children in e.g. health care, social services and education.

Any way: an Act that is more or less a copy of the CRC may suggest a kind of optimum harmonization, but it is not the comprehensive act because it lacks the

specific elaboration that is needed to implement children's rights not only e.g. art. 3 (best interest) and art. 12 (right to express views/to be heard), but also art. 32 (child labour) and art. 19, 33-36 (various forms abuse and exploitation). In this regard some remarks on the distinction made between countries with a monistic and countries with a dualistic legal system. In the monistic system an international treaty, such as the CRC, that has been ratified is automatically incorporated and becomes part of the law of the land. In the dualistic system a ratified international treaty only becomes part of the domestic law via specific legislative measures to that effect, also known as the domestication of international law (in this case the CRC). But the idea that such targeted legislative measures are unnecessary in countries with a monistic system is, in my opinion, an illusion. Most provisions of the CRC need specific elaboration at the national level, regardless the legal system. I'll come back to that in a minute.

But the conclusion is that a step-by-step process will be most likely the way most countries will try to harmonize their domestic law with the CRC.

Here, I like to reiterate my remarks on the comprehensive legal review as the first step in an harmonization process. It is important because it can prevent that a step-by-step harmonization will result in a patchwork of legal provisions with inconsistencies and/or gaps.

There is another practical aspect in favour of the step-by-step approach: the drafting of an all encompassing **Children's Act** may take a lot of time in the consultative stage and runs the risk that some parts may face serious opposition in parliament, meaning that the adoption of acceptable parts will be delayed significantly.

Finally: part of the HOW should be specific attention for the possibilities/obstacles for the implementation of the legislative measures. Include in any kind of draft an estimate of the costs of the implementation (again: may require a step-by-step implementation process) and where appropriate the need to ensure regularly evaluation of the measures in order to check whether the goals have been achieved and to amend, if necessary, the law to make it more effective.

2b. Harmonization: What?

As I said before harmonization requires an elaboration of the provisions of the CRC. It is not enough to copy the text of e.g. art. 12 or art. 32 or most of the other articles (exception e.g. art. 7 and 37). For this elaboration the General Comments of the CRC Committee provides a lot of guidance and direction. Let me give some examples of issues, some of which are also addressed in the ACPF's report:

- corporal punishment

The CRC requires that a child is protected from all forms of physical or mental violence, injury or abuse (art. 19) and that no child shall be subjected to torture or other cruel inhuman or degrading treatment or punishment (art. 37). But do these provisions include all forms of corporal punishment? The CRC Committee's answer to this question is a clear and unconditional YES. The arguments for this answer can be found in General Comment No 8. Does it mean that the countries must introduce corporal punishment as a crime in their penal code? Most likely not because most countries do have provisions in the penal code that make assault a crime, but the problem is that often parents can use their (parental) right to reasonably chastise their children to escape justice, also in cases of serious physical punishment.

So it can be enough to include in the civil code that parents don't have the right to use violence, including corporal punishment, in the upbringing of the child. For more details see General Comment No 8.

- adolescent health and development

In the provision of the CRC adolescents are not specifically mentioned. They can be associated with the concept of "evolving capacities" (art. 5 and 14) indicating that their growing capacities should be taken into account when their rights are implemented and/or are exercised by them. But what does that mean more concretely for e.g. the right to enjoy the highest attainable standard of health (art. 24) and to have your views taken into account (art. 12). Can an adolescent girl consult a doctor confidentially (that is: without information to her parents) about the use of contraceptives and can she be given those contraceptives (without prior parental consent)?

The same question can be raised regarding e.g. testing for HIV/AIDS and in that regard: is the adolescent the only one who is entitled to the results of the tests and can they only be given to others including her/his parents, with prior consent of the adolescent?

These and other questions are not given an answer in the CRC. But the CRC Committee has provided some possible answers and recommendations in its GC No 4 on Adolescent Health and Development.

- juvenile justice and minimum age criminal responsibility (MACR) (art. 40 CRC)

Another problem for legislators who want to harmonize domestic law with the CRC is art. 40, par. 3:

"States Parties shall seek to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law" in other words (and disregarding the wording of par. 3): establish a minimum age for criminal responsibility.

So a country that establishes a MACR at age 8 does comply with this provision? The Beijng Rules state that the MACR should not be set too low. But the CRC does not specify what is "too low". But again, the CRC Committee provides guidance and direction by stating that a MACR of 12 years is the absolute minimum and that States Parties should strive for a higher age in General Comment No 10 on Children's Rights in Juvenile Justice. This GC contains many more recommendations for the concrete elaboration in national legislative measures of the provision of the CRC, for example the provision (art. 40, par. 3 under b) that children in conflict with the law should be dealt with – when appropriate and desirable – without resorting to judicial proceedings (diversion/alternative measures).

- violence and exploitation (art. 19, 32-36)

It goes far beyond the scope of this presentation to fully discuss this topic. I hope everybody is not only aware of the UN Study on Violence against Children, but also has a copy of Mr. Pinheiro's report submitted to the UN General Assembly in October 2006 and the accompanying book. But it goes without saying that it is not a sufficient harmonization to incorporate the text of e.g. art. 34 and 35 (on sexual exploitation, abduction, sale and traffic in children) in the national laws. What is needed in this regard can be found in particular in the Optional Protocol on the Sale of children, child prostitution and child pornography (OPSC): e.g. legislative measures to criminalize specific activities mentioned in art. 3, to establish extra

territorial jurisdiction and to arrange for an effective regulation of extradition (art. 4 and 5). So the 8 Eastern and Southern African (ESA) countries that did not yet ratify this Optional Protocol should do so as a matter of priority.
The other countries should take the necessary legislative (and other) measures to bring the domestic law in full compliance with this OPSC they did ratify.
In this context it is also important that the States Parties take adequate legislative measures to protect children victim and/or witnesses throughout the legal proceedings (either child protective or criminal law proceedings) they might be involved in.
Art. 8 of the OPSC contains rather specific provisions in this regard. Further guidance can be found in the UN Guidelines for Treatment of Children victims and witnesses in matters of justice. The CRC Committee constantly recommends States Parties to implement these guidelines including via specific legal provisions.

3. Final remarks

Much more can be said about the harmonization of the domestic law with the CRC. But let me conclude:
. Harmonization is much more than copying the CRC. It requires elaboration of the provisions of the CRC. This elaboration may, to a certain degree, differ from country to country but a lot of guidance can be found in the country specific Concluding Observations and the General Comments and in other international standards such as e.g. the Beijing Rules and the Havana Rules and the UN Guidelines for Treatment of Children victims/witnesses.

This harmonization can also be guided and strengthened by the ratification of the two Optional Protocols to the CRC. I already mentioned OPSC but it is equally important that all African countries ratify the Optional Protocol on the involvement of children in armed conflict, including the 8 in ESA countries that did not yet ratify it.

. How the harmonization is carried out will vary from country to country. The most ambitious approach may be the drafting and adoption of a comprehensive all encompassing Children's Act. But a step-by-step approach can, if well prepared and well planned, be equally effective. But in both approaches an open, participatory process should be conducted.