

Exploring and Understanding Child Labour and Children's Rights in the Context of the African Social Value System in Zimbabwe

James Tsabora*, Paradzai Mushore** and Paidamwoyo Mukumbiri***

ABSTRACT

The paper is concerned with accommodation under the 2013 Constitution of Zimbabwe and other related statutes of the complex interrelationship between protection against child labour, as a human right, and the expectation under Zimbabwe's cultural norms and values that children, as part of their upbringing, should work within the family set up. The paper notes that the 2013 Constitution gives primacy to human rights. Notwithstanding affirmation in the Constitution of every person's right to culture, cultural norms and values that contradict human rights must give way. The paper also observes that the Constitution does not prohibit all forms of child labour. Children may work at home, but it is for other statutes such as the Children's Act, Labour Act and the Criminal Law Codification and Reform Act to elaborate on how children may be made to work in households without infringing their rights, such as the right to be protected from economic and sexual exploitation, from child labour and from maltreatment.

1. INTRODUCTION

A conceptualisation of child labour in African society raises interesting debates that reflect contestations between aspirations of enacted law on one hand and lived social realities on the other. In general, African society exalts the practical indoctrination of children on the importance of hard, manual work. Indeed, the African social setting identifies the child as a contributor, actor and unit of labour, critical in the sustenance of family and community livelihoods. In contrast, human rights discourse recognises the unlawfulness, indignity, abusive and exploitative nature of various forms of child labour. Consequently, put in its simplest form, the question is whether all forms of work given to, done and expected of children by their parents or society constitute child labour, and thus in violation of children rights. Where can the line be drawn?

*LLB; LLM & PhD Law. Senior Lecturer in Law, University of Zimbabwe, Zimbabwe.

**BSc Social Work; MSc Social Work; Lecturer, Women's University in Africa.

***LLB; LLM (International Human Rights and HIV); Masters in Women's Law, LLD Candidate. Lecturer in Law, Zimbabwe Ezekiel Guti University, Bindura.

On the African continent, children continue being viewed as young adults who are capable of working and bearing punishment if they breach the law. They are also viewed as the work units by their parents who have the discretion to determine their upbringing in accordance with cultural and social norms. Parental powers are often unchecked and can easily be abused. From a human rights perspective, this reality is frowned against and constitutes human rights violation. The tensions apparent from this include parents' rights versus the children's rights, children's rights versus social values as well as developmental versus protective services. In exploring the various questions that arise from the debates, there is no doubt that there exists a perceived conflict between children's rights perspectives and cultural values on livelihoods, and children education and indoctrination in African society. The issues to be teased from these muddy waters are further complicated by the traditional conflict between proponents of the idea that human rights are and must be universal on one hand, and those on the other, who support perspectives of cultural relativism.

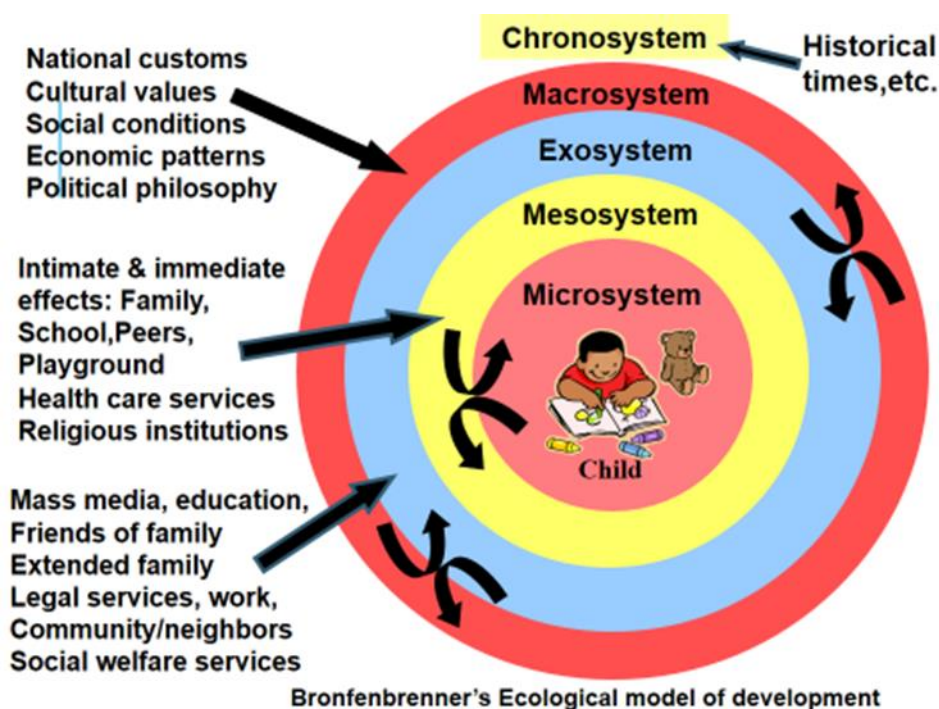
This article critically analyses how the Zimbabwean social and constitutional system has dealt with the perceived conflict and contestation inherent in the debates identified above. Underpinning the research is the assumption that constitutional frameworks regulating African social systems must be sensitive to cultural systems that are part and parcel of lived realities on the continent. Further, that such constitutional systems must strive to strike an equilibrium between lived realities and aspirations of modern human rights discourse, especially where such discourse is still regarded as suspect in some parts of Africa.

2 CHILD LABOUR AND AFRICAN SOCIETY

Child labour is a pertinent children's rights issue and a subject of significant social concern in Africa. The phenomenon is heavily entrenched in African societies, mainly due to the socio-cultural value system and norms. Child labour practices continue to haunt, unabated, child welfare systems on the continent. In its extreme forms, it often culminates in violence, sexual, physical and emotional abuse which occurs in homes, industries, farms, schools and communities through-out the continent. In view of this, there is a need to analyse how social systems interact or conflict with structural factors (social, cultural, legal, and organisational and policy responses) that enhance and promote child labour practices. This approach helps to identify causal factors and pathways of child labour. What this means is that, in finding remedies, it will not be left to the law alone but to all other relevant social institutions.

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In deconstructing the perceived tensions, a social ecological approach in child labour issues can be preferred and this is informed by the dynamic systems theory. This is an approach that examines how the experiences of individuals are shaped and interacted with the structures and systems around them.¹ Most of them use concentric rings to illustrate how individuals are shaped by the environment closest to them.



Social values are acquired as the child grows and are perfected in adulthood through social institutions (subsystems). If structural social systems and institutions in society promote child labour, the phenomenon will manifest in its various forms. Children will end up believing that child labour practices are normal social occurrences. Human problems (including child labour practices) are best understood from the complex interaction of psychological, social, economic, political and physical forces.² Social interventions to prevent and deal with child labour issues must without doubt target all these subsystems in the society. These interventions include those legal, social and other strategies that aim at reducing the risk and extent of harm children are exposed to by child labour. It can be argued that without an understanding of the

¹ See U Bronfenbrenner and P A Morris 'The Bio-ecological Model of Human Development' in RM Lerner & W. Damon (Eds.) *Handbook of child psychology: Theoretical models of human development* (Hoboken, NJ, US: John Wiley & Sons 2006) 793-828

² Ibid 794

social systems and subsystems, interventions might not be able to achieve the deterrent objective. An-Naim and Hammond, who recognise the importance of these fluid social systems, assert that culture preconditions the ability of members of society to take alternative courses of action.³

It is important to determine how the Zimbabwean constitution has approached the perceived conflicts and tensions, and whether it proposes effective interventions that are capable of reconciling various interests and contrasting positions on child labour and child rights.

3. THE CONSTITUTIONAL FRAMEWORK

An analysis of the constitutional framework is important since it assists in the determination of the place, status, treatment and roles of children in the constitutional system. It further clarifies the relationship between cultural traditional practises and human rights. Finally, the rights discourse can illuminate the respect and recognition, if any, given to children's rights in the constitutional system and how this impacts on the constitutionally recognised traditional institutional and value system.

A constitution is a fundamental document that a society can base its social architecture. It thus becomes the foundation for any society and has a significant role in shaping a society's social, economic and political systems and institutions. In addition, a constitution can drive social change and evolution by echoing progressive norms or practises whilst introducing new ones at the same time. The debate that comes is whether a constitution's validity is endangered when it imports foreign normative dimensions in its human rights system. For instance, can the validity of a constitution be contested if it introduces deeply Westernised approaches to regulate sensitive issues such as children affairs, socialisation and upbringing? The answer to this would be a simple no. Societies in constitutional democracies ascribe to be guided by what the Constitution prescribes. Thus, the danger cannot be the erosion of the Constitution's validity, but perhaps the practical relevance and application of those entirely Westernised concepts and approaches to lived realities of African societies. A constitution that introduces these foreign aspects from the international human rights discourse however runs the risk of retaining those provisions as mere paper tigers, difficult or impossible to implement.

³ A A An-Na'im and J Hammond 'Cultural transformation and human rights in African societies' in AA Na'im (ed) *Cultural transformation and human rights in Africa*; Zed Books, New York, 13.

So, what interesting aspects then does the constitutional document bring to the fore in this contested area? To start with, the preamble to the 2013 Constitution affirms the nations' commitment to upholding and defending fundamental human rights and freedoms whilst simultaneously celebrating 'the vibrancy of 'our traditions and cultures'.⁴ Here, the adversity between traditional culture and human rights is subtle since there is no suggestion that there is a conflict. With these two fundamental themes echoed in the Constitution's preamble, it can be argued that the constitution expected a co-existence between cultural traditional practises and fundamental rights and freedoms.

Even if this argument can be rejected, there is a subtle realisation that the constitution supports a dualist approach based on the recognition of human rights and also respects seemingly parallel traditional and cultural systems.⁵ Indeed, from the preamble, there is no suggestion that traditional and cultural practises are subordinate to the human rights agenda in the Constitution. To buttress this, the founding values and principles of the 2013 Constitution recognise that the nation is founded on, *inter alia*, 'diverse cultural, religious and traditional values'. The same list of founding values includes recognition of the rights of women, the elderly, youths and children. Apparently, the value system underlying the 2013 Constitution recognises the relevance of two systems, namely the human rights system and the traditional cultural system. It is necessary to explore the extent to which both systems relate in the context of the children's rights discourse embedded in Chapter 4 of the 2013 Constitution.

3.1 The Rights Discourse and the Traditional Cultural System

Entrenching rights and freedoms in a constitution lends such rights and freedoms fundamental social importance. Tsabora and Kasuso argue, albeit in the context of labour rights, that provisions on constitutional rights can be used to develop the common law as well as customary law in terms of section 46 of the Constitution, which calls for such development. Thus, constitutional rights can lead to the improvement and modification of not only customary law, but even the much-vaunted common law. However, whilst the customary law can be used to clarify, interpret or at times give flesh to constitutional provisions, it cannot be used to develop constitutional law *per se*. How is this reflected in the Declaration of Rights?

⁴ See Preamble to Zimbabwe's 2013 Constitution.

⁵ See section 192 of the 2013 Constitution, that states that the law that must be administered in Zimbabwe is the 'law that was in force' when the Constitution came into force. That law encompasses customary law.

The 2013 Constitution recognises various rights that can be related to the contentious issue of child labour. The first right is enshrined in section 54, which is the right against slavery and servitude. In section 55, forced or compulsory labour is prohibited. It must be said with haste that these rights do not address particular age groups. The prohibitions are effective and binding despite the age of the victim or perpetrator, and despite the circumstances.

Section 65, which is the constitutional labour rights provision, creates a framework for labour rights. This provision must be understood within the context of lawful labour or employment, executed by adults based on contracts of employment. The section addresses what is traditionally known as wage labour. Marginally, or by interpretation, the section can be construed with the lens of child labour issues. This can be done through the argument that section 65 brings to the fore the concept of fair labour practise. In brief, the section guards the right of every person to fair and safe labour practice, meaning employers who commit unfair labour practises violate this right.

Zimbabwe imported the concept of the right to fair labour practices from South Africa, which introduced it in the Labour Relations Act, 1995. Section 2 of this Act defined an unfair labour practice as ‘an unfair labour practice specified in Part III or declared to be so in terms of any other provision of this Act.’ The same definition is retained in the current Zimbabwean Labour Act, (Chapter 28:01). The Labour Act provides an exhaustive list of unfair labour practices in sections 8 and 9. If a practice is not listed as unfair in the Labour Act, then it cannot be raised as such.⁶ It is fair to say that the construction of what constitutes unfair labour practice under the Labour Act is narrow as it can only be committed by employers, trade unions or workers committees.⁷ Section 10 of the Labour Act allows the Minister of Labour to prescribe further acts as unfair labour practices. What can be said is that there is no specific provision that states that an employer who hires children as wage labour can be guilty of unfair labour practises as envisaged in both the Labour Act and the 2013 Constitution. However, the Labour Act, as stated above, regulates lawful employment situations. It is inherently unlawful to employ minors and the Labour Act can be construed to that effect.

⁶ M Gwisai *Labour and employment law in Zimbabwe* (Zimbabwe Labour Centre and Institute of Commercial Law University of Zimbabwe Harare Zimbabwe 2006) 88; L Madhuku L *Labour law in Zimbabwe* (Weaver Press 2015)

⁷⁸; *Magurure & 63 Others v Cargo Carriers International Haulers (Pvt) Ltd t/a Sabot* CCZ 15/16.

⁷ Examples of the unfair labour practices described in sections 8 and 9 of the Labour Act include: preventing and hindering an employee from exercising any of the rights conferred in Part II of the Labour Act; refusing to negotiate in good faith; refusing to co-operate with an employment council; failure to comply with a collective bargaining agreement, decision of the Labour Court, labour officer, designated agent or arbitrator; sexual harassment and bargaining with another union where a registered union exists.

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In addition to section 65 on labour rights, section 63 (b) of the 2013 Constitution provides for every person's right 'to participate in the cultural life of their choice'..., but proceeds to prohibit the exercise of this right in a manner that conflicts with the Declaration of Rights. An example suffices at this point. Participation in a person's cultural activities is prohibited if such participation constitutes a violation of any fundamental right and freedom. Thus, for instance, employing child labour may be permitted in one's culture but will be regarded as unconstitutional since it is a violation of children's right 'to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse.'⁸

The significance of the above provisions must be teased further since there are various meanings and positions that need to be clarified. Firstly, by subjecting cultural activities to the Declaration of Rights, the 2013 Constitution is clearly giving primacy to the human rights agenda. Anything that violates or is contrary to the provisions in the Bill of Rights must fall away. Secondly, where rights in the Bill of Rights are seemingly conflicting, the human rights spirit resolves the conflict by favouring the protection and promotion of human rights as a whole. Consequently, the right to culture is condoned only where it does not conflict with any provisions in the Bill of Rights. To exemplify, cultural indoctrination and socialisation practises that seem to permit child labour in the family unit are not permitted since such practises clearly permit compulsory labour, servitude and slavery. The 2013 Constitution is not apologetic in the manner it seeks to subordinate culture and tradition to the human rights agenda and spirit entrenched in the Declaration of Rights and echoed throughout the whole document. In the context of child labour, it then means that any form of child labour that can be justified on the basis of acculturation, indoctrination or socialisation has to pass the test of constitutionality: such practises must not contradict other provisions of the Bill of Rights or the Constitution per se.

Is it arguable to justify traditionally accepted forms of child labour on the basis that they are part and parcel of traditional education and upbringing envisaged within the 'right to education' in section 75? The answer seems to be in the negative. The right to education envisaged in section 75 pertains to formal state-funded education such as formal primary school education. The provision further recognises the right to further education, and there is nothing to support a conclusion that either basic education or further education encompasses, or relates to cultural or traditional indoctrination, or socialisation. This view is supported by section 19

⁸ Section 81(1) (e) of the 2013 Constitution.

(3) (b) (ii) which prohibits child labour that endangers children's education, moral and social development.

3.2 The Constitution and Rights of children

In addition to the various rights canvassed above, the 2013 Constitution contains specific provisions on children's rights in section 81. Strangely, these children's rights are inserted outside the main parts of the Bill of the Rights that speaks about fundamental rights and freedoms. The rights are in Part 3 of Chapter 4 of the Constitution, whilst fundamental human rights and freedoms are situated in Part 2 of Chapter 4. Specifically, rights of children are categorised under a section titled 'Elaboration of certain rights'. The 2013 Constitution opens this section by explaining that this part 'elaborates certain rights and freedoms to ensure greater certainty as to the application of those rights and freedoms to particular classes of people'. The first question is whether the rights in this part have the same force and weight as rights in the main Declaration of Rights. Arguably, this does not appear the case; rights under this part appear as mere elaborations of previously given rights. One must navigate and check whether children's rights were granted in the main Chapter for them to need elaboration in a seemingly less powerful section of the Constitution. There are no children's rights in the main part of the Declaration of Rights at all. The interpretation that can be made is that the rights in the elaboration may be taken to constitute stand-alone rights and freedoms, depending on the circumstances. If such rights are directly connected to rights given earlier in Part 1, then they can be construed as mere extensions or elaborations. However, if there is no direct connection, these rights must be taken to constitute independent rights holding the same weight and force as other rights in Part 1.

Notwithstanding this rather unusual distraction, there are various children's rights enshrined in section 81. Pertinent to this discussion is the recognition that a child is a person under the age of eighteen years. Child labour prohibitions must always use this age threshold despite the fact that there are numerous problems that come with such threshold. To prohibit some forms of family-based child labour, paid or unpaid, to a child who is seventeen years is unsustainable in various African family and cultural contexts. A simple canvassing of various family-based businesses, family incomes and other social settings suggests that persons within the age range of ten and seventeen years undertake copious amounts of labour for various beneficial and developmental reasons. They work to contribute to family income; they work to earn a living, especially considering the child-headed family phenomenon driven by HIV/AIDS

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and other misfortunes. The various work contexts in which this age group is found not only suggests that this is not abnormal or the exceptional case, but that this is the lived reality ingrained as part and parcel of African life and African society. To examine child labour with the lens of all persons under the age of eighteen will be to raise the bar too high and this has implications on the relationship between law and lived realities in society.

An important right in section 81 is the right of children to be 'protected from economic and sexual exploitation, from child labour and from maltreatment, neglect or any form of abuse'. Further, section 81 must be understood as underpinned by the principle of the best interests of the child. A general overview of the principle suggests that at some stage, the personal choices and preferences of the affected children must be explored. Thus, the interests of children nearing eighteen years may be respected and given effect to more readily than interests of those below ten years. It is therefore not clear whether those children in their teens can choose to involve themselves in what can be categorised as child labour without inviting the frown of section 81 on their erstwhile employers.

Additionally, it is not clear whether the 2013 Constitution would desire a distinction between family based work and formal employment. Does the Constitution ban all kinds of work for children under 18 years, whether formal or informal, family or professional? There is no guidance from the provisions of section 81. This lack of further guidance from the Constitution means that there is room for argument. One argument that can be accepted is that child labour must be distinguished from household chores, and that if work is categorised as household chores, then it must be exempt from the wrath of the law. This approach has benefits and problems of its own. The main benefit is that it ensures that various forms of labour in the family household can proceed whilst other forms need to pass a sterner test. The main danger of accepting this approach is however that household chores might be more tedious, harder and demanding than paid labour. In African society such labour is tougher in the rural context, and might involve demanding duties such as brick making, forest clearing, vending, cutting firewood, agricultural activities and other manual labour. This can be distinguished from various office work that is not demanding. Clearly, the distinction between household labour and other labour contexts cannot be too helpful.

The relationship between culture and human rights on the issue of child labour can also be better appreciated by distinguishing provisions on women's rights and those on children's rights. The 2013 Constitution clearly identifies both as vulnerable groups needing special or more pronounced protection. However, in relation to women's rights, section 80 (3) specifically provides that all 'laws, customs, traditions and cultural practises that infringe the

rights of women conferred by this Constitution are void to the extent of the infringement.’ Clearly, human rights of women take precedence and there is an equivocal support to the claim that cultural, traditional and customary positions are subordinated by the constitution’s human rights agenda. Surprisingly, there is no similar provision in relation to children despite the fact that children can also be victims of customary law, traditions and other cultural practises on a number of fronts.

Finally, the Constitution identifies the best interests of children as the guiding legal and policy approach on all issues pertaining to children. Section 19 (1) introduces this concept, and it is echoed in section 81 (2) of the Constitution. A curious provision directly relevant to child labour and child rights is section 19 (3) (b) which reads:

‘The State must take appropriate legislative and other measures ... to ensure that children are not required or permitted to perform work or provide services that

- (i) are inappropriate for the children's age; or
- (ii) place at risk the children's well-being, education, physical or mental health or spiritual, moral or social development.’

In brief, it seems clear that children can perform child labour lawfully if it is appropriate for their age. This provision is important as it appears as accepting that children can indeed work. Despite the constitution prohibiting work that is not appropriate for children’s age, there is no guide as to how such determination is going to be made. Certainly therefore, the test might be very subjective and context specific. Additionally, the constitution appears to regard child labour as lawful if it enhances the child’s well-being, promotes his/her education and other development. Consequently, the sum-total of these provisions is not a total prohibition of child labour, but a recognition that children may find themselves in work circumstances and that when this is the case, the clarion call is for such work to be developmental, safe and not detrimental to children in any way.

Considering the above positions, it can be concluded that the Constitution grants **a right to protection from child labour** (our emphasis), instead of a complete prohibition against of child labour. Thus, the condemnation of child labour would have been stronger where the right was couched as: No person shall be subjected to child labour and no person may use or employ child labour’.⁹ Alternatively, the provision could have been couched as ‘Every person has a

⁹ This is the language and approach in other prohibitions such as prohibition from slavery (section 54); prohibition from forced labour and compulsory labour (section 55); and prohibition from torture (section 53).

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right not to be engaged in child labour or be recruited as child labour for any purpose'.¹⁰ The rather weaker language and phrasing of the right of protection from child labour seems to be an admission that this area is full of controversy in the context of African society. The right to protection itself is broad and is generally impossible to construe in strictly legal terms. The limits and parameters are not that clear. What the Constitution seems to be saying is that this area cannot be conclusively dealt with in the Constitution. It must be further elaborated in other legislation.

4. NATIONAL LEGISLATIVE FRAMEWORK ON CHILD LABOUR

The constitution as the supreme law of the land creates a framework upon which all other legislation should build. It sets the foundation. Other legislation should ideally expound on constitutional provisions, for example, by establishing institutions and setting out procedures for the implementation and enforcement of constitutional principles. The Labour Act, Chapter 28:01; Children's Act, Chapter 5:06; and the Criminal Law Codification and Reform Act, Chapter 9:23, attempt to address child labour, but in a manner that is not entirely satisfactory. Among other shortcomings, none of these statutes has explicit provisions regulating labour provided by children in non-employment set up such as the family.

4.1 Children's Act

The purpose of the Children's Act is to protect children. The Act establishes institutions that uphold the welfare of children such as the Children's court, Welfare Councils and Rehabilitation centres. The Act also provides for procedures for adoption of children. It also has provisions for the welfare and supervision of children and juveniles.¹¹ It outlaws ill-treatment. This is in line with section 81 (1) (e) of the Constitution which provides that children should be protected from 'economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse.' The Act enshrines the best interests of the child principle which is one of the pillars for the protection of children outlined in the 2013 Constitution of Zimbabwe, the United Nations Convention on the Rights of the Child, and the

¹⁰ This is the general approach with various rights such as the right to human dignity (section 51); personal security (section 52); and privacy (section 57).

¹¹ Section 2 of the Children's Act

African Charter on the Rights and Welfare of the Child. The Children's Act prohibits employment of children of school going age. It provides:

‘Except in such circumstances as may be prescribed, no—

- ‘(a) parent or guardian of a child or young person of school-going age shall knowingly cause or permit the child or young person to absent himself from school in order to engage in employment for gain or reward;
- (b) person shall employ for gain or reward a child or young person of school-going age at a time when the child or young person might reasonably be expected to attend school.’¹²

The above section outlaws failure to send children to school for the sole purpose of employing them. The essence of this provision is to protect children's right to education. This provision however only regulates employment of children for reward or gain. It is silent on work done as part of upbringing of a child which is not rewarded.

Section 7 of the Children's Act prohibits ill-treatment of children. It stipulates that:

‘..... if any parent or guardian of a child or young person assaults, ill-treats, neglects, abandons or exposes him or allows, causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him unnecessary suffering or to injure or detrimentally to affect his health or morals or any part or function of his mind or body, he shall be guilty of an offence.’

For an act to be considered ill-treatment, it has to be done in a manner that deliberately results in unnecessary suffering to the health and morals of the child. This provision does not assist in terms of determining whether work done by children in domestic spaces amounts to child labour or not. If a child is assigned tasks as part of upbringing in a manner that is designed to protect morals then it will not be regarded as ill-treatment. The provision also creates challenges in implementation. It does not set out guidelines on what is considered excessive working conditions. The provision also seems to allow a minimum degree of suffering, if it is necessary. And this could be contrary to the best interests of the child. In this case allocation of excessive child labour beyond the expected norm would amount to ill treatment of children and therefore punishable under the Act.

¹² Section 10A (1)

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The Children's Act also prohibits child labour in the form of begging and entertainment. Section 10 of the Act criminalises the involvement of children in begging and participation in entertainment that is likely to affect their morals and health.

4.2 The Criminal Law Codification and Reform Act

The Criminal Law Codification and Reform Act, (Criminal Code), outlaws child labour but, again, not specifically in reference to labour carried out at home. Criminal law is generally designed to punish, deter and reform those that violate the law. Criminal sanctions in matters of child labour are integral to ensuring that the community desists from exploitation of children under the guise of training for adulthood. The Criminal Code criminalises employment of children as prostitutes. Section 87 of the Code provides:

‘Any parent or guardian who causes or allows his or her child under the age of eighteen years to associate with prostitutes or to be employed by any prostitute as a prostitute or to reside in a brothel shall be guilty of allowing a child to become a prostitute and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding ten years or both.’

The Criminal Code further prohibits the use of children in selling and dealing with drugs. The use of children in activities associated with drugs aggravates the crime of dealing in dangerous drugs, and a person convicted will be liable to imprisonment for a period not less than 15 years.¹³

4.3 Labour Act

The Labour Act was briefly discussed above. It regulates employment relationships. Section 2 of the Labour Act provides that the purpose of the Labour Act is to “advance social justice and democracy in the workplace” through provision of labour rights and establishment of labour dispute resolution processes. The Act also provides for fair labour standards. The scope of the Act clearly covers relationship between employer and employee to the exclusion of labour provided in a family set up.

Section 11 (1) of the Labour Act is controversial. It appears to envisage employment, as apprentices, of young persons who may be below the age of 18. It provides:

¹³ Section 156 (2) of the Criminal Code

- ‘... [N]o employer shall employ any person in any occupation—
- (a) as an apprentice who is under the age of thirteen years;
 - (b) otherwise than as an apprentice who is under the age of fifteen years.’

This appears to be inconsistent with the 2013 Constitution which, as noted above, prohibits employment of children below the age of 18 years. This is compounded by section 11 (4) which stipulates that ‘no employer shall cause any person under the age of eighteen years to perform any work which is likely to jeopardize that person’s health, safety or morals...’ Technically, therefore, section 11 permits engagement of child apprentices, for performance of work that is not hazardous. The fact that parents may have consented to such engagement does not in any way protect children from exploitation, since parents can consent to have their children undertake hazardous work due to poverty.

As highlighted earlier, the Labour Act applies to formal cases of employment. It does not regulate issues of labour conducted in non-employment settings such as at home, where parents or guardians may simply assign chores. Section 11 not only confounds the Constitution, which outlaws child labour, it also confounds promotion of social justice, the rationale of the Labour Act itself. It is submitted that the insinuation that at the age of 16 a child is mature enough to work, albeit as an apprentice, is not conducive to attainment of social justice.

4.4 Should the law regulate child labour at home?

The view that law should regulate the work performed by children at home is a highly contested issue. Firstly the Constitution provides that parents are responsible for the moral upbringing of their children. As such it is ideal to allow them the latitude to bring up their children in a way that is permissible according to their beliefs, but subject to compliance with the provisions of the constitution. There is a belief that child labour ‘is a natural extension of what children have always done in Zimbabwean society.’¹⁴ However, work assigned to children should not result in economic exploitation. Ncube argues that debates on children’s rights should be situated within ‘specific social and cultural context.’¹⁵ This is because of the fact that cultures have

¹⁴ R Loewenson ‘Child Labour in Zimbabwe and the Rights of the Child’ 6, 1 (1991) *Journal of social development in Africa* 19-31, 20

¹⁵ W Ncube ‘The African Cultural Fingerprint? The changing concept of childhood’ in W Ncube (ed) *Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa*, (Ashgate, England 1998) 11-28, 11

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different conceptualisation of children and children's rights.¹⁶ Kabeberi-Macharia argues that the term hazardous work is relative, especially in cases where 'what is termed as work is often referred to as assisting the family.'¹⁷ The family is therefore given the power to shape their children's moral upbringing. The Convention on the Rights of the Child (CRC) highlights the responsibilities of parents in the upbringing of children. Article 14(2) obligates states to 'respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her rights in a manner consistent with the evolving capacities of the child.'

The African Charter on the Rights and Welfare of the Child impose duties on children to work towards family cohesion and respect their parents and family¹⁸. The African Charter is grounded in African realities. It provides that children have an obligation to assist their families in times of need.¹⁹

It is clear from the above interrogation of the law that the legislative framework mainly focuses on child labour that takes places in the public sphere between the employer and the employee. The current legislative framework narrowly construes child labour to services offered by children in employment spaces, yet child labour also occurs where children perform work above expected family duties. The law does not provide a minimum age which is permissible for a child to work at home. Child labour that takes place in the context of the family is largely unregulated. This gap remains even though evidence has shown that children engage in non-economic labour in the family set up such as housework, caring for the sick and looking after younger siblings.²⁰ This gap in law cements the incorrect view that work done by children at home does not constitute child labour. This exposes children to various forms of labour. This has resulted in children as young as 5 years performing adult household chores such as caring for the sick.²¹ As a result, the legislative provisions are not alive to the nuances that are inherent in people's lives particularly when children's expected duties at home become excessive and tantamount to child labour.

Another contrasting perspective that must be explored is that work done by children at home cannot easily be regulated through the law. Issues such as stipulating the nature of work

¹⁶ Ibid

¹⁷ J. Kabeberi-Macharia 'Reconstructing the Image of the Girl- Child' in W Ncube (ed) *Law, Culture , Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate, England 1998) 47-57 at 53

¹⁸ Article 31 (a)

¹⁹ Article 31 (a)

²⁰ Zimbabwe National Statistics Agencies (ZIMSTATS) *Child Labour Report 2014t*

²¹ ZIMSTATS *Child Labour Report of 2014* at 49 revealed that children as young as 5 years old are involved in unpaid care work.

done by children at home and the minimum hours that a child can work need to be thoroughly considered. Another point to reflect on is whether it is necessary to have such specific regulation given the fact that some laws can be indirectly applied to punish forms of ill-treatment. For instance, the Children's Act criminalises ill-treatment of children. The provisions of the Children's Act can be utilised to cater for situations when children's duties the home border on ill-treatment. However, the biggest hurdle, again, is determination of the limits of the definition of ill-treatment.

Ill-treatment must be understood in the context of the constitutional set-up. For instance, the Constitution of Zimbabwe clearly provides that parents are responsible for the moral and upbringing of their children. This entitles parents to determine the domestic chores that a child can perform within the family as part of the child's upbringing. The question which remains is whether the state must be given the right to determine the tasks that can be assigned to a child.

5. CONCLUSION

The contestation between human rights and African culture on the conceptualisation of child labour depicts a debate on universalism and relativism of human rights. While rights are seemingly universal, they are interpreted and implemented differently in each context. States have a margin of appreciation on the implementation of rights. Due to the cultural relativism it is important to ensure that there is a dialogue within culture on what is permissible work to children within the family set up. Communities should come up with the minimum duties that are expected of children. The dialogue should be alive to the fact that culture is not static but is constantly evolving due to economic, social and legal developments. The constitutionalisation of children's rights entails that all practices that infringe children's rights are invalid. As it stands child labour is taking place under the pretext of culture despite the constitutional provisions that protect children from child labour. Subordinate legislation is silent on the regulation of child labour in private spaces. Allocation of excessive work to children in the context of the family should be regulated to avoid exploitation of children. Without a sustained dialogue on the seemingly conflictual positions of tradition and human rights in the area of child labour, the progressive provisions of the 2013 Constitution will remain a distant dream to the targeted beneficiary, which paradoxically, is the ever-changing African society itself.