

# **In search of a focus: Methodological provocations in the quest for the recognition and implementation of children's rights and legal entitlements**

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## **Introduction**

Like most challenges that are thrown at one, there is a moment of pause, a moment of panic, and then a resigned acceptance. I have to admit that the challenge to write a piece on children's rights forced me to interrogate my perceptions of the rights of the child and their efficacy. The span of human rights and basic legal provisions needed to provide for comprehensive rights for children is extensive and fortunately readily to be found in multiple conventions and legislation. Thus there is guidance available to states as to what is required in terms of legislation, policy and government action to provide for and deliver the basic rights and entitlements to children.

Yet, even when the necessary legal and policy measures have been put in place in countries in relation to human rights delivery fulfilment this is but the start of the process. It is common cause that there are enormous barriers to the attainment of children's rights universally.<sup>1</sup> To tackle these barriers we need to have a thorough and detailed understanding of their nature, shape and form and, especially, who the actors are who sustain or maintain those barriers. I would argue, it is as much the barriers, and those who erect and people them, that we need to tackle, as it is the putting in place of the reforms or potential implementation plans.

## **What we very obviously need to tackle**

Even if we confine ourselves to looking at just two of the instruments that deal with the rights of children – the Convention on the Rights of the Child (CRC)<sup>2</sup> and its African

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1 Some children may benefit, but they are likely to be the already economically privileged, those who already have access to education, to good health care, and experience liberal social, cultural and religious attitudes.

2 The most extensively ratified instrument that augments the Universal Declaration of Human Rights (UDHR) is the Convention on the Rights of the Child, 1989. The CRC has been

counterpart the African Charter on the Rights and Welfare of the Child (ACRWC) there has to be broad based interrogation of the current constitutional, legal, institutional and economic capacity of states to deliver on these rights across the board.

States have to address issues such as education, development both personal and resource-based and the cultural and religious aspects of life as they affect children. Access to health care is an indispensable area to be interrogated as is that of child labour and its complex components from minor home-based family-oriented assistance to child employment that deprives the child of a normal childhood, especially of education and leisure. Other areas that require interrogation are barriers to the full and enjoyable pursuit of childhood, the security of a family, and the need to have membership of some form of family which is supported and protected whilst at the same time ensuring that the family is not a source of violence, exploitation and insecurity. One can move right by right and list the interrogations that need to be made also one by one. My work in relation to delivery of human rights to women indicates that it is possible to create a background interrogation template that raises a general awareness of the sometimes hidden problems and barriers that still need to be tackled regardless of the legislation and the policy frameworks that may already be in place.

### **What we often fail to tackle**

In using a human rights based approach the real difficulties are not the conceptualization of the rights, there great progress has been made, but rather in how we work to effect delivery of the rights. There has been trenchant criticism of and disillusionment with a rights-based approach in some quarters because despite the provision of rights on paper, change that penetrates to the neediest of children is very slow or seemingly non-existent.

I would suggest that to a large extent criticism and disillusion have come about because, obviously, rights are not self-implementing. However, it is not the rights that are the problem, nor at a purely conceptual level is there a problem in using a rights-based approach. A rights framework defines basic minimum standards. The international policy approaches, such as the Millennium Development Goals, embellish the frameworks laid out in the instruments as do the reports and recommendations from the oversight committees. Countries may have domesticated all or part of international children's rights instruments and even put in place institutions to further the rights and interests of children. Yet there is still a gap between aspirations expressed and children's grounded experiences. I now seek to provide some tools, largely in the form of provocations (questions) to be directed at rights agendas in an effort to locate where the 'sticking points' are in their implementation.

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largely replicated within the African context by the African Charter on the Rights and Welfare of the Child (ACRWC), 1990.

Suffice it to say that identifying the ‘sticking points’ does not mean that we have an easy quick fix available, the reality is that it will probably require further and deeper investigations. But at the very least understanding of the problems and barriers should be heightened and this should mean realistic interventions can be considered.

Thus whatever the right or the entitlement that is sought, contemplated, is being legislated about, is being put into policy frameworks or is being implemented, it is important to pause and interrogate that initiative.

The most important provocations that have to be raised, the questions that have to be asked are:

- How is this supposed to benefit children?
- How will it benefit children in real terms?

It is important to know whether the interveners have:

- Identified all the potential child beneficiaries of the interventions
- Located the children who need to be targeted, not merely by hypothesising, but by exploring the issue of who is in need of interventions and their location.
- Identified the range of situational needs that the various categories of children will probably have in relation to the intervention/s.

Self-evidently these interrogations answer some questions but immediately raise a host of new ones; that is the purpose of the process; the answers came only come if the appropriate questions are asked.

## **Sex and gender as tools for interrogating the delivery of rights**

Firstly, it is vital that as rights-based approach development practitioners we can identify and understand the issues that affect children, from the sex and gender perspectives of the boy child and the girl child. What this, inevitably, must involve is a serious engagement with sex gender mainstreaming but from the perspective of the targeted children. Let me explain why this is so vital.

Sex is more or less a biological given, but gender is a cultural construction, yet both greatly influence how individual children will experience life and the opportunities that life offers even if they come from the same ‘nuclear’<sup>3</sup> family and the same social background. One of the most profound divisions that effects implementation of rights

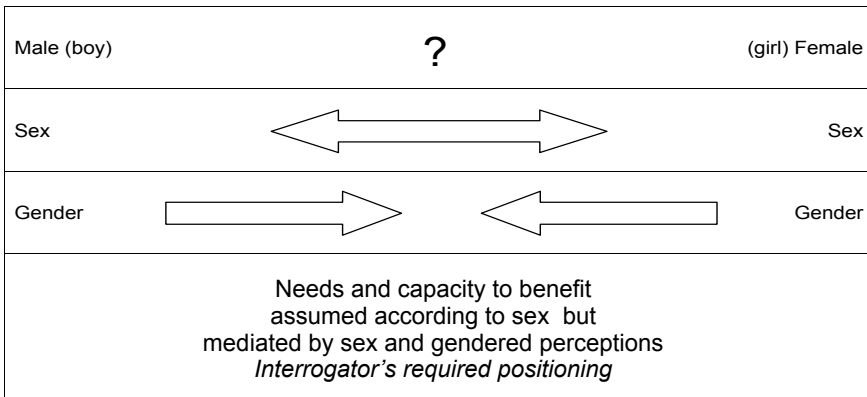
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3 I use the term ‘nuclear’ to describe the one mother family, even though the mother maybe in a polygynous relationship she herself is frequently limited to one partner – thus she is monogamous but her partner may not be, however her children will, probably, have, in theory, similar basic potentials. The reality may be different from our assumptions, being affected by circumstances extraneous to the family which affect attitudes and opportunities.

and the capacity to benefit from such rights is that of sex and gender. Sex and gender profiling of individuals creates distinctions and arenas of discrimination which are often not perceived as such, rather because they are consistent with what is culturally and socially normal and thus discrimination is not perceived as such, 'it is not a problem'.

If one tries to stand, metaphorically, in the middle of the sex and gender continua, which is what a serious gender mainstreamer must do, it becomes apparent that no matter what rights one is contemplating the capacity to benefit, pursue and effectively utilize those rights is inextricably linked to both one's sex and one's gender. The table seeks to show how males and females are not sharply defined as such by sex, although there are certain criteria that physiologically define the male and the female but the matter is neither clear cut nor obvious.<sup>4</sup> However whatever that sex maybe biologically, it is not necessarily the same as one's gender and the gender roles and life circumscribing perceptions that are ascribed to an individual. One's sex and gender may or may not coincide and one can located anywhere along the gender continuum and this may change over the years, but one's sex is not normally so mutable.

**Figure 1<sup>5</sup>**



4 We are inclined to regard biological (physiological) sex, as something which is clear and pre-determined. Of course it is not always clear which sex some individuals belong to, the recent distressing and publicly debated case of Caster Semanya of South Africa starkly illustrates the uncertainty for some of processes of conception and development of physiological sex. Caster's is not initially a problem of gender, but of manifesting externally a sex which appeared female but was physiologically ambivalent when her other sexual characteristics are taken into account. Repeated press and other media statements referred to gender testing, actually they were tests to reveal a sex profile. As to gender; that is for Caster to determine. Is Caster socially and culturally female or male or someone who fits somewhere in the middle regions of the sex continuum? How Caster feels about gender identity is the combination of a sense of sex based identity and a perception of where one is located on the male female gender continuum. Where that is, is not entirely of one's own making.

5 See for a further explanation of this approach, but based on adults Stewart (2004).

In an ideal world one's sex-based needs and entitlements should be a matter that at worst requires management, and that should mean that gender becomes a minor factor in mediating one's life opportunities and challenges. But, it is not an ideal world so sex-based differences which require a management approach become transformed into barriers built on perceptions of fundamental capacity and competence.

Whereas we can say that the 'child is the mother or father of the person whom she or he will become' the projection by those around a child of the person they think will eventually emerge profoundly influences who he or she will become. Thus whether it is thought you will become a future 'mother' or 'father' potentially circumscribes how a child will be socialized, acculturated, educated and exposed to the opportunities and challenges of life.

## **Interrogating rights delivery interventions**

Thus, there are issues that we have to tackle by explicitly placing ourselves in the middle of the sex and gender continua and interrogating initiatives and the rights that inform them closely:

- How will it benefit the girl child?
- How will it benefit the boy child?

This leads to asking:

- Are there specific needs for the boy child to be able to benefit from this right?
- Are there specific needs for the girl child to be able to benefit from this right?
- Are there age-related factors that have also to be considered for females and males in relation to the right being considered?
- Are there factors that will influence the capacity of the girl child to benefit from this right?
- Are there factors that will influence the capacity of the boy child to benefit from this right?

Is there after such an interrogation a need to:

- Make adjustments to meet the needs of the girl child?
- Make adjustments to meet the needs of the boy child?

For example, if we are talking about provision of schooling and the facilities that ought to accompany that schooling, it is important to ascertain whether the specific sanitation needs of the girl child have been taken into account. Are the means for managing menstruation in place, such as suitably discreet toilets and sanitary waste disposal facilities? They can be simple, locally built; the question is have they been factored into the rights implementation agenda? Schools may be in place, but might the girl child who reaches puberty suddenly find school attendance problematic because she cannot cope with the products and stress of menstruation.<sup>6</sup>

<sup>6</sup> Stewart (2007); Dengu Zvobogo (2004); Moyo et al. (2004).

Especially in rural areas, but not exclusively so, a gender based consideration is how far does a child have to travel to school and by what means? For a girl child this can be problematic, if she lives far from the school her initial enrolment may be delayed till she can travel the distance comfortably on foot, but then as she nears and reaches puberty there may be concerns about her physical and sexual safety based on the gendered and deeply embedded perceptions about the vulnerability of the girl child. So her schooling is truncated at both ends, and is often curtailed on a daily basis because of the gendered chores that she must undertake in the home such as care of younger siblings, collecting water, helping with cooking, washing and general household chores.

In rural areas the boy child may enrol in school later than the girl child, he too may have chores and responsibilities such as cattle herding, but he probably has more spare time than the girl child and there are fewer fears about his safety so he may be retained in school for much longer. So his potential to enjoy the right to education may be greater than that of the girl child who is, in other respects, on par with him. So if we place ourselves in the middle of the sex-gender continua table above and analyze how girls and boys will be affected by physiological realities and gendered perceptions of who they are and their life potentials we can see that without further interventions that actively respond to these factors rights will in all probability be differentially experienced.<sup>7</sup>

At this point it is important to realize that these are but the first set of broad general interrogations, we have not even considered issues of ethnicity, religion or social and economic factors, issues of geopolitics, educational foundations and a host of other variables that largely determine how a child, male or female will 'enjoy' or be excluded from the enjoyment of rights and policy interventions. Further, the examples used are only in relation to toilets and access to schools in the geographical sense. So far we have not even touched on curriculum, or sports activities or the myriad of other issues that affect school, school attendance and general benefit of and from school as an educational and social space. Each one of these needs to be interrogated in the manner set out above, constantly building on the prior assessments and evaluations produced in attempting to obtain a holistic picture of the operation and efficacy of rights based approaches.

### **Understanding the context for interventions**

Perhaps one can feel a sense of relative comfort when working from the overarching human rights norms, but this does obviate the duty, at the level of implementation, to ensure that there is a fit between the rights and the actual implementation processes. Is there sex and gender awareness? Has sufficient care been taken to ensure that whatever

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<sup>7</sup> I am not going to delve into what those interventions should be, some I have already mentioned, others such as reconsidering distances between available schools, local parental protection groups for children (escorting children) lie within the purview of the state or might be addressed at the level of local initiatives. For the purposes of this chapter the critical issue is that there is awareness that sex and gender are significant factors which can inhibit a child benefiting when it seems that everything else is in place.

is being undertaken, mooted or considered is going to be context sensitive, especially where issues of culture and religion may affect acceptance of interventions?

There is usually a need as societal boundaries are crossed and efforts are made to spread the message and content of rights to be sure as to whether or not there is understanding of the problem it sought to rectify. Do we know what the points of resistance might be to our actions, who the resisters will be and how to interact with them.? This is similar to the interrogation undertaken when women's rights are being pursued, although in that case the issue is whether or not men have been brought on board and are aware of women's rights and why women ought to be able to exercise those rights.

So, as with the case of women, children's rights organizations are often very able in informing and advising children of their rights, but have they also laid the groundwork in the wider society, especially with families, communities and religious leaders for them to accept the rights of children? We need to be aware that a child is far less likely to be able to take up his or her rights than adults. If women have problems pursuing their rights, how much more difficult will it be for a child, especially a girl child.

This is not to suggest that rights should not be put in place, that programmes and interventions should not be devised and implemented. We cannot lose sight of the reality that it is adults who by and large take up the rights of children, but it is adults who are able to pervert and deny rights to children at all levels of our societies. Thus we need to mainstream our thinking once again and this time take the position in the middle of the sex and gender frame and ask:

- Are children aware of the right, opportunity, or intervention that is being offered?
- Are girl children aware?
- Are boy children aware?

Although one would hope awareness would not be differentiated by sex and gender there is a distinct possibility that this might be the case because of the different places where boys and girls interact, congregate, and the different people they come into contact with. Once again mainstreaming, or centralizing our interrogatory position on children's rights is important.

## **From information to utilization**

Of course the possible interrogations are endless, but it is important to ensure that given the multiple factors that may lead to indirect, and often unarticulated and even unintended discrimination that we continue the interrogation:

- Do both girl children and boy children have equal opportunity to take advantage of what is being done or offered?

- Are adults, who have the power to mediate access to the rights on the part of children to offers and opportunities, aware of these rights, opportunities and offers?
- Have adults been brought 'on board' so that they understand and accept these interventions, opportunities and offers for the improvement of children's lives?

We might also ask in this context whether the methods of information dissemination, the processes for raising awareness have been thorough, appropriate and adequate. Have children be appropriately targeted for their age groups, their culture, in the context of their religion, their geographical location, their economic situation?

We might ask:

- Are these rights attainable for the children being targeted at a particular place or moment?
- Are the facilities available for them to benefit, given where the children are located?
- Are there costs involved, whether economic or social, that might inhibit capacity to benefit?
- Are we raising false hopes for a future that cannot be?

If the answer is yes to any or all of these questions, it is no reason to abandon the pursuit of rights or the delivery of rights but clearly it is a warning that more needs to be done in terms of research, planning, policy formulation and implementation strategies if we are to succeed in the rights based approach.

### **Are we using the right language? Are children's rights cast in appropriate language?**

Over the years I have turned sharply away from acceptance of the legal drafting rubric that 'the male implies the female unless the contrary is indicated' to what I have crudely termed 'in your face drafting' where both the male and female pronouns must be used together unless it is an issue which affects only one of the sexes or genders.

I have come to appreciate the value of sex and gender explicit drafting, the message is then unequivocal. Perhaps of greatest significance in this change of the state of my legal mind have been the comments of my non-lawyer masters students, some of whom have expressed shock and actively alleged discrimination in legislation where the male would be taken to imply the female. Of course their lawyer colleagues leap to the drafter's defence and explain the drafting convention, but this is dismissed as 'lawyers' games'. And, arguably, so they are, law needs to be explicit, and unequivocal as do human rights. So it was somewhat surprising to discover that in relation to children's rights, especially at the African regional level, there is laxity and confusion in the use of language relating to sex and gender and gender confused language. It is not quite so problematic at the



international level. One of the reasons that I raised the sex and gender interrogations of rights in a very general sense is because of this very problem of lack of explicit sex and gender focus in the instruments. But even where there is articulation of both the male and the female in relation to being a rights holder, the sex and gender interrogations still need to be undertaken. Merely mouthing ‘he’ and/or ‘she’ does not indicate that the sex and gender differentiations and potential discriminations will be revealed, tackled or corrected.

When I was searching for a focus and a direction for this chapter I read the CRC and, especially the ACRWC and was somewhat surprised by the sex and gender laxity of the language.

My perusal of these two major conventions on children’s rights, CRC and the ACRWC, revealed that they are written in ‘sex and gender neutral’, or ‘sex and gender equal’, or fortunately less frequently ‘sex and gender implied to be equal’ language. Sex and gender neutral language is language that uses, for example, the words child or children to automatically embrace and articulate the needs and the ensuing rights of both the boy child and the girl child as if they are synonymous. Sex and gender equal language is language that uses he and she, his and her as if there are identical needs and concerns and identical remedies for the male and female child in terms of deprivation of rights and entitlements, and the route to equality of rights and entitlements. Sex and gender to be implied language, is language which presumes, or so it seems,<sup>8</sup> in accordance with legal drafting conventions that the male is taken to imply the female unless the contrary is indicated.

Sex and gender neutral and sex and gender equal language are used throughout the CRC with the exception of the following in the Preamble which is from the earlier Declaration of the Rights of the Child which uses the male to subsume the female:

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of *his* physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth” [Emphasis added].

Yet, it is important to appreciate that where sex and gender neutral language is used that the reality of children’s lives is that they are not lived out in sex and gender equality – rather children’s lives are the nurturing and embedded sites of the sex and gender inequalities that permeate the whole spectrum of human life.

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8 Where the different forms are used in one document it might be argued that the document is to be read literally and that the female cannot be read to be included in the male. Although one hopes judicial commonsense would prevail where problems of interpretation arise and that the implication would be made.

As discussed earlier the ACRWC is inconsistent, sometimes using sex and gender equal language which is sometimes combined with gender neutral language but frequently lapsing into sex and gender implied language, for example, one finds the following in the Preamble:

RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of *his* personality. the child should grow up in a family environment in an atmosphere of happiness, love and understanding, RECOGNIZING that the child, due to the needs of *his* physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.  
[Emphases added]

Given the acknowledged male privileging in many African societies and countries it is disturbing, albeit probably not sinister, that *his* is used alone in these two paragraphs with her being omitted, one hopes as an oversight not as a deliberate exclusion.

Such sloppy drafting arguably create a distinction which could, but one would sincerely hope not, be restrictively interpreted as being applicable to males only and not equally males and females. At the very least they are embarrassing drafting lapses and could be extremely embarrassing were such an approach ever to be raised. In the current sex and gender awareness political context one would hope that the interpretation would be that the male clearly implies the female. Nonetheless these are problematic lapses that it is preferable not to see still in existence and, more particularly, which fail to consistently 'put issues of female, male child equality in the face of the public'.

### Does it matter?

Interestingly the other articles in ACRWC that adopt, or display, a sex and gender implied approach are: Articles 6, Name and Nationality; Article 10, Protection of Privacy; Article 11, Education; Article 13, Handicapped Children; Article 17, Administration of Juvenile Justice; Article 19, Parent Care and Protection; Article 23, Refugee Children; and Article 31, Responsibility of the Child. One could construct a sinister interpretation of the use of the male only given that the bearing of the family name in many African societies vests in the male child, that the life of a girl child is frequently focused on the reproduction of the family and that her sexuality needs to be controlled – so is she entitled to the same notions of privacy as the male child? Education is, interestingly, inappropriately couched in sex neutral terms in Article 11 unless the intention is to cover both males and females as the authors of a pregnancy within its ambit:

6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become *pregnant* before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.

Although one doubts that sex inclusivity was intended, this is one occasion where sex specific drafting is required – *girl* or *girls* should have been used instead of *children*.

A male based reference to the rights of handicapped children again raises a concern that this might have been a conceptual slip in that it is often the male handicapped child who presents the problem of family representation and continuation in a way that a female child would not.

## A final general provocation

Put differently, I am asking the reader to interrogate the image that comes into the minds of the drafters and politicians when they envisage the child or children on whom they are conferring rights. The realities of children's lives is that they are not lived out in arenas of equality economically, educationally, socially, religiously, medically or in sex and gender equality. Rather they are the nurturing and embedded sites of inequality, especially the sex and gender inequalities that permeate the whole spectrum of human life. So I am back at the start of my explorations and provocations on the rights of the child.

So after much rambling about as a chapter in search of a focus, that was it – the importance of evolving methodologies to interrogate the human and legal rights of children and, more especially, interrogating the factors that effect their implementation for children themselves. Especially so for those children being in greatest need of the human rights based interventions and their reformative powers.

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