

**Chapter 10**  
**Article 9**  
**Freedom of thought, conscience and religion**

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1. Every child shall have the right to freedom of thought, conscience and religion.
2. Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and the best interests of the child.
3. State parties shall respect the duty of parents and, where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

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## 1 Introduction

Freedom of thought, conscience and religion is a fundamental right that stands as a cornerstone in the edifice of children's rights.<sup>1</sup> It is an internationally-recognised human right that is formally included in most constitutions in the world.<sup>2</sup> This provision is provided for, among others, in the Constitutions of South Africa,<sup>3</sup> Malawi,<sup>4</sup> Nigeria<sup>5</sup> and Kenya.<sup>6</sup> The provision protects the freedom to profess, practise and manifest religion or belief, and encompasses a wide range of conduct.<sup>7</sup> According to the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the right to freedom of thought, conscience and religion, includes the following freedoms:<sup>8</sup>

- (a) to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) to establish and maintain appropriate charitable or humanitarian institutions;
- (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) to write, issue and disseminate relevant publications in these areas;
- (e) to teach a religion or belief in places suitable for these purposes;
- (f) to solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

At the heart of this right lies the recognition of children's inherent dignity, worth and autonomy as individuals.<sup>9</sup> It acknowledges that children, like adults, possess the capacity for independent thinking, moral reasoning and spiritual exploration.<sup>10</sup> This acknowledgment is crucial in fostering children's holistic development and empowering them to form their own beliefs, opinions and values, independent of external influences.<sup>11</sup> This is in line with the principle of the right to life, survival and development, which envisages a holistic perspective in the improvement of the rights and well-being of the child.<sup>12</sup> It also allows children to explore diverse perspectives, question established norms and

- 1 E Koren & S Nelson 'Renewing the international human rights project: The fundamental importance of religious freedom' (2020) 10 *Journal of Christian Legal Thought* 46.
- 2 N Lerner *Religion, belief, and international human rights* (2000) 129.
- 3 The Constitution of the Republic of South Africa, 1996 art 15(1).
- 4 The Constitution of the Republic of Malawi, 1994 sec 33.
- 5 The Constitution of the Federal Republic of Nigeria, 1999 art 38.
- 6 The Constitution of Kenya, 2010 arts 32(1) & (2).
- 7 Lerner (n 2) 908.
- 8 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly Resolution 36/55 of 25 November 1981 art 6.
- 9 M Freeman 'The value and values of children's rights' in J Williams (ed) *The human rights of children: From visions to implementation* (2011) 20.
- 10 G Lansdown 'The evolving capacities of the child' (2005) *UNICEF Innocent Research Centre* 5.
- 11 CRC Committee General Comment 7 on Implementing Child Rights in Early Childhood (20 September 2006) CRC/C/GC/7/Rev.1 para 17; CRC Committee General Comment 20 on the Implementation of the Rights of the Child During Adolescence (6 December 2016) CRC/C/GC/20 para 17.
- 12 A Weihrauch 'The principle of life, survival and development' (2023), <https://www.humanium.org/en/the-principle-of-life-survival-and-development/> (accessed 2 April 2024).

develop critical thinking skills.<sup>13</sup> This autonomy in the exercise of this right is fundamental in shaping their individuality and self-expression, enabling them to navigate complexities and make informed choices in various aspects of life.<sup>14</sup>

This chapter provides commentary on the normative content of article 9 and assesses the status of its implementation. The chapter is organised into six parts. Following this introduction, the second part draws out linkages between article 9 and other articles of the African Charter on the Rights and Welfare of the Child (African Children's Charter). It leads to part 3 three which looks at other provisions beyond the African Children's Charter. Part 4 discusses the concepts brought together under article 9, and offers a legal interpretation of the article in the context of the nature and scope of state obligations. Part 5 gives insights into constitutional, legislative and judicial measures that states have employed to implement article 9. Part 6 offers a conclusion that at its core highlights challenges to implementing article 9, the development of regional jurisprudence, and gives recommendations to state and non-state actors.

## 2 Links to other Children's Charter articles

Article 9 should be read together with related provisions within the African Children's Charter as follows:

### 2.1 Equality and non-discrimination

Children's rights to freedom of thought, conscience and religion are closely linked to the principle of equality and non-discrimination.<sup>15</sup> The Preamble to the African Children's Charter confirms this by providing that children are entitled to all the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind, including religion or any other opinion or status. More particularly, article 3 of the Charter provides for non-discrimination and guarantees every child the enjoyment of their rights and freedoms recognised and guaranteed in the Charter irrespective of the child's ethnic group, sex, language, religion, political or other opinion or status.<sup>16</sup> State parties are expected to ensure that the enjoyment of the right to freedom of thought, conscience and religion is not based on the grounds enumerated in article 3 of the African Children's Charter.

### 2.2 Best interests of the child

Article 4 of the African Children's Charter provides for the best interests of the child to be the primary consideration in all actions undertaken by any person or authority.<sup>17</sup> Particularly regarding children's freedom of thought, conscience and religion, this fundamental principle is mirrored when the Charter mandates parents or legal guardians to provide guidance and direction to children in the exercise of these rights having regard to their evolving capacities and best interests.<sup>18</sup> Regarding article 9, deliberate efforts that do not stifle both flexibility and adaptability in the child's thoughts, conscience

13 BB Hudgins & S Edelman 'Children's self-directed critical thinking' (1998) 81 *Journal of Educational Research* 264.

14 P Bou-Habib & S Olsaretti 'Autonomy and children's well-being' in A Bagattini & C Macleods (eds) *The nature of children's well-being: Theory and practice* (2015) 16.

15 A Donald & E Howard 'The right to freedom of religion or belief and its intersection with other rights' (2015) *Middlesex University* 1-16.

16 Art 3.

17 Art 4.

18 Art 9(2).

and selection of religion should be encouraged.<sup>19</sup> The circumstances of the child (individually and collectively) should be considered on a case-by-case basis.

### 2.3 Freedom of expression/participation

Article 7 of the African Children's Charter guarantees children, who are capable of communicating their views, the freedom to express these freely, subject to restrictions that are prescribed by law.<sup>20</sup> Freedom of thought often intersects with freedom of expression, as children have the right to freely express their beliefs, opinions, and convictions, including religious beliefs.<sup>21</sup> In respect of religion or belief, the right to freedom of expression is engaged when a child is expressing their religion or belief, or views about the religion or belief of others.<sup>22</sup> The child's agency should take centre stage with the assurance from the state that the views of the child should be communicated and considered.<sup>23</sup>

### 2.4 Freedom of association

Article 8 of the African Children's Charter grants children the right to free association and freedom of peaceful assembly in conformity with the law. These freedoms allow children to gather peacefully and associate with others who share their beliefs or convictions, including religious associations or communities.<sup>24</sup> The ambit extends to children's rights to participate in religious ceremonies, worship and rituals collectively.<sup>25</sup>

## 3 Links to other human rights treaties

Article 9 of the African Children's Charter is linked to various key international instruments that safeguard the right to freedom of thought, conscience and religion. These are highlighted below.

### 3.1 Constitutive Act of the African Union

The Constitutive Act of the African Union (AU) reaffirms the commitment of member states to uphold democratic principles, human rights and the rule of law.<sup>26</sup> It underscores the importance of promoting and protecting the fundamental freedoms enshrined in the African Charter on Human and Peoples' Rights (African Charter) and other relevant international human rights instruments.<sup>27</sup> It further recognises the diversity of cultures, religions and beliefs across the African continent, emphasising the need to foster tolerance, dialogue, and mutual respect.<sup>28</sup> Additionally, it calls upon member states to promote peaceful coexistence and understanding, for instance, among different religious and cultural communities,<sup>29</sup> thereby fostering democracy and sustainable social and cultural development.<sup>30</sup> It is

19 CRC Committee General comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1) Document CRC/C/GC/14 para 32.

20 African Children's Charter art 7.

21 Donald & Howard (n 15) 7-9.

22 Donald & Howard (n 15) 7.

23 These principles on the consideration of the views of the child are articulated in CRC General Comment 12 (2009) CRC/C/GC/12. It finds application due to the complementarity between the African Children's Charter and CRC.

24 S Langlaude *The right of the child to religious freedom in international law* (2007) 9.

25 As above.

26 Constitutive Act of the African Union, adopted at the 36th ordinary session of the Assembly of Heads of State and Government on 11 July 2000 in Lomé, Togo, art 4(m).

27 Constitutive Act (n 26) art 3(h).

28 Constitutive Act Preamble.

29 Constitutive Act art 4(i).

30 Constitutive Act art 3(j).

argued that the application of article 9 helps children to develop organically as persons in their own right and with an agency of their own without the narrative that they are a symbiotic extension of their parents or care givers.<sup>31</sup>

### 3.2 African Charter on Human and Peoples' Rights

Article 8 of the African Charter guarantees the freedom of conscience, the profession, and the free practice of religion. Further, subject to law and order, the African Charter prohibits restrictions on the exercise of these freedoms.<sup>32</sup> Additionally, it mandates member states to respect, protect and fulfil these and many other rights enshrined in it, by adopting legislative and other measures to give effect to them.<sup>33</sup> The African Charter uses a human rights-based approach that inculcates the recognition of rights based on participation, accountability, non-discrimination and equality, empowerment and legality.<sup>34</sup> These principles amplify the child rights-based approach that encapsulates non-discrimination, the best interests principle, the right to life, survival and development and participation.<sup>35</sup>

### 3.3 Universal Declaration of Human Rights

Article 18 of the Universal Declaration of Human Rights (Universal Declaration) states that everyone has the right to freedom of thought, conscience and religion.<sup>36</sup> According to the Universal Declaration, this right includes a person's freedom to change their religion or belief, and freedom, either alone or in community with others and in public or private, to manifest the religion or belief in teaching, practice, worship and observance.<sup>37</sup>

### 3.4 Convention on the Rights of the Child

Article 12 of the Convention on the Rights of the Child (CRC) guarantees the protection of children's freedom of thought by enshrining the right of children, who are capable of forming their views, to freely express their thoughts and opinions. It further asserts that children have the right to be heard in all matters affecting them, with due weight given to their evolving capacities.<sup>38</sup> In addition, article 14 of CRC emphasises that children have the right to manifest their own beliefs and practices, subject to limitations that are prescribed by law and are necessary to protect public safety, order, health or morals.<sup>39</sup> This latter phrase does not appear in the African Children's Charter's text, although article 9(3) refers to the enjoyment of the right being subject to 'national laws and policies', without specifying the grounds on which the right could legitimately be restricted.

31 General Comment 1 (Article 30 of The African Charter on the Rights and Welfare of the Child) on 'Children of incarcerated and imprisoned parents and primary caregivers' 1 para 18, [https://www.acerwc.africa/sites/default/files/2022-09/General\\_Comment\\_Article\\_30\\_ACRWC\\_English.pdf](https://www.acerwc.africa/sites/default/files/2022-09/General_Comment_Article_30_ACRWC_English.pdf) (accessed 2 April 2024). See also *S v M* CCT 53/06 [2007] ZACC 18 (September 2007) para 18.

32 African Children's Charter art 8.

33 African Charter art 1.

34 M Hunsungule 'Human rights: The African Charter on Human and Peoples' Rights' in M Hunsungule (ed) *The African Union: Legal and institutional framework* (2012) 415-453.

35 African Children's Charter arts 3, 4(1), 5, 7 & 4(2).

36 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948 art 18.

37 As above.

38 CRC art 12(2).

39 CRC art 14(3).

### 3.5 International Covenant on Civil and Political Rights

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) mirrors the language of the Universal Declaration, affirming the right to manifest one's religion or beliefs in worship, observance, practice and teaching.<sup>40</sup> ICCPR proscribes subjecting a person to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.<sup>41</sup> It further provides for the restriction of the freedom of religion, but only in certain circumstances necessary for the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others.<sup>42</sup>

### 3.6 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

Article 1 of the Declaration reaffirms the principles of the Universal Declaration and ICCPR concerning freedom of religion and belief.<sup>43</sup> It further condemns all forms of discrimination and intolerance based on religion or other beliefs<sup>44</sup> and calls upon states to take effective measures, including legal measures, to prevent and eliminate such practices.<sup>45</sup> Specifically with respect to children, article 5 of the Declaration prohibits discrimination against children based on their religion or belief and emphasises the need to ensure their equal rights and opportunities.<sup>46</sup> In addition, the Declaration underscores the importance of protecting children from religious indoctrination or coercion that may interfere with their freedom of thought and belief.<sup>47</sup> Furthermore, the Declaration promotes tolerance, understanding and respect for diversity of religion and belief.<sup>48</sup>

### 3.7 European Convention on Human Rights

Article 9 of European Convention guarantees the right to freedom of thought, conscience and religion, encompassing both individual and collective manifestations of religion or belief, through worship, teaching, practice and observance.<sup>49</sup> It further highlights limitations to the exercise of this right, only when they are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>50</sup>

## 4 Legal Interpretation

Article 9 contains key concepts and terms whose elaboration is crucial to understanding the content of the provision. Article 9 places an obligation on parents and legal guardians to provide guidance and direction to children, as they exercise the rights guaranteed therein. It further reinforces the need for

40 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, art 18(1) (ICCPR).

41 ICCPR art 18(2).

42 ICCPR art 18(3).

43 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief Proclaimed by General Assembly Resolution 36/55 of 25 November 1981 art 1.

44 Declaration (n 43) art 3.

45 Declaration art 4(1) & (2).

46 Declaration art 5(3).

47 Declaration art 5(2).

48 Declaration art 5(3).

49 Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, ETS 5, 4 November 1950 art 9(1), <https://www.refworld.org/legal/agreements/coe/1950/en/18688> (accessed 1 April 2024).

50 European Convention (n 49) art 9(2).



parents and legal guardians to discharge their duties with due regard to the evolving capacities and best interests of children.<sup>51</sup> Article 9 furthermore mandates states to respect the duty of parents and legal guardians as they provide guidance and directions to the children in respect of their rights, subject to their national laws and policies.<sup>52</sup> This chapter now turns to the various aspects of the article.

#### 4.1 Nature and scope of state obligations

To understand the nature and scope of the obligations under article 9, one has to appreciate the same from article 1 of the African Children's Charter before looking at the specificities of the obligations in any given article. Article 1 mandates states to recognise the rights, freedoms and duties enshrined in the Charter, including children's freedom of thought, conscience and religion.<sup>53</sup> There is no qualification of the rights either as civil and political, on the one hand, or socio-economic, on the other. In addition, the obligations of state parties cover rights, freedoms and duties – an expanse that offers a wider threshold of protection.

State parties are further mandated to undertake the necessary steps to give effect to the provisions of the African Children's Charter, including in their national constitutional and legislative processes.<sup>54</sup> It is interesting to note that the requirement that states 'take necessary steps' covers a wide array of engagements to ensure the promotion and protection of the rights of the child. Under the terms of the Children's Charter, the legitimate justification for states to limit children's manifestation of their thoughts, conscience and religion, is when a religious practice is inconsistent with the other rights, duties and obligations provided in the Charter.<sup>55</sup>

States have a dual responsibility concerning children's freedom of thought, conscience and religion. First, they must uphold and protect these rights as fundamental human rights enshrined in the African Children's Charter.<sup>56</sup> Second, states must recognise and respect the duty of parents and legal guardians to provide guidance and direction in the enjoyment of these rights, within the framework of national laws and policies.<sup>57</sup> These are discussed next.

##### 4.1.1 *Obligation to uphold and protect freedom of thought, conscience and religion*

State parties to the African Children's Charter should respect, protect and fulfil children's rights, including their freedom of thought, conscience and religion.<sup>58</sup> At the legislative level, state parties are responsible for enacting laws that protect children's rights to freedom of thought, conscience and religion.<sup>59</sup> These laws should follow international human rights standards and should safeguard children from indoctrination, coercion, discrimination, or infringement upon their autonomy in matters of belief or religion.<sup>60</sup>

51 African Children's Charter art 9(2).

52 African Children's Charter art 9(3).

53 African Children's Charter art 1(1).

54 African Children's Charter art (1).

55 African Children's Charter art 1(3).

56 African Children's Charter art 1.

57 African Children's Charter art 9(3).

58 African Children's Charter art 1(1).

59 African Children's Charter arts 1(1) & 9(3).

60 African Children's Charter arts 1, 3, 4 & 9.

States are further obligated to establish administrative mechanisms to ensure the effective implementation of laws,<sup>61</sup> such as fulfilling the rights and freedoms guaranteed under article 9 of the African Children's Charter.<sup>62</sup> In this case, for example, states are mandated to provide avenues for children or their representatives to seek redress in cases of violations.<sup>63</sup> Additionally, states are obligated to create an enabling environment that promotes religious tolerance, interfaith dialogue and respect for diversity within society.<sup>64</sup> This entails fostering dialogue among different religious and cultural communities, promoting diversity and peaceful co-existence,<sup>65</sup> and taking appropriate measures to promote and protect the rights and welfare of the African child.<sup>66</sup>

Further, states may not interfere with children's exercise of their freedom of conscience, thought and religion.<sup>67</sup> Essentially, this relates to the informal and formal nurturing of children being brought up as religious beings, including their practices, festivals, and the transmission of parental beliefs to the child and religious education.<sup>68</sup> The state must not impede this or make it more difficult for children to exercise their rights.<sup>69</sup> In the same vein, states are precluded from interfering with children's rights to choose another religion or affecting certain characteristics of the child such as their religious identity, clothing, diet, language or the record of religion on official documents.<sup>70</sup>

#### 4.1.2 *Obligation to respect parents and legal guardians' obligation to provide guidance and direction*

From the formative years, children look up to their parents or guardians as care givers for guidance and direction in navigating the complexities of life, including matters of faith and belief systems.<sup>71</sup> This is affirmed by article 9, which mandates parents and legal guardians to provide direction and guidance over children concerning their freedom of thought, conscience and religion, with particular regard to the children's evolving capacities and the best interests of the child.<sup>72</sup>

While parents and legal guardians hold significant authority in guiding their children's religious and moral upbringing, states have a concurrent responsibility to protect children against the family and religious community and, if necessary, against harmful practices.<sup>73</sup> The recognition of parental guidance in children's enjoyment of their freedom of thought, conscience and religion does not absolve the state of its responsibility to protect children's rights.<sup>74</sup> Instead, it underscores the importance of collaboration between the state and parents or legal guardians in promoting the holistic development of children.<sup>75</sup>

61 A Lloyd 'The African regional system for the protection of children's rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 36.

62 African Children's Charter art 9.

63 African Children's Charter art 16(2).

64 R Sala 'Toleration and respect in a multicultural society: An overview' (1997) *Notizie* 24.

65 Sala (n 64) 25.

66 African Children's Charter Preamble.

67 I Didea & G Popa 'The child and freedom of thought, conscience and religion' (2013) 9 *European Journal of Science and Technology* generally.

68 H Aran & M Nayebkabar 'The role of parents in religious and social education of children' (2018) 5 *International Journal of Multicultural and Multireligious Understanding* 182.

69 DW Archard *Children, family and the state* (2018) 116.

70 Archard (n 69) 117.

71 J Kagan 'The role of parents in children's psychological development' (1999) 104 *Pediatrics* 164.

72 African Children's Charter art 9(2).

73 African Children's Charter arts 1(3), 9 & 21.

74 M Eichner 'Children, parents, and the state: Rethinking relationships in the child welfare system' (2005) 12 *Virginia Journal of Social Policy and the Law* 12.

75 As above.



In addition, in the exercise of their rights, children are entitled to receive direct protection from the state, in cases where parents fail to provide adequate protection of or, in some cases, abuse of, the rights of children.<sup>76</sup> States further have a responsibility to build the capacity of parents, extended families, legal guardians and community members to provide appropriate direction and guidance to children.<sup>77</sup> Additionally, states have an obligation to ensure that parental guidance respects the principles of non-discrimination, autonomy and the best interests of the child, as outlined in the Charter and other international human rights instruments.<sup>78</sup>

## 4.2 Thought

The first strand of article 9 of the African Children's Charter provides for freedom of thought. Thought is the very essence of human consciousness, the process by which people perceive, analyse and interpret the world around them.<sup>79</sup> At its core, thought encompasses a wide array of mental processes, including perception, reasoning, imagination and emotion.<sup>80</sup> It involves the manipulation of mental representations to generate ideas, solve problems, make decisions and communicate with others.<sup>81</sup> Thought is not merely a passive reflection of reality but an active and dynamic process shaped by internal cognitive structures and external stimuli.<sup>82</sup>

One fundamental aspect of thought is its dual nature: It can be both conscious and unconscious.<sup>83</sup> While conscious thought refers to deliberate mental activity, unconscious thought operates beneath the surface of awareness, influencing behaviour and perception without explicit awareness.<sup>84</sup> This duality underscores the complexity of thought and highlights the interplay between conscious and unconscious processes in shaping human cognition.<sup>85</sup>

Thought serves a myriad of functions essential for human adaptation and survival.<sup>86</sup> From basic tasks such as perceiving sensory information to higher-order cognitive processes such as problem solving and decision making, thought facilitates people's interaction with the environment and guides our behaviour.<sup>87</sup> Moreover, thought enables people to reflect on past experiences, anticipate future events, and imagine alternative realities.<sup>88</sup>

Article 9 draws on an approach that distinguishes 'thought' from conscience and religion.<sup>89</sup> This approach ensures that the far-reaching and profound nature of 'thought' as a concept embraces its application in all matters that range from personal conviction to commitments to conscience and

76 African Children's Charter arts 16 & 21.

77 CRC Committee General Comment 21 on children in street situations CRC/C/GC/21 (2017) 21 June 2017 para 35.

78 African Children's Charter art 20.

79 DC Daniel *Consciousness explained* (1993) 2.

80 DF Halpern *Thought and knowledge: An introduction to critical thinking* (2013) 6.

81 RMJ Byrne 'Precis of the rational imagination: How people create alternatives to reality (2007) 30 *Behavioural and Brain Sciences* 441.

82 Daniel (n 79) 3.

83 K Frankish & J Evans 'The duality of mind: A historical perspective' in K Frankish & J Evans *In two minds: Dual processes and beyond* (2009) 2-3.

84 Frankish & Evans (n 83) 6.

85 As above.

86 GH Harman *Thought* (2015) 25.

87 BF Malle *How the mind explains behaviour: Folk explanations, meaning, and social interaction* (2006) 2.

88 Malle (n 87) 3.

89 International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (ICCPR) art 18.

religion as manifested individually or collectively in a given community.<sup>90</sup> Although other instruments with similar provisions do not expect state parties to derogate from this right even during emergencies,<sup>91</sup> the African Children's Charter does not contain a derogation clause. This offers a higher threshold for protecting the child's right to freedom of thought, conscience and religion.

### 4.3 Conscience

Conscience is embedded within the depths of human consciousness, from religious teachings to secular ethics; it plays a pivotal role in shaping human behaviour and moral judgments.<sup>92</sup> In the realm of human morality and decision making, conscience stands as a guiding force, an inner compass that directs individuals toward what they perceive as right and wrong.<sup>93</sup>

Conscience can broadly be understood as the innate sense of moral awareness that prompts individuals to discern between right and wrong actions.<sup>94</sup> Rooted in both cognitive reasoning and emotional responses, conscience operates as a subjective arbiter of morality, influenced by cultural, societal, and personal factors.<sup>95</sup> While definitions may vary, most interpretations of conscience emphasise its role in guiding ethical behaviour and fostering a sense of moral responsibility.<sup>96</sup>

The development of conscience begins in early childhood and evolves throughout an individual's life, shaped by experiences, upbringing and social interactions.<sup>97</sup> Psychologists such as Piaget and Kohlberg have proposed theories on the stages of moral development, highlighting the progression from a self-centred orientation to a more principled understanding of morality.<sup>98</sup> During this developmental process, children internalise societal norms, familial values and ethical principles, gradually forming their moral identity and sense of conscience.<sup>99</sup>

Religious and philosophical traditions have long pondered the nature of conscience and its relationship to divine or transcendent principles.<sup>100</sup> In many religious frameworks, conscience is regarded as a divine gift or a manifestation of spiritual guidance, reflecting the moral will of a higher power.<sup>101</sup> Religious teachings often emphasise the importance of heeding one's conscience as a pathway to righteousness and spiritual fulfilment.<sup>102</sup>

90 S Joseph & M Castan *The International Covenant on Civil and Political Rights: Cases, materials, and commentary* (2013) para 17.02.1.

91 ICCPR (n 89) art 4(2).

92 R Domingo 'Restoring freedom of conscience' (2015) 30 *Journal of Law and Religion* 176.

93 As above.

94 A Giubilini 'Conscience' (2016) 90 *Stanford Encyclopedia of Philosophy* 2.

95 Giubilini (n 94) 3.

96 As above.

97 DJ Siegel *The developing mind: How relationships and the brain interact to shape who we are* (2020) 3.

98 M Moheghi, M Ghorbanzadeh & J Abedi 'The investigation and criticism moral development ideas of Kohlberg, Piaget and Gilligan' (2020) 7 *International Journal of Multicultural and Multireligious Understanding* 363-370; JC Gibbs 'Kohlberg's moral stage theory: A Piagetian revision' (1979) 22 *Human Development* 91; D Macrae 'A test of Piaget's theories of moral development' (1954) 49 *Journal of Abnormal and Social Psychology* 14.

99 Siegel (n 97) 3.

100 JB Pratt *The religious consciousness* (2006) 3.

101 Pratt (n 100) 2.

102 See generally D Groothuis *World religions in seven sentences: A small introduction to a vast topic* (2023); DM Roark *The Christian faith: An introduction to Christian thoughts* (2005) 5-7.

On the contrary, the secular understanding of conscience also holds significant weight in moral discourse, emphasising individual autonomy and rational deliberation.<sup>103</sup> Philosophers such as Kant championed the idea of conscience as an internal moral legislator, independent of external authority or divine command.<sup>104</sup> According to Kant, moral decisions should be guided by the categorical imperative, a universal principle derived from reason, which obligates individuals to act according to maxims that could be willed as universal laws.<sup>105</sup> According to this view, conscience serves as a rational faculty that enables individuals to discern moral duties and obligations based on principles of duty and justice.<sup>106</sup>

#### 4.4 Religion

In broad terms, religion is defined as a collection of beliefs, ideas and representations that constitute a religious world view in people's individual and collective appearances.<sup>107</sup> As such religion is an intensely personal matter, with every individual being able to decide for themselves which set of beliefs to adopt.<sup>108</sup> For most people, however, religion is much more than a set of beliefs, given that they often feel the need to translate their beliefs into action.<sup>109</sup> Ultimately, religion invokes the sacred or the supernatural to influence the behaviour of individuals.<sup>110</sup>

The main components of religion are believing, acting and belonging, holding several religious beliefs, acting upon one's faith, or simply being born into a family from a particular religious tradition.<sup>111</sup> Common elements run through religious traditions, with almost all traditions emphasising informal nurture in the family and slightly more formal nurture in a religious community.<sup>112</sup> In terms of children, they are brought up within religious families and the parents pass on their beliefs to the child.<sup>113</sup> The children learn about the religion through living in the family, observing their parents and also being initiated by the parents to several initiation rituals, ceremonies and festivals.<sup>114</sup> Parents further take their children to religious services, convened by their religious communities, often in a building dedicated to that usage.<sup>115</sup> Like the family, the religious communities play important roles in conducting formal religious services, initiation rituals and ceremonies.<sup>116</sup>

It should be noted, however, that some children, when growing up, will turn away from the faith in which they grew up, or may choose to follow some religious practices but not others.<sup>117</sup> That is why it is necessary to consider the issue of autonomy as a key concept often associated with the existence

103 J Maclure & C Taylor *Secularism and freedom of conscience* (2011).

104 As captured by F Paulsen in F Paulsen *Immanuel Kant: His life and doctrine* (1902) 1-419.

105 I Kant & AE Teale *Kantian Ethics* (1951); A Reath 'Contemporary Kantian ethics' in J Skorupski (ed) *The Routledge companion to ethics* (2010) 456-466.

106 I Shapiro & R Adams (eds) *Integrity and conscience* (1998) 115.

107 S Jensen *What is religion?* (2019) 53.

108 B Dickson 'The United Nations and freedom of religion' (1995) 44 *International and Comparative Law Quarterly* 327.

109 As above.

110 A Day *Believing in belonging: Belief and social identity in the modern world* (2011) 163.

111 Day (n 110) 158.

112 Day (n 110) 160.

113 VL Bengtson *Families and faith: How religion is passed down across generations* (2017) 72.

114 Day (n 110) 160.

115 S Langlaude 'Children and religion under article 14 UNCRC: A critical analysis' (2008) 16 *International Journal of Children's Rights* 477.

116 As above.

117 Langlaude (n 115) 478.

of the right to freedom of religion.<sup>118</sup> This is mainly because the right to freedom of religion entails the right of every child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society.<sup>119</sup>

## 5 Domestication of article 9 in national legal systems

This part discusses varied approaches adopted by different countries in ensuring children's freedom of thought, conscience and religion in their domestic laws. It further discusses the extent of the implementation of article 9 by analysing the reports submitted to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).

### 5.1 Constitutional measures

Many African countries include provisions guaranteeing freedom of thought, conscience and religion in their constitutions. For example, the Constitution of the Republic of South Africa states that everyone has the right to freedom of conscience, religion, thought, belief and opinion.<sup>120</sup> It further provides for religious observations that may be conducted at state or state-aided institutions, provided that such observations follow rules made by the appropriate authorities, they are done on an equitable basis and that attendance is voluntary.<sup>121</sup> South Africa's Constitution further proceeds to prohibit discrimination on the grounds of religion, conscience and belief.<sup>122</sup>

The same guarantees are also noted in the Constitution of the Republic of Malawi, as it provides that every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom.<sup>123</sup> As in the case of South Africa, the Constitution of the Republic of Malawi proscribes discrimination of people in any form on grounds of religion or other opinion, status or condition.<sup>124</sup> In addition, Malawi goes further to render any discriminatory practices and the propaganda of such practices criminally punishable by the courts.<sup>125</sup>

Additionally, the Constitution of the Federal Republic of Nigeria also guarantees the right to freedom of thought, conscience and religion, including the freedom to change one's religion or belief.<sup>126</sup> It further provides for the freedom to manifest and propagate religion or belief in worship, teaching, practice and observance, which can be done either alone or in community with others.<sup>127</sup>

Further, the Constitution of Kenya guarantees freedom of conscience, religion, belief and opinion, including the right to manifest one's religion or belief in worship, observance, practice and teaching, in an expansive nature.<sup>128</sup> The Constitution extends the right to include the prohibition of denying any person access to any institution, employment of facility, or the mere enjoyment of the right based on

118 F Ahmed 'The autonomy rationale for religious freedom' (2017) *The Modern Law Review* 239.

119 A Scolnicov 'The child's right to religious freedom and formation of identity' (2007) 15 *International Journal of Children's Rights* 3.

120 The Constitution of the Republic of South Africa, 1996 art 15(1).

121 The Constitution of the Republic of South Africa arts 15(2)(a)(b) & (c).

122 The Constitution of the Republic of South Africa art 9(3).

123 The Constitution of the Republic of Malawi, 1994 (n 4) sec 33.

124 The Constitution of the Republic of Malawi sec 20(1).

125 The Constitution of the Republic of Malawi sec 20(2).

126 The Constitution of the Federal Republic of Nigeria, 1999 (n 5) art 38.

127 The Constitution of the Federal Republic of Nigeria art 38(1).

128 The Constitution of Kenya, 2010 (n 6) arts 32(1) & (2).

the person's belief or religion.<sup>129</sup> It further proscribes the coercion of any person to act or engage in any act that is contrary to that person's belief or religion.<sup>130</sup>

## 5.2 Legislative measures

Most countries have specific legislation that further guarantees the right to freedom of thought, conscience and religion. For instance, Nigeria's Child's Rights Act, 2003 explicitly provides for children's right to freedom of thought, conscience and religion.<sup>131</sup> The Act further emphasises the need for parents or legal guardians to have regard to the evolving capacities and best interests of the child as they guide their children concerning these rights.<sup>132</sup> Additionally, the Act accentuates that religion shall be a paramount consideration in fostering, custody, guardianship or adoption of a child.<sup>133</sup>

Liberia also enacted the Children's Laws that affirm children's freedom of thought and religion, and explicitly states that every child has the right to think freely and adopt any religion.<sup>134</sup> The exercise of this right, however, is subject to children's evolving capacities,<sup>135</sup> parental and other appropriate guidance,<sup>136</sup> the best interests of the child,<sup>137</sup> national security,<sup>138</sup> public order, public health, morals or rights.<sup>139</sup>

## 5.3 Judicial interpretation

Courts play a crucial role in interpreting and upholding constitutional provisions, particularly those related to freedom of thought, conscience and religion.<sup>140</sup> The judicial decisions shape the understanding and application of these freedoms in specific contexts and cases.<sup>141</sup> For example, the Constitutional Court of South Africa interpreted and upheld constitutional provisions in the case of *Christian Education South Africa v Minister of Education*.<sup>142</sup> In dismissing an appeal against a ban on corporal punishment as being against parents' religious beliefs, the Court held that freedom of religion includes both the right to have a belief and the right to express such belief in practice, and that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs.<sup>143</sup>

Similarly, in Nigeria courts have addressed cases related to the right to freedom of thought, conscience and religion. For instance, in *Medical and Dental Practitioners Disciplinary Tribunal v Dr John Emewulu Okonkwo*<sup>144</sup> the Court expounded that the right of freedom of thought, conscience or religion

129 The Constitution of Kenya art 32(3).

130 The Constitution of Kenya art 32(4).

131 Child's Rights Act 26 of 2003 art 7.

132 Child's Rights Act art 7(2).

133 Child's Rights Act art 7(4).

134 Children's Law sec 15(1).

135 Children's Law sec 15(1)(a).

136 Children's Law sec 15(1)(b).

137 Children's Law sec 15(1)(c).

138 Children's Law sec 15(1)(d).

139 Children's Law sec 15(1)(e).

140 NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 52.

141 Udombana (n 140) 51.

142 *Christian Education South Africa v Minister of Education* Constitutional Court of South Africa 2000 (10) BCLR 1051 (CC).

143 *Christian Education South Africa* (n 142) para 19.

144 (2001) 7 NWLR (Pt 711) 206.

implies a right not to be hindered, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief. Additionally, in *Esanubor v Faweya*<sup>145</sup> the Court dismissed an appeal by the mother of a critically sick child who had a blood transfusion administered to them despite the mother's refusal based on religious reasons. Among others, the Court found that the infant was incapable of giving consent to die on account of the religious belief of the mother; and that the mother's desire to sacrifice her son's life is an 'illegal and despicable' act that must be condemned in the strongest terms. Consequently, the Court held that the right to life of the child trumped the religious right of the mother, which the Court conceived did not give her the right to determine whether her son should receive a blood transfusion.<sup>146</sup>

In Kenya the Court also addressed the far-reaching implications for the protection of freedom of religion in the case of *Phillip Okoth and Law Society of Kenya v Board of Management, St Anne's Primary School Ahero & Others*,<sup>147</sup> when it held that compelling students to participate in interfaith activities that contradict their faith was a direct violation of their freedom of religion under article 32 of the Kenyan Constitution.

#### 5.4 State party reports

This part discusses the state reports to the African Children's Committee on measures taken concerning article 1(1) of the African Children's Charter, and specifically on article 9, as noted in the latest reports of Botswana, Rwanda and Uganda, referred to below as illustrative examples.

Botswana submitted that its Constitution guarantees freedom of conscience, which includes freedom of thought and religion, freedom to change one's religion or belief and freedom, either alone or in community with others, in public or private, to manifest or propagate one's religion or belief, in worship, teaching, practice and observance.<sup>148</sup>

Further, in addition to the constitutional guarantees, it has ensured that its legislative, policy and institutional frameworks effectively promote and protect children's freedom of conscience, thought and religion within its jurisdiction.<sup>149</sup> For instance, Botswana domesticated children's freedom of thought through the enactment of the Children's Act.<sup>150</sup> Of interest is section 21 of the Children's Act which particularly provides that while a parent, other relative or guardian may provide a child with guidance on political and other matters, no parent, other relative or guardian shall force that child to adopt any particular religion, philosophy or doctrine.<sup>151</sup> Botswana submitted that it has ensured that this provision is effectively translated into practice and all citizens are obliged to ensure that children effectively realise their freedom of thought, conscience and religion through the guidance of their parents and/or guardians.<sup>152</sup>

In addition, Botswana submitted that its Penal Code of 1964, as amended, protects the freedom of thought, conscience and religion, by making it an offence to insult any religion or to disturb any

145 2019 All FWLR (Pt 478) 380 (CA).

146 (2019) All FWLR (Pt 478) 380 (CA) 397.

147 Civil Appeal 173 of 2020.

148 Constitution of Botswana sec 11(1).

149 Republic of Botswana, Combined 1st, 2nd, 3rd, 4th, 5th, 6th and 7th reports submitted by the Republic of Botswana to the African Children's Committee on the Implementation of the African Charter on the Rights and Welfare of the Child (2003-2021) October 2021 12.

150 Children's Act 8 of 2009.

151 Children's Act (Botswana) sec 21.

152 Republic of Botswana state party report (n 149) 26-27.



religious assembly.<sup>153</sup> Botswana developed the Public Health (Prevention of Immunisable Childhood Diseases) Regulations, to criminalise refusal by parents to immunise their children for religious beliefs or any other reason.<sup>154</sup> Botswana submitted that the development of the Regulations was prompted by the refusal of some religious groups to immunise their children due to their beliefs.<sup>155</sup>

Rwanda also submitted that freedom of thought, conscience, religion, worship and the public manifestation thereof is guaranteed by the state following the law.<sup>156</sup> That is particularly for children, and to ensure their exercise of this and many other rights, Rwanda has legislation and organs for the protection of children.<sup>157</sup> For instance, building upon the constitutional provisions, Rwanda proscribes and criminalises discrimination of any kind or its propaganda, including based on religion, faith, opinion and any form.<sup>158</sup>

In addition to the Constitution of 2003 (as amended), Rwanda submitted that other laws have been adopted, institutions established and specific programmes designed to give effect to constitutional provisions and other international standards on the protection of children's rights.<sup>159</sup> Particularly regarding freedom of thought, conscience and religion, Rwanda submitted that as far as religion is concerned, any Rwandan, including a child, has the freedom to participate in religion of their choice.<sup>160</sup>

Uganda also submitted the country's guarantees of article 9 and stated that the right to freedom of expression, association, thought, conscience and religion is guaranteed in article 29 of the 1995 Constitution.<sup>161</sup> Further laws and policies have been passed to give effect to the constitutional rights, responsibilities and protections to the children of Uganda, such as the Children's Act.<sup>162</sup> Uganda submitted that the Children's Act consolidates the principles and provisions of various laws, legal frameworks and policies on children's rights and provides a more responsive legal environment to current challenges faced by Ugandan children.<sup>163</sup> More specifically, the Act enshrines children's rights to freely express their views in any matter that affects their well-being.<sup>164</sup>

Additionally, Uganda submitted that several policies have been adopted by the government to facilitate and guide the implementation of child-related laws in the area of civil, economic, social and cultural rights.<sup>165</sup> In terms of institutional development, Uganda submitted that there is an increasing emphasis on child participation, stakeholders' responsiveness and promotion of the rights of all children, and that several bodies and entities are charged with the protection and promotion of children's rights.<sup>166</sup>

153 Penal Code of Botswana secs 136 & 137.

154 Public Health (Prevention of Immunisable Childhood Diseases) Regulations 8 July 2006 sec 4(a).

155 Botswana state party report (n 149) 26.

156 The Constitution of the Republic of Rwanda art 37.

157 The Constitution of the Republic of Rwanda art 19.

158 The Constitution of the Republic of Rwanda art 16.

159 Republic of Rwanda, 3rd periodic report of the Republic of Rwanda on the Implementation of the African Charter on the Rights and Welfare of the Child, March 2019-September 2022 4.

160 Rwanda 3rd Periodic Report 21.

161 Republic of Uganda, periodic report to the African Children's Committee on the Implementation of the African Charter on the Rights and Welfare of the Child, 2020 2.

162 Children Act, ch 59; Children (Amendment) Act 9 of 2016; Uganda state party report (n 161) 2.

163 Uganda state party report (n 161) 3.

164 The Children Act as amended (2016) sec 4(1)(b).

165 These include the National Child Participation Strategy 2017/18-2021/22, the National Child Policy 2020 and the National Programme Implementation Plan 2020/2021-2024/2025, Uganda state report 3.

166 Uganda 3rd periodic report 4.

## 6 Conclusion

Despite the extant legal frameworks as discussed, challenges persist in ensuring the effective implementation of article 9. Cultural norms and societal attitudes often pose significant barriers to the full realisation of children's rights to freedom of thought, conscience and religion.<sup>167</sup> In many countries, deeply-ingrained traditions and beliefs conflict with the principles enshrined in article 9, leading to resistance or reluctance to embrace children's autonomy in matters of faith and belief.<sup>168</sup> Moreover, gaps in legislative and policy frameworks create ambiguity and inconsistency in the application of children's rights under article 9, leaving them vulnerable to exploitation or neglect.<sup>169</sup>

Yet, amidst these challenges, the development of regional jurisprudence signals a growing recognition of the importance of protecting children's rights to freedom of thought, conscience and religion in diverse contexts.<sup>170</sup> Court decisions and legal interpretations contribute to the evolving understanding of article 9, providing guidance and precedent for addressing emerging issues and advancing children's freedoms.<sup>171</sup> Furthermore, ongoing efforts by both state and non-state actors and institutions play a crucial role in driving progress towards the effective implementation of article 9.<sup>172</sup>

Recommendations for overcoming these challenges and advancing the implementation of article 9 include strengthening legal protections through comprehensive legislation and robust enforcement mechanisms to safeguard children against any violations.<sup>173</sup> Further, promoting inclusive and participatory approaches that actively engage children in decision-making processes to ensure that policies and practices are responsive to their diverse needs and perspectives should be encouraged.<sup>174</sup> By prioritising children's rights and working collaboratively across sectors, Africa can create an enabling environment where every child can exercise their autonomy and flourish following their own beliefs and values.<sup>175</sup>

167 T Lindholm, WC Durham & B Tahzib-Lie (eds) *Facilitating freedom of religion or belief: A deskbook* (2004) 64.

168 F Raday 'Culture, religion, and gender' (2003) 1 *International Journal of Constitutional Law* 665-668.

169 Langlaude (n 115) 246.

170 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 132-135.

171 Udombana (n 140) 52.

172 GJ Andreopoulos, ZFK Arat & PH Juviler *Non-state actors in the human rights universe* (2006) 3-9.

173 JL Fernando 'Children's rights: Beyond the impasse' (2001) 575 *Annals of the American Academy of Political and Social Science* 12-23.

174 H Matthews 'Children and regeneration: Setting an agenda for community participation and integration' (2003) 17 *Children and Society* 265.

175 Fernando (n 173) 12.